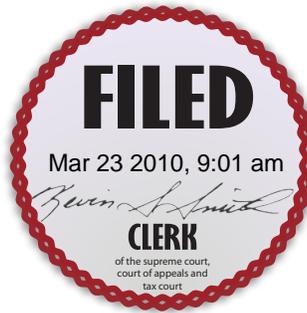


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**IN THE
COURT OF APPEALS OF INDIANA**

CURTIS DANCE,)
)
Appellant-Defendant,)
)
vs.) No. 49A02-0907-CR-637
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kurt M. Eisgruber, Judge
Cause No. 49G01-0710-MR-204525

MARCH 23, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Appellant Curtis Dance appeals from his convictions by jury for two counts of murder pursuant to Indiana Code § 35-42-1-1. We affirm.

ISSUES

Dance raises four issues for review, which we restate as:

- I. Whether the trial court abused its discretion by limiting the scope of Dance's cross-examination of a witness.
- II. Whether the trial court abused its discretion by finding Dance competent to stand trial.
- III. Whether the trial court abused its discretion by admitting certain evidence.
- IV. Whether the trial court abused its discretion by allowing the State to display enlarged autopsy photographs to the jury.

FACTS

The victims in this case, Lee Driver, Sr. ("Driver"), and Lashell Wooden ("Wooden"), lived together with their two children, Lee Jr. and LaShell. Driver remodeled homes and sold drugs in large quantities. In March 2003, Driver had a falling out with his cousin, Christopher Driver ("Christopher"), because Driver refused to supply Christopher with any more drugs to sell.

On the day after Driver and Christopher argued, Christopher met with Dance. Dance told Christopher that he "needed to hit a lick on somebody." Tr. p. 144. Hitting a

lick means committing a robbery. Christopher suggested that Dance could rob Driver and Wooden. A week after Christopher and Dance talked, Christopher showed Dance where Driver and Wooden lived. Christopher also told Dance how to get into the house and where he should look for money and guns. In addition, Christopher described Wooden's work schedule for Dance. Christopher was supposed to get a portion of the money from Dance's robbery of Driver and Wooden.

On the evening of June 20, 2003, Christopher received several brief phone calls from Dance. During the first phone call, Dance told Christopher "We got 'Shell" and hung up. Tr. p. 152. During the second phone call, Dance asked Christopher "where the stuff was." *Id.* Christopher told Dance where to look in the house and Dance hung up. During the third phone call, Dance told Christopher "Lee on his way home." Tr. p. 153.

On that same evening, Driver picked up Lee Jr. and LaShell and took them home. At that time, Lee Jr. was five years old and LaShell was three. Lee Jr. played basketball outside while Driver and LaShell went inside. A person wearing a mask over his mouth came outside and carried Lee Jr. indoors. Inside, Lee Jr. saw three strangers, including the man who had carried him indoors. All three wore masks. Driver was on the ground, and one of the men asked him where he kept his money or car keys. Driver denied having any money, got up and started to run down a hallway. The intruders shot Driver and he fell to the ground. Driver died from his wounds.

Next, the men took Lee Jr. to his mother's room, and he saw Wooden and LaShell on the floor next to a bed. Wooden was tied up. One of the intruders came in and fatally shot Wooden, and the three men left. Lee Jr. and LaShell spent the night next to their

mother's body, and a relative found them the next morning. The police subsequently identified Dance's palm print on a piece of duct tape at the house.

DISCUSSION AND DECISION

I. CROSS-EXAMINATION

Trial courts have wide discretion to determine the scope of cross-examination, and a trial court's decision as to the appropriate extent of cross-examination will be reversed only for an abuse of discretion. *McCorker v. State*, 797 N.E.2d 257, 266 (Ind. 2003).

The Sixth Amendment of the United States Constitution guarantees a defendant the right to confront witnesses. *Id.* This right is secured for defendants in state criminal proceedings through the Fourteenth Amendment. *Id.* Any beneficial agreement between an accomplice and the State must be revealed to the jury. *Id.*

It is appropriate and necessary for counsel to make an offer of proof on cross-examination if counsel believes the trial court has improperly limited a line of questioning or has erroneously sustained an objection by opposing counsel. *Arhelger v. State*, 714 N.E.2d 659, 666 (Ind. Ct. App. 1999). The offer of proof must make the substance of the excluded evidence or testimony clear to the court; it must identify the grounds for admission of the testimony; and it must identify the relevance of the testimony. *Id.*

In this case, Dance contends that the trial court violated his right to confront witnesses pursuant to the Sixth Amendment to the United States Constitution and his

right to due process pursuant to the Fourteenth Amendment to the United States Constitution by limiting his cross-examination of Christopher.

