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IN THE
COURT OF APPEALS OF INDIANA

KHRISTOPHER D. HARVEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-1101-CR-35
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0907-MR-7

December 27, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Khristopher D. Harvey appeals his conviction for Murder, a felony, following a jury trial. Harvey presents a single issue for review, namely, whether the trial court abused its discretion when it admitted testimony by Jasper Edwards that he had seen Harvey carrying a revolver on the day of the murder.

We affirm.

FACTS AND PROCEDURAL HISTORY

On June 1, 2009, Jasper Edwards and a friend were driving around when they saw Harvey. Jasper had previously given Harvey the phone number of his cousin, Maurio Edwards.[1] While Jasper and Harvey were talking, Jasper saw Harvey was carrying a revolver in his waistband. Harvey showed Jasper the revolver, a .357 Taurus revolver, and then replaced it in his waistband.

Later that day, Harvey and his cousin Dujuane Woods drove in Woods' car to visit Woods' cousin, Londell Woods. They arrived at dusk. Harvey used Dujuane's cell phone to make some calls. When Londell left, Harvey and Dujuane also left Londell's home. Harvey asked Dujuane to take him to "get some weed." Transcript at 75. The two men drove somewhere to "pick up some money and then [they] went to Stephanie Villas." Id. When they arrived at the apartment complex, Harvey told Dujuane where to park. Harvey then asked to use Dujuane's phone again. Harvey made a call, and Dujuane heard him say "is Stephanie Villas right" and Harvey exited the car. Transcript at 78.

[1] For clarity, we will refer to people who share the same last name by their first names.

In the early morning hours of June 2, Maurio was playing cards with his girlfriend, Rosetta Collins, in their apartment at Stephanie Villas in Fort Wayne. Shortly after midnight, Edwards received a call on his cell phone from Dujuane's cell phone number. Collins recognized the caller's voice to belong to Harvey and heard him say he was outside. Edwards then went outside. Collins then heard gunshots. She went to the apartment balcony and looked down, where she saw Maurio lying in a pool of blood. Collins then called 911.

Meanwhile, Dujuane had also heard shots fired, and Harvey then returned to Dujuane's car very soon after having left it. Harvey told Dujuane to leave and that "the guy" was dead. Transcript at 84. Dujuane observed a red stain on Harvey's shirt that had not been there earlier. While driving, Harvey took Dujuane's cell phone and threw it out the window. Harvey said that something had happened and he did not want it to "come back" to him or to Dujuane. Id. at 85. They drove to a friend's house and parked Dujuane's car in the garage. They then walked to a lighted alley, where Dujuane saw the handle of a gun sticking out of Harvey's waistband.

An autopsy later determined that Maurio had died from gunshot wounds, one to his shoulder and one to his right temple. The doctor who performed the autopsy opined that the bullet that had created the shoulder wound ricocheted and then caused the head wound, lodging in the brain.

On July 1, the State charged Harvey with murder, a felony, with an application for an additional fixed term for the use of a firearm, and with unlawful possession of a firearm by a serious violent felon. On June 10, 2010, the State filed an amended

information, adding a charge of aggravated battery, as a Class B felony. The court bifurcated the proceedings, trying the murder and aggravated battery charges to a jury beginning November 16, 2010.

Before trial on the murder charge, Harvey filed a motion in limine seeking to exclude any "testimony or evidence concerning any allegation that Khristopher Harvey was in possession of a firearm at any time other than during the course of the alleged murder of Maurio Edwards." Appellant's App. at 18. The trial court denied that motion. At trial Dujuane testified without objection that he had seen a gun handle in the waistband of Harvey's pants shortly after they left Stephanie Villas. Later, Jasper testified over objection that he had seen Harvey with a revolver in his waistband earlier on the day of the murder. After a three-day trial, the jury returned a verdict finding Harvey guilty of murder.

The jury then heard evidence on the sentence enhancement and found that the State had proved the factual basis for an enhancement. The trial court then sentenced Harvey to an aggregate term of eighty years executed. Harvey now appeals his murder conviction.

DISCUSSION AND DECISION

Harvey contends that the trial court abused its discretion when it admitted certain testimony by Jasper Edwards. Our standard of review of a trial court's admission of evidence is an abuse of discretion. Speybroeck v. State, 875 N.E.2d 813, 818 (Ind. Ct. App. 2007). A trial court abuses its discretion only if its decision is clearly against the logic and effect of the facts and circumstances before the court. Id. In reviewing the

admissibility of evidence, we consider only the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor. Dawson v. State, 786 N.E.2d 742, 745 (Ind. Ct. App. 2003), trans. denied.

