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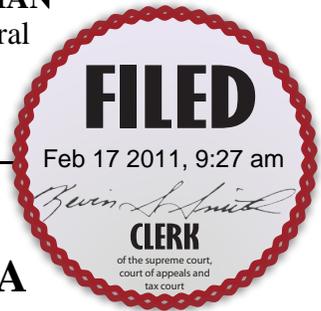
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**IN THE  
COURT OF APPEALS OF INDIANA**

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TERRY W. DIMMETT, )

Appellant-Defendant, )

vs. )

STATE OF INDIANA, )

Appellee-Plaintiff. )

No. 82A01-1003-CR-120

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APPEAL FROM THE VANDERBURGH CIRCUIT COURT

The Honorable Kelli E. Fink, Magistrate

Cause No. 82C01-0908-FB-899

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**February 17, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## **STATEMENT OF THE CASE**

Terry W. Dimmett appeals his convictions for dealing in methamphetamine, as a Class B felony, and possession of precursors with intent to manufacture methamphetamine, as a Class D felony.<sup>1</sup> Dimmett presents a single issue for review, namely, whether the trial court abused its discretion when it denied his motion for a mistrial.

We affirm.

## **FACTS AND PROCEDURAL HISTORY**

On the morning of August 8, 2009, Dimmett's girlfriend, Stephanie Kloc, visited Dimmett at his home in Evansville. That afternoon, Dimmett drove Kloc's vehicle to buy ingredients for the manufacture of methamphetamine. After returning home, Dimmett placed a cooler, a tank, and a box in the trunk of Kloc's car, and the two drove to a wooded area near the Ohio River. There, Dimmett manufactured methamphetamine. When finished, Dimmett returned the cooler and the tank to the trunk of the car and placed a clear glass jar in the car. Kloc then drove Dimmett back to Evansville.

Once Kloc and Dimmett had returned to town, Officer Robert Pylant of the Evansville Police Department saw Kloc's vehicle and observed what he believed to be an expired license plate. After following the vehicle for a time, Officer Pylant initiated a traffic stop. Upon approaching the car, the officer "smelled a strong chemical odor of ether coming from the vehicle, observed that both occupants were sweating profusely, and [that they] appeared very nervous." Appellant's App. at 2. He also smelled

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<sup>1</sup> Dimmett was also convicted of false informing, as a Class B misdemeanor. He does not appeal that conviction.

anhydrous ammonia. When Officer Pylant asked for identification, Dimmett identified himself by his brother's name. When the officer ran both names, he learned that Dimmett had falsely identified himself.

After backup officers arrived, Officer Pylant removed Dimmett from Kloc's vehicle, handcuffed him, Mirandized him, and put him in a squad car. Officer Pylant then noticed a glass mason jar containing a white cloudy liquid lying on the floorboard behind the driver's seat of Kloc's car. Officer Pylant asked Kloc if her car contained a meth lab. She replied that she did not know but there was a tank in the trunk. Officer Pylant requested the assistance of the Joint Drug Task Force of the Evansville Police Department and the Vanderburgh County Sheriff's Department ("Task Force").

Detective Sergeant Scott Hurt of the Task Force arrived on the scene in response to Officer Pylant's Task Force request. Detective Sergeant Hurt introduced himself to Dimmett and confirmed with Dimmett that he had been read a Miranda warning. Dimmett told the detective that everything in the car belonged to Kloc and that he had not smelled anything there. He then asked whether he would be "allowed to work [the] charges off" if he admitted that the items in the car were his. Transcript at 350. Understanding Dimmett to be asking whether he could avoid charges by working as a confidential informant, Detective Sergeant Hurt declined Dimmett's offer. Dimmett then told the detective that "he was afraid any new drug charges might send him away for a long time." Id. at 352.

The State charged Dimmett with dealing in methamphetamine, as a Class B felony; possession of methamphetamine, as a Class D felony; possession of precursors

with intent to manufacture methamphetamine, as a Class D felony; and false informing, as a Class B misdemeanor. A jury trial was held January 28 and 29, 2010. During direct examination by the State, Detective Sergeant Hurt testified that Dimmett had offered to “work off” the charges. He then testified further:

Q: And did you accept that offer [to “work off” any charges]?

A: No.

Q: Why?

A: I did not. I just . . . I didn’t want to play the game that day, sir. I . . . he told me originally that he didn’t know anything about those items[,] that they were hers, and then for him to come back in just a matter of seconds and say, “If I tell you about those items, can I work the charges off?” No.

\* \* \*

Q: What happened . . . what transpired between the two of you after that statement by him?

A: Our conversation was pretty limited. He told me he had a drug problem and that he was afraid any new drug charges might send him away for a long time.

