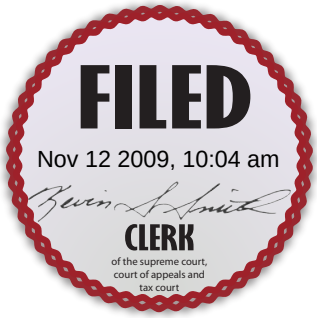

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IN THE
COURT OF APPEALS OF INDIANA

EDWARD E. WARD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A04-0904-CR-231
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Kenneth R. Scheibenberger, Judge
Cause No. 02D04-0712-FD-1063

November 12, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Edward E. Ward ("Ward") appeals his conviction for Intimidation, as a Class D felony.[1] We affirm.

Issues

Ward presents two issues for review:

I. Whether there is sufficient evidence to support his conviction for Intimidation; and

II. Whether he was entitled to a mistrial because of his communication in the presence of a juror.

Facts and Procedural History

On December 16, 2007, Fort Wayne police officers Robert Abels ("Officer Abels") and Miranda Burch ("Officer Burch") were dispatched in response to a 9-1-1 call regarding a domestic disturbance. The officers met Monica Braun ("Braun") outside her residence. Braun reported that her boyfriend, Ward, had threatened both her and her daughter, and she wanted him removed from the premises.

The officers entered the residence, where Officer Abels spoke with Ward and verified that Ward did not own the house and was not "on the lease." (Tr. 152.) Once informed that Burch wanted him out, Ward "started screaming and continued to scream for about ten minutes." (Tr. 152.) Shouting obscenities and demanding that Burch repay him $200, Ward threatened to "kick her a--." (Tr. 153.) He indicated that he had been in prison for seventeen years and was not scared of the police officers, even if they brought the "whole g-- d----

[1] Ind. Code § 35-45-2-1.

posse." (Tr. 153.)

Officer Abels coaxed Ward out of the house; however, Ward stood in the front yard and continued to scream and make threats. Burch indicated that she wanted to press charges against Ward for trespassing, and she asked Ward once or twice to leave and get off her property. Ward moved to the side of the house but continued to scream. Eventually, he "slipped around the house" to the back and hid by pressing his body "right up against the house." (Tr. 156.)

Officer Abels followed Ward's footprints in the snow, and found him at the back of the house. Observing that Ward's hands were in his pockets, Officer Abels ordered Ward to display his hands and step away from the house. Ward would not comply with either command. Officer Abels drew his weapon, to which Ward responded, "What you going to do now, shoot me?" (Tr. 158.) Ward began to walk away, saying, "I'm going to go get my gun," or "I'm going to come back after you," or "I've got a gun. I'm going to come back after you." (Tr. 158.) Officer Abels informed Ward that he was under arrest, and Officer Bunch handcuffed him.

On December 20, 2007, the State charged Ward with intimidating Officer Abels.[2] Subsequently, a habitual offender allegation was added.[3] On February 17, 2009, Ward was brought to trial before a jury, convicted of Intimidation, and found to be a habitual offender. He was sentenced to three years imprisonment, enhanced by three years due to his status as a

[2] No charges were brought with respect to Ward's conduct against Braun or her daughter.
[3] Ind. Code § 35-50-2-8.

habitual offender. Ward now appeals.

Discussion and Decision

I. Sufficiency of the Evidence

A. Standard of Review

Our supreme court has recently summarized our standard of review when assessing claims of insufficient evidence:

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted) (emphasis in original).

B. Analysis

Indiana Code Section 35-45-2-1 provides, in relevant part, that a person commits Intimidation when he "communicates a threat to another person, with the intent that the other person be placed in fear of retaliation for a prior lawful act[.]" The offense is a Class D felony if the victim is a law enforcement officer.

Ward concedes that he communicated with Officer Abels, a police officer. However,

he argues that his conviction must be vacated because there is insufficient evidence that his speech constituted a threat or was conveyed with the intent to cause Officer Abels to be in fear of retaliation. Further, Ward argues that "there exists no lawful prior action on the part of [Officer] Abels sufficient to sustain a conviction for purposes of the statute." Appellant's Brief at 8.

Indiana Code Section 35-45-2-1(c), in relevant part, defines "threat" as "an expression, by words or action, of an intention to: (1) unlawfully injure the person threatened or another person[.]" The State's establishment of the required intent depends upon the facts and circumstances surrounding the offense. Hyde v. State, 531 N.E.2d 472, 473 (Ind. 1988).

Officer Abels testified to the following events. He responded to a 9-1-1 dispatch and, after some investigation, requested that Ward leave the premises. Ward loudly spewed curses and threats for several minutes, but was coaxed into the yard. Eventually, Ward appeared to leave but actually hid against the back of his girlfriend's house. When Ward was confronted and refused to remove his hands from his pockets, Officer Abels pointed his weapon at Ward. Ward began to walk away, stating that he would return with a gun.

The jury could conclude, from Ward's statement that he would return with a gun, that Ward expressed his intent to injure Officer Abels and thus threatened him. The timing of the threat demonstrates that it was made in response to Officer Abels' efforts to resolve a domestic dispute after he was dispatched in response to a 9-1-1 call. The State presented sufficient evidence such that the jury could conclude that Ward communicated a threat to Officer Abels with the intent that Officer Abels be placed in fear of retaliation for a prior

lawful act.

II. Mistrial

Braun testified that Ward had called her daughter a "nappy head little b----" before the police officers arrived. (Tr. 97.) Braun's daughter testified that the name-calling occurred in the presence of the officers. Later, during a recess, one of the jurors was in the men's restroom and heard Ward talking about a "nappy headed ho." (Tr. 118.) Ward was loud and "pretty demonstrative" such that it appeared to the juror that Ward "might use loud words in a difficult situation and attempt to get [his] way." (Tr. 120-22.) After the juror indicated that he could remain impartial, Ward requested and was denied a mistrial. He now claims that he was entitled to a mistrial because the juror heard him potentially commenting upon inconsistent testimony and then "formed opinions about [Ward's] demeanor based on the tone of voice used in that conversation." Appellant's Brief at 17.

A mistrial is an extreme remedy and should only be used when no other curative measure will rectify a situation. Shriner v. State, 829 N.E.2d 612, 618 (Ind. Ct. App. 2005). A mistrial motion should be granted where the accused, under all the circumstances, has been placed in a position of grave peril to which he should not have been subjected. Id. However, a defendant who creates his own cause for mistrial presents no error. Id. Ward chose to make loud and demonstrative comments, which may have concerned evidence presented at trial, in a place where he could be overheard. The trial court could not properly have granted Ward a mistrial upon invited error. See id. (holding that a defendant who mentioned a lie detector test during his testimony created his own cause for mistrial and could not have

obtained a mistrial upon his own motion).

Conclusion

There is sufficient evidence to support Ward's conviction for Intimidation. He was not entitled to the declaration of a mistrial.

Affirmed.

VAIDIK, J., and BRADFORD, J., concur.