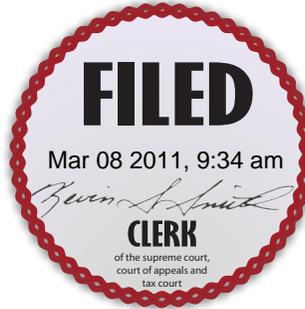


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

MARK KENNEDY,)
)
Appellant-Defendant,)
)
vs.) No. 49A04-1005-CR-265
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
Cause No. 49G06-0910-FA-86143

March 8, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Following a jury trial, Mark Kennedy was convicted of attempted murder,¹ a Class A felony, and carrying a handgun without a license,² a Class A misdemeanor, and was adjudged to be an habitual offender.³ Kennedy now appeals and asks for a new trial, claiming that the trial court abused its discretion by denying his motion for a mistrial after the State, during opening statements, referred to alleged prior bad acts, which violated the trial court's order in limine.

We affirm.

FACTS AND PROCEDURAL HISTORY

On the afternoon of September 12, 2009, Edward Culver returned to his Indianapolis residence after working at Ziebart, where he had been employed for eighteen years. Culver did not have a bank account and often carried between \$800 and \$2000 in cash in his wallet. That evening, around 5:00 or 5:30 p.m., Culver was sitting at his computer playing online games, when there was a knock at his door. He opened it to find Kennedy, an acquaintance and former Ziebart coworker, along with a woman, whom Culver had met once before. Kennedy had worked for Ziebart for approximately one year, but had not worked there for some months prior to showing up at Culver's home. During that time period, Kennedy had begun working for another former-Ziebart employee, a manager, who left Ziebart employment and started his own automobile detailing business. Since leaving Ziebart,

¹ See Ind. Code § 35-41-5-1, 35-42-1-1.

² See Ind. Code §35-47-2-1

³ See Ind. Code 35-50-2-8.

Kennedy had asked Culver on more than one occasion to steal chemicals from Ziebart for his use at that other business, but Culver always refused.

Because Kennedy had been to Culver's residence on four or five previous occasions, Culver felt comfortable inviting Kennedy and the woman into his home. Culver returned to his chair at the computer. Moments later, Culver saw Kennedy pull out a handgun, and Kennedy shot Culver in the head. Kennedy removed Culver's wallet from the back pocket of his pants. The female felt Culver's finger and advised Kennedy that he was still alive, saying, "[Y]ou're going to have to shoot him again." *Tr.* at 82-84. Kennedy shot Culver in the head again. Before temporarily losing consciousness, Culver saw the gun wrapped in a white handkerchief as Kennedy stuck it up under his arm and shot Culver a third time in his torso.

Culver regained consciousness and, finding that Kennedy and the woman were gone, stumbled outside toward his car. A neighborhood boy saw Culver and alerted his mother, Roberta Price, who located Culver and called 9-1-1. Price applied pressure to Culver's wounds until emergency personnel arrived. Culver told Price that "Mark Kennedy" had shot him. *Id.* at 91-92, 231. Price observed the emergency medical team cut off Culver's blue shirt and his pants at the scene.

Culver also informed Officer Roger Feuquay two times at the scene that "Mark Kennedy" had shot him. *Id.* at 211. At the hospital before being transferred into surgery, Culver told Detective Cameron Brosseau, the initial homicide detective assigned to the case, that "Mark Kennedy" had shot him. *Id.* at 322. He also told Detective Peter Perkins, the

aggravated assault lead detective who later interviewed Culver while in the hospital, that “Mark Kennedy” had shot him. *Id.* at 353. Culver identified Kennedy in a photo array lineup that Detective Perkins showed to him. Culver’s pants, cut off him at the scene, were never recovered.

The State charged Kennedy with attempted murder, a Class A felony; robbery as a Class A felony; and carrying a handgun without a license, a Class A misdemeanor. A month later, the State filed an habitual offender enhancement. Prior to the jury trial, Kennedy filed a motion in limine to exclude evidence of other crimes, wrongs, and acts pursuant to Indiana Evidence Rule 404(b). The State did not express any intention of offering such evidence, and the trial court granted Kennedy’s motion.

At the beginning of the jury trial, during the State’s opening comments, the prosecutor stated,

At some point when the defendant worked [at Ziebart] with Ed Culver they noticed large amounts of chemicals coming up missing. . . . The defendant was suspected to have some involvement—[.]

