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IN THE
COURT OF APPEALS OF INDIANA

CHARLES FARRELL, III,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-1008-CR-457
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-1003-MR-2

July 19, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Charles Farrell III appeals his conviction of felony murder.[1] He raises three issues for our review:

1. Whether the trial court abused its discretion by denying Farrell's motion for mistrial;
2. Whether the trial court committed reversible error by engaging in *ex parte* communication with the jury; and
3. Whether there was sufficient evidence to convict Farrell of felony murder.

We affirm.

FACTS AND PROCEDURAL HISTORY

On July 25, 2009, Farrell asked Daron Tuggle if Farrell could "get some work," which Tuggle understood to mean Farrell wanted to purchase cocaine. Farrell indicated he wanted a "kilo or two."[2] (Tr. at 88-89.) Tuggle contacted Alphonso James, whom Tuggle had assisted with large quantity cocaine deals in the past, and arranged a deal between Farrell and James.

Farrell arrived at the designated site with Bruce White and an unidentified third person. James was present with Tuggle and Noble Dennie. All six men entered a lower level

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[1] The State originally charged Ferrell with murder based on his killing another human being while committing or attempting to commit "dealing in or manufacturing cocaine or a narcotic drug (Ind. Code § 35-48-4-1)." *See* Ind. Code § 35-42-1-1(3)(A). The State charged Ferrell's underlying felony as: "attempting to commit Dealing in Cocaine, that is to knowingly engage in conduct which constituted a substantial step toward knowingly delivering cocaine[.]" (App. at 10); *see also* Ind. Code §§ 35-48-4-1(a)(1)(C) (dealing in cocaine) & 35-41-5-1 (attempt). Later, the State amended the charge to indicate Ferrell may have knowingly or intentionally aided, induced, or caused another person commit murder. *See* Ind. Code § 35-41-2-4.

[2] A "kilo" refers to a kilogram of cocaine. Cocaine is usually sold and packaged in one gram increments. *See Montego v. State*, 517 N.E.2d 74, 77 (Ind. 1987) (evidence sufficient to convict Montego of dealing in cocaine based on multiple one-gram packages found in his apartment; witness testified cocaine is normally sold this way).

apartment, where James handed Farrell two packages that were three inches wide and eleven inches long and wrapped in duct tape. Tuggle testified such packaging was indicative of a "bird or brick" of cocaine. (*Id*. at 82.) Farrell asked for something to open the "brick" and Tuggle went to the kitchen to look for a knife.

While Tuggle was out of the room, White pulled out a gun, pointed it at James, and told James to "give it up." (*Id*. at 101.) While James and White struggled with the gun, Farrell pulled out a gun and pointed it at Tuggle. When he saw the gun, Tuggle ducked down to the floor, saw White shoot James, and covered his head until the gunfire stopped. After the other men left, Tuggle called 911 to get help for James. When police arrived, James was dead.

Farrell, Tuggle, and White were charged with felony murder. Tuggle agreed to plead guilty to conspiracy to deliver cocaine and to testify against Farrell. In exchange, the State dropped the murder charge against Tuggle. A jury found Farrell guilty of felony murder.

DISCUSSION AND DECISION

1. Denial of Mistrial

Farrell claims the trial court should have granted his request for mistrial. A mistrial is an "extreme remedy that is warranted only when less severe remedies will not satisfactorily correct the error." *Francis v. State*, 758 N.E.2d 528, 532 (Ind. 2001). "On appeal, the trial judge's discretion in determining whether to grant a mistrial is afforded great deference because the judge is in the best position to gauge the surrounding circumstances of an event and its impact on the jury." *McManus v. State*, 814 N.E.2d 253, 260 (Ind. 2004), *reh'g*

denied. "When determining whether a mistrial is warranted, we consider whether the defendant was placed 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." *James v. State*, 613 N.E.2d 15, 22 (Ind. 1993).

Farrell argues he was entitled to a mistrial because the prosecution deployed an "evidentiary harpoon." "An evidentiary harpoon occurs when the prosecution places inadmissible evidence before the jury for the deliberate purpose of prejudicing the jurors against the defendant." *Evans v. State*, 643 N.E.2d 877, 879 (Ind. 1994). To succeed with such a claim, Farrell must show (1) the prosecutor acted deliberately to prejudice the jury and (2) the evidence was inadmissible. *See id*.

