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# IN THE COURT OF APPEALS OF INDIANA

JERRY H. GUFFEY,
Appellant-Defendant,
vs.
STATE OF INDIANA,
Appellee-Plaintiff.

No. 48A05-0911-CR-624

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause No. 48D01-0807-MR-190

**August 12, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BRADFORD, Judge**

Following a jury trial, Appellant-Defendant Jerry Guffey was convicted of Murder, a felony;[1] Class D felony Auto Theft;[2] and Class D felony Aiding, Inducing, or Causing Arson,[3] for which he received an aggregate sentence of sixty-eight years in the Department of Correction. Upon appeal, Guffey contends that the trial court committed reversible error on the following grounds: (1) by failing to sustain his motion for a mistrial when certain witnesses referred to an existing protective order against him; (2) by admitting certain statements made while he was in custody; and (3) by excluding defense witness testimony regarding an alleged history of abuse of the victim by his girlfriend. We affirm.

## FACTS AND PROCEDURAL HISTORY

On Wednesday, July 9, 2008, at approximately 8:00 or 8:30 p.m., certain eyewitnesses observed Guffey walking north on 11th Street in Elwood, in the direction of John Collier's house at 400 North 11th Street. Guffey, who was wearing a western-style shirt, was staggering.

At approximately 10:00 or 10:30 p.m. that night, Guffey's neighbors saw Guffey drive Collier's white four-door Crown Victoria into Guffey's driveway at 916 South B Street. It appeared that Guffey was the only person in Collier's car. Guffey stepped out of the car and walked into and out of his house multiple times, at one point carrying an

[1] Ind. Code § 35-42-1-1(1) (2008).

[2] Ind. Code § 35-43-4-2.5(b)(1) (2008).

[3] Ind. Code § 35-43-1-1(d) (2008).

object wrapped inside a cloth into his house. Approximately ten to fifteen minutes later, Guffey drove off in Collier's car.

At approximately 11:00 p.m. or midnight that night, Guffey arrived in the car at the New Castle home of his son Jerry Guffey, Jr. ("J.J."). J.J. had never seen Guffey drive that car before. After drinking a beer, Guffey told J.J. that he had killed a man in Elwood by cutting his head off with a butcher knife, that he had returned the knife to his own kitchen, and that he had taken the man's car.

Guffey and his brother, Jeff, who was also at J.J.'s house, decided to dispose of the car by burning it. Jeff placed some motor oil and a one-gallon jug of gasoline into the car. Jeff subsequently left in the car, hitting some parked cars as he left. One of these cars belonged to J.J.'s neighbor Joni.

Jeff drove the car approximately eight to ten miles into the country. Jeff pulled the car to the side of the road, threw in the one-gallon jug of gasoline, and lit the car on fire, burning his arm in the process. Jeff subsequently hitched a ride back to J.J.'s house in New Castle. Jeff's wallet, which he believed he had dropped while setting the car on fire, was later found at the scene. There is no dispute that the car Jeff testified to burning was a Crown Victoria registered to Collier.

At some point during the early morning hours of July 10, 2008, J.J. knocked on Joni's door, told her that her car had been hit, and ultimately told her Guffey's version of the events in question. Joni reported the incident to authorities, including J.J.'s report of Guffey's statements.

At approximately 7:00 a.m., J.J.'s acquaintance Frank drove Guffey, J.J., and Jeff to Guffey's home. Authorities arrived at Guffey's home approximately five to ten minutes later and took him into custody based upon an outstanding warrant for his arrest, apparently for contempt of court in another county. At the time of his arrest, officers noticed blood stains on Guffey's shirt.

On Friday, July 11, 2008, Collier's grandson found Collier lying dead inside his home. Collier had sustained a deep cutting wound to the left side of his neck, which was subsequently determined to have caused his death. This wound to Collier's neck "wrapped around and went all the way down to the bone and cut the major artery and then went around the front." Tr. p. 120. Pathologist Dr. Paul Mellen opined that, given the "deep and heavy" nature of the wound, it must have been inflicted by a large heavy knife rather than by a small knife. Tr. p. 130. Collier also sustained other injuries, including twenty-one small cut marks to his hands which were consistent with defensive injuries. According to Dr. Mellen, the state of Collier's body was not inconsistent with his having been dead for up to forty-eight hours.