On direct examination, Christopher acknowledged that he and Driver had argued over money, and that he had informed Dance that Driver and Wooden would be good targets for a robbery. Christopher further stated that he had shown Dance where Driver and Wooden lived, told Dance how to get into the home, where to look for money and guns in the house, and when Wooden would be home, with the understanding that Dance would give Christopher a cut of the money from the robbery. Christopher further testified on direct examination that he had been convicted of conspiracy to commit robbery, a Class A felony, and sentenced to forty (40) years for his role in Driver and Wooden's deaths. Christopher stated that in exchange for testifying against Dance, his sentence would be reduced to twenty-five (25) years, with five (5) years suspended.

On cross-examination, Christopher testified as follows:

Q: Now, you went to trial and you were sentenced to 40 years in the Department of Correction, and if you behave, you get day-for-day credit so you would be out in 20 or so; is that right?

A: Yes.

Q: And if you took some classes or whatever, it could even be less time for your involvement in the death of these two people in front of the children, right?

A: Yes.

Q: And now because you're coming in here and testifying for the State, that time in jail is going to be cut in half and you're going to do 10 or less years in prison; is that right?

A: Yes.

* * *

Q: How is prison?

A: How was it?

[STATE]: Judge, objection, that's irrelevant.
THE COURT: That would be sustained.
[DANCE]: Your Honor, he's getting a huge benefit by this testimony and I think that this goes to his incentive to tell the truth.
THE COURT: I think that's been explored, I think we can continue.

Transcript, pp. 161-163.

Thus, Dance argued that Christopher's testimony about his plea agreement was relevant to the question of Christopher's truthfulness, but Dance did not make the substance of the excluded testimony clear to the trial court or identify the grounds for admission of the testimony. Therefore, Dance did not make an offer to prove after the trial court sustained the State's objection to his question, so this issue is waived. *See Arhelger*, 714 N.E.2d at 666 (determining that Appellant's cross-examination claim was waived for failure to make a proper offer to prove).

II. COMPETENCY

The trial and conviction of a defendant who lacks adequate competence is a denial of federal due process. *Brewer v. State*, 646 N.E.2d 1382, 1384 (Ind. 1995). The standard for deciding competency is whether or not the defendant possesses the ability to consult rationally with counsel during the case and factually comprehend the proceedings against him or her. *Id.* The trial court as trier of fact is vested with discretion to determine if reasonable grounds exist for believing a defendant is competent to stand trial, and we will review the trial court's decision for an abuse of discretion. *See id.* at 1385. Where the evidence is in conflict, we will normally only reverse this decision if it

was clearly erroneous, unsupported by the facts and circumstances before the court and the reasonable conclusions that can be drawn therefrom. *Id.*

Dance argues that he “may or may not have been competent to stand trial prior to trial.” Appellant’s Br. p. 18. We disagree. The trial court ordered that Dance be examined to determine whether he was competent to stand trial. Dr. Don Olive, a psychiatrist, noted that Dance was nonresponsive and did not cooperate with the examination, but he concluded Dance was malingering rather than incompetent to stand trial because Dance spoke casually with a cellmate upon being returned to his cellblock after the interview. A second psychiatrist, Dr. Ned Masbaum, also examined Dance. Dance cooperated with Dr. Masbaum, and Dr. Masbaum concluded that Dance was able to understand the nature of the proceedings and assist his attorney. Based on the psychiatrists’ reports, the trial court did not abuse its discretion in determining that Dance was competent to stand trial.

Dance also argues that even if the trial court’s pre-trial ruling was correct, subsequent incidents at trial indicated that Dance was not competent to assist in his defense, and that proceeding with the trial without a reevaluation of his competency denied him his right to due process under the Fourteenth Amendment to the United States Constitution.