Farrell claims the "evidentiary harpoon" occurred during the following exchange between the prosecutor and Shannon Kirkendoll, James' girlfriend:

> Prosecutor: That red and gray Monte Carlo, was it for sale?
> Kirkendoll: No.
> Prosecutor: In fact, did [James] have any vehicles for sale whatsoever?
> Kirkendoll: No.
> Prosecutor: When he was selling something, what was it that he was selling?
> Kirkendoll: Drugs.
> Prosecutor: Drugs. As in cocaine?
> Kirkendoll: Powder.
> Prosecutor: Pardon me?
> Kirkendoll: Powder.
> Prosecutor: Powder cocaine?
> Kirkendoll: Yes.
> Prosecutor: Okay. And on this occasion, he wasn't selling a car, was he?
> Kirkendoll: No.

(Tr. at 572.) Farrell objected and moved for a mistrial, indicating the testimony "was an

intentional effort to elicit testimony that was previously kept out. [The witness] was not permitted to testify to her opinion [regarding what James was selling] . . ." (*Id*. at 573.)

Outside the presence of the jury, the trial court determined the evidence was cumulative and denied Farrell's request for mistrial:

> It should be no secret to anyone here in the courtroom that the very first witness called by the [S]tate described a drug transaction that was taking place at the address in question on the date in question. It was two kilos of drugs that were going to be exchanged for approximately $60,000.
>
> So to the extent that [defense counsel] makes the argument that this is a total shock and a surprise to the jury, it should not under any circumstance be a shock to anyone to learn that Mr. James and Mr. Tuggle were allegedly going to make a drug deal with the defendant. Whether or not the jury chooses to believe that or not, I think it's clear that this evidence is cumulative of the evidence the jury has already heard.

(*Id*. at 580.) When the jury returned, it was told a motion for mistrial had been denied.

As the jury had already heard a drug deal was afoot on the day of James' murder, we cannot say the prosecutor was attempting unfairly to prejudice the jury with inadmissible evidence. Farrell cannot demonstrate cumulative evidence rendered his trial fundamentally unfair and, thus, the trial court did not abuse its discretion in denying Farrell's request for mistrial.

2. <u>Alleged *Ex Parte* Communication between Judge and Jury</u>

Farrell contends the trial court judge engaged in impermissible *ex parte* communication with the jury during a walk around the building on the third day of the trial. An *ex parte* conversation between a trial judge and a juror does not necessarily deprive a defendant of any constitutional right. *Majors v. State*, 773 N.E.2d 231, 234 (Ind. 2002).

While such a communication may create a presumption of error, "such a presumption is rebuttable and does not constitute *per se* grounds for reversal." *Warren v. State*, 757 N.E.2d 995, 1001 (Ind. 2001). In deciding if the presumption is rebuttable, we consider the nature of the communication and the effect it might have had on a fair determination of the issues at trial. *Id*. The presumption of harm arises only when the *ex parte* communication relates to a substantial right of the defendant. *Majors*, 773 N.E.2d at 234.

Near the end of the third day of Farrell's trial, the court said: "So after consultation with counsel and the jurors and the bailiff and the Court staff, we decided to take the jury for a walk around the courthouse. We did do that. There were a couple of smokers who smoked a cigarette, and everyone is ready to go now." (Tr. at 707.) Before that recess, the trial court admonished the jurors to "not discuss the facts of the case with anyone other than your fellow jurors. *You may not discuss this case with me* or with the lawyers, parties or with any of the witnesses." (*Id*. at 706) (emphasis added).

Besides noting the jury and trial judge were together outside the courthouse, Farrell directs us to no evidence they communicated or that any communication "relate[d] to a substantial right of the defendant." *See Majors*, 773 N.E.2d at 234. Nor has he demonstrated any such communication had any effect on "a fair determination of the issues at trial." *See Warren*, 757 N.E.2d at 1001. We decline to hold a presumption of harm arose during the judge's walk with the jurors.

