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**IN THE
COURT OF APPEALS OF INDIANA**

MARK PEDZINSKI,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 71A05-0703-CR-133

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Frese, Judge
Cause No. 71D03-0509-FC-273

October 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

After a jury trial, Mark Pedzinski appeals his conviction for battery¹ as a Class C felony. Pedzinski raises the following issue on appeal: whether the trial court abused its discretion in denying his motion for a mistrial when testimony was given as to his prior bad acts.

We affirm.

FACTS AND PROCEDURAL HISTORY

At approximately 3:50 in the morning on June 26, 2005, Pedzinski called his ex-girlfriend, J.K., at her home, where he used to live, and asked her for help. A few minutes later, Pedzinski came charging through her back sliding glass door and immediately began hitting J.K. in the eye, nose, and side of her face. J.K. eventually escaped. As a result of the attack, J.K. lost three teeth and suffered swelling to the side of her face, lacerations on her lip and chin, contusions to her leg, and a fractured jaw.

The State charged Pedzinski with battery as a Class C felony. During the trial, the jury submitted a question following J.K.'s testimony asking, "[J.K.] said the [sic] [Pedzinski] said, 'when are you going to learn?' Learn what? Had he hit her before? Because she said that she had never been beat up before?" *Appellant's App.* at 11. The trial court did not allow the question. A few witnesses later, Officer David Turk testified to his encounter with Pedzinski hours prior to the assault. During Officer Turk's testimony the following exchange occurred:

State: Why wouldn't you do a report that evening?

¹ See IC 35-42-2-1(a)(3).

Officer: He was just an unwanted person - - well, basically he was a suspicious person I'd known him from the other address prior to because of other calls against him and by - -

Court: Hold it, hold it, hold it. Jury, disregard that last gratuitous statement. This is not a trial on all these other things that are being raised about who, when, where, and what circumstances and all that stuff. This is a trial about something that is claimed to have happened on the 26th and only that, and that is all you consider. Do you understand that?

Appellant's App. at 35.² Outside the presence of the jury, Pedzinski moved for a mistrial, claiming that Officer Turk's gratuitous comment had not been cured by the trial court's instruction and that the taint of the testimony placed Pedzinski in grave peril. *Tr.* at 167; *Appellant's App.* at 36. The trial court acknowledged that Officer Turk should have known better, but that the response was not elicited by the prosecutor's question. *Tr.* at 159. Further, the trial court stated that its quick interruption of Officer Turk's testimony cured any negative effect it may have had and denied Pedzinski's motion. *Id.*

The jury convicted Pedzinski as charged. He now appeals.

DISCUSSION AND DECISION

The grant or denial of a motion for mistrial is entrusted to the sound discretion of the trial court, because it is in the best position to evaluate the circumstances of an allegedly prejudicial event and to assess its impact on the jury. *Simmons v. State*, 760 N.E.2d 1154, 1162 (Ind. Ct. App. 2002). When reviewing a trial court's denial of a mistrial, we look to whether the moving party was placed in an unreasonable position of

² We remind counsel not to include the original pages of the transcript in his appendix, but instead, photocopy those pages needed. *See* Ind. Appellate Rule 50(A)(2)(d).

grave peril. *Id.* The gravity of the peril is a function of the probable persuasive effect of the statement or conduct, and not of the degree of the conduct's impropriety. *Id.* A mistrial is an extreme remedy warranted only when no other curative measure, such as an admonishment, will rectify the situation. *Id.*

In *Simmons*, the defendant claimed the State inserted an evidentiary harpoon by deliberately eliciting hearsay testimony from an officer regarding the victim's statements about the defendant's state of mind. *Id.* at 1162. During trial, the State asked the officer whether the victim ever gave him the defendant's name or description. *Id.* The officer replied, "[She] did. She gave me his name, description, [sic] of him. At one point she told me that he was crazy, that he had no reason, that it wouldn't be beyond him to get on a plane" *Id.* The trial court interrupted the testimony, struck it, and admonished the jury to disregard it. *Id.* We held that the State did not intentionally elicit the officer's testimony, and that the trial court did not abuse its discretion by denying defendant's motion for a mistrial because the trial court's actions were adequate to cure any prejudice to the defendant. *Id.* at 1162-63.

Pedzinski claims that Officer Turk's testimony was so prejudicial as to place him in grave peril and deny his substantial rights. In support, Pedzinski claims that the jury's question relating to whether he had hit her before was proof that the trial court's instruction did not cure the testimony regarding his prior bad acts. We disagree. First, the jury's question was submitted to the trial court three witnesses prior to Officer Turk's testimony, and therefore, was irrelevant to the trial court's curative instruction. Second, the trial court is in the best position to judge the prejudicial impact of the officer's

testimony and the resulting curative instruction. The trial court found the prosecution did not elicit the response and the instruction was adequate. Pedzinski has failed to show that the testimony was so prejudicial as to place him in irreparable peril, and as such, the trial court did not abuse its discretion.

Affirmed.

ROBB, J., and BARNES, J., concur.