Transcript at 351-52. Dimmett’s counsel then requested a sidebar, during which she asked for a mistrial based on the detective’s testimony that Dimmett had said any new drug charges would send him away for a long time. Following argument by counsel, the trial court denied Dimmett’s request for a mistrial but offered to admonish the jury. Dimmett’s counsel declined the offer of an immediate admonishment, asking permission to decide the issue the following day.

By the time trial resumed the following day, the parties had agreed on an admonishment to be given to the jury regarding Officer Hurt's testimony. The court admonished the jury as follows:

The first thing I want to do is give you an instruction or an admonishment, and so listen very carefully. I instruct you to disregard any prior testimony from Detective Sergeant Hurt regarding any statements made by Mr. Dimmett. This admonishment does not relate to any future testimony you may hear.

Transcript at 375-76. The State then continued its direct examination of Detective Sergeant Hurt.

After the close of evidence, the jury found Dimmett guilty as charged. The court entered judgment of conviction on all counts but the one charging possession of methamphetamine.<sup>2</sup> On February 24, the court sentenced Dimmett to twelve years for dealing in methamphetamine, two years for possession of precursors, and one hundred eighty days for false informing, to be served concurrently in the Department of Correction.<sup>3</sup> Dimmett now appeals.

## **DISCUSSION AND DECISION**

Dimmett contends that the trial court abused its discretion when it denied his motion for a mistrial. Whether to grant or deny a motion for a mistrial is a decision left to the sound discretion of the trial court. Alvies v. State, 795 N.E.2d 493, 506 (Ind. Ct. App. 2003), trans. denied. We will reverse the trial court's ruling only upon an abuse of

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<sup>2</sup> The court did not enter judgment of conviction on the possession of methamphetamine charge to avoid a double jeopardy violation.

<sup>3</sup> Dimmett included a copy of the order appealed from in compliance with Appellate Rule 46(A)(10) by attaching a copy of select pages from the Chronological Case Summary. Dimmett also attached an abstract of judgment, but that abstract pertains to a different defendant.

that discretion. Id. We afford the trial court such deference on appeal because the trial court is in the best position to evaluate the relevant circumstances of an event and its impact on the jury. Id. To prevail on appeal from the denial of a motion for a mistrial, the appellant must demonstrate that the statement or conduct in question was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected. Id. We determine the gravity of the peril based upon the probable persuasive effect of the misconduct on the jury's decision rather than upon the degree of impropriety of the conduct. Id.

A mistrial is an extreme sanction warranted only when no other cure can be expected to rectify the situation. Id. 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. Id.

Dimmett contends that the trial court should have granted his request for a mistrial because the testimony from Detective Sergeant Hurt was inadmissible under three different evidentiary rules. He also argues that the admonishment did not cure any prejudice suffered by the admission of that testimony. We initially note that Dimmett has not argued that the admission of this evidence placed him in grave peril. Instead, he argues only that the evidence was not admissible. A showing of grave peril is a much higher burden than showing that inadmissible evidence was nevertheless admitted. However, in order to address the issues on the merits, we assume that his arguments

imply an allegation that he was placed in grave peril. Thus, we address each of his contentions in turn.

### **Rules of Evidence**

Dimmett contends that he was entitled to a mistrial because the testimony at issue was inadmissible under Evidence Rules 402, 404(a), and (b). Under Rule 403, evidence that is relevant may nevertheless be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . .” Rule 404(a) provides that character evidence is “not admissible for the purpose of proving action in conformity therewith on a particular occasion[.]” And under Rule 404(b), “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .”

The decision to admit or exclude evidence is within the sound discretion of the trial court and is afforded great deference on appeal. Davidson v. Bailey, 826 N.E.2d 80, 85 (Ind. Ct. App. 2005) (quoting Bacher v. State, 686 N.E.2d 791, 793 (Ind. 1997), aff’d on other grounds after remand, 722 N.E.2d 799 (Ind. 2000)). A decision will be reversed only for a manifest abuse of that discretion. Id. But “[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . .” Ind. Evid. Rule 103(A)(2).

Under Rule 404(a), Dimmett argues that Detective Sergeant Hurt’s testimony that Dimmett was worried about “any new drug charges” leading to a lengthy term of

imprisonment “invited the jury to conclude that Dimmett was simply acting in conformity with an addiction-based and criminal character trait when he committed the drug offenses underlying this appeal.” Appellant’s Brief at 9. However, character evidence is sometimes admissible under Rule 404(b). To make that determination, we must (1) determine whether the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the person’s propensity to engage in a wrongful act; and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Indiana Rule of Evidence 403. See Hauk v. State, 729 N.E.2d 994, 1001 (Ind. 2000).

