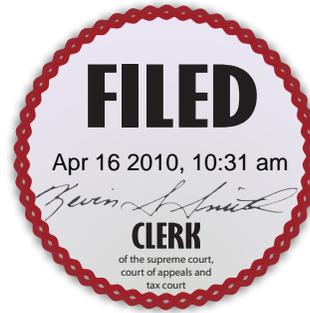


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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JULIAN D. GRADY, )  
 )  
Appellant-Defendant, )  
 )  
vs. ) No. 02A03-0910-CR-491  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Respondent. )

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APPEAL FROM THE ALLEN SUPERIOR COURT  
The Honorable Frances C. Gull, Judge  
Cause No. 02D04-0812-FB-212

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**April 16, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

Julian D. Grady appeals his convictions of Class B felony robbery,<sup>1</sup> Class D felony resisting law enforcement,<sup>2</sup> Class A misdemeanor possession of marijuana,<sup>3</sup> and Class A misdemeanor operating a vehicle with a suspended license.<sup>4</sup> He alleges fundamental error in the admission of a videotaped deposition and the omission of information from the preliminary instructions. He also argues the trial court abused its discretion by denying a motion for a continuance. We affirm.

### **FACTS AND PROCEDURAL HISTORY**

On the evening of December 2, 2008, Grady ordered two pizzas from MJ's Pizza. Approximately ten minutes after Grady picked up his order, Brandon and William Britt robbed MJ's at gunpoint. Matthew Davis, the owner of MJ's, hit the silent alarm button. When a police officer arrived on the scene, the Britts fled out the back door of the restaurant. Davis followed them and saw them enter a silver Grand Am with tinted windows. Davis returned to the restaurant and reported to the police a description of the car and the direction of its travel.

Sergeant Jeffrey Petro saw a car fitting the description and stopped it. When he ordered the occupants to exit the vehicle, it sped off. A high speed chase ensued, and it ended when the Grand Am ran over "stop sticks" the police placed in the road. (Tr. of Jury Trial at 172.) When the Grand Am came to a stop, the Britts exited from the back seats, and

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<sup>1</sup> Ind. Code § 35-42-5-1.

<sup>2</sup> Ind. Code § 35-44-3-3.

<sup>3</sup> Ind. Code § 35-48-4-11.

<sup>4</sup> Ind. Code § 9-24-19-2.

Grady exited from the driver's seat. Sergeant Petro determined Grady's license had been suspended. Officer Chris Hoffman handcuffed Grady and removed from the pocket of Grady's sweatshirt a plastic bag containing a green leafy substance, \$22 in cash, a coupon for MJ's Pizza, a bandana, and a pair of gloves.

Grady was charged with Class B felony robbery, Class D felony resisting law enforcement, Class A misdemeanor possession of marijuana, and Class A misdemeanor operating a vehicle with a suspended license. Subsequently, charges were filed against Grady under three additional cause numbers. All four cases were scheduled for jury trial on the same day. At a pre-trial hearing on May 21, 2009, the prosecutor represented he was prepared for trial on all four cases and intended to begin with the MJ's robbery case, as it had been filed first. The prosecutor also explained Officer Hoffman would be "unavailable" for trial. (Tr. of May 21 Hearing at 3.) He stated, "I spoke to [defense counsel] and we can go forward with an evidentiary deposition which will not delay this trial." (*Id.*) Neither Grady nor defense counsel disputed the prosecutor's statement.

Grady, however, made an oral motion for a continuance because he felt counsel had not been adequately communicating with him and he wanted to hire a new attorney. Defense counsel represented that he had promptly forwarded discovery and a plea agreement offer to Grady. The trial court denied Grady's motion for a continuance, stating:

This was originally set for trial back in February. You requested a continuance at that time. You were-received your continuance. As I said, it's now set for June 10 and 11. It's your right to hire a lawyer if you wish, but I want you to understand that lawyer is going to have to be ready to go to trial June 10 and 11. This case will not be continued.

(*Id.* at 6.)

At the jury trial the State offered into evidence a DVD of Officer Hoffman's deposition, stating:

Your Honor, at this time the State would move to enter the DVD of Officer Chris Hoffman's testimony. The DVD was – or the testimony was done on an evidentiary deposition that was requested by the attorneys at one of the pretrial hearings and we videotaped it and Mr. Hicks of course was there along with his client and we'd like to proceed at this point with the playing of that video.

