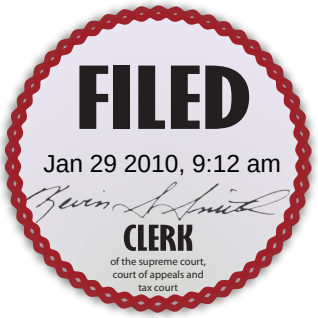

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IN THE
COURT OF APPEALS OF INDIANA

HERBERT D. SEAY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 30A04-0904-CR-178
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HANCOCK SUPERIOR COURT
The Honorable Terry K. Snow, Judge
Cause No. 30D01-0805-FB-93

January 29, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Herbert Seay appeals his convictions for Class B felony carjacking, Class B felony escape, Class C felony conversion, and Class D felony resisting law enforcement. We affirm.

Issues

Seay raises five issues, which we consolidate and restate as:

I. whether the trial court properly denied his request for a mistrial after he was introduced to prospective jurors while wearing handcuffs;

II. whether there is sufficient evidence to sustain his escape and carjacking convictions;

III. whether the admission of evidence relating to marijuana is reversible error; and

IV. whether the trial court properly instructed the jury.

Facts

At approximately 4:00 p.m., on May 28, 2008, Seay was taking Sabrina Meredith and her two children to a Greenfield restaurant so she could pick up her husband's paycheck. While they were preparing to leave Meredith's house, one of Meredith's neighbors called 911, reported that Meredith was going to leave her children at home alone, and indicated that she had seen Meredith and Seay involved in a drug transaction. This neighbor described Seay's car and gave his license plate number to the 911 operator. Based on this information, Deputy Bridget Foy of the Hancock County Sheriff's Department initiated a traffic stop when she observed Seay's car approximately a mile

and a half from Meredith's home. Deputy Jarrod Bradbury arrived at the scene to assist Deputy Foy. Deputy Bradbury parked his marked police car behind Deputy Foy's car and left the key in the ignition and the engine running.

At the time of the stop, the children were safe, Seay was not violating any traffic laws, and Seay's license and registration were valid. Deputy Foy asked for Seay's consent to search his car, and Seay refused. Deputy Foy then requested assistance from the canine unit. Approximately twenty minutes later, Deputy Aaron Fawver arrived at the scene, and his canine, Flash, alerted to possible drugs in the car. Seay's car was searched, and a duffle bag containing marijuana was discovered under the passenger seat. Seay was arrested, handcuffed, and placed in the front passenger seat of Deputy Bradbury's car with the seatbelt buckled.

Somehow, Seay removed one hand from the handcuffs, moved to the driver's seat, and sped away from the scene in Deputy Bradbury's police car. Seay led police on an eleven-mile chase through Greenfield, during which Seay reached speeds of 130 miles per hour. At the conclusion of the chase, Seay tried to avoid stop sticks, lost control of the police car, and drove into a field, where he was apprehended. The stop and chase were captured by cameras located in the various police cars, including the camera in Deputy Bradbury's car .

On May 30, 2008, the State charged Seay with Class B felony carjacking, Class B felony escape, Class C felony conversion, Class D felony resisting law enforcement, and Class D felony possession of marijuana, which was later amended to Class A misdemeanor possession of marijuana. Seay moved to suppress the marijuana, and his

motion was granted. A jury found Seay guilty of the carjacking, escape, conversion, and resisting charges and not guilty of the possession of marijuana charge. The trial court entered judgments of conviction accordingly. Seay now appeals.

