



## STATEMENT OF THE CASE

Marquis A. Foard appeals his convictions for attempted murder, a class A felony;<sup>1</sup> and aggravated battery, a class B felony.<sup>2</sup>

We affirm.

### ISSUE

Whether the trial court abused its discretion in not excluding evidence or granting Foard's motion for mistrial due to the State's alleged discovery violations.

### FACTS

During the early morning of May 11, 2008, Lillian Fuller went to Club 765 in Anderson to celebrate her birthday with some friends and family. Her sons, Stevaughn and Stacy; and daughter, Stasia, were among those celebrating. Although the club was crowded, Lillian noticed Foard, in particular, because he was wearing sunglasses and "just kept staring" at Stasia. (Tr. 141). Wanting to remove her daughter from Foard's presence, Lillian took her family into a back room to have their picture taken. After the picture was taken, Stevaughn, Stacy, and Stasia went back onto the dance floor while Lillian remained in the back room. The dance floor was lit well enough that "[y]ou could still see" people's faces. (Tr. 169).

While Stasia was on the dance floor, Foard, who was still wearing sunglasses, bumped into her "maybe two or three times . . . ." (Tr. 107). Each time he bumped into

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<sup>1</sup> Ind. Code §§ 35-42-1-1; 35-41-5-1.

<sup>2</sup> I.C. § 35-42-2-1.5.

her, Stasia “pushed [her] hands out just to let him know” that she was behind him. (Tr. 107). At one point, he turned and said something to Stasia in an aggressive manner. Stasia then raised her hand, holding it in front of Foard’s face. When Stasia raised her hand, Foard smacked it. After Stevaughn saw Foard hit Stasia’s hand, he struck Foard, causing Foard to stumble backward.

Before he even regained his footing, Foard pulled out a semi-automatic handgun and shot Stevaughn in the head. As Foard continued shooting at Stevaughn, one of the bullets struck Andrea Mitchell, a bystander, in the abdomen.

Stasia saw Stevaughn “laying [sic] on his back . . . and [Foard] was standing over him just shooting.” (Tr. 108). A second bullet grazed Stevaughn’s forehead. With Foard standing over Stevaughn and still shooting at him, Stevaughn rolled onto his stomach and began crawling toward the bar area. As Stevaughn crawled away, Foard kicked him several times with his right foot.

When Foard started shooting, Lillian, who had been in the back room, ran to the door. When she got to the doorway, she observed Foard running across the dance floor with a gun in his hand.

Foard went to his brother’s house after fleeing the club. He telephoned his friend, Tranisha Clay, and asked her for a ride. Clay picked up Foard, and at his request, took him to the residence of his children’s mother, Marquisha Foster.

While Clay waited in the car, Foard went inside for approximately fifteen minutes. Foster had agreed earlier in the evening to pick Foard up from Club 765 but had fallen asleep. She woke when she heard him say, "I think I shot somebody." (Tr. 253).

After Foard left Foster's residence, Clay took him to her home. Clay noticed that Foard was "acting kind of weird," in that he was not talking as much as he usually does. (Tr. 229). Foard informed Clay that "something happened at the club, that he got into it with somebody." (Tr. 230). He then proceeded to tell Clay several different stories about what had happened at the club, including that that he had shot someone.

Subsequently, Foster brought a change of clothes for Foard. Foard later gave the sunglasses he had been wearing at the club to Clay. Foster then left Clay's residence, taking some of Foard's clothes.

When shown a photographic array of possible suspects, Stasia unequivocally identified Foard as the shooter. Stevaughn also identified Foard from a photographic array as the man who shot him. Lillian believed Foard to be the man she had seen with the gun but could not be certain because he had been wearing sunglasses. Stacy identified Foard and another man as possible suspects. Upon being shown a photographic array, Andrea Mitchell initially identified three men as possible suspects. After reviewing the photographs for several minutes, she cautiously identified Foard as the shooter; however, she identified him as the shooter at trial.

Detective Jake Brooks of the Anderson Police Department interviewed Foard on May 12, 2008. Foard admitted that he had been on the dance floor of Club 765 when

Andrea Mitchell and Stevaughn were shot. He, however, denied any involvement in the shooting.

