

Johnnie Ferguson appeals his conviction of Murder,¹ a felony, and Carrying a Handgun Without a License,² a class A misdemeanor. Ferguson presents the following restated issues for review:

1. Did the trial court err in denying Ferguson's motion to dismiss with prejudice?
2. Did the trial court err in restricting the testimony of an alibi witness?
3. Was the evidence sufficient to sustain Ferguson's convictions?

We affirm.

The facts favorable to the convictions are that at approximately 9 p.m. on April 23, 2007, Porsche Kimball was sitting on the front porch of her Indianapolis home on North Temple Avenue with three other people. She saw Ferguson, whom she knew, confront another black male, Christopher Lucas, whom Kimball did not know. Ferguson was standing on a sidewalk with two other individuals and Lucas was walking past them in the middle of the street. As Lucas approached, Ferguson asked him "why his bitch ass was in their neighborhood." *Transcript* at 235. Lucas responded that he "didn't have time to fight with those n***** boys." *Id.* at 235-36. One of the three individuals in Ferguson's group yelled, "What did that n***** say?" *Id.* at 236. The three men chased Lucas and caught him in the nearby parking lot of the Mullins Tool Rental store. Kimball moved to the sidewalk, where she could see the confrontation in the parking lot. The three individuals surrounded Lucas, who had dropped the beer can he was carrying and prepared to fight. One of individuals said

¹ Ind. Code Ann. § 35-42-1-1 (West, PREMISE through 2008 2nd Regular Sess.).

² Ind. Code Ann. § 35-47-2-1 (West, PREMISE through 2008 2nd Regular Sess.).

to Ferguson, who was standing approximately four feet from Lucas, that he should “whoop [Lucas’s] ass and take everything in his pockets.” *Id.* at 241. Ferguson responded, “Fuck that. I’m going to shoot him.” *Id.* Lucas started backing away from Ferguson. At that point, Kimball headed toward the porch to get her daughter. Before she reached the porch, however, Kimball heard a single gunshot. She turned to look toward the group in the parking lot and saw Ferguson “lowering his hand with a gun in his hand and all of them took off running, and [Lucas] hit the ground.” *Id.* at 243.

Kimball ran to her daughter, scooped her up, and ran inside her house. Once inside, she called 911 on her cell phone to report what had happened. As she did this, she ran down the street to check on Lucas, whom she found lying on the ground and gasping for air. Kimball administered CPR until emergency personnel arrived. When they arrived, Kimball ran back to her house, crying hysterically. A police officer followed Kimball and asked if she had information about the incident. She was not forthcoming with information because, as she later explained, “[s]nitches get stitches.” *Id.* at 253. Detective Kevin Duley of the Indianapolis Police Department left his card at her home in the event that anyone wanted to speak with him about the incident.

Lucas died within approximately ten minutes after he was shot. An autopsy revealed that he died from a bullet wound to the heart. Gunpowder stippling around the entrance wound in the victim’s chest revealed that the fatal shot was fired from a gun held at a distance between six inches and two feet from Lucas’s chest.

After speaking with her pastor on the evening of Wednesday, April 25, 2007, Kimball

called Crime Stoppers and reported some details of the incident. Kimball eventually gave statements to police detailing her knowledge of the shooting. She did not know the shooter's actual name, but knew him by his nickname, "Smiley." Detective Duley prepared a photo array and Kimball picked Ferguson's photo from the array. Approximately one week after Lucas was murdered, Kimball's landlady shouted out to the street that Kimball had called Crime Stoppers. Kimball moved out of her house into a motel, which Detective Duley helped her find. Detective Duley paid for two nights of her approximate six-week stay there.

On May 10, 2007, the State charged Ferguson with murder and carrying a handgun without a license. Trial commenced on those charges on December 3, 2007. On the first day of trial, defense counsel was apprised by the State that it had failed to produce certain materials during discovery. Defense counsel immediately moved for mistrial upon that basis and the trial court granted the request. On December 7, 2007, Ferguson filed a motion to dismiss with prejudice, as will be more fully explained later in this opinion. The trial court denied the motion. The matter proceeded to trial again, commencing on July 14, 2008. Ferguson was convicted on both counts following a jury trial. Further facts will be provided where relevant.

1.

Ferguson contends the trial court erred in denying his motion to dismiss with prejudice. During a recess in the State's case-in-chief on the first day of the first trial, the prosecutor notified defense counsel that Detective Duley had taken notes during his investigation that had not been provided to the defense during discovery. To understand the

significance of these notes and Ferguson's arguments relative thereto, we must review a deposition of defense witness LaTashia Ware by defense attorney Kelly Bauder. Ware's son was a friend of Ferguson's. This deposition was conducted in the presence of prosecuting attorney Maureen Devlin. Ware's deposition testimony included the following:

[Bauder] Did your son [Damian³ Williams] ever tell you anything about that [sic] he saw or heard related to this killing?

