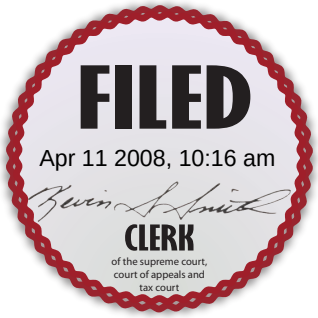

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IN THE
COURT OF APPEALS OF INDIANA

ALJONON DUVALL COLEMAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A05-0709-CR-526
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Frese, Judge
Cause No.71D03-0607-MR-10

April 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, Aljonon Coleman appeals his conviction of murder, a felony. On appeal, Coleman raises three issues, which we restate as 1) whether the trial court properly admitted into evidence audio recordings and testimony pertaining to several phone conversations; 2) whether the trial court properly responded to questions from the jury after deliberations had begun; and 3) whether alleged misconduct by the prosecutor warrants a new trial. We affirm, concluding that the trial court properly admitted the audio recordings and testimony into evidence, that the trial court properly responded to the jury question Coleman preserved for appellate review, and that any prosecutorial misconduct was harmless error.

Facts and Procedural History

On the evening of July 12, 2006, Coleman picked up Allan Russell and the two drove to Coleman's girlfriend's home to smoke marijuana. When they had finished, Coleman and Russell drove up the street and Coleman stopped to speak with two females. While Coleman was speaking with them, James Harvey and ten-year-old N.H. approached on bicycles. After speaking briefly with Coleman, Harvey got in the backseat of Coleman's vehicle.

Coleman, Harvey, and Russell drove to a nearby gas station, where Harvey entered the store. The three then drove around smoking marijuana for another fifteen to twenty minutes when Coleman abruptly stopped the vehicle on the side of the road and told Harvey to "get the fuck out the car." Transcript at 272. After Harvey had exited, Coleman followed, brandishing a gun, and shot Harvey two times. Harvey ran around the back of the vehicle in

an attempt to escape, but Coleman shot him three more times, killing him. Coleman then drove with Russell to a nearby bridge and threw the gun over the side.

The State charged Coleman with murder, a felony. At trial, the State introduced testimony from several investigating officers, crime scene technicians, and witnesses who saw Coleman and Harvey together that evening, as well as from Russell, who testified to the events described above. The jury found Coleman guilty, and the trial court accepted the jury's verdict and entered a judgment of conviction. Following a sentencing hearing, the trial court sentenced Coleman to sixty years executed. Coleman now appeals.

Discussion and Decision

I. Admission of Russell's Testimony and Audio Recording

The trial court permitted Russell to testify to the following over an objection on several grounds from Coleman's counsel:

> Q Mr. Russell, you were telling us about a conversation or a phone call you received from a person who identified themselves [sic] as E, is that correct?
> A Yes, sir.
> Q Can you tell us what happened when you received that call?
> A Well, he called me and told me that Aljonon told me to say – well, to try to lie for him.
> Q Aljonon said what?
> A He said that Aljonon wanted me to lie for him, I'm saying.
> Q Did he give you details of what you were to say?
> A I stopped him before he started saying it, before he started saying anything.
> Q How long did that phone call last?
> A Like about a minute.

Id. at 297-98. The relevance of Russell's testimony became more apparent when the trial court, again over an objection on several grounds by Coleman's counsel, admitted into evidence an audio recording of a phone call Coleman initiated from the St. Joseph County

Jail on July 17, 2006 (the "Recording"). During the call, Coleman instructs a person he refers to as "E" to contact Russell and tell Russell, among other things, that Harvey did not get in the vehicle with them. See State's Exhibit 91. The State presumably offered the Recording in conjunction with Russell's testimony to prove that Coleman wanted Russell to lie, in turn suggesting Coleman's consciousness of guilt.

This court reviews the trial court's decision to admit evidence for an abuse of discretion. Pickens v. State, 764 N.E.2d 295, 297 (Ind. Ct. App. 2002), trans. denied. Abuse of discretion occurs when the trial court's ruling is clearly against the logic and effect of the facts and circumstances before it. Id. Because Coleman's objections to Russell's testimony and to the Recording were based on several grounds, we will examine each one in turn.

A. Hearsay

Coleman argues the trial court abused its discretion when it admitted Russell's testimony and the Recording because both contain inadmissible hearsay. Indiana Evidence Rule 802 states that hearsay is inadmissible "except as provided by law or by these rules." Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ind. Evidence Rule 801(c). Subparagraphs (A) and (D) of Indiana Evidence Rule 801(d)(2) provide that a statement is not hearsay even if offered to prove the truth of the matter asserted if the statement "is offered against a party and is (A) the party's own statement . . . or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship . . . ." In light of subparagraph

(A), Coleman does not appear to argue that his statements constitute hearsay. Instead, Coleman argues that E's statements – as elicited through Russell's testimony and on the Recording – constitute inadmissible hearsay.

