

## MEMORANDUM DECISION

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IN THE  
**Court of Appeals of Indiana**

Tony Tewayne Gardner,  
*Appellant-Defendant*

v.

State of Indiana,  
*Appellee-Plaintiff*



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April 15, 2024

Court of Appeals Case No.  
23A-CR-1321

Appeal from the Vanderburgh Circuit Court

The Honorable Celia Pauli, Magistrate

Trial Court Cause No.  
82C01-2211-F5-6861

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**Memorandum Decision by Judge Kenworthy**  
Chief Judge Altice and Judge Weissmann concur.

## **Kenworthy, Judge.**

### **Case Summary**

- [1] Tony Gardner appeals the trial court’s denial of his motion for a mistrial. Concluding the trial court did not abuse its discretion by denying Gardner’s motion, we affirm.

### **Facts and Procedural History**

- [2] On November 7, 2022, Gardner became angry with his wife, Shannon, because there was no chocolate cake in the house. Later that evening, Gardner told Shannon, “[I]t’s going to take more than your family and the police to save you.” *Tr. [Hrg 01.04.23] Vol. 2* at 74. Then, when Shannon attempted to pick up her phone, Gardner hit her on the head with a fan. Gardner straddled Shannon and punched her in the face until she passed out. When Shannon awoke, Gardner was telling her he loved her but did not give Shannon her phone for thirty minutes. Once Shannon got her phone back, she called her daughter.
- [3] On November 10, police conducted a welfare check at the couple’s home. When police arrived at the residence, Gardner opened the door but slammed it shut upon seeing the officers. Then, Gardner opened the door again, and the officers requested to speak with Shannon alone. In response, Gardner yelled at the officers. Once the officers were able to speak with Shannon alone, Shannon became emotional and told the officers what occurred three days prior.

- [4] Gardner was arrested and charged with domestic battery, two counts of intimidation, criminal confinement, interference with the reporting of a crime, and disorderly conduct. Prior to trial, Gardner filed a motion in limine requesting the State be instructed not to refer to Gardner’s criminal history or prior bad acts. The trial court granted the motion.
- [5] During Gardner’s jury trial, the State asked Shannon why she called her daughter rather than the police after the events of November 7, 2022. Shannon responded by stating, “Because if I called the police it would just, he was just going to make me not say, tell them that it didn’t happen like I had to do in [the] past.” *Id.* at 76. Gardner objected, and his objection was sustained. The trial court struck Shannon’s statement and admonished the jury not to consider it. Gardner moved for a mistrial, arguing Shannon’s statement alluded to past incidents of domestic violence and could not be cured by an admonishment. The trial court found the statement was not so prejudicial as to warrant a mistrial and denied Gardner’s motion. *See id.* at 81–82. At the conclusion of the trial, the trial court entered judgments of conviction for Level 5 felony domestic battery, Levels 5 and 6 felony intimidation, and Class B misdemeanor disorderly conduct and sentenced Gardner to a total of four years in the Indiana Department of Correction.

## **Standard of Review**

- [6] We review a trial court’s decision to grant or deny a mistrial only for an abuse of discretion, as the trial court is in the best position to judge the surrounding circumstances of the event and its impact on the jury. *Knapp v. State*, 9 N.E.3d

1274, 1283–84 (Ind. 2014), *cert. denied*. A mistrial is an extreme remedy which should be granted only where other remedies cannot satisfactorily rectify the error. *Id.* at 1284. Admonishing the jury to disregard an improper statement or conduct is presumed to cure any error in admission of the evidence. *Lay v. State*, 659 N.E.2d 1005, 1009 (Ind. 2005).

- [7] “To succeed on appeal from the denial of a motion for mistrial, the appellant must demonstrate the statement or conduct in question was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected.” *Bradley v. State*, 649 N.E.2d 100, 107 (Ind. 1995). The gravity of the peril is measured by the probable persuasive effect of the misconduct on the jury’s decision rather than the degree of impropriety of the conduct. *Id.* at 107–08. “To determine the probable persuasive effect of the stricken testimony on the jury verdict, the other evidence presented is an important consideration.” *Warren v. State*, 757 N.E.2d 995, 999 (Ind. 2001).

### **Gardner’s Motion for Mistrial Was Properly Denied**

- [8] The trial court granted Gardner’s motion in limine seeking to prohibit the State from introducing evidence of, among other things, prior bad acts. Indiana Evidence Rule 404(b) prohibits evidence of a “crime, wrong, or other act . . . to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.” The purpose of this rule is to prevent the jury from conflating the defendant’s prior bad acts with present guilt. *See Fairbanks v. State*, 119 N.E.3d 564, 565 (Ind. 2019), *cert. denied*. “To

achieve this purpose, Rule 404(b) prohibits the State from introducing evidence of other bad acts to show a defendant's propensity to commit a crime." *Id.*

[9] When Shannon was asked at trial why she called her daughter rather than the police on November 7, she stated, "Because if I called the police it would just, he was just going to make me not say, tell them that it didn't happen like I had to do in [the] past." *Tr. [Hrg 01.04.23] Vol. 2* at 76. The trial court struck this statement and determined an admonishment to the jury was sufficient to cure any prejudice to Gardner. Gardner claims Shannon's statement was a violation of the order in limine that placed him in a position of grave peril. Although Shannon's statement may have indicated Gardner made her lie in the past, it was unclear under what circumstances this occurred. Thus, her statement did not amount to an allegation of previous domestic violence. Shannon's testimony was offered as evidence to explain why she did not immediately contact police rather than to establish Gardner had previously acted in conformity with the crimes charged in this case. Under these circumstances, the trial court did not abuse its discretion. *See Owens v. State*, 937 N.E.2d 880, 895 (Ind. Ct. App. 2010) (no abuse of discretion where trial court deemed admonishment sufficient to cure any prejudice caused by isolated, vague, brief reference that violated order in limine but was not offered to show action in conformity with alleged offense), *trans. denied*.

[10] Further, there was independent evidence of Gardner's guilt. Other evidence of guilt is an important consideration when reviewing the trial court's denial of a mistrial. *Warren*, 757 N.E.2d at 999. In *Warren*, the Court found a jury

admonishment cured any prejudice to the defendant because of other evidence of guilt even though the stricken testimony was “highly prejudicial.” *Id.* Here, Shannon testified Gardner hit her with a fan, then punched her in the face until she passed out. She also testified Gardner took her phone away when she tried to call 9-1-1 and would not let her answer the door when police arrived. Body camera footage revealed Gardner yelling from inside the home after slamming the door in the officers’ faces. Gardner was hesitant to allow the officers to speak to Shannon, and when they were able to speak with her, she was “emotional” and “seemed a little scared.” *Tr. [Hrg 01.04.23] Vol. 2* at 53. In light of the independent evidence of Gardner’s guilt, the probable persuasive effect of Shannon’s vague, brief statement did not place Gardner in grave peril requiring a mistrial.

## **Conclusion**

[11] Gardner failed to prove he was placed in a position of grave peril by Shannon’s statement. Therefore, the trial court did not abuse its discretion by denying Gardner’s motion for a mistrial.

[12] Affirmed.

Altice, C.J., and Weissmann, J., concur.

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