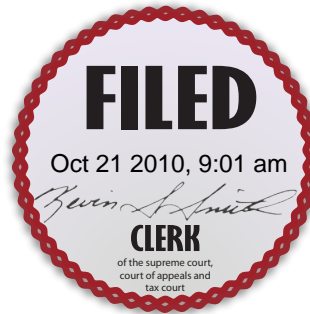


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

WILLIAM HOWARD,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-1002-CR-201

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila A. Carlisle, Judge
The Honorable Stanley Kroh, Commissioner
Cause No. 49G03-0911-FC-094307

October 21, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

William Howard (“Howard”) appeals his conviction for Burglary, as a Class C felony,¹ presenting the sole issue of whether he was entitled to a mistrial due to prosecutorial misconduct. We affirm.

Facts and Procedural History

Shortly after 7:00 p.m. on November 10, 2009, Jake Nelson (“Nelson”) pulled his vehicle into the driveway of his Indianapolis residence. Nelson’s attention was immediately drawn to activity inside the garage of his neighbor, Sara Riemen (“Riemen”). A man was crawling on his stomach outside Riemen’s garage and the garage door was lifting up. The man, later identified as Howard, went into the garage, “hit the door,” and again crawled forward on his stomach. (Tr. 35.) The garage door sensor would not allow the garage door to completely close. Nelson observed Howard standing with a “confused” look on his face. (Tr. 36.) Beside Howard were a bicycle, air compressor, and extension cord.

Nelson called police to report a suspected burglary, and Indianapolis Metropolitan Police Officer Jeffrey Kelly (“Officer Kelly”) responded to the dispatch. He located Howard crouched down between two houses. When Officer Kelly patted down Howard, he discovered a crowbar tucked into Howard’s left pant leg. Within Howard’s vicinity, there was a saw, an air compressor, and an extension cord. An abandoned bicycle was nearby.

Indianapolis Metropolitan Police Officer Joel Reiersen (“Officer Reiersen”) went to Riemen’s house to inform her of the suspected burglary. Riemen looked through her garage

¹ Ind. Code § 35-43-2-1.

and determined that two bicycles, a lawn mower, an air compressor, a circular saw, and some extension cords were missing. She also observed pry mark damage to her garage door that had not been there when she had arrived home from work around 7:00 p.m.

On November 13, 2009, the State charged Howard with Burglary and Theft.² The State also alleged that Howard is a habitual offender. On January 13, 2010, a jury found Howard guilty as charged and adjudicated him a habitual offender. The trial court entered judgment of conviction as to the Burglary count only. Howard was sentenced to eight years imprisonment for the Class C felony conviction, enhanced by eight years due to his habitual offender status, for an aggregate sentence of sixteen years. Howard now appeals.

Discussion and Decision

Prior to trial, Howard sought a motion in limine to prevent the State from eliciting evidence, in the absence of scientific testing, that the pry marks on Riemen's garage door "matched" the crowbar found on Howard's person. (Tr. 10.) The trial court observed that lay opinions were admissible; the parties agreed that lay testimony on the pry marks was permissible so long as no scientific "match" was suggested.

At trial, Indianapolis Metropolitan Police Officer Daniel Brezik ("Officer Brezik") testified without objection that he and another officer took the crowbar recovered from Howard to Riemen's garage to make a comparison. According to Officer Brezik, "we compared the crowbar to the marks used to force open the door, and they were – the size of the crowbar was consistent with the pry marks on the door." (Tr. 117.) Officer Andrew

² Ind. Code § 35-43-4-2.

Lamle testified that he photographed the crowbar and door; the photograph was admitted without objection.

In closing arguments, the following exchange took place:

Prosecutor: That crowbar that was recovered off of the defendant matched.

Defense: Objection, your honor. That was not the testimony. I would move to strike.

Prosecutor: I apologize. ...

Defense: I'd ask that the jury be admonished. And I am moving for a mistrial.

Court: All right. Well, Ladies and Gentlemen, you'll be instructed, and you have been instructed in your preliminary instructions, that the statements of the attorneys are not evidence. The statements are allowed to discuss the evidence, the law, and attempt to persuade you to a particular verdict. You may accept or reject those arguments as you see fit. And so the Court does grant the – or sustain the objection and will strike the characterization of “match.” ... But the Court does deny the motion for mistrial.

(Tr. 154-55.) The prosecutor went on to argue, without objection, that “the crowbar is consistent with the marks that are made on the door.” (Tr. 156.) (emphasis added.)

Howard contends that he is entitled to a mistrial because the Prosecutor's reference to a “match” was “not literally true and suggested to the jury that Howard had to be the one who broke into the garage to the exclusion of anyone else,” depriving Howard of a fair trial. Appellant's Brief at 5. On appeal, a trial court's exercise of discretion in determining whether to grant a mistrial is afforded great deference. Mickens v. State, 742 N.E.2d 927, 929 (Ind. 2001). This is so because the trial judge is in the best position to gauge the surrounding circumstances of an event and its impact upon the jury. Id.

A mistrial is an extreme remedy that is only justified when other remedial measures are insufficient to rectify the situation. Id. To prevail on appeal from the denial of a motion for mistrial, the appellant must establish that the challenged conduct was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected. Id. The gravity of the peril is determined by considering the misconduct's probable persuasive effect on the jury's decision, not the impropriety of the conduct. Id.

When we review a claim of prosecutorial misconduct, we must determine first, whether the prosecutor engaged in misconduct and, second, whether that misconduct, under all the circumstances, placed the defendant in a position of grave peril to which he should not have been subjected. Donnegan v. State, 809 N.E.2d 966, 972 (Ind. Ct. App. 2004), trans. denied. Here, the Prosecutor's comment was summarizing police testimony and did not suggest that there had been a match based upon scientific testing. Therefore, we find no misconduct.

Nonetheless, the trial court was apparently persuaded that an improper implication may have ensued from the prosecutor's comment, and gave a contemporaneous admonition to the jury. This is presumed to have cured any error. See Gamble v. State, 831 N.E.2d 178, 184 (Ind. Ct. App. 2005), trans. denied. We also observe that Howard did not renew the request for a mistrial after the admonition. See Washington v. State, 902 N.E.2d 280, 289-90 (Ind. Ct. App. 2009) (observing that if an admonishment is insufficient to cure the error, the defendant must request a mistrial), trans. denied. Howard failed to show that he was placed

in a position of grave peril to which he should not have been subjected. The denial of a mistrial did not constitute an abuse of discretion.

Affirmed.

RILEY, J., and KIRSCH, J., concur.