On May 16, 2008, the State charged Foard with Count I, attempted murder, a class A felony; Count II, aggravated battery, a class B felony; Count III, criminal recklessness, as a class C felony; Count IV, unlawful possession of a firearm by a serious violent felon, a class B felony; and Count V, carrying a handgun without a license as a class A misdemeanor. Prior to the commencement of trial, the State made a motion to dismiss Counts III, IV, and V, which the trial court granted. On March 16, 2009, the trial court ordered the State to provide “final discovery materials” by March 20, 2009. (App. 45).

The trial court commenced a three-day jury trial on April 14, 2009. The State sought to admit into evidence the shoes worn by Foard during the shooting as well as the results of blood and DNA tests performed on samples taken from the shoes. Foard’s counsel objected, asserting that the State had failed to disclose the DNA-evidence report. Foard’s counsel argued that the State violated the trial court’s standing discovery order, which required the State to disclose “[a]ny reports or statements of experts, made in connection with the particular case, including results of . . . scientific tests, experiments or comparisons.” (App. 28).

The trial court conducted a bench conference, during which Foard’s counsel acknowledged receiving a fourteen-page facsimile from the State on March 20, 2009, but denied receiving any discovery regarding DNA tests.

A review of the facsimiled documents, however, revealed that the State had provided several reports from Detective Brooks regarding the investigation. Specifically, Detective Brooks reported that State Police Laboratory (the “Lab”) had detected blood on Foard’s shoes; the Lab retained the shoes for DNA tests; the DNA profile subsequently taken from the blood on Foard’s right shoe matched Stevaughn’s DNA profile; the State obtained a DNA sample from Foard; and the case file contained the Lab’s certificates of analysis. The State, however, had failed to provide Foard’s counsel with the certificates of analysis prepared by the Lab in advance of the trial.

Foard’s counsel argued that any evidence pertaining to the shoes be excluded or stricken from the record. In the alternative, he sought a mistrial. Finding that the State did “it’s [sic] job in attempting to fairly and appropriately provide pre-trial discovery,” the trial court admitted the shoes and test results into evidence. (Tr. 64). The trial court further ordered that the State provide Foard’s counsel with the certificates of analysis and granted Foard’s counsel additional time to review the certificates.

Accordingly, Detective Brooks testified that after obtaining a search warrant, he recovered a duffel bag containing men’s clothing and a pair of men’s tennis shoes from the trunk of Foster’s vehicle. He sent the shoes to the Lab for examination. Kimberly Masden, a forensic serologist with the Lab, testified that tests performed on the shoes indicated the presence of blood. She further testified that she issued a certificate of analysis regarding these results on August 11, 2008. Lisa Robbins, a DNA analyst with the Lab, testified that further tests revealed Stevaughn to be the source of DNA extracted

from blood samples taken from the right tennis shoe found in Foster's trunk. She issued a certificate of analysis regarding the DNA results on September 12, 2008.

In addition to testimony regarding the events following the incident, Clay testified that she had loaned Foard a pair of sunglasses prior to May 11, 2008. Stacy, Andrea Mitchell, and Stevaughn testified regarding their pre-trial identification of Foard as the perpetrator; they also made in-court identifications of Foard as the perpetrator.

The jury found Foard guilty of Counts I and II. The trial court held a sentencing hearing on May 19, 2009, after which it sentenced Foard to forty-five years on Count I and twenty years on Count II. The trial court ordered that the sentences be served consecutively, for a total executed sentence of sixty-five years.

#### DECISION

Foard asserts that the trial court abused its discretion in not excluding evidence or granting a mistrial. He maintains that he was entitled to one of these remedies as the State violated the trial court's discovery order and Indiana Trial Rule 26 by not disclosing "lab test results for the testing of blood and DNA comparisons, supplemental reports concerning witnesses' out-of-court viewings of photo arrays for identification, and even the names and summaries of witnesses who were later called to testify for the State."

Foard's Br. at 9.

