

Appellant-defendant Andre Goodman appeals his convictions for Criminal Recklessness,¹ a class D felony, Interference With the Reporting of a Crime,² a class A misdemeanor, Possession of Paraphernalia,³ a class A misdemeanor, and Resisting Law Enforcement,⁴ a class A misdemeanor, and the trial court's finding that he is a Habitual Offender.⁵ Goodman argues that the trial court abused its discretion by denying Goodman's requests for a mistrial following several allegedly problematic statements made by a witness and the deputy prosecutor. Finding no error, we affirm.

FACTS

On December 25, 2009, Goodman, Erica Hison, and Bradley Irvine were at Anthony Emmons's house in Marion County. Goodman and Erica began arguing. Erica called Joy Ausley, who told her husband, Arthur Ausley, to go help Erica. When Arthur arrived, Goodman was holding Erica in a corner and threatening her. Erica stated she wanted to leave. Goodman went into the kitchen and came out holding a butcher knife. At some point, Erica attempted to make another phone call but Goodman prevented her from doing so by ripping the telephone jack out of the wall.

Goodman began choking Erica. Arthur grabbed one of Emmons's walking sticks and told Goodman, "Look, she wants to leave." Tr. p. 107. Goodman grabbed the other

¹ Ind. Code § 35-42-2-2.

² Ind. Code § 35-45-2-5.

³ Ind. Code § 35-48-4-8.3(b).

⁴ Ind. Code § 35-44-3-3.

⁵ Ind. Code § 35-50-2-8.

walking stick, after which he was holding the butcher knife in one hand and the walking stick in the other. Goodman said, “If y’all don’t get up out of here, there’s gonna be some bloodshed in this mother f*cker.” Id. at 108-09, 179, 308. Goodman brandished the knife, swinging it towards Erica, Irvine, and Arthur, who were about two feet away. Goodman got in front of Erica as she attempted to move to the front door, nudging her on the shoulder while holding the knife. Erica then sat down on the couch.

Goodman stated that he wanted to talk to Erica privately. Erica agreed, and Irvine and Arthur exited through the front door and stood on the front porch; Goodman locked the door behind them. Irvine then heard banging noises coming from inside. Arthur looked through the window and saw Goodman pin Erica down and choke her with the knife at her neck. Goodman dragged Erica towards the bedroom. Eventually, Goodman and Erica appeared at the back door. Goodman, still holding the knife, told Arthur to get out of his way or he would kill him.

Arthur called the police. When officers arrived on the scene, Goodman ran down an alley, discarding the knife as he was running. Goodman was apprehended following a twenty-second chase. A metal crack pipe was found in Goodman’s pocket, and the police also found the discarded knife.

On December 29, 2009, the State charged Goodman with class B felony criminal confinement, two counts of class D felony criminal recklessness, class A misdemeanor battery, class A misdemeanor interference with reporting a crime, class A misdemeanor possession of paraphernalia, and class A misdemeanor resisting law enforcement. The

State later added charges of class C felony intimidation and class D felony criminal confinement and alleged Goodman to be a habitual offender.

At Goodman's February 25, 2010, jury trial, at which Erica did not testify, defense counsel made multiple motions for a mistrial following certain portions of testimony. The trial court denied all mistrial requests. At the conclusion of the trial, the jury convicted Goodman of class D felony criminal recklessness, class A misdemeanor interference with reporting a crime, class A misdemeanor possession of paraphernalia, and class A misdemeanor resisting law enforcement, acquitting him of the remaining charges. The trial court subsequently found Goodman to be a habitual offender. At Goodman's March 16, 2010, sentencing hearing, the trial court sentenced Goodman to an aggregate seven-year term. Goodman now appeals.

DISCUSSION AND DECISION

Goodman's sole argument on appeal is that the trial court erroneously denied his motion for a mistrial. The decision to grant or deny a mistrial is within the trial court's sound discretion, and we will afford great deference to its decision. Treadway v. State, 924 N.E.2d 621, 628 (Ind. 2010). A mistrial is "an extreme sanction that is warranted only when no other cure can be expected to rectify the situation." Agilera v. State, 862 N.E.2d 298, 308 (Ind. Ct. App. 2007). In determining whether a mistrial was warranted, we will consider whether the complained-of testimony placed the defendant in a position of grave peril to which he should not have been placed. Warren v. State, 757 N.E.2d 995, 998 (Ind. 2001).

