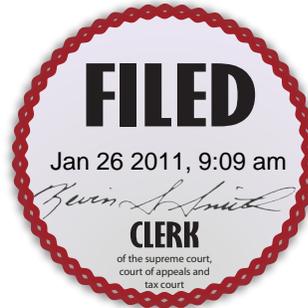


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

TEVIN REAVES,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 71A04-1005-CR-332

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Frese, Judge
Cause No. 71D03-0906-MR-17

January 26, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Tevin Reaves was convicted of murder and conspiracy to commit murder. On appeal, he contends that the trial court erred in denying his motion for mistrial after the victim's girlfriend cried on the witness stand when she viewed a photograph of the victim's corpse. He also contends that the trial court erred in excluding two belatedly disclosed alibi witnesses and in failing to hold a hearing on his motion to correct error regarding the recantation of one of the State's witnesses. We find no error with respect to these issues and therefore affirm Reaves's murder conviction, but we sua sponte vacate his conspiracy conviction and sentence on double jeopardy grounds.

Facts and Procedural History¹

The facts most favorable to the jury's verdict indicate that on the evening of May 19, 2009, Reaves told his girlfriend, Paige Shields, to take him to see his older brother, Henry "Hennessey" Bonds, near the intersection of Lincoln Way West and Sherman Avenue in South Bend. Reaves, who was carrying a .25 caliber semiautomatic pistol, told Shields that Bonds had "a job" for him. Tr. at 402.² Bonds, a drug dealer, often stayed in that neighborhood, as did another drug dealer, Courtney Rowell. Shields dropped Reaves off and went back to their apartment. Bonds told one of his neighbors "that if [he] was going to be

¹ We remind Reaves's counsel that an appellant's statement of facts "shall be stated in accordance with the standard of review appropriate to the judgment or order being appealed" and "shall be in narrative form and shall not be a witness by witness summary of the testimony." Ind. Appellate Rule 46(A)(6)(b)-(c).

² We direct the court reporter to Indiana Appellate Rule 28(A)(7) and Form App. R. 28-1, which specifies that the cover page of each transcript volume must indicate the pages it contains ("Pages _____ through _____").

around there tonight, watch what's going to happen." *Id.* at 460. Bonds "said that it didn't have anything to do with [Bonds]. It was going to be one of [Bonds's] young friends.... [S]omebody ha[s] to go." *Id.*

Reaves was out of ammunition because he had fired his pistol the previous day on Scott Street. At approximately 10:00 p.m., Reaves and Bonds purchased a box of fifty .25 caliber bullets from a Meijer store. This transaction was recorded on one of the store's surveillance cameras.

At approximately midnight, Rowell and his girlfriend, Tiffany Melton, arrived at their apartment at Lincoln Way and Sherman. Rowell opened the door, and Melton started walking upstairs. Reaves, who was wearing a sweatshirt with the hood up and talking on a cell phone, walked toward the building. Melton turned and saw Reaves charge at Rowell with his pistol drawn and heard him say, "Bitch ass n****r." *Id.* at 565. Reaves fired at least four shots at Rowell. One bullet struck Rowell in the chest, another in the top of his left shoulder, and a third in the top of his head. Rowell collapsed on the sidewalk and later died from his wounds.

Reaves abandoned his hooded sweatshirt and ran to a convenience store with Bonds, who was waiting nearby. Reaves called Shields and asked her to pick him up. When Shields arrived, Reaves got into the car and said, "I think I killed somebody." *Id.* at 409. Bonds also got into the car, and Shields dropped him off at his girlfriend's house. Bonds gave Reaves a box of ammunition, and Shields and Reaves went back to their apartment. Reaves told Shields that he and Bonds had "tried to rob somebody, and the guy they tried to rob was

trying to fight [Reaves] back and all [Reaves] thought was to shoot.” *Id.* at 416. He also told her that he had fired the pistol four or five times and shot the victim in the head and upper body. Reaves told Shields to get rid of the pistol and ammunition and said, “I got to get out of here.” *Id.* at 420. Shields sold the pistol and ammunition and took Reaves to the Gary Metro Station so that he could leave town. Shields burned the clothes that Reaves had worn the night of Rowell’s murder. Police recovered four .25 caliber shell casings from the murder scene and determined that they had been fired from the same gun as a shell casing that had been recovered on Scott Street. Reaves’s pistol was never recovered.