The right to a competency hearing is not absolute. *Campbell v. State*, 732 N.E.2d 197, 202 (Ind. Ct. App. 2000). Such a hearing is required only when a trial judge is confronted with evidence creating a reasonable or bona fide doubt as to a defendant’s competency. *Id.* Whether reasonable grounds exist to order evaluation of competency is

a decision that will be reversed only if we find that the trial court abused its discretion. *Id.* A trial judge's observations of a defendant in court are an adequate basis for determining whether a competency hearing is necessary; such a determination will not be lightly disturbed. *Id.*

We note that Dance did not explicitly ask the trial court for a second competency hearing at trial. In any event, the evidence does not create a reasonable doubt as to Dance's competency. During voir dire, Dance removed some of his clothes, which he had attempted to do three or four times earlier that day. However, immediately after the incident, Dance's counsel told the trial court, "I don't know, but he's—he's—whether he's faking it or not, you know, they found that he was malingering, he definitely has issues" Tr. p. 10. Also during voir dire, Dance complained of back pain, but not mental distress. Later, during the trial, it appeared that Dance was having trouble staying in his chair, but this may have been attributable to back pain rather than mental disturbance. In addition, Dance drooled at several times during the trial, but on several other occasions during the trial, the trial court asked Dance if he was "with us" or present, and Dance responded affirmatively. Tr. pp. 102, 213. Finally, during a sidebar Dance's counsel stated "I'm in a bind. He hasn't contributed anything." Tr. p. 183. However, counsel also stated "I'll talk to him at the lunch break and say if you don't want to be in here, you don't have to be." *Id.* Thus, Dance's counsel indicated to the trial court that Dance was capable of determining whether he wanted to be present. Based on this conflicting evidence, we cannot conclude that the trial court, who was in the best position

to observe Dance's behavior, abused its discretion by continuing with the trial rather than *sua sponte* addressing Dance's competency again.

III. ADMISSION OF EVIDENCE

The trial court's discretion to admit or exclude evidence is broad, and it will not be reversed absent an abuse of that discretion. *Vertner v. State*, 793 N.E.2d 1148, 1151 (Ind. Ct. App. 2003). A trial court abuses its discretion when its evidentiary ruling is clearly against the logic, facts and circumstances presented. *Id.*

Dance contends that the trial court erred by allowing Detective Mark Albert to testify that certain phone numbers were associated with Wesley Tavorn. Tavorn was alleged at trial to have possessed a watch that had belonged to Driver. Dance argues that Detective Albert's testimony relating those phone numbers to Tavorn, and subsequent testimony about telephonic communication between Tavorn or one of his relatives and Dance on the day of the murders was based on hearsay and was therefore inadmissible.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Ind. Evidence Rule 801(c). Hearsay is not admissible except as provided by law or the Indiana Rules of Evidence. Ind. Evidence Rule 802. The exclusion of hearsay is meant to prevent the introduction of unreliable evidence that cannot be tested through cross-examination. *Tate v. State*, 835 N.E.2d 499, 508 (Ind. Ct. App. 2005), *transfer denied*.

When the admissibility of an out-of-court statement received by a police officer during the course of an investigation is challenged as hearsay, the court must first

determine whether the testimony describes an out-of-court statement asserting a fact susceptible of being true or false. *Craig v. State*, 630 N.E.2d 207, 211 (Ind. 1994). If the statement contains no such assertion, it cannot be hearsay and the objection should be overruled. *Id.* If the out-of-court statement does contain an assertion of fact, then the court should consider the evidentiary purpose of the proffered statement. *Id.* If the evidentiary purpose is to prove a fact asserted, and such purpose is not approved under Indiana Rule of Evidence 801(d), then the hearsay objection should be sustained. *Id.* If the statement is offered for a purpose other than to prove a fact which is asserted, then the Court should consider whether the fact to be proved under the suggested purpose for the statement is relevant to some issue in the case, and whether the danger of prejudice outweighs its probative value. *Id.*

In this case, Detective Albert testified that he became involved in the case in January 2007 as a “cold case” investigator. Tr. p. 251. He became familiar with the case by reviewing the police files. Detective Albert further testified, over Dance’s objection, that based on reviewing police reports, he identified certain phone numbers as being associated with Tavorn. He also stated that, based on his review of phone records, on the day of the murders Tavorn or a family member used those phone numbers to communicate with Dance.