Tr. at 42. Kennedy objected on the basis that the suggestion that Kennedy was a suspect in a theft was in violation of the trial court’s order in limine, and the parties approached the bench for a conference with the trial judge. The State asserted that Kennedy’s involvement with Ziebart chemicals was relevant to the issue of motive, because after Kennedy left Ziebart employment, he asked Culver to steal chemicals and Culver refused to participate. The trial court overruled Kennedy’s objection, stating:

I’ll overrule your objection based on motive nature, but before we go into any evidence of this let’s have a hearing outside the presence of the jury. Okay.

Id. at 43. The parties agreed to the trial court’s directions. Kennedy did not request a mistrial at this time.

Later, during the State’s direct examination of Culver, the prosecutor asked, “And did there come a, ever come a time when the defendant would ask, ask you for any chemicals or anything like that—[,]” at which time Kennedy objected on the basis it violated the order in limine and was irrelevant. *Id.* at 56. A hearing was held outside the jury’s presence. After some dialogue, the State conceded that while it was relevant to the issue of motive that Kennedy was asking Culver to steal chemicals from Ziebart, and Culver refused, it was not relevant that Ziebart may or may not have suspected Kennedy of taking any chemicals while he worked there. The trial court ruled that it “won’t allow any evidence . . . that [Kennedy] was suspected of any offense or that there was anything showing that he committed any offense at Ziebart.” *Id.* at 62. Kennedy then requested a mistrial “based upon what [the prosecutor] said in opening statements.”⁴ *Id.* at 63. The trial court denied the motion for mistrial, but clarified what would and would not be admissible:

So to the extent that . . . there may have been a conflict between the two of them [over chemicals], the Court doesn’t believe that that’s in violation of 404(b) and rule it as admissible. On the other hand, as to whether or not [Kennedy] was suspected of theft from Ziebart, that’s an entirely different issue, and that is limined out.

⁴ During the ensuing discussion between counsel and the trial court, Kennedy’s counsel expanded the basis for the motion for mistrial to include both of the following: “[Culver’s] testimony to this point, plus comments made by the State in their opening[.]” *Tr.* at 65. The State’s response was that Kennedy’s counsel timely objected before Culver testified about any suspected criminal activity at Ziebart; counsel for Kennedy agreed with the State on this point. *Id.* at 66.

Id. at 68. Counsel for Kennedy requested that “the jurors be admonished as to what they heard in opening statements[.]” *Id.* at 67. When the jury reconvened, the trial court issued the following admonishment:

During the break the Defense raised an objection which the Court sustained. The Court[] wants to remind you that in terms of any argument made by either side in the opening statements, Court again wants to remind you that those statements are not evidence. You’re not to consider anything that was said in opening statements as evidence. The only thing [that] may be considered as evidence is what is spoken of and mentioned from the witness stand or from the Court’s instructions itself, and you should disregard any other information that comes from the, the opening statements in terms of those being evidence. They’re only a preview of what the attorneys expect the evidence to be.

Id. at 70. The trial court asked counsel for Kennedy if he had any objection to the admonishment, and he did not. No further mention was made during trial, either in testimony or closing argument, about Kennedy having involvement in or being suspected of stealing chemicals from Ziebart. Before resting his case, Kennedy renewed his motion for a mistrial, which the trial court denied. Kennedy was convicted of Class A felony attempted murder and Class A misdemeanor carrying a handgun without a license, and he was thereafter adjudged to be an habitual offender. Kennedy now appeals.

DISCUSSION AND DECISION

Kennedy argues that the trial court abused its discretion when it denied his motion for a mistrial. Generally, the correct procedure to correct an improper or prejudicial opening statement is to request an admonishment; however, if counsel is not satisfied with the admonishment or finds it will not be sufficient to cure error, then counsel may move for a mistrial. *Pavey v. State*, 764 N.E.2d 692, 699 (Ind. Ct. App. 2002), *trans. denied*. “[A]

mistrial is an extreme remedy that is only justified when other remedial measures are insufficient to rectify the situation.” *McManus v. State*, 814 N.E.2d 253, 260 (Ind. 2004) (quotation omitted); *Pavey*, 764 N.E.2d at 697. 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. *Hale v. State*, 875 N.E.2d 438, 443 (Ind. Ct. App. 2007), *trans. denied* (2008). We therefore review the trial court’s decision solely for abuse of discretion. *Id.* To succeed on appeal from the denial of a motion for mistrial, a defendant must demonstrate that the conduct complained of was both error and had a probable persuasive effect on the jury’s decision. *Id.* (citing *Booher v. State*, 773 N.E.2d 814, 820 (Ind. 2002)). The overriding concern is whether the defendant was so prejudiced that he was placed in a position of grave peril. *Lucio v. State*, 907 N.E.2d 1008, 1010 (Ind. 2009); *Kirby v. State*, 774 N.E.2d 523, 533 (Ind. Ct. App. 2002), *trans. denied* (2003). Reversible error is seldom found when the trial court has admonished the jury to disregard a statement made during the proceedings because a timely and accurate admonition to the jury is presumed to sufficiently protect a defendant’s rights and remove any error created by the objectionable statement. *Alvies v. State*, 795 N.E.2d 494, 506 (Ind. Ct. App. 2003), *trans. denied*.

