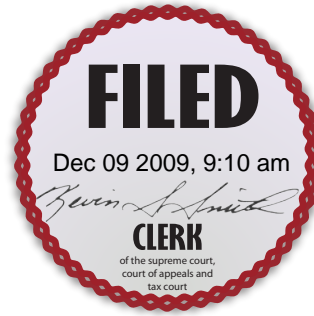


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

MICHAEL ANTHONY TAYLOR,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 71A03-0907-CR-325

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Frese, Judge
Cause No. 71D03-0806-FA-00025

December 9, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Michael Anthony Taylor (“Taylor”) was convicted in St. Joseph Superior Court of Class B felony robbery resulting in bodily injury and found to be a Habitual Offender. The trial court sentenced Taylor to an aggregate term of thirty-five years with four years suspended. Taylor appeals and argues the following:

- 1) Whether the trial court abused its discretion by denying Taylor’s motion to exclude a State’s witness;
- 2) Whether the trial court abused its discretion by denying Taylor’s motion for continuance; and
- 3) Whether the trial court and the State denied Taylor his constitutional right to present a defense when a defense witness asserted his Fifth Amendment right against self-incrimination.

We affirm.

Facts and Procedural History

At approximately 5:40 a.m. on June 22, 2008, Bhubinder Singh (“Singh”) was working from 8:00 p.m. until 8:00 a.m. as the sole employee at a gas station mini mart in South Bend, Indiana when two African-American males entered. The two males were later identified as Tyrone Sims (“Sims”) and Taylor.

Sims approached the secure cashier’s booth and asked for change for a dollar. Meanwhile, Taylor walked to the back of the store and picked up a bag of chips. Taylor returned to the cashier’s booth and began to argue with Singh about the price of the chips. Taylor told Singh to come out of the booth to show him the price. Singh refused and Sims hit the booth three times. Sims and Taylor began to use abusive language towards Singh. Taylor attempted to open the window on the booth and succeeded in opening it part of the way. Singh tried to close it but was punched in the nose by Sims. Sims then

tried to pull the cash register out of the booth. Singh took a metal bat he kept in the booth and tried to push Sims away. Singh also pushed a button that locked the store.

In the face of their mounting failures, Sims and Taylor conferred, after which Sims brandished a knife and attempted to stab Singh through the cashier's window. The pair then threw various items at Singh. Finally, Taylor climbed through the window and began to beat Singh. Taylor then pulled Singh out of the booth and continued to beat Singh.

As this happened, a South Bend police officer, Corporal Ronald Glon ("Corporal Glon"), arrived to pick up a newspaper as part of his morning routine. As he drove up, Corporal Glon saw Taylor beating Singh, immediately drew his weapon and tried to enter the store. Corporal Glon also saw Sims come out of the cashier's booth holding a knife and a wad of cash. Upon seeing Corporal Glon, Sims yelled that the police were there, dropped his knife, and ran to back of the store. Taylor released Singh and ran to the front of the store where he saw that Corporal Glon had his weapon pointed at Taylor. Despite being unable to enter because the doors were locked, Corporal Glon ordered Taylor to lie on the ground and told Singh to open the door. Taylor lay on the ground and Singh pressed the button to unlock the door. Corporal Glon entered the store and ordered Sims to come to the front of the store and Taylor to put his hands behind his back. Corporal Glon called for backup and other officers soon arrived at the store.

Before the incident, there had been \$300 to \$400 in the cash register. When the register was checked after the incident, it was empty. The money was later found in the

back of the store. Blood was found inside and outside the cashier's booth. Singh suffered injuries to his nose and finger and required medical attention.

On June 24, 2008, the State charged Taylor with Class A felony robbery and with being a Habitual Offender. On December 4, 2008, a jury trial was set for March 23, 2009. On March 18, 2009, Taylor filed a motion to exclude Singh as a witness after being unable to depose him prior to trial. On March 19, 2009, following a hearing on the motion, the trial court denied the motion to exclude. On March 20, 2009, Taylor filed a motion to continue the trial to allow for the deposition of Singh. The State filed its response to Taylor's motion on March 23, 2009 noting that Taylor had been given Singh's deposition from Sims's trial in January 2009, and had not sought to depose Singh for Taylor's trial until March 3, 2009.

