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IN THE COURT OF APPEALS OF INDIANA

MICHAEL SHANE BRAMLEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 80A05-0602-CR-74
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPTON CIRCUIT COURT
The Honorable Thomas R. Lett, Judge
Cause No. 80C01-0402-MR-38

December 12, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Michael Shane Bramley appeals his conviction for Felony Murder.[1] Specifically, Bramley contends that a new trial is warranted because (1) the trial court abused its discretion when it admitted his allegedly involuntary confession into evidence at trial, and (2) the trial court abused its discretion when it denied Bramley's motion for a mistrial after the prosecutor made an improper comment regarding the admissibility of his confession. Finding no error, we affirm the judgment of the trial court.

FACTS[2]

Shortly after midnight on December 27, 2003, Tipton City Police Officers Steven Johnson and Jeff Stout were dispatched to 410 South Independence Street in Tipton after reports of a gunshot wound at that residence. After arriving at the scene, the officers found Morris Moody upstairs in the house with a fatal gunshot wound to his head.

On January 20, 2004, the Indiana State Police received information from Heather Bradley regarding the murder. Bradley provided the officers with the names of three suspects she believed were connected to the murder. In response to that information, Detective Tony Frawley interviewed one of the individuals, Ethan Pennington, three times between January 20, 2004, and February 2, 2004.

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[1] Ind. Code § 35-42-1-1(2).

[2] We heard oral argument in Indianapolis on November 15, 2006. We commend counsel for their excellent written and oral presentations, and we thank the Carmel High School students who attended the argument for their presence and respectful demeanor.

On February 5, 2004, after receiving additional information from Pennington that implicated Bramley, police secured a search warrant for Bramley's apartment in Hamilton County. When the search warrant was executed, Bramley was awakened by a bullhorn after he had taken Xanax, used marijuana, and slept for one to two hours. While police searched his apartment, Bramley's friend Jeff Watson approached them and told the officers that he had information for them about Bramley. Hamilton County Sheriff William Clifford and Tipton City Police Officer Kevin Stiner went with Watson to his home where Watson gave them a black Millennium .40-caliber handgun that Bramley had given to him a few weeks earlier. After executing the search warrant, the police arrested Bramley. They also arrested Pennington and Jason Roudebush after conducting separate searches on their homes.

Bramley was advised of his Miranda[3] rights immediately after his arrest. On the way to the Hamilton County Jail, Hamilton County Sheriff's Department Detective Kevin Jowitt told Bramley that there were other suspects in this case and that the police only had "one apple" to give. Tr. 1217. Detective Jowitt testified at trial that the apple in his analogy represented a plea deal a defendant could get if he cooperated with the police before the other suspects. Id.

While being videotaped, Bramley was advised of his Miranda rights at the police station, signed a form entitled "Interrogation: Advice of Rights," and gave a statement to the police. Appellant's App. p. 346. In the videotaped statement, Bramley told Detectives Jowitt, Frawley, and Joe Osborn that on the night of the murder, he came to Tipton with

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

Pennington and Roudebush with the intent to rob Moody. During the first robbery attempt, Pennington stayed in the vehicle while Bramley and Roudebush approached Moody as he exited his vehicle, but Moody escaped and ran inside his house. Several people from inside the house came outside and confronted Bramley and Roudebush, causing the men to leave the scene temporarily. Later that night, Bramley and Roudebush decided to enter the house and make another attempt to rob Moody. The men entered the house and Roudebush stayed downstairs while Bramley entered Moody's room on the second floor. Bramley confronted Moody with a handgun and a struggle ensued. The gun accidentally discharged, and the bullet hit Moody in the head and killed him. Bramley told police that he later gave the handgun to a friend in Westfield named Jeff. Tests conducted by the Indiana State Police Department laboratory confirmed that a bullet retrieved during Moody's autopsy and a casing found at the scene came from the gun Jeff Watson gave the police while they were searching Bramley's house.

On February 10, 2004, Bramley was charged with felony murder and conspiracy to commit robbery. On December 8, 2004, Bramley filed a motion to suppress his confession. Bramley filed an amended motion to suppress on February 9, 2005, arguing that the police had used improper interrogation techniques. Following a hearing on February 11, 2005, the trial court denied the motion. Bramley filed a request for certification of the order for interlocutory appeal, which was granted by the trial court on February 14, 2005. On March 30, 2005, we issued an order denying Bramley's motion to accept the interlocutory appeal. Id. at 73.