The trial court has broad discretion in dealing with discovery violations and may be reversed only for an abuse of that discretion involving clear error and resulting prejudice. Generally, the proper remedy for a discovery violation is a continuance. 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.

*Berry v. State*, 715 N.E.2d 864, 866 (Ind. 1999) (internal citations omitted); *see also* *Beauchamp v. State*, 788 N.E.2d 881, 892-93 (Ind. Ct. App. 2003) (“Exclusion of evidence as a discovery abuse sanction is proper where there is a showing that the State engaged in deliberate or otherwise reprehensible conduct that prohibits the defendant from receiving a fair trial.”).

As to granting a mistrial for discovery violations, it is “an extreme remedy that should not be routinely granted.” *Hatcher v. State*, 762 N.E.2d 170, 174 (Ind. Ct. App. 2002), *trans. denied*. Whether to grant a mistrial is within the trial court's discretion. *Id.* We will find an abuse of discretion only where the defendant has demonstrated that the conduct in question was so prejudicial that he was placed in a “position of grave peril to which he should not have been subjected.” *Id.* (quoting *Norcutt v. State*, 733 N.E.2d 270, 273 (Ind. Ct. App. 1994)). “The gravity of the peril is determined by considering the probable persuasive effect of the misconduct on the jury's decision.” *Hatcher*, 762 N.E.2d at 174.

Where a continuance is the appropriate remedy, failure to request one “constitutes a waiver of any alleged error pertaining to noncompliance with the trial court's discovery order.” *Fleming v. State*, 833 N.E.2d 84, 91 (Ind. Ct. App. 2005); *see also* *Lindsey v. State*, 877 N.E.2d 190, 196 (Ind. Ct. App. 2007) (“Where a continuance is an appropriate

remedy, a defendant will waive any alleged error regarding noncompliance with the trial court's discovery order by failing to request a continuance.”), *trans. denied*.

Failure to disclose evidence favorable to the defendant, however, may constitute a due process violation. *Beauchamp*, 788 N.E.2d at 895.

For a due process violation to occur, the defendant must demonstrate that: (1) the evidence is favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the evidence has been suppressed by the State, either willfully or inadvertently; and (3) the suppressed evidence was material. The evidence should be deemed “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. A “reasonable probability” is one that is sufficient to undermine confidence in the outcome.

*Id.* (internal citations omitted). “A due process violation will not be found, however, where the defendant failed to exercise due diligence to discover the evidence.” *Lindsey*, 877 N.E.2d at 196.

## 1. Lab Results

Foard contends that he was denied due process because the State failed to disclose DNA evidence in a timely manner as required by the trial court's discovery order and Indiana Trial Rule 26(E)(1).<sup>3</sup> We disagree.

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<sup>3</sup> Indiana Trial Rule 26(E)(1) provides:

A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to:

We first note that Foard did not request a continuance when the State sought to admit Foard's shoes and the tests of samples taken from those shoes. Thus, he has waived this issue regarding the State's alleged violation of the discovery order. *See Fleming*, 833 N.E.2d at 91 (Ind. Ct. App. 2005).

Citing to *Beauchamp*, Foard argues that a continuance would not have been an appropriate remedy, and therefore, this argument should not be considered waived. Specifically, he maintains that

[t]he disclosure of such evidence mid-trial affected defense counsel's strategy and prejudiced [him] because counsel had already committed in his opening statement that the only evidence the State would produce would be questionable eyewitness testimony in the midst of a fast moving situation or from biased family members or their associates.

Foard's Br. at 10.

The relevant facts of *Beauchamp* are that on August 6, 1998, Chance, the eleven-month-old son of Beauchamp's girlfriend, suffered a skull fracture after allegedly falling from his crib. Thereafter, on September 6, 1998, the baby suffered additional injuries and stopped breathing. Beauchamp claimed that he had fallen while holding the baby, causing the baby to hit his head on a desk. The baby succumbed to his injuries, resulting in the State filing several charges against Beauchamp.