[Ware] Yes. He heard of some guy that possibly did it, but that was – I was just hearing rumors, but I also heard some things too.

[Bauder] Tell me what your son saw or heard.

[Ware] He heard about a guy named Jermal and Jermaine.

[Bauder] Are these two guys?

[Ware] Yes. These are two guys, yes.

[Bauder] When did he tell you this?

[Ware] He told me not long after it happened.

* * * * *

[Bauder] Did you ask him or did – did you ask the kids like, did you guys see anything happen?

[Ware] I asked even Smiley [i.e., Ferguson]. I mean, what's going on? Why are they saying these things? I really don't want you in my house or if you're hanging around people like that. And [Ferguson] kept saying no, he didn't know, he didn't know what was going on. After [Ferguson] got locked up, [Williams] was telling me that it was – he believing it to be Jermaine and Jermal, which I told the police about Jermal[.]

³ Williams's first name is spelled alternately as "Damian" and "Damien" in the transcript.

Id. at 90. Deputy prosecutor Devlin later deposed Williams. Jermaine Weston's and Jermal Hatton's names "came up" during that deposition. *Id.* at 93. She apprised Detective Duley of this fact, but ultimately did not find Williams's claim worth pursuing. She explained at the hearing on Ferguson's motion to dismiss with prejudice:

First of all, the defense is correct that these names came up during the deposition of Damien Williams, the person who was listed by the defense as a witness and that's why I took his deposition, and I believe the defense probably came to the same conclusion I did, which is why they took him off of their witness list, that he is not himself a very credible witness. He was all over the place and very confusing in what he was saying. And yes, he stated the names of these two people during his deposition. I thought it was interesting that he never noted those things to the detective when the case was being investigated or when he gave a statement to the police. These were names that he came up with well after the fact of this defendant, his friend, being arrested and charged with murder. And the fact that he mentioned them in his deposition, I don't think put any burden on me to go to my detective and say go follow up on this kid's statement in his deposition that I didn't find particularly credible.

Id. at 93-94.

Detective Duley explained that in September 2007, he received an email from a narcotics detective advising that he was working with a confidential informant, subsequently identified as Alicia Jefferson, who was angry with her boyfriend "and was wanting to tell somebody that she thought that they were involved in a homicide." *Id.* at 79. Detective Duley learned that Jefferson, who is blind, was a cocaine user who had been robbed by someone that she thought was Jamar Hatton, her boyfriend at the time. Detective Duley and the narcotics detective went to Jefferson's home and interviewed her for approximately thirty minutes. According to Detective Duley, Jefferson implicated Hatton and an individual

named Jermaine Weston. Detective Duley had heard of Weston, but was not “ever . . . able to really nail down who [Hatton] was.” *Id.* at 83. Afterwards, he concluded that she lacked credibility for the following reasons:

Given the circumstances that she was robbed by her boyfriend and that that was the same guy that she was now saying was involved in this, and the fact that what she told me was that she had overheard a conversation where he had made some statement about somebody, an unknown person ending up missing like the guy on Tacoma. Well, this murder didn’t even happen on Tacoma, it happened on Temple and the victim was never missing, just things like that. I found, you know, that she, I kind of felt she was being vindictive more than anything.

Id. at 81-82. Detective Duley advised the prosecutor of his conversation with Jefferson and provided the State with a copy of his notes. It appears that the prosecutor’s office also did not find the information credible, as it failed to follow-up on Jefferson’s tip. In opposing Ferguson’s motion for mistrial, the deputy prosecutor explained:

The information that we received was that it was nothing. Even if -- even if those two people were somehow involved with this, that does not mean that Johnnie Ferguson was not our shooter, which is the only evidence that we have in our case points only to him, no one else. There’s evidence that there were some other people there with him but that he is the shooter, so even if for some stretch of the imagination, which I do not think the evidence shows, but even if they were the other two people there, it would not be exculpatory for this defendant for that to be the case. I was not fully informed and – you know, the detective, I guess, went out and took this statement. I was not aware of all of the details of that, but I did ask him about his conclusion of it and he didn’t – he relayed to me that he did not find her credible and that, you know, the circumstances about her coming forward, so and I’m still not clear on exactly what the names were that she gave versus the ones in the deposition, and I don’t know if they were the same people or not, but the information that he received from talking to this woman does not even really seem to implicate our trial or our case given that she’s talking about a completely different body on Tacoma, which has nothing to do with our case.

Id. at 94-95.

