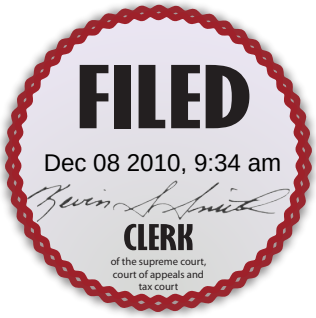

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IN THE COURT OF APPEALS OF INDIANA

STEVEN BROWN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1002-CR-206
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No. 49G02-0909-FB-78168

December 8, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Steven Brown appeals his convictions for two counts of class B felony Robbery,[1] two counts of class B felony Criminal Confinement,[2] and one count of class C felony Carrying a Handgun Without a License.[3] Brown presents the following issues for review:

1. Did the trial court commit reversible error by admitting evidence of a statement Brown made to police, which the State disclosed to him five days before trial?

2. Did the trial court improperly enter judgments of conviction on two counts of robbery?

We affirm in part, reverse in part, and remand.

On August 31, 2009, a man entered a Speedway gas station in Indianapolis wielding a handgun. He forced an elderly customer to the floor and ordered the cashier to open the drawer to her register. After removing the money from the register, the robber ordered the cashier to open a second register, but it was locked. The cashier explained that another employee in the cooler area could open the register. That employee then came out and opened the register as directed. The robber removed the cash from the drawer.

While the robbery was in progress, Benjamin Messer entered the store unaware of what was going on inside. His friend, Brandon Cooper, followed behind him. The robber quickly grabbed Messer and forced him to the floor. Cooper fled the scene and called 911. Shortly thereafter, the robber left the station and ran to a nearby alley. Cooper observed him jump into the passenger side of a car, which immediately sped off.

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[1] Ind. Code Ann. § 35-42-5-1 (West, Westlaw through 2010 2nd Regular Sess.).
[2] I.C. § 35-42-3-3 (West, Westlaw through 2010 2nd Regular Sess.).
[3] Ind. Code Ann. § 35-47-2-1 (West, Westlaw through 2010 2nd Regular Sess.).

Witnesses provided responding officers with a detailed description of the robber and the getaway vehicle. About a mile from the robbery Officer Jeffrey Kelley observed a vehicle matching the description recently broadcast by dispatch. There were two occupants in the suspect vehicle. Officer Kelley initiated a stop. When the vehicle pulled over, the passenger got out and ran from the scene. A gun was found just outside the vehicle on the passenger side, and a green hat like the one worn by the robber was on the passenger seat. The driver of the car was identified as George Edwards, and the passenger was not apprehended that day.

About two days later, police created a photo array that included Brown's picture. Cooper and Messer separately identified Brown in the photo array as the robber of the Speedway. Both men indicated at the time and at trial that they were certain of the identification. Upon further investigation of the vehicle driven by Edwards, Brown's fingerprints were discovered on the upper-exterior portion of the passenger-side door frame, as well as the outside of the trunk.

Following a jury trial in January 2010, Brown was convicted as set forth above. The trial court sentenced him to concurrent terms of fifteen years on the two robbery counts to be served consecutive to concurrent terms of ten years on the two confinement counts. Brown also received a concurrent, two-year term for the handgun charge. Brown now appeals.

1.

Brown challenges the admission of evidence relating to a statement he made to police on September 7, 2009, in which he admitted robbing the Speedway in question. Brown argues that the State untimely disclosed this statement to him.

In this same context, our Supreme Court has explained:

> A trial judge has the responsibility to direct the trial in a manner that facilitates the ascertainment of truth, ensures fairness, and obtains economy of time and effort commensurate with the rights of society and the criminal defendant. Where there has been a failure to comply with discovery procedures, the trial judge is usually in the best position to determine the dictates of fundamental fairness and whether any resulting harm can be eliminated or satisfactorily alleviated. Where remedial measures are warranted, a continuance is usually the proper remedy, but exclusion of evidence may be appropriate where the discovery non-compliance has been flagrant and deliberate, or so misleading or in such bad faith as to impair the right of fair trial. The trial court must be given wide discretionary latitude in discovery matters…. Absent clear error and resulting prejudice, the trial court's determinations as to violations and sanctions should not be overturned.

Vanway v. State, 541 N.E.2d 523, 526-27 (Ind. 1989) (citations omitted). *See also Berry v. State*, 715 N.E.2d 864, 866 (Ind. 1999) ("[e]xclusion of the evidence is an extreme remedy and is to be used only if the State's actions were deliberate and the conduct prevented a fair trial").

Here, at a pre-trial hearing five days before the scheduled trial, the State indicated that it had just learned from a detective on another case involving Brown that Brown had made an admission regarding the instant case. The State requested a continuance, which the court denied. That same day, the State was able to obtain an audio recording of the statement and have it transcribed, as well as provide said evidence to the defense.

When the State attempted to introduce testimony regarding the statement at trial, the defense objected based upon the late disclosure of the evidence. After thoroughly addressing the matter and providing defense counsel with the opportunity to question the police witnesses during a recess, the trial court ruled as follows:

> I'm going to allow the statement as long as we do not get into any other robberies. That's my big concern with that. And with respect to the tardiness of the – of telling you that. [State], I understand that you – as soon as you got it, you made [defense counsel] aware of that – that was last Wednesday, we were in court, so he was aware of that. And now that you've made [the detectives] available to discuss, I feel comfortable in going forward. I will also add that it's this statement of this defendant, and this defendant was in a better position than anyone to know that he made that statement. So I think that cures the prejudice of that statement.

Transcript at 192-93.

Contrary to Brown's bald assertions on appeal, it is clear that the untimely disclosure in the instant case was not the result of prosecutorial bad faith or flagrant and deliberate misconduct. Further, Brown has wholly failed to establish prejudice. The challenged evidence, which was Brown's own statement to police made only four months prior, was provided to defense counsel five days before trial. The statement was not lengthy, and the trial court made sure that defense counsel had an opportunity to question the detectives outside of court prior to any testimony regarding the statement. Thus, any potential harm in the late disclosure was satisfactorily alleviated. Moreover, the other evidence presented by the State to support Brown's convictions, including two eye-witness identifications and Brown's fingerprints on the getaway car, was overwhelming. We find no abuse of discretion in the trial court's ruling on this issue.

2.

Brown next contends that he should not have been convicted of two counts of robbery. In this regard, he observes that the evidence established that he robbed the Speedway gas station of money and did not take personal property from either of the employees.

The State acknowledges that under these facts our Supreme Court has clearly held that

a defendant can only be convicted of a single count of robbery. *See Williams v. State*, 395 N.E.2d 239 (Ind. 1979) (holding that when the property of a business establishment is taken from several employees of the business, the robbery amounts to one robbery and not a robbery against each of the employees). *See also Randall v. State*, 455 N.E.2d 916 (Ind. 1983) (refusing the State's invitation to reconsider *Williams*); *Lane v. State*, 428 N.E.2d 28 (Ind. 1981) (expressly reaffirming *Williams* in the face of a strong dissent from Justice Prentice). Relying upon authority from other jurisdictions, as well as the dissent in *Lane*, the State argues that the employees were the real victims, not Speedway, and asks us to reconsider the rule established in *Williams*.

It is not our role to reconsider Supreme Court decisions. *See e.g.*, *Culbertson v. State*, 929 N.E.2d 900 (Ind. Ct. App. 2010), *trans. denied*. Pursuant to *Williams*, the trial court erred by entering judgments of conviction on both counts of robbery in this case. On remand, the trial court shall vacate one of Brown's robbery convictions.

Judgment affirmed in part, reversed in part, and remanded.

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