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**IN THE  
COURT OF APPEALS OF INDIANA**

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DARRELL FARMER,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 49A02-1007-CR-772

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Lisa F. Borges, Judge  
Cause No. 49G04-0807-MR-167013

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**June 21, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## **Case Summary**

Darrell Farmer demanded and took money from a passenger in a stopped vehicle and then shot him multiple times, killing him. The driver of the vehicle testified at Farmer's first trial, but it ended in a mistrial. At his second trial, Farmer filed an untimely notice of alibi defense. The court ruled that Farmer could present the alibi evidence only if the State had an opportunity to investigate the alibi. When the alibi witness failed to show up for any depositions, the court excluded her testimony. The court also admitted the prior trial testimony of the driver, who was unavailable to testify at the second trial.

Farmer now appeals his convictions for murder, Class B felony robbery, and Class A misdemeanor carrying a handgun without a license. Farmer contends that the trial court abused its discretion by excluding the testimony of his alibi witness and violated his Sixth Amendment confrontation right by admitting the driver's prior trial testimony without giving him an adequate opportunity to cross-examine her. Farmer also contends that the trial court's bias against him denied him the right to a fair trial and that the court abused its discretion by denying his motion for a mistrial based on the State's failure to disclose evidence. We conclude that the trial court did not abuse its discretion by excluding the testimony of his alibi witness and did not violate his Sixth Amendment confrontation right by admitting the driver's prior trial testimony. Further concluding that Farmer has failed to establish bias or prejudice and that the court did not abuse its discretion by denying his motion for a mistrial, we affirm.

## **Facts and Procedural History**

Matoyna Johnson grew up in Indianapolis but moved to St. Louis. In May 2008, she and her boyfriend Curtis Pratt drove to Indianapolis so that Pratt could meet Johnson's mother. They brought \$4200 with them. When Johnson and Pratt arrived in Indianapolis, they went to James Clemons' house on Eugene Street. Clemons, who is Farmer's grandfather, ran an illegal bar at his house. Johnson and Pratt bought alcohol and crack for themselves and others at the house.

A few days later, Johnson and Pratt were broke. Pratt left Clemons' house to get some money, and when he returned he bought more alcohol and became "sloppy drunk." Tr. p. 289. Later that evening, Clemons told them to leave. When they reached their van in the driveway, Johnson got into the driver's seat because Pratt was drunk. Pratt stood at the passenger side and argued with her about wanting to drive. Farmer then came out of the house and walked to Pratt's side of the van. He said, "[Y]ou're not going to buy nothing from me." *Id.* at 292. Johnson explained that they spent all their money and that Farmer would have to wait until they got some more. Johnson and Pratt then resumed arguing about who would drive. When Farmer grabbed Pratt and interrupted their argument, Pratt stepped into the front passenger seat. At that point, Clemons came out of the house, pulled Farmer away from the van, shut the front passenger door, and told them to leave.

Johnson pulled out of the driveway. Pratt tried to snatch the keys out of the ignition, so Johnson put the van in park and turned off the ignition, and they began arguing again. Farmer then walked up to the passenger side and demanded that they open the door. Johnson reached over Pratt and opened the door. Farmer reached over, took

the keys from the ignition, and then pulled a gun. He told Pratt, “[G]ive [me] the motherf\*\*\*ing money.” *Id.* at 296. Pratt responded, “I’m not giving you the motherf\*\*\*ing money. F\*\*\* you.” *Id.* at 297. Farmer shot Pratt in the left leg and continued to demand money. When Pratt refused again, Farmer shot him again. Johnson, scared that Farmer would kill Pratt, told Pratt to give him the money. Pratt fumbled around for his money, and when he finally found it, Farmer grabbed it from him and shot him several times, emptying his gun. Farmer then ran from the van.

