

Case Summary

Juanita Hart appeals her convictions for criminal recklessness as a Class D felony, criminal recklessness as a Class A misdemeanor, and criminal mischief as a Class A misdemeanor. We affirm.

Issues

Hart raises two issues, which we restate as:

- I. whether the trial court abused its discretion when it denied Hart's request to make an offer of proof regarding an excluded defense witness; and
- II. whether the trial court abused its discretion by excluding a defense witness who was disclosed two days prior to the trial.

Facts

At approximately 9:00 p.m. on September 7, 2008, Officer Jason Ross of the Indianapolis Metropolitan Police Department received a dispatch to the 1200 block of Lemans Court in Indianapolis. Marquitta Hogan reported to Officer Ross that she had arrived at the apartment complex with her son and her mother, Lisa Roscoe, in Roscoe's GMC vehicle. Hogan was going to her cousin's apartment. Hogan walked onto the sidewalk, heard screeching tires, and saw Hart's Oldsmobile Intrigue driving toward her. Hart's vehicle struck Hogan, knocking her to the ground, and then Hart's vehicle ran over Hogan's legs. Hart then repeatedly drove her vehicle into Roscoe's GMC. Roscoe's GMC had damage on the driver's side of the vehicle, Hart's Oldsmobile had damage on both the front and rear of the vehicle, and Hogan had injuries to her leg and arm.

The State charged Hart with criminal recklessness as a Class D felony, criminal recklessness as a Class A misdemeanor, and criminal mischief as a Class A misdemeanor.¹ At the bench trial, Hart attempted to call Kenneth McGee as a witness. The trial court refused to allow McGee to testify because the case had been pending since September 2008, it had been set for trial on at least two prior occasions, and McGee was not added as a defense witness until two days before the bench trial. The trial court also refused to allow an offer of proof regarding McGee's testimony. Hart testified that she was in the parking lot to use McGee and Tina Caldwell's telephone. According to Hart, Hogan then began hitting Hart's vehicle with a baseball bat. Hart admitted in her testimony that she backed into Roscoe's vehicle with her car, but denied hitting Hogan.

The trial court did not find Hart's explanation credible and stated that Hart's "story does not make sense." Tr. p. 76. The trial court found that the "location of the vehicles, the damage to the vehicles, and the injuries to Ms. Hogan" convinced it beyond a reasonable doubt that the State had met its burden. *Id.* The trial court found Hart guilty as charged and sentenced Hart to an aggregate sentence of two years with 694 days suspended to probation.

Analysis

I. Offer of Proof

The first issue is whether the trial court abused its discretion when it refused to allow Hart to make an offer of proof regarding McGee's testimony. The purpose of an

¹ The State also charged Hart with battery as a Class C felony and domestic battery as a Class A misdemeanor, but those charges were dismissed prior to the trial.

offer of proof is to preserve for appeal the trial court's allegedly erroneous exclusion of evidence. Nelson v. State, 792 N.E.2d 588, 595 (Ind. Ct. App. 2003), trans. denied. The offer of proof can also aid the trial court in ruling on the objection. Id. As we noted in Nelson, “[w]e cannot very well require trial counsel to make an offer of proof to preserve error on appeal, while at the same time we allow the trial court to deny counsel the opportunity to make such a record.” Nelson, 792 N.E.2d at 594-595. In general, “a party has a right to make an offer of proof,” and “it is reversible error for a trial court to deny a party the opportunity to explain the substance, relevance, and admissibility of excluded evidence with an offer of proof.” Id. at 595.

The State concedes and we agree that the trial court's denial of Hart's right to make an offer of proof was error. However, such an error may be harmless. See id. Hart argues that McGee's testimony was “vital” to her defense because he was “the only witness who could corroborate Hart's testimony.” Appellant's Br. p. 11. Hart contends that “[t]rial testimony was conflicting as to who initiated the confrontation between the parties, and McGhee [sic] may well have been the only unrelated witness to testify as to the events that occurred prior to the arrival of police.” Id. Thus, Hart appears to argue that McGee's testimony would have corroborated her account that Hogan initiated the incident by hitting Hart's vehicle with a baseball bat.

