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IN THE
COURT OF APPEALS OF INDIANA

BRYCE A. RUPSKA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 84A01-0905-CR-217
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable Michael J. Lewis, Judge
Cause No. 84D06-0704-MR-1167

September 18, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Bryce A. Rupska appeals his conviction for class B felony aggravated battery. We affirm.

Issues

Rupska raises the following issues for review:

I. Did the trial court abuse its discretion in denying his motion for mistrial on the basis of an alleged *Doyle* violation?

II. Did the State present sufficient evidence to sustain his conviction?

Facts and Procedural History

On March 30, 2007, Rupska and his girlfriend, Trena Chapman, drank tequila at their Terre Haute home with their friends, Richard Ramey and Terri Neese. The group decided to walk to T's Lounge for drinks and dancing. Rupska and Ramey became involved in a fight with at least one other bar patron, and the fight escalated when other patrons joined in. The brawl gravitated to the back door of the bar, and ten to thirty people followed it outside.

Several people sustained injuries, including Jason White, who received a fatal puncture wound to the temple. At some point during the fight, Rupska pulled out a pocket knife and stabbed Travis Hughes. Hughes suffered seven stab wounds to his arm and upper back between his shoulder and spine, causing one of his lungs to collapse. Hughes floated in and out of consciousness, and emergency personnel inserted a chest tube en route to the hospital. Upon arrival, Hughes was admitted to the intensive care unit and given a blood transfusion.

Meanwhile, Chapman had suffered a deep laceration in her leg, and she and Rupska ran to their nearby home and called 911. In response, Terre Haute Police Officer Michael Ellerman came to the home, unaware that Rupska was a suspect in the brawl. Officer Ellerman arranged emergency services for Chapman. Shortly thereafter, other officers arrived and informed Officer Ellerman that Rupska was a suspect, and he placed Rupska in custody.

On April 4, 2007, the State charged Rupska with murder, class C felony battery with a deadly weapon, three counts of class B felony aggravated battery, and a habitual offender count. A bifurcated jury trial began on February 19, 2008. During the initial phase of the trial, the prosecutor asked Officer Ellerman whether Rupska had offered to give him the knife he used during the brawl. Rupska moved for a mistrial, claiming that the question amounted to an unlawful attempt to use his silence to impeach him.[1] The trial court denied his motion, and the jury found Rupska guilty of one count of class B felony aggravated battery against Hughes. During the habitual offender phase of the trial, the jury was unable to reach a verdict. On November 12, 2008, Rupska admitted his habitual offender status pursuant to a plea agreement. The trial court entered judgment of conviction on December 11, 2008. This appeal ensued. Additional facts will be provided as necessary.

Discussion and Decision

I. Doyle Violation

Rupska contends that the trial court erred in denying his motion for mistrial. "A

[1] Doyle v. Ohio, 426 U.S. 610, 619 (1976).

mistrial is an extreme remedy warranted only when no other curative measure will rectify the situation." *Evans v. State*, 855 N.E.2d 378, 385 (Ind. Ct. App. 2006) (citation and quotation marks omitted), *trans. denied* (2007). Because the trial court is in the best position to gauge the circumstances surrounding an event and their impact on the jury, we review its decision to deny a mistrial for an abuse of discretion. *Morgan v. State*, 903 N.E.2d 1010, 1019 (Ind. Ct. App. 2009), *trans. denied*. A mistrial is appropriate only where the questioned conduct is so prejudicial and inflammatory that it places the defendant "in a position of grave peril to which he should not have been subjected." *Id*. (citation and quotation marks omitted). "The gravity of the peril is measured by the conduct's probable persuasive effect on the jury." *Id*. (citation and quotation marks omitted).

Rupska based his motion for mistrial on *Doyle v. Ohio*, in which the United States Supreme Court held that a prosecutor may not use the silence of an arrested and Mirandized defendant to impeach him. 426 U.S. 610, 619 (1976). "*Doyle* rests on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." *Teague v. State*, 891 N.E.2d 1121, 1125 (Ind. Ct. App. 2008) (citation and internal quotation marks omitted).

Rupska alleges that a *Doyle* violation occurred based on the following interchange during the State's re-direct examination of Officer Ellerman:

> [Prosecutor]: [Defense counsel] also asked you about Mr. Rupska approaching you and not running away, that he came up to the car and was waving you in. *At any point*, did he offer to give you a knife that he may have allegedly had at T's lounge?

[Officer Ellerman]: No.

[Prosecutor]: I have no further questions.

Tr. at 506 (emphasis added).

