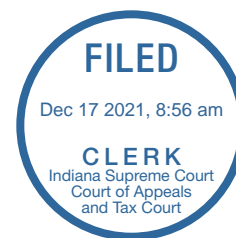


MEMORANDUM DECISION

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

Demetrius D. Link,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 17, 2021

Court of Appeals Case No.
21A-CR-1456

Appeal from the Kosciusko Circuit
Court

The Honorable Michael W. Reed,
Judge

Trial Court Cause No.
43C01-2005-F2-386

Bradford, Chief Judge.

Case Summary

- [1] On December 18, 2019 and January 13, 2020, Demetrius Link sold methamphetamine to a confidential informant (“CI”). Link was subsequently charged with Level 2 felony dealing in methamphetamine, Level 3 felony dealing in methamphetamine, Level 4 felony possession of methamphetamine, and Level 5 felony possession of methamphetamine. The State did not receive or disclose the laboratory report (“the Report”) confirming that the substances received by the CI were methamphetamine until the day before trial. Link moved to exclude the Report but, after the trial court denied this request, did not request a continuance. Link also rejected an offer by the trial court for his counsel to interview the laboratory employee who would be testifying prior to the introduction of said testimony to the jury.
- [2] Also, during jury deliberations, one juror accused another juror of being under the influence of drugs or alcohol. The trial court, in the presence of the parties, questioned the accused juror under oath regarding the accusation. The juror emphatically denied being under the influence of any substance and reiterated her belief that she could be a fair and impartial juror. The juror in question was permitted to remain on the jury, which subsequently found Link guilty as charged. Just prior to the reading of the jury’s verdicts, Link, for the first time, requested a mistrial due to the alleged, but unproven, jury misconduct. The trial court denied the motion and subsequently sentenced Link to an aggregate term of seventeen and one-half years of incarceration.

Facts and Procedural History¹

- [3] On December 18, 2019, a CI, working with the Warsaw Police Department (the “Warsaw PD”), arranged to purchase methamphetamine from Link. A controlled buy was set up, the CI was given \$300.00, and police followed the CI to a house on Bronson Street. When the CI parked, Link exited the house, approached the vehicle, leaned down to talk to the CI “for a very short amount of time,” and then walked away. Tr. Vol. II p. 45. The CI then proceeded to the pre-determined post-buy location where the CI met with police. The CI gave police a green solo cup that contained two plastic bags that had nearly seven grams of methamphetamine inside.
- [4] The CI, again working with the Warsaw PD, arranged another controlled buy on January 13, 2020. After following the same procedures as outlined above, the CI purchased an additional 10.43 grams of methamphetamine from Link. On May 28, 2020, the State charged Link with Level 2 felony dealing in methamphetamine, Level 3 felony dealing in methamphetamine, Level 4 felony possession of methamphetamine, and Level 5 felony possession of methamphetamine.

¹ We note that Link’s appellate brief does not contain any citations to the record in either his “Statement of the Case” or “Statement of the Facts.” We take this opportunity to remind Link’s appellate counsel that Rule 46(A) of the Indiana Rules of Appellate Procedure requires “page references to the Record on Appeal or Appendix” in both of these sections of an Appellant’s brief.

[5] Prior to trial, the State sent the drugs recovered during the controlled buys to a laboratory for testing. Although the information contained in the Report, which was created by the testing laboratory and confirmed that the substances received by the CI were methamphetamine, was not unexpected, the State did not receive or disclose the Report to Link until the day before trial. Prior to receiving the Report from the State, Link moved to exclude the Report from evidence, arguing that, pursuant to the local rules, the State had failed to disclose it in a timely fashion. The trial court considered Link's motion to exclude on the morning that trial was scheduled to begin. Link's counsel indicated that had he received the results sooner, he would have spoken to Link who "would then have [had] to make a decision whether he wanted to challenge those results. Send them to an independent lab of his own." Tr. Vol. II p. 6. The trial court denied the motion to exclude. Neither Link nor his counsel requested a continuance of the scheduled trial following the denial of Link's motion to exclude. The trial court offered to allow the defense to interview the laboratory technician the State planned to call as a witness to testify about the Report, but Link's counsel declined.

