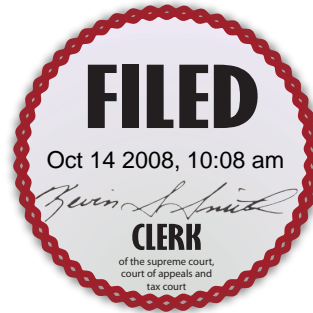


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

SAMUEL DARNELL BANKS,)

Appellant-Defendant,)

vs.)

No. 34A02-0804-CR-347)

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable William C. Menges, Judge
Cause No. 34D01-0706-FA-451

October 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Samuel Darnell Banks (“Banks”) appeals his conviction for Dealing in Cocaine, as a Class A felony.¹ We affirm.

Issues

Banks presents three issues for review:

- I. Whether the trial court should have excluded testimony that frequent drug sales took place in Garden Square Apartments, prompting management to obtain police intervention;
- II. Whether the trial court properly responded to the objection that a prosecution witness held and referred to his police statement although the witness had not first claimed a lack of memory; and
- III. Whether the trial court erroneously denied Banks’ motion for separation of witnesses as untimely.

Facts and Procedural History

On November 13, 2006, Banks sold cocaine to a confidential informant (“the C.I.”) who had participated in a sting organized by the Kokomo Police Department at the Garden Square Apartments, a public housing project. Scott Pearson (“Pearson”) had allowed his apartment to be used for the sale.

On June 26, 2007, the State charged Banks with two counts of Dealing in Cocaine, as a Class A felony, alleging that he sold cocaine on November 13, 2006 and on November 14, 2006. At the conclusion of his jury trial on January 8, 2008, Banks was convicted of the count involving the November 13, 2006 transaction. He was sentenced to thirty-five years imprisonment. This appeal ensued.

Discussion and Decision

I. Admission of Testimony

The State's first witness at trial was Shirley Young ("Young"), the Executive Director of the Kokomo Housing Authority. Young testified that there was drug activity at Garden Square Apartments, prompting her to enlist the assistance of the Kokomo Police Department. Banks contends that the trial court should have excluded this testimony when he objected that it was irrelevant and likely to inflame the passions of the jury.

The decision to admit evidence is within the sound discretion of the trial court and is afforded great deference on appeal. Bacher v. State, 686 N.E.2d 791, 793 (Ind. 1997). Generally, the admission or exclusion of evidence will not result in a reversal on appeal absent a manifest abuse of discretion that results in a denial of a fair trial. Dorsey v. State, 802 N.E.2d 991, 993 (Ind. Ct. App. 2004).

Indiana Evidence Rule 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

All evidence that is relevant to a criminal prosecution is inherently prejudicial, and thus the Evidence Rule 403 inquiry boils down to a balance of the probative value of the proffered evidence against the likely unfair prejudicial impact of that evidence. Carter v. State, 766 N.E.2d 377, 382 (Ind. 2002) (citing Richmond v. State, 685 N.E.2d 55-56 (Ind. 1997)). "When determining the likely unfair prejudicial impact, courts will look for the dangers that

¹ Ind. Code § 35-48-4-1(a)(1) – (b)(3).

the jury will (1) substantially overestimate the value of the evidence or (2) that the evidence will arouse or inflame the passions or sympathies of the jury.” Id. (citing Evans v. State, 643 N.E.2d 877, 880 (Ind. 1994)).

Here, the challenged evidence is relevant in that it explains the reason for the placement of the C.I. within the Garden Square Apartments. We discern little if any danger that the jury would overestimate the value of this background testimony or that reference to a general problem of drug dealing in public housing would shock the jury so as to inflame their passions. Banks fails to demonstrate a violation of Evidence Rule 403.

II. Refreshing Witness Recollection

During the C.I.’s testimony, Banks observed that the C.I. appeared to be refreshing his memory from a document and objected that the proper procedure for refreshing a witness’ memory had not been followed. The trial court indicated that Banks could explore the matter on cross-examination, which he did. The cross-examination revealed that the C.I. was experiencing difficulty recalling details and had been referring to his police statement. On appeal, Banks presents a cursory argument that “[the] objection should have been sustained and the testimony should have been stricken.” Appellant’s Brief at 8.