A jury trial began on October 3, 2005, and lasted eight days. During trial, Bramley's counsel, Brent Dechert, objected to the admissibility of Bramley's confession and made a brief argument to the judge with the jury present:

> Judge, I'd renew my motion on the basis that any statement provided by my client was produced after coercion, unethical actions by the police department, forced [sic]. That my client did not freely and voluntarily given [sic] as a result of the coercion, the promises of leniency made by Captain Jowitt here . . . .

Tr. p. 1209. The trial court overruled the objection, and after some additional arguments, the State responded:

> Your Honor, may I also make a point that I want it to be clear for the jury that Mr. Dechert's assertions that unethical conduct, promises of leniency, coercion, that a Motion to Suppress has already been held and the Court has already ruled in regard to that and found none of those things existed.

Id. at 1210. The trial court excused the jury, and Dechert moved for a mistrial. The State also moved for a mistrial based on Dechert's comments about the police officers' "unethical actions." Id. at 1209. The trial court found that "each comment cancels each other out" and denied both requests. Id. at 1213.

On October 12, 2005, the jury found Bramley guilty on the felony murder and conspiracy to commit robbery charges. On November 9, 2005, the trial court sentenced Bramley to fifty-five years for the felony murder conviction and vacated the conviction for conspiracy to commit robbery. Bramley now appeals.

DISCUSSION AND DECISION

I. Admissibility of Bramley's Statement

Bramley argues that the trial court erred when it admitted his confession into evidence because it was involuntary. Specifically, Bramley contends that the police made threats and promises of leniency to induce his confession and that the improper interrogation tactics overcame his free will and turned a voluntary interview into an involuntary confession.

Although Bramley originally challenged the admission of his confession into evidence through a motion to suppress, he appeals following a completed trial and, thus, challenges the admission of such evidence at trial. Miller v. State, 846 N.E.2d 1077, 1080 (Ind. Ct. App. 2006), trans. denied. Therefore, the issue is appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial. Washington v. State, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). Our standard of review on the admissibility of evidence is essentially the same whether the challenge is made by a pretrial motion to suppress or by a trial objection. Ackerman v. State, 774 N.E.2d 970, 974-75 (Ind. Ct. App. 2002). We do not reweigh the evidence and we consider conflicting evidence in a light most favorable to the trial court's ruling. Collins v. State, 822 N.E.2d 214, 218 (Ind. Ct. App. 2005), trans. denied

When a defendant challenges the admissibility of his statement, the State must prove beyond a reasonable doubt that the defendant voluntarily waived his rights and that his confession was given voluntarily. Miller v. State, 770 N.E.2d 763, 767 (Ind. 2002). When a defendant makes a voluntariness challenge, the decision to admit the statement is left to the sound discretion of the trial court. Horan v. State, 682 N.E.2d 502, 509 (Ind. 1997). A trial court's finding of voluntariness will be upheld if the record discloses substantial evidence of

probative value that supports the trial court's decision. Kahlenbeck v. State, 719 N.E.2d 1213, 1216 (Ind. 1999). We will not reweigh the evidence, and conflicting evidence is viewed in a light most favorable to the trial court's ruling.[4] Haak v. State, 695 N.E.2d 944, 948 (Ind. 1998).

The voluntariness of a statement is determined by examining the totality of the circumstances surrounding the interrogation. Clark, 808 N.E.2d at 1191. Relevant factors include the length, location, and continuity of the interrogation, and the maturity, education, physical condition, and mental health of the defendant. Id. In making its determination, the trial court weighs the evidence to ensure that a confession was not obtained "through inducement, violence, threats or other improper influences so as to overcome the free will of the accused." Ellis v. State, 707 N.E.2d 797, 801 (Ind. 1999). A confession is inadmissible if it is obtained by promises of mitigation or immunity, but vague and indefinite statements by the police that it would be in a defendant's best interest if he cooperated do not render a subsequent confession inadmissible. Clark, 808 N.E.2d at 1191; Turpin v. State, 400 N.E.2d 1119, 1121 (Ind. 1980) (holding that police officers' vague statements that they would "[see] what they could do" for the accused did not render the confession inadmissible). Where a promise of leniency stems from a defendant's specific request for leniency as a precondition

[4] As precedent instructs, we will show deference to the trial court's ruling regarding the voluntariness of Bramley's confession. However, as the State conceded at oral argument, the sole evidence presented at the suppression hearing was Detective Jowitt's preparatory testimony and the videotape of Bramley's Miranda rights waiver and subsequent confession. Historically, the rationale for this deferential standard of review stemmed from the fact that the live evidence was only presented to the trial court.

for making a statement, the voluntariness of the statement is not induced by misconduct. Bivins v. State, 642 N.E.2d 928, 940-41 (Ind. 1994).