With respect to E's statements, we note that this court's decision in Dorsey v. State, 802 N.E.2d 991, 993-95 (Ind. Ct. App. 2004), compels a conclusion that Rule 801(d)(2)(D) renders such statements nonhearsay. The defendant in Dorsey was convicted of battery resulting in serious bodily injury, a Class C felony. The trial court admitted an audio recording of a jailhouse telephone conversation between a witness, the defendant, and an unidentified person over the defendant's hearsay objection. During the conversation, the unidentified person urges the witness to testify falsely at a deposition that the defendant was somewhere else when the battery occurred.

On appeal, the Dorsey court noted initially that the statements made on the recording by the unidentified person were "clearly hearsay." Id. at 994. However, based on evidence that the unidentified person stated he "was just relaying a message," that the defendant participated in the conversation, and that the defendant was present at or near the placement of the call, the court concluded there was sufficient proof the unidentified person was acting as the defendant's agent when he urged the witness to lie. Id. at 995. Accordingly, the court concluded Rule 801(d)(2)(D) rendered the statements made by the unidentified person nonhearsay. Id. at 995.

Russell's testimony that E "said that Aljonon wanted me to lie for him" is hearsay because it is an out of court statement offered to prove the truth of the matter asserted,

namely, that Coleman wanted Russell to lie. Tr. at 297. This does not end our inquiry, however, because Rule 801(d)(2)(D) renders Russell's testimony nonhearsay if there is sufficient evidence that E made the statement to Russell as an agent of Coleman while acting within the scope of that agency. In this respect, evidence of an agency relationship between E and Coleman is stronger than the evidence in Dorsey. A review of the Recording reveals that Coleman repeatedly instructs E to "tell him" ("him" referring to Russell) various things about what happened on the evening of July 12th, including an instruction to tell Russell that Harvey never got in Coleman's vehicle. See State's Ex. 91. Short of a written agreement, we are hard pressed to think of stronger evidence of an agency relationship than a recording of a conversation where a person instructs another to do the person's bidding. Accordingly, we conclude Rule 801(d)(2)(D) renders Russell's testimony and the Recording nonhearsay, and it follows that the trial court did not abuse its discretion in admitting them into evidence.

B. Confrontation Clause

Coleman argues the trial court's admissions of Russell's testimony and the Recording into evidence violated his Sixth Amendment right "to be confronted with the witnesses against him." U.S. Const. amend. VI.[1] The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Crawford v.

[1] Coleman also appears to argue the trial court's admissions constitute a violation of Article I, Section 13 of the Indiana Constitution, but has waived the right to raise this argument on appeal because he has not cited any authority to support it or otherwise sufficiently developed it through cogent reasoning. See Ind. Appellate Rule 46(A)(8)(a); Gayden v. State, 863 N.E.2d 1193, 1195 n.2 (Ind. Ct. App. 2007), trans. denied.

Washington, 541 U.S. 36, 53-54 (2004). In Davis v. Washington, 547 U.S. 813, 821-22 (2006), the Supreme Court clarified what constituted a "testimonial statement" in the context of police questioning:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Although the Supreme Court cautioned that this clarification "is not meant to imply . . . that statements made in the absence of any interrogation are necessarily nontestimonial," id. at 822 n.1, we do not think it follows that Coleman can establish a Confrontation Clause violation based on the State's failure to have E testify at trial. In this respect, we note that statements admitted pursuant to the co-conspirator exception to the hearsay rule, Ind. Evidence Rule 801(d)(2)(E), do not implicate the Confrontation Clause, Jones v. State, 834 N.E.2d 167, 169 (Ind. Ct. App. 2005); see also United States v. Hargrove, 508 F.3d 445, 449 (7th Cir. 2007) (reaching the same conclusion under Federal Rule of Evidence 801(d)(2)(E), which contains the same language as the Indiana rule). For purposes of determining a Confrontation Clause violation, we are not convinced that a statement admitted pursuant to Rule 801(d)(2)(D) should yield a different result than one admitted pursuant to the co-conspirator exception, and Coleman does not attempt to make a distinction. Accordingly, consistent with Jones and Hargrove, we conclude the trial court did not violate Coleman's Sixth Amendment right to confront witnesses against him when it admitted Russell's

testimony and the Recording.

