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IN THE
COURT OF APPEALS OF INDIANA

FLOYD L. COCKRELL, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 84A04-0709-CR-544
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable Michael H. Eldred, Judge
Cause No.84D01-0602-FB-414

July 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, Floyd Cockrell appeals his conviction of armed robbery, a Class B felony. Cockrell raises two issues, which we restate as whether the trial court abused its discretion in denying Cockrell's motion for a mistrial and whether the trial court committed reversible error in admitting an investigating police officer's testimony regarding statements made to him in the course of his investigation. Concluding that the trial court acted within its discretion in denying Cockrell's motion for a mistrial and that although the trial court abused its discretion in admitting the officer's testimony, the error was harmless, we affirm.

Facts and Procedural History

The facts favorable to the decision below indicate that on June 4, 2005, Cockrell and Takiesha Bean, his girlfriend at the time, were driving around when Cockrell mentioned robbing the Days Inn in Terre Haute, Indiana. Cockrell parked in the hotel's parking lot, told Bean to stay in the car, and entered the hotel. After walking around the lobby and going into the restroom, Cockrell returned to his vehicle to retrieve his handgun. Cockrell returned to the lobby and asked the night desk clerk, Pamela Pilon, if a certain person had checked into the hotel. Pilon checked the guest list, and turned to face Cockrell, who had his gun on the counter pointed at Pilon. Cockrell told Pilon to give him the money in the cash drawer, adding "so I don't have to kill you." Transcript at 116. Pilon gave Cockrell the money, approximately $165.00, and Cockrell thanked Pilon and left.

The next day, Pilon gave a statement to Detective Aaron Loudermilk, of the Terre Haute Police Department. Pilon described the robber as a black male with a dark complexion who was roughly 5' 9'' to 6' tall and weighed 170 to 180 pounds. Pilon later changed her description to indicate the robber weighed roughly 210 pounds. She stated the robber wore a striped blue work shirt with patches, which were covered with duct tape, on either side. On June 14, 2005, Detective Loudermilk interviewed Pilon and showed her a photographic array. Pilon did not identify anyone in the array as the perpetrator. It does not appear that a photograph of Cockrell was included in the array. Pilon then met with a sketch artist, who developed a sketch of the perpetrator based on Pilon's description. On August 11, 2005, Detective Loudermilk compiled another photographic array. This time, Pilon picked a photograph of Sherbert Hurtt.

On October 28, 2005, Bean contacted police with information regarding the robbery. She confessed to participating in the robbery as a getaway driver, and implicated Cockrell as the robber. After speaking with Bean, Detective Loudermilk spoke with Hurtt and his girlfriend and excluded Hurtt as a suspect. On February 1, 2006, Detective Loudermilk arranged a live lineup, and Pilon identified Cockrell as the robber.

On February 3, 2006, the State charged Cockrell with armed robbery, a Class B felony. Roughly two weeks later, Detective Loudermilk received information indicating that Cedric Hall may have been involved in the robbery. Detective Loudermilk spoke with Hall and excluded him as a suspect. On March 22, 2006, the State amended the charging information to add an allegation that Cockrell was an habitual offender. On

June 20, 2007, the trial court held a jury trial. At this trial, Detective Loudermilk testified regarding his investigation of the robbery. Pilon testified and identified Cockrell as the man who committed the robbery and Cockrell cross-examined her at length about her previous identification of Hurtt from a photographic array. Hurtt testified, and explained that police had contacted him, but ruled him out as a suspect. Bean also testified, and implicated Cockrell as the perpetrator.

The jury found Cockrell guilty of armed robbery. Cockrell waived his right to a jury on the habitual offender allegation, and the trial court found that insufficient evidence established Cockrell's habitual offender status. On July 23, 2007, the trial court held a sentencing hearing and sentenced Cockrell to twenty years. Cockrell now appeals his conviction.