Detective Albert’s testimony that police reports indicated that certain phone numbers were associated with Tavorn is a fact susceptible of being true or false. Therefore, we consider whether the statement was offered for a purpose other than to prove a fact which is asserted. The State asserts that the purpose of the testimony was to

show the course of the police investigation. Thus, we must consider the relevance of the course of police investigation and whether the prejudice in admitting the testimony outweighed its probative value.

Here, the relevance of the course of investigation was slight because the genesis of the investigation into the murders was not at issue at trial. Dance did not dispute that Detective Albert took over the murder investigation as a “cold case” and was reviewing the evidence. Dance also did not dispute that Tavorn may have possessed a watch that had belonged to Driver. On the other hand, the prejudicial impact of Detective Albert’s testimony was great because the testimony tended to prove that certain phone numbers were associated with Tavorn and that Tavorn, who later allegedly possessed a watch that Driver had owned, had used those phone numbers to communicate with Dance on the day of the murders. Therefore, Detective Albert’s testimony about phone numbers associated with Wesley Tavorn and telephonic communications between Tavorn and Dance on the day of the murders was hearsay. The trial court abused its discretion by admitting the testimony into evidence.

The State contends that even if the admission of Detective Albert’s testimony was erroneous, the error was harmless. Reversal for the erroneous admission of hearsay evidence is appropriate where the evidence caused prejudice to the defendant’s substantial rights. *Craig*, 630 N.E.2d at 211. In determining whether error in the introduction of evidence affected the appellant’s substantial rights, this Court must assess the probable impact of that evidence upon the jury. *Id.*

Here, Lee Driver, Jr., testified that three men entered his family's home and shot his parents. Christopher testified that he had spoken with Dance about robbing Driver and Wooden and had given Dance information about Driver and Wooden's home and schedule in exchange for a share of the robbery proceeds. Christopher also testified that Dance called him several times on the evening of June 20, 2003, telling him "We got 'Shell" and "Lee on his way home." Tr. pp. 152-153. Furthermore, Dance asked Christopher during one conversation that evening where "stuff" could be found in Driver and Wooden's home. Tr. p. 152. Finally, Dance's palm print was found on a piece of duct tape in Driver and Wooden's home. This evidence is sufficient to sustain Dance's conviction without Detective Albert's testimony. In light of this evidence, we conclude that the erroneous admission of Detective Albert's testimony did not have an impact on the jury's verdict and did not prejudice Dance's substantial rights. Thus, the erroneous admission of the testimony was harmless error.

IV. PUBLICATION OF EXHIBITS

Dance contends that the manner in which autopsy photographs of Driver and Wooden were published to the jury was erroneous because the manner of publication served no purpose but to inflame the jury. Specifically, the State projected enlarged versions of the photographs onto a screen in the courtroom during the testimony of a forensic pathologist.

The enlarged photographs appear to have been demonstrative evidence. Demonstrative evidence is evidence offered for purposes of illumination and

clarification. *Wise v. State*, 719 N.E.2d 1192, 1196 (Ind. 1999). To be admissible, the evidence need only be sufficiently explanatory or illustrative of relevant testimony to be of potential help to the trier of fact. *Id.* The admissibility of demonstrative evidence, like all evidence, is also subject to the balancing of probative value against the danger of unfair prejudice. *Id.* Trial courts are given wide latitude in weighing probative value against the danger of unfair prejudice, and we review their determination for an abuse of discretion. *Id.*

In this case, Dr. Stephen Radentz, a forensic pathologist who had performed the autopsies on Wooden and Driver, testified for the State. During his testimony, Dr. Radentz described the nature of the wounds that Wooden and Driver had sustained. Dr. Radentz also identified photographs of Wooden and Driver's bodies that were taken during the autopsies. The photographs display the gunshot wounds. After the trial court admitted the autopsy photographs into evidence without objection from Dance, they were projected onto a large screen over Dance's objection. Dr. Radentz then discussed each photograph, referring to them individually to further describe the nature of Wooden and Driver's wounds. We conclude that the enlarged photographs helped to clarify Dr. Radentz's testimony, and that the probative value of the photographs outweighed the possible prejudice from showing Wooden and Driver's wounds in an enlarged fashion. Therefore, the trial court did not abuse its discretion by permitting the State to display the enlarged photographs to the jury.

CONCLUSION

For these reasons we find no reversible error.

Affirmed.

NAJAM, J., and BROWN, J., concur.