The State charged Reaves with murder, conspiracy to commit murder, felony murder, attempted robbery, and robbery. While in jail awaiting trial, Reaves told his cellmate that he had murdered Rowell by shooting him four times with a .25 caliber firearm. On March 12, 2010, a jury found Reaves guilty of murder and conspiracy to commit murder and not guilty of the remaining charges. On April 29, 2010, the trial court sentenced Reaves to concurrent terms of fifty-five years for murder and twenty years for conspiracy to commit murder. This appeal ensued.

Discussion and Decision

I. Denial of Motion for Mistrial

On direct examination of Melton, Rowell’s girlfriend, the prosecutor asked her to view a crime-scene photo, which had already been admitted without objection as State’s Exhibit 18. The photo depicts an unconscious Rowell with blood streaming out of his head onto the sidewalk. Melton said, “Oh, my God,” and, in the words of the court reporter, began

“to hysterically cry.” Tr. at 569. The trial court asked Melton to “get [herself] together” and then admonished the jury as follows:

Jury, I’m reminding you I told you that trials can have difficult times. I also told you that you are to evaluate the evidence. And you do that by logic, by using your common sense, and you don’t judge this case on emotion. I need you to go to the jury room for a few minutes.

Does any juror have a problem with doing what I just said?

Id. at 569-70. None of the jurors voiced a concern, and they exited the courtroom.

Reaves’s counsel moved for a mistrial. The court replied, “No, I’ve already instructed the jury. They said they could follow the law. Denied.” *Id.* at 570. The court scolded the prosecutor for using the photo, allowed Melton to collect herself, and brought the jury into the courtroom. The court said, “Jury, you remember my reminder just before you left and as you were leaving, and I said, hey, anybody here have any problem with following the instructions which is you judge the facts and the evidence and the law. Right? Okay? No problems anybody? Thank you.” *Id.* at 572-73. Melton then identified Rowell as the person in the photo, and the direct examination continued.

On appeal, Reaves purports to challenge the trial court’s denial of his motion for mistrial, but his meandering argument fails to mention the appropriate standard of review as required by Indiana Appellate Rule 46(A)(8)(b).³ We have stated that

a mistrial is an extreme remedy warranted only when no other curative measure will rectify the situation and whether to grant a motion for a mistrial is a matter committed to the sound discretion of the trial court. When

³ See Ind. Appellate Rule 46(A)(8)(b) (“The argument must include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues.”).

determining whether a mistrial is warranted, the court on review must consider whether the defendant was placed in a position of grave peril to which he should not have been subjected. The gravity of the peril is determined by the probable persuasive effect on the jury's decision.

DeBerry v. State, 659 N.E.2d 665, 669 (Ind. Ct. App. 1995) (citations omitted). A timely and accurate admonishment is presumed to cure any error. *Id.*

Here, the trial court issued two admonishments, and Reaves does not contend that they were either untimely or inaccurate.⁴ The jury was able to evaluate the evidence dispassionately, as indicated by its acquittal of Reaves on the robbery-related charges, and the evidence that Reaves shot Rowell was overwhelming. Under these circumstances, we cannot say that the trial court abused its discretion in denying Reaves's motion for mistrial.

II. Exclusion of Alibi Witnesses

Almost eight months after charges were filed, Reaves belatedly filed a notice of alibi defense that listed three witnesses: Benjamin Bonds, Yvonne Reaves, and Santoria Reaves.⁵ The prosecutor did not object to the witnesses as long as he was provided with their addresses and an opportunity to interview them before trial. By the time the trial began one month later, the prosecutor had been able to interview Benjamin Bonds and did not object to

⁴ Reaves complains that the trial court "did not poll the jury to determine the effect on them of the emotional outburst." Appellant's Br. at 9. As indicated above, the trial court polled the jury as a group, and Reaves cites no authority that individual polling is required. As for Reaves's contention that showing the photo to Melton and her ensuing outburst constituted an "evidentiary harpoon," *id.* at 6, we note that the photo had already been admitted without objection from Reaves and that the trial court admonished the jury not to judge the case on emotion.