Discussion and Decision

I. Denial of Cockrell's Motion for a Mistrial

At one point during Detective Loudermilk's testimony, the prosecutor asked Detective Loudermilk: "Based upon your interview with Takiesha Bean, then what did you do in furtherance of the investigation." Transcript at 42. Detective Loudermilk responded: "The interview with Takiesha Bean, she said that Floyd Cockrell Junior was responsible for the robbery. Based on that information I then took a step forward and found out later that Floyd Cockrell was in the Vigo County Jail on a separate case." Id. at 43. Cockrell objected, and moved for an admonishment and a mistrial. The trial court stated:

> Okay, show that's denied. You are just admonished to disregard the statement that he knew that he was in the jail and not consider that in any

> way as if you have never heard of it as I said to you in the preliminary instructions. Completely irrelevant to this particular charge in any rate.

Id. Cockrell now argues that the trial court abused its discretion in denying his motion for a mistrial.

A. Standard of Review

"A mistrial is an extreme remedy that is warranted only when less severe remedies will not satisfactorily correct the error." Warren v. State, 725 N.E.2d 828, 833 (Ind. 2000). "A decision regarding a motion for mistrial is within the trial court's discretion, and we will reverse only when the defendant establishes that the trial court abused this discretion." Smith v. State, 872 N.E.2d 169, 175 (Ind. Ct. App. 2007), trans. denied. "In determining whether a mistrial is warranted, we consider whether the defendant was placed in a position of grave peril to which he should not have been subjected; the gravity of the peril is determined by the probable persuasive effect on the jury's decision." Leach v. State, 699 N.E.2d 641, 644 (Ind. 1998). If we conclude that "the jury's verdict is supported by independent evidence of guilt such that we are satisfied that there was no substantial likelihood that the evidence in question played a part in the defendant's conviction, any error in admission of prior criminal history may be harmless." Id. (quoting James v. State, 613 N.E.2d 15, 22 (Ind. 1993)).

B. Detective Loudermilk's "Evidentiary Harpoon"

Initially, Cockrell argues that Detective Loudermilk's statement constitutes an "evidentiary harpoon." "An evidentiary harpoon is the placing of inadmissible evidence before the jury with the deliberate purpose of prejudicing the jurors against the defendant." Kirby v. State, 774 N.E.2d 523, 535 (Ind. Ct. App. 2002), trans. denied. In

order to prevail on this claim, a defendant must show that the State deliberately acted to prejudice the jury and that the evidence was inadmissible. Evans v. State, 643 N.E.2d 877, 879 (Ind. 1994). A defendant is not required to demonstrate that the evidentiary harpoon "injured him to the extent that he would not have been found guilty but for the harpooning." Jewell v. State, 672 N.E.2d 417, 424 (Ind. Ct. App. 1996), trans. denied. Instead, a defendant "need only show that he was placed in a position of grave peril to which he should not have been subjected." Id.

The State argues that the statement should not be considered an evidentiary harpoon because "the Prosecutor did not deliberately steer Detective Loudermilk to testify where he discovered [Cockrell]." Appellee's Brief at 7. However, a claim of error based on an alleged evidentiary harpoon does not necessarily involve a claim of intentional misconduct on the part of the prosecutor. See Perez v. State, 728 N.E.2d 234, 237 (Ind. Ct. App. 2000) ("We do not place distinguishing significance upon the fact that the deliberate act was that of the police officer witness rather than that of the prosecution itself."), trans. denied; cf. Mack v. State, 736 N.E.2d 801, 803 n.4 (Ind. Ct. App. 2000) (concluding a police officer's testimony that he identified the defendant out of a photographic array of known drug-dealers warranted a mistrial, but pointing out that the case did not involve prosecutorial misconduct), trans. denied. Witnesses' statements that are not responsive to posed questions can amount to evidentiary harpoons. See McConnell v. State, 436 N.E.2d 1097, 1105 (Ind. 1982) (concluding a police officer's answer was not an evidentiary harpoon as it was "not so unresponsive as to indicate it was done deliberately with an intent to purposely prejudice the defendant's cause"); cf.

