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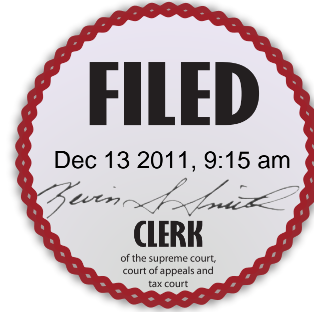

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IN THE
COURT OF APPEALS OF INDIANA

ROBERT E. POSEY,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 84A01-1103-CR-97
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable David R. Bolk, Judge
Cause No. 84D03-0907-FA-2166

December 13, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Robert E. Posey ("Posey") was convicted of Class A felony child molesting in Vigo Superior Court. Posey appeals and presents two issues, which we restate as: (1) whether the trial court erred in admitting evidence that was not timely disclosed to the defense, and (2) whether the trial court erred in denying Posey's motion for a mistrial.

We affirm.

Facts and Procedural History

At the time relevant to this appeal, Posey attended a church in Terre Haute, Indiana, and drove parishioners to and from church using a van owned by the church. On June 17, 2009, Posey drove thirteen-year-old K.F. and her family to and from the church. On the drive home, Posey told K.F. that there was an activity planned for teens at the church the following day and that she should call him if she wanted to attend. The following day, K.F. obtained her father's permission to attend the church event and called Posey to ask for a ride to the church.

Although church rules prohibited using personal vehicles to transport people for church functions and also prohibited a single member of one sex to transport a single member of the opposite sex to and from church functions, Posey drove his personal vehicle to K.F.'s house to pick her up. When K.F. got in Posey's vehicle, he did not take her to the church, but instead drove her to a horse stable. When K.F. asked why Posey had not driven to the church, he explained that he needed to pick up some items from his home. Posey then drove to his home. When Posey went inside, K.F stood at the door to wait for him. Posey then invited K.F. inside while he obtained the items he needed. Posey told K.F. to sit on the couch and play a video game while he was busy. Posey soon

joined K.F. on the couch and showed her how to play the video game. As he did, he put his arm around the girl and began to kiss her. Posey then pulled K.F. close to him and took her into his bedroom.

In the bedroom, K.F. attempted to run away, but tripped and fell onto the bed. Posey got on top of K.F. and removed his and K.F.'s clothing. Posey then briefly left the bedroom and went down the hallway to retrieve something, which K.F. thought was a condom. When he returned to the bedroom, he stopped K.F. from putting her clothes back on and began kissing her on her body, including her breasts and genital area. Posey then put a condom on and had sexual intercourse with K.F. while she physically resisted him. When Posey was finished, he gave K.F. a towel and told her to clean herself. K.F., who was in pain and bleeding from her vagina, ran into the bathroom and put her clothes back on. Posey then drove K.F. back home and told her not to tell anyone about what he had done to her.

When K.F. got home, she took a bath, placed her clothes in the washer, and fell asleep. K.F. eventually told one of her friends what had happened, and that friend telephoned K.F.'s father and told him that he needed to speak with K.F. When her father questioned her, K.F. told him what had happened. K.F.'s father then consulted his parents and his ex-wife, K.F.'s mother. At one point, Posey called K.F.'s father and asked him not to bring criminal charges. The following morning, K.F.'s father took her to the hospital. After speaking with K.F. and her father, a nurse at the hospital contacted the police. The police then spoke with K.F. and her father and collected K.F.'s clothing. After obtaining a warrant to search Posey's home, the police took a towel, the bed sheets,

and a comforter from Posey's home. The police also obtained blood samples from both K.F. and Posey.

Posey was interviewed by the police on June 26, 2009. During that interview, Posey told the police that K.F.'s stepmother had asked him to give K.F. a ride, but that he had refused because it was against church rules. Posey claimed that K.F. came to his house on her own and that he told her that she should not be there. Posey claimed that he drove K.F. home after she used his bathroom.

On July 20, 2009, the State charged Posey with one count of Class A felony child molesting. On July 21, 2009, the police again interviewed Posey. At trial, the police claimed that, before the recording equipment could be activated, Posey admitted that he had lied during the first interview and that K.F. had kissed him while they sat on his bed. Posey denied this and claimed that he had always maintained that his original statement was correct.