Under Rule 404(b), Dimmett argues that the testimony “clearly communicated that prior ‘charges’ constituted a criminal record.” Id. at 8. Even if that were true, such evidence was admissible to show Dimmett’s motive for manufacturing methamphetamine, namely, the need to feed his habit. See Evid. R. 404(b) (evidence of other crimes may be admissible “for other purposes, such as proof of motive”). Still, in balancing the probative value and prejudice of this evidence, Dimmett argues that evidence of a prior criminal record “is as prejudicial as evidence can get” and has “no probative value whatsoever.” Id. at 10 (citation omitted). In support he cites Jones v. State, 708 N.E.2d 37 (Ind. Ct. App. 1999), trans. denied. But, even under Jones, evidence of prior crimes or wrongs may be admissible given a “strong showing of probative value.” Id. at 40. Considering Dimmett’s motive for manufacturing methamphetamine, to support his drug habit, and the vagueness of the reference at issue, we conclude that the testimony complained of is more probative than prejudicial. As

such, Dimmett has not shown that the testimony was inadmissible under the evidentiary rules.<sup>4</sup>

### **Admonishment**

Dimmett also contends that the trial court did not cure any error in the admission of Detective Sergeant Hurt's recitation of Dimmett's statement by admonishing the jury. Again, a mistrial is an extreme remedy and required only "when no other method can rectify the situation." TRW Vehicle Safety Sys. v. Moore, 936 N.E.2d 201, 213 (Ind. 2010) (citation omitted). A prompt admonishment advising the jury to disregard the improper testimony is usually enough to avoid a mistrial. Id. Failure to grant a mistrial may not be asserted on appeal where an admonishment is accepted without further objection or claim that it is insufficient. Id.

Here, following Dimmett's objection to Detective Sergeant Hurt's testimony, the trial court denied Dimmett's subsequent motion for a mistrial but offered to admonish the jury. Dimmett requested permission one day to consider a response to the court's offer. The following day, after the parties had agreed to the language to be used, the court admonished the jury as follows:

The first thing I want to do is give you an instruction or an admonishment, and so listen very carefully. I instruct you to disregard any prior testimony from Detective Sergeant Hurt regarding any statements made by Mr. Dimmett. This admonishment does not relate to any future testimony you may hear.

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<sup>4</sup> In his brief, Dimmett also contends that the testimony complained of should not have been admitted because this case "turned on a credibility contest between [Dimmett] and Kloc" and "the injection of Dimmett's record and criminal character was a devastating blow to Dimmett's defense." Appellant's Brief at 10. But Dimmett did not support that argument with analysis, cogent reasoning, or citations to Kloc's contradicting testimony. As such, the argument is waived. Ind. Appellate Rule 46(A)(8)(a).

Transcript at 375-76.

Having requested one day to decide whether to request an admonishment, Dimmett cannot, and does not, argue that, due to the delay, the admonishment fails to cure the refusal to grant a mistrial. Instead, Dimmett argues that the admonishment was ineffective because it was vague. But, again, Dimmett had agreed to the language the court was to use when admonishing the jury. As such, he cannot raise this issue on appeal. See TRW Vehicle Safety Sys., 936 N.E.2d at 213. And, in any event, we do not find the admonishment at all vague. The court clearly instructed the jury to disregard any “prior testimony from Detective Sergeant Hurt regarding any statements made by Mr. Dimmett.” Transcript at 375-76. In other words, the court instructed the jury not to use the described testimony for any reason. Dimmett’s argument that the court should have been more specific in instructing the jury how it should not use that testimony is unpersuasive.

Finally, Dimmett argues that the admonishment was ineffective because the trial court “did not make an adequate determination as to how the jury was affected by the error.” Appellant’s Brief at 12. In support he cites Lehman v. State, 777 N.E.2d 69, 73 (Ind. Ct. App. 2002), where this court held that the admonishment given by the trial court had not cured the defect where, despite being reminded of an order in limine, an officer had testified that the defendant had nine other victims. The court reasoned:

Harmon’s reference to “nine other victims” was so prejudicial and inflammatory that the effect on the jury of learning that Lehman was being investigated for molesting nine other “victims” was very likely to have been significant. In so holding, we are mindful of the trial court’s admonishment to the jury to disregard Harmon’s response. However, under

these circumstances, we are not persuaded that the admonishment cured the defect.

Id.

The facts here are distinguishable from those in Lehman. Here, we have concluded both that the testimony at issue was admissible and that its probative value outweighed any prejudicial effect. See Evid. R. 403. Such was not the case in Lehman, where the court determined that the admission of certain evidence may well have placed the defendant in grave peril. Thus, there was no error here about which the trial court should have made a record of the effect on the jury. Lehman is inapposite, and Dimmett's argument on this point must fail.<sup>5</sup>

Affirmed.

DARDEN, J., and BAILEY, J., concur.

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<sup>5</sup> Dimmett also contends that the erroneous admission of evidence is not harmless because, again, "this case came down to a credibility contest" between Dimmett and Kloc. Appellant's Brief at 14. Because we find no error in the admission of the testimony at issue, we need not address Dimmett's harmless error argument.