Pratt swallowed three or four times and then stopped breathing. Johnson did not call out for help or honk the horn because “I was afraid they were gonna come back and kill me.” *Id.* at 321. She found a spare key in Pratt’s pockets but did not drive to a hospital because Pratt was already dead and she had an outstanding warrant. She drove around and eventually went to her mother’s house. She told her mother that Farmer had killed Pratt. Johnson’s mother called the police. When officers arrived they noticed blood dripping from the bottom of the front passenger door of the van. Pratt, who showed no signs of life, was covered in blood, and there was blood all over the front passenger compartment.

During the shooting, Johnson had her purse on her lap. When officers spoke with her that night, she told them there was a shell casing in her purse. There was also a bullet hole in her purse. An officer took the purse and transported it to the homicide office. James Roth, a crime scene specialist from the Indianapolis-Marion County Forensic Services Agency, photographed the purse and all of the items inside. Roth recovered the spent shell casing from inside the purse and a spent bullet and jacket from between the

liner and the outside of the purse. Officer Leslie Vanbuskirk, the detective assigned to Pratt's murder, returned the personal items from the purse to Johnson.

In July 2008, the State charged Farmer with murder, Class A felony robbery, and Class A misdemeanor carrying a handgun without a license. Farmer was first tried before a jury in November 2009. After the jury retired to deliberate and returned with questions, however, the trial court moved for a mistrial, and Farmer and the State agreed. The court scheduled a new trial for January 19, 2010.

Farmer's counsel withdrew in early December 2009. On January 6, 2010, Farmer's new counsel, who also represents him on appeal, filed his appearance. At a hearing that day, defense counsel moved to continue the January 19 trial date and requested a date in April. The court set the trial for April 12 but warned defense counsel that it would not give him another continuance.

At a February hearing, defense counsel noted that he had filed a notice of deposition accompanied by a subpoena for Johnson and asked about the court's grant of the State's motion to quash the subpoena. The court explained that Johnson was an out-of-state witness and that it did not want the witness to be harassed. Because Johnson had testified at the first trial, defense counsel could obtain her sworn testimony from that trial. The court stated that defense counsel could arrange with the State for a deposition if he found that he needed to ask Johnson questions beyond what was already asked.

The court held another hearing on March 24 regarding, among other things, defense counsel's motion for leave to depose the State's witnesses, including Johnson, and March 4 notice of alibi defense. The court agreed to allow the depositions but

reiterated that they were to cover new issues. The State noted that it had been unable to contact Johnson but would continue to try to make her available for a deposition. Both parties made initial arguments regarding the notice of alibi defense. Defense counsel noted that it only discovered the alibi witness's name, Lashek Hood, the day before the hearing. The court set the issue for briefing and a hearing on March 31.

At hearings on March 31 and April 1, the State argued that the notice of alibi defense, which stated only that Farmer was cheating on his girlfriend at a Motel 6, *id.* at 83, was deficient for failing to include the date and place of Farmer's alibi. The State also argued that the notice was filed far too late: eighteen months after the deadline, twenty months after Farmer was charged, after his first trial where neither of his two previous attorneys provided the State with any information regarding an alibi, and two months after he retained new counsel. The State asked the court to exclude the alibi witness or to allow the State sufficient time to investigate the alibi defense. Farmer and his mother testified that they told his two previous attorneys about the alibi but neither followed up on it. Farmer's mother also testified that she told defense counsel about the alibi defense before he entered his appearance. Defense counsel pointed out guest documents from the Motel 6 indicating that Farmer checked in to the motel. Before ruling, the trial court stated:

The Defendant has had basically one trial . . . at which he learned all of the State's evidence; it was all presented there. Defendant had an opportunity to present that evidence at that time. What strikes me as unusual is that it would take two years to try to figure out who it was that you might have been having sex with on a particular date and time. I would think that your memory and the clues as to the identity of who that might have been would have been more fresh closer to the time of the event and I just think it smacks of something extremely unusual. . . . [W]hat you've told me is that

it was primarily through the assistance of the family members that this person was identified. So, if that's the case, I don't understand why the motive to do that didn't exist two years ago.

