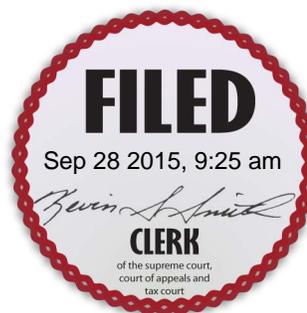


## MEMORANDUM DECISION

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

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Timothy Lee,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff*

September 28, 2015

Court of Appeals Case No.  
49A04-1502-CR-45

Appeal from the Marion County  
Superior Court, Criminal Div. 21

The Honorable Mark Renner,  
Judge

Trial Court Cause No.  
49G21-1411-CM-051901

**Bailey, Judge.**

## Case Summary

- [1] Timothy Lee (“Lee”) appeals his conviction for Invasion of Privacy, a Class A misdemeanor.<sup>1</sup> He presents the sole issue of whether the trial court abused its discretion in admitting a photograph that was late-disclosed by the State. We affirm.

## Facts and Procedural History

- [2] Following Lee’s convictions for Criminal Confinement and Domestic Battery, the Marion County Superior Court issued on March 12, 2014 an order that Lee have no contact with S.M. and three other individuals. Lee acknowledged receipt of the order in March 2014.
- [3] On November 17, 2014, while the no-contact order was still in effect, Indianapolis Metropolitan Police Department (“IMPD”) Officer Steven Donahue (“Officer Donahue”) responded to a dispatch about a disturbance at a home on South Trowbridge Street in Marion County. On arrival, Officer Donahue heard arguing inside the home, and when he knocked, S.M. answered the door. Lee was also inside the home and stated “Oh God, I’m going back to jail.” (Tr. 19.) After talking to both parties, Officer Donahue ran a computer

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<sup>1</sup> Ind. Code § 35-46-1-15.1(13).

search and discovered the court order directing Lee to have no contact with S.M. Lee was placed under arrest.

[4] On November 17, 2014, the State charged Lee with Invasion of Privacy, a Class A misdemeanor. On December 3, 2014, during pre-trial discovery, the State filed a supplemental notice of discovery compliance, in which the State declared its intent to forward Lee a certified copy of S.M.'s Indiana State BMV photograph when received by the State. Lee then attempted to depose S.M. on December 5 and 23, 2014, but S.M. failed to appear at either scheduled deposition. As a result, on December 24, 2014, Lee filed a motion to exclude S.M.'s testimony.

[5] A bench trial was held on January 7, 2015, at the beginning of which the trial court granted Lee's motion to exclude. To identify S.M., the State then offered to introduce into evidence a certified IMPD booking photograph of S.M. Lee objected to the photograph's admission, arguing that the State had not provided him the photo until the day of trial<sup>2</sup> and the late disclosure was prejudicial to his defense. The trial court admitted the photograph. After Officer Donahue identified the person in the photo as the same person he saw with Lee during the November 17 incident, the State introduced the accompanying booking information, which identified S.M. as the person in the photograph. At the

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<sup>2</sup> It is unclear from the record whether Lee first received a copy of the photograph the day of trial or actually during trial. Lee's counsel stated: "I have never received a copy of that photo up until today. I double-checked to make sure that it wasn't a mistake by my paralegal not giving me the copy." (Tr. 14.) He further informed the court that "I haven't received a copy of that photo and I've never seen it until today." (Tr. 16.)

conclusion of trial, Lee was found guilty and sentenced to 365 days, with 200 days to be served in the Marion County Jail and 165 days in community corrections. Lee now appeals his conviction.

## Discussion and Decision

[6] The trial court has broad discretion in dealing with a discovery violation by the State in the alleged late disclosure of evidence to the defense. *Kennedy v. State*, 934 N.E.2d 779, 784 (Ind. Ct. App. 2010) (citing *Berry v. State*, 715 N.E.2d 864, 866 (Ind. 1999)). We will reverse the trial court's ruling in such matters only for an abuse of discretion involving clear error and resulting prejudice. *Berry*, 715 N.E.2d at 866. The proper remedy for a discovery violation is generally a continuance. *Id.* "Exclusion of the evidence is an extreme remedy and is to be used only if the State's actions were deliberate and the conduct prevented a fair trial." *Id.* Failure to alternatively request a continuance upon moving to exclude evidence, where a continuance may be an appropriate remedy, constitutes a waiver of any alleged error based on noncompliance with the court's discovery order. *Warren v. State*, 725 N.E.2d 828, 832 (Ind. 2000).

[7] Pursuant to the Marion County Local Court Rules, the trial court at the initial hearing will automatically order the State to disclose and furnish all relevant items and information to the defendant within twenty days of the date of the initial hearing. Marion LR49-CR00-107(a). Here, the State filed a notice on December 3, 2014, that it would forward to Lee a certified copy of S.M.'s Indiana State BMV photograph upon receipt. The State did not forward a

BMV photo to Lee; rather, the State introduced at trial a certified copy of an IMPD booking photo of S.M.

- [8] At trial, Lee objected to the admission of the late-disclosed photo, arguing that its admission was prejudicial. When Lee objected, however, he did not also request a continuance. Moreover, Lee’s trial counsel expressed his agreement that the “State had no idea that this [booking] record was not discovered” and specifically stated that “I don’t blame [the prosecuting attorney].” (Tr. 15.) Lee thus has failed to identify any deliberate conduct by the State preventing a fair trial such that the extreme remedy of exclusion was necessary. Furthermore, by arguing on appeal that “at minimum, the court should have allowed defense counsel to have a continuance or a recess” (Appellant’s Br. 7), Lee implicitly concedes that a continuance would have been an appropriate remedy for the State’s late-disclosure. Having not requested a continuance at trial, where a continuance would have been an appropriate remedy, Lee has waived any claim of error.

## Conclusion

- [9] The trial court did not abuse its discretion in admitting into evidence the late-discovered photograph.
- [10] Affirmed.

Baker, J., and Mathias, J., concur.