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IN THE COURT OF APPEALS OF INDIANA

WELBY HENDRICKSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0706-CR-541
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila A. Carlisle, Judge
The Honorable William Robinette, Commissioner
Cause No. 49G03-0610-FC-200223

February 14, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Welby Hendrickson appeals from his Class D Felony theft conviction.[1] Hendrickson contends that the trial court erred in allowing the State to file an allegedly late habitual offender charge and that the trial court erroneously instructed the jury. We affirm.

FACTS AND PROCEDURAL HISTORY

On October 16, 2006, Paul Shields returned to his home at 3018 North Guilford Avenue at approximately 9:00 p.m. Upon returning home, Shields noticed that the doors on his tool shed had been pried open and that some items were missing. Shields notified the Indianapolis Police Department, which sent an officer to Shields's home to survey the damage and complete an incident report. After the police officer completed the report, Shields latched the shed door and went to a friend's home nearby. Shields returned home at approximately 1:00 a.m. on October 17, 2006. When he returned home, he once again noticed that the doors on his tool shed had been opened, additional items were missing, and that some of the remaining items had been moved to the front of the shed. Shields decided to go upstairs and wait in a bedroom window where he would have a clear view of the shed if anyone returned.

Shields waited for a few hours until, at some time between 5:00 a.m. and 6:30 a.m., a red Chevrolet pulled into the alley and stopped behind Shields's home. Shields watched as a man, later identified to be Welby Hendrickson, approached his tool shed and reached out to open the door. Shields filed a warning shot in the air, and

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[1] Ind. Code § 35-43-4-2 (2006).

Hendrickson ran away. Shields ran to his car and followed Hendrickson. Eventually, the police stopped both cars on westbound 30th Street. Upon stopping the vehicles, Police found numerous items that belonged to Shields in Hendrickson's vehicle.

On October 19, 2006, the State charged Hendrickson with burglary and theft. On January 12, 2007, the State filed an additional charge alleging that Hendrickson was a habitual offender. Hendrickson objected to the habitual offender enhancement on January 16, 2007. On January 17, 2007, after a hearing on Hendrickson's objection, the trial court ruled that the State could proceed with the habitual offender filing. A jury trial was held on February 22, 2007, at the conclusion of which the jury found Hendrickson guilty of theft but was unable to reach a verdict on the burglary charge. On May 17, 2007, Hendrickson pled guilty to the habitual offender enhancement. In return, the State agreed to dismiss the remaining burglary charge. On May 24, 2007, Hendrickson was sentenced to an aggregate sentence of six years. This appeal follows.

DISCUSSION AND DECISION

I. Habitual Offender Filing

Hendrickson contends that the trial court erred in allowing the State to file an allegedly late habitual offender count. Hendrickson has waived any claim he might have had on this basis by pleading guilty. When a defendant pleads guilty, he or she cannot question pre-trial orders after a guilty plea is entered. *Cornelious v. State*, 846 N.E.2d 354, 357 (Ind. Ct. App. 2006), *trans. denied*. Therefore, by pleading guilty, Hendrickson waived any claim that the trial court erroneously allowed the State to file its habitual offender count.

II. Mistrial

Hendrickson next contends that the trial court erred in denying his motion for a mistrial.

> A mistrial is an extreme remedy warranted only when no other curative measure will rectify the situation. The determination of whether to grant a mistrial is within the trial court's discretion, and we will reverse only for an abuse of that discretion. An abuse of discretion has occurred if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the trial court. We accord great deference to the trial court's decision, as it is in the best position to gauge the circumstances and the probable impact on the jury.

Kirby v. State, 774 N.E.2d 523, 533-34 (Ind. Ct. App. 2003), *trans. denied*.

When determining whether a mistrial is warranted, we must consider whether the defendant was placed in a position of grave peril to which he should not have been subjected. *Id*. at 534. The gravity of the peril is determined by the probable persuasive effect of the matter complained of on the jury's decision, not the degree of impropriety of the conduct. *Id.*; *Ballin v. State*, 610 N.E.2d 846, 848 (Ind. Ct. App. 1993), *trans. denied*. The appellant carries the burden of showing that no action other than a mistrial could have remedied the perilous situation into which he was placed. *Ballin*, 610 N.E.2d at 848.

Generally, when the trial court timely and adequately admonishes the jury to disregard an event that occurred at trial, the admonishment is usually considered to be an adequate curative measure, and, as such, a mistrial is not necessary. *Dillard v. State*, 755 N.E.2d 1085, 1090 (Ind. 2001); *see also Kirby*, 774 N.E.2d at 534. In reviewing a trial

court's determination that an admonition sufficiently cured any prejudice, this court looks to the likely impact on the verdict. *Dillard*, 755 N.E.2d at 1090.

Here, the trial court, while instructing the jury, discovered that Instruction 20 was erroneously included in the packet of final instructions given to the jury. Upon discovering the erroneous inclusion of Instruction 20, the trial court immediately discontinued its oral instructions and admonished the jury, stating:

> I believe the Instruction 20 that you have is the wrong instruction. I'm going to read the right instruction to you. … I'm going to admonish you not to pay attention to the Instruction 20 that you have. And the proper instruction is – and you'll be given – each given a copy of it to take back with you.[2]

Tr. p. 192-93. The trial court then asked the jury to "pass the final instructions up this way. You'll be given them back with the correction. The one that I did not read will be taken out. Give those – all the copies to me for right now. Thank you." Tr. p. 196. Further, after dismissing the jury to the jury room, the trial court informed the parties that it was going to "take out the one [erroneous] Instruction 20 and put in the right Instruction 20. I did not read to them the wrong one." Tr. p. 197. Hendrickson alleged error and moved for a mistrial. The trial court denied his motion stating, "I think the explanation that I gave [the jury] cleared [any alleged error] up." Tr. p. 197.

Hendrickson claims that the trial court abused its discretion by denying his motion for a mistrial. Specifically, Hendrickson claims that because the jury had time to read the

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[2] The record does not include the allegedly erroneous Instruction 20, and, as such, we are unable to determine what it instructed. The record does contain the corrected Instruction 20, which instructs the jury that "No Defendant may be compelled to testify. A Defendant has no obligation to testify. The Defendant did not testify. You must not consider this in any way." Appellant's App. p. 87.

erroneous Instruction 20 before the trial court admonished the jury to disregard it, the jurors could have been misled by the erroneous Instruction 20 and, as a result, Hendrickson's decision not to testify could have been impermissibly tainted. We disagree.

On appeal, Hendrickson provided no evidence demonstrating what the erroneous Instruction 20 instructed. Further, Hendrickson provided no evidence supporting his claim that said instruction misstated the law in a manner likely to mislead the jury. Additionally, Hendrickson also failed to prove what prejudice, if any, he suffered as a result of the initial inclusion of the erroneous Instruction 20. The record demonstrates Instruction 20 was, immediately removed from the instruction packet and that the court immediately admonished the jury. Hendrickson has failed to meet his burden to show either that he was in a perilous position or that a mistrial was necessary to remedy it. *See Ballin*, 610 N.E.2d at 848. We therefore conclude that the trial court did not abuse its discretion in denying Hendrickson's motion for a mistrial.

The judgment of the trial court is affirmed.

BAKER, C.J., and DARDEN, J., concur.