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IN THE
COURT OF APPEALS OF INDIANA

TOMMY D. FORD,)
)
Appellant-Defendant,)
)
vs.) No. 45A03-0701-CR-20
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas P. Stefaniak, Jr., Judge
Cause No. 45G04-0511-MR-11

October 23, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Tommy D. Ford appeals his murder conviction and sentence. We affirm.

Issues

We restate Ford's issues as follows:

I. Whether the trial court abused its discretion by admitting certain hearsay evidence through the excited utterance exception; and

II. Whether the sentence is inappropriate in light of the nature of his offense and his character.

Facts and Procedural History

On November 1, 2005, Ford visited Glen Park in Gary and encountered an acquaintance, James Grace. Ford talked with Grace and drank vodka with one of Grace's friends. Grace told Ford that he needed a place to store his vehicle. Ford offered to show Grace his garage as a possible storage location. Ford left his car at the park and rode with Grace to Ford's home. As the two men approached Ford's house, they passed fifteen-year-old Christian Hodge, who was seated on a front-yard retaining wall on the property next door. Ford and Hodge greeted each other. When Ford and Grace entered Ford's house, Ford said to Grace, "I can't stand that mother fucker. I'll be back." Tr. at 78. Ford left the house, and Grace heard a popping sound shortly thereafter. He looked outside and saw Hodge lying in the street. Ford came back inside the house and said to Grace, "I got to get the fuck out of here, and meet me down—meet me at the end of the alley and pick me up." *Id*. at 87. Grace got into his truck and drove away. He soon located a police officer and led him back to the crime scene. Hodge had suffered one gunshot wound to the back of his head, and he died the next day.

At the crime scene, Gary Police Officer Daniel Quasney spoke with witness Ronell Simmons, who appeared to be "upset, in disbelief, and in a state of shock." *Id*. at 246. Simmons stated that he had seen the victim talking to a black male in a black hooded sweatshirt. He stated that the man pulled out a gun and shot Hodge in the head and then walked away.

Ford's first trial, in which Simmons testified, ended in a mistrial on May 18, 2006. During the second trial, the State alleged that Simmons was unavailable to testify and moved for admission of Simmons's prior testimony. The trial court denied the State's request. The State later moved to admit Officer Quasney's testimony recounting Simmons's statements at the crime scene. The trial court admitted this evidence pursuant to Indiana Evidence Rule 803(2), the excited utterance exception to the hearsay exclusion rule. *See* Ind. Evidence Rule 801(c) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); Ind. Evidence Rule 802 ("Hearsay is not admissible except as provided by law or by these rules.").

The jury found Ford guilty as charged. At sentencing on December 8, 2006, the trial court found as a mitigator that Ford would likely respond affirmatively to short-term imprisonment. The trial court found as an aggravating circumstance that Ford had two prior misdemeanor convictions, including one for battery. Finding that the mitigators outweighed the aggravators, the trial court sentenced Ford to fifty years. He now appeals.

Discussion and Decision

I. Admission of Hearsay Evidence

Ford contends that the trial court committed reversible error in admitting Officer

Quasney's testimony regarding Simmons's statements at the crime scene. The trial court has broad discretion when ruling upon the admissibility of evidence. *Barrett v. State*, 837 N.E.2d. 1022, 1026 (Ind. Ct. App. 2005), *trans. denied*. When the trial court admits hearsay testimony that falls within an exception, the court reviews this decision for an abuse of discretion. *Forler v. State*, 846 N.E.2d 266, 267-68 (Ind. Ct. App. 2006). However, the admission of hearsay is not grounds for reversal where it is merely cumulative of other evidence admitted. *Mathis v. State*, 859 N.E.2d 1275, 1280 (Ind. Ct. App. 2007). "'The improper admission of evidence is harmless error when the conviction is supported by substantial independent evidence of guilt as to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction.'" *Id.* (quoting *Cook v. State*, 734 N.E.2d 563, 569 (Ind. 2000)).

