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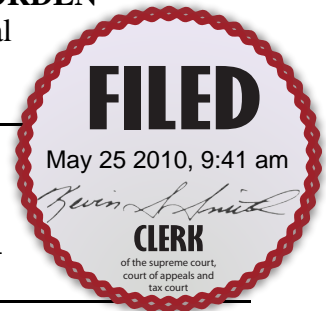
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**IN THE
COURT OF APPEALS OF INDIANA**

MITCHELL L. KING,
Appellant- Defendant,

vs.

STATE OF INDIANA,
Appellee- Plaintiff,

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No. 45A03-0911-CR-505

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas P. Stefaniak, Jr., Judge
Cause No. 45G04-0711-FD-93

May 25, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Mitchell King appeals his conviction by jury of theft as a Class D felony. King's sole argument is that the trial court erred in denying his motion for a mistrial. Concluding King was not placed in grave peril, we affirm.

Facts and Procedural History

In 2004 and 2005, King, a Lake County Sheriff's Department Officer, was the secretary/treasurer and an executive board member of the Chris Anton Lodge 125 Fraternal Order of Police ("FOP"). At some point, King told FOP President John Meznarick that he would like to invest \$15,000 of the FOP's money with an individual named Larry Shy. King wanted to invest the money without telling the FOP general membership. Meznarick told King it was the FOP's money and King would need membership approval before it could be invested. King responded that the members were not smart enough to recognize a good investment. Meznarick told King he absolutely could not invest the money without the members' approval.

King nevertheless invested the \$15,000 with Shy.¹ When Meznarick learned of the investment, King told him that two FOP trustees had approved it. After learning that the trustees had not approved the investment, Meznarick called a board meeting to discuss what King had done. Before the meeting, King went with one FOP trustee to the home of another trustee. King told the trustees that he had written checks totaling \$1,345 to himself from the FOP account.² He assured the trustees this was all the money that he

¹ Shy eventually refunded the money to the FOP.

² The ledger showed three checks for \$250 made payable to three different charities. The ledger also showed a \$595 check made payable to an insurance company. The four checks, however, were actually made payable to King.

had taken, and resigned from the FOP executive board. At the scheduled board meeting, the board members ordered an audit of FOP funds.

The following week, King returned FOP property to one of the trustees. The trustee noticed that there were no financial records on the FOP laptop King returned. King explained that the system had crashed. One week later, King attended an FOP board meeting where he explained that he had taken the money because he and his wife had been having financial problems due to his wife's poor health. The board told King there would be an audit and requested that he resign his general membership. Several weeks later, King returned an additional \$3,000 to the FOP. He explained these were additional funds he had taken that would be revealed during the audit. Later it was discovered that a \$1,500 cashier's check had also been written to King's wife from a fund for retiring FOP members.

FOP accountant Donald Smith conducted the audit. He noticed that the accounting program had been removed from FOP's laptop. However, the other programs on the laptop still worked. Also during the audit, Smith found several transactions without receipts to substantiate them. Following the audit, the FOP gave the information to the Lake County Prosecutor's Office, which charged King with one count of theft as a Class D felony for exercising unauthorized control over FOP's money with intent to deprive FOP of its use or value.

At trial, Smith was called to testify about the audit. The trial court qualified him as an expert, and Smith explained that his role was simply to determine whether King owed additional money to the FOP. In this regard, Smith simply detailed transactions or

checks he felt needed further review or explanation from King. During his testimony, Smith referred to a file of materials. King's counsel informed the court he had never been provided the materials to which Smith referred. The State had interviewed Smith several times but had never asked to see the documents in this particular file. The trial court recessed for lunch and allowed King's counsel an opportunity to review the file.

King performed voir dire of Smith to determine the extent of the expert's reliance on the materials, which included copies of the FOP check register. Smith explained that he did not rely on the check register because he did not know who prepared it. The file also included Smith's own work papers as well as bank copies of FOP issued checks. Smith explained that he relied on these documents "to a very limited degree." Transcript at 493. During the course of discovery, the State served seven discovery responses on King.

King requested a mistrial and an overnight continuance. The following day, King renewed his request for a mistrial. The trial court found the discovery violation was unintentional and consisted solely of the State failing to inspect the documents Smith relied on to a limited extent in the audit. The court denied King's motion for a mistrial and explained as follows:

[T]here isn't something that's come to light in these documents so far that is so earth shattering that it would affect the defense in this matter as I can see it, and it's mainly because there's ample evidence in front of this jury that the defendant admitted that he stole funds from the FOP. To what extent seems to be a question, but he admitted it. So the request for mistrial is again denied.