Baker v. State, 506 N.E.2d 817, 818 (Ind. 1987) (holding trial court improperly denied defendant's motion for a mistrial after police officer, in response to general question regarding his investigation, stated that he had offered the defendant the opportunity to take a polygraph examination). As long as Detective Loudermilk voluntarily put inadmissible evidence before the jury, we will conclude he launched an evidentiary harpoon. See Scruggs v. State, 511 N.E.2d 1058, 1059 (Ind. 1987) (recognizing that if a police officer's testimony regarding the defendant's criminal history had come "in response to direct examination by the State or had his answer been totally unresponsive to cross-examination, it would certainly be considered to be an evidentiary harpoon"); Perez, 728 N.E.2d at 236 (concluding a police officer's "voluntary statement about [the defendant] being a convicted felon amounts to an evidentiary harpoon"); Oldham v. State, 779 N.E.2d 1162, 1179 (Ind. Ct. App. 2002) (Sullivan, J., concurring and dissenting) ("It makes no difference whether the prosecutor and the witness together create the problem or whether the witness himself and upon his own initiative attempts to bolster the State's case. The prejudice to the defendant is the same."), trans. denied; Houchen v. State, 632 N.E.2d 791, 794 (Ind. Ct. App. 1994) (reversing a conviction where "one police officer took it upon himself to guarantee a conviction by tossing out an evidentiary harpoon that the jury could not ignore"); cf. White v. State, 257 Ind. 64, 70-71, 272 N.E.2d 312, 315 (Ind. 1971) ("The volunteering by police officers of inadmissible testimony prejudicial to the defendant has been condemned time and again by both state and federal courts." (quoting Gregory v. United States, 369 F.2d 185, 189-90 (D.C. Cir. 1966))); Myers v. State, 887 N.E.2d 170, 191 (Ind. Ct. App. 2008)

(recognizing the difference between "an accidental outburst by a lay witness" and the testimony of an "experienced law enforcement officer").

We agree with Cockrell that Detective Loudermilk's statement constituted an evidentiary harpoon. The fact that Cockrell was in jail for an unrelated matter was completely irrelevant to the issues at hand, and the testimony's only apparent purpose was to put evidence of Cockrell's prior bad acts before the jury. Cf. Scruggs, 511 N.E.2d at 1059 (recognizing that an evidentiary harpoon consists of "irrelevant evidence offered solely for the purpose of reflecting unfavorably upon [a defendant]"); Harris v. State, 878 N.E.2d 504, 506 (Ind. Ct. App. 2007) (recognizing that "there was no reason for the State to throw its prejudicial evidentiary harpoon in placing before the jury the matter of [the defendant's] many prior criminal convictions"). As Officer Loudermilk's testimony constituted an evidentiary harpoon, we now must determine whether this harpoon placed Cockrell in grave peril.

First, Loudermilk's statement that Cockrell was in jail "on a separate case," does not clearly state that Cockrell was convicted of a crime. See Tompkins v. State, 669 N.E.2d 394, 399 (Ind. 1996) (recognizing that the trial court could have determined that a witness's statement did not clearly inform the jury that the defendant had a criminal history); Smith v. State, 872 N.E.2d 169, 175 (Ind. Ct. App. 2007) (noting that the witness's statement that her son "was in YCC and [the defendant] was in YCC too," "does not unambiguously inform the jury that [the defendant] had a criminal history"), trans. denied.

Also, Officer Loudermilk referred to Cockrell's imprisonment only a single time and in the context of extensive testimony regarding his investigation of Cockrell's involvement in the instant offense, and his reference revealed no details of Cockrell's incarceration to the jury. See Smith, 872 N.E.2d at 176 (concluding the trial court properly denied motion for a mistrial based on a witness's "brief reference to [the defendant's] time spent in [a youth detention center]"); Burks v. State, 838 N.E.2d 510, 520 (Ind. Ct. App. 2005) (concluding testimony regarding another crime committed by the defendant "was sufficiently minor as not to affect [the defendant's] substantial rights"), trans. denied; Conner v. State, 613 N.E.2d 484, 493 (Ind. Ct. App. 1993) ("The reference to the collateral criminal conduct was vague, made in passing, and could not have left a serious impression upon the jury."), aff'd in relevant part, 626 N.E.2d 803 (Ind. 1993).

