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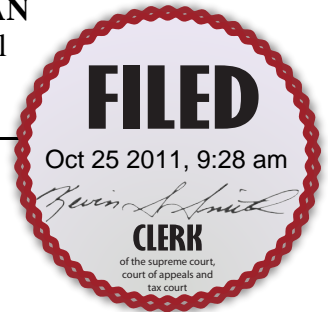
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**IN THE
COURT OF APPEALS OF INDIANA**

CHRIS DAVIS,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A02-1102-CR-141

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
Cause No. 49G06-1001-FB-3760

October 25, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Chris Davis appeals his conviction of carrying a handgun without a license, a class C felony.¹

We affirm.

ISSUE

Whether the trial court abused its discretion in denying Davis's motion for mistrial.

FACTS

On January 15, 2010, Ruben Cabrera-Bustamante was standing outside his Indianapolis apartment when he saw Davis approaching. Davis placed a gun alongside Cabrera-Bustamante's head and demanded that he surrender his money. Cabrera-Bustamante refused, and Davis fired a shot into the doorframe of Cabrera-Bustamante's apartment. Davis struck Cabrera-Bustamante with the pistol, and Cabrera-Bustamante gave him money. Davis then left.

After his wife called the police, Cabrera-Bustamante decided to get into his car and follow Davis. Cabrera-Bustamante saw Davis walking down the street and made eye contact with him. Davis pointed the gun at the car, so Cabrera-Bustamante drove the car toward Davis, eventually hitting him. Davis then stood up and flagged down a passing truck. The driver of the truck blocked Cabrera-Bustamante's car, causing Cabrera-Bustamante to exit his car and explain the situation to the driver. Davis jumped out of the

¹ Ind. Code § 35-47-2-1.

truck and fought with Cabrera-Bustamante until the truck driver stopped the altercation by pointing his own gun at Davis. Police arrived and secured the scene. Davis told the police that he had not robbed anyone but that he was carrying a gun for protection.

The State charged Davis with Count I, class B felony robbery; Count II, class D felony criminal recklessness; Count III, class D felony pointing a firearm; Count IV (Part I) class A misdemeanor carrying a handgun without a license and (Part II) class C felony carrying a handgun without a license; and Count V, class A misdemeanor possession of a firearm by a domestic batterer. The State subsequently dismissed Count V.

At trial, Davis testified that he had previously been convicted of a felony. Davis acknowledged at trial that he had told the investigating officers that he went to Cabrera-Bustamante's apartment to sell drugs; he saw an unidentified man approaching with a gun; and he pulled out his gun that he had brought for protection.

In final argument, the deputy prosecutor stated the following about Part I of Count IV:

And [for the offense of] carrying a handgun without a license. He had a handgun. First of all, you've got all sorts of witnesses saying he had a handgun. Ruben saying it was pointed at his head. The Defendant himself in different, in all the different variations of the stories has the gun at one point or another. For this charge you must knowingly have it, knowingly have a gun in a place, not your home or your business basically is the rule or in a vehicle of yours, is carrying a handgun without a license. And you will be instructed that the presumption is that someone does not have a license unless it is rebutted by the Defense. That hasn't been done. No license. Had a gun, no license.

(Tr. 356).

In final argument, defense counsel stated with reference to Part I of Count IV:

The burden has shifted to us in order to prove that [Davis] has a license to carry a handgun and he doesn't. (indiscernible). So you may be authorized at this point to convict [Davis] of that Carrying a Handgun without a License, but I want you to stop and think and take a minute and decide whether or not you want to do that. Because, you know what? You can say no. They may have proven he had the gun. But why did he have a gun?

(Tr. 374).

During rebuttal, the deputy prosecutor pointed out that Davis had told the investigating officers that he was carrying the gun for protection, and he pulled it because “the sh** didn't look right.” (Tr. 385). The deputy prosecutor then stated, “Regardless of whether you believe, Carry[ing] a Handgun without a license is a status offense. Do they have it and where are they at? Being a convicted felon, you can't carry a handgun.” *Id.* Defense counsel then objected on the basis that “[Davis] is charged with an A misdemeanor. It has nothing to do with his prior conviction for Confinement. [The deputy prosecutor] just argued that being a convicted felon you cannot carry a handgun. That is not the evidence in this case. At this point we'd move for a mistrial” (Tr. 385-86).

The trial court conditionally denied the motion, stating that it would give additional time for the parties to supplement their arguments. The deputy prosecutor then completed rebuttal by stating, “Did [Davis] have a license to carry the gun though? Did he carry the gun? By his own admission, yes. Whether you believe him depending on

what story he told you is up to you. The Defendant's statement [was] at the end, 'Yeah, that was my gun.'" (Tr. 386).

After the jury retired to deliberate, defense counsel was given the opportunity to again address his objection to the deputy prosecutor's rebuttal statement. He contended that "[t]he thrust of my argument is the statement in context made by the deputy prosecuting attorney, was, he's a convicted felon and should not be in a possession of a handgun." (Tr. 391). The trial court again overruled the objection, noting that the jury had been instructed that statements by the parties are not evidence and that convictions must be based on evidence.

