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**IN THE
COURT OF APPEALS OF INDIANA**

ROBERT THOMAS,)
)
Appellant-Defendant,)
)
vs.) No. 82A01-0610-CR-481
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable David D. Kiely, Magistrate
Cause No. 82C01-0511-MR-1211

December 18, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Robert Thomas appeals his conviction for Murder and his adjudication as an Habitual Offender following a jury trial. He presents the following issues for our review:

1. Whether the trial court abused its discretion when it denied his motion for mistrial.
2. Whether the State presented sufficient evidence to support his murder conviction.

We affirm.

FACTS AND PROCEDURAL HISTORY

During the evening of October 26, 2005, Thomas was driving around Evansville with Kenneth Lowe, Toya Duerson, and Matthew Thomas riding in the vehicle as passengers. Thomas saw Robert Buzzingham walking near a liquor store, and Thomas told his passengers that Buzzingham owed him money. Thomas pulled over and asked Duerson to drive so that he could sit in a back seat. Thomas then directed Duerson to drive to the liquor store where they saw Buzzingham. When Duerson stopped in a parking lot across the street from the liquor store, Thomas called to Buzzingham and asked him to walk over to the vehicle. Buzzingham complied, and a conversation ensued. After a few minutes, Thomas shot Buzzingham four times, and Thomas instructed Duerson to drive away. A passerby drove Buzzingham to the hospital, where he was pronounced dead on arrival.

Later that night, Thomas went to Teresa Carter's house and stated, "I just smoked a mother ****er." Transcript at 491. Carter saw that Thomas had a gun. Officers arrested Thomas at Carter's house the next morning. And they found a gun hidden in a

bed in an upstairs bedroom. Forensic testing revealed that that gun had been used to shoot Buzzingham.

The State charged Thomas with murder and alleged that he was an habitual offender. A jury found him guilty as charged, and the trial court entered judgment and sentence accordingly. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Mistrial

Thomas first contends that the trial court abused its discretion when it denied his motion for mistrial. In particular, he contends that a State's witness, Matthew Thomas, violated a motion in limine when he disclosed that Thomas had previously been in prison, placing Thomas in a position of grave peril. We cannot agree.

Whether to grant or deny a motion for mistrial is a decision left to the sound discretion of the trial court. Alvies v. State, 795 N.E.2d 493, 506 (Ind. Ct. App. 2003), trans. denied. We will reverse the trial court's ruling only upon an abuse of that discretion. Id. We afford the trial court such deference on appeal because the trial court is in the best position to evaluate the relevant circumstances of an event and its impact on the jury. Id. To prevail on appeal from the denial of a motion for mistrial, the appellant must demonstrate the statement or conduct in question was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected. Id. We determine the gravity of the peril based upon the probable persuasive effect of the misconduct on the jury's decision rather than upon the degree of impropriety of the conduct. Id.

A mistrial is an extreme sanction warranted only when no other cure can be expected to rectify the situation. Id. Reversible error is seldom found when the trial court has admonished the jury to disregard a statement made during the proceedings because a timely and accurate admonition to the jury is presumed to sufficiently protect a defendant's rights and remove any error created by the objectionable statement. Id.

Here, the trial court granted Thomas' motion in limine to prohibit witnesses from testifying about his prior bad acts. However, Matthew Thomas, the State's witness, violated the order in limine when the following exchange occurred:

Prosecutor: Okay, now, as I understand it from your initial statement to the police that you and [Thomas] had only seen each other one time and that was about three weeks prior to that, because you guys had a falling out years ago?

Matthew Thomas: I think it was the first time he had got out of prison. When he first came home, when we first seen him.

Transcript at 343.

Generally, a defendant's refusal of a trial court's offer to admonish the jury constitutes a waiver of any error in the denial of the motion. Randolph v. State, 755 N.E.2d 572, 575 (Ind. 2001). Here, the trial court advised defense counsel that it would give an admonishment if so requested. But defense counsel rejected that offer. Thus, Thomas "did not give the trial court an opportunity to strike the remarks and deflate any possible prejudicial effect." See Robinson v. State, 693 N.E.2d 548, 552 (Ind. 1998). The issue is waived.

Waiver notwithstanding, the challenged testimony did not place Thomas in a position of grave peril. The gravity of peril is measured by the probable persuasive effect

of the misconduct on the jury's decision. Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006). As we discuss below, there was overwhelming evidence of Thomas' guilt. Based on that evidence, Matthew Thomas' statement likely had little impact on the jury's verdict. The trial court did not abuse its discretion when it denied Thomas' motion for mistrial.

Issue Two: Sufficiency of the Evidence

Thomas next contends that the State presented insufficient evidence to support his murder conviction. When reviewing the claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

Thomas maintains that given the lack of direct evidence of his guilt, his conviction is based on mere speculation. In particular, Thomas asserts that there is neither physical evidence, nor eyewitness testimony to prove that he shot Buzzingham. But the State presented a significant amount of circumstantial evidence showing Thomas' guilt. A murder conviction may be based entirely on circumstantial evidence. Franklin v. State, 715 N.E.2d 1237, 1241 (Ind. 1999). Circumstantial evidence will be deemed sufficient if inferences may reasonably be drawn that enable the trier of fact to find the defendant guilty beyond a reasonable doubt. Id.

The State presented the testimony of the three men riding in the vehicle with Thomas at the time that Buzzingham was shot. The testimony of those men, and other witnesses, revealed that: Thomas stated that Buzzingham owed him money; Thomas called Buzzingham over to the vehicle to speak to him; after a few minutes, Thomas raised his arm, and several gunshots were fired; Thomas then instructed the driver to leave the scene; the four men then went to a friend's house, and Thomas used a rag to wipe off a gun; Thomas stated that he had just "smoked" someone, transcript at 491; and Thomas stated that "he hit him twice in the chest," transcript at 281. Further, when officers apprehended Thomas at Carter's residence, they found a gun hidden in an upstairs bedroom of that residence. An Indiana State Police Firearms Examiner determined that that gun was used to fire the two bullets found in Buzzingham's chest.

Thomas' contention on appeal amounts to a request that we reweigh the evidence, which we will not do. The jury's verdict is not based on mere speculation. The evidence presented and the reasonable inferences to be drawn therefrom are sufficient to support Thomas' murder conviction.

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.