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**IN THE  
COURT OF APPEALS OF INDIANA**

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DOUGLAS CURE, )  
 )  
Appellant- Defendant, )  
 )  
vs. ) No. 49A02-0811-CR-1025  
 )  
STATE OF INDIANA, )  
 )  
Appellee- Plaintiff, )

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Robert Altice, Judge  
Cause No. 49G02-0709-FB-180465

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June 22, 2009

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

### Case Summary and Issues

Douglas Cure appeals his conviction, following a jury trial, of four counts of robbery, all Class B felonies, and one count of criminal confinement, a Class B felony. For our review, Cure raises two issues, which we reorder and restate as: 1) whether the trial court erred when it denied Cure's motion to sever the charges against him; and 2) whether the trial court abused its discretion when it denied Cure's motion for a mistrial. Concluding the trial court did not abuse its discretion in either instance, we affirm.

### Facts and Procedural History

On August 17, 2007, between 9:00 and 9:30 p.m., Caroline Koley sat in the driver's seat of her car, and Scott Massey stood outside of the car talking to her. Koley saw a man approach the pair from across the street and strike Massey two or three times in the head with a blunt object. After threatening to kill the pair, the man demanded Koley's purse and struck her on the jaw before she could comply. Koley pushed her purse in the man's direction, and he took the purse and ran off.

On August 24, 2007, between 8:00 and 9:00 p.m., Alisha Garrison sat in the driver's seat of a U-Haul truck, and Benjamin Bernthal stood outside the truck on the passenger side, leaning in to write a note on the passenger seat. A man approached Bernthal from behind and struck him in the back of the head with a blunt object. The man then demanded Garrison's purse and Bernthal's wallet. The man hit Bernthal again, took the keys to the U-Haul, ran off, and got into the passenger seat of a nearby car, which drove off.

Later that same night, around 11:30 p.m., Kate Sitzman and Sarah Vernon were sitting in a car in a McDonald's parking lot. A man pulled open the driver's side door, and struck Sitzman across the face with a blunt object. The man demanded both women's purses. After Sitzman complied, the man struck Vernon in the face with the blunt object. Sitzman gave the man Vernon's purse, and he ran off.

All of the robberies took place in the Broad Ripple area of Indianapolis. An anonymous tip led police to Cure as a suspect. Thereafter, Massey, Garrison, and Vernon, separately identified Cure as their attacker from a photo array. Subsequently, the State charged Cure with the following: five counts of robbery, all Class B felonies; one count of battery, a Class A misdemeanor; and one count of criminal confinement, a Class B felony.<sup>1</sup>

Cure moved the trial court to sever the charges against him. The trial court denied his request after a hearing, stating:

[Y]ou've got three robberies, all of them occurring in the vicinity of the Broad Ripple area, all of them occurring close in time, all of them occurring with the alleged victims being approached as they were about to enter their car and at that either, [sic] I think one case there was a purse that was taken, others asked their wallets be given and things like that. So I think they're surely showing a common scheme and plan with regard to these robberies and so I think they are – based on that I'm going to deny the Motion to Sever.

Transcript at 539.

Prior to the jury trial, the trial court granted Cure's motion in limine and prohibited the State from referring to an anonymous tip received by the police identifying Cure as a suspect in the robberies. Nonetheless, during the trial, while questioning

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<sup>1</sup> The State later amended one of the robbery charges to a Class A felony alleging the robbery resulted in the permanent or protracted loss of vision quality in Vernon's eye.

Detective Kevin Wethington, who investigated the robberies, the State asked: “Were you made aware of any suspects by way of anonymous tip?” Id. at 271. Detective Wethington answered: “Eventually, yes.” Id. Cure’s counsel then requested a bench conference and moved for a mistrial based on the State’s violation of the motion in limine. The trial court denied the motion for a mistrial but admonished the jury, stating: “Ladies and gentleman of the jury, very important, I’m telling you to absolutely disregard that last question of counsel. Take that out of your mind and not think about it any more [sic]. Okay? Can all of you do that? All right. Okay. Proceed, counsel.” Id. at 273.

At the conclusion of the trial, the jury found Cure guilty of four counts of robbery and one count of criminal confinement, all Class B felonies. The trial court held a sentencing hearing on October 15, 2008, after which it sentenced Cure to an aggregate term of forty years executed with the Department of Correction. Cure now appeals.

### Discussion and Decision

#### I. Motion to Sever Offenses

##### A. Severance as a Matter of Right

Cure argues the trial court erred when it denied his motion to sever the charges against him because joinder of the charges was based only on the fact that they are of the same or similar character. Two or more offenses may be joined in the same indictment or information when the offenses either: “(1) are of the same or similar character, even if not part of a single scheme or plan; or (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.” Ind. Code § 35-34-1-9(a). However, Indiana Code section 35-34-1-11(a) allows a defendant to move for

a severance of the offenses. When the offenses have been joined for trial “solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses.” Id. In all other cases, the trial court shall grant a defendant’s motion for severance of the offenses whenever it determines that severance is appropriate to promote a fair determination of the defendant’s guilt or innocence of each offense. Id. In other words, “[i]f offenses are joined solely on the ground that they are of the same or similar character, a defendant is entitled to severance as a matter of right and the trial court has no discretion to deny a motion to sever.” Harvey v. State, 719 N.E.2d 406, 409 (Ind. Ct. App. 1999). However, if “offenses are joined as being part of a single scheme or plan, it is within the trial court’s discretion to grant severance ....” Id.

