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**IN THE
COURT OF APPEALS OF INDIANA**

DONALD FRANCE,)
)
Appellant-Defendant,)
)
vs.) No. 49A05-0712-CR-715
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Paula Lopossa, Judge
Cause No.49F08-0606-FD-103668

September 10, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Donald France appeals following his conviction for Attempting to Obtain a Controlled Substance by Fraud or Deceit, a Class D felony.¹ On appeal, France contends that the evidence was insufficient to support his conviction, the State engaged in prosecutorial misconduct, and the trial court's denial of his motion for a mistrial was an abuse of discretion. We affirm.

FACTS AND PROCEDURAL HISTORY

On May 9, 2006, Alene Abaddi was employed as a pharmacist at the Walgreens Pharmacy located at 711 East 38th Street, in Indianapolis. On that date, while Abaddi was working, Donald France came in to pick up a prescription for Tussionex, a cough syrup that contains the controlled substance hydrocodone. The prescription displayed France's birth date as required by store policy for all prescriptions, and his driver's license information as required by state law for prescriptions containing a controlled substance. Abaddi became suspicious of France's prescription because Tussionex prescriptions are normally written for approximately 180 cc and France's prescription was written for 480 cc. Due to the large amount of Tussionex allegedly prescribed, Abaddi refused to fill the prescription for France. Abaddi then contacted the prescribing doctor and the police.

France's prescription for Tussionex was allegedly written by Dr. Klaus Hilgarth of the Clarian West Medical Center. However, Dr. Hilgarth, who practices at Primary Care, a division of the Wishard Health Network, did not write the prescription. Dr. Hilgarth had never treated France, nor had he ever worked for or held privileges at the Clarian West

¹ Ind. Code §§ 35-41-5-1, 35-48-4-14(c) (2005).

Medical Center. Dr. Hilgarth, however, had previously treated a Dorothy France, who was later determined to be France's mother.

In May of 2006, Indianapolis Police² Detective Karen Smith was assigned to the prescription fraud unit. At some point, Detective Smith became involved with the investigation of the fraudulent prescription presented to Walgreens by France. On May 12, 2006, Detective Smith spoke with Abaddi about the fraudulent prescription and asked Abaddi to identify the person who had attempted to pick up the prescription from a photo array. Abaddi identified France.

On June 12, 2006, the State charged France with one count of attempting to obtain a controlled substance by fraud or deceit, a Class D felony. A jury trial was held on October 10, 2007. The jury found France guilty, and on November 14, 2007, he was sentenced to five hundred forty-five days in Community Corrections, with the first six months to be served on home detention. France now appeals.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

France contends that the evidence presented by the State was insufficient to support his conviction.

Our standard of review for a sufficiency of the evidence claim is well settled. In reviewing sufficiency of the evidence claims, we will not reweigh the evidence or assess the credibility of the witnesses. We will consider only the evidence most favorable to the judgment, together with all reasonable and

² We note that at some point between May 9, 2006 and the present, the Indianapolis Police Department was reorganized and is now known as the Indianapolis Metropolitan Police Department.

logical inferences to be drawn therefrom. The conviction will be affirmed if there is substantial evidence of probative value to support the conviction of the trier of fact. A judgment based on circumstantial evidence will be sustained if the circumstantial evidence alone supports a reasonable inference of guilt.

Richardson v. State, 856 N.E.2d 1222, 1227 (Ind. Ct. App. 2006), *trans. denied* (citations omitted). It is not necessary that the court find that the circumstantial evidence excludes every reasonable hypothesis of innocence. *Metzler v. State*, 540 N.E.2d 606, 609 (Ind. 1989). It need only be demonstrated that inferences may reasonably be drawn which support the finding of guilt. *Id.*

France claims that the State failed to prove that he possessed the required mental state. Pursuant to Indiana Code sections 35-48-14-4(c) and 35-41-5-1, the State must prove that France knowingly or intentionally attempted to acquire possession of a controlled substance by misrepresentation, fraud, forgery, deception, subterfuge, alteration of a prescription order, concealment of a material fact, or use of a false name or false address. “A person engages in conduct ‘intentionally’ if, when he engages in the conduct, it is his conscious objective to do so.” Indiana Code § 35-14-2-2(a) (2005). “A person engages in conduct ‘knowingly’ if, when he engages in this conduct, he is aware of a high probability that he is doing so.” Indiana Code § 35-14-2-2(b).³