Analysis

I. Handcuffs

Seay argues that the trial court improperly denied his request for a mistrial after the prospective jurors saw him in the courtroom wearing "shackles" on his wrists and ankles during the introductory phase of the trial before the jury was impaneled. Appellant's Br. p. 8. Outside of the presence of the jurors, Seay requested that new jurors be called. The trial court noted that Seay had been wearing handcuffs on his wrists but that the jurors likely had not seen the shackles on Seay's ankles, and the trial court denied Seay's request to call new jurors. After a jury was impaneled and prior to opening statements, Seay renewed his request as a motion for mistrial, and the trial court denied this motion.[1]

"As a general proposition a defendant has the right to appear before a jury without physical restraints, unless such restraints are necessary to prevent the defendant's escape, to protect those present in the courtroom, or to maintain order during trial." Overstreet v. State, 877 N.E.2d 144, 160 (Ind. 2007), cert. denied, 129 S. Ct. 458. "This right arises from the basic principle of American jurisprudence that a person accused of a crime is presumed innocent until proven guilty beyond a reasonable doubt." Id. "For this

[1] Seay declined to have the jury instructed to disregard the handcuffs because he did not want to draw additional attention to the issue.

presumption to be effective, courts must guard against practices that unnecessarily mark the defendant as a dangerous character or suggest that his guilt is a foregone conclusion." Id.

"The granting of a mistrial lies within the sound discretion of the trial court, and we reverse only when an abuse of discretion is clearly shown." Davis v. State, 770 N.E.2d 319, 325 (Ind. 2002). It is not an abuse of discretion for a trial court to deny a motion for mistrial because a juror has seen a defendant in handcuffs unless the defendant demonstrates actual harm. Id. Seay has not made such a showing.

Even if we assume that the jurors saw Seay in handcuffs during the introductory phase of the trial, there is no evidence that the presence of Seay in handcuffs unnecessarily marked him as dangerous or suggested that his guilt was a foregone conclusion. See Overstreet, 877 N.E.2d at 160. First, the jurors' brief exposure to Seay seated in the courtroom wearing handcuffs and street clothes was unlikely to unnecessarily mark him as dangerous given the extensive evidence of the high-speed chase, including video footage that the jury saw. Further, the jury found Seay not guilty of the marijuana charge, suggesting that his guilt was not a foregone conclusion. Accordingly, Seay has not demonstrated that he was actually harmed by the jury seeing him in handcuffs.[2]

[2] Seay cites Walker v. State, 274 Ind. 224, 410 N.E.2d 1190 (1980), for the proposition that "The Indiana Supreme Court found that the convenience of the court due to the late hour of the day was not a sufficient ground for departing from the rule against a defendant's shackling in open court in front of a jury and reversed and remanded for a new trial." Appellant's Br. p. 10. Although the Walker court did conclude that the trial court's convenience was not a sufficient basis for permitting the jury to see the defendants shackled in court, it reversed on other grounds. Walker, 274 Ind. at 229, 410 N.E.2d at 1193 ("Because the case must be reversed for the error in permitting the jury to separate, it is unnecessary for us to

II. Sufficiency of the Evidence

Upon a challenge to the sufficiency of evidence to support a conviction, we do not reweigh the evidence or judge the credibility of the witnesses. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We must consider only the probative evidence and reasonable inferences supporting the verdict. Id. We must affirm a conviction if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. Id.

Seay first argues there is insufficient evidence to support his Class B felony escape conviction because Deputy Bradbury's car was not a deadly weapon for purposes of the escape statute. To convict Seay of Class B felony escape, the State was required to show that Seay intentionally fled from lawful detention and while committing the offense he used a deadly weapon. Ind. Code § 35-44-3-5(a). The State specifically alleged that Deputy Bradford's police car was a deadly weapon. Seay argues that because the resisting law enforcement statute distinguishes between using a vehicle to commit the offense and using a deadly weapon to commit the offense, the legislature could not have intended for a vehicle to be included as a deadly weapon for purposes of the escape statute. See I.C. § 35-44-3-3(b) (defining Class D felony resisting law enforcement).

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determine whether or not other trial errors warrant reversal. However, we believe it appropriate to point out such errors in order that they will not be repeated upon a re-trial of the cause.").