C. Violation of Discovery Procedures

Coleman argues the trial court abused its discretion when it refused to exclude Russell's testimony and the Recording as a sanction for the State's alleged violation of discovery procedures. This court gives considerable discretion to the trial court in handling discovery matters. Braswell v. State, 550 N.E.2d 1280, 1283 (Ind. 1990). The rationale for granting such discretion is that "the trial court is usually in the best position to determine the dictates of fundamental fairness and whether any resulting harm [caused by a discovery violation] can be eliminated or satisfactorily alleviated." Id. Accordingly, a trial court's decision regarding a discovery violation will not be disturbed absent "an abuse of discretion involving clear error and resulting prejudice." Berry v. State, 715 N.E.2d 864, 866 (Ind. 1999).

The State did not disclose the Recording until Friday, April 23, 2007, with trial set to begin on Monday, April 26, 2007. At a hearing on the morning before trial, the prosecutor explained that he had been assigned the case one month previously and had assumed the Recording was disclosed because it was listed in evidence logs that were submitted to Coleman's counsel. Three weeks before trial, however, the prosecutor realized the Recording had not been disclosed and notified Coleman's counsel. Based on this explanation, the trial court concluded that the State's failure to disclose was based on an oversight rather than deliberate conduct and that excluding the Recording was unwarranted. Thereafter, the following exchange occurred between the trial court and Coleman's counsel

regarding the appropriate remedy:

> THE COURT: No you're on plan B. Do you want a continuance? And I'm not sure I'll grant it anyway. But I might. But it still will be your continuance.
> MR. TUSZYNSKI: Understood. My –
> THE COURT: Deal or no deal?
> MR. TUSZYNSKI: My dilemma is this.
> THE COURT: It's not a dilemma. It's a choice.
> MR. TUSZYNSKI: It is. And candidly I haven't – I need a few minutes with my client.
> THE COURT: Talk to your client.
> MR. TUSZYNSKI: Thank you.
> (Brief recess while Mr. Tuszynski confers with the defendant.)
> THE COURT: So?
> MR. TUSZYNSKI: I am not asking the Court to continue this trial.

Tr. at 26. Our supreme court has stated that the failure to request a continuance as a means to remedy a discovery violation results in waiver of the right to argue the issue on appeal. Warren v. State, 725 N.E.2d 828, 832 (Ind. 2000). Coleman attempts to sidestep his trial counsel's explicit decision not to request a continuance by arguing that counsel moved for a continuance the following day, Tuesday, April 24, 2007. That motion, however, was based on an unrelated overnight shooting of two police officers that Coleman's counsel feared might have unfairly prejudiced the jury.[2] Because Coleman's counsel explicitly disavowed a motion for a continuance, it follows Coleman waived his right to argue on appeal that the trial court abused its discretion when it refused to exclude Russell's testimony and the Recording.

II. Responses to Jury Questions

[2] The trial court denied that motion after questioning each juror individually to determine whether any of them heard about the shooting. One juror testified she inadvertently heard about the shooting, but stated it would not affect her duties as a juror.

Coleman argues the trial court abused its discretion in responding to several questions from the jury after deliberations had begun. Instructing the jury lies within the trial court's discretion, and its decision will not be considered an abuse of discretion unless the instruction misstates the law or otherwise misleads the jury. State v. Snyder, 732 N.E.2d 1240, 1244 (Ind. Ct. App. 2000). Even where an abuse of discretion has occurred, the defendant must also show the abuse prejudiced his substantial rights to receive a new trial. Gantt v. State, 825 N.E.2d 874, 877 (Ind. Ct. App. 2005). Because Coleman assigns error to two of the trial court's responses, we will examine each one separately.

A. First Response

Coleman first assigns error to the trial court's response to the following question from the jury: "WHOSE PHONE NUMBER IS [293-xxxx]" (the "293 Number")? Appellant's Appendix at 59. Before addressing the trial court's response, some background is in order. Russell testified he called his girlfriend from Coleman's cellular phone shortly after the shooting, but did not talk to her because the phone's battery died. Phone records admitted into evidence indicate that a call from Coleman's cellular phone was made to a number with a 320 prefix (the "320 Number") on July 13, 2006, at 1:16 a.m. See Tr. at 642. Russell and Detective David Wells, one of the investigating officers, testified that the 320 Number was Russell's girlfriend's phone number, see id. at 344, 642, but Detective Wells testified on cross examination that the 293 Number also was a contact number for Russell's girlfriend,

see id. at 662-63.[3] With the agreement of counsel, the trial court responded to the jury's question by providing them with the following excerpt of Detective Wells's cross examination:

> Question: With respect to – well, during the course of [Coleman's] statement to you, there was some discussion about [Russell] and who he was and how perhaps you could get in touch with [Russell]. Correct?
> Answer: Yes.
> Question: And he had given you a number, [the 293 Number]. Correct?
> Answer: I believe so.
> Question: As a possible contact number for [Russell].
> Answer: I believe so.
> Question: And I think if my memory is correct didn't he identify that as a contact number for [Russell's] girlfriend?
> Answer: Yes, I believe so.