In his brief, Kennedy claims that the trial court should have declared a mistrial because “[t]he State referenced uncharged misconduct in opening statements *and* during the testimony of Edward Culver.” *Appellant’s Br.* at 8 (emphasis added). However, as explained above, when Kennedy’s counsel asserted during trial that the motion for mistrial was based

not only on the opening comments, but also on Culver's testimony, the State responded, and Kennedy agreed, that his objection was successfully lodged prior to Culver answering any questions about whether Kennedy was suspected to have stolen chemicals from Ziebart; further, the trial court specifically asked counsel for Kennedy, "I understand that you want me to do the admonition as to the opening statement []. ... [I]s there anything that [Culver] said that you believe [] I either need to admonish the jury about or to grant the mistrial?" *Tr.* at 65-66. Counsel for Kennedy answered, "No, Your Honor." *Id.* at 66. To the extent that Kennedy now argues that the trial court should have granted a mistrial based on statements by Culver, that issue is waived. *See Randolph v. State*, 755 N.E.2d 572, 575 (Ind. 2001) (defendant waived appeal of denial of motion for mistrial where defendant declined trial court's offer to admonish jury).

With that backdrop, we now turn to the issue at hand of whether the trial court abused its discretion in denying Kennedy's motion for mistrial, more specifically, whether the State's comments during opening statements placed Kennedy in a position of grave peril which denied him of a fair trial. After careful examination of the record before us, we conclude they did not.

Here, the trial court gave a thorough and timely admonishment, reminding the jury that opening comments are not evidence and must not be considered as such. *Tr.* at 70; *see Singh v. Lyday*, 889 N.E.2d 342, 351 (Ind. Ct. App. 2008), *trans. denied* (2009) (opening statements and comments by counsel are not substantive evidence). An admonishment is deemed to cure error. *Beer v. State*, 885 N.E.2d 33, 48 (Ind. Ct. App. 2008); *Hackney v.*

State, 649 N.E.2d 690, 694 (Ind. Ct. App. 1995), *trans. denied*. Also, as the State argues, a defendant is not placed in grave peril by every “fleeting reference” to improper subject matter. *Appellee’s Br.* at 7.

In *Lucio*, a witness was asked how long the defendant and a co-conspirator had known each other, and she responded that they met in jail. 907 N.E.2d at 1009. Lucio’s counsel moved for a mistrial, arguing that the testimony was highly prejudicial and created the “bad person” inference, *i.e.*, once a criminal always a criminal. *Id.* The trial court denied the mistrial motion, but instructed the jury that the witness’s statement was stricken from the record and was to be treated as though they never heard it. *Id.* at 1010. On appeal, we determined that the trial court did not err in denying the mistrial motion, observing that the witness’s comment about Lucio having been in jail was the sole reference to his criminal record, no other witness provided evidence regarding a criminal record, and the State made no reference to the witness’s statement during trial. We concluded, “By all accounts the statement was fleeting, inadvertent, and only a minor part of the evidence against the defendant.” *Id.* at 1011. Similarly, we find that, here, the prosecutor’s comment in opening statements that suggested Kennedy was suspected of stealing chemicals from Ziebart was fleeting and only a minor part of the evidence against him, and, as in *Lucio*, the State did not thereafter raise the issue of Kennedy possibly having stolen chemicals from Ziebart before his leaving employment there.

Furthermore, even if it was error for the trial court to deny Kennedy’s motion for a mistrial, and we conclude that it was not, any error was harmless because there was

substantial evidence that Kennedy shot Culver. In particular, Culver told the assisting neighbor at the scene and at least two responding law enforcement officers, one at the scene and the other at the hospital before surgery, that Kennedy had shot him. Thereafter, his story remained consistent when discussing the crime with the lead detective on the case, and he identified Kennedy twice in a photo array.

Based on the record before us, we are satisfied that the trial court's very specific and timely admonishment cured any error that might have occurred as a result of the State's remarks during opening statements, and the trial court did not abuse its discretion when it denied Kennedy's motion for mistrial. That said, we nonetheless express disapproval of the State's opening comments that suggested Kennedy was suspected of stealing chemicals from Ziebart, an uncharged bad act, particularly, in light of the trial court's order in limine prohibiting any mention of prior bad acts.

Affirmed.

CRONE, J., and BRADFORD, J., concur.