[D]uring the trial, the court permitted Dr. Thomas Luerssen to testify as a rebuttal witness for the State. The trial court had issued a pretrial

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- (a) the identity and location of persons having knowledge of discoverable matters, and
  - (b) the identity of each person expected to be called as an expert witness at trial, the subject-matter on which he is expected to testify, and the substance of his testimony.

discovery order essentially requiring both parties to disclose the names and addresses of expert witnesses, as well as reports or summaries of their expected testimony. At some point prior to trial, Beauchamp's counsel had deposed Dr. Luerssen regarding the injuries that Chance had sustained. Dr. Luerssen essentially formed no opinion as to how Chance was injured. It was Beauchamp's theory of defense that Chance's death was the result of the injuries he sustained in August, in addition to those that occurred on September 6. Thereafter, during rebuttal testimony that Dr. Luerssen presented at trial, he offered opinions that were new and substantially different from those he had provided in the deposition. Specifically, Dr. Luerssen was of the opinion that Chance's injuries could not have been caused by a fall from a crib and that they had likely been intentionally inflicted. Even though the State had listed Dr. Luerssen as a potential witnesses, it had not provided any reports or summaries of his expected testimony to Beauchamp's counsel that differed from the deposition testimony.

*Id.* at 885.

The jury found Beauchamp guilty of battery. Beauchamp appealed, asserting that the trial court abused its discretion in admitting Dr. Luerssen's rebuttal testimony because "he proffered opinions at trial that were different from his pretrial deposition testimony that had not been supplied to Beauchamp in violation of T.R. 26[(E)(1)] and the pretrial discovery order." *Id.* at 892. He therefore "was denied a fair trial because the State waited to call Dr. Luerssen as a rebuttal witness when the evidence showed it was aware of his newly formed opinions that had not been provided to him." *Id.*

In reviewing the record, this court determined that by not providing Beauchamp with Dr. Luerssen's new opinions, the State violated the trial court's standing discovery order and Trial Rule 26(E)(1). This court further determined that a continuance was not a satisfactory remedy for the surprise testimony "because Beauchamp had already offered

the testimony of Dr. Luerssen establishing that he had not formed any opinion with respect to Chance's injuries." *Id.* at 894. The rebuttal testimony "substantially impeded the likelihood of proceeding with" the defense that Chance's injuries in August and September had contributed to his death. *Id.*

Even with a continuance, this court could not "perceive of any plausible way that Beauchamp might be able to extricate himself from this dilemma." *Id.* "Given the prejudicial impact of the testimony as a result of the violation of the discovery order as well as the provisions of T.R. 26(E)(1)," this court found that "the trial court's decision to allow Dr. Luerssen to offer his new and undisclosed opinions as to how Chance was injured amounted to reversible error." *Id.*

*Beauchamp* is distinguishable from the facts in this case. In *Beauchamp*, the State presented the testimony of a rebuttal witness after Beauchamp had presented his defense, thereby rendering a continuance "futile . . . ." *Id.* at 894. Here, however, the State was presenting its case-in-chief when it moved to admit the blood and DNA evidence. Therefore, a continuance, if requested, would not have been futile given that Foard had not offered any testimony regarding the DNA and still had the opportunity to cross-examine the State's witnesses. Accordingly, Foard waived this argument by failing to move for a continuance.

Waiver notwithstanding, Foard's argument fails. Unlike in *Beauchamp*, we cannot say that the State lay "in wait" as Foard offered his defense, only to go "on the offensive with the undisclosed, damaging testimony" regarding the blood found on

Foard's shoes. *See id.* Here, the State provided discovery responses regarding the results of blood and DNA tests performed on samples taken from Foard's shoes. The State also obtained buccal swabs from Foard for DNA comparisons and seized Foard's shoes. Thus, Foard was on notice that the State intended to introduce evidence regarding DNA found on his shoes.

As to the State's failure to provide the certificates of analysis, there is no showing that the failure was deliberate. We therefore find no abuse of discretion in failing to exclude the evidence or grant a mistrial. *See Berry*, 715 N.E.2d at 866.