⁵ Indiana Code Section 35-36-4-1 provides that a defendant's notice of alibi defense must be filed no later than twenty days prior to the omnibus date in a felony case. Indiana Code Section 35-36-8-1(a) provides that an omnibus date in a felony case "must be no earlier than forty-five (45) days and no later than seventy-five (75) days after the completion of the initial hearing, unless the prosecuting attorney and the defendant agree to a different date."

his testimony. The other two witnesses, however, had failed to attend an interview scheduled the week before trial. The prosecutor objected to their testimony, which the trial court excluded. In an offer to prove, Reaves stated that Yvonne Reaves would have testified that she picked him up at approximately 11:00 p.m. on the night of Rowell's murder and took him to Santoria's house, and Santoria would have testified that he spent the night there.

Reaves now contends that the trial court erred in excluding Yvonne and Santoria as alibi witnesses. Our standard of review is well settled:

The determination of whether to admit or exclude evidence is entrusted to the trial court and will only be reversed for an abuse of discretion. An abuse of discretion occurs when the trial court's action is clearly erroneous and against the logic and effect of the facts and circumstances before it.

Washington v. State, 840 N.E.2d 873, 880 (Ind. Ct. App. 2006) (citation omitted), *trans. denied*.

Indiana Code Section 35-36-4-3(b) provides that if a defendant fails to timely file his notice of alibi defense and "does not show good cause for his failure, then the court *shall* exclude evidence offered by the defendant to establish an alibi." (Emphasis added.) The determination of whether a defendant has established good cause is left to the trial court's discretion. *Washington*, 840 N.E.2d at 880. We agree with the State that Reaves "offered no cause, let alone good cause, to the trial court for his failure to timely file the notice, and he also fails to make any such demonstration on appeal." Appellee's Br. at 13 (citation omitted). Consequently, we find no abuse of discretion.

III. Denial of Hearing on Motion to Correct Error

At trial, Reaves's brother, Henry Bonds, testified that Reaves shot Rowell. At the sentencing hearing, Reaves moved to admit an unverified handwritten letter from Bonds, which reads in pertinent part as follows:

I was tolled [sic] to lie on my brother, as it would help myself, but I was lied to: By the State; Everything I said about what happened was made up, by me and the State. The State said that they would let me go, if I truned [sic] on my brother. So, I did it. The State did not release me. So now I dont [sic] want to help the State. I lied on or in my statement I didn't see or hear a thing it was all made up by the State.

Appellant's App. at 16. Reaves later filed a motion to correct error alleging that Bonds's letter constituted newly discovered evidence that would have affected the outcome of the trial. The trial court denied the motion without a hearing.

On appeal, Reaves does not specifically challenge the denial of his motion to correct error. Such a challenge would be meritless, given that a motion based upon evidence outside the record "shall be supported by affidavits showing the truth of the grounds set out in the motion and the affidavits shall be served with the motion." Ind. Trial Rule 59(H)(1). No affidavits were served with Reaves's motion.

Instead, Reaves challenges the trial court's failure to hold a hearing on the motion. This challenge is equally meritless because Reaves did not request a hearing, and Trial Rule 59 does not require one. Accordingly, we find no error.

IV. Double Jeopardy

Finally, although Reaves does not raise this claim, we conclude that his convictions and sentences for murder and conspiracy to commit murder violate double jeopardy

principles. “We raise this issue sua sponte because a double jeopardy violation, if shown, implicates fundamental rights.” *Smith v. State*, 881 N.E.2d 1040, 1047 (Ind. Ct. App. 2008).

“[A] defendant may be convicted of both conspiracy to commit a felony and commission of the underlying felony. A double jeopardy violation occurs where the same evidence used to prove the overt act committed in furtherance of the conspiracy also proves the commission of the underlying crime.” *Johnson v. State*, 749 N.E.2d 1103, 1108 (Ind. 2001) (citation omitted). Here, the State concedes that “[t]he overt act alleged in the conspiracy charge was the murder, of which [Reaves] was also convicted.” Appellee’s Br. at 2 n.1; *see also* Appellant’s App. at 7-8 (charging information) (alleging that Reaves “did agree with Henry Bonds to commit the crime of murder, that is knowingly killing another human being, and with the intent to commit murder, and [sic] the parties performed an overt act in furtherance of the agreement, by shooting Courtney Rowell with a firearm causing him to die.”). Therefore, we vacate Reaves’s conspiracy conviction and sentence on double jeopardy grounds. In all other respects, we affirm. Because the trial court imposed concurrent sentences, the vacation of the conspiracy conviction and sentence will have no effect on Reaves’s aggregate sentence of fifty-five years.

Affirmed in part and vacated in part.

KIRSCH, J., and BRADFORD, J., concur.