Rupska admits that at the time Officer Ellerman arrived at his home, he was not even identified as a suspect, let alone Mirandized. However, he argues that the State's use of the phrase "at any point" covered not only the time when the officer arrived at his home, but also extended to include any point before trial, and thus implicated his post-Miranda silence. We disagree. The context of the question and the surrounding circumstances clearly indicate that the phrase "at any point" was meant to cover the time that Officer Ellerman spent with Rupska on the night of the brawl. First, the prosecutor reiterated certain specifics regarding Rupska's conduct at the time the officer first arrived, which the defense had introduced on cross-examination to demonstrate Rupska's initial cooperation with police. Moreover, the record indicates that Rupska was not Mirandized until the next morning at the hospital when he made a statement to police. By that time, Officer Ellerman's involvement in the case had ceased. In sum, we find no *Doyle* violation here.

Even assuming for argument's sake that such a violation occurred, a *Doyle* violation may be harmless if it is clear beyond a reasonable doubt that the error did not contribute to a defendant's conviction. *Sobolewski v. State*, 889 N.E.2d 849, 857 (Ind. Ct. App. 2008), *trans. denied*. In analyzing whether a *Doyle* violation is harmless error, we examine five factors: (1) the use to which the prosecution put the post-arrest silence; (2) who elected to pursue the line of questioning; (3) the amount of other evidence indicative of guilt; (4) the

intensity and frequency of the reference; and (5) the availability to the trial court of an opportunity to give a curative instruction or grant a motion for mistrial. *Id*.

Here, the State asked Officer Ellerman an isolated question about whether Rupska offered or gave him the knife he had used during the brawl. When the Officer said "no," the State asked no further questions and never addressed the issue again. The State raised the issue in response to defense counsel's attempt to demonstrate Rupska's cooperative conduct. Moreover, eyewitness Tawni Miller testified that she saw Rupska stab Hughes, and Rupska himself admitted that "there's a good chance" he had stabbed him. Tr. at 385-86, 1020. As such, substantial independent evidence supports Rupska's conviction. Also, the trial court gave a curative instruction admonishing the jury that "the defendant has a right not to answer any questions or offer any evidence against himself when he is under arrest. And that goes with regard to the last question that was asked." *Id*. at 513. "We presume that the jury follows the trial court's instructions." *Morgan*, 903 N.E.2d at 1019. Thus, "[w]here the trial court adequately admonishes the jury, such admonishment is presumed to cure any error that may have occurred." *Johnson v. State*, 901 N.E.2d 1168, 1173 (Ind. Ct. App. 2009). As such, "reversible error is seldom found when the trial court has admonished the jury to disregard a statement made during the proceedings." *Evans*, 855 N.E.2d at 386. Finally, the fact that the jury convicted Rupska of battery upon Hughes and acquitted him of battery upon other victims indicates that its verdict was not unfairly impacted by the prosecutor's question. Thus, any *Doyle* violation was harmless beyond a reasonable doubt.

II. Sufficiency of Evidence

Rupska also contends that the State presented insufficient evidence to sustain his conviction for aggravated battery. When reviewing a claim of insufficiency of evidence, we neither reweigh evidence nor judge witness credibility. *Klaff v. State*, 884 N.E.2d 272, 274 (Ind. Ct. App. 2008). Rather, we consider only the evidence and reasonable inferences most favorable to the verdict. *Id*. We will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *Id*.

Ample probative evidence exists to support Rupska's conviction for aggravated battery. Indiana Code Section 35-42-2-1.5 states that "[a] person who knowingly or intentionally inflicts injury on a person that creates a substantial risk of death *or* causes … protracted loss or impairment of the function of a bodily member or organ … commits aggravated battery." (Emphasis added.) Rupska does not dispute that he knowingly stabbed Hughes. In fact, he admitted that he pulled out his pocket knife during the barroom brawl and that "there's a good chance" he stabbed Hughes with it. Tr. at 1020. Rather, he asserts that the evidence is insufficient to support an inference that his act of stabbing Hughes caused a substantial risk of death. We disagree. First, the State was not required to present expert testimony to establish the substantial risk of death element. *Oeth v. State*, 775 N.E.2d 696, 702 (Ind. Ct. App. 2002), *trans. denied* (2003). Thus, on review, we look to the observable facts, including the nature and location of the injury and the treatment provided. *Id*. The observable facts regarding Hughes's injuries and treatment are as follows: his seven stab wounds in his back and arm resulted in a collapsed lung and required that he be rushed

to the hospital, have a chest tube inserted en route, be admitted to the intensive care unit, and receive a blood transfusion. In sum, the extent of Hughes's injuries and the ensuing treatment were such that the jury could reasonably infer that Rupska's conduct exposed him to a substantial risk of death. As such, the evidence is sufficient to support Rupska's conviction. Accordingly, we affirm.

Affirmed.

MAY, J., and BROWN, J., concur.