Intent is a mental function and, absent admission, it must be determined by courts and juries from a consideration of the defendant’s conduct and the natural and usual consequences of such conduct. Because intent is a mental

³ While we acknowledge that the parties’ arguments focus solely on whether France possessed the knowingly *mens rea* when he committed the alleged offense, we observe that pursuant to the statute under which France was charged, France can be found guilty if he had either the “knowingly” or “intentionally” *mens rea*.

state, the trier of fact must usually resort to reasonable inferences based upon an examination of the surrounding circumstances to determine whether, from the person's conduct and the natural consequences that might be expected from that conduct, a showing or inference the intent to commit that conduct exists. For crimes of attempt, the State must prove the defendant, having the requisite intent, engaged in conduct constituting a substantial step toward the commission of the crime.

Metzler, 540 N.E.2d at 609 (citations omitted).

Here, the evidence established that France attempted to pick up a prescription for Tussionex from the Walgreen's Pharmacy located near 38th Street and College Avenue in Indianapolis. France's prescription included his birth date, which is required to be on all prescriptions by Walgreens, as well as his driver's license information which is required by state law for all prescriptions containing a controlled substance. France's prescription was written for an unusually large amount of Tussionex. Additionally, the evidence established that France's prescription was allegedly written by Dr. Hilgarth, but Dr. Hilgarth had never treated France. Dr. Hilgarth, however, had previously treated France's mother. The evidence also established that France's prescription was written on prescription blanks from the Clarian West Medical Center, but also that Dr. Hilgarth, who practices for a division of the Wishard Health Network, had never worked for the Clarion West Medical Center or held privileges there. Furthermore, Dr. Hilgarth does not normally prescribe Tussionex because it is not a formulary prescription at Wishard.⁴

Considering France's behavior and actions, and the natural and usual consequences of such conduct, the trier of fact could easily infer that he knowingly or intentionally attempted

⁴ Formulary prescriptions are prescriptions that are covered through Wishard Pharmacies.

to acquire possession of a controlled substance by misrepresentation, fraud, forgery, deception, etc. The State presented sufficient evidence of the appropriate *mens rea* as well as the other elements of attempting to obtain a controlled substance by fraud or deceit. To reach a different conclusion would require us to reweigh evidence and judge credibility, tasks that we may not perform on appeal. *See Richardson*, 856 N.E.2d at 1227.

II. Prosecutorial Misconduct

France next contends that the State engaged in prosecutorial misconduct. His complaint is based on the following facts. During closing arguments, the State, in discussing the burden of proof, stated the following:

So we have to prove that Mr. France knew what he was doing, this wasn't an accident, he wasn't confused, he wasn't deluded, he wasn't acting on a mistake. We don't have to prove that he knew that it was hydrocodone and that it was a controlled substance. We have to prove that he knew he was presenting this prescription and we have to prove that the prescription for Tussionex which does contain hydrocodone which is in fact a controlled ...

Tr. p. 148. France objected to the statement of the law, and the trial court sustained France's objection. France did not request an admonishment or move for a mistrial. In addition to this statement, France objected to two additional statements made by the State during closing argument. These statements are as follows:

Now, you've heard a lot about the State has to prove that Mr. France knew that Tussionex contained hydrocodone and that it was a controlled—Schedule 3, controlled substance. We don't. We have to prove that he knew what he was doing. We have to prove that he knew that he was presenting a forged prescription in order to get this. We have to prove that what he was trying to get was Tussionex which contained hydrocodone, a Schedule 3, controlled substance. We do not have to prove that Mr. France had a pharmacy degree. And if you follow the Defense[']s interpretation of this law that is what we would have to prove. Every defendant that comes in here we would have to

prove that he had a pharmaceutical degree and knew exactly what was involved in this.

* * * *

What we need to prove is that it was in fact Mr. France and he did in fact realize that what he was doing was presenting a forged script trying to get a substance that clearly was controlled or he wouldn't need to have a forged prescription in the first place.

Tr. pp. 146-47, 150. The trial court overruled France's objection to both of these statements.

When an improper argument is alleged to have been made, the correct procedure is to request the trial court to admonish the jury. *Dumas v. State*, 803 N.E.2d 1113, 1117 (Ind. 2004) (citing *Brewer v. State*, 605 N.E.2d 181, 182 (Ind. 1993)). If the party is not satisfied with the admonition, then he or she should move for mistrial. *Id.* Failure to request an admonition or to move for mistrial results in waiver. *Id.* Here, although France objected to the State's comments, he did not request an admonition nor did he move for mistrial. This issue is thus waived for review. *Id.*

France attempts to avoid the effects of his waiver, however, by arguing that the prosecutor's comments amounted to fundamental error. Specifically, he claims that in light of the fact that the trial court failed to admonish the jury or give a correct statement of the law, the gross misstatement of law, as presented by the State, "casts doubt on whether the Jury's conclusion was properly based on the evidence in light of the actual law or what they perceived the law to be." Appellant's Br. p. 7.