We conclude that the trial court's error was harmless. McGee's testimony regarding the baseball bat merely would have been cumulative of Hart's own testimony. Hart admitted to backing into Roscoe's GMC with her vehicle, but she denied hitting Hogan with her vehicle. The trial court found that Hart's explanation of the events was

inconsistent with the physical evidence, which included damage to Roscoe's vehicle, damage to the front and back of Hart's vehicle, and injuries to Hogan. McGee's testimony regarding the baseball bat would not have explained the other inconsistencies in Hart's testimony. See Nelson, 792 N.E.2d at 596 (holding that, "even though the trial court abused its discretion when it limited Nelson's cross-examination and denied his request to make an offer of proof, the error was harmless because Fuller's testimony was mere surplusage").

II. Exclusion of Defense Witness

The next issue is whether the trial court abused its discretion when it excluded McGee's testimony. "The trial court has inherent discretionary power on the admission of evidence, and its decisions are reviewed only for an abuse of that discretion." Vasquez v. State, 868 N.E.2d 473, 476 (Ind. 2007). "Likewise, we leave to the trial court decisions regarding the orderly procedure of a trial." Id. "[W]here a trial court has made a decision regarding a violation or sanction, we will reverse only if there is clear error and resulting prejudice." Id.

"While wide discretion is given to the trial court in such matters as the course of proceedings, exclusion of evidence, and violations, in making its decisions, the trial court must give substantial weight to a defendant's constitutional rights, here the right to compulsory process under the Sixth Amendment to the U.S. Constitution and Art. 1, § 13 of the Indiana Constitution." Id. "The U.S. Supreme Court has made clear that, depending on the circumstances, excluding a witness may be appropriate or it may be unconstitutional." Id. (citing Taylor v. Illinois, 484 U.S. 400, 407-16, 108 S.Ct. 646,

652-56 (1988)). “Indiana jurisprudence recognizes a strong presumption to allow defense testimony, even of late-disclosed witnesses: ‘The most extreme sanction of witness exclusion should not be employed unless the defendant’s breach has been purposeful or intentional or unless substantial and irreparable prejudice would result to the State.’” Id. (quoting Wiseheart v. State, 491 N.E.2d 985, 991 (Ind. 1986)). Our supreme court has identified factors that are helpful in determining whether to exclude a witness:

- (i) when the parties first knew of the witness; (ii) the importance of the witness’s testimony; (iii) the prejudice resulting to the opposing party; (iv) the appropriateness of lesser remedies such as continuances; and (v) whether the opposing party would be unduly surprised and prejudiced by the inclusion of the witness’s testimony.

Id. (citing Williams v. State, 714 N.E.2d 644, 651 n.5 (Ind. 1999); Cook v. State, 675 N.E.2d 687, 691 n.3 (Ind. 1996)). Even if we find error in the trial court’s exclusion of a witness, we will deem such error harmless if its probable impact, in light of all of the evidence in the case, is sufficiently minor so as not to affect the defendant’s substantial rights. Williams, 714 N.E.2d at 652.

Even if the trial court erred by excluding McGee’s testimony, we conclude that any error was harmless. Again, McGee’s testimony merely would have been cumulative of Hart’s own testimony regarding Hogan’s use of a baseball bat on Hart’s vehicle. McGee’s testimony regarding the baseball bat would not have explained the other inconsistencies in Hart’s testimony. We conclude that the probable impact of the exclusion of McGee’s testimony, in light of all of the evidence in the case, is sufficiently minor so as not to affect Hart’s substantial rights. See, e.g., id. (“White’s testimony is

unlikely to have weighed appreciably in Williams' favor in light of the DNA and other evidence that connected him to the crime. Accordingly, we conclude that the exclusion of her testimony was harmless error.'').

Conclusion

We conclude that, although the trial court erred by denying Hart's request to make an offer of proof, the error was harmless. Additionally, even if the trial court erred by excluding McGee's testimony, any error was harmless. We affirm.

Affirmed.

MATHIAS, J., and BROWN, J., concur.