

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Patrick Diontre Dorsey,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 28, 2022

Court of Appeals Case No.
21A-CR-966

Appeal from the Lake Superior
Court

The Honorable Natalie Bokota,
Judge

Trial Court Cause No.
45G02-1911-F3-189

Mathias, Judge.

- [1] Patrick Diontre Dorsey was convicted in Lake Superior Court of Level 3 felony armed robbery and was adjudicated a habitual offender. Dorsey appeals

his conviction and argues that the trial court abused its discretion when it denied his motion for mistrial. Dorsey's motion for mistrial was based on his claims that several of the State's witnesses violated the trial court's separation of witnesses order and the State committed a *Brady* violation.

[2] Concluding that Dorsey has not established reversible error, we affirm.

Facts and Procedural History

[3] On November 4, 2019, at approximately 10:00 a.m., Dorsey robbed a CVS pharmacy in Dyer, Indiana, while armed with a handgun. While CVS employee Jonah Kamp worked at the cash register, Dorsey approached the counter. While Kamp was assisting a customer, she noted that Dorsey was wearing a winter coat with the hood drawn tightly around his head. Dorsey was also chewing on the draw strings of his coat. Dorsey's behavior struck Kamp as odd. Tr. Vol. 2, p. 223.

[4] When it was his turn to make a purchase, Dorsey placed two candy bars in front the register. Kamp rang up the purchase and told Dorsey what he owed. Dorsey said, "Nah. Listen, you're gonna open up that drawer." Tr. Vol. 2, p. 204. After Kamp refused to open the drawer, Dorsey raised his shirt and showed Kamp that he had a silver handgun in the waistband of his pants. Kamp still refused to open the drawer and told Dorsey a manager would have to open it. But after Dorsey aimed the gun at Kamp and threatened her, she complied with his demand to open the drawer. Kamp emptied the drawer and gave Dorsey approximately \$300. Dorsey took the money and exited the store.

- [5] Customer Evie Hepworth witnessed the robbery and called 911. Hepworth's fiancée, Geena Locicero waited for Hepworth in the parking lot. Locicero saw Dorsey exit the store and watched a black Chrysler 300 leave the parking lot. She noted the vehicle's distinctive platinum grill. Tr. Vol. 3, p. 70.
- [6] Law enforcement officers arrived to investigate the robbery and Dyer Police Officer Ryan Boss assisted with the investigation. Three days before the robbery, Officer Boss conducted a traffic stop of a black Chrysler 300. The car was registered to Dorsey, who had been a passenger in the vehicle that day. Officer Boss reviewed surveillance footage from the inside and outside of the CVS store which captured images of the suspect. Officer Boss recognized Dorsey from the images. Tr. Vol. 4, p. 174. The day after the robbery, Kamp identified Dorsey from a six-person photo array.
- [7] On November 7, 2019, the State charged Dorsey with Level 3 felony armed robbery. The State later amended the charging information to include the allegation that Dorsey was a habitual offender. A four-day jury trial commenced on March 22, 2021. The central issue at trial was Dorsey's identification as the robber.
- [8] A few days before trial, Hepworth met with the prosecutors and looked at a photo array. Hepworth stated that the man who had robbed the CVS might be the individual shown in either photo number four or photo number five, but she was unable to pick one individual from the photo array. Tr. Vol. 4, pp. 120–21. Dorsey was the individual depicted in one of the photos. The State did not

disclose Hepworth's selection of Dorsey and another individual from the photo array to defense counsel.

- [9] On the first day of trial, during Kamp's testimony, the trial court recessed the proceedings for a lunch break. Kamp was distraught when she left the courtroom. Hepworth and Locicero followed her into a restroom. Dianne Dorsey, the defendant's wife, followed the group of women into the restroom. Kamp was anxious and upset and the other women attempted to console her. Dianne did not disclose her relationship to Dorsey.
- [10] Shortly thereafter, Hepworth, Locicero, Kamp, Kamp's husband, and Dianne went to a nearby restaurant for lunch where they sat outside together. Kamp's testimony resumed after lunch, and then the State presented testimony of three witnesses who were at or near the CVS during the robbery: Hepworth, Locicero, and another CVS customer, Flora Salinas.
- [11] On the second day of trial, defense counsel informed the trial court that Kamp, Hepworth, and Locicero had lunch together on the first day of trial. Defense counsel stated that Dianne overheard Kamp discussing her cross-examination and Dorsey's physical description with the other witnesses. Dianne also informed counsel that Hepworth mentioned she was unable to identify Dorsey from a photo array. Dorsey moved for a mistrial, alleging that Kamp, Hepworth, and Locicero had violated the court's witness separation order and that the State had committed a *Brady* violation.