(Tr. of Jury Trial at 242.) Defense counsel stated, "I have no problem with that," and the DVD was played for the jury. (*Id.*)

Brandon Britt testified he and William drove Grady to MJ's to pick up a pizza. The Britts remained outside, while Grady went inside to pay for his order. When Grady returned to the car, Grady told the Britts he thought MJ's would be an easy place to rob. Grady did not want to go back to MJ's because he had already been seen there, so the Britts agreed to rob the restaurant, and Grady would be the get-away driver. Brandon testified that when they were pulled over, Grady "was asking everybody what they wanted to do and, you know, guess he had stuff on him and we just had robbed a place, so . . . he sped off." (*Id.* at 264.) Brandon clarified that the "stuff" Grady had on him was marijuana. (*Id.* at 265.) He testified that he and William did not hold their guns to Grady and order him to drive.

Grady stipulated that Officer Hoffman removed seventeen grams of marijuana from his person on December 2, 2008, and that he knew his license was suspended on that date. Grady testified in his own behalf and acknowledged the Britts took him to MJ's to get pizza. He claimed that after he returned to the car, Brandon drove about a block, then stopped and

acted like he did not want to drive anymore. Grady offered to drive, and both the Britts got out of the car. Grady got in the driver's seat, but the Britts walked away. Grady testified he was on the phone and was high on marijuana, so he did not pay attention to what the Britts were doing and assumed they were going to see someone they knew in the area. The Britts returned after a few minutes, and for the first time, Grady realized they had guns. Brandon, who was wielding an AK-47, told Grady, "go, n\*\*\*\*\*, go." (*Id.* at 295.) Grady felt he was not "in control to argue." (*Id.* at 304.) When he stopped for the police, one of the Britts said, "go, N\*\*\*\*\*, go. What is [sic] you doing?" (*Id.* at 313.)

The jury returned a guilty verdict on all four counts.

## **DISCUSSION AND DECISION**

Grady argues: (1) the trial court abused its discretion by denying his motion for a continuance; (2) the deposition of Officer Hoffman was improperly admitted; and (3) the trial court erred by omitting from the preliminary instructions information that is required by Ind. Jury Rule 20.

### 1. Continuance

"Rulings on nonstatutory motions for continuance lie within the discretion of the trial court and will be reversed only for an abuse of that discretion and resultant prejudice." *Stafford v. State*, 890 N.E.2d 744, 750 (Ind. Ct. App. 2008). An abuse of discretion occurs when the decision is against the logic and effect of the facts and circumstances before the trial court. *Id.*

Grady argues the trial court should have granted his continuance because Officer Hoffman was not going to be available for trial anyway and the parties were prepared to proceed on the other cases against him. While the record reflects the prosecutor was prepared to proceed on any of the four cases against Grady, defense counsel made no similar assertion. Grady did not ask for the court to postpone the trial so that Officer Hoffman could attend the trial; rather, he appeared to agree that the officer's deposition could be used in lieu of live testimony.<sup>5</sup> Grady does not assert the trial court abused its discretion by not affording him additional time to hire a new attorney, which was his stated reason for the continuance. Therefore, we cannot say the trial court abused its discretion.

## 2. Admission of Evidence

Grady argues the trial court erred by admitting the video of Officer Hoffman's deposition because it was hearsay and because the State did not show why Officer Hoffman was "unavailable," thus violating Grady's federal and state constitutional rights to confrontation. Grady also argues the trial court should not have accepted his counsel's stipulation to the admissibility of the video, because the stipulation was not in writing and

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<sup>5</sup> The State argues the fact that Grady did not support his motion with an affidavit was by itself a sufficient reason to deny the motion. The State relies on *Randall v. State*, 474 N.E.2d 76, 81 (Ind. 1985), which states, "Failure to support a motion for a continuance with an affidavit is sufficient by itself to permit the trial court in its discretion to deny the motion." Our Supreme Court made that statement in the context of interpreting Ind. Code § 35-1-26-1, which at the time governed statutory motions for continuance by a defendant. An analogous provision is currently codified at Ind. Code § 35-36-7-1, which requires a defendant to support a motion for continuance with an affidavit when the defendant seeks to postpone a trial because of the absence of evidence. Grady's motion was not made on a statutory basis. We note Ind. Trial Rule 53.5 provides, "Upon motion, trial *may* be postponed or continued in the discretion of the court, and *shall* be allowed upon a showing of good cause established by affidavit or other evidence." (emphasis added). Like Ind. Code § 35-36-7-1, T.R. 53.5 requires motions made due to the absence of evidence to be supported by an affidavit. The State cites no authority requiring a motion for continuance to be supported by an affidavit when the motion is not based on the absence of evidence.