When the prosecutor discovered, and notified defense counsel, during the first trial that Detective Duley's notes had not been provided to Ferguson's counsel, defense counsel submitted oral motions for mistrial and dismissal with prejudice. The trial court granted the motion for mistrial, but took the motion to dismiss with prejudice under advisement. On December 7, 2007, counsel submitted a written motion to dismiss with prejudice, which the trial court denied after a hearing. Ferguson contends the court erred in denying his motion to dismiss with prejudice because retrial violated his right against double jeopardy. He argues: "[u]nder current federal and State analysis, the question as to whether or not a mistrial bars retrial is decided by determining whether the prosecution 'goaded' the defense into requesting a mistrial." *Appellant's Brief* at 6. Ferguson contends "the prosecution did intend to goad the defense into requesting retrial." *Id.*

Pursuant to the Fifth Amendment of the United States Constitution, no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." Generally, a defendant's motion for a mistrial constitutes "a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact[.]" *Farris v. State*, 753 N.E.2d 641, 645 (Ind. 2001) (quoting *United States v. Scott*, 437 U.S. 82, 93 (1978)). The United States Supreme Court has carved out a narrow exception that bars retrial after a mistrial "where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial." *Farris v. State*, 753 N.E.2d at 645 (quoting *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982)). In deciding whether retrial is prohibited under this exception, we focus on the subjective intent of the prosecutor. *Farris v. State*, 753 N.E.2d

641. The trial court's decision in this regard is a factual determination and we will affirm unless the decision is clearly erroneous. *Id.* "Although a trial court's determination of prosecutorial intent is not conclusive for purposes of appellate review, its determination is 'very persuasive.'" *Id.* at 646 (quoting *Wilson v. State*, 697 N.E.2d 466, 473 (Ind. 1998)).

The State clearly was responsible for the circumstances that forced defense counsel into moving for a mistrial. This is not enough, however, to compel dismissal of the charges on double jeopardy grounds. *Warner v. State*, 773 N.E.2d 239 (Ind. 2002). In denying Ferguson's motion, the trial court noted that the State was prepared for trial, had called witnesses to the stand, and had other witnesses present and ready to testify. The State opposed the motion for mistrial and indicated it was ready to proceed with trial. In opposing mistrial, the State explained that the information contained in the detective's notes was deemed by both the detective and the prosecutor to be either incredible or irrelevant to the case. In any event, the trial court found there is no evidence that the State sought to goad defense counsel into submitting a motion for mistrial, and we decline to reweigh the evidence relative to that determination. *See Green v. State*, 875 N.E.2d 473 (Ind. Ct. App. 2007), *trans. denied*.

2.

Ferguson contends the trial court erred in restricting the testimony of Hatton, an alibi witness, on what appears to be relevancy grounds. We will afford a trial court's decision to exclude evidence great deference on appeal, and will reverse only for a manifest abuse of discretion that denies the defendant a fair trial. *Bryant v. State*, 802 N.E.2d 486 (Ind. Ct.

App. 2004), *trans. denied*. Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Ind. Evidence Rule 401. A defendant generally has a right to present evidence that someone else committed the crime for which he is charged. *Id.* The defendant’s right to do so, however, is not without limits. The admissibility of alibi evidence is still subject to the rules of evidence, including the rules pertaining to relevance, most notably Rules 401, 402, and 403. *See Hicks v. State*, 690 N.E.2d 215 (Ind. 1997). Our Supreme Court has stated, “relevance is defined broadly as probative value, and the trial court has wide discretion in ruling on the relevance of evidence under Rule 402.” *Id.* at 220.

Shortly before the retrial commenced, Hatton, a close friend of Ferguson’s, indicated he had evidence that Weston, not Ferguson, was the shooter. During an offer to prove, Hatton provided detailed testimony about Weston’s actions on the night of the murder. Hatton, who lived near the scene of the murder, claimed that Ferguson was with him (Hatton) at the time of the shooting. According to Hatton, on the night of the shooting, Weston ran up to his porch carrying a .22 caliber handgun and claiming he had just shot someone. Weston told Hatton that if Hatton said anything, “he’d [referring to Weston] do something.” *Transcript* at 173. The court permitted Hatton to offer the foregoing testimony at trial. Hatton gave other testimony during an offer to prove, however, that was excluded by the trial court’s ruling in limine that Ferguson challenges here.

The court disallowed testimony included Hatton’s claim that he knew that, prior to the

day Lucas was killed, Weston typically carried a gun. Also, Hatton claimed that after the shooting, Weston bragged about it “all the time.” *Id.* at 175. When pressed for details about such bragging, Hatton eventually admitted that he had actually heard Weston boast about it “like, probably like once or twice[.]” *Id.* Hatton was questioned further about Weston’s alleged bragging on those occasions:

Q And so what did he say to you when he’s talking about it those one or two times?