*Id.* at 135-36. The court did not find good cause for the late filing:

I think the State's absolutely right that it's late. Absolutely right that it puts them at a disadvantage and etcetera, but the case law all says that absent good cause. I think this is cause. I'm not sure that how great the cause is because I think the motive to develop this alibi witness existed at the same time this arrest took place two years ago. I don't think the motive to find this person is any different now than it was then and it surprises me that two years later we could remember the name and find the person. But, nonetheless, I think that it[']s evidence that you believe is extremely important.

*Id.* at 138. The court nevertheless allowed the notice of alibi defense but imposed a condition: "If I'm going to allow you to present this evidence, then I need to allow the State time to flush it out and do whatever it is they need to do to be prepared to respond to it." *Id.* at 137. The court granted defense counsel's request to reset the clock on Farmer's fast and speedy trial, which made the deadline for trial June 11, and continued the trial to June 7.

After being unable to depose Hood, the alibi witness, the State filed a motion to exclude her testimony. At the final pre-trial conference on June 2, the State told the court that it had provided defense counsel with three separate subpoenas for three different dates: May 14, 21, and 28. Although one of those dates was due to a rescheduling issue, Hood failed to show up for any of them. The State noted that Farmer's speedy deadline of June 11 was quickly approaching. In addition, the State said that although Farmer had earlier claimed he did not know Hood's full name, the State recently learned during a deposition of Farmer's girlfriend that she knew Hood's full name even before Farmer

was charged. Defense counsel argued, among other things, that Hood's testimony was vital to the case because she would testify that he was at a motel with her that night and did not leave. Defense counsel requested the court "to use the State's subpoena power and law enforcement to bring [Hood] here and compel her to be here either before the day of trial or the morning of trial." *Id.* at 159. The trial court granted the State's motion to exclude Hood's testimony:

[I] have given you great leeway in allowing you to present an alibi if you can put one -- if you can do that and I know you're doing your best to do that. I've given you that opportunity. The problem being that it's just not really coming to fruition and I really -- I went way further than I had to because the notice certainly was very late, obviously, according to the law. Now, I did allow it, but now we're at the eve of trial again and we have an uncooperative witness and I'm not going to force the State to procure your witness for you even though I understand that that's what you're asking me to do is somehow ask law enforcement to go -- go get her. I'm granting the State's motion.

*Id.* at 161. Defense counsel asked if the court was making a finding of bad faith on the part of the defendant. The court responded that it was not making a specific finding of bad faith, but if there was bad faith, "it's on the part of the Defendant. He and his family had access to individuals who could have easily given you the name of that person." *Id.* at 162.

On June 7, the first day of trial, the State made an oral motion requesting the court to declare Johnson unavailable and to allow the State to read into evidence her testimony from the first trial. The State detailed its extensive efforts to secure her attendance and said it had an affidavit from an investigator with the St. Louis County Prosecutor's Office stating that he served Johnson on May 26. Defense counsel stated, "We would be objecting to Matoyna Johnson's testifying at this trial based upon discovery rule

violations as well as an additional reason that we have filed and identified pretty thoroughly through legal justification for that in our motions.” *Id.* at 187. But it then stated, “So, with respect to whether or not she’s available and the [State has] made reasonable efforts, we have no objection to that; we believe she’s not available and we believe that the State has made reasonable efforts.” *Id.* The court granted the State’s motion.

During direct examination of Roth, the crime scene specialist, the State asked whether he was able to determine if a hard object inside Johnson’s purse stopped the bullet. Roth responded that the only thing he saw inside the purse that was damaged was a handkerchief, which had a hole in it. He stated that “there was nothing in the purse that would have caused a bullet to separate and be damaged in the manner it was damaged,” *id.* at 422, and that the bullet hitting a cloth purse or a handkerchief would not have caused that damage. Roth further stated that the bullet hitting a person before hitting the purse could have caused such damage.