signed by Grady as required by Allen County Local Criminal Rule LR02-TR00-15.<sup>6</sup>

“Generally, we review the trial court’s ruling on the admission of evidence for an abuse of discretion.” *Whatley v. State*, 908 N.E.2d 276, 280 (Ind. Ct. App. 2009), *trans. denied*. Grady acknowledges, however, that he did not object to the admission of the video. “Failure to object to the admission of evidence at trial normally results in waiver and precludes appellate review unless its admission constitutes fundamental error.” *Id.* “The standard for fundamental error is whether the error was so prejudicial to the rights of the defendant that a fair trial was impossible.” *Boatright v. State*, 759 N.E.2d 1038, 1042 (Ind. 2001).

The State argues this issue is not only waived, but Grady invited the error. We agree. At the May 21 hearing, the prosecutor represented he had spoken to defense counsel, and they had agreed to use the officer’s deposition. Neither Grady nor defense counsel contradicted the prosecutor. Grady attended the deposition with counsel, who cross-examined the officer. At trial, the prosecutor again mentioned the agreement before introducing the video into evidence, and defense counsel said, “I have no problem with that.” (Tr. of Jury Trial at 242.) Invited error generally is not reversible error, and Grady has not shown that the admission of the deposition rises to fundamental error. *See Dumas v. State*, 803 N.E.2d 1113, 1121 (Ind. 2004) (no reversible error in admission of hearsay evidence because Dumas argued at trial it was admissible). Nor has he explained how violation of the

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<sup>6</sup> LR02-TR00-15 provides: “All stipulations must be in writing, signed by all parties or their counsel, signed by the defendant personally, and approved by the court.” Available at <http://www.in.gov/judiciary/allen/> (last visited Mar. 15, 2009).

Allen County Local Rules prejudiced him.

3. Preliminary Instructions

Grady argues the trial court erred by omitting required information from the preliminary instructions. Jury Rule 20 provides, in pertinent part:

(a) The court shall instruct the jury before opening statements by reading the appropriate instructions which shall include at least the following:

\* \* \* \* \*

(5) the personal knowledge procedure under Rule 24;

\* \* \* \* \*

(7) that jurors, including alternates, may seek to ask questions of the witnesses by submission of questions in writing.

(8) that jurors, including alternates, are permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence. The court shall admonish jurors not to discuss the case with anyone other than fellow jurors during the trial.

Grady did not object to the preliminary instructions; therefore, he must establish fundamental error. *Phillips v. State*, 496 N.E.2d 87, 89 (Ind. 1986).

The trial court instructed the jurors that they could ask questions, but did not specify that the alternate could also ask questions. As to discussions, the court initially instructed the jury:

When you're outside the jury room, you mustn't discuss the case among yourselves or with anyone else. However, you may discuss the evidence with your fellow jurors in the jury room during recesses from trial when all of you are present as long as you reserve judgment about the outcome of the case until deliberations begin.

(Tr. of Jury Trial at 115.) This instruction did not specify that the alternate had to be present during discussions; however, after the first break from trial after the presentation of evidence

began, the court told the jury, “Please don’t form any opinions or conclusions about the case and I would remind you that you are allowed to discuss the evidence that you’ve heard so far, but you may only do that if all 13 of you are present in the jury room at the same time.” (*Id.* at 193.) There is no indication the alternate was called upon to serve as a juror. Grady therefore could not have been prejudiced by the court’s failure to inform the alternate he could ask questions or to inform the jury in the preliminary instructions that the alternate must be present during discussions.

Grady correctly notes the trial court did not instruct the jury on the personal knowledge procedure. However, he has not shown he was prejudiced by the omission. Grady asserts, without explanation or citation to authority, the omission deprived him of “a true jury trial.” (Appellant’s Br. at 16.) Failure to cite authority waives the issue for review. *See* Ind. Appellate Rule 46(A)(8)(a); *Bean v. State*, 913 N.E.2d 243, 254 (Ind. Ct. App. 2009), *trans. denied*. Therefore, we conclude Grady has not established fundamental error in the preliminary instructions, and we affirm the judgment of the trial court.

Affirmed.

KIRSCH, J., and DARDEN, J., concur.