Id. at 790-91.

Coleman argues the trial court abused its discretion in responding as such because the jury's question neither reflected disagreement among the jurors nor pertained to a question of law. In this respect, Indiana Code section 34-36-1-6 states:

> If, after the jury retires for deliberation:
>
> > (1) there is a disagreement among the jurors as to any part of the testimony; or
> > (2) the jury desires to be informed as to any point of law arising in the case;
>
> the jury may request the officer to conduct them into court, where the information required shall be given in the presence of, or after notice to, the parties or the attorneys representing the parties.

Although we agree with Coleman that the jury's question neither pertained to a question of law nor reflected disagreement among the jurors, it does not necessarily follow that the trial

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[3] Detective Wells further testified on cross-examination that calls were made from Coleman's cellular

court abused its discretion. In Foster v. State, 698 N.E.2d 1166, 1170 (Ind. 1998), our supreme court concluded that a trial court has discretion to provide the jury with requested information regardless of whether there is "a disagreement among the jurors" or the question pertains to a "point of law arising in the case" within the meaning of Indiana Code section 34-36-1-6. In light of our supreme court's decision in Foster, Coleman has not explained why the trial court's response constitutes an abuse of discretion. More significantly, Coleman overlooks that the trial court's decision to respond as such was due in part to the fact that neither party objected to it.[4] See Tr. at 790 (court reporter's note stating that "[b]y agreement of counsel, the Court attached an excerpt from the cross-examination of Sergeant Wells by [Coleman's counsel] in response to jury's question "Whose phone number is [the 293 Number?]") (emphasis added); cf. Perry v. State, 867 N.E.2d 638, 643 (Ind. Ct. App. 2007) (concluding the trial court did not abuse its discretion in responding to several jury questions where the parties stipulated to the trial court's responses), trans. denied. Coleman cannot assign error to a response his counsel endorsed.

B. Second Response

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phone to the 293 Number on July 12th at 10:24 and 11:22 p.m. and on July 13th at 12:14 a.m. See Tr. at 663.

[4] Coleman states in his brief that "over proper objection by defense counsel, the trial court read back portions of testimony given where a witness, Sergeant David Wells, identified whose phone number it was," and cites to pages 785 to 791 of the transcript in support of this claim. Appellant's Brief at 12. However, nowhere within that citation or elsewhere does the record indicate that Coleman's trial counsel objected to the trial court's proposed response. We urge Coleman's appellate counsel to represent the record accurately.

Coleman also assigns error to the trial court's decision to allow counsel for both parties to provide five minutes of further argument on concepts such as determining witness credibility and guilt beyond a reasonable doubt. The trial court arrived at this decision after receiving a series of notes from the jury, the first of which stated, "We have a deadlock. Do you want us to continue[?]" Appellant's App. at 53. With the agreement of counsel, the trial court responded, "Dear Jury: I have informed the parties of your question. My response to you is, please continue. Thank you." Id.; tr. at 791.

Approximately one hour and forty minutes later, the jury sent a second note that stated, "We are 11:1[.] The one [is] very firm[.] Do you wish us to continue[?]" Appellant's App. at 51. After consulting with the parties, the trial court brought the jury back into the court room, explained that it thought the jury was at an impasse based on their recent questions, and addressed them in relevant part as follows:

> Now, one of the new rules says if the jury says they have an impasse, the Court may – after consulting with the lawyers and the parties present may inform the jury that under the new rules I can ask you – and I am asking you – to determine whether and how we may assist you in reaching a verdict.
>
> You don't have to give us a count or anything. But if there's some way that you could suggest without talking about a head count, if you could suggest, well – I'm only giving you examples. I'm only giving examples. If you think further argument is helpful, if you think – if it's possible, to have further instruction on some point of law if there's some question that you think involves a point of law. If you think there is something that the lawyers could give you further brief arguments on some issue that would be helpful, you can do that. Do you understand what I'm saying? And you can all do all that. I mean you can ask for more than one thing.
>
> . . . But if there's some way you feel that we could help you, the lawyers in argument, me in instructions, or some combination, if you could sort of give us a kind of clue of what may be issues that you would like further instructions of law or evidence – not evidence. Can't do evidence. The evidence is closed. Okay? But arguments or instructions.