Authorities subsequently recovered a large butcher knife from Guffey's home which tested positive for blood that matched Collier's DNA. In addition, the shirt Guffey was wearing at the time he was arrested, which matched the shirt witnesses saw him wearing the night of July 9, tested positive for blood and Collier's DNA.

On July 16, 2008, the State charged Guffey with murder, Class D felony auto theft, and Class D felony aiding, inducing, or causing arson. The matter was tried to a jury beginning on August 25, 2009 and concluding on September 2, 2009.

At trial, New Castle Police Officer Matthew Scoffield testified that he was informed that Guffey had a "Protective Order or Restraining Order that had been served on him[.]" Tr. p. 346. Defense counsel objected, questioning resumed, and Officer Scoffield stated again that he had been advised about the existence of a protective order, causing defense counsel to object again. Subsequently, Elwood Police Chief Jason Brizendine testified that, upon being informed that Guffey had mentioned possibly cutting someone's head off, authorities "immediately checked for anybody on a protective order[.]" Tr. p. 466. At the conclusion of Officer Brizendine's testimony, defense counsel moved for a mistrial on Indiana Rule of Evidence 404(b) grounds. The trial court denied defense counsel's motion but offered to admonish the jury not to consider the protective order testimony. Defense counsel did not request an admonition.

Also at trial, Elwood Police Officer Cara Barton testified that upon booking Guffey, she pointed out to him that he had blood on his shirt, causing Guffey to respond by stating, in Barton's words, that "he had done something to his nose. There was an abrasion on his note [sic] and he said he had fallen and scraped his nose and that's where the blood had come from." Tr. p. 584. According to Barton, authorities removed Guffey's shirt as a result of her observation. Defense counsel objected to Barton's testimony, but, following an unrecorded bench conference, the trial court deemed it admissible.

Subsequently at trial, during the defense's presentation of evidence, the trial court excluded testimony by defense witness Susan Atwood that Collier's girlfriend Mary

Parks allegedly abused him. The trial court excluded the testimony on the grounds that it was "total speculation[]" and not based upon personal knowledge. Tr. p. 736.

As part of the defense's case, Guffey testified on his own behalf. According to Guffey, he had borrowed Collier's car on the day in question, driven to McDonald's to buy his dinner, and then home to eat it. Upon returning the car to Collier's home later that evening, Guffey discovered Collier lying dead inside his home in a pool of blood with a knife beside him. Allegedly believing that someone was inside Collier's home, Guffey picked up the knife to protect himself and left for his own home. Guffey placed the knife on the knife rack in his home and drove to New Castle to his son's house, where his brother was also present. According to Guffey, his son had asked whose car he was driving, and he had responded, "It belongs to a man who got his head cut off." Tr. p. 874. Guffey had then suggested burning the car because there were fingerprints on it and had helped look for cans and oil in furtherance of that effort. As part of his testimony, Guffey admitted that he had a criminal history and that Collier's blood was on his shirt at the time of his arrest. Guffey further testified that he believed at the time of his arrest that the blood on his shirt was from his own nose.

The jury ultimately found Guffey guilty as charged. During an October 5, 2009 sentencing hearing, the trial court found that Guffey's crime was among the "worst of the worst" and imposed a maximum sixty-five year sentence for his murder conviction. Tr. p. 1024. The trial court additionally sentenced Guffey to concurrent terms of three years for his auto theft and arson convictions, to be served consecutive to his sixty-five year

sentence for murder, for an aggregate sentence of sixty-eight years in the Department of Correction. This appeal follows.

## DISCUSSION AND DECISION

Upon appeal, Guffey challenges the trial court's denial of a mistrial, its admission of Barton's testimony, and its exclusion of Atwood's testimony. We address each challenge in turn.