At the end of the second day of trial, a juror asked Officer Vanbuskirk if there was a complete list of what was inside Johnson’s purse. Officer Vanbuskirk responded that there was photo documentation that was provided to both the State and Farmer through discovery. The State then introduced a photograph of the contents of Johnson’s purse, which was admitted without objection.

Before the jury was called on the third day of trial, Farmer moved for dismissal of the case with prejudice or a mistrial. He argued that the photograph of the contents of Johnson’s purse was not disclosed to the defense in violation of *Brady*. The State

responded that it had notified Farmer's prior counsel back in August 2008 that they could have access to all of the photographs they had. Farmer then argued that he filed a specific discovery request in February 2010 asking for a listing of all objects collected during the investigation. The trial court recalled that Officer Vanbuskirk's testimony showed that Johnson's personal items were not collected, but merely photographed and then returned to her. Noting that there was nothing "even marginally potentially exculpatory" about Johnson's personal items and that Farmer did not object to the admission of the photograph, the trial court denied Farmer's motion for dismissal with prejudice or a mistrial. *Id.* at 700-01.

A jury found Farmer guilty on all three counts. At sentencing, the trial court reduced the robbery conviction to a Class B felony after finding that the conviction could not be elevated to an A felony by the same serious bodily injury that formed the basis of the murder conviction. The trial court sentenced Farmer to fifty-five years for murder, a consecutive ten years for robbery, and a concurrent one year for carrying a handgun without a license.

Farmer now appeals.

### **Discussion and Decision**

Farmer contends that the trial court abused its discretion by excluding the testimony of his alibi witness and violated his Sixth Amendment confrontation right by admitting Johnson's prior trial testimony without giving him an adequate opportunity to cross-examine her. Farmer also contends that the trial court's bias against him denied

him the right to a fair trial and that the court abused its discretion by denying his motion for a mistrial based on the State's failure to disclose all the items in Johnson's purse.

### **I. Exclusion of Alibi Witness**

Farmer first contends that the trial court abused its discretion by excluding testimony of his alibi witness.

As an initial matter, the State argues that Farmer has waived this argument by failing to preserve the issue for review. To preserve an alleged error in the exclusion of a witness's testimony, a party must make an offer of proof. *Tyson v. State*, 619 N.E.2d 276, 281 (Ind. Ct. App. 1993), *trans. denied*. Farmer stated that Hood would testify that he was at a motel with her on the night of the crimes and that he did not leave. We find this statement to be a sufficient offer of proof and decline to find waiver.

When a defendant charged with a felony intends to offer evidence of an alibi, he must file with the court and serve upon the prosecuting attorney a written statement of his intention to offer such a defense no later than twenty days before the omnibus date. Ind. Code § 35-36-4-1; *Washington v. State*, 840 N.E.2d 873, 880 (Ind. Ct. App. 2006), *trans. denied*. The notice must include specific information regarding the exact place where the defendant claims to have been on the date stated in the information. I.C. § 35-36-4-1. If the defendant fails to file and serve a notice of alibi defense in accordance with these requirements and does not show good cause of his failure, "the court shall exclude evidence offered by the defendant to establish an alibi." *Id.* § 35-36-4-3(b). The determination of whether a defendant has established good cause is left to the discretion

of the trial court. *Seay v. State*, 529 N.E.2d 106, 110 (Ind. 1988); *Washington*, 840 N.E.2d at 880.

Meanwhile the Sixth Amendment to the United States Constitution and Article 1, Section 13 of the Indiana Constitution provide that a criminal defendant has the right to have compulsory process for obtaining witnesses in his favor. “The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies.” *Washington v. Texas*, 388 U.S. 14, 19 (1967). While the right to present witnesses is of critical importance, the right is not absolute and must sometimes yield to other legitimate interests in the criminal trial process. *Kroegher v. State*, 774 N.E.2d 1029, 1033 (Ind. Ct. App. 2002), *trans. denied*.