[12] The trial court held a hearing on the motion for mistrial. Dianne testified that, during lunch, Kamp told Dianne, Hepworth, and Locicero that she felt that defense counsel implied that her identification of Dorsey was based on his race. Tr. Vol. 4, pp. 12–13. Dianne claimed that Kamp discussed her description of Dorsey’s jacket and his physical description. *Id.* at 14–18. Finally, Dianne testified that Hepworth discussed the photo array she had been shown a few days before trial and that she had been unable to select a photo of the robber. *Id.* at 19-20.

[13] Kamp testified that she did not discuss any of her testimony while in the courthouse restroom. *Id.* at 42–43. Kamp said that Dianne claimed the State subpoenaed her to testify because she was in the CVS parking lot on the day of the robbery. *Id.* at 46–47. Kamp disputed Dianne’s claim that she discussed her testimony with the other witnesses while they had lunch on the first day of trial. *Id.* at 47–49. Kamp had no recollection of Hepworth discussing a photo array. *Id.* at 55.

[14] Hepworth testified that they did not discuss Kamp’s testimony in the restroom on the first day of trial. *Id.* at 102–03. She stated that Dianne, whom they did not know, included herself in their conversation and invited herself to lunch. *Id.* at 110. Hepworth stated that Kamp did not discuss her testimony at lunch but noted that Dianne repeatedly tried to discuss the suspect’s identity with them. *Id.* at 112–13, 115. Locicero’s testimony was consistent with both Hepworth’s and Kamp’s testimonies. *Id.* at 135, 140–41.

[15] Hepworth also testified that, a few days before trial, she had agreed to look at a photo array. *Id.* at 120. Hepworth picked Dorsey's photo and another unidentified man's photo from the array. She told the prosecutors that she could not be certain which of the two men was the robber. *Id.* at 121.

[16] The State also introduced a jail phone call between Dorsey and Dianne that occurred at approximately 6:20 p.m. on the first day of trial. Tr. Vol. 4, p. 93; Ex. Vol. State's Ex. 32. During the phone call, Dorsey shared details about the trial testimony with Dianne. Particularly, the two discussed whether various witnesses had been able to identify him as the robber. Dorsey told Dianne that Hepworth testified that the prosecutors showed her a photo array three days before trial but that she had been unable to identify Dorsey as the suspect in court. Much of the testimony Dianne claimed had been discussed among the witnesses during lunch was also discussed by Dorsey during the phone call. At the end of the call, Dorsey asked Dianne to call him back on another account. No other phone calls were entered into evidence.

[17] After considering the evidence, the trial court denied Dorsey's motion for mistrial. The trial court concluded that the information Dianne obtained and relayed to defense counsel could have been obtained through the phone call with Dorsey or during other conversations with him. *Id.* at 162. The court also concluded that Hepworth's and Locicero's testimony at trial was not influenced by the testimony of any other witness but was based solely on their own recollection of the events during and after the robbery and was therefore credible. *Id.* Finally, as to the alleged *Brady* violation, the court concluded that

Hepworth's selection of the two photos in the array, one of which depicted Dorsey, was "arguably incriminating" and did not rise to the level of a *Brady* violation that would warrant granting the motion for mistrial. *Id.* at 162–63.

[18] The jury found Dorsey guilty as charged. Thereafter, Dorsey pleaded guilty to being a habitual offender. The trial court ordered Dorsey to serve a fourteen-year sentence in the Department of Correction and enhanced his sentence by an additional fourteen years due to the habitual offender adjudication. Dorsey now appeals.

Standard of Review

[19] Dorsey appeals the trial court's denial of his motion for mistrial. We review the trial court's decision to grant or deny a motion for a mistrial for an abuse of discretion. *Isom v. State*, 31 N.E.3d 469, 480 (Ind. 2015). "A mistrial is an extreme remedy that is only justified when other remedial measures are insufficient to rectify the situation." *Id.* at 481 (alteration and quotation marks omitted).

