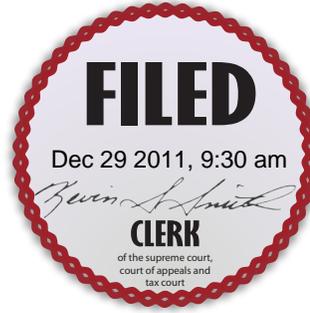


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

MIGUEL ESQUEDA,
Appellant- Defendant,

vs.

STATE OF INDIANA,
Appellee- Plaintiff,

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No. 20A05-1105-CR-263

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0902-FA-9

December 29, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issue

After a covert investigation employing cooperating sources and undercover officers, Miguel Esqueda was charged with nine counts of dealing in cocaine and three counts of dealing in methamphetamine, all Class A felonies. A three-day jury trial ensued, during which juror number two revealed to the court that she had prior outside information about Esqueda's house and the drugs found inside because she attempted to purchase the house after Esqueda was incarcerated. Juror number two was removed and replaced with an alternate juror. The trial court questioned the rest of the jury to determine what juror number two revealed to them. It removed the remaining alternate juror based on that juror's responses.

Esqueda moved for mistrial, contending the remaining jurors could not be impartial. The trial court denied Esqueda's motion and admonished the jury to disregard juror number two's comments. The jury found Esqueda guilty of all twelve counts. Esqueda raises one issue for our review, which we restate as whether the trial court abused its discretion in denying Esqueda's motion for mistrial. Concluding the trial court did not abuse its discretion, we affirm.

Facts and Procedural History

Esqueda's twelve counts of dealing in cocaine and methamphetamine arose from various drug deals between Esqueda and cooperating sources ("CS") for the Elkhart County Interdiction and Covert Enforcement Unit ("EICE") and searches of his home and vehicle, collectively spanning a period of approximately one and one-half months. At trial, the State presented a timeline to assist the jury in visualizing the series of events.

Transcript of Evidence, State's Exhibit 2. The State proceeded to fill in the timeline as to each event with witness testimony and various other exhibits.

Esqueda's first dealing in cocaine conviction stems from events on December 16, 2008. An EICE undercover officer, "UC 151," testified that after investigating a man they referred to as Juanito, they stopped Juanito while he was driving and subsequently discovered cocaine in his truck. Chief Branson testified that while conducting the stop of Juanito, he observed Esqueda drive by in a green Toyota truck. One of the EICE's cooperating sources, referred to as "CS 11," testified that he spoke with Esqueda on December 17, 2008, to arrange a drug transaction, and Esqueda said he provided Juanito with the cocaine police found the day before in Juanito's truck.

Esqueda's second dealing in cocaine conviction originated on December 23, 2008. Shawn Turner, a member of the EICE, testified that a controlled buy was arranged between a CS and Esqueda in Roxbury Park, and that the EICE's standard practice for a controlled buy is to place an audio recording device on the participating CS so that they can hear the dialogue of the transaction. David Clendenen of the EICE added that it was standard practice to search the participating CS and his vehicle prior to a controlled buy to ensure any drugs or cash the CS returned with came from the transaction. Turner stated he was acting in a security role and while watching the transaction he observed Esqueda arrive in a green truck and proceed to execute a transaction with CS 11. Joseph Pinch, also of the EICE, testified that after CS 11 returned from the transaction on December 23, CS 11 handed him a bag with what was later identified as cocaine. CS 11 confirmed Pinch's testimony, stating that while in Esqueda's vehicle in Roxbury Park, Esqueda sold him cocaine.

The third dealing in cocaine conviction arose from December 29, 2008. Turner testified a transaction was arranged at the parking lot of Ricky's Taqueria. Once CS 11 arrived, he got into a red GMC truck. UC 151 testified he observed Esqueda inside the GMC truck and no one else, and that when CS 11 returned from the transaction he had a bag of what was later identified as cocaine. CS 11 confirmed UC 151's testimony, stating Esqueda sold him cocaine while he was inside the GMC truck. After the transaction, Turner testified that he and the rest of the surveillance team followed Esqueda's truck to a residence at County Road 22 and County Road 11, and that the house subsequently became part of their ongoing investigation.