On the day of trial, the trial court held a hearing on Taylor's motion to continue the trial and denied the motion but ordered that the parties make arrangements to depose Singh. At 1:30 p.m. on March 23, 2009, the jury was selected but not sworn in and ordered to return the next day at 1:00 p.m. Singh was deposed the night of March 23, 2009. On March 24, 2009, the trial began and Taylor renewed his motion to continue the trial which was denied. Taylor requested a separation of witnesses. The State presented its case during which Singh testified with assistance of an interpreter. Taylor also requested a bench warrant for Kenneth Anderson, a defense witness who failed to appear.

On March 25, 2009, Taylor again sought a continuance which was denied. Taylor called Sims as a witness. The State informed the trial court that Sims had been seen looking through the courtroom door testifying and talking on a cell phone about the case

while Corporal Glon was testifying. Taylor sought a mistrial, which the trial court denied. Instead, after speaking with Sims and two witnesses, the trial court found that Sims was in contempt of court for violating the separation of witnesses order but did not exclude his testimony or notify Sims of the contempt finding. However, when Sims was called to testify later that day, he could not be found. The trial court told Taylor to have Sims present at 1:00 p.m. the following day.

On March 26, 2009, Sims appeared and notified the trial court of his intent to assert his Fifth Amendment right to not incriminate himself if he was called to testify. The trial court asked the State whether it would grant Sims use immunity. The State declined to do so. After the trial court questioned Sims further, it determined that Sims had a valid reason to assert his Fifth Amendment right and that he would be released from his subpoena. Taylor objected to that decision. The trial court informed Sims of the contempt finding but found that, since he was not testifying, the contempt had not resulted in any prejudice to the proceedings. The trial court ultimately found that Sims was not in contempt of court. Taylor then decided to testify.

Following Taylor's testimony, he again sought a mistrial and/or a continuance which the trial court denied. The jury returned a verdict of guilty on the lesser included Class B felony robbery charge. Upon separate trial of the habitual offender count to the trial court, Taylor was found to be a habitual offender. On April 21, 2009, the trial court sentenced Taylor to ten years on the Class B felony conviction, enhanced by twenty-five years for being a habitual offender. The trial court suspended four years with three years to be served on probation. Taylor now appeals.

I. Motion to Exclude Witness

Taylor argues that the trial court abused its discretion when it denied his motion to exclude Singh as a discovery violation sanction for being unable to depose Singh prior to trial. “The trial court has inherent discretionary power on the admission of evidence, and its decisions are reviewed only for an abuse of that discretion.” Jones v. State, 780 N.E.2d 373, 376 (Ind. 2002). Likewise, we leave to the trial court decisions regarding the orderly procedure of a trial. State ex. rel. White v. Marion Superior Court, Criminal Division, No. 3, 271 Ind. 174, 175-76, 391 N.E.2d 596, 597 (1979); State ex. rel. Rooney v. Lake Circuit Court, 236 Ind. 345, 348, 140 N.E.2d 217, 219 (1957); Hyatte v. Lopez, 174 Ind.App. 149, 152, 366 N.E.2d 676, 678 (1977). And where a trial court has made a decision regarding a violation or sanction, we will reverse only if there is clear error and resulting prejudice. Bradley v. State, 770 N.E.2d 382, 387 (Ind. Ct. App. 2002), trans. denied.

We recognize a strong presumption in favor of allowing testimony. “The most extreme sanction of witness exclusion should not be employed unless the defendant’s breach has been purposeful or intentional or unless substantial and irreparable prejudice would result to the State.” Wiseheart v. State, 491 N.E.2d 985, 991 (Ind. 1986).

Our supreme court has provided factors that are helpful in determining whether to exclude a witness:

- (i) when the parties first knew of the witness;
- (ii) the importance of the witness’s testimony;
- (iii) the prejudice resulting to the opposing party;
- (iv) the appropriateness of lesser remedies such as continuances; and
- (v) whether the opposing party would be unduly surprised and prejudiced by the inclusion of the witness’s testimony.

Williams v. State, 714 N.E.2d 644, 651 n. 5 (Ind. 1999); Cook v. State, 675 N.E.2d 687, 691 n. 3 (Ind. 1996); accord Wiseheart v. State, 491 N.E.2d 985, 991 (Ind. 1986).