Generally, a claim of prosecutorial misconduct requires a determination that the misconduct had a probable persuasive effect on the jury's decision. *Rodriguez v. State*, 795

N.E.2d 1054, 1058 (Ind. Ct. App. 2003), *trans. denied*. When we review a claim of prosecutorial misconduct, we first determine whether the prosecutor engaged in misconduct and then consider whether, under all the circumstances, the prosecutor's misconduct placed the defendant in a position of grave peril to which he would not otherwise have been subjected. *Id.* This inquiry depends upon an analysis of the probable persuasive effect any misconduct had on the jury's decision, and whether the alleged misconduct was repeated such that it appears that the prosecutor engaged in a deliberate attempt to improperly prejudice the defendant. *Id.* at 1059. In some instances, prosecutorial misconduct may amount to fundamental error, but the prosecutor's conduct must have subjected the defendant to grave peril and had a probable persuasive effect on the jury's decision. *Id.* The gravity of the peril turns on the probable persuasive effect of the misconduct on the jury's decision and not on the degree of impropriety of the conduct. *Id.*

Here, we first note that, contrary to an assertion made by France, the trial court correctly stated the law before the jury on two separate occasions. In both its preliminary and final instructions, the trial court instructed the jury as follows:

To convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. acting with the culpability required to commit the crime of Obtaining a Controlled Substance by Fraud or Deceit, which is defined as:
3. knowingly
4. acquire possession of hydrocodone, a controlled substance
5. by fraud or by deception
6. did present to Alene Abaddi a forged prescription on the blank of Dr. Klaus Hilgarth, M.D., with said prescription not issued by Dr. Klaus Hilgarth, M.D.
7. which was conduct constituting a substantial step toward the

commission of the crime of Obtaining a Controlled Substance by Fraud or Deceit.

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of Attempt Obtaining a Controlled Substance by Fraud or Deceit, a Class D Felony.

If the State did prove each of these elements beyond a reasonable doubt, you may find the Defendant guilty of Attempt Obtaining a Controlled Substance by Fraud or Deceit, a Class D Felony.

Tr. of Preliminary Instructions p. 3, Final Instruction No. 3. The trial court also instructed the jury that a “person engages in conduct ‘knowingly’ if, when he engages in this conduct, he is aware of a high probability that he is doing so.” Tr. of Preliminary Instructions p. 3, Final Instruction No. 4. Additionally, the trial court instructed the jury that “[u]nder the Constitution of the State of Indiana you have the right to determine both the law and the facts. The Court’s instructions however are your best source of determining the law.” Tr. of Preliminary Instructions p. 1. With respect to statements made by the attorneys, the trial court instructed the jury that “[s]tatements made by the attorneys are not evidence.” Final Instruction No. 8. The trial court also instructed the jury as follows:

When the evidence is completed the attorneys may make final arguments. These final arguments are not evidence. The attorneys are permitted to characterize the evidence, discuss the law and attempt to persuade you to a particular verdict. You may accept or reject those arguments as you see fit.

Tr. of Preliminary Instructions p. 7.

In light of the trial court’s detailed instruction to the jury, we are unpersuaded that the prosecutor’s alleged misconduct placed France in a position of grave peril. The prosecutor’s alleged misconduct constituted three statements, all included in his closing arguments, which France asserts misconstrued the law. However, regardless of whether the prosecutor’s

statements amounted to an inaccurate statement of the law, the trial court clearly instructed the jury as to the proper state of the law and even specifically informed the jury that they had the right to determine both the law and the facts, the attorney's statements were not evidence, and they could therefore accept or reject the attorney's arguments as they saw fit. Furthermore, France has failed to show that the trial court's instructions were inadequate, or that he was prejudiced in any manner as a result of the State's comments during closing arguments. Because we conclude that the prosecutor's statements did not subject France to grave peril, we conclude that France's claim that the State committed prosecutorial misconduct is without merit.