Transcript at 509. The jury convicted King of theft as a Class D felony. He now appeals his conviction.

Discussion and Decision

I. Standard of Review

King's sole argument is 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. Kirby v. State, 774 N.E.2d 523, 533 (Ind. Ct. App. 2002), trans. denied. 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. Id. An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the trial court. Id. at 534. 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 upon the jury. Id.

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. The gravity of the peril is determined by the probable persuasive effect of the matter complained of on the jury's decision. Id. Generally, a timely and accurate admonition is an adequate curative measure for any prejudice that results. Id.

Here, King contends the trial court erred in denying his motion because 1) the State violated the trial court's discovery order when it failed to provide him with the material to which Smith referred during his testimony and upon which he relied to a limited extent in performing the audit; and 2) the State's failure to disclose the exculpatory evidence in Smith's file violated his due process rights. We address each of his contentions in turn.

II. Discovery Order

King first argues that the trial court should have granted his motion for a mistrial because the State violated the court's discovery order when it failed to provide him with the material to which Smith referred during his testimony and upon which he relied to a limited extent in performing the audit. When reviewing a challenge to discovery matters, we must give a trial court wide discretionary latitude. Fleming v. State, 833 N.E.2d 84, 91 (Ind. Ct. App. 2005). Since the trial court has a duty to promote the discovery of truth and to guide and control the proceedings, it will be granted deference when assessing what constitutes substantial compliance with discovery orders. Id. In cases where there has been a failure to comply with discovery procedures, the trial court is usually in the best position to determine the dictates of fundamental fairness and whether any resulting harm can be eliminated or satisfactorily alleviated. Id. Absent clear error and resulting prejudice, the trial court's determination of discovery violations and sanctions will be affirmed. Id. Here, King has failed to show how he was prejudiced by the State's failure to provide him with this material or how this material would have made a difference at trial where the evidence revealed King admitted he wrote several unauthorized checks to himself with FOP funds.

In addition, a severe sanction for a discovery violation, such as exclusion of evidence or a mistrial, is only proper where there is a showing that the State's actions were deliberate or otherwise reprehensible, and this conduct prevented the defendant from receiving a fair trial. See Warren v. State, 725 N.E.2d 828, 832 (Ind. 2000). Here, King has not demonstrated that the State's action was deliberate or otherwise

reprehensible. This is not a case of the State ambushing the defense or purposely failing to disclose discovery items. See id. Rather, the trial court found the discovery violation was unintentional and consisted solely of the State failing to inspect the documents Smith relied on to a limited extent in the audit. King was not placed in grave peril, and the trial court did not err in denying his motion for a mistrial.

III. Due Process Rights

King also argues that the trial court should have granted his motion for a mistrial because the State violated his due process rights. Specifically, he contends that the State failed to disclose the contents of Smith's file in violation of Brady v. Maryland, 373 U.S. 83 (1963). Due process requires the State to disclose to the defendant favorable evidence which is material to either his guilt or punishment. Stephenson v. State, 742 N.E.2d 463, 491 (Ind. 2001), cert. denied, 534 U.S. 1105 (2002). Pursuant to Brady, favorable evidence is material only if there is a reasonable probability that the result of the proceeding would have been different if the evidence had been disclosed to the defense. Id. (citing Brady, 373 U.S. at 87). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Here, no Brady violation occurred because the evidence was disclosed to King before the conclusion of trial. See Williams v. State, 714 N.E.2d 644, 648-49 (Ind. 1999), cert. denied, 528 U.S. 1170 (2000) (recognizing if the favorable evidence becomes known to the defendant before or during the course of trial, Brady is not implicated).

Further, even if Brady was implicated, as we previously noted, King admitted that he wrote several unauthorized checks to himself using FOP funds. Based upon this

evidence, there is no reasonable probability that the result of the proceeding would have been different if the information in Smith's file had been disclosed to the defense, including the bank copies of FOP issued checks. The trial court did not err in denying King's motion for a mistrial because there was no violation of his due process rights and he was not placed in grave peril.

Conclusion

The trial court did not err in denying King's motion for a mistrial.

Affirmed.

FRIEDLANDER, J., and KIRSCH, J., concur.