Initially we note that the escape statute contains no distinction between deadly weapons and vehicles. Nevertheless, we have rejected a similar argument regarding a criminal recklessness conviction. We reasoned:

> The statute is clear-if one commits criminal recklessness, without more, it is a Class C misdemeanor. I.C. § 35-42-2-2(b). If the reckless conduct includes the use of a vehicle, the crime is elevated to a Class A misdemeanor. I.C. § 35-42-2-2(c)(1). If the crime is committed while the defendant was armed with a deadly weapon, it is elevated to a Class D felony. I.C. § 35-42-2-2(c)(2). The specific issue before us arises when the deadly weapon involved happens to be a vehicle. An automobile may be considered a "deadly weapon" given appropriate circumstances. . . .
>
> We do not view the statute as containing two mutually exclusive subsections. That a vehicle may be considered a deadly weapon implies the corollary that not all vehicles are necessarily deadly weapons. If criminal recklessness is committed and includes the use of a vehicle, whether the vehicle is considered a deadly weapon or not, the requirements of subsection 2(c)(1) are met. If, as here, criminal recklessness is committed and the defendant is "armed" with a vehicle used in such a manner as to be considered a deadly weapon, then the requirements of subsection 2(c)(2) are also met. In such a case, subsection 2(c)(1) would be a factually-included offense of subsection 2(c)(2). We do not discern from the statute that the General Assembly intended to elevate the crime of criminal recklessness to a Class D felony if the defendant is armed with a deadly weapon, but that if the deadly weapon happens to be a vehicle, the crime may only be elevated to a Class A misdemeanor.

DeWhitt v. State, 829 N.E.2d 1055, 1064-65 (Ind. Ct. App. 2005) (footnote omitted). This is consistent with our supreme court's holding that an automobile can be a deadly weapon if used or intended to be used in a manner readily capable of causing serious bodily harm even though an automobile is not particularly defined as a deadly weapon in

our criminal code. Johnson v. State, 455 N.E.2d 932, 936 (Ind. 1983); see also I.C. § 35-41-1-8 (defining deadly weapon).

Here, the State presented evidence that Seay put the police car in reverse, hit the police car parked behind him, and then drove forward toward Deputy Bradbury. Witnesses testified that Deputy Bradbury's "life was in danger" and that, if he had not jumped to the side, he would have been struck or "rundown." Tr. pp. 201, 202. This testimony was confirmed by the video footage from the camera in Deputy Bradbury's car. The video footage also show Deputy Bradbury's police car being driven at an extremely high rate of speed through Greenfield, running several stop signs, and causing several near-collisions. Given the facts of this case, there is sufficient evidence to support the inference that the police car was used as a deadly weapon.

Seay also argues there is insufficient evidence to support his carjacking conviction. Carjacking is defined as knowingly or intentionally taking a motor vehicle from another person or from the presence of another person by using or threatening the use of force on any person or by putting any person in fear. I.C. §§ 35-42-5-2. Seay acknowledges Deputy Bradbury's testimony that he was placed in fear by Seay's action but argues that Deputy Bradbury was placed in fear because "he ran in front of the moving vehicle's immediate path." Appellant's Br. p. 14.

This is a request to reweigh the evidence, which shows that when taking Deputy Bradbury's car, Seay drove toward Deputy Bradbury as he accelerated, forcing Deputy Bradbury to jump out of the path of the car. The evidence also shows that Deputy Bradbury knew that his backup weapon was in an unsecured compartment on the driver's

side door of the car. Deputy Bradbury testified that he saw Seay's hand going down by the driver's side door and that Seay could have shot him or could have run over him with the car and killed him. From this evidence, the jury could have inferred that Seay took the vehicle from Deputy Bradbury's presence by placing him in fear. There is sufficient evidence to support Seay's carjacking conviction.

III. Marijuana

Seay argues that the trial court improperly admitted evidence relating to the marijuana found in his car because the marijuana itself was suppressed. Seay points to the prosecutor's reference to marijuana during the opening statement, the deputies' testimony that Seay was arrested for possession of marijuana, and Meredith's testimony that she found a bag containing marijuana in Seay's car before the stop. Seay claims his convictions should be reversed because "[r]epeated reference to marijuana in Mr. Seay's possession without the underlying marijuana itself was used only to prejudicially influence the jury against Seay on the other charges." Appellant's Br. p. 16.