Bramley directs us to three statements that the detectives made that he contends amount to promises of leniency and threats and render his confession involuntary. First, Bramley directs us to an analogy Detective Jowitt used while transporting him to the Hamilton Count Jail. Detective Jowitt told Bramley that there were three suspects and only one apple and that "[o]ne person generally gets to eat the whole apple." Appellant's App. p. 480. Detective Jowitt testified at trial that the apple in the analogy represented a plea deal a defendant could get if he cooperated with the police before the other suspects did. Tr. p. 75-77, 93-94.

Bramley next directs us a statement Detective Jowitt made during the interrogation:

> And you don't want other people giving accounts of Michael Shane Bramley because you don't know what they're saying and you don't know . . . like I said you don't know the spin that they're putting on it. The spin can be real important. Ok? 'Cause that can be the difference between Michael Shane Bramley is . . . a cold hearted ruthless, dangerous, psychopathic, you know yada, yada, yada, or just hey, something happened up there and it didn't really go down like it was supposed to and there was . . . a problem or there was a mistake or there was an accident or it didn't happen quite the way it maybe appeared just by looking at the surface facts of it, okay?

Appellant's App. p. 362-63.

Finally, Bramley highlights statements that the detectives made that he claims implied that he would receive a lesser sentence if he testified that Moody's death was an accident. Typical examples of the detectives' statements are: "I sure wouldn't want to be put in the situation where someone else is putting stuff down on me that wasn't quite the way it

happened," id. at 363, and "[the difference between intentional murder and an accident] is just different. Worse thing in the world [is intentional murder]," id. at 377. The detectives focused on the differences between an accidental and an intentional killing and emphasized the benefits that a suspect could reap if he tells his side of the story because the other suspects cannot adversely fill in the "gray parts" of the crime:

> Detective Jowitt: You hear people getting X sentence for this and Y sentence for exactly the same thing and there can be huge differences and it's cause of the gray parts. . . . It can make a huge difference. . . . Could matter to the prosecutor [and it could matter to the court].[5]

Id. at 381, 389.

The heart of Bramley's argument is that he "took the apple but received no leniency." Appellant's Br. p. 18. After reviewing the record, we find that Bramley played the "prisoner's dilemma"[6] game and lost. The classic dilemma is described as follows:

> Two prisoners, unable to confer with one another, must decide whether to take the prosecutor's offer: confess, inculpate the other, and serve a year in jail, or keep silent and serve five years. If the prisoners could make a (binding) bargain with each other, they would keep silent and both would go free. But they can't communicate, and each fears that the other will talk. So both confess.

Page v. United States, 884 F.2d 300, 301 (7th Cir. 1989).

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[5] Bramley claims that the phrase "and it could matter to the court" can be heard on the interrogation audiotape, State's Ex. 2, but that it was not transcribed in the interrogation record. The State does not dispute this claim.

[6] The term "prisoner's dilemma" is generally attributed to the Princeton Mathematics Professor and RAND Corporation consultant Albert Tucker. Tucker coined the term to describe the game created in 1950 by two other RAND Corporation consultants, Merrill Flood and Melvin Dresher, and posed a challenge to traditional game theory. Russell L. Christopher, The Prosecutor's Dilemma: Bargains and Punishments, 72 Fordham L. Rev. 93, 168 n.25 (2003).

Here, there were two other suspects in Moody's murder and Detective Jowitt tried to explain to Bramley, by using the apple analogy and the "grey parts" comment, that the other two suspects could wrongly implicate Bramley if he did not tell the truth about his role in the crime. While Bramley may have lost the prisoner's dilemma game, Detective Jowitt's comments do not rise to the level of specific promises of leniency or threats that have previously been held to render a confession involuntary. See 2 Wayne LaFave et al., Criminal Procedure § 6.2(c) at 453-54 (2d ed. 1999) (nationwide examples of threats or specific promises that have rendered a confession involuntary include a threat to take a defendant's wife into custody; a threat that defendant could lose her welfare payments and custody of her children; a promise of nonprosecution; a promise to drop some of the charges; a promise of medical treatment; and a promise of a certain reduction in the punishment the defendant may receive); see also Pierce v. State, 761 N.E.2d 821, 824 (Ind. 2002) (noting that police statements that express a desire that the suspect cooperate and explain the crimes and penalties that are possible consequences are not specific enough to constitute either promises or threats). Because Detective Jowitt's comments do not rise to the level of threats or specific promises, we conclude that the trial court did not abuse its discretion when it admitted Bramley's confession into evidence.