### I. Denial of Mistrial

#### A. Standard of Review

The trial court is in the best position to assess the impact of a particular event upon the jury. *Myers v. State*, 887 N.E.2d 170, 189 (Ind. Ct. App. 2008), *reh'g denied, trans. denied*. Thus, the decision of whether to grant or deny a motion for mistrial is committed to the sound discretion of the trial court and will be reversed only upon an abuse of that discretion. *Id.* The denial of a motion for mistrial will be reversed only upon a showing that the defendant was placed in a position of grave peril to which he should not have been subjected. *Id.* The declaration of a mistrial is an extreme action and is warranted only when no other action can be expected to remedy the situation. *Id.* The burden on appeal is upon the defendant to show that he was placed in grave peril by the denial of the mistrial motion. *Id.* The defendant has the additional burden to show that no other action could have remedied the perilous situation into which he was placed. *Id.*

#### B. Analysis

Guffey argues that the multiple references by the State's witnesses to a protective order violated Indiana Evidence Rules 404(b) and 403 and warranted a mistrial. The

State responds by arguing that Guffey waived this claim by failing to seek an admonition and that, in any event, the protective order references did not place Guffey in grave peril.

In response to Guffey's motion for a mistrial, the trial court stated as follows in offering to admonish the jury:

> And I think it's a strategic call, [defense counsel], whether or not you want me to say something about that should not have been discussed it's a suggestion of some possible misconduct that has no bearing on this case and the jury should not consider it and treat it as if it hadn't been said. You know you can almost make a bigger, you can make a mountain out of something that's pretty small. So that's a strategic issue. The mistrial is denied. You decide whether or not the problem is compounded by an admonition. But I think an admonition is warranted if you ask for it.

Tr. pp. 487-88. Following additional statements by the prosecutor, the trial court again provided an opportunity for defense counsel to request an admonition:

> [I]f you want to think about it during the lunch hour or mention it to your client, sometimes trying to cure a problem is more injurious than ignoring it. But that's a strategic call and I will try to frame some sort of a short admonition if you think that's appropriate. But there's not going to be a mistrial.

Tr. p. 489. Defense counsel did not request an admonition.

Guffey's failure to request an admonition, despite repeated opportunities to do so, waives his current challenge to the trial court's denial of a mistrial. "'A timely and accurate admonition is presumed to cure any error in the admission of evidence.'" *Randolph v. State*, 755 N.E.2d 572, 575 (Ind. 2001) (quoting *Heavrin v. State*, 675 N.E.2d 1075, 1084 (Ind. 1996) (internal quotation omitted)). However, refusal of an offer to admonish the jury constitutes a waiver of any error in the denial of a motion for mistrial. *Id.*

Waiver notwithstanding, Guffey's claim fails on the merits. Of the two witnesses who used the "protective order" language in their testimony, only one of them, Officer Scoffield, testified that the protective order at issue, which apparently protected Guffey's estranged wife from him, actually existed and applied to Guffey. Officer Brizendine's use of the phrase simply indicated that he had gone through certain procedural steps upon learning that Guffey had mentioned cutting someone's head off, including checking for anybody on a protective order. Tr. p. 466. Nevertheless, the prosecutor conceded that the existence of a protective order was unnecessary to the State's case, and that he had specifically instructed Officer Brizendine not to use the protective order language.[4] Tr. p. 484.

Assuming *arguendo* that the protective order references violated Indiana Evidence Rules 404(b) and/or 403, we cannot conclude that they placed Guffey in grave peril. As the trial court observed, the references to the protective order simply indicated that one existed; they did not state or suggest that Guffey had ever *violated* the protective order. In addition, to the extent that the existence of a civil protective order against Guffey tended to cast him in a negative light, his allusions at trial to his "history with the police officers" and admission that he had a criminal history likely placed him in a far more negative light than the existence of any civil order against him might have done. Tr. p. 883, 884. Perhaps most significantly, the fact that Guffey also admitted to being in possession of and wanting to burn, for purposes of destroying fingerprints, a vehicle

[4] Officer Brizendine immediately stopped after using the phrase, and, according to the prosecutor, flinched, suggesting that his comment was unintentional.

belonging to a man "who got his head cut off," Tr. p. 874, whom he stipulated to be Collier, would have been sufficiently prejudicial that the existence of a protective order relating to his relationship with an unnamed person in another matter would have had a minimal effect on his trial for Collier's murder. We find no abuse of discretion in the trial court's denial of Guffey's motion for mistrial.

## II. Admissibility of Barton's Testimony

Guffey argues that the trial court's admission of Elwood Police Officer Barton's testimony regarding certain statements he made to her while in custody violated his Fifth Amendment rights. Guffey made these statements in response to Officer Barton's comment to him that there was blood on his shirt.

