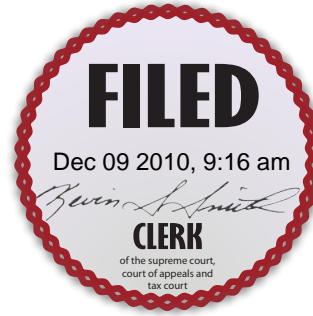


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

ROBERT D. KING
The Law Office of Robert D. King, Jr., P.C.
Indianapolis, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

ANGELA SANCHEZ
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

TROY FLANAGAN,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A02-0910-CR-963

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Lisa F. Borges, Judge
Cause No. 49G04-0706-FC-115376

December 9, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Troy Flanagan operated a scrap yard. He was convicted of corrupt business influence¹ and three counts of attempting to receive stolen property² after he bought copper from an undercover police officer who represented the copper was stolen. He argues on appeal the trial court should have allowed him to depose the Indianapolis Police Chief and there was insufficient evidence to support his convictions. We affirm.

FACTS AND PROCEDURAL HISTORY

In 2007, Indianapolis police conducted an undercover investigation of some Indianapolis scrap yards, including one owned by Flanagan. On three occasions an officer took copper power cable to Flanagan. He told Flanagan he had stolen the cable, and Flanagan purchased it. The State charged Flanagan with three counts of attempting to receive stolen property and one count of corrupt business influence.

Flanagan sought to depose the Indianapolis Chief of Police, but the trial court denied his motion on the ground the Chief had no personal knowledge relevant to Flanagan's defense: "At no time has [Flanagan] satisfied the court's repeatedly enunciated requirement that [Flanagan] provide evidence that the Chief of Police has any *personal* knowledge relevant to the facts of this case." (App. at 176) (emphasis in original).

DISCUSSION AND DECISION

1. Denial of Deposition

Decisions regarding discovery matters are within the broad discretion of the trial court

¹ Ind. Code § 35-45-6-2.

² Ind. Code § 35-43-4-2 (receiving stolen property); Ind. Code § 35-41-5-1 (attempt).

as part of its inherent power to guide and control the proceedings. *Norris v. State*, 516 N.E.2d 1068, 1070 (Ind. 1987). Our rules are designed to allow liberal discovery with minimal court involvement in the process. *In re WTHR-TV*, 693 N.E.2d 1, 5 (Ind. 1998). Parties to a lawsuit may request information or material directly from parties and non-parties. Ind. Trial Rule 34.

The scope of discovery is governed by Trial Rule 26(B):

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject-matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

That rule also permits any party or third party from whom discovery is requested to be protected from “annoyance, embarrassment, oppression, or undue burden or expense,” or to have conditions imposed on the release of discovered information. T.R. 26(C). The sum of these provisions is that, as a general proposition, discovery should go forward, but, if challenged, a balance must be struck between the need for the information and the burden of supplying it. *WTHR*, 693 N.E.2d at 6. Where non-parties to a dispute “are involuntarily dragged into court their interest in being left alone is a legitimate consideration in this balancing and they are no less entitled to any protections the Trial Rules afford.” *Id.*

Specifically, in the context of a defendant’s discovery request in a criminal case, the following test has been applied to determine whether the information is discoverable: (1) there must be a sufficient designation of the items sought to be discovered (particularity); (2) the items requested must be material to the defense (relevance); and (3) if the particularity and materiality requirements are met, the trial court must grant the request unless there is a showing of “paramount interest” in non-disclosure. Trial court rulings within this

framework are reviewed for an abuse of discretion.

Id. (footnote and citation omitted).

The trial court did not abuse its discretion in denying Flanagan's request to depose the Police Chief because Flanagan did not demonstrate the information he sought was material to his defense. "An item is 'material' if it appears that it might benefit the preparation of the defendant's case." *Id.* at 7. In cases where "the materiality of the information is not self-evident," the defendant must indicate its potential materiality to the best of his ability. *Id.* See also *Shortridge v. Platis*, 458 N.E.2d 301, 306-07 (Ind. Ct. App. 1984) (trial court properly denied plaintiffs' motion to require defendant to produce certain documents where plaintiffs failed to establish how any documents in defendant's possession were germane to an issue in the case).

In his motion to depose the Police Chief, Flanagan noted newspaper articles indicating the Police Department investigated the city's largest metal recycling business, which is one of Flanagan's competitors. The article stated fifty-one police officers were on that company's payroll, including the lead detective on metal theft. Flanagan noted the newspaper had posed the question, "Was the moonlighting detective who busted [Flanagan] working for the police or for a rival scrap yard?" (App. at 162.) Flanagan then asserted in his motion, without explanation, the Chief had "personal knowledge or information and documentation that would assist or aid [Flanagan] in preparation for trial." (*Id.* at 163.)

In *WTHR*, our Supreme Court determined a televised news interview, with its outtakes, was material to the defense of sixteen-year-old Krista Cline, who had been charged

with murder. *WTHR*, 693 N.E.2d at 9. After Cline retained counsel, but without counsel's knowledge or consent, one or more Indianapolis television stations conducted a videotaped interview of Cline at the jail. Parts of the interview were shown on local news programs, but it was unclear who arranged and conducted the interview, which media organizations either directly participated or aired any part of the interview, and exactly what was discussed.

Cline served subpoenas on two television stations demanding the interview and other materials be produced. Cline's counsel had not seen the broadcast portion of the interview and did not know the contents of any outtakes, but maintained his Sixth Amendment duty to provide effective assistance of counsel required him to investigate what had happened, even if none of the video footage would be used at trial. He also asserted the material might be relevant to a civil action against the news organizations.