Even assuming the admission of this evidence was erroneous, any error was harmless. It is well-settled that errors in the admission of evidence are to be disregarded as harmless unless they affect the substantial rights of a party. Ortiz v. State, 741 N.E.2d 1203, 1206 (Ind. 2001); Ind. Trial Rule 61. Regarding the possession of marijuana charge, the jury found Seay not guilty of that offense. Thus, any erroneous admission of marijuana-related evidence did not affect Seay's substantial rights.

Similarly, because the jury acquitted Seay of the possession charge, we are not convinced that the marijuana-related evidence had a significant impact on the jury as it

considered the other charges. There is overwhelming evidence against Seay in this case. Several police officers testified regarding the stop and the subsequent chase, and Meredith confirmed their testimony. Most importantly, the stop and chase were captured on more than one police camera. Any error in the admission of the marijuana-related evidence is not grounds for reversal.

IV. Jury Instruction

Seay argues that the trial court abused its discretion when it refused to give his tendered duress instruction. When a party has challenged a trial court's refusal of a tendered jury instruction, we perform a three-part evaluation. Walden v. State, 895 N.E.2d 1182, 1186 (Ind. 2008). "First, we ask whether the tendered instruction is a correct statement of the law." Id. "Second, we examine the record to determine whether there was evidence present to support the tendered instruction." Id. "Third, we determine whether the substance of the tendered instruction was covered by another instruction or instructions." Id. We perform this evaluation in the context of determining whether the trial court abused its discretion when it rejected the instruction. Id.

Seay's tendered instruction read:

> Duress exists when the person who engaged in the prohibited conduct was compelled to do so by threat of imminent serious bodily injury to himself or another person. With respect to offenses other than felonies, if the person who engaged in the prohibited conduct was compelled to do so by force or threat of force, he is not guilty of the criminal offense. Compulsion under this section exists only if force, threat, or circumstances are such as would render a reasonable person incapable of resisting the pressure.
>
> Duress can not apply to a person who (recklessly, knowingly, or intentionally placed himself in a situation in

> which it was foreseeable that he would be subjected to duress) (committed an offense against the person as defined in IC 35-42) [sic].
>
> The State has the burden of proving beyond a reasonable doubt that the accused did not act under duress.

App. p. 39.

Seay argues that because he was "violently thrust" against the car when Deputy Bradbury placed Seay in the car and because he was illegally detained without explanation, it was possible for the jury to conclude that he feared imminent serious bodily harm. Appellant's Br. p. 18. He also claims that, because he was handcuffed and placed inside the car, he had no opportunity to avoid this threatened injury other than to use the vehicle to evade law enforcement.

Even assuming the tendered instruction was a correct statement of the law and was not covered by other instructions, there was no evidence presented to support the instruction. As for Seay's argument that he was violently placed in the police car, the evidence shows that Seay was handcuffed at 4:00 p.m. on U.S. 40 during "pretty heavy" traffic. Tr. p. 199. After he was handcuffed, Seay tried to jerk away from Deputy Bradbury, and Deputy Bradbury pinned Seay against his car in order to open the door. Deputy Bradbury described his effort to control Seay as a "defensive tactic," not an "injuring one." Id. at 246. More importantly, after Deputy Bradbury placed Seay in his car, Deputy Bradbury returned to the scene of the stop, and Seay was alone in the car. Even if his detention and arrest were illegal, there is no evidence that he faced imminent serious bodily injury while he was alone in the police car. Further, there is no indication that a reasonable person, even one who is illegally arrested, would be incapable of

resisting the pressure of removing a handcuff, stealing a police car, and leading police on a high-speed chase. The trial court did not abuse its discretion by declining to give the duress instruction.

Conclusion

The trial court did not err in denying Seay's request for a mistrial after he was seated in front of the jury in handcuffs. There is sufficient evidence to support his escape and carjacking convictions. Any error in the admission of the marijuana-related evidence was harmless. Even if Seay was illegally arrested, a duress instruction was not warranted. We affirm.

Affirmed.

MATHIAS, J., and BROWN, J., concur.