Finally, the trial court admonished the jury to disregard Officer Loudermilk's statement. "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." Agilera v. State, 862 N.E.2d 298, 308 (Ind. Ct. App. 2007), trans. denied; see also Bradley v. State, 649 N.E.2d 100, 108 (Ind. 1995) ("[R]eversible error is seldom found when the trial court has admonished the jury to disregard a statement made during the proceedings."); Frentz v. State, 875 N.E.2d 453, 466 (Ind. Ct. App. 2007) (concluding that any error in the prosecutor's statements was cured by the trial court's admonishment), trans. denied. We recognize that the admonishment in this case was not ideal, as it did not explain to the jury why it could not consider the evidence or why the

statement was irrelevant. Cf. Boner v. State, 796 N.E.2d 1249, 1253 (Ind. Ct. App. 2003) (recognizing that "juries may be more likely to adhere to an admonishment issued by the trial court if they are informed of the reason for disregarding inadmissible evidence"). Still, we recognize that "the trial court was in the best position to determine the impact of the statement on the jury." Tompkins v. State, 669 N.E.2d 394, 399 (Ind. 1996). Given the relatively brief and vague nature of Detective Loudermilk's testimony regarding Cockrell's criminal history, we cannot say the trial court abused its discretion in denying Cockrell's motion for a mistrial and instead determine that an admonishment cured any harm caused to Cockrell.

II. Admission of Evidence

A. Standard of Review

We review a trial court's decision to admit evidence for an abuse of discretion. Collins v. State, 826 N.E.2d 671, 677 (Ind. Ct. App. 2005), trans. denied, cert. denied, 546 U.S. 1108 (2006). We will find that a trial court has abused its discretion when its decision is "clearly against the logic and effect of the facts and circumstances before it." Id. Even when we find that a trial court has abused its discretion by admitting evidence, we will not reverse unless the defendant's substantial rights have been affected. Ind. Evidence Rule 103(a); Pruitt v. State, 834 N.E.2d 90, 117 (Ind. 2005), cert. denied, 548 U.S. 910 (2006). In determining whether or not a party's substantial rights were affected by the erroneous admission of evidence, we "assess the probable impact of that evidence upon the jury." Corbett v. State, 764 N.E.2d 622, 628 (Ind. 2002).

B. Officer Loudermilk's Testimony Regarding Pilon's Conduct

Cockrell argues the trial court improperly admitted, over his hearsay objection, Detective Loudermilk's testimony that prior to Pilon's selecting a photograph of Hurtt out of a photographic array, she spent a substantial amount of time looking at the photographs. However, we conclude this testimony is not hearsay. As Cockrell argues in his brief, "it seems the whole purpose of the testimony detailing Pilon's struggle over the photographic lineup was to prove that she was stressed when she picked out a man that was not the defendant." Appellant's Br. at 20. Therefore, Detective Loudermilk's testimony regarding Pilon's statements and conduct was not introduced to prove the truth of the matters asserted by Pilon, but instead was introduced to show Pilon's state of mind. Cf. Purvis v. State, 829 N.E.2d 572, 582 (Ind. Ct. App. 2005) (holding a statement was not hearsay as it was introduced to show the victim's state of mind), trans. denied, cert. denied, 547 U.S. 1026 (2006).

C. Officer Loudermilk's Testimony Regarding Cedric Hall

On cross-examination, Cockrell asked Detective Loudermilk if he had included Cedric Hall in the live lineup. Detective Loudermilk indicated that he had not. On re-direct, the following exchange occurred:

> Q: What is Cedric Hall's weight?
> [Defense Counsel]: Objection, hearsay.
> Court: Sustained!
> [Detective Loudermilk]: A hundred and fifty-five pounds.
> [Prosecutor]: No.
> [Defense Counsel]: Oh, objection.
> Court: Sustained means you can't answer that.
> [Detective Loudermilk]: I'm sorry. I'm sorry.