The Court noted it could only "surmise" as to the materiality of the interview, because its contents were not before the Court. *Id.* It noted the relevance of some information or items may be self-evident, but in other situations, materiality may not be known or easily demonstrated until the information or item is actually examined. "Where the only method for determining materiality is production, a specific showing of materiality is not required," *id.* at 7, but where the materiality of the information is not self-evident, the defendant "must indicate its potential materiality to the best of his ability." *Id.* (quoting *Dillard v. State*, 257 Ind. 282, 292, 274 N.E.2d 387, 392 (1971)). Such "potential materiality" includes an evaluation of "not only theoretical relevance, but also the availability of the information from other sources, the difficulty of compliance, and some plausible showing as to what

information the respondent has and why there is a need to demand it from the respondent.”

Id.

The *WTHR* Court cited *Shortridge*, 458 N.E.2d at 306-07, where we held the trial court properly denied a motion to require a defendant to produce certain documents where plaintiffs did not “establish how any documents in defendant’s possession were germane to an issue in the case.” *Id.* at 7. In *WTHR*, by contrast, Cline had met the “potential materiality” test:

The interview was broadcast and, for all Cline knows, taped by the State. The State may seek to introduce Cline’s statements as admissions by a party opponent. Ind. Evidence Rule 801(d)(2)(A). Cline also suggests the statements may prove to be admissible for offensive purposes. Though we are at a loss to conjure up such a scenario, and Cline came up with none at oral argument when the question was posed, we cannot dismiss it out of hand. In any event, the defense must at least prepare for the possibility of use at trial. And irrespective of whether the State obtains a copy of the questioning, the unique circumstances under which the interview was conducted may yield insights into how to present Cline’s defense. What Cline said, and how she said it, may factor into whether to call Cline as a witness and other strategic considerations. Even if the State does not now have the tape, its availability to impeach Cline is a possibility the defense needs to consider in evaluating whether she should testify. Although [Cline’s counsel] can ask Cline about the contents of the interview, Cline may not be able to recall all the details, and certainly may not be able to give her lawyers a reliable view of the impressions she gives the viewer. In sum, that the interview may be beneficial in preparing Cline’s defense, and may provide information not obtainable from another source, is not a close question.

Id. at 9.

Flanagan did not establish any such potential materiality. His request is more like that in *Shortridge*, as he did not “establish how any documents in defendant’s possession were germane to an issue in the case.” *Id.* at 7. In his motion to quash, the Police Chief denied he

had any personal knowledge of the investigation of Flanagan, and Flanagan does not challenge that assertion. Flanagan's trial counsel made statements to the effect he thought Flanagan was targeted for investigation because his business was a competitor to the business where a number of police officers were employed, but Flanagan did not indicate in his motion what information he thought the Chief might have or why the Chief's presumed awareness the other recycler was being investigated might be relevant to Flanagan's defense of the charges against him.

In *WTHR*, after holding Cline was entitled to the interview footage, our Supreme Court rejected her claim the trial court erred by denying her vague request for other unidentified materials:

[Cline] has not specified what she hopes to gather from the stations. Nor has Cline offered any theory of "potential materiality" as to why anything other than the interview might be relevant to her defense, or even why she believes the television stations have anything responsive to the subpoena, or if they do, what it is. As such, aside from the interview, her request amounts to the "fishing expedition" held to be impermissible under the discovery rules in *Dillard*. Although a party need not specify the information sought where the contents of the item are unknown or unknowable, something more precise than "give me everything related to the case" must be shown. That is particularly true of demands on third parties. Accordingly, except for the interview, Cline's request is beyond the bounds of permissible discovery due to lack of particularity and any showing of materiality.

Id. at 8 (footnotes omitted). As Flanagan has not offered any theory of "potential materiality" indicating why information the Police Chief could provide might be relevant to his defense, the trial court did not abuse its discretion in denying Flanagan's request to depose the Police Chief. *See id.*

2. Sufficiency of Evidence

When reviewing the sufficiency of evidence supporting a conviction, we consider only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the fact-finder's role, and not ours, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. *Id.* To preserve this structure, when we are confronted with conflicting evidence we consider it most favorably to the trial court's ruling. *Id.* We affirm a conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id.* It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence, *id.* at 147; the evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. *Id.*

A. Attempted Receiving Stolen Property

There was ample evidence Flanagan attempted to receive stolen property. A person who knowingly or intentionally receives, retains, or disposes of the property of another person that has been the subject of theft commits receiving stolen property. Ind. Code § 35-43-4-2. The facts most favorable to the judgment are that the undercover officer explicitly told Flanagan the copper was stolen and Flanagan bought it anyway. The officer returned two more times with similar cable and sold it to Flanagan on both occasions. While we acknowledge Flanagan's assertions he was "offended" when the officer tried to sell him stolen cable and he "ran a legitimate business and did not purchase stolen property," (Br. of Appellant at 10), we may not assess witness credibility or weigh the evidence. *See Drane*,

867 N.E.2d at 146.

B. Corrupt Business Influence

A person commits corrupt business influence if he or she, through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of property or an enterprise. Ind. Code § 35-45-6-2(2). “Racketeering activity” includes an attempt to commit the offense of receiving stolen property. Ind. Code § 35-45-6-1(e)(15). A “pattern of racketeering activity” means engaging in at least two incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents. Ind. Code § 35-45-6-1(d).

As explained above, the facts most favorable to the judgment are that, on three occasions, Flanagan purchased cable from an undercover officer after the officer told him the cable was stolen. There was sufficient evidence to convict Flanagan of corrupt business influence.

CONCLUSION

The trial court was within its discretion to deny Flanagan’s motion to depose the Chief of Police, and there was ample evidence to support Flanagan’s convictions. We accordingly affirm.

Affirmed.

ROBB, J., and VAIDIK, J., concur.