A I mean, he’s just saying how you can kill somebody and get away with it.

Q Did he talk about any of the specifics of the murder?

A Not really.

Q So how do you know he was talking about that one?

A I mean, because he was running from that direction and he had said that he had done it.

Q Do you know of any other murders he’s committed?

A I wouldn’t know.

Id.

In the end, the trial court did not permit Hatton to testify as to his general belief that Weston carried a gun at about the time Lucas was killed. We fail to see the relevance of this information, especially when Hatton was permitted to testify that he did see Weston carrying a particular gun just after the shooting occurred. Similarly, Hatton could not connect Weston’s general bragging on one, or possibly two, occasions about the ease of “getting away with” killing someone with this particular crime. Thus, the trial court correctly

excluded the evidence as lacking relevance.

Moreover, even assuming for the sake of argument that the trial court erred in excluding the proposed testimony, the error was harmless. Errors in the exclusion of evidence are to be disregarded as harmless unless they affect the substantial rights of the party. Ind. Trial Rule 61; *Wilson v. State*, 770 N.E.2d 799 (Ind. 2002). “To determine whether an error in the introduction of evidence affected a defendant’s substantial rights, this [c]ourt considers the probable impact of that evidence upon the jury.” *Id.* at 802. The jury heard Hatton testify (1) that he saw Weston running away from the scene of the murder just moments after it occurred, (2) that Weston was carrying a black .22 handgun and breathlessly claimed to have shot someone, and (3) that Weston threatened Hatton with harm if Hatton told anyone about it. If this did not convince the jury that Weston shot Lucas, then Hatton’s testimony that he believed Weston generally was armed with a handgun and remarked once or twice after the shooting that it was easy to kill someone and get away with it would not have done so either. In short, in light of the nature of Hatton’s permitted testimony, which the jury obviously disbelieved or disregarded, the excluded testimony would almost certainly have had little persuasive effect. *See Wilson v. State*, 770 N.E.2d 799. Therefore, there is no reversible error here.

3.

Ferguson contends the evidence was insufficient to sustain his convictions. Our standard of review for challenges to the sufficiency of evidence is well settled.

When considering a challenge to the sufficiency of evidence to support a conviction, we respect the fact-finder’s exclusive province to weigh conflicting

evidence and therefore neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the verdict, and “must affirm ‘if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.’” *Id.* at 126 (quoting *Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

Gleaves v. State, 859 N.E.2d 766, 769 (Ind. Ct. App. 2007). The uncorroborated testimony of one witness may be sufficient by itself to sustain a conviction on appeal. *Gleaves v. State*, 859 N.E.2d 766. In this case, Kimball’s testimony was of critical importance in obtaining Ferguson’s convictions. Ferguson seeks a ruling, however, that by application of the principle of incredible dubiousity, Kimball’s testimony is not worthy of belief. For testimony to be so inherently incredible that it is to be disregarded on this basis, “the witness must present testimony that is inherently contradictory, wholly equivocal or the result of coercion, and there must also be a complete lack of circumstantial evidence of the defendant’s guilt.” *Clay v. State*, 755 N.E.2d 187, 189 (Ind. 2001).

Ferguson attacks Kimball’s credibility on several grounds. First, he notes that she did not come forward until after Crime Stoppers had posted a reward for information about the shooting. Second, he points out that Kimball was standing approximately one hundred feet from the shooting when it occurred, and it was dark at the time. He claims Kimball first claimed she did not see the gun, but afterward described it with specificity. Finally, Ferguson states “the fact that [Kimball] told her story to authorities in seven installments over a period from April 23 to May 7, 2007 is highly suspect.” *Appellant’s Brief* at 29.

We note first that Ferguson overstates the inconsistencies in Kimball’s testimony

concerning the gun. Although she did indeed state, during her trial testimony, “I did not see the gun”, the ensuing testimony revealed that she was indicating thereby that she did not see the gun well enough to describe its color. *Transcript* at 246. She saw it well enough, however, to state that “[i]t looked like a toy gun” and “[i]t was small”. *Id.* As to the other points made by Ferguson, these were matters bearing on the credibility of Kimball’s account of the incident. All of this information was placed before the jury by defense counsel during Kimball’s cross-examination and in closing argument. It was the jury’s duty to decide whether, in light of the alleged inconsistencies and the questions raised regarding her ability to observe the shooting and her motivations for coming forward, Kimball’s testimony was worthy of belief. The jury determined that it was, and we will not second-guess its determination in that regard.

Judgment affirmed.

NAJAM, J., and VAIDIK, J., concur.