### A. Standard of Review and Applicable Law

The admission or exclusion of evidence is a matter left to the sound discretion of the trial court. *Terry v. State*, 857 N.E.2d 396, 409 (Ind. Ct. App. 2006), *trans. denied*. On review, we will not reweigh the evidence. *Id.* "Instead, we will consider all conflicting evidence in favor of the trial court's ruling, and only the uncontested evidence favorable to the defendant." *Id.*

The Fifth Amendment privilege against self-incrimination prohibits admitting statements given by a suspect during "custodial interrogation" without a prior warning. *Ritchie v. State*, 875 N.E.2d 706, 716 (Ind. 2007) (citing *Illinois v. Perkins*, 496 U.S. 292, 296 (1990)). Police officers are not required to give *Miranda* warnings unless the defendant is both in custody and subject to interrogation. *Id.* The State does not dispute that Guffey was "in custody" for *Miranda* purposes at the time he made his statements

and that he had not been apprised of his *Miranda* rights. As for the question of interrogation, under *Miranda*, "'"interrogation" includes express questioning and words or actions on the part of the police that the police know are reasonably likely to elicit an incriminating response from the suspect.'" *Id.* (quoting *White v. State*, 772 N.E.2d 408, 412 (Ind. 2002)) (emphasis omitted).

**B. The Merits**

As the State points out, at the time Guffey made the statements to Officer Barton, he was being booked in connection with an outstanding warrant on a civil matter. The fact of the civil warrant, however, does not demonstrate that Officer Barton's observation about the blood on Guffey's shirt was unrelated to a murder investigation. In fact, at the time Guffey was arrested on the civil warrant, the Elwood Police Department had been informed by Detective Captain Kim Kronk of the Henry County Sheriff's Department that there was a "high probability" of a homicide in the vicinity of Guffey's residence. Tr. p. 355. Indeed, the first Elwood Police Officers on the scene had been informed that Guffey had blood stains on his shirt and had mentioned cutting someone's head off. Officer Barton was also at the scene and can be presumed to have been aware of these allegations. Given Barton's awareness of the reported blood on Guffey's shirt and its alleged connection to a homicide, we cannot conclude that her comment to Guffey regarding this blood was somehow not designed to elicit an incriminating response. To the contrary, it had already been acknowledged to be a key piece of evidence in the investigation.

To the extent it is also necessary to consider Guffey's perspective, we must similarly conclude that Officer Barton's comment would have been likely to elicit an incriminating response. *See Furnish v. State*, 779 N.E.2d 576, 579 (Ind. Ct. App. 2002) (endorsing interpretations of "interrogation" definition which focus on perceptions of suspect rather than intent of police), *trans. denied*. Guffey's own version of the events in question demonstrate that he was uncomfortable enough with the fact that he was in possession of the deceased Collier's car to seek to have it burned. The fact that he was in police custody the very next day with blood on his shirt and being subjected to comments about that blood would in all likelihood have caused him to make a cover-up attempt. We conclude that Officer's Barton's comment to Guffey regarding the blood on his shirt was designed to elicit an incriminating response and that the trial court abused its discretion in admitting Guffey's responsive statements. *See Alford v. State*, 699 N.E.2d 247, 250 (Ind. 1998) (observing that confronting defendant with potentially incriminating evidence constituted interrogation).

### C. Harmless Error

The State argues that any error in the admission of Barton's testimony regarding Guffey's statements constitutes harmless error. The Indiana Supreme Court has determined that violations of *Miranda* are subject to harmless error analysis. *Rawley v. State*, 724 N.E.2d 1087, 1090 (Ind. 2000). The improper admission of evidence is harmless error when the conviction is supported by substantial independent evidence of guilt which satisfies the reviewing court that there is no substantial likelihood the challenged evidence contributed to the conviction. *Morales v. State*, 749 N.E.2d 1260,

1267 (Ind. Ct. App. 2001). A federal constitutional error is reviewed de novo and must be "'harmless beyond a reasonable doubt.'" *Id.* (quoting *Alford*, 699 N.E.2d at 251 (internal quotation omitted)). The court must find that the error did not contribute to the verdict, that is, that the error was unimportant in relation to everything else the jury considered on the issue in question. *Id.*