We also cannot say that Foard was so prejudiced by the DNA evidence as to merit either the exclusion of the evidence or a mistrial. In his opening statement, Foard's counsel offered as his defense the eyewitnesses' reliability, stating:

I'm going to ask each one of you to say okay, who's interested, who's biased, who has relationships, and what are those interests, what are those biased [sic], and what are those relationships, and how do they effect [sic] the testimony.

(Tr. 37-38). The evidence introduced by the State does not damage this defense, particularly given that Foard admitted to being on the club's dance floor, and therefore, in Stevaughn's proximity, at the time of the shooting. We also cannot say that Foard was prejudiced as the exercise of due diligence in reviewing the State's supplemental discovery would have alerted his counsel to the fact that the State had matched Stevaughn's DNA to that found on Foard's shoe. *Cf. Lindsey*, 877 N.E.2d at 196

(holding that no due process violation will be found where the defendant has failed to exercise due diligence to discover the evidence).

Finally, Foard makes no showing that the undisclosed evidence was exculpatory. Thus, we find no violation of Foard's due process rights due to the State's failure to timely disclose the evidence. *See Beauchamp*, 788 N.E.2d at 895. Accordingly, we find no abuse of discretion in admitting the evidence pertaining to the shoes and the blood found thereon.

## 2. Witness Statements

Foard also asserts that the trial court abused its discretion in failing to grant his motion to strike or motion for mistrial when it became apparent that his counsel "did not receive as part of discovery any information related to the out-of-court identifications that Stacy Fuller or Andrea Mitchell had participated in at the Anderson Police Department" prior to trial; he did not have Detective Brooks' "supplement reflecting a summary of a statement given by Stevaughn"; and "Tranisha Clay was not listed as a witness and [Foard] did not know about her until opening statements or about the statement she had given police . . . until in trial." Foard's Br. at 22, 23.

Again, Foard has waived this issue for failure to seek a continuance. *See Fleming*, 833 N.E.2d at 91. We also note that Foard cites to no authority to support his position and fails to make a cogent argument, resulting in waiver. *See Lyles v. State*, 834 N.E.2d 1035, 1050 (Ind. Ct. App. 2005) ("A party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the

record.”), *trans. denied*. Moreover, as to Andrea Mitchell’s testimony, Foard waived any error upon appeal for failure to make a contemporaneous objection to the admission of the evidence at trial. *See N.W.W. v. State*, 878 N.E.2d 506, 509 (Ind. Ct. App. 2007), *trans. denied*.

Waiver notwithstanding, Foard’s argument again fails. Foard has made no showing that the State deliberately withheld discovery pertaining to witnesses’ pre-trial identification of him or deliberately omitted Clay from the witness list. He also has failed to establish that the omissions prevented a fair trial, where he had the opportunity to cross-examine the witnesses; Stasia and Stevaughn unequivocally identified Foard as the perpetrator; and Foster testified that Foard had admitted to shooting someone at the club. We therefore find no abuse of discretion in denying either Foard’s motion to exclude the evidence or his motion for mistrial. *See Ware v. State*, 859 N.E.2d 708, 722 (Ind. Ct. App. 2007), *trans. denied*; *Berry*, 715 N.E.2d at 866 (holding that a continuance is the proper remedy for discovery violations where there is no showing that the State’s actions were deliberate and prevented a fair trial).

### 3. Cumulative Errors

Foard argues that “the cumulative weight of non-compliance by the State” requires reversal. Foard’s Br. at 24. We disagree.

“Trial irregularities which standing alone do not amount to error do not gain the stature of reversible error when taken together.” *Reaves v. State*, 586 N.E.2d 847, 858 (Ind. 1992). Even assuming that cumulative errors could warrant reversal, such would

not be the case here given the substantial evidence of Foard's guilt. *See Hubbell v. State*, 754 N.E.2d 884, 895 (Ind. 2001) (stating that reversal is not warranted where there is no prejudice due to evidence of guilt).

Foard received a fair trial. We therefore find no basis for reversal. *See Myers v. State*, 887 N.E.2d 170, 196 (Ind. Ct. App. 2008) ("A defendant is entitled to a fair trial, not a perfect one."), *trans. denied*.

Affirmed.

KIRSCH, J., and MAY, J., concur.