III. Motion for Mistrial

France also contends that the trial court abused its discretion in denying his request for a mistrial following Detective Smith's testimony that "Mr. France had been arrested." Tr. p. 83. A mistrial is an extreme remedy warranted only when no other curative measure will rectify the situation. *Burks v. State*, 838 N.E.2d 510, 519 (Ind. Ct. App. 2005), *trans. denied*. The decision to grant a motion for a mistrial lies within the sound discretion of the trial court. *Pavey v. State*, 764 N.E.2d 692, 698 (Ind. Ct. App. 2002), *trans. denied*. The trial court's decision is afforded great deference on appeal because the trial court is in the best position to gauge the surrounding circumstances of the event and its impact on the jury. *Id.* In order to prevail on appeal from the denial of a motion for a mistrial, a defendant must establish that the questioned information or event was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected. *Burks*, 838 N.E.2d at

519. ““The gravity of the peril is determined by the probable and persuasive effect on the jury’s decision.”” *Id.* (quoting *Mote v. State*, 775 N.E.2d 687, 689 (Ind. Ct. App. 2002), *trans. denied.*). ““Moreover, reversible error is seldom found when the trial court has admonished the jury to disregard a statement made during the proceedings.”” *Id.* at 519-20 (quoting *Warren v. State*, 757 N.E.2d 995, 999 (Ind. 2001)).

It is well-settled that, absent exceptional circumstances, evidence of offenses not charged in the indictment or information is not only inadmissible, but prejudicial if admitted. *Henson v. State*, 514 N.E.2d 1064, 1066 (Ind. 1987). Any potential prejudicial effect, however, does not necessarily require a new trial. *Id.* In reviewing this issue, we analyze whether the evidence was intentionally interjected despite its known inadmissibility, whether there was a serious conflict in the evidence, the degree to which the defendant was implicated by the evidence under scrutiny, and whether the trial court admonished the jury. *Id.*

In *Henson*, the investigating officer testified regarding the photo array from which the victim identified the defendant. *Id.* at 1065. Specifically, in response to a question by the prosecutor about the process of displaying a photo array to a witness, the investigating officer testified as follows: “We have what we call an Idmo-file. We keep a file of pictures of people we have arrested in the Bloomington Police Department.” *Id.* Defense counsel objected and moved for a mistrial. *Id.* The trial court denied the motion for a mistrial, but struck the comment from the record and admonished the jury. *Id.* Upon review, the Indiana Supreme Court concluded that:

By denying the mistrial, the trial judge determined that the inadmissible information was not intentionally volunteered by the officer nor elicited by the

prosecutor. The record does not compel us to find otherwise.

Id. at 1066.

Similarly, here, Detective Smith testified as follows:

Q: Is a photo line-up the same as a photo array?

A: Yes.

Q: Did you present this to Mr. Abaddi?

A: Yes, I did.

* * * *

Q: How did you know what identifiers to put into the system in order to generate this photo line-up?

A: I simply entered his name.

Q: And who would this be?

A: Donald France.

Q: And how did you obtain that information?

A: Mr. France had been arrested.

Tr. pp. 82-83. At this point, counsel for France objected and moved for a mistrial. The trial court denied France's request for a mistrial because it did not believe that France had been placed in a position of great peril.⁵

In light of the similarity between the State's line of questioning here and in *Henson*, and in light of the Supreme Court's holding in *Henson*, we conclude that the trial court did not abuse its discretion in denying France's request for a mistrial. Here, the trial court determined not only that Detective Smith's testimony alluding to France's arrest was neither intentionally volunteered by the Detective Smith nor elicited by the State, but also and that

France had not been subjected to great peril. On appeal, France has failed to convince us otherwise. We therefore conclude that the trial court did not abuse its discretion in denying France's request for a mistrial. Moreover, unlike in *Henson*, here, the record on appeal gives no indication that Detective Smith's testimony led the jury to assume that the arrest she alluded to was not connected to the instant case.

CONCLUSION

In sum, having concluded that the evidence was sufficient to support France's conviction, the State did not engage in prosecutorial misconduct requiring reversal, and the trial court did not abuse its discretion in denying France's request for a mistrial, we affirm the judgment of the trial court.

The judgment of the trial court is affirmed.

BARNES, J., and CRONE, J., concur.

⁵ We note that unlike in *Henson*, the trial court did not admonish the jury to disregard Detective Smith's testimony regarding France's arrest. However, the trial court did give France the opportunity to request that Detective Smith's testimony pertaining to the arrest be struck from the record or for the court to admonish the jury, but France made no such request, stating that "at this point I don't ask the court to do anything." Tr. p. 91.