Tr. at 796-98. In response, the jury sent the following note:

> [E]xplain [and] [g]ive examples of everyday reasonable doubt.
> [H]ow credible does the witness need to be? If we find one piece of a witness' testimony that is not credible do we determine that all the testimony is not credible?
> We would like explanation from Judge – not from Attorneys if possible.
> We need the "law" explained in simpler terms.

Appellant's App. at 43-44. Over objection from Coleman's counsel on grounds that the more appropriate response would be to refer the jury to the instructions, the trial court decided to have counsel make additional arguments pertaining to concepts such as determining witness credibility and guilt beyond a reasonable doubt.

Coleman argues the trial court abused its discretion in responding as such because it "did not properly recognize an impasse." Appellant's Br. at 14. In support of this argument, Coleman cites the jury's question in the second note – "Do you wish us to continue?" – and claims that "[t]his is clearly a question that the Supreme Court has recognized as not an impasse." Id. (citing Ronco v. State, 862 N.E.2d 257, 260 (Ind. 2007)). Although we agree with Coleman that our supreme court in Ronco recognized that "[a] question is not an impasse," 862 N.E.2d at 260, conspicuously absent from Coleman's argument is that the first jury note stated, "We have a deadlock. Do you want us to continue[?]," appellant's app. at 53. In light of this explicit acknowledgement of an impasse, we are not convinced the trial court improperly concluded the jury was at an impasse.

When a trial court has properly concluded the jury is at an impasse, Indiana Jury Rule 28 authorizes the trial court to "inquire of the jurors to determine whether and how the court and counsel can assist them in their deliberative process. After receiving the jurors'

response, if any, the court, after consultation with counsel, may direct that further proceedings occur as appropriate." Our supreme court has stated that under Rule 28, "a trial court may, for example, . . . directly answer the jury's question (either with or without directing the jury to reread the other instructions), may allow counsel to briefly address the jury's question in short supplemental arguments to the jury, or may employ other approaches or a combination thereof." Tincher v. Davidson, 762 N.E.2d 1221, 1224 (Ind. 2002). Thus, because the trial court's decision was consistent with the approach outlined in Tincher, it follows that it did not abuse its discretion when it allowed counsel "to briefly address the jury's question in short supplemental arguments to the jury." Id.

III. Prosecutorial Misconduct

Coleman argues the prosecutor committed misconduct when he repeatedly elicited testimony from Russell to the effect that Russell and Coleman smoked marijuana before the shooting. In reviewing a claim of prosecutorial misconduct, this court first must determine whether the prosecutor engaged in misconduct and, if so, then determine whether the misconduct placed the defendant in a position of grave peril. Stephenson v. State, 742 N.E.2d 463, 482 (Ind. 2001), cert. denied 534 U.S. 1105 (2002). "The gravity of the peril is measured by the probable persuasive effect of the misconduct on the jury's decision, not on the degree of impropriety of the conduct." Id. (internal quotation marks omitted). Moreover, where, as here, there was no objection to the prosecutor's conduct, the issue is waived and the defendant carries the additional burden of establishing fundamental error in order to receive a new trial. Cowan v. State, 783 N.E.2d 1270, 1277 (Ind. Ct. App. 2003).

Misconduct rises to the level of fundamental error if the misconduct is "so prejudicial to the rights of the defendant as to make a fair trial impossible." Id.

Putting to the side whether the prosecutor committed misconduct, we are not convinced Coleman has carried the heavy burden of establishing that the testimony was so prejudicial it made a fair trial impossible. In this respect, Coleman overlooks that the trial court sua sponte admonished the jury to not use the testimony as proof of Coleman's character and that it was allowing the testimony only because "it's part of what the witness is saying he saw and observed and happened that day and evening." Tr. at 257. A proper admonishment is presumed to correct any error, Ramsey v. State, 853 N.E.2d 491, 500 (Ind. Ct. App. 2006), trans. denied, and Coleman has not presented any evidence or argument to rebut this presumption. Thus, it follows that even assuming the prosecutor committed misconduct, Coleman has not established that the resulting prejudice made a fair trial impossible.

Conclusion

The trial court properly admitted Russell's testimony and the Recording into evidence over Coleman's objections and, to the extent Coleman did not waive his right to argue the issue, properly responded to questions from the jury. Moreover, any alleged misconduct by the State was harmless error.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.