3. Sufficiency of the Evidence

When reviewing sufficiency of evidence to support a conviction, we consider only the probative evidence and reasonable inferences supporting the decision. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the fact-finder's role, and not ours, "to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction." *Id.* To preserve this structure, when confronted with conflicting evidence, we consider it most favorably to the trial court's ruling. *Id.* We affirm a conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id.* The evidence need not overcome every reasonable hypothesis of innocence; rather, the evidence is sufficient if an inference reasonably may be drawn from it to support the jury's decision. *Id.* at 147.

a. Incredible Dubiosity

Farrell argues his conviction was based on "incredibly dubious" testimony by Tuggle, and without Tuggle's testimony "there was no reasonable basis upon which a reasonable juror could find Farrell guilty beyond a reasonable doubt." (Br. of Appellant at 10.) Under the "incredible dubiosity rule" we may "impinge on the jury's responsibility to judge the credibility of the witness only when it has confronted 'inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity'." *Rodgers v. State*, 422 N.E.2d 1211, 1213 (Ind. 1981). We will reverse a conviction if the sole witness presents inherently improbable testimony and there is no circumstantial evidence of the defendant's guilt. *White v. State*, 706 N.E.2d 1078, 1079-80 (Ind. 1999).

Farrell points to the fact that Tuggle's trial testimony was inconsistent with his pre-trial statements. "The fact that a witness gives trial testimony that contradicts earlier pre-trial statements does not necessarily render the trial testimony incredibly dubious." *Murray v. State*, 761 N.E.2d 406, 409 (Ind. 2002). Farrell cross-examined Tuggle about his contradictory statements. Tuggle testified he lied to other inmates and the police to preserve his safety, escape personal culpability, and improve his chances of a favorable plea bargain. The jury heard Tuggle's testimony and explanation for the inconsistencies, and it heard Farrell attempt to impeach Tuggle's prior statements and elicit information about Tuggle's plea bargain.

In light of the other evidence of Farrell's guilt, including Kirkendoll's testimony Farrell was one of the men who entered the apartment with James and then fled the apartment in the getaway car, we cannot hold Tuggle's testimony was incredibly dubious. Farrell's argument is an invitation to reweigh the evidence, which we cannot do. *See Drane*, 867 N.E.2d at 146.

b. Evidence of Underlying Felony

Farrell argues the State did not prove he was engaged in attempted dealing in cocaine when James was killed. In the charging information, the State alleged Farrell committed murder while: "attempting to commit Dealing in Cocaine, that is to knowingly engage in conduct which constituted a substantial step toward knowingly delivering cocaine[.]" (App. at 10.)

To prove attempted dealing in cocaine, the State must present evidence Farrell, acting with the culpability to commit the crime, engaged in conduct constituting a substantial step toward commission of the crime. Ind. Code §§ 35-48-4-1(a)(1)(C) and 35-41-5-1. A substantial step toward the commission of the crime is "dependent on the facts of each case, but the requirement is a minimal one, often defined as any overt act in furtherance of the crime." *Neuhoff v. State*, 708 N.E.2d 889, 893 (Ind. Ct. App. 1999).

The evidence most favorable to Farrell's conviction indicates he requested a large quantity of drugs from Tuggle, then met Tuggle and James to obtain it. If a quantity of cocaine "is such that it could not be personally consumed or used, then an inference of a predisposition to sell can reasonably be drawn." *Goodner v. State*, 685 N.E.2d 1058, 1062 n.4 (Ind. 1997). Thus, based on the quantity of drugs Farrell tried to buy, a reasonable fact-finder could conclude Farrell completed a substantial step toward his delivery of the cocaine to someone else in the future. *See Neuhoff*, 708 N.E.2d 889 (Neuhoff guilty of dealing in marijuana for moving a box he knew contained a large quantity of marijuana from one place to another and stating he was doing so because he thought the police were watching him).

CONCLUSION

Farrell has not established the prosecutor put him in "grave peril," and thus the trial court did not abuse its discretion in denying his request for mistrial based on an alleged "evidentiary harpoon." Nor did he show there was *ex parte* communication between the

judge and the jury that affected his rights. Finally, the State presented sufficient evidence to convict Farrell of felony murder based on Farrell's attempt to obtain cocaine that he could later deal. Accordingly, we affirm.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.