December 30, 2008, led to Esqueda's fourth dealing in cocaine conviction. Turner testified the EICE arranged another transaction with Esqueda at Ricky's Taqueria. UC 151 testified he rode with CS 11 to the transaction. UC 151 saw Esqueda arrive in a silver Audi. After CS 11 entered the Audi, Esqueda grabbed something from around the sunroof and gave it to CS 11. When CS 11 returned he handed UC 151 a bag of what was later identified as cocaine. CS 11 confirmed this series of events in his testimony.

Esqueda's fifth dealing in cocaine conviction arose from January 2, 2009. UC 151 testified they arranged a deal with Esqueda, but Esqueda sent someone else to conduct the transaction. Originally it was to occur at Ricky's Taqueria, but Esqueda called and switched the location to a nearby Big Lots because Ricky's was too busy. After arriving, Esqueda's replacement got out of a yellow Jeep and instructed CS 11 to grab the bags from inside the Jeep and leave money on the seat. CS 11 did so, and when he returned he handed UC 151 a bag of what was later identified as cocaine. CS 11 also testified,

confirming the deal established with Esqueda, the instructions Esqueda gave them, and the cocaine purchased from his replacement.

On January 7, 2009, the events leading to Esqueda's sixth conviction for dealing in cocaine and first conviction for dealing in methamphetamine occurred. UC 151 testified that two separate transactions were arranged. The first transaction was for cocaine, and UC 151 observed Esqueda arrive while UC 151 was conducting surveillance. Pinch testified CS 11 handed him a bag of what was later identified as cocaine when he returned from Esqueda's vehicle. The second transaction on January 7 with Esqueda, thirty minutes later, was for methamphetamine. Afterwards, CS 11 returned and handed UC 151 a bag containing a crystal substance later identified as methamphetamine. CS 11 testified, confirming the testimonies of UC 151 and Pinch.

The events of January 14, 2009, led to Esqueda's seventh conviction for dealing in cocaine and second conviction for dealing in methamphetamine. UC 151 testified a deal was arranged with Esqueda and they met at Ricky's Taqueria. CS 11 got into Esqueda's green Toyota pickup truck, and when he returned he handed UC 151 bags containing what was later identified as cocaine and methamphetamine. CS 11's testimony confirmed the transaction for both drugs.

The last drug deal that was executed occurred on January 21, 2009, and led to Esqueda's eighth conviction for dealing in cocaine. Clendenen testified that after the transaction occurred, CS 11 returned and handed him a sealed food bag containing what was later identified as cocaine. CS 11 testified he purchased both cocaine and methamphetamine from Esqueda.

On January 29, 2009, the EICE decided to end the investigation by arresting Esqueda and executing a warrant to search his residence on County Road 22. Sheriff Deputy Evan Witt testified he was part of the team assigned to arrest Esqueda. After arresting Esqueda at Ricky's Taqueria, Witt drove Esqueda's green Toyota pickup truck to the county jail intake garage. Turner testified that while at the intake garage, cocaine and methamphetamine were found in the back seat of Esqueda's pickup.

After Esqueda left his residence to go to Ricky's Taqueria, a SWAT team executed a search warrant at his residence on County Road 22. James Stanley testified that while searching the garage during a safety sweep of the house, he discovered narcotics in a dog house located in the garage. Pinch testified he found cash and ledgers from narcotics transactions in the master bathroom; cash in a coat pocket in the foyer closet; Inositol, a cutting agent used to increase the volume of narcotics; and a handgun. Further, in addition to narcotics, in the garage officers discovered Inositol, baking soda, weighing scales, plastic bags, vacuum sealable bags, a box of ammunition, a spoon covered in a white powder residue, and a coffee grinder containing a white powder residue. Esqueda was convicted for dealing in cocaine and methamphetamine from the events of January 29, his ninth and third convictions, respectively, for such acts.

