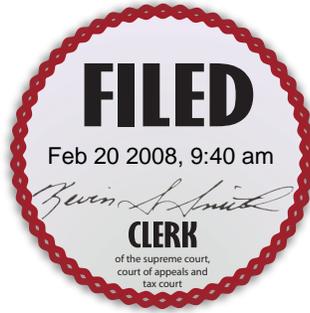


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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TONY THOMAS, )  
 )  
Appellant-Defendant, )  
 )  
vs. )  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

No. 49A02-0706-CR-539

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Jose Salinas, Judge  
Cause No. 49G17-0609-FD-185307

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**February 20, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

Tony Thomas appeals his conviction of domestic battery, a Class A misdemeanor.<sup>1</sup> Thomas argues the trial court erred by denying his motion for a mistrial after the prosecutor committed misconduct by referencing Thomas' decision not to talk to police. Concluding Thomas was not placed in grave peril, we affirm.

### **FACTS AND PROCEDURAL HISTORY**

Thomas and his wife Doreen have four children who live with them. On Tuesday, September 19, 2006, Thomas accused Doreen of having an affair and hit her several times on her head, arms, legs, and stomach. Thomas called in sick to work and stayed home to prevent Doreen from leaving the house alone. Later, they picked up their children from school and dropped them off at the home of Thomas' mother, Mary Thomas. Thomas and Doreen returned home, and Thomas continued to argue with Doreen and hit her. Late in the evening, they picked up the children. The children were told to go to their room and shut the door. While the children were in their room, Thomas again hit Doreen.

On Wednesday and Thursday, Thomas stayed home from work and continued to yell at Doreen, hit her, and monitor her activity. Thomas did not allow Doreen to be by herself until Friday evening, when he returned to work. While he was gone, their daughter A.T. took pictures of Doreen's injuries.

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<sup>1</sup> Ind. Code § 35-42-2-1.3.

The abuse continued through September 23, 2006. On that day, two of the children had a football game, and Thomas allowed Doreen to take the children to the game. On the way, Doreen dropped off for development the pictures A.T. had taken. Thomas arrived at the end of the game and took the children with him.

Doreen picked up the pictures and went to her mother's house. Doreen's mother, Gaylene Strain, observed Doreen had a black eye and bruises and was very emotional. Strain called the police, and Officer Jeffrey Mehrlich responded. Officer Mehrlich also observed Doreen's injuries. Detective Terry Osborne also met Doreen that day. He observed Doreen's injuries and believed they were recent. Doreen claimed Thomas had beaten her with his fists and a metal tube from a vacuum cleaner, held a gun on her, and threatened to kill her and the children if anyone called the police.

Doreen believed Thomas was at home with the children. Concerned for their safety, she asked the police to remove the guns from the home. When the police arrived at the Thomases' apartment, they called Thomas' cell phone and asked him to come out. Thomas said he was "not anywhere near" the apartment. (Tr. at 193.) The officers then called into the apartment and asked the occupants to come out. The children were there with Thomas' sister, Michelle Sterling, and his mother, Mary. They believed Thomas had gone to a nearby store. The police retrieved nine guns from the home.

Thomas was charged with two counts of criminal recklessness, Class D felonies;<sup>2</sup> intimidation, a Class D felony;<sup>3</sup> domestic battery, a Class A misdemeanor; battery, a

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<sup>2</sup> I.C. § 35-42-2-2.

<sup>3</sup> I.C. § 35-45-2-1.

Class A misdemeanor;<sup>4</sup> and criminal confinement, a Class D felony.<sup>5</sup> During Thomas' jury trial, Sterling testified Thomas did not come home on September 23, although he was supposed to take her to work. Mary testified Thomas was aware the police were at his apartment looking for him. During closing arguments, the prosecutor discussed this evidence:

Why wouldn't [Thomas] come back home? When he left, his mother told you, courageous woman. What more could she do? She stood here, she sat here and she told you the truth . . . . [Thomas] said he was going to the grocery store which was about ten minutes from his home. He never came back. Michelle Sterling, his sister told you that. He was going to the grocery store. He was supposed to take her to work that night. Did he come back? No! Why not? It was his opportunity to talk with the detectives on that night so they could hear his side of the story.

*(Id. at 496.)*

Thomas objected and moved for a mistrial. The trial court declined to grant a mistrial, but told the prosecutor to "tone it down" and "[m]ove on." *(Id. at 497.)* The prosecutor resumed her argument stating, "He never came back. He didn't come back that night," then proceeded to discuss other aspects of the case. *(Id. at 499.)*

During his closing argument, defense counsel responded to the prosecutor's argument:

Now the State brought something up . . . several times, why wouldn't [Thomas] go back that night after he talked to the police. . . . The police told you what he said, I don't want to go to jail. Sounds reasonable. An innocent man doesn't want to go to jail.