Separation of Witnesses

[20] Dorsey argues that his motion for mistrial should have been granted because Kamp, Hepworth, and Locicero violated the trial court's witness separation

order. Dorsey claims that Kamp’s discussion of her testimony with the other witnesses necessarily influenced their testimonies as to the robber’s identity.¹

[21] “The primary purpose of a separation of witnesses order is to prevent witnesses from gaining knowledge from the testimony of other witnesses and adjusting their testimony accordingly.” *Morell v. State*, 933 N.E.2d 484, 489 (Ind. Ct. App. 2010). “Where there has been a violation of a separation order, the trial court, in the absence of connivance or collusion by the party calling the witness, may permit the witness to testify.” *Id.* (citing *Heck v. State*, 552 N.E.2d 446, 452 (Ind. 1990)). “Even when confronted with a clear violation of a separation order, the trial court may choose to allow the violating witness to testify.” *Id.* at 489–90 (citing *Jordan v. State*, 656 N.E.2d 816, 818 (Ind. 1995)).

[22] The determination of the remedy for any violation of a separation order is within the discretion of the trial court. *Joyner v. State*, 736 N.E.2d 232, 244 (Ind. 2000). We will not disturb the trial court’s decision on such matters absent a showing of a clear abuse of discretion. *Id.*; see also *Wisner v. Laney*, 984 N.E.2d 1201, 1208 (Ind. 2012) (explaining that our court will not “disturb a trial court’s determination regarding a violation of a separation of witnesses order, absent a showing of a clear abuse of discretion”).

[1] ¹ The witnesses’ descriptions of the robber varied. He was described as being between 5 feet, 7 inches and 6 feet in height and weighing anywhere between 250 and 350 pounds.

[23] It is undisputed that the Hepworth, Kamp, and Locicero spoke in the courthouse restroom and had lunch together on the first day of trial. It is also undisputed that Dorsey's wife, Dianne, was present and overheard the witnesses' conversations. However, all three witnesses denied Dianne's claim that Kamp discussed her testimony with them. Tr. Vol. 4, pp. 104, 112–13, 135, 140–41. And Hepworth denied Dianne's claim that, while they were eating lunch, Hepworth discussed looking at a photo array a few days before trial. *Id.* at 124–25. Locicero, Kamp, and Kamp's husband also testified that Hepworth did not say anything about a photo array while they were eating lunch. *Id.* at 55, 70, 147. Hepworth and Locicero testified that their testimony was truthful and accurate and not influenced by any other person. *Id.* at 118, 141.

[24] Dorsey argues that Dianne, who was not present in the courtroom, had no way to know the content of Kamp's testimony unless Kamp discussed her testimony with Dianne, Hepworth, and Locicero at lunch during the first day of trial. For example, Dianne alleged that Kamp, who described herself as "mulatto," told them during lunch that she was upset that Dorsey's counsel asked her if the robber sounded "ghetto." Tr. Vol. 2, p. 245, Vol. 4 p. 13.

[25] Kamp testified both before and after the lunch break on the first day of trial. And counsel asked Kamp the question about Dorsey sounding "ghetto" *after* lunch on the first day of trial. Tr. Vol. 2 pp. 240, 245. Therefore, Kamp could not have discussed counsel's question during lunch.

[26] Dianne spoke to Dorsey via telephone at approximately 6:00 p.m. on the first day of trial. They discussed Hepworth's and Locicero's testimony, whether the witnesses were able to identify Dorsey, and Hepworth's testimony that she had been shown a photo array a few days before trial. Ex. Vol., State's Ex. 32. Although not every statement Dianne relayed at the mistrial hearing was discussed between herself and Dorsey during the phone call, from the context of the recorded phone call, it was reasonable for the trial court to conclude that Dianne and Dorsey spoke again later that day.

[27] The trial court concluded that there was "no credible evidence of a violation by the State's witnesses of the order for separation of witnesses" and that Dianne "could have" obtained her information from Dorsey. Tr. Vol. 4, pp. 161–62.² It was within the trial court's discretion to weigh the credibility of the witnesses, and we will not second guess that determination on appeal.