Sometime during deliberations, the jury sent a question to the trial court. The question was, "On one charge, number four, we have discussed and voted and the vote is nine not guilty and three guilty. That is our final decision. Now what happens to this charge?" (Tr. 397). The trial court consulted with the attorneys and informed the jury to "continue to deliberate to see if you can reach an [sic] unanimous verdict." *Id.*

Later, the jury sent a second question to the trial court. The second question was, "Are we supposed to take into account the opening statements and closing statements made by both parties? Specifically, that we do not have to convict Chris of Carrying A Handgun without a License, even though he admitted to having the gun at some point." *Id.* The trial court again consulted with the attorneys, and it informed the jury that it "should review the Court's instructions and continue to deliberate." *Id.*

The jury ultimately found Davis not guilty of Counts I-III and guilty of Count IV, possession of a handgun without a license (Part I), a class A misdemeanor. Later, the trial court held a bench trial and found Davis guilty of possession of a handgun without a license (Part II), a class C felony.² The trial court sentenced Davis to six years, with three years to be served on community corrections home detention and three years suspended.

DECISION

Davis contends that the trial court abused its discretion in denying his motion for mistrial after the prosecutor stated on rebuttal that a felon cannot carry a handgun. Davis argues that the prosecutor's statement constitutes prosecutorial misconduct that placed him in grave peril by directing the jury away from its consideration of whether the State proved the elements of carrying a handgun without a license. He further argues that the grave peril is shown by the jury's questions to the court during deliberations.

"A mistrial is an extreme remedy warranted only when no other curative measure will rectify the situation." *Harris v. State*, 824 N.E.2d 432, 439 (Ind. Ct. App. 2005). The grant of a mistrial is a determination within the trial court's discretion, and we will reverse only for an abuse of that discretion. *Id.* We give great deference to the trial court's decision, as it is in the best position to gauge the circumstances and the probable impact on the jury. *Id.*

² In the Part II, the trial court enhanced the conviction to a class C felony after finding that Davis had previously been convicted of domestic battery. *See* I.C. § 35-47-2-1(b) (2010).

When a claim of prosecutorial misconduct is raised, the reviewing court “first determines whether misconduct occurred, and if so whether it had a probable persuasive effect on the jury.” *Ritchie v. State*, 809 N.E.2d 258, 268 (Ind. 2004), *cert. denied*, 546 U.S. 828 (2005). “Although often phrased in terms of ‘grave peril,’ a claim of improper argument to the jury is measured by the probable persuasive effect of any misconduct on the jury’s decision and whether there were repeated instances of misconduct which would evidence a deliberate attempt to improperly prejudice the defendant.” *Id.* at 269.

Here, there is no doubt that the prosecutor should not have made the challenged statement. However, the statement consists of two sentences in a two-day trial, and we question whether the statement rises to the level of a deliberate attempt to mislead the jury. However, assuming without deciding that the statement is misconduct, we will determine whether the statement had a persuasive effect upon the jury.

In order to prove the offense of carrying a handgun without a license, the State was required to show only that Davis was in possession of a handgun in a place other than his dwelling, property, or fixed place of business. *See Harris v. State*, 716 N.E.2d 406, 411 (Ind. 1999) (citing I.C. § 35-47-2-1).³ Once the State proved such possession, the burden shifted to Davis to “establish that he possessed a valid license.” *See id.* There is no question that the State established that Davis possessed the handgun, and Davis conceded both that the State met its burden and that he failed to meet his burden and

³ The statute has been amended, effective on July 1, 2011. *See* P.L. 164-2011, Sec. 1. The amended statute does not apply in this case.

show that he possessed a valid license. Indeed, the crux of defense counsel's final argument was that the jury should ignore the evidence against his client. The possible persuasive effect of the deputy prosecutor's rebuttal statement was negated by the undisputed evidence and Davis's concessions to the evidence.

We have held that the trial court's instructions are presumed to cure any improper statements made during trial. *See Guy v. State*, 755 N.E.2d 248, 258 (Ind. Ct. App. 2001). Here, in Final Instruction No. 8, the trial court instructed the jury that Davis's admission that he was a felon was "received solely on the issue of [Davis's] truthfulness. This evidence is to be considered by you only for the limited purpose for which it was received. It should not be considered by you as any evidence that [Davis] committed the crimes charged in this case." (App. 161). The court also instructed the jury in Final Instruction No. 9 that:

The unsworn statements or comments of counsel on either side of the case should not be considered as evidence in the case. It is your duty to determine the facts from the testimony and evidence admitted by the Court and given in your presence, and you should disregard any and all information that you may derive from any other source.

(App. 162). The court also instructed the jury on the elements of the offense. We conclude that these instructions cured any ills that the deputy prosecutor's statement might have caused.

Davis argues that the jury's questions to the trial court show that the jury possibly was confused or influenced by the deputy prosecutor's statement. He maintains that the

first question indicates that the jury was inclined to acquit him and the second question shows that they were possibly misled by the deputy prosecutor's rebuttal statement into convicting him on the wrong basis. However, as noted above, the second question asked, "Are we supposed to take into account the opening statements and closing statements made by both parties? *Specifically, that we do not have to convict Chris of Carrying a Handgun without a license, even though he admitted to having the gun at some point.*" (Tr. 397) (emphasis added). Although the first sentence uses the plural and refers to opening statements, it is clear from the use of the word "specifically" and the words that follow in the second sentence that the jury is referring to defense counsel's closing argument and not the deputy prosecutor's rebuttal statement.

Given the undisputed evidence, the concessions by the defense, and the court's jury instructions, we conclude that the deputy prosecutor's isolated and quickly corrected rebuttal statement⁴ did not place Davis in grave peril to which he should not have been subjected. Stated differently, the deputy prosecutor's rebuttal statement did not persuade the jury to convict Davis for the wrong reason.

Affirmed.

FRIEDLANDER, J., and VAIDIK, J., concur.

⁴ As we note in our statement of the facts, the deputy prosecutor followed the rebuttal statement with a statement of the proper elements of the offense.