II. Motion for Mistrial

Bramley argues that the trial court abused its discretion when it denied his motion for a mistrial after the prosecutor made a comment that Bramley contends was improper. Specifically, Bramley argues that the prosecutor's comment informed the jury that the trial court had already found his confession to be admissible, thereby rendering a portion of his trial argument moot.

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). The determination of whether to grant a mistrial is within the trial court's discretion, and we will reverse only for an abuse of that discretion. Schlomer v. State, 580 N.E.2d 950, 955 (Ind. 1991). An abuse of discretion has occurred if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the trial court. Gibson v. State, 733 N.E.2d 945, 951 (Ind. Ct. App. 2000). We afford great deference to the trial court's decision because it is in the best position to gauge the circumstances and the probable impact on the jury. Schlomer, 580 N.E.2d at 955. When determining whether a mistrial is warranted, we must consider whether the defendant was placed in a position of grave peril to which he should not have been subjected. Id. Generally, a timely and accurate admonition is an adequate curative measure for any prejudice that results from an improper comment made by a prosecutor. Id. at 956.

When reviewing a claim of prosecutorial misconduct, we must first consider whether the prosecutor engaged in misconduct. Williams v. State, 724 N.E.2d 1070, 1080 (Ind.

2000). We must then consider whether the alleged misconduct placed the defendant in a position of grave peril to which he should not have been subjected. Id. In judging the propriety of the prosecutor's remarks, we consider the statement in the context of the argument as whole. Hollowell v. State, 707 N.E.2d 1014, 1024 (Ind. Ct. App. 1999). A prosecutor is entitled to respond to allegations and inferences raised by the defense even if the prosecutor's response would otherwise be objectionable. Lopez v. State, 527 N.E.2d 1119, 1125 (Ind. 1988).

During trial, Bramley's counsel objected to the admissibility of Bramley's confession and made a brief argument to the judge with the jury present:

> Judge, I'd renew my motion on the basis that any statement provided by my client was produced after coercion, unethical actions by the police department, forced [sic]. That my client did not freely and voluntarily given [sic] as a result of the coercion, the promises of leniency made by Captain Jowitt here . . . .

Tr. p. 1209. The trial court overruled the objection, and after some additional arguments, the State responded:

> Your Honor, may I also make a point that I want it to be clear for the jury that Mr. Dechert's assertions that unethical conduct, promises of leniency, coercion, that a Motion to Suppress has already been held and the Court has already ruled in regard to that and found none of those things existed.

Id. at 1210. The trial court excused the jury and Dechert moved for a mistrial, arguing that the State's comments invaded the province of the jury because the jury is able to independently determine whether a statement was either given freely and voluntarily or coerced through promises and threats. The State also moved for a mistrial based on

Dechert's comments about the police officers' unethical conduct. The trial court found that "each comment cancels each other out" and denied both requests. Id. at 1213.

Notwithstanding Bramley's potential waiver of this argument,[7] the trial court did not err by refusing to grant Bramley's request for a mistrial because Bramley's counsel invited the prosecutor's response with his initial comment. In front of the jury, Bramley's counsel accused the police officers of "coercion [and] unethical actions" in obtaining Bramley's confession. The prosecutor directly responded to Bramley's comment when he remarked that the trial court had already ruled on the admissibility of Bramley's confession. See Lopez, 527 N.E.2d at 1125 (holding that a prosecutor is entitled to respond to allegations and inferences raised by the defense even if the prosecutor's response would otherwise be objectionable). Furthermore, the prosecutor's comment, which began "[y]our honor . . . ," was directed at the trial court and was not made directly to the jury during the presentation of evidence. Id. at 1210. Therefore, we find that the trial court did not abuse its discretion when it denied Bramley's motion for a mistrial.[8]

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[7] Initially, the State argues that Bramley waived this argument on appeal because he did not request an admonishment at trial: "[w]hen facing prosecutorial misconduct, the defendant is required to object to the misconduct and request an admonishment." Kirby, 774 N.E.2d at 534 n.5 (emphasis added). It is important to note, however, that if the defendant expressly declined an admonishment because he believed that such a request would only emphasize the reference, and the defendant instead sought a different remedy—even the drastic remedy of requesting a mistrial—we decline to decide the case on the basis of waiver. See, e.g., id.

[8] As an aside, we note that, after denying Bramley's motion for a mistrial, the trial court could have admonished the jury by informing it that the jury could made a factual determination regarding the voluntariness of Bramley's confession. The trial court's finding that the two comments "cancel[] each other out", tr. p. 1213, brings to mind the old adage "two wrongs don't make a right," which the trial court should seek to avoid in the future.

The judgment of the trial court is affirmed.

NAJAM, J., and CRONE, J., concur.