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<sup>4</sup> I.C. § 35-42-2-1.

<sup>5</sup> I.C. § 35-42-3-3.

(*Id.* at 508-09.) At the conclusion of the arguments, Thomas again moved for a mistrial, arguing an admonition would only draw more attention to the prosecutor's comment. The trial court again denied the motion. Thomas was found guilty of domestic battery and not guilty of all other charges.

## DISCUSSION AND DECISION

Thomas argues the prosecutor's reference to his decision not to talk to the police was misconduct that required the trial court to grant a mistrial.<sup>6</sup>

Whether to grant or deny a motion for mistrial is a decision left to the sound discretion of the trial court. We will reverse the trial court's ruling only upon an abuse of that discretion. We afford the trial court such deference on appeal because the trial court is in the best position to evaluate the relevant circumstances of an event and its impact on the jury. To prevail on appeal from the denial of a motion for mistrial, the appellant must demonstrate the statement or conduct in question was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected. We determine the gravity of the peril based upon the probable persuasive effect of the misconduct on the jury's decision rather than upon the degree of impropriety of the conduct.

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<sup>6</sup> The State argues Thomas has not preserved the issue for appeal because he did not request an admonition.

When [an] improper argument . . . is alleged to have occurred, an objecting party should request an admonishment. If, after an admonishment, the party is still not satisfied, the proper procedure is to move for a mistrial. The failure to request an admonishment or move for a mistrial results in waiver of the issue.

*Robinson v. State*, 693 N.E.2d 548, 552 (Ind. 1998) (citations omitted). Thomas immediately objected to the prosecutor's statement. In a sidebar conference, defense counsel stated, "No correct instruction is going to cure that. I'm going to move for a mistrial." (Tr. at 498.) The trial court denied the motion, stating "a more specific record" would be made later. (*Id.*) After closing arguments, Thomas renewed his motion for a mistrial and argued an admonition would draw more attention to the improper comment. Thomas presented a specific argument as to why he believed an admonition was insufficient, and he indicated his desire for further relief. The trial court had the opportunity to consider the appropriate remedy, and the issue was properly preserved.

*Alvies v. State*, 795 N.E.2d 493, 506 (Ind. Ct. App. 2003) (citations omitted), *trans. denied* 804 N.E.2d 758 (Ind. 2003). We must determine:

(1) whether the prosecutor engaged in misconduct, and if so, (2) whether that misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she should not have been subjected. The “gravity of peril” is measured by the “probable persuasive effect of the misconduct on the jury’s decision, not on the degree of impropriety of the conduct.”

*Coleman v. State*, 750 N.E.2d 370, 374 (Ind. 2001) (citations omitted).

“The Fifth Amendment privilege against compulsory self-incrimination is violated when a prosecutor makes a statement that is subject to reasonable interpretation by a jury as an invitation to draw an adverse inference from a defendant’s silence.” *Moore v. State*, 669 N.E.2d 733, 739 (Ind. 1996). During her closing argument, the prosecutor noted that Thomas did not return to his apartment while the police were there, although it was “his opportunity to talk with the detectives . . . so they could hear his side of the story.” (Tr. at 496.) This was a clear invitation to the jury to draw an adverse inference from Thomas’ decision not to give the police “his side of the story.” (*Id.*) The statement suggests an innocent man would want to talk to the police, and therefore, the argument was improper.

Not every improper argument, however, requires reversal. We must consider the probable persuasive effect on the jury. *Booher*, 773 N.E.2d at 817. Where, as here, there is ample evidence of guilt, we will find misconduct harmless. *See Coleman*, 750 N.E.2d at 375. The domestic battery charge alleged Thomas touched Doreen in a rude, insolent, or angry manner, which resulted in bruising on several parts of her body. A.T. took

pictures of Doreen's bruises and testified she heard her parents fighting. An officer also took pictures. Strain and two officers saw Doreen's injuries and testified the pictures were an accurate representation of her injuries. The officers opined the injuries were fresh based on the coloration of the bruises. The evidence also indicated Thomas and Doreen were together almost constantly between September 19 and 23, and they had little contact with anyone other than their young children during that time. There was ample persuasive evidence of Thomas' guilt.

In measuring the persuasive effect of an improper argument, we have also noted "the return of not-guilty verdicts in matters that would have been equally affected by an improper comment suggests that the comment was not prejudicial." *Moore*, 669 N.E.2d at 740. If the jury was strongly persuaded by the prosecutor's argument that Thomas should have gone to the police with his side of the story in finding him guilty of domestic battery, it would presumably have been persuasive as to the other charges. Therefore, we conclude the improper argument did not place Thomas in grave peril, and the trial court did not abuse its discretion when it denied Thomas' motion for a mistrial.

Affirmed.

KIRSCH, J., and RILEY, J., concur.