The proper procedure for refreshing the recollection of a witness has been described by our Indiana Supreme Court as follows:

[A] “simple colloquy” is all that is required under Rule 612: The witness must first state that he does not recall the information sought by the questioner. The witness should be directed to examine the writing, and be asked whether that examination has refreshed his memory. If the witness answers negatively, the examiner must find another route to extracting the testimony or cease the line of questioning.

Thompson v. State, 728 N.E.2d 155, 160 (Ind. 2000). The State agrees with Banks that the proper procedure to refresh witness recollection was not used in this instance. Nevertheless, “an error will be found harmless if its probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties.” Fleener v. State, 656 N.E.2d 1140, 1142 (Ind. 1995).

During cross-examination by Banks, the C.I. claimed to have an independent recollection that he had purchased cocaine from Banks. However, the C.I. explained that he had been involved in many undercover transactions and that he was unsure if he would have been able to testify “to the particulars of this case” without referring to his police statement. (Tr. 249.) Upon defense counsel’s request to examine the statement, the C.I. tendered it to defense counsel, in accordance with Indiana Evidence Rule 612(a).² Banks did not then move to admit other portions of the statement or to strike the C.I.’s testimony, in whole or in part. On appeal, Banks fails to explain how he was prejudiced by the C.I.’s reference to his police statement. Accordingly, there is no showing that the failure to follow the established procedure for refreshing witness recollection affected Banks’ substantial rights.

III. Motion for Separation of Witnesses

After the State had presented the testimony of several witnesses, including that of the C.I., Banks moved for a separation of witnesses order. The trial court denied the motion as

² Evidence Rule 612(a) provides: “If, while testifying, a witness uses a writing or object to refresh the witness’s memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.”

untimely. Banks claims that the ruling denied him a fair trial because Pearson testified after the C.I. and had the opportunity to tailor his testimony to that of the C.I.

The purpose of a witness separation order is to prevent the testimony of one witness from influencing another witness. Corley v. State, 663 N.E.2d 175, 176 (Ind. Ct. App. 1996).

Before the adoption of Indiana Evidence Rule 615, which was effective January 1, 1994, the question of separation of witnesses was wholly within the discretion of the trial court. Kuchel v. State, 501 N.E.2d 1045, 1047 (Ind. 1986). However, a motion for separation of witnesses had to be made and ruled upon before any witness in the case had testified. See id.

The separation of witnesses is now governed by the Indiana Rules of Evidence. Indiana Rule of Evidence 615 provides in relevant part: “At the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of or discuss testimony with other witnesses, and it may make the order on its own motion.” Rule 615 does not specify the timing of the order, yet “shall” is mandatory terminology, and there is authority for the position that a request at any stage of the proceedings is timely. Anderson v. State, 743 N.E.2d 1273, 1276 (Ind. Ct. App. 2001). Ideally, a motion for separation of witnesses should be made before any witness testifies. Id. However, a motion after testimony has begun may be permissible as long as basic notions of fundamental fairness are not offended. Id. Nonetheless, when a motion is erroneously denied, an error will be found harmless if the probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties. Id.

In this case, the effectiveness of a request for the separation of witnesses lodged after the State's primary witness had presented his direct testimony is questionable at best. The toothpaste was out of the tube, so to speak. Moreover, there is no indication that Pearson tailored his testimony to that of the C.I. Pearson contradicted the C.I.'s testimony that Pearson received some cocaine as his reward for brokering the November 13, 2006 transaction. He also denied that he saw any drug transaction take place at his apartment on the following day. Assuming that the denial of the motion for separation of witnesses was erroneous, we can confidently say that the error did not affect Banks' substantial rights.

Conclusion

Banks did not establish reversible error in the trial court's evidentiary rulings or the ruling upon a motion for separation of witnesses.

Affirmed.

RILEY, J., and BRADFORD, J., concur.