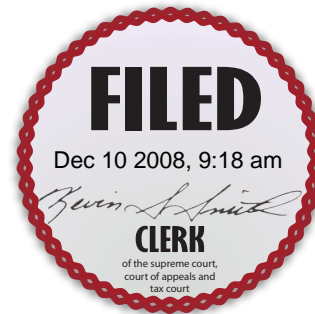


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JAMES GENE BARTLEY, III,)

Appellant-Defendant,)

vs.)

No. 71A05-0808-CR-447

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause No. 71D01-0710-FC-294

December 10, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

James Gene Bartley, III, (“Bartley”) appeals following a jury trial from his

convictions of carrying a handgun without a license,¹ a Class A misdemeanor, possession of a handgun with obliterated serial number,² a Class C felony, and possession of a handgun with a prior felony conviction within fifteen years,³ a Class C felony. Bartley raises the following issues for our review:

- I. Whether the trial court abused its discretion by denying his motion for a mistrial;
- II. Whether the trial court erred by admitting hearsay evidence of identity under the excited utterance exception to the hearsay rule; and
- III. Whether there was sufficient evidence to support the verdict.

We affirm and remand.

FACTS AND PROCEDURAL HISTORY

On October 14, 2007, Officer Timothy Huff of the South Bend Police Department was dispatched to the intersection of College Street and Vassar Street in South Bend, Indiana, to investigate a report that a group of males were fighting in the street. When Officer Huff arrived at the scene he observed that, of the approximately ten males who were yelling and screaming at each other, some of the men appeared scared, while some appeared ready to fight. Officer Huff, who was nervous about the situation, exited his vehicle and grabbed the person yelling the loudest, Lakeann Bartley, Bartley's brother. Some of the men began running away, while others began yelling that Officer Huff had the wrong person. Officer Huff heard someone say "[T]he dude's got a gun." *Tr.* at 148-49. Officer Huff asked who

¹ See Ind. Code § 35-47-2-1.

² See Ind. Code § 35-47-2-18(2).

³ See Ind. Code § 35-47-2-1; Ind. Code § 35-47-2-23(c).

had the gun, and three people pointed and said, “[T]he dude in the yellow, there he goes right there.” *Id.* Huff then saw Bartley, who was wearing a yellow shirt, running down the street. Huff radioed to other officers that he wanted Bartley stopped. Officer Huff was able to maintain visual contact of Bartley until Bartley turned onto Brookfield Street. Huff got into his police car and sped toward Brookfield Street where he found Bartley already in the custody of Officer Anthony Dawson.

Officer Dawson had heard the report of a possibly armed suspect wearing a yellow shirt fleeing the scene of a fight and responded to the call. Officer Dawson spotted Bartley, who appeared to be holding an object under his shirt. However, when Bartley neared a home located at 1046 Brookfield Street, Bartley suddenly turned and began walking in the street. Seconds later, Officer Dawson pulled his police vehicle near Bartley, exited the car, and ordered Bartley to lie on the ground. Bartley said, “Man, I ain’t got no pistol, man.” *Tr.* at 103; *State’s Ex. 3A.* Approximately two minutes later, another officer exclaimed, “I got it.” *Ex. 3A.* A loaded revolver, which appeared to have been thrown or dropped in its location, was found next to the foundation of the home at 1046 Brookfield Street. The serial number on the weapon appeared to have been intentionally obliterated.

The State charged Bartley with carrying a handgun without a license, a Class A misdemeanor, enhanced to a Class C felony because of a prior felony conviction, and possession of a handgun with an obliterated serial number, a Class C felony. On February 5, 2008, a jury found Bartley guilty of the underlying offenses and Bartley admitted the existence of a prior felony conviction. The trial court sentenced Bartley to one year executed

for his carrying a handgun without a license conviction; six years for his possession of a handgun with an obliterated serial number conviction, with two years suspended to probation; and six years for his felon in possession of a handgun conviction, with two years suspended to probation, all to be served concurrently. Of the non-suspended four-year sentence, one year was to be served in the custody of the Department of Correction. The remaining three-year -non-suspended sentence was to be served as a direct commitment to the St. Joseph Community Corrections Center program. Bartley now appeals.

DISCUSSION AND DECISION

The State correctly notes that the trial court erroneously entered convictions and sentences for both carrying a handgun without a license, as a Class A misdemeanor, and felon in possession of a handgun, a Class C felony. The jury found Bartley guilty of carrying a handgun without a license, under Indiana Code section 35-47-2-1. Bartley admitted that he had a prior felony conviction for theft within fifteen years of the present offense. Under Indiana Code section 35-47-2-23(c)(2)(B), a conviction under section 1 is enhanced to a Class C felony if the person has been convicted of a felony within fifteen years of the date of the offense. Accordingly, we remand this matter to the trial court to vacate Bartley's conviction and sentence for carrying a handgun without a license, as a Class A misdemeanor.

I. Motion For Mistrial

Bartley claims that the trial court erred by denying his motion for a mistrial. Before evidence was introduced at trial, Bartley successfully argued for an order in limine

prohibiting “anybody [from] testifying that the guy in the yellow shirt had a gun, any comment about somebody at the scene of where this originated that said the guy in the yellow shirt has got a gun.” *Tr.* at 79. Bartley argues that the multiple violations of the order in limine by the State constituted prosecutorial misconduct and that the trial court erred by denying Bartley’s motion for a mistrial.

Officer Dawson, the State’s first witness, testified without objection on direct examination, “Officer Huff responded to a fight with multiple people, and a guy took off running from the scene that was possibly armed, and I proceeded to that area.” *Tr.* at 96. Officer Dawson further testified without objection on direct examination, “Officer Huff said the guy they thought was armed was in a yellow shirt running westbound on Vassar.” *Id.* Lastly, Dawson testified without objection, “As I’m coming up eastbound on Vassar, I see a subject in a yellow shirt run towards me about a block up, and he ran southbound on Brookfield.” *Id.* On cross-examination, Bartley’s defense counsel asked Officer Dawson, “Now, how much time elapsed from when you first--I assume you heard over your radio that they’re looking for a guy in a yellow shirt, right?” *Id.* at 109. Officer Dawson responded, “Yes.” *Id.*

After Officer Dawson’s re-direct examination and just prior to the jury questions, Bartley’s counsel moved for a mistrial. Bartley claimed that the officer had violated the order in limine, and that Bartley did not object at the time of the testimony because he was not sure how the violation could be cured. The trial court allowed the jurors to ask their questions of the witness and then sent the jury back for a break while the trial court researched the issue. After having the court reporter read back the testimony, the trial court

noted that Bartley had included the objectionable description in a question on cross-examination, and also asked the State whether the officer had been informed of the order in limine.

The trial court made the following ruling:

I propose, because I do not find this was a willful injection of information, I find that after the first time an objection could have been made to what the officer was speaking about was not[sic]. So I think both sides could have dealt with this a little bit better. I believe that this can be cured by an admonishment to the jury that the Court is striking any references to clothing, if you wish, any references to clothing or a gun referred to by other people who have not testified in this court, and admonishing the jury that they can not consider that evidence in any way in arriving at a verdict in this case. So that I believe addresses what happened this morning.

Tr. at 127.

“On appeal, the trial judge’s discretion in determining whether to grant a mistrial is afforded great deference because the judge is in the best position to gauge the surrounding circumstances of an event and its impact on the jury.” *Hale v. State*, 875 N.E.2d 438, 443 (Ind. Ct. App. 2007) (quoting *McManus v. State*, 814 N.E.2d 253, 260 (Ind. 2004)). Our review of the trial court’s decision is for an abuse of discretion. *Id.* A mistrial is an extreme remedy that is only justified when other remedial measures are insufficient to rectify the situation. *Id.* To succeed on appeal from the denial of a motion for mistrial, Bartley must demonstrate that the conduct complained of was both error and had a probable persuasive effect on the jury’s decision. *See Booher v. State*, 773 N.E.2d 814, 820 (Ind. 2002).

Bartley’s claim appears to be based on the evidentiary harpoon doctrine, which is a type of prosecutorial misconduct. *See Roberts v. State*, 712 N.E.2d 23, 34 (Ind. Ct. App. 1999). An evidentiary harpoon is the placing of inadmissible evidence before the jury with

the deliberate purpose of prejudicing the jurors against a defendant. *Kirby v. State*, 774 N.E.2d 523, 535 (Ind. Ct. App. 2002). In reviewing prosecutorial misconduct, we first determine whether the prosecutor engaged in misconduct and then consider whether, under all the circumstances, the prosecutor's misconduct placed the defendant in a position of grave peril to which he should not have been subjected. *Paschall v. State*, 825 N.E.2d 923, 924 (Ind. Ct. App. 2005). However, a claim of prosecutorial misconduct is waived when the defendant fails to immediately object, request an admonishment, and then move for a mistrial. *Reynolds v. State*, 797 N.E.2d 864, 868 (Ind. Ct. App. 2003).

Here, Bartley arguably waived his claim by failing to immediately object to the testimony. Granting a motion in limine does not determine the ultimate admissibility of the evidence. *Francis v. State*, 758 N.E.2d 528, 533 (Ind. 2001). Rather, the purpose of a ruling in limine is to prevent the presentation of potentially prejudicial evidence until the trial court can rule on the admissibility of the evidence in the context of the trial itself. *Id.* Therefore, the defendant must make a contemporaneous objection at the time the evidence is offered. *See Prewitt v. State*, 761 N.E.2d 862, 871 (Ind. Ct. App. 2002). A contemporaneous objection allows the trial court an opportunity to make a final ruling on the matter in the context in which the evidence is introduced. *Id.* A party's failure to make a contemporaneous objection to evidence offered at trial precludes later appellate review of its admissibility. *Id.*

That said, such a default may not be fatal to a claim if the prosecutorial misconduct amounts to fundamental error. For prosecutorial misconduct to constitute fundamental error, it must "make a fair trial impossible or constitute clearly blatant violations of basic and

elementary principles of due process [and] present an undeniable and substantial potential for harm.” *Booher*, 773 N.E.2d at 817 (quoting *Benson v. State*, 762 N.E.2d 748, 756 (Ind. 2002)).

Here, the order in limine was violated several times by the State’s first witness, a police officer.⁴ The trial court found that the best remedy was to admonish the jury to disregard Officer Dawson’s testimony about the hearsay statements of the crowd. The declaration of a mistrial is an extreme action which is warranted only when no other recourse could remedy the perilous situation. *Pavey v. State*, 764 N.E.2d 692, 698 (Ind. Ct. App. 2002). A timely and accurate admonishment is presumed to cure any error in the admission of evidence. *Kirby*, 774 N.E.2d at 535. The trial court twice admonished the jury to disregard Officer Dawson’s testimony regarding the clothing of the suspect or any comments that he allegedly possessed a gun. Accordingly, any error occasioned by the officer’s violation of the order in limine was cured by the trial court’s admonishments. Furthermore, given our resolution of the issue of the admissibility of the statements made by the crowd, we find that Bartley was not placed in a position of grave peril to which he should not have been subjected. We find that the trial court did not abuse its discretion by using the lesser curative measure of admonishing the jury, rather than granting the motion for mistrial.

II. Excited Utterances

⁴ We caution prosecutors and police officers to be more careful when presenting the State’s evidence, and to be mindful of their responsibilities as officers of the court. When a trial court says not to talk about a matter, the deputy prosecutor should make sure the witness, especially a sworn officer, does not talk about the matter.

Next, Bartley argues that the trial court erred by allowing Officer Huff to testify about the hearsay statements made by members of the crowd after Officer Huff arrived on the scene of the street fight. Bartley claims that the evidence, even if admissible under the hearsay exception of excited utterance, was more prejudicial than probative.

Officer Huff testified about the statements made by members of the crowd shortly after he arrived at the scene of the street fight. After Officer Huff grabbed Lakeann Bartley, members of the crowd began yelling that Officer Huff had the wrong person, and that the person wearing the yellow shirt and running away from the group had a gun. The trial court allowed the testimony to come in under the excited utterance exception to the hearsay rule.

The admission of evidence is within the sound discretion of the trial court, and the decision whether to admit evidence will not be reversed absent a showing of manifest abuse of discretion by the trial court resulting in the denial of a fair trial. *Johnson v. State*, 831 N.E.2d 163, 168-69 (Ind. Ct. App. 2005). Hearsay is generally inadmissible. Ind. Evidence Rule 802. However, Indiana Evidence Rule 803(2) states that an excited utterance is not excluded by the hearsay rule even though the declarant is available as a witness. *See Jones v. State*, 800 N.E.2d 624, 627 (Ind. Ct. App. 2003). For a hearsay statement to be admitted as an excited utterance, three elements must be present: 1) a startling event has occurred; 2) a statement was made by a declarant while under the stress of excitement caused by the event; and 3) the statement relates to the event. *Id.* Under this test, the heart of the inquiry is whether the statement is inherently reliable because the declarant was incapable of thoughtful reflection. *Id.* Further, the statement must be trustworthy under the facts of the particular

case, and the trial court should focus on whether the statement was made while the declarant was under the influence of the excitement engendered by the startling event. *Id.*

While the amount of time that has passed between the event and the statement is not dispositive of the issue, the unrehearsed nature of the statements made while still under the stress of the excitement from the startling event, may supply the indicia of reliability to support admission of the statements. *See Burdine v. State*, 751 N.E.2d 260, 264 (Ind. Ct. App. 2001). Furthermore, the foundational requirements to admissibility oftentimes involve factual determinations to be made by the trial court. *Id.* at 263. Those factual findings and determinations are entitled to the same deference on appeal as any other factual finding. *Id.* at 264.

In the present case, the statements were made during the course of a large fight that a police officer was trying to bring under control. There were people in the crowd who appeared scared while others appeared cocky and readying for a fight. The statements about the person with the gun included allegations that the person with the gun was trying to “shoot people.” *Tr.* at 120. While we acknowledge that the confrontational and adversarial nature of the encounter could give rise to an incentive to provide false information, the unrehearsed nature of the statements made in response to Officer Huff’s question about who had the gun, and Huff’s testimony that three individuals immediately pointed in the direction of the man in the yellow shirt support the trial court’s decision to admit the statements under the excited utterance exception to the hearsay rule.

Bartley claims, under Indiana Evidence Rule 403, that the statements were more prejudicial than probative and should have been excluded even if admissible under the

excited utterance exception to the hearsay rule. The evidence is clearly relevant. The statements made caused Officer Huff to focus on Bartley, who likely was in possession of a handgun. “‘Unfair prejudice’ addresses the way in which the jury is expected to respond to the evidence; it looks to the capacity of the evidence to persuade by illegitimate means, or the tendency of the evidence ‘to suggest decision on an improper basis....’” 12 ROBERT LOWELL MILLER, INDIANA PRACTICE § 403.102 at 284 (1995) (footnotes omitted). Here, Officer Huff testified that he maintained visual contact with Bartley until Bartley turned on Brookfield Street. Officer Dawson responded to the report of a fleeing suspect and saw Bartley on Brookfield Street, who appeared to be holding an object under his shirt. Bartley neared a home located at 1046 Brookfield, and suddenly turned and began walking in the street. When Officer Dawson pulled his vehicle near Bartley, exited his car, and ordered Bartley to lie on the ground, Bartley volunteered, “Man, I ain’t got no pistol, man.” *Tr.* at 103, *Ex 3A*. Minutes later, another officer found a loaded revolver next to the foundation of the home at 1046 Brookfield. While the admission of statements was prejudicial to Bartley’s theory of the case, the admission of the statements was not unfairly prejudicial. Furthermore, the probative value of the statements outweighed the prejudicial impact. The trial court did not abuse its discretion.

