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IN THE COURT OF APPEALS OF INDIANA

KENNETH McCREARY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1002-CR-179
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Peggy Hart, Master Commissioner
Cause No. 49G20-0907-FB-65104

December 27, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Kenneth McCreary appeals his conviction of and sentence for Class B felony dealing in cocaine[1] and raises the following issues:

1. Did the trial court err in denying McCreary's motion for mistrial?
2. Did the trial court abuse its discretion in admitting a photo array the confidential informant used to identify McCreary as the person who sold cocaine?
3. Was McCreary's sentence inappropriate based on the nature of the offense and his character?

We affirm.

FACTS AND PROCEDURAL HISTORY

On July 15, 2009, a confidential informant (CI) bought cocaine from McCreary at McCreary's home in Indianapolis. The CI wore an audio/visual recording device and recorded the transaction. McCreary was arrested shortly thereafter, and charged with Class B felony dealing in cocaine. On January 20, 2010, after a jury trial, McCreary was convicted as charged and sentenced to six years, with four years incarcerated, one year in community corrections, and one year suspended to probation.

DISCUSSION AND DECISION

1. Denial of Motion for Mistrial

A mistrial is an "extreme remedy" warranted only when no other curative measure can remedy the "perilous situation." *Kirby v. State*, 774 N.E.2d 523, 533 (Ind. Ct. App. 2002).

[1] Ind. Code § 35-48-4-1.

The decision whether to grant a motion for mistrial lies within the trial court's sound discretion and will be reversed only for an abuse of that discretion. *Id*. In reviewing a decision to deny a mistrial, we consider whether the defendant was placed in a position of grave peril to which he should not have been subjected. *Id*. The gravity of the peril is determined by the probable persuasive effect on the jury's decision. *Id*. We give great deference to the trial court's determination because the trial court is in the best position to gauge the circumstances and probable impact on the jury. *Id*.

During McCreary's trial, the prosecutor asked Detective Mann where he procured the photos for a photo array, and Detective Mann stated, "[w]e have a computer system that stores all the X image photos. Basically an X image photo is when anybody is arrested, they are photoed [sic] in downtown at processing." (Tr. at 129.) McCreary's counsel immediately objected, and the jury was taken out of the room while the judge, prosecutor, and defense counsel discussed the matter on the record. McCreary's counsel motioned for a mistrial because "[t]he officer's testimony is clearly going to get into [Evidence Rule] 404-B area of prior bad acts that would imply directly that our client has a criminal history." (*Id*. at 130.) While the jury was out of the room, but still on the record, Detective Mann testified that the photos could have also been procured from BMV records. The trial court denied McCreary's motion for mistrial, and admonished the jury to disregard Detective Mann's testimony regarding the origin of the photos in the array.

However, reversal of a trial court's denial of mistrial is not required if the reference that prompted the motion was unintentional or if the evidence of guilt is strong. *Vanzandt v.*

State, 731 N.E.2d 450, 454 (Ind. Ct. App. 2000), *trans. denied*. Neither is a mistrial required for every fleeting reference to a criminal past, especially when the reference does not "clearly indicate" that a defendant has been convicted of a crime. *Tompkins v. State*, 669 N.E.2d 394, 399 (Ind. 1996). Nor is reversal usually required if the trial court admonished the jury to disregard the complained-of statement or conduct. *Simmons v. State*, 760 N.E.2d 1154, 1162 (Ind. Ct. App. 2002).

In the instant case, Detective Mann's reference to the origin of the photos was in response to the question presented, appears to have been unintentional, and the origin was clarified to include BMV photos. McCreary argues the evidence against him was not strong, as there was not video evidence on the surveillance CD of McCreary actually possessing the crack cocaine and the confidential informant was paid only when his information resulted in an arrest and was paid to testify. We disagree. When Detective Mann made the statement, the State had already played a portion of a video of McCreary selling crack cocaine to a confidential informant, and the confidential informant had testified that McCreary sold him crack cocaine; thus there was strong evidence against McCreary at the time of Detective Mann's statement. Additionally, the trial court admonished the jury to disregard Detective Mann's statement and warned counsel, "I don't want you to open the door again. . . .or someone is going to get assessed costs." (Tr. at 135.)

Based on those facts, McCreary was not put in "grave peril" by Detective Mann's fleeting statement, as the evidence already presented against McCreary was strong, the statement did not necessarily indicate criminal history, and the court properly admonished the

jury to disregard Detective Mann's statements regarding the origin of the pictures in the photo array. *See, e.g.*, *Simmons*, 760 N.E.2d at 1162 (admonishment of jury to disregard statement sufficient to avoid mistrial). Thus, the trial court did not abuse its discretion when denying McCreary's motion for mistrial. *See id.*

2. Photo Array

The admission of evidence falls within the sound discretion of the trial court, and we review such admission for an abuse of discretion. *Bradley v. State*, 770 N.E.2d 382, 385 (Ind. Ct. App. 2002), *trans. denied*. Photographic evidence which is relevant may be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice. *Id*.

