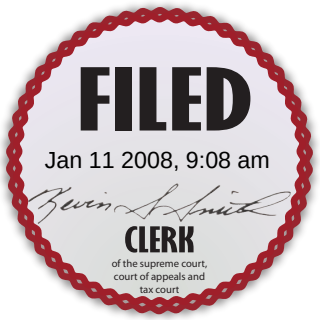

ATTORNEY FOR APPELLANT:

CLARK W. HOLESINGER
Valparaiso, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ZACHARY J. STOCK
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

STEPHEN FLEMING,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 64A03-0703-CR-134
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable William E. Alexa, Judge
Cause No. 64D02-0505-FC-4338

January 11, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Stephen Fleming ("Fleming") was convicted in Porter Superior Court of Class C felony leaving the scene of an accident resulting in death. Fleming appeals and argues that the trial court improperly denied his motion for a mistrial and that the trial court abused its discretion when it refused Fleming's tendered jury instruction.

We affirm.

Facts and Procedural History

On May 22, 2005, Fleming pulled out from his mother's driveway and drove down the street at a high rate of speed. Moments later, Fleming struck pedestrian Patrick Gallagher ("Gallagher") causing Gallagher to be fatally injured. Fleming continued to drive. He called 911 as he drove and informed them of the accident. After being instructed to return to the scene by the 911 operator, Fleming returned. Roughly fourteen minutes had elapsed since the time Fleming struck Gallagher and when Fleming returned to the scene of the accident. Upon his return, Fleming cooperated with the officers' investigation of the accident.

Gallagher died on May 23, 2005 from severe head trauma. On May 25, 2005, Fleming was charged with Class C felony leaving the scene of an accident resulting in death. The three-day jury trial commenced on October 24, 2006. Prior to trial both Fleming and the State filed proposed jury instructions, specifically one related to the definition of "immediate." The trial court rejected these proposed instructions and issued its own instruction.

On the first day of trial, during the State's opening statement, the State displayed a photo of Fleming, purportedly his mug shot though not marked as such. Fleming

objected and both parties approached the judge to discuss the photo. During this discussion, the photo remained displayed for the jury. Fleming noticed this and the photo was immediately removed. The trial court sustained Fleming's objection regarding the photo. Fleming filed a motion for a mistrial that the trial court denied.

The jury found Fleming guilty as charged. On June 19, 2007, the trial court sentenced Fleming to four years with two years suspended to probation and two years in community corrections. Fleming now appeals.

I. Mistrial

Although Fleming frames his argument as the denial of a fair trial, his argument is essentially that the trial court erred in denying his motion for a mistrial after the jury saw his photo during the State's opening statement. We recognize that the decision to grant or deny a motion for mistrial is 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 only reverse the trial court's ruling if the trial court abused its discretion. Id. Also, we note that the trial court is afforded deference on appeal due to its ability to evaluate the circumstances of an event and its impact on the jury. Id. For Fleming to prevail on appeal, he must show that the "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.

Only when no other cure can be expected to rectify the situation will the extreme sanction of mistrial be used. 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.

In this case, during its opening statement, the State displayed a color photo of Fleming which had been cropped, but portions of an orange shirt were still visible. Appellant's App. p. 64. Fleming immediately objected, and after a conversation with both attorneys off the record, the trial court sustained the objection and the photo was removed. In response to Fleming's motion for mistrial, the court stated "[Fleming] objected at the time the picture was on the screen, and at that point, [I] directed [the State] to take [the photo] off, and [the State] did right away." Tr. p. 15. Then, the trial court admonished the jury after the opening statements. Tr. p. 10.

We conclude that Fleming was not placed in grave peril by the brief display of a photo at the beginning of the trial. The State presented the photo during their opening statement and did not seek to proffer it as evidence later in the trial and no further discussion of the photo arises in the record. The photo was objected to within the first three sentences of the State's opening statement and removed "right away." The trial court also admonished the jury shortly after the display of the photo. Under these facts and circumstances, we conclude that the trial court did not abuse its discretion when it denied Fleming's motion for mistrial.