During the State's presentation of evidence and after hearing discussion of Esqueda's residence on County Road 22, the court received a note from juror number two stating "[m]y husband and I made an offer on [Esqueda's] house after his arrest. We were given information that the county had . . . cleared it in regards to meth contamination. We were also told . . . of the discovery of drugs on the premises and some information on the previous owner's situation." Transcript at 158. The trial court

dismissed juror number two due to her outside knowledge of Esqueda's home and replaced her with an alternate juror.

The trial court eventually questioned each of the remaining jurors individually to determine what, if anything, they heard from juror number two about Esqueda or his home. All of the remaining jurors heard juror number two discuss her attempt to purchase Esqueda's home on County Road 22. Juror number ten was the only remaining juror who heard more details about the home.¹ He stated juror number two mentioned she and her husband attempted to buy the house and "they had heard rumors about a drug background." Id. at 207-08. The trial court then asked juror number ten if what he heard would impact his ability to be fair and impartial as a juror, to which juror number ten responded, "[n]o, not at all." Id. at 208.

Esqueda moved for mistrial, contending the jury would not be able to remain fair and impartial after hearing outside information from juror number two. The trial court denied Esqueda's motion for mistrial. Instead, the trial court issued an admonishment to the jury, stating:

Ladies and Gentlemen, all of you have heard statements made earlier today by [the excused juror]. Those statements are not evidence, and you are admonished to disregard [the excused juror's] comments in your deliberations of the cause and in arriving at a verdict or verdicts in this case.

Id. at 217 (quotation omitted). The trial court then asked the jurors to raise a hand if any of them believed they could not follow the admonishment. No one raised a hand in response, and the trial court continued to hear testimony. During deliberations, juror

¹ Alternate juror number one also heard statements made by juror number two regarding the presence of drugs in the home, but alternate juror number one was excused.

number ten was chosen as the jury foreman. Esqueda now appeals the denial of his motion for mistrial.

Discussion and Decision

I. Standard of Review

The decision to grant or deny a motion for mistrial is within the trial court's discretion and will be reversed only for an abuse of that discretion. Kirby v. State, 774 N.E.2d 523, 533 (Ind. Ct. App. 2002), trans. denied. An abuse of discretion occurs only when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Weis v. State, 825 N.E.2d 896, 900 (Ind. Ct. App. 2005). We will consider only the evidence favorable to the trial court's ruling and the reasonable inferences to be drawn therefrom. Kelley v. State, 825 N.E.2d 420, 424 (Ind. Ct. App. 2005). "To succeed on appeal from the denial of a motion for mistrial, the appellant must demonstrate 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." Warren v. State, 757 N.E.2d 995, 998-99 (Ind. 2001) (quoting Bradley v. State, 649 N.E.2d 200, 207-08 (Ind. 1995)). Further, "[w]e 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. Moreover, reversible error is seldom found when the trial court has admonished the jury to disregard a statement made during the proceedings." Id. at 999.

II. Esqueda's Motion for Mistrial

To convict Esqueda of dealing in cocaine or narcotic drug, the State must prove beyond a reasonable doubt that Esqueda 1) knowingly or intentionally; 2) delivered; 3)

cocaine or a narcotic drug, or that Esqueda 1) possessed; 2) with intent to deliver; 3) cocaine or a narcotic drug. Ind. Code § 35-48-4-1(a). Further, the offense is a Class A felony if the amount of the drug involved weighs three grams or more. Ind. Code § 35-48-4-1(b)(1). The jury found Esqueda guilty of nine counts of dealing in cocaine and three counts of dealing in methamphetamine, all Class A felonies.

Esqueda argues the denial of his motion for mistrial placed him in a position of grave peril because the information passed on by juror number two, at least to juror number ten, was then confirmed and corroborated by witnesses called by the State. We disagree that Esqueda was placed in a position of grave peril. In light of the extensive and thorough evidence presented by the State, we find it highly improbable that information obtained from juror number two had a persuasive effect on the jury's decision. Juror number two was removed, the other jurors stated they only heard from juror number two that she and her husband attempted to buy Esqueda's home, and what juror number ten heard was not significantly damaging to Esqueda. It was merely a rumor that Esqueda's residence, not even Esqueda himself, had a drug history. Further, the trial court admonished the jury to ignore anything they may have heard from juror number two and that anything juror number two stated should not be considered evidence. