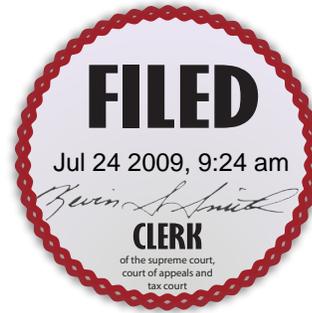


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

TONY PERRY,)
)
 Appellant-Defendant,)
)
 vs.)
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

No. 49A04-0812-CR-735

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patricia Gifford, Judge
Cause No. 49G04-0506-MR-94927

July 24, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Tony Perry appeals his convictions of and sentences for murder,¹ Class B felony aggravated battery,² and Class A misdemeanor carrying a handgun without a license.³ We affirm.

FACTS AND PROCEDURAL HISTORY

On the evening of March 6, 2005, several people were gathered at Amber Hooks' residence. Most of the people, including Richard Bailey, Mark Owens, Justin Davis, Phillip Cole, Lawan Bailey, and Derrick Harrington, decided to go to a skating rink. Lawan, Cole, and Harrington were planning to ride together. Richard, Owens, and Davis were planning to ride in Richard's vehicle. Before they left, a man approached Richard's vehicle, said something about pills, and shot Richard in the head. Owens, who was sitting in the front passenger seat, was shot in the hand.

Perry was charged with the murder of Richard, aggravated battery of Owens, and carrying a handgun without a license. After a jury trial on July 17-19, 2006, Perry was found guilty of those offenses. Perry appealed, and this court reversed his convictions based on the trial court's response to questions from the jury during deliberations. *Perry v. State*, 867 N.E.2d 638 (Ind. Ct. App. 2007), *trans. denied*.

Perry was retried on November 17-19, 2008. Hooks testified that on the evening of March 6, 2005, there were fifteen to twenty people at her house on Olney Street in Indianapolis. All of her guests left to go to a skating rink, but she was planning to stay home. She heard two shots, and then heard some additional shots a minute later. She

¹ Ind. Code § 35-42-1-1.

² Ind. Code § 35-42-2-1.5.

³ Ind. Code § 35-47-2-1 and -23(c).

peeked outside and saw someone next to Richard's car, which was parked in front of her house. It was too dark for her to tell who the person was. She saw the person get into a red car, which sped away. She went out to Richard's car and saw Richard had been shot in the head and Owens was lying still, so she went back inside to call the police. Owens came to her door and fell into her house when she opened the door for him.

Owens testified he was sitting in the front passenger seat. Someone approached Richard's door and asked him if he wanted to buy some pills. Richard said, "No, I don't do that," and slammed the door. (Tr. at 100.) The person started shooting at the car. Owens lay down and pretended to be dead. He was shot in the hand and was unable to use his hand for several months. He has a scar, he cannot stretch his fingers all the way, and he sometimes loses his grip.

Owens saw the shooter for only a few seconds. He described the shooter as a black male shorter than 6'1" with braids and wearing a black jacket with white words and a hood. He did not get a good look at the shooter's face. Although Owens picked someone from a photo array, he admitted he was unable to identify the shooter. He claimed he had picked someone because he had been at the hospital and police station for several hours without receiving pain medication, was upset, and wanted to go home.

Justin Davis was in the back seat of Richard's car. He testified someone approached the car and said "something about some pills." (*Id.* at 123.) The person started shooting, and Justin played dead. He could see that the shooter was wearing all black, but he could not see the shooter's face. After the shooting, he ran to the back door

of Amber's house, and she let him in. He hid in the bathroom because he had an outstanding warrant for his arrest.

Lawan, Cole, and Harrington were in Harrington's car. Cole was in the driver's seat, and Lawan was in the back. Lawan, who is Richard's brother, saw someone approach Richard's car and then heard gunshots. He did not recognize the shooter or get a chance to see his face.

Cole saw a person staggering down the street, as if he were very drunk. He described the person as a black man wearing a black coat, a red cap, and blue jeans. The man shot into Richard's window. When the shooting started, Cole took off, but he parked about a block away. They called Lawan and Richard's mother, then returned to the scene of the shooting. By then, the police had arrived and were taping off the scene. Richard was gasping for air and coughing up blood.

Officer Joshua Barker was one of the first officers on the scene. There were bullet holes in the driver's side window of Richard's car. Richard was unresponsive. Owens was "phas[ing] in and out of consciousness." (*Id.* at 32.) Owens described the shooter as a black male in his late teens wearing a black coat, baggy jeans, and a red cap.

Shawn Blount testified that in the early morning hours of March 7, Perry and Michael Chowning came to his house. Chowning appeared nervous and scared, and Perry appeared drunk. Perry gave Blount a .38 handgun. Blount had loaned the gun to Perry a few weeks earlier because "another one of our friends had got into it with somebody." (*Id.* at 239.) Blount testified he sold the gun to a friend because he learned it had been used in a shooting.

Chowning's testimony from the first trial was read into the record.⁴ Perry is one of Chowning's best friends; they have known each other since they were young. He was with Perry on March 6. Chowning was driving a red Grand Prix, Perry was in the passenger seat, and someone nicknamed "H" was in the back. They ended up on Olney Street, near Hooks' house. Chowning wanted to buy some ecstasy pills. Perry was going to get them for him because Chowning had been in fights with someone in that neighborhood nicknamed "Mob." Chowning had a 9mm High Point handgun with him to protect himself from Mob. While Chowning was speaking on his cell phone, he noticed the gun was gone from his lap.

Although initially reluctant to do so, Chowning eventually testified that Perry had taken the gun from him:

Q And who took your gun from you?

A I really can't say that. There was two people that got out of the car, and when I looked back, the back door was open.

Q Do you remember giving a deposition sworn under oath in the same way you were here today?

A Yeah.

* * * * *

Q "Okay. Did Tony [Perry] take that gun out of your car?" And your answer was, "He slid it out of my lap. . . ." Yeah, you remember giving that statement?

A No, I really didn't. . . . I drink a lot.

Q Oh, so you drink a lot. Were you drinking a lot when you were in Mr. Mohler's office talking to us?

A No, I wasn't drunk then.

* * * * *

Q Was Mr. Mohler there?

A Yeah, now I remember.

* * * * *

⁴ At the time of the second trial, Chowning was wanted for attempted murder, and the State was unable to locate him. After hearing testimony about the State's attempts to locate Chowning, the trial court declared him unavailable as a witness.

Q Hey, was Tony there?

A Nope.

Q Oh, so something's changed here today. Tony's here today, right?

* * * * *

A Okay. All right. If I said that then that's what I said.

Q It's what you said, right? . . . Mr. Chowning – isn't it true that you told Mr. Mohler, the lawyer for Tony there and I that Tony was the person that slid the gun out of your lap?

A I guess so, yes.

Q Yes. Do you need to make arrangements for Mr. Mohler's court reporter to come down here and testify that that's what you said?

A No. It's right there, if you say that's what I said.

* * * * *

Q And there on page 141, that was the first time that you had told us that Tony slid the gun out of your lap, isn't that correct, Mr. Chowning?

A I just told you yes.

* * * * *

Q . . . Page 147, first question, sir: "And you're saying you did not see or feel Tony take the gun?" And your answer was: "I said he slid it off. . . ." Do you remember that answer?

A Yeah.

* * * * *

Q Okay. And then you said – let me see, one, two, three, four, fifth question, Mr. Mohler once again, "He slid it off?" And you said, "Yeah, he slid it off my lap." Mr. Mohler asked you: "Meaning he grabbed it?" And you said, "Yeah, and he's gotten out of the car." Is that what you said in deposition in March of this year [2006], Mr. Chowning?

* * * * *

A I don't remember saying it but, okay, if I did, yes.

Q Okay. Do you remember that being what happened?

* * * * *

A I guess, yeah. It's in black and white, clear as day.

* * * * *

Q Would your memory be better then than it is now?

* * * * *

A Yeah.

* * * * *

Q A guy got smoked there on Olney, right?

A Yeah.

Q And Tony Perry grabbed your gun, right?

A Yeah.

* * * * *

Q Okay, Tony Perry just took it and slid it off your lap, right?

A Yeah.

(Tr. at 306-311, 322-23.)

Chowning denied seeing Perry shoot the gun and denied telling a detective that he had seen Perry shooting. He acknowledged having a conversation with Perry after the shooting:

Q . . . [W]hat did Tony Perry tell you?

A When it first happened, it was said that, what was going around on the streets was that he done it.

* * * * *

Q . . . What did you tell the detective that Tony told you?

A Um, said that he was drunk.

Q Keep going, you're doing fine.

A And he didn't know what he did.

Q And?

A And that's it, he didn't mean to do it.

(Tr. at 317-18.)

Stanley Gilbert, who had been Perry's cellmate in the Marion County Jail, testified that Perry had admitted he committed the shooting. Perry said he had been riding around with "H" and Chowning, when they stopped on Olney. Perry got out and said something to some men in another car; Gilbert was not sure what the conversation was about. Perry ended up shooting into the car and shot Richard in the head. Perry said he got back into the car with Chowning and H, and they took off. Perry and Chowning took the gun to Blount and told him what happened, and Blount said he would give the gun to someone else.

The prosecutor asked Gilbert if Perry gave a reason for the shooting, and Gilbert responded, “He didn’t really give me a reason. I asked him why he did it, and he just basically shrugged his shoulders and said he was on Ecstasy and drinking” (*Id.* at 418.) Gilbert testified Perry seemed concerned that his fingerprints would be found on the gun: “We conversated about fingerprints, how long fingerprints could stay on a firearm if it’s transferred from hand-to-hand, would the last person’s fingerprints be on it and things like that.” (*Id.* at 419.)

Michael Putzek, the firearms section supervisor for the Indianapolis-Marion County Forensic Services Agency, testified concerning two items, identified as items 17 and 18, which were recovered during Richard’s autopsy. Item 17 “was a fired 9mm, .38 caliber bullet, a jacketed bullet.” (*Id.* at 395.) Item 18 was “a fired jacket fragment, a very small fragment.” (*Id.*) Item 17 could have been fired from a High Point, an American Derringer, or a BJT Derringer, but the High Point was “the greater possibility.” (*Id.* at 400.)

Perry was found guilty of murder, aggravated battery, and carrying a handgun without a license. Perry was sentenced to sixty years for murder, consecutive to ten years for battery, but concurrent with one year for the handgun offense. The trial court gave the following rationale:

The Court finds as aggravating circumstances the Defendant’s prior criminal history, including his juvenile history involving weapons in 2003, a conviction for carrying handgun without a license as a Class C felony, for his conviction in January 2002 for dealing in a substance represented to be a controlled substance, and finally finding the escalation of the pattern of violence leading to this murder charge. I would find the fact that the

Defendant was 21 would, in fact, be a mitigator but that the aggravat[ors], in fact, outweigh the mitigators.

(*Id.* at 572-73.)

DISCUSSION AND DECISION

1. Sufficiency of Evidence

Perry argues there was insufficient evidence that he was the shooter. In reviewing the sufficiency of evidence, we do not reweigh the evidence or judge the credibility of witnesses. *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind. 2001). We will affirm if the probative evidence and reasonable inferences to be drawn therefrom could allow a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. *Id.*

Perry notes none of the eyewitnesses identified him as the shooter, including Davis, who was in Richard's car at the time and who was familiar with Perry. He also notes Chowning refused to identify him as the shooter, even when confronted with an alleged statement made to a detective, and the State did not offer the statement into evidence.

Nevertheless, Chowning's testimony provided circumstantial evidence that Perry was the shooter. Chowning testified they were on Olney Street at the time of the shooting. Chowning acknowledged that Perry took a 9mm High Point gun from him just before the shooting. Although Chowning denied seeing Perry shoot, he acknowledged having a conversation later in which Perry said he was drunk and did not mean to do it.

Additional circumstantial evidence connected Perry to the shooting. Putzek testified "a fired 9mm, .38 caliber bullet, a jacketed bullet" was recovered during

Richard's autopsy. (Tr. at 395.) It could have been fired from one of three kinds of guns, but the High Point was a "greater possibility." (*Id.* at 400.) Blount testified Perry and Chowning returned a .38 handgun to him on the night of the shooting. Blount got rid of the gun because he was aware it had been used in a shooting.

Gilbert's testimony also connected Perry to the shooting. Perry argues Gilbert's testimony should be disregarded under the incredible dubiousity rule.

"Under this rule, a court will impinge on the jury's responsibility to judge the credibility of the witness only when it has confronted 'inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiousity'." When a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed.

White v. State, 706 N.E.2d 1078, 1079 (Ind. 1999) (citations omitted). As discussed above, there is circumstantial evidence linking Perry to the shooting. Furthermore, Gilbert's testimony was neither equivocal nor uncorroborated; rather, it comported with the testimony of other witnesses. Perry challenges Gilbert's claim that he came forward with information about Perry because he was concerned about the safety of his two sons, who lived in the area near the shooting. Perry argues Gilbert's true motive was a deal in which charges were filed in state rather than federal court, because Gilbert faced a higher maximum sentence and would not earn as much credit time if his case proceeded in federal court. However, the jury heard evidence of Gilbert's incentive to testify, and we will not judge his credibility. Therefore, we conclude Perry's convictions were supported by sufficient evidence.

2. Appropriateness of Sentence

Perry argues his sentence is inappropriate. We may revise a sentence if it is “inappropriate in light of the nature of the offense and the character of the offender.” Ind. Appellate Rule 7(B). Perry committed his offenses when the presumptive sentencing scheme was in effect. The presumptive sentence for murder was fifty-five years, and the maximum was sixty-five. Ind. Code § 35-50-2-3 (2004). The presumptive sentence for aggravated battery, a Class B felony, was ten years. Ind. Code § 35-50-2-5 (2004). The “presumptive sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed.” *Weiss v. State*, 848 N.E.2d 1070, 1071 (Ind. 2006).

Perry received the presumptive sentence for aggravated battery, and an enhanced sentence of sixty years for murder. Perry argues the murder was not distinguishable from any other murder and his criminal history was not “so severe as to justify the enhanced, consecutive sentence imposed here.” (Appellant’s Br. at 13.) We disagree. Consecutive sentences are warranted because there were two victims. *See Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). We acknowledge the trial court misspoke when it stated Perry had a “juvenile history involving weapons in 2003,” (Tr. at 573); nevertheless, we conclude his criminal history supports an enhanced sentence. *See Williams v. State*, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008) (“A single aggravator is sufficient to support an enhanced sentence.”). Perry was twenty-one at the time he committed these offenses. By that time, he had true findings of battery, criminal trespass, fleeing law enforcement, and possession of marijuana, all Class A misdemeanors if committed by an adult. He also

had convictions of Class C felony carrying a handgun without a license and Class D felony dealing in a substance represented to be a controlled substance. Perry has had probation revoked on two occasions. As noted by the trial court, Perry has progressed from low-level handgun and battery offenses to aggravated battery and murder. Therefore, we cannot say his sentence is inappropriate.

Affirmed.

BAKER, C.J., and BARNES, J., concur.