Goodman directs our attention to a number of portions of testimony that he argues warranted a mistrial. First, he points out Indianapolis Metropolitan Police Officer Jacob Snow's testimony regarding his interviews with Erica, Arthur, and Irvine:

Q. . . . [Erica, Arthur, Irvine], these people you talked to, [were their] stor[i]es consistent or inconsistent?

A. They were consistent.

Tr. p. 72. Goodman's attorney then objected, fearing that Officer Snow was going to testify about what Erica had told him, which may have constituted hearsay because she did not testify. The trial court overruled the objection, at which point Officer Snow continued with his answer: "When I—when I spoke with [Erica] and [Arthur] and finally Mr. Irvine, basically all three of their stories—" *id.* at 72-73, at which point, defense counsel again objected, on the same basis. This time, the trial court sustained the objection and the prosecution withdrew the question.

Goodman did not request an admonishment or move for a mistrial at that time. Consequently, he has waived the issue for appeal. Dumas v. State, 803 N.E.2d 1113, 1117 (Ind. 2004).

Waiver notwithstanding, we note that hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ind. Evidence Rule 801(c). Here, Officer Snow did not testify about a statement made by Erica. Instead, he merely explained that her general version of events was consistent with that of Arthur and Irvine. Consequently, this testimony was not hearsay. And inasmuch as Irvine and Arthur both testified, their

consistent version of events was in the record, meaning that even if it had been error to admit this testimony, the error would have been harmless. Consequently, we find that mistrial was not warranted based on this testimony.

Next, Goodman directs our attention to the following instances in which a witness testified or prosecutor argued that Erica appeared to be afraid and wanted to leave during the encounter with Goodman:

- Officer Snow testified that Erica “definitely appeared to be afraid. She was—wanted to know—” tr. p. 93, at which point defense counsel objected to any testimony about what Erica might have said. The trial court sustained the objection.
- When questioning Officer Snow, the State asked, “in your report did you not say that [Erica] stated she was afraid when she attempted to leave?” Id. at 270. Defense counsel objected and moved for a mistrial, and the trial court sustained the objection but denied the request for a mistrial.
- Irvine testified that “Erica said she wanted to leave to go down to . . . [Arthur’s] house and [Goodman] didn’t want her to go.” Id. at 105-06. Defense counsel objected and the trial court overruled the objection but admonished the jurors that they could “only evaluate what the witness had said Erica said to evaluate her state of mind. It’s not for the truth of what was asserted there” Id.
- In the State’s closing argument, the deputy prosecutor argued to the jury that Erica was “petrified,” using the adjective twice. Id. at 341-42, 346-47. Defense counsel objected and the trial court sustained the objection, cautioning the jury that “[w]hat the lawyers say is not evidence.” Id. at 342. Defense counsel also moved for a mistrial, which the trial court denied.

Initially, we note that to the extent defense counsel failed, on occasion, to request a mistrial, and failed, in each instance, to request an admonishment, Goodman has waived this argument. Dumas, 803 N.E.2d at 1117.

Waiver notwithstanding, we note that in two of the above instances, the trial court sua sponte admonished the jury regarding the proper way it could consider the testimony at issue. Therefore, any error was cured. See Beer v. State, 885 N.E.2d 33, 48 (Ind. Ct. App. 2008) (holding that a timely and accurate admonishment is presumed to cure any error in testimony).

Furthermore, we note that Erica's alleged fear was her emotional state rather than an assertion. Consequently, it was not hearsay. In any event, even if she had intended her nonverbal conduct to be an assertion, it would have been admissible under an exception to the hearsay rule, inasmuch as it was her existing mental and emotional condition. Evid. R. 803(3). Under these circumstances, we do not find that the trial court abused its discretion by denying Goodman's requests for a mistrial.

Finally, Goodman directs our attention to Arthur's testimony that, at some point in the past, Goodman had "climbed in the window in [Erica's house] and beat her up and jumped on her and attempt[ed] to rape her one day." Tr. p. 238. Defense counsel objected and the trial court sustained the objection and emphasized to the jurors that the statement was "stricken from the record" Id. Initially, we note that defense counsel did not request a mistrial at that time; consequently, he has waived the issue. Moreover,

as noted above, the trial court's admonishment to the jury is presumed to cure the error. Beer, 885 N.E.2d at 48.

Finally, we note the ample evidence in the record establishing Goodman's guilt, including the testimony of Arthur and Irvine, and highlight the fact that the jury acquitted or hung on multiple charges. Thus, the jury could not have inferred from this brief segment of Arthur's testimony that Goodman was a "bad" person; had the jury done so, it would have convicted him as charged. Under these circumstances, therefore, we find that Goodman has not established that he was prejudiced as a result of this stricken testimony and that the trial court did not abuse its discretion by failing to order a mistrial.

The judgment of the trial court is affirmed.

VAIDIK, J., and BARNES, J., concur.