II. Jury Instruction

The trial court has within its sound discretion the manner of instructing a jury, and we review its decision thereon only for an abuse of that discretion. Stringer v. State, 853

N.E.2d 543, 548 (Ind. Ct. App. 2006). When the trial court refuses a tendered instruction, we consider: (1) whether the instruction is a correct statement of the law; (2) whether evidence in the record supports the giving of the instruction; and (3) whether the other instructions given have covered the substance of the tendered instruction. Id. "Jury instructions are to be considered as a whole and in reference to each other." Id. Unless the entire jury charge misleads the jury as to the law in the case, error in a particular instruction will not result in reversal. Id. To be entitled to a reversal, the defendant must affirmatively show the instructional error prejudiced his substantial rights. Id.

Fleming was charged and convicted of Class C felony leaving the scene of an accident resulting in death. Indiana Code sections 9-26-1-1 and 9-26-1-8 provide that the State must show that Fleming was the driver of a vehicle, which was involved in an accident that resulted in the death of Gallagher and that Fleming failed to immediately stop at the scene or failed to immediately return to the scene and remain there. Fleming focused his defense on whether he had immediately returned to the scene of the accident. To this end, Fleming proffered a jury instruction providing a definition of immediate which states that "[t]he word "immediate" as used in Indiana statutes means within a reasonable amount of time." Appellant's App. p. 15. The State defined "immediate" as follows: "having nothing coming between; with no intermediary specifically not separated in time; acting." Id. at 16. The trial court declined to define "immediate" and instead instructed the jury generally that the "legislature intended the language used in a statute to be applied logically and not to bring about an unjust or absurd result." Id. at 17.

Fleming argues that his proffered instruction is an accurate statement of the law with regard to the definition of "immediate." We disagree. Fleming offers one criminal case to support his definition of "immediate" as being within a reasonable time. That case, Mettler v. State, 697 N.E.2d 502 (Ind. Ct. App. 1998), defines "immediate" in a footnote to a dissenting opinion, and a dissenting opinion is not an accurate statement of the law unless and until its reasoning is adopted in a majority decision. In addition, the Mettler case does not support Fleming's proposed instruction, defining "immediate" as "near to or related to the present." Id. at 506.

Fleming also cites to a string of cases involving contract disputes that use the definition of "immediate" as being within a reasonable time. None of these cases applied Fleming's definition to a criminal case. "When an instruction does not fully and accurately state the law and thus, tends to mislead or confuse the jury, the instruction is properly rejected." Duren v. State, 720 N.E.2d 1198, 1205 (Ind. Ct. App. 1999) trans. denied. We conclude that Fleming's instruction was not a correct statement of law within the context of this criminal case, would have confused the jury, and was properly rejected by the trial court.

Moreover, the trial court provided instructions that covered the "substance" of the proposed instruction, i.e. helping the jury determine how to apply a statute. The trial court stated that "[i]t is presumed that the legislature intended the language used in a statute to be applied logically and not to bring about an unjust or absurd result." Tr. p. 260. Additionally, the trial court told the jury, "[y]ou are the exclusive judges of the evidence." Tr. p. 263. The trial court also instructed the jury to consider "other

evidence, your knowledge, common sense, and life experience." Tr. p. 264. Contrary to Fleming's assertions, the final jury instructions do provide guidance as to how the term "immediate" should be read. Br. of Appellant at 10. The final jury instructions adequately covered the substance of Fleming's proposed instruction on the definition of "immediate."

For all these reasons, we conclude that the trial court did not abuse its discretion by refusing Fleming's proposed jury instruction concerning the definition of "immediate."

Conclusion

The trial court properly denied Fleming's motion for a mistrial and acted within its discretion when it refused to tender Fleming's instruction to the jury.

Affirmed.

NAJAM, J., and BRADFORD, J., concur.