The trial court's admission of Guffey's statement to Officer Barton that the blood on his shirt came from his nose constitutes harmless error. Evidence at trial indicated that DNA testing of the shirt revealed the blood on the shirt belonged to Collier. To the extent the admission of Guffey's statement to the contrary suggested that he was being untruthful or evasive with respect to the instant circumstances, other evidence similarly—and more forcefully—established this fact. Guffey admitted during testimony that he had lied in the past about the events in question and that he had sought to burn Collier's car in an attempt to cover up his own fingerprints. Moreover, Guffey effectively repeated the substance of the prohibited statement during his own testimony, when he claimed to have believed—as Barton reported he had—that the blood on the shirt came from his nose. It is difficult to conclude, therefore, that the erroneous admission of Barton's testimony regarding the same substantive content as Guffey's own testimony would have been particularly harmful.

Most importantly, of course, was the strong evidence against Guffey, including his own admission that he was in possession of Collier's car, which he sought to burn to conceal his fingerprints, and the murder weapon, which he admittedly placed at his house. This evidence, together with multiple witnesses' accounts of Guffey's confession

to the crime, and the existence of Collier's blood on items in Guffey's possession, including his shirt, are sufficiently incriminating such that the mere fact of Guffey's claiming this blood was his own rather than Collier's does not establish reasonable doubt.

### III. Exclusion of Atwood's Testimony

As part of the defense's case, Guffey sought to introduce testimony from Collier's daughter, Susan Atwood, regarding Collier's alleged history of abuse at the hands of his girlfriend, Mary Parks. According to defense counsel's offer of proof, Atwood had heard multiple reports from other persons that Parks was abusive toward Collier. Atwood had also apparently overheard Parks screaming into the phone during conversations with Collier and knew that Parks had baked a pie for Collier's former wife which had made her ill. The trial court excluded the evidence on the grounds that the testimony was entirely speculative and lacked a proper foundation of personal knowledge.

Guffey challenges the trial court's exclusion of this evidence by claiming that he was entitled to present third-party motive testimony in support of his defense. Evidence of a third-party motive makes it less probable that the defendant committed the crime, and is therefore relevant under Indiana Evidence Rule 401. *See Pelley v. State*, 901 N.E.2d 494, 505 (Ind. 2009). While relevant, this evidence must also be otherwise admissible under the remaining rules of evidence. *See id.* (observing that third-party motive evidence must comply with Rule 403). Indiana Evidence Rule 602 requires that witnesses only testify to matters about which they have personal knowledge. Indiana Evidence Rule 802 deems hearsay evidence inadmissible unless it falls within a noted exception. Guffey points to no applicable exceptions.

In defense counsel's offer of proof, Atwood admitted that she had not witnessed Parks's alleged mistreatment of her father and that she had merely heard from other persons that such mistreatment had occurred. Pursuant to Rules 602 and 802, the trial court properly excluded Atwood's testimony based upon other persons' observations and statements rather than her own personal knowledge.

As for Atwood's contention that she had heard Parks screaming at Collier through the phone, the trial court was similarly within its discretion to conclude that the connection between screaming and abuse, without more, was too speculative to be admissible or have any basis in personal knowledge. Indeed, as the trial court found, Parks could have been screaming out a warning to prevent someone from being scalded from boiling water in an effort to protect that person. We find no abuse of discretion.

Finally, to the extent Guffey contends that Atwood should have been able to testify regarding an alleged pie baked by Parks which made Collier's former wife sick, Guffey fails to explain how Parks's allegedly evil intent with respect to Collier's former wife somehow foreshadowed her intent with respect to Collier. Indeed, Atwood admitted that, when baking the allegedly tainted pie, Parks presumably knew Collier would not eat it, suggesting that Parks would have had differing intentions with respect to Collier and his former wife. The trial court was well within its discretion to exclude this evidence. *See Pelley*, 901 N.E.2d at 505 (observing that third-party motive evidence may be excluded if there is no demonstrated connection between the third party's actions and the crime).

## IV. Conclusion

Having concluded that Guffey's challenges to the evidence do not constitute reversible error, we affirm his convictions for murder; auto theft; and aiding, inducing, or causing arson.

The judgment of the trial court is affirmed.

RILEY, J., and MATHIAS, J., concur.