McCreary contends the trial court abused its discretion in admitting a photo array with the words, "Indianapolis Metropolitan Police Department" printed on it because McCreary's identity was not at issue and the photo array was more prejudicial than probative. We first note McCreary did not object to the admission of the photo array at trial. If a defendant fails to make a contemporaneous object to the admission of evidence, any error in the admission thereof is waived for our review. *Wilson v. State*, 514 N.E.2d 282, 284 (Ind. 1987). An exception to the doctrine of waiver arises when an error is fundamental. *Id*. Fundamental error occurs when the error is a blatant violation of basic principles, the harm or potential for harm is substantial, and the error denies the defendant due process. *Id*. Therefore, we will review McCreary's claim to ensure a fundamental error did not occur.

McCreary classifies the photo array as consisting of mug shots, and he argues it

should have been excluded because the admission of a mug shot, when identity is not at issue,[2] violates Ind. Evidence Rule 404(b), which states, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." McCreary notes the array had "Indianapolis Metropolitan Police Department" printed across the top, and all of the pictures were "full frontal head shots." (Appellant's Br. at 6.)

However, our Indiana Supreme Court has held photographs with "'no name, no identification number, [and] no indication of prior arrest'. . . .[do] not fall within the 'classic definition' of mug shots." *Stark v. State*, 489 N.E.2d 43, 46 (Ind. 1986). Moreover, at trial, Detective Mann, who assembled the photo array, testified the photos used could have been taken from a database or "BMV photos." (Tr. at 1321.) Further, after McCreary's objection and motion for mistrial as described *supra*, the jury was admonished to disregard Detective Mann's earlier testimony about the origin of the photos in the array. On appeal, we presume the jury follows the court's instructions. *Pruitt v. State*, 622 N.E.2d 469, 473 (Ind. 1993). Under this set of facts, we cannot say the potential for harm was so great that fundamental error occurred.

3. Appropriateness of Sentence

Even if a trial court acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate

[2] McCreary asserts identity was not at issue in this case, as the confidential informant already had identified McCreary as the person who sold drugs to him and the State already had presented an audio-video recording of the transaction between McCreary and the confidential informant, which contained at least three still shots of

review and revision of a sentence. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g by* 875 N.E.2d 218 (Ind. 2007). This appellate authority is implemented through Ind. Appellate Rule 7(B), which provides a reviewing court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, it finds the sentence inappropriate in light of the nature of the offense and the character of the offender. *Id*. As we review the appropriateness of a sentence, we "may consider all aspects of the penal consequences imposed" by the trial court, *Davidson v. State*, 926 N.E.2d 1023, 1025 (Ind. 2010), including "whether a portion of the sentence is ordered suspended or otherwise crafted using any of the variety of sentencing tools available to the trial judge." *Id.*

McCreary argues his six-year sentence for Class B felony dealing in cocaine was inappropriate because more of his sentence should have been suspended. We first note McCreary was given the minimum sentence for his crime. *See* Ind. Code § 35-50-2-5 (sentencing range for a Class B felony is "between six (6) and twenty (20) years, with the advisory sentence being ten (10) years"). The court ordered he serve four years incarcerated, one year in community corrections, and one year suspended on probation.

With regard to the nature of the offense, there is nothing extraordinary about McCreary's crime -- he sold .0708 grams of crack cocaine to a confidential informant. The trial court found no aggravating circumstances surrounding the crime, though the State argued children were present during the commission of the crime. With regard to McCreary's character, the trial court found his lack of criminal history to be a mitigating

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McCreary's face.

circumstance.

McCreary was given the minimum sentence for his crime, with some of that time suspended to probation or community corrections. The trial court found no aggravating circumstances, the nature of the crime was not particularly heinous and McCreary's lack of criminal history was found to be mitigating. Therefore, McCreary's sentence of six years for Class B felony dealing in cocaine is not inappropriate based on the nature of the offense or his character.

CONCLUSION

The trial court did not abuse its discretion when it denied McCreary's motion for mistrial because he was not put in grave danger by Detective Mann's brief statement. Neither did fundamental error occur when the court admitted the photo array without objection from McCreary. Finally, McCreary's sentence is not inappropriate based on the nature of the offense or McCreary's character. Accordingly, we affirm.

Affirmed.

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