Although Farmer’s notice of alibi defense is not included in the record, it appears that it stated only that Farmer was cheating on his girlfriend at a Motel 6.<sup>1</sup> This does not meet the specificity requirements of Indiana Code section 35-36-4-1. *See Baxter v. State*, 522 N.E.2d 362, 367-68 (Ind. 1988) (statement that defendant was in Pennsylvania insufficient), *reh ’g denied*; *Graham v. State*, 464 N.E.2d 1, 8 (Ind. 1984) (statement that defendant was in Indianapolis at time of crime insufficient).

Notwithstanding specificity requirements, Farmer’s notice was filed too late. Farmer’s deadline for filing a notice of alibi defense appears to have been in September 2008. Tr. p. 84. He filed it eighteen months later in March 2010. Moreover, even

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<sup>1</sup> The Appellant’s Appendix contains only the chronological case summary, excerpts from the trial transcript, and some exhibits.

though Farmer obtained new counsel after the filing deadline, the evidence shows that defense counsel learned of the alibi defense before he entered his appearance on January 6, 2010, but still failed to file the notice until March 4. Defense counsel argued to the trial court that he did not file the notice until March because he did not know Hood's last name. However, at the time Farmer filed the notice, trial was set for one month later in April and the court had already warned him that it would not grant him another continuance. Further, the information Farmer did have, such as the location of the Motel 6 and that the alibi witness's first name was Lashek, *id.* at 95 (Farmer's mother's testimony that she knew the alibi witness's first name but not her last name), would have provided the State with at least some notice of an alibi defense. Given these circumstances, the trial court was within its discretion in finding that Farmer's explanation did not constitute good cause. *See Mitchell v. State*, 272 Ind. 369, 398 N.E.2d 1254, 1257 (1979) (no good cause for untimely filing where case had been pending for over two years, trial date was set well in advance, and defendant had ample time to file but filed just one day before trial); *Webster v. State*, 579 N.E.2d 667, 670 (Ind. Ct. App. 1991) (no good cause for untimely filing where defendant's explanation was that witness was unsure what date he picked up defendant at bus station).

Despite the late filing and the trial court's clear reservations regarding why it took twenty months after Farmer was charged to learn Hood's last name, the court reluctantly allowed the notice of alibi defense. Noting prejudice to the State, however, the court was clear that Farmer could only present the alibi evidence if the State had an opportunity to

investigate the alibi. We conclude that this condition was permissible given that Farmer failed to present good cause for the late filing.

The State had no such opportunity to investigate. Although the State provided defense counsel with multiple subpoenas for different deposition dates in May, Hood failed to show up for any of them. On June 2, 2010, just five days before trial and nine days before Farmer's speedy-trial deadline, the State filed a motion to exclude Hood's testimony. In light of these circumstances, we cannot say that the trial court abused its discretion by excluding Hood's testimony.

To the extent Farmer argues that the court violated his constitutional rights by denying his request to compel Hood to obey the subpoenas, we disagree. Given our conclusion that the court was within its discretion in finding that Farmer's explanation did not constitute good cause, the court could have denied his notice of alibi defense outright, which would have prohibited Hood from testifying as an alibi witness. We therefore cannot find that Farmer's constitutional rights were violated when the court denied his request to compel Hood to obey the subpoenas.