III. Sufficiency Of The Evidence

Our standard of review for sufficiency claims is well settled. We will not reweigh the evidence or assess the credibility of witnesses. *Cox v. State*, 774 N.E.2d 1025, 1028 (Ind. Ct. App. 2002). We consider only the evidence most favorable to the judgment, together with all reasonable inferences that can be drawn therefrom. *Id.* If a reasonable trier of fact could

have found the defendant guilty based on the probative evidence and reasonable inferences drawn therefrom, then a conviction will be affirmed. *Id.* at 1028-29.

Indiana Code section 35-47-2-1 prohibits a person from carrying a handgun in any vehicle *or on or about* the person's body without a license. (emphasis added). "On" refers to actual possession, which occurs when a person has direct physical control over the item. *See Winters v. State*, 719 N.E.2d 1279, 1281 (Ind. Ct. App. 1999). "About" involves constructive possession, which occurs when a person has the intent and capability to maintain dominion and control over the item. *Id.* Accordingly, the State had to prove that Bartley had either actual or constructive possession of the handgun. *See Deshazier v. State*, 877 N.E.2d 200, 204 (Ind. Ct. App. 2007). "When proceeding on a theory of constructive possession, the State must show that the defendant had 'both the intent and capability to maintain dominion and control over the [handgun].'" *Id.* at 205 (quoting *Bradshaw v. State*, 818 N.E.2d 59, 62-63 (Ind. Ct. App. 2004)). Such a showing inherently involves showing the defendant had knowledge of the handgun's presence. *Id.* at 205. Dominion and control can be found through various means. *See Winters*, 719 N.E.2d at 1281. Consequently, Bartley's argument about the insufficiency of the evidence that he "carried" the handgun on his person fails here.

The evidence reveals that there was a report of a man wearing a yellow shirt and in possession of a handgun running from the scene of a street fight. Officer Dawson encountered Bartley, who was wearing a yellow shirt and was holding something under his shirt. Bartley abruptly changed course near the location where the gun was found. Seconds after Bartley was seized by Officer Dawson, Bartley denied having a gun. A gun, having the appearance of being thrown or dropped where it was found, was discovered approximately

fifty feet from where Bartley stopped running and changed his course. The incriminating statements, furtive movements, and proximity to the weapon are sufficient additional circumstances pointing to Bartley's knowledge of the presence of the gun. *See id.* The evidence was sufficient to support Bartley's conviction of carrying a handgun without a license.⁵

Bartley also claims that the evidence was insufficient to support his conviction of possession of a handgun with obliterated serial number. Indiana Code section 35-47-2-18(2) makes it illegal to possess any handgun on which the serial number or other mark of identification has been changed, altered, removed, or obliterated. The State was required to establish that Bartley knew that the serial number of the gun had been altered. *See Wagerman v. State*, 597 N.E.2d 13, 16 (Ind. Ct. App. 1992). A person engages in conduct knowingly if, when he engages in the conduct, he is aware of a high probability that he is doing so. Ind. Code §35-41-2-2(b). Knowledge may be proved by circumstantial evidence inferred from the circumstances and facts of each case. *Heavrin v. State*, 675 N.E.2d 1075, 1079 (Ind. 1996).

Here, a firearms expert testified that the serial number on the handgun was not accidentally removed. He testified that the markings supported the conclusion that there was an effort to alter, obscure, and transform the serial number on the handgun. The serial number was located just above the trigger guard on the left side of the gun. A photograph of

⁵ Bartley claims that his plea in which he admitted to having a prior felony conviction should be voided assuming that there was insufficient evidence to support his conviction of carrying a handgun without a license. However, given our resolution of that issue contrary to Bartley's position, his plea based upon his admission stands.

the handgun depicted visibly shiny scratch marks on the left side of the handgun. The evidence permitted the inference that Bartley, who possessed the handgun, knew about the obliteration of the serial number. *See Robles v. State*, 758 N.E.2d 581, 583-84 (Ind. Ct. App. 2001)(defendant possessed gun with shiny spot where serial number had been filed off). The evidence was sufficient to support Bartley's conviction.

Affirmed and remanded.

VAIDIK, J., and CRONE, J., concur.