> [Prosecutor]: That's all right.
> [Defense Counsel]: Judge, I would move that you admonish the jury not to pay attention to that and I think that is grounds for a mistrial.
> Court: All right. No, you think everything is grounds for a mistrial.
> [Defense Counsel]: Judge, that's not true!
> Court: You're admonished to disregard that statement, the objection was sustained and it should not have been answered, so you can just [dis]regard that.

Tr. at 102-03.

Cockrell argues that Detective Loudermilk's response was prejudicial to Cockrell's defense as Pilon had initially indicated the robber weighed approximately 180 pounds, and later changed her description to 210 pounds. "Therefore, when Detective Loudermilk announced Cedric Hall's weight to the jury, he in essence affirmed the State's case and allowed the jury to infer that it couldn't have possibly been another suspect that robbed the Days Inn because he did not weigh over 200 pounds." Appellant's Br. at 26.

Initially, we fail to discern how Detective Loudermilk's testimony that Hall weighed 155 pounds was hearsay. In any regard, although Detective Loudermilk should not have answered the question after the trial court sustained an objection, the trial court admonished the jury to disregard his response. A proper admonishment is presumed to correct any error. Ramsey v. State, 853 N.E.2d 491, 500 (Ind. Ct. App. 2006), trans. denied. Cockrell has failed to present an argument that rebuts this presumption, and we conclude the trial court acted within its discretion in denying Cockrell's motion for a mistrial.

D. Officer Loudermilk's Testimony Regarding Bean's Statements

At trial, Detective Loudermilk testified as to several statements made to him by Bean. Cockrell objected, arguing that Bean's statements were inadmissible hearsay. Specifically, Cockrell objects to Detective Loudermilk's testimony that Bean told him she had been dating Cockrell at the time of the robbery and that "[s]he said she was with [Cockrell] when the robbery occurred at Days Inn here in Terre Haute, at 555 South 3rd Street. She said the two of them had been drinking and they needed money. She said that Floyd offered up the idea that he could rob the Days Inn. . . ." Tr. at 42.

Hearsay is defined as 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. Evid. Rule 801(c). Therefore, testimony regarding out-of-court statements to prove the truth of the matters asserted in those statements is generally excluded from trial. Martin v. State, 736 N.E.2d 1213, 1217 (Ind. 2000).

We note that as justification for admitting Officer Loudermilk's testimony, the trial court referenced the fact that Bean, the declarant, was a witness and would be available for cross-examination. See Tr. at 41 (trial court stating "it is . . . recognized [that] hearsay is allowable if the declarant is available for cross examination and based on the representation that she is, I will allow it"). The rule allowing hearsay to be admitted based on the declarant's availability for cross-examination has long been abrogated. See Warren v. State, 725 N.E.2d 828, 834 (Ind. 2000) (recognizing that this rule was abrogated in 1991). Instead, "regardless of whether the declarant is available at trial for

cross-examination, a hearsay statement is not ordinarily admissible as substantive evidence." Id.

The trial court also relied on the rule permitting testimony that explains an officer's investigation. See Tr. at 41 ("First of all this is in the course of [Detective Loudermilk's] investigation, so it is not necessarily being interposed for the truth of the matter of which he's stating."). In its appellate brief, the State also argues that the testimony was admissible "to show the course of [Detective Loudermilk's] investigation, and was properly admitted as an exception to hearsay." Appellee's Br. at 11. Both the trial court's reasoning and the State's argument on appeal overstate the rule regarding the admissibility of statements made to officers in the course of an investigation. We agree that "the State may offer testimony to show the steps of an investigation." Spencer v. State, 703 N.E.2d 1053, 1057 (Ind. 1999). However, the "admission of a victim's statements through the testimony of a police officer [is] improper when the sole purpose [is] claimed to be showing the steps in the investigative process." Id. at 1056. Therefore, instead of allowing an officer to testify as to what a victim told the officer, the trial court should limit such testimony "to the fact that [the officer] took certain steps in response to what [a victim] had told him." Owens v. State, 659 N.E.2d 466, 476 (Ind. 1995). To determine whether hearsay is admissible to explain the course of a police investigation, a trial court must perform a three-part analysis:

> First, the trial court should inquire if the testimony describes an out-of-court statement asserting a fact susceptible of being true or false. "If the out-of-court statement does contain an assertion of fact, then the [trial court] should consider ... the evidentiary purpose of the proffered statement." Finally, if there is a proffered purpose, the court should ask: "Is the fact to be proved under the suggested purpose for the statement relevant

> to some issue in the case, and does any danger of prejudice outweigh its probative value?"

Maxey v. State, 730 N.E.2d 158, 161 (Ind. 2000) (quoting Craig v. State, 630 N.E.2d 207, 210-11 (Ind. 1994) (citations omitted)). The trial court clearly did not perform such an analysis here, and instead appears to have admitted the evidence under the erroneous belief that anything said to an officer in the course of an investigation is admissible.

The State has failed to put forth any justification for admitting the testimony. The testimony clearly involves an out-of-court statement asserting a fact – that Cockrell was the perpetrator. The proffered purpose – explaining Detective Loudermilk's investigation – has no discernable relevance to the issues of the case. Neither the fact that Bean accused Cockrell of committing the robbery nor the details of her accusation were contested. See Craig, 630 N.E.2d at (explaining that the officer's testimony relaying the victim's mother's statements was not relevant other than proving the facts asserted in the mother's statements as "[q]uite clearly, the specific content of the report of the mother to [the testifying officer] was not a contested issue in this case"). Because the testimony was not relevant to any fact at issue other than the truth of the matter asserted, it was inadmissible hearsay and the trial court abused its discretion in admitting the evidence.

Still, the erroneous admission of evidence is not grounds for reversal if "its probable impact upon the jury, in light of all of the evidence in the case, is sufficiently minor as to not affect the substantial rights of the parties." Goodson v. State, 747 N.E.2d 1181, 1185 (Ind. Ct. App. 2001), trans. denied. We acknowledge that the trial court could have provided stronger assurance that this testimony did not affect Cockrell's substantial rights had it admonished the jury that Detective Loudermilk's testimony

regarding Bean's statements was not admitted for the statements' truth. See Owens, 659 N.E.2d at 476. However, this testimony was cumulative of Bean's testimony. See Newbill v. State, 884 N.E.2d 383, 397 (Ind. Ct. App. 2008) ("The admission of hearsay is not necessarily grounds for reversal, especially where it is merely cumulative of other evidence admitted."), trans. denied. Indeed, Bean's testimony was consistent with and much more extensive than that of Detective Loudermilk, and Cockrell had the opportunity to cross-examine Bean extensively. See McClain v. State, 675 N.E.2d 329, 331-32 (Ind. 1996) (concluding improper admission of hearsay was harmless where testimony "merely repeated the declarant's statements made on the stand"); Miles v. State, 777 N.E.2d 767, 771 (Ind. Ct. App. 2002) (concluding any error in the admission of hearsay was harmless where it "was brief and consistent with the longer and more detailed testimony of [the declarant]"). Although Detective Loudermilk's testimony may have had some tendency to bolster Bean's credibility, we conclude any impact was minor. See Craig, 630 N.E.2d at 211-12. Even without the inadmissible hearsay, Cockrell's conviction is supported by Bean and Pilon's testimony, which we conclude is "substantial independent evidence of guilt satisfying [this court] that there is no substantial likelihood the [hearsay testimony] contributed to the conviction," Edwards v. State, 862 N.E.2d 1254, 1260 (Ind. Ct. App. 2007), trans. denied. Therefore, the trial court's error in admitting the hearsay testimony was harmless and does not warrant reversal.

Conclusion

We conclude the trial court acted within its discretion in denying Cockrell's motion for a mistrial. We also conclude that although the trial court abused its discretion in admitting the hearsay testimony of Detective Loudermilk, the error was harmless.

Affirmed.

BAKER, C.J., and RILEY, J., concur.