A jury trial commenced on November 30, 2010, and the jury found Posey guilty as charged on December 2, 2010. At a sentencing hearing held on February 18, 2011, the trial court sentenced Posey to thirty-five years incarceration. Posey now appeals.

I. Admission of Late-Disclosed Evidence

Posey first claims that the trial court erred in admitting evidence that was not disclosed to the defense until the day before his trial. Decisions regarding the admission of evidence rest within the sound discretion of the trial court, and we review the court's decision only for an abuse of that discretion. Rogers v. State, 897 N.E.2d 955, 959 (Ind. Ct. App. 2008), trans. denied.

Posey specifically refers to laboratory evidence which indicated that both blood and K.F.'s DNA were found on a cutting obtained from the sheet found in Posey's home. Posey claims that he was unaware until the day before trial that K.F.'s DNA was located on the same cutting from the sheet that also included material that presumptively tested as blood. That is, Posey does not deny that he was aware well before trial that the sheet contained a stain that presumptively tested positive as blood. Indeed, he admits that the State timely provided him with the Certificate of Analysis from the Indiana State Police Laboratory which clearly states that "[p]resumptive testing indicated the possible presence of blood on the sheet contained in item 2." Ex. Vol., p. 55. But the Certificate of Analysis further states that "[n]o further serological testing was performed in order to preserve the sample for DNA analysis." Id.

Nor does Posey deny that he was aware well before trial that a cutting from the sheet contained K.F.'s DNA. Again, the Certificate of Analysis states that:

> The DNA profile obtained from the cutting from the sheet (item 2C1b contained in item 2C1) demonstrated the presence of a mixture with a major and a minor profile. In the absence of an identical twin, [K.F.] (item 1A) is the source of the major DNA profile to a reasonable degree of scientific certainty. No conclusion can be drawn from the remaining alleles.

Id. Posey's only claim is that he was not made aware until the day before trial that the DNA was obtained from the same cutting of the sheet that contained the blood stain. Posey claims that this new revelation prejudiced his defense and that the trial court should therefore either have suppressed the evidence or granted his motion for a continuance.

Posey insists that the presence of K.F.'s DNA on the sheet was consistent with his theory that K.F. had been in his apartment and used the restroom. But he claims that evidence linking this DNA to the bloodstain unfairly prejudiced him. We are unpersuaded. Posey was aware all along that the sheet contained a possible blood stain and that K.F.'s DNA was located on the sheet. That K.F.'s DNA might be located on the same part of the sheet that contained the presumptive blood stain was thus always possible. And Posey has failed to demonstrate how evidence that the blood stain and K.F.'s DNA were on the same portion of the sheet unfairly prejudiced his defense. In fact, at trial Posey effectively cross-examined the State's expert witness regarding the fact that the presumptive test for blood was not confirmation that the stain was blood and that the stain could have come from other sources.

We also are unpersuaded by Posey's claim that he should have been granted a continuance to further test the items. A ruling on a non-statutory[1] motion for a continuance is committed to the sound discretion of the trial court, and we will reverse the trial court's decision only upon a showing of an abuse of that discretion and resultant prejudice. Lundquist v. State, 834 N.E.2d 1061, 1066 (Ind. Ct. App. 2005).

Posey does not explain what tests he would have performed had he been granted a continuance. Posey had long been aware that both a stain that tested presumptively positive for blood and K.F.'s DNA had been located on the sheet. Despite this

[1] Indiana Code section 35-36-7-1 (2004) establishes certain procedures a defendant must comply with when a motion for a continuance is filed because of: (1) the absence of evidence, (2) the absence of a witness, or (3) the illness of the defendant. Lundquist v. State, 834 N.E.2d 1061, 1066 n.4 (Ind. Ct. App. 2005). Posey's motion obviously fell outside these parameters.

knowledge, he never sought to have an independent expert retest the sheet. Posey fails to explain how knowledge that the DNA was located on the same portion of the sheet as the presumptive blood stain calls into question the laboratory results in such a way that would require him to have the materials retested. Nor does Posey claim that the State's actions in this instance were intentional or in bad faith.