## **II. Admission of Johnson's Prior Trial Testimony**

Farmer next contends that the trial court violated his Sixth Amendment confrontation right by admitting Johnson's prior trial testimony without giving him an adequate opportunity to cross-examine her.<sup>2</sup> Specifically, Farmer argues that since he was going to argue at the second trial that he had an alibi, he needed to ask Johnson questions going to her credibility that "had not been covered or not fully covered by prior

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<sup>2</sup> Farmer does not contest that Johnson's prior testimony falls into one of the exceptions to the hearsay rule.

counsel.” Appellant’s Br. p. 15; *see also id.* at 17 (“Farmer’s defense in the second trial contended that Johnson was not telling the truth and [the] statement [that Johnson was in the driver’s seat with her purse in her lap] is contrary to the physical evidence.”). The only subject matter he identifies with any specificity pertains to Johnson’s purse: the hole in the purse, the contents of the purse, whether the contents fell out or were taken out of the purse before the shooting, and how a spent bullet and jacket ended up between the liner and the outside of the purse.

The Sixth Amendment to the United States Constitution provides, “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .” The Confrontation Clause bars admission of testimonial hearsay unless the declarant is unavailable to testify and the defendant has had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

Farmer concedes that Johnson was unavailable. Appellant’s Br. p. 16-17 (“Therefore, *even though Johnson was not available to testify at the trial*, because she flagrantly refused to permit Farmer to conduct further cross-examination through the court ordered telephone questioning, the State should not have been permitted to violate Farmer’s Sixth Amendment rights by entering into evidence Johnson’s prior trial testimony without Farmer having the opportunity to conduct the telephone questioning as ordered by the court.” (emphasis added)). The question is therefore whether Farmer had a prior opportunity to cross-examine her.

At the first trial, Johnson testified on direct that her purse was sitting on her lap during the shooting, after the shooting there was a bullet hole in her purse and a shell

casing inside her purse, and the police took her purse. Tr. p. 304-06 (from direct examination of Johnson at first trial, which was read into evidence at second trial). At the first trial, Farmer had an opportunity to cross-examine and in fact did cross-examine Johnson. *See id.* at 309-29 (cross-examination of Johnson at first trial, which was read into the evidence at second trial). “The Confrontation Clause . . . generates only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” *Fowler v. State*, 829 N.E.2d 459, 469 (Ind. 2005) (quotations omitted), *reh’g denied*. The fact that Farmer did not cross-examine Johnson about the purse does not negate the fact that he had an opportunity to do so.

Farmer appears to argue that the court abused its discretion by admitting Johnson’s prior testimony since Johnson did not participate in a deposition as allowed by the court. He points out that the court could have compelled Johnson to be available for a deposition and continued the trial. The State, however, had already subpoenaed Johnson with the assistance of the St. Louis County Prosecutor’s Office, and Farmer did not request a continuance. Further, the trial court was aware that Farmer’s speedy-trial deadline was quickly approaching. The trial court did not abuse its discretion.

We conclude that the trial court did not violate Farmer’s Sixth Amendment confrontation right by admitting Johnson’s prior trial testimony.

### **III. Bias**

Farmer also contends that the trial court’s bias against him denied him the right to a fair trial. He points to the trial court’s comment that he and his family could have more

timely provided the name of the alibi witness. He also argues that although the trial court excluded Hood's testimony because she failed to show up for a deposition, the trial court did not exclude Johnson's testimony even though she failed to show up for a deposition.

Farmer did not object or move for a change of judge on these grounds. *See* Ind. Crim. Rule 12(B) ("In felony and misdemeanor cases, the state or defendant may request a change of judge for bias or prejudice."); *see also* *Hobson v. State*, 471 N.E.2d 281, 287 (Ind. 1984) ("One may not await the outcome of a trial and then complain that he was prejudiced."). Farmer's argument is thus waived.

Waiver notwithstanding, Indiana law presumes that a judge is unbiased and unprejudiced. *Everling v. State*, 929 N.E.2d 1281, 1287 (Ind. 2010); *see also* Ind. Judicial Conduct Canon 2.2 ("A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."). To rebut that presumption, a defendant must establish from the judge's conduct actual bias or prejudice that places the defendant in jeopardy. *Smith v. State*, 770 N.E.2d 818, 823 (Ind. 2002). Mere assertions that certain adverse rulings by a judge constitute bias and prejudice do not establish the requisite showing. *Voss v. State*, 856 N.E.2d 1211, 1217 (Ind. 2006).

