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IN THE
COURT OF APPEALS OF INDIANA

KEVIN BROWN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1012-CR-1283
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol J. Orbison, Judge
Cause No. 49G22-1004-FC-31745

October 26, 2011

MEMORANDUM DECISION ON REHEARING - NOT FOR PUBLICATION

CRONE, Judge

In our prior memorandum decision in this case, we recited the following relevant facts:

> [O]n April 20, 2010, Brown went to a CVS pharmacy in Indianapolis intending to rob the store of its OxyContin supply. Brown put on a disguise consisting of a blue knit cap pulled down to his eyebrows, a light blue collared shirt, a dark blue coat, blue jean shorts, white tennis shoes, and gauze bandages over his nose and left eye. Brown entered the store, approached Craig Horter, the on-call pharmacist, and stated, "This is a holdup and I want your OxyContin eighty milligram." Tr. at 9. Horton replied, "This is a holdup?" *Id.* Brown replied, "Yes. It's a holdup. I want your OxyContin eighty and if you don't give it to me there's going to be trouble." *Id*. Horter told Brown that the only legal way to get OxyContin was with a prescription and did not give Brown anything. After a brief standoff, Brown said, "Well, I'll be back and there's going to be trouble." *Id*. at 11. Horter asked, "What kind of trouble?" *Id.* However, Brown did not elaborate and left the store.
>
> The cashier at the front of the store saw Brown walk across the street. When Horter told the cashier what happened, they immediately locked the door and called the police. The police arrived at the store and reviewed the store's surveillance video with Horter. Approximately an hour later, the officer took Horter from the CVS to rendezvous with other officers and a suspect they had in their custody. Horter identified the suspect, Brown, as the person he had encountered earlier at the pharmacy.

Brown v. State, No. 49A02-1012-CR-1283, slip op. at 2-3 (Ind. Ct. App. Aug. 12, 2011).

The State charged Brown with class C felony attempted robbery. At trial, Brown asserted an abandonment defense, and the court found him guilty as charged. Brown appealed his conviction, contending that the State failed to rebut his abandonment defense beyond a reasonable doubt. We said,

> Abandonment is a legal defense to crimes aborted before their commissions. *Smith v. State*, 636 N.E.2d 124, 127 (Ind. 1994). "[A]bandonment must occur after the defendant has taken a substantial step toward the commission of the underlying crime, and thus, in the case of an attempted crime, after the inchoate crime of attempt has been committed, but before the completion of the underlying crime." *Munford v. State*, 923 N.E.2d 11, 17 (Ind. Ct. App.

> 2010). However, the abandonment must be voluntary. *Id*. at 18. "To be considered voluntary, the decision to abandon must originate with the accused and not be the product of extrinsic factors that increase the probability of detection or make more difficult the accomplishment of the criminal purpose." *Id*.

Id. at 3-4. We then addressed Brown's argument in pertinent part as follows:

> [T]he evidence most favorable to the judgment indicates that Brown did not abandon the crime voluntarily. Brown himself testified that "without a firearm . . . [he was] running out of time . . . and [there was] another employee [there that] might call the police [on him]." [Tr.] at 129. Those extrinsic factors increased the probability of detection and made committing the robbery more difficult, and therefore the desire to abandon the crime did not originate from him. Accordingly, we affirm the trial court's judgment.

Id. at 4.

In his petition for rehearing, Brown correctly observes that he did not utter those words at trial, and that actually they were uttered by the prosecutor during the following exchange:

> Q So that was the reason why you left. Right? Because you concluded that without a firearm, running out of time, and another employee might call the police, you decided it was time to go. Correct?
>
> A After the fact, on the statement [that Brown gave to Detective Brian Hofmeister after he was apprehended]. Those were my internal thoughts. They weren't borne out by the actual events that were happening.

Tr. at 129.

Brown asks us to grant his petition for rehearing and evaluate his claim "based on what he actually testified to rather than to [sic] erroneous attribution of a State's question to him." Petition for Reh'g at 2. We grant Brown's petition for that limited purpose but reach the same result because he said the same thing to Detective Hofmeister: "I concluded that,

uh, without a firearm and, uh, uh, running out of time and another employee who might call the police said it was time to go." This statement appears in State's Exhibit 23, which was admitted at trial over Brown's objection. Brown did not challenge the admissibility of the exhibit on appeal. The trial court was free to assign whatever weight it chose to Brown's pretrial statement and to his apparent attempt to distance himself from that statement at trial. Considering only the evidence most favorable to the trial court's judgment, as we must, we again conclude that Brown did not abandon the attempted robbery voluntarily and again affirm Brown's conviction.

BAILEY, J., and MATHIAS, concur.