During Officer Quasney's testimony, the State asked him to describe Simmons's demeanor at the crime scene. Ford made a relevancy objection. During a sidebar conference, Ford argued that any testimony from Officer Quasney regarding statements made to him by Simmons were inadmissible hearsay. The State countered that, depending upon Officer Quasney's testimony regarding Simmons's demeanor at the crime scene, Simmons's statements to Quasney might be admissible through the excited utterance exception. *See* Ind. Evidence Rule 803(2) (defining excited utterance as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.") The trial court allowed the parties to question Officer Quasney outside the jury's presence in order to make a determination on this issue. The trial court concluded as follows:

> There certainly was a startling event where a man was shot in the head and as it relates to Ronell Simmons, a passage of time between the shooting which is deemed at about 1:30 and a dispatch at 1:34 with an arrival and a statement right around that time frame of eight or nine minutes is very close to the event that was witnessed.
>
> The statement given by Ronell Simmons was a statement that related to the event and the condition, and it was based on Ronell Simmons' personal knowledge. As such, as it relates to Ronell Simmons under 803(2), [Officer Quasney] will be allowed to testify as to what Ronell Simmons told him.

Tr. at 243-44. Officer Quasney then testified before the jury that Simmons told him that he saw a black male wearing a black hooded sweatshirt shoot Hodge in the head with a silver gun and then walk away.[1]

We need not review the trial court's decision to admit this testimony because any error in admitting it was harmless. Clearly, the evidence at issue was merely cumulative of other evidence admitted at trial. For example, Officer Quasney testified that at the crime scene, he interviewed Will Rolle, another witness who testified at the first trial only. Officer Quasney testified that Rolle had stated that he saw a black male—wearing a black sweatshirt and carrying a gun—walking away from the person lying in the street.[2] At the second trial, Veveca Story testified that she heard a gunshot and turned to see Ford walking toward his front lawn with a gun in his hand. She saw him make a slashing gesture across his neck.

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[1] The State argues that Ford waived review of the admission of Officer Quasney's testimony because he failed to object when the challenged evidence was presented at trial following the trial court's ruling that it was admissible. Our review of the transcript indicates that Ford immediately objected as to relevance when the State asked Officer Quasney about Simmons's demeanor at the crime scene. Then the court held a sidebar conference during which Ford argued that Officer Quasney's testimony about statements made to him by Simmons were hearsay and thus inadmissible. We think that this hearsay objection was sufficient to preserve the issue for our review.

[2] Simmons did not object to the admission of this hearsay testimony.

Sade Robinson testified that she saw Ford walking toward his house with a gun in his hand.[3] Finally, Ford's former cellmate testified that Ford had admitted to him that he shot Hodge because he owed Hodge sixty dollars for crack cocaine.

In light of all of this evidence supporting the jury's verdict, we must conclude that any error in admitting Officer Quasney's testimony regarding Simmons's statements was harmless and therefore not reversible error.

II. Appropriateness of Sentence

Ford also argues that his fifty-year sentence is inappropriate. He asks us to revise his sentence pursuant to Indiana Appellate Rule 7(B), which states, "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Sentencing decisions are generally within the discretion of the trial court. *Estes v. State*, 827 N.E.2d 27, 29 (Ind. 2005). The burden is on the appellant to persuade the reviewing court that his sentence is inappropriate. *McMahon v. State*, 856 N.E.2d 743, 748-49 (Ind. Ct. App. 2006).

Pursuant to Indiana Code Section 35-50-2-3, the sentencing range for murder is forty-five to sixty-five years, with the advisory sentence being fifty-five years. Ford argues that a forty-five year sentence is appropriate in his case because the trial court identified his character as "generally hard working and generally law abiding." Sent. Tr. at 22. As the court also noted, however, Ford does have a criminal history which includes a battery

[3] Sade Robinson was unavailable to testify at Ford's second trial. Pursuant to the stipulation of both parties, the trial court admitted a transcript of her testimony from the first trial.

conviction. Moreover, the nature of Ford's crime is disturbing, to say the least. Ford shot a fifteen-year-old boy in the back of the head, apparently to free himself of a sixty-dollar debt. There is no evidence that the victim posed a physical threat to Ford. In fact, it was Ford who initiated the confrontation and apparently shot Hodge in cold blood. Finally, at sentencing, Ford expressed no remorse for this heinous act and continued to maintain his innocence. We cannot conclude that his sentence of fifty years is inappropriate in light of the nature of the offense and his character.

Affirmed.

DARDEN, J., and MAY, J., concur.