Here, Harvey argues that the trial court did not properly apply the standard for determining the admissibility of Jasper's testimony that he had seen Harvey with a revolver within twelve to fourteen hours of the murder under Evidence Rule 404(b). He also argues that Jasper's testimony was more prejudicial than probative and, therefore, should not have been admitted pursuant to Evidence Rule 403. The State counters that Harvey waived any error regarding evidence that he had possessed a handgun. We address each contention in turn.[2]

Turning first to the State's argument, the State contends that Jasper's testimony about Harvey's handgun possession was merely cumulative of Dujuane's earlier testimony that he had seen Harvey with a handgun handle in his waistband. Harvey did not object to the admission of Dujuane's testimony. Therefore, the argument goes, Harvey has waived any objection to Jasper's similar testimony. We cannot agree. Dujuane's testimony is fraught with contradictions, resulting in serious credibility issues. Jasper's testimony lends credibility to at least one part of Dujuane's testimony, namely, that Harvey had possessed a handgun around the time of the murder. Moreover, Jasper testified that the handgun Harvey showed him was a revolver. A revolver does not eject shell casings when fired, and no casings were found at the murder scene. Jasper's

[2] In his Summary of Argument Harvey also asserts that the testimony at issue is irrelevant. But Harvey does not support that contention with any analysis or cogent argument. As such, any issue regarding the relevance of Jasper's testimony about the revolver is waived. See Indiana Appellate Rule 46(A)(8)(a).

testimony provided relevant, additional details. We cannot conclude that Jasper's testimony was sufficiently similar to Dujuane's testimony that he waived any objection to it.

We next consider Harvey's argument that the trial court "failed to apply the appropriate standard for assessing the admissibility of the testimony under the [sic] Indiana Rules of Evidence 404(b)." Appellant's Brief at 13. Indiana Rule of Evidence 404(b) provides that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." In assessing admissibility of 404(b) evidence the court must (1) determine that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Rule 403. Fry v. State, 748 N.E.2d 369, 372 (Ind. 2001) (citation omitted). The relevance and balancing issues are reviewed for an abuse of discretion. Id. (citation omitted).

Harvey's argument is based on the premise that evidence of his possession of a handgun was evidence of another crime, wrong, or act to prove his character. That is not the case here. Possession of a handgun, without more, is not an illegal act. See Ind. Code § 35-47-2-1 (setting conditions under which persons may lawfully carry a

handgun). Without more, evidence that Harvey had a handgun in his possession is not evidence contemplated in Rule 404(b).[3]

In any event, whether the trial court specifically articulated its analysis of the balancing process under Rule 404(b) is of no moment if our review of the evidence in favor of the trial court's ruling shows that the trial court did not abuse its discretion when it admitted Jasper's testimony under Rule 403. That rule provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, or needless presentation of cumulative evidence.

Ind. Evidence Rule 403.

Before trial, Harvey argued that testimony regarding his alleged possession of a gun "at any time other than during the course of the murder" was more prejudicial than probative because there was nothing to tie the black-handled gun observed by Dujuane in Harvey's waistband to the chrome revolver that Harvey showed to Jasper. Appellant's App. at 19. In opposing Harvey's motion in limine, the State pointed out that Jasper would testify that the chrome revolver Harvey had shown him had black grips. During Jasper's testimony, Harvey timely objected "for the reasons previously stated" when arguing the motion in limine. Transcript at 307. The trial court overruled the objection.

On appeal Harvey contends that there is nothing to link the revolver that Jasper had seen before the murder to the handgun, observed only by its grip, that Dujuane had seen immediately after the murder. Thus, the argument goes, the "only probative value

[3] Harvey was also charged with possession of a firearm by a serious violent felon. Thus, his possession of the revolver was indeed evidence of another crime. However, that charge was bifurcated from the murder charge. Therefore, during the murder trial, evidence that the handgun possession was a criminal offense was not before the jury.

of the testimony was to put some unknown and unrelated gun in the hands of the person accused of the murder." Appellant's Brief at 11. Harvey is correct that the testimony at issue from Dujuane and Jasper put a potential murder weapon in Harvey's possession several hours before and immediately after the murder.[4] But Rule 403 prohibits the admission of evidence where the probative value is outweighed by the danger of unfair prejudice. Any evidence tending to prove an element of the crime is always harmful to the defense's goal of an acquittal, but it is not unfairly prejudicial. Such is the case here. Harvey has not shown that Jasper's testimony was improperly admitted under Rule 403.

Harvey has not shown that Jasper's testimony of Harvey's possession of a revolver hours before the murder was an abuse of discretion under either Rule 404(b) or Rule 403. As such, his conviction for murder is affirmed.

Affirmed.

ROBB, C.J., and VAIDIK, J., concur.

[4] In explaining the background to his argument, Harvey makes much of the fact that the State did not link Harvey's possession of a gun to the actual murder weapon through the testimony of a forensic expert, as promised when the State argued in opposition to the motion in limine. But Harvey does not refer to this purported shortcoming in his Rule 403 analysis. In any event, it was not necessary for the State to prove by direct evidence that the handgun Dujuane and Jasper saw Harvey possess was the murder weapon. The jury was permitted to infer that fact. See Pelley v. State, 901 N.E.2d 494, 500 (Ind. 2009) ("Circumstantial evidence is sufficient for a conviction if inferences may reasonably be drawn that allowed the jury to find the defendant guilty beyond a reasonable doubt.").