In Harvey, we considered similar circumstances. There, the defendant was charged with committing two robberies in the same part of Indianapolis just four days apart. Two black men, one very tall and the other fairly short, accomplished the robberies with the larger man wielding a gun and physically manipulating the victims while the shorter man assisted. In each robbery, the larger man “pistol-whipped the victim after emptying the cash register.” Id. Although acknowledging that “some of these similarities are inherent in many robberies,” this court held the facts “sufficient to show a ‘series of acts connected together’ induced by the common motive to rob,” and “Harvey ... was not entitled to severance as a matter of right.” Id.

Here, in each robbery Cure acted at night, approached the victims from behind, threatened to harm the victims, demanded their purses or wallets, and struck the victims with a blunt object. In addition, the crimes all occurred in the same area of Indianapolis

and within one week of each other. Contrary to the State's assertion, we do not discern a unique modus operandi linking the crimes and tying them to Cure. See Frentz v. State, 875 N.E.2d 453, 462 (Ind. Ct. App. 2007) (“[O]ffenses may be sufficiently ‘connected together’ to justify joinder if the State can establish that a common modus operandi linked the crimes and that the same motive induced that criminal behavior.” (quoting Ben-Yisrayl v. State, 690 N.E.2d 1141, 1145 (Ind. 1997))), trans. denied. Rather, the circumstances of the robberies read like an instructional handbook for conducting a basic robbery, and, at first blush, they appear to be linked only by a similar character, thus entitling Cure to severance as of right.

However, the Garrison/Berenthal and Sitzman/Vernon robberies on August 24th took place in the same area of Indianapolis, under the same circumstances, and within a couple hours of each other. The similarities coupled with the spatial and temporal closeness of the crimes demonstrates a common scheme as to those two robberies. The Koley/Massey robbery on August 17th also occurred in the same area of Indianapolis, at the same time of day, and under the same circumstances. These similarities are sufficient to extend the existence of a common scheme in the August 24th robberies to the August 17th robbery. Therefore, as in Harvey, the facts are sufficient to demonstrate a series of acts connected together induced by a common motive to rob. As a result, we hold Cure was not entitled to severance as a matter of right.

#### B. Discretionary Severance

In light of this, the decision to grant Cure's motion to sever was within the trial court's discretion. Harvey, 719 N.E.2d at 409. In reaching its decision, the trial court

must consider: “(1) the number of offenses charged; (2) the complexity of the evidence to be offered; and (3) whether the [jury] will be able to distinguish the evidence and apply the law intelligently as to each offense.” Ind. Code § 35-34-1-9(a)(1)-(3). The decision to sever charges is within the sound discretion of the trial court and we will reverse only upon a showing of clear error. Harvey, 719 N.E.2d at 409. In addition, we consider whether the denial of separate trials subjected the defendant to prejudice “in light of what actually occurred at trial ....” Id.

Here, all of the victims testified regarding the three robberies. One victim from each incident identified Cure as the robber from a photo array prepared by the police as part of the investigation. Each of these victims also identified Cure as the robber at trial. Further, each of the crimes occurred in a similar manner. In light of this, the jury would have no problem distinguishing the evidence of one crime from that of another, and Cure has not demonstrated that the trial court’s denial of his motion to sever subjected him to prejudice. Therefore, the trial court did not err when it denied Cure’s motion to sever the offenses.

## II. Motion for Mistrial

Cure also argues the trial court erred when it denied his motion for a mistrial after the State violated an order in limine. “A mistrial is an extreme remedy that is warranted only when less severe remedies will not satisfactorily correct the error.” Warren v. State, 725 N.E.2d 828, 833 (Ind. 2000). The trial court has discretion to grant or deny a motion for mistrial and we reverse only for an abuse of that discretion. Smith v. State, 872 N.E.2d 169, 175 (Ind. Ct. App. 2007), trans. denied. In determining whether a mistrial is

warranted, we consider whether the State's actions put the defendant "in a position of grave peril to which he should not have been subjected; the gravity of the peril is determined by the probable persuasive effect on the jury's decision." Id. (quoting Leach v. State, 699 N.E.2d 641, 644 (Ind. 1998)). However, "reversible error is seldom found when the trial court has admonished the jury to disregard a statement made during the proceedings." Burks v. State, 838 N.E.2d 510, 519-20 (Ind. Ct. App. 2005) (citations omitted), trans. denied.

Initially, we point out that the State's question was a blatant violation of the trial court's order in limine. The trial court expressly forbid the State from mentioning a tip received by police from an anonymous source implicating Cure as a suspect in the robberies. The trial court also instructed the State that it could mention that Cure was developed as a witness without mentioning the anonymous tip. Nonetheless, the State flouted the trial court's authority and directly questioned Detective Wethington about receiving an anonymous tip.

Despite the State's misconduct, however, we cannot say that the statement placed Cure in grave peril. First, although the State's line of question undoubtedly was building to the identification of Cure as the subject of the anonymous tip, the objectionable question asked only if an anonymous tip led to a suspect – not to Cure specifically. Nor did the Detective's affirmative answer mention Cure. In addition, the evidence of Cure's guilt was substantial including positive identifications by a victim of each of the three robberies both at trial and prior to trial from a photo array. Finally, and most importantly, the trial court immediately took the appropriate corrective action by admonishing the jury

to disregard the statement. Therefore, the trial court did not abuse its discretion when it denied Cure's motion for a mistrial.

### Conclusion

The trial court did not err when it denied Cure's motion to sever the charges against him and did not abuse its discretion when it denied Cure's motion for a mistrial.

Affirmed.

DARDEN, J., and BAILEY, J., concur.