In this case, both parties knew of Singh from the time charges were filed, since he was the victim of the crime and his name was included on the charging information and the probable cause affidavit. Appellant's App. pp. 51, 62. Singh's testimony was indeed important because he was the victim and the eyewitness to the events leading up to and including the crime Taylor is charged with. However, any prejudice to Taylor in being unable to depose Singh prior to trial was minor since Taylor had Singh's deposition from Sims's case and was allowed to depose Singh before the parties presented their cases.

Finally, Taylor had reviewed Singh's first deposition in January 2009. Taylor also deposed Singh following voir dire on the first day of trial. Taylor was neither surprised by the inclusion of Singh as a witness nor surprised by the content of his testimony. Taylor claims that Singh's trial testimony differed significantly from his deposition. However, this merely provided Taylor another opportunity to impeach Singh as a witness and reduce his credibility with the jury. The trial court's denial of Taylor's motion to exclude Singh as a witness was neither clear error nor unduly prejudicial to Taylor.

II. Motion to Continue

Next, Taylor argues that the trial court abused its discretion when it denied his motion for a continuance of the trial setting so Taylor could depose Singh. He concedes that the motion fell outside the parameters for continuances under Indiana Code Section 35-36-7-1. Rulings on non-statutory motions for continuance lie within the discretion of the trial court and will be reversed only for an abuse of that discretion and resultant

prejudice. Maxey v. State, 730 N.E.2d 158, 160 (Ind. 2000). An abuse of discretion occurs only where the decision is clearly against the logic and effect of the facts and circumstances. Palmer v. State, 704 N.E.2d 124, 127 (Ind. 1999). Continuances for additional time to prepare for trial are generally disfavored, and courts should grant such motions only where good cause is shown and such a continuance is in the interest of justice. Id.

Taylor had known that Singh would likely be a witness since June 22, 2008. He contacted the State regarding Singh's deposition as early as November 25, 2008, yet did not notify the State of his intent to depose Singh until March 3, 2009. Despite the denial of the continuance, Taylor was still able to depose Singh before Singh's testimony, albeit a short time before. The trial court's denial of Taylor's motion for continuance was not an abuse of discretion under these circumstances.

III. Sixth Amendment Right to Present a Defense

Finally, Taylor argues that his Sixth Amendment right to present a defense by calling a defense witness and his right to due process. Essentially Taylor's argument is that the trial court abused its discretion by excluding Sims as a defense witness. To reverse a trial court's decision to exclude evidence, there must have been error by the court that affected the defendant's substantial rights and the defendant must have made an offer of proof or the evidence must have been clear from the context. Stroud v. State, 809 N.E.2d 274, 283 (Ind. 2004). "This offer to prove is necessary to enable both the trial court and the appellate court to determine the admissibility of the testimony and the prejudice which might result if the evidence is excluded." Wiseheart, 491 N.E.2d at 991.

The purpose of an offer of proof is to convey the point of the witness's testimony and provide the trial judge the opportunity to reconsider the evidentiary ruling. State v. Wilson, 836 N.E.2d 407, 409 (Ind. 2005). Equally important, it preserves the issue for review by the appellate court. Id.

Taylor failed to make an offer to prove regarding Sims's testimony. When a defendant does not make an offer of proof, he has not adequately preserved the exclusion of witness' testimony as an issue for appellate review. Wiseheart, 491 N.E.2d at 991. Taylor did not provide the trial court with any information about what Sims would have testified to. Without that information, we cannot determine whether the trial court abused its discretion when it excluded Sims and his testimony. Taylor waived the issue of the trial court's exclusion of Sims by failing to make an offer to prove to the trial court.

Even if Taylor had preserved this issue, we would likely not find that the trial court abused its discretion when it decided to exclude Sims. Had the trial court ordered Sims to the stand, he would have invoked his Fifth Amendment right not to testify. While Taylor has the right to present a defense and call witnesses, he does not have the right to call a witness and attempt to compel testimony from a witness who has already notified the court that he will validly invoke his Fifth Amendment right to not testify.

Conclusion

The trial court did not abuse its discretion when it denied Taylor's motion to exclude Singh's testimony at trial or when it denied Taylor's motion to continue the trial. Taylor waived the issue of the trial court's exclusion of Sims as a defense witness.

Affirmed.

DARDEN, J., and ROBB, J., concur.