[6] While the jury was deliberating, the trial court received a note from one of the jurors alleging that Juror 12 was under the influence of drugs or alcohol. The trial court questioned Juror 12, under oath, about whether she was under the influence of any substance. Juror 12 emphatically denied being under the influence of drugs or alcohol. Juror 12 indicated that the other juror who raised the concern was lying and had raised the concern after she had disagreed with

Juror 12 during a debate about drug use in general. Juror 12 stated that she could “still act as a juror and be fair and unbiased.” Tr. Vol. II p. 154. Link did not raise any concern regarding Juror 12 at the time or ask her any questions. After being convinced that Juror 12 was not under the influence of any substances, the trial court allowed Juror 12 to return to the jury room to continue with deliberations.

[7] Approximately thirty minutes later, the jury reached its verdicts. After the jury reached its verdicts but before the verdicts were read in open court, Link moved for a mistrial “in light of the situation that occurred with the juror who was accused of misconduct.” Tr. Vol. II p. 155. The following exchange then occurred:

[The Court]: What misconduct would that have been?

[Link’s Counsel]: The juror was alleged to have been high. She came in here and although she denied it. Her behavior seemed to indicate that she was exhibiting symptoms of ---

[The Court]: You did not ask me to remove that juror.

[Link’s Counsel]: I did not ask you to your honor.

[The Court]: I’ll deny the motion for a mistrial.

Tr. Vol. II p. 155.

[8] The jury ultimately found Link guilty as charged. With respect to Link’s Level 2 and Level 3 felony convictions, the trial court imposed an aggregate seventeen

and one-half year sentence. The trial court did not impose any sentence for Link's Level 4 and Level 5 felony convictions, merging the Level 4 felony into the Level 2 felony and the Level 5 felony into the Level 3 felony.

Discussion and Decision

[9] On appeal, Link contends that the trial court abused its discretion in admitting the Report, which confirmed that the drugs in question were methamphetamine. He also contends that the trial court abused its discretion by denying his request for a mistrial.

I. Admission of Evidence

[10] "Trial courts have broad discretion in dealing with discovery violations by the State in the alleged late disclosure of evidence to the defense." *Alcantar v. State*, 70 N.E.3d 353, 356 (Ind. Ct. App. 2016). "We may reverse the manner in which the trial court deals with such an alleged violation only for an abuse of that discretion involving clear error and resulting prejudice." *Id.*

[11] The Indiana Supreme Court has held that "[e]xclusion 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." *Berry v. State*, 715 N.E.2d 864, 866 (Ind. 1999). "Generally, the proper remedy for a discovery violation is a continuance." *Alcantar*, 70 N.E.3d at 356. "If a continuance would have cured the harm that arose by the discovery violation, failure to request one results in waiver." *Id.*; see also *Warren v. State*, 725 N.E.2d 828, 832 (Ind. 2000) ("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 pertaining to noncompliance with the court’s discovery order.”).

[12] On April 29, 2021, the State filed a notice of intent to introduce the Report as evidence at trial. On May 17, 2021, Link filed a motion to exclude the Report, arguing that, pursuant to the local rules, it should have been excluded because it was not shared in a timely fashion. In making this motion, Link

acknowledge[d] that the [R]eport is not currently in the State’s “possession or control,” and thus does not contend that the State is improperly withholding evidence. The Defense contend[ed], rather, that the failure of the State to obtain the [R]eport in a timely manner, despite ample opportunity to do so, has resulted in the same practical effect: the inability of the Defense to properly examine the lab results prior to trial or properly prepare a cross-examination of the lab technician.

Appellant’s App. Vol. II p. 55.

[13] The State received the Report at approximately 4:30 p.m. on the afternoon before Link’s trial was scheduled to begin and immediately provided a copy of the Report to Link’s counsel. On the morning of trial, Link’s counsel indicated that had he received the results sooner, he would have spoken to Link who “would then have [had] to make a decision whether he wanted to challenge those results. Send them to an independent lab of his own.” Tr. Vol. II p. 6. He did not, however, request a continuance of the scheduled trial. The trial court offered to allow the defense to interview the laboratory technician the

State planned to call as a witness to testify about the Report, but Link's counsel declined.