[28] Moreover, Kamp had identified Dorsey in a photo array the day after the robbery, and she identified him as the man who robbed the CVS during her testimony before lunch on the first day of trial. Tr. Vol. 2, pp. 220–21, Ex. Vol. State's Ex. 2A-2E. Flora Salinas, a CVS customer, was not present at lunch and identified Dorsey as the man who robbed the CVS. Tr. Vol. 3, p. 8. And Officer Boss identified Dorsey as the robber from the surveillance images taken from

² Before lunch, while Dianne, Hepworth and Locicero were in the restroom trying to console Kamp, Kamp mentioned that defense counsel used a pointer and that she did not like him. Tr. Vol. 4, pp. 126-27. Dorsey does not claim that these disclosures could have or did influence any other person's testimony.

the security footage of the CVS robbery. Tr. Vol. 4, pp.174–75. This evidence, which could not have been tainted by any alleged discussions the witnesses had at lunch the first day of trial, sufficiently identified Dorsey as the man who robbed the CVS. Therefore, even if Dorsey had proved that Kamp discussed her testimony with other witnesses, he would not have been able to establish that he was placed in a position of grave peril warranting a mistrial. *See, e.g., Spinks v. State*, 122 N.E.3d 950, 957 (Ind. Ct. App. 2019).

***Brady* Violation**

[29] Dorsey also argues that his motion for mistrial should have been granted based on his claim that the State committed a *Brady* violation. The State has an affirmative duty to disclose evidence favorable to a criminal defendant. *See Kyles v. Whitely*, 514 U.S. 419, 432, (1995) (citing *Brady v. Maryland*, 373 U.S. 83 (1963)). The *Brady* Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” 373 U.S. at 87.

[30] To prevail on a *Brady* claim, Dorsey must establish: (1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material to an issue at trial. *See Bunch v. State*, 964 N.E.2d 274, 297 (Ind. Ct. App. 2012) (citations omitted), *trans. denied*; *Farris v. State*, 732 N.E.2d 230, 232–33 (Ind. Ct. App. 2000). Evidence is material only “if there is a reasonable probability that, had the evidence been disclosed to the

defense, the result of the proceeding would have been different.” *Kyles*, 514 U.S. at 433–34 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.)). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Farris*, 732 N.E.2d at 233.

[31] Dorsey’s identity as the robber was a central issue at trial. However, Hepworth did not provide an in-court identification of Dorsey as the individual who robbed CVS. Moreover, when Hepworth was shown the photo array three days before trial, but almost two years after the robbery, she selected two photos from the photo array as potential suspects because of their darker complexions and facial features. Tr. Vol. 4, pp. 120–124. Dorsey’s photo was one of the two Hepworth selected. The State did not use the photo array shown to Hepworth during trial.

[32] Because Hepworth selected Dorsey’s photograph, the photo array was arguably incriminating. Moreover, even if Hepworth’s selection of the two photos had been disclosed to the defense, there is no reasonable probability that the outcome of the proceeding would have been different. Hepworth was not confident in her ability to identify the robber from a photo array, especially because the robbery occurred nearly two years earlier. Tr. Vol. 4, pp. 123–24. And at trial, Hepworth testified that she did not know whether she would recognize the robber if she saw him again. Tr. Vol. 3, p. 38. Hepworth had been standing in line behind Dorsey at the CVS counter and glanced at his face only a “couple of times.” *Id.*

[33] In addition, on direct examination, Hepworth testified that she had been shown a photo array a few days before trial. *Id.* at 47. During cross examination, counsel clarified that Hepworth was not shown a photo array at any other time during the investigation but did not ask any additional questions about the photo array.

[34] For all of these reasons, Dorsey cannot establish that the result of this proceeding would have been different if the State had disclosed Hepworth's selection of two men from the photo array, particularly given that one of the photographs selected was Dorsey's. And, as we noted above, the State presented substantial evidence to prove that Dorsey robbed the CVS. Therefore, the trial court did not abuse its discretion when it denied Dorsey's motion for mistrial for the alleged *Brady* violation.

Conclusion

[35] The trial court did not abuse its discretion when it denied Dorsey's motion for mistrial. The trial court's conclusion that the State's witnesses did not discuss Kamp's testimony at lunch on the first day of trial is supported by sufficient evidence. And Dorsey cannot establish that he was prejudiced by the State's failure to disclose to the defense Hepworth's identification via a photo array of Dorsey and another individual as the person who committed the CVS robbery. Finally, given the overwhelming evidence of Dorsey's identity as the individual who robbed the CVS, Dorsey cannot establish that the trial court's alleged errors placed him in a position of grave peril warranting a mistrial.

[36] Affirmed.

Bailey, J., and Altice, J., concur.