Under these particular facts and circumstances, we cannot say that the trial court abused its discretion in admitting the evidence from the sheet or in denying Posey's motion for a continuance.

II. Motion for Mistrial

Posey next claims that the trial court denied his motion for a mistrial which was made after the State made an improper comment in the presence of the jury. When Posey objected to the admission of the evidence from the bed sheet, the prosecuting attorney requested that the parties approach the bench. Posey's counsel responded that he was not yet through with his objection, and continued to argue the grounds for his objection in the presence of the jury. When Posey's counsel was finished with his objection, the prosecuting attorney stated to the trial court, "but the sheet has been available, it's been in the property locker room, . . . it shows up on the evidence sheet, all through the course of this case, if counsel or the Defendant wanted to have any further testing." Tr. p. 327. Shortly after this statement, the trial court had the jury removed from the courtroom and heard further argument. Only then did Posey object to the prosecutor's earlier comment regarding the possibility that the defense could have tested the sheet earlier and request a

mistrial. The trial court denied the motion for a mistrial. But when the jury was brought back into the courtroom the trial judge admonished it as follows:

> Ladies and gentlemen of the jury, during argument by counsel, there was a suggestion that the Defendant could have secured and tested the items under discussion. As I indicated to you in the Court's preliminary instructions, the Defendant is not required to present any evidence to prove his innocence, or to prove or explain anything. You are to disregard the comments of counsel. It's not to be discussed by you in any way in the decision that you render, and I'm admonishing you not to discuss it or to consider it, those comments, in any fashion, during your deliberations in this matter.

Tr. pp. 348-49.

We would be within our discretion to hold that Posey's failure to immediately object to the State's comments resulted in waiver of this issue for appeal. See Owens v. State, 937 N.E.2d 880, 893 (Ind. Ct. App. 2010) (concluding that defendant failed to preserve appellate argument regarding prosecutor's comments by failing to contemporaneously object), trans. denied. But even if we considered Posey's claim on the merits, he would not prevail.

Our supreme court has long held that:

> Mistrial is an extreme remedy in a criminal case which should be granted only when nothing else can rectify a situation. The trial court has discretion in determining whether to grant a mistrial, and the decision is afforded great deference on appeal because the trial court is in the best position to gauge the surrounding circumstances of the event and its impact on the jury. To prevail on appeal, appellant must show that he was so prejudiced that he was placed in a position of grave peril to which he should not have been subjected. Whether appellant has been subjected to "great peril" so as to be entitled to a mistrial is determined by the probable persuasive effect of the testimony on the jury's decision, and such determination is to be made by the trial judge.

Schlomer v. State, 580 N.E.2d 950, 955 (Ind. 1991). Moreover, "[u]sually an admonishment to the jury is considered adequately curative and will support the trial judge in his denial of a motion for mistrial." Id. at 956.

Here, even if we consider the prosecutor's comments to have been an attempt to improperly shift the burden of proof to Posey, the comments were fleeting. More importantly, the trial court quickly admonished the jury that Posey did not have a burden to prove his innocence. The trial court also instructed the jury not to consider the prosecutor's comments in their deliberations in any way. We therefore conclude that the trial court was well within its discretion to deny Posey's motion for a mistrial. See Wright v. State, 690 N.E.2d 1098, 1112 (Ind. 1997) (affirming trial court's denial of defendant's motion for mistrial based on prosecutor's suggestion during closing argument that defendant had the burden of proof where trial court properly instructed jury regarding the burden of proof); Schlomer, 580 N.E.2d at 956 (concluding that defendant had not demonstrated any prejudice by improper testimony where trial court immediately admonished the jury to disregard such evidence).

Conclusion

The trial court did not abuse its discretion in admitting the evidence regarding the possible presence of blood on that portion of the sheet where K.F.'s DNA was located, nor did the trial court abuse its discretion in denying Posey's motion for a continuance. And the trial court did not abuse its discretion in denying Posey's motion for a mistrial.

Affirmed.

BAILEY, J., and CRONE, J., concur.