[14] Given Link's statements about what he would have done differently had the Report been disclosed earlier, Link should have requested a continuance to give him and his counsel an opportunity to review the Report and to determine whether to challenge the results. A remedy for the late disclosure of the Report would therefore have been for Link to request, and the trial court to grant, a continuance. *See Warren*, 725 N.E.2d at 832; *Alcantar*, 70 N.E.3d at 356. Link, however, did not request a continuance or even take advantage of the trial court's offer to interview the laboratory technician responsible for completing the testing of the drugs at issue prior to her testifying. Link has therefore waived his challenge to the admission of the Report. *See Alcantar*, 70 N.E.3d at 356 (providing that a defendant who failed to request a continuance following a discovery violation, under circumstances where a continuance would have been useful, waived appellate review of a challenge to the admission of the evidence at issue).

II. Motion for a Mistrial

[15] A mistrial is an extreme remedy warranted only when no other curative measure will rectify the situation. In order to prevail on appeal from the denial of a motion for mistrial, a defendant must establish that the questioned information or event was so prejudicial and inflammatory that he or she was placed in a position of grave peril to which he or she should not have been subjected. The gravity of the peril is determined by the probable and persuasive effect on the jury's decision. Since the trial court

is in the best position to gauge the circumstances and probable impact upon the jury, a trial court's decision whether to grant a mistrial is afforded great deference. Therefore, we will review the trial court's ruling on a motion for a mistrial only for an abuse of discretion.

Bisard v. State, 26 N.E.3d 1060, 1067–68 (Ind. Ct. App. 2015) (internal citations and quotations omitted).

[16] At some point during jury deliberations, the trial court received a note from one of the jurors alleging that Juror 12 was under the influence of drugs or alcohol. The trial court questioned Juror 12, under oath, about whether she was under the influence of any substance. Juror 12 emphatically denied being under the influence of drugs or alcohol. Juror 12 indicated that the other juror who raised the concern was lying following a disagreement between the two jurors during a debate about drug use in general. Juror 12 reiterated that she could “still act as a juror and be fair and unbiased.” Tr. Vol. II p. 154. Link did not raise any concern regarding Juror 12 at the time or ask her any questions. After being convinced that Juror 12 was not under the influence of any substances, the trial court allowed Juror 12 to return to the jury room to continue with deliberations.

[17] Approximately thirty minutes later, after the jury reached its verdicts, but before the verdicts were read in open court, Link, for the first time, moved for a mistrial “in light of the situation that occurred with the juror who was accused of misconduct.” Tr. Vol. II p. 155. When asked to what misconduct Link was referring, Link's counsel answered: “The juror was alleged to have been high. She came in here and although she denied it. Her behavior seemed to indicate

that she was exhibiting symptoms of --- [.]” Tr. Vol. II p. 155. The trial court noted, and Link’s counsel agreed, that Link’s counsel “did not ask [the trial court] to remove that juror” before denying Link’s motion for a mistrial. Tr. Vol. II p. 155.

[18] In arguing that the trial court abused its discretion in denying his request for a mistrial, Link asserts that the trial court “apparently ruled that the request was untimely.” Appellant’s Br. p. 14. Contrary to Link’s assertion, the trial court did not find that the motion was untimely, it simply denied the request. The trial court questioned Juror 12, under oath, who emphatically denied being under the influence of either drugs or alcohol. To the extent that Juror 12 may have seemed agitated, we do not believe that it is unreasonable for an individual who has been falsely and unjustly accused of using illegal drugs to be agitated. Juror 12 testified under oath that she was not under the influence of any foreign substance and that she could be an impartial and fair juror. In addition, the trial court was able to observe Juror 12 for any signs of impairment but noted none. Based on the record before us, we conclude that Link has failed to establish that the alleged, but unproven, juror misconduct was so prejudicial and inflammatory that he was placed in a position of grave peril. Link, therefore, has failed to convince us that the trial court abused its discretion in denying Link’s request for a mistrial. *See Bisard*, 26 N.E.3d at 1068.

[19] The judgment of the trial court is affirmed.

Crone, J., and Tavitas, J., concur.