The trial court's comment that Farmer and his family could have more timely provided the name of his alibi witness was based on the State's uncontroverted statement that Farmer's girlfriend knew the alibi witness's full name even before Farmer was charged. The court's comment does not support a claim for bias or prejudice. In addition, our discussion above establishes that the trial court's exclusion of Hood's

testimony and admission of Johnson's prior testimony were both supported by the record. Farmer has failed to establish bias or prejudice.

#### **IV. Mistrial**

Farmer finally contends that the trial court abused its discretion by denying his motion for a mistrial based on the State's failure to disclose all the items in Johnson's purse. He argues that a mistrial should have been granted because the State's failure to disclose was a violation under the United States Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963).

The ruling on a motion for a mistrial is left to the sound discretion of the trial court as that court is in the best position to assess the circumstances of an error and its probable impact upon the jury. *Stokes v. State*, 922 N.E.2d 758, 762 (Ind. Ct. App. 2010), *trans. denied*. We reverse only upon an abuse of that discretion. *Id.* To prevail on appeal from the denial of a motion for a mistrial, the defendant must demonstrate that 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. *Id.* at 762-63. A mistrial is an extreme remedy that is justified only when less severe remedies will not satisfactorily correct the error. *Id.* at 763.

In *Brady v. Maryland*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. To prevail on a *Brady* claim, the defendant must establish that: (1) the prosecution suppressed evidence, (2) the evidence

was favorable to the defense, and (3) the evidence was material to an issue at trial. *Kubsch v. State*, 934 N.E.2d 1138, 1145 n.4 (Ind. 2010), *reh'g denied*. Evidence is material under *Brady* only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

The evidence does not show that the State committed a *Brady* violation. After taking a picture of the contents of Johnson's purse, the police returned the personal items to her. The State could not suppress evidence that it no longer had, and the photograph of the purse's contents was available to the defense. Moreover, Farmer has not shown how Johnson's personal items were favorable to the defense and in fact concedes that they may not have been favorable. Appellant's Br. p. 22 ("It is possible that the existence or nonexistence of the items removed from Johnson's purse would not have been cloaked with favorable materiality . . ."). Further, Farmer has not shown how the evidence was material to an issue at trial. Although he claims that the evidence could diminish Johnson's credibility, he states only that he could have asked Johnson why she did not call the police with her cell phone, which was depicted in the photograph. He further speculates that Johnson could have gotten into a physical struggle with Pratt after their argument, items in her purse could have fallen out at that time, and that Johnson could have shot Pratt. We decline to find that these items were suppressed or were favorable to the defense, but even if they were, they were not material to an issue at trial. That is, their disclosure would not have changed the outcome of the proceedings.

Farmer also argues that “the prosecution exaggerated [the absence of items in Johnson’s purse] in [the] evidence, made its absence an issue and materially misled the jury.” *Id.* Specifically, he argues that the State’s concealment of the items from both the defense and from Roth, the crime scene specialist, combined with the State’s questioning of Roth about what could have caused damage to the bullet placed Farmer in an unfair position. We disagree. First, there is no evidence that the State concealed the items from the defense. Second, the State did not conceal the existence of the items from Roth. In fact, Roth was the person who photographed the purse and its contents. *See* Tr. p. 595 (Officer Vanbuskirk testifying: “[Roth] photographed the purse up in my office and then he went through and all the items he took out of the purse and set them on the table and photographed them.”). Finally, we cannot say that the State exaggerated the absence of items in Johnson’s purse when it introduced the photograph showing the contents of her purse.

We conclude that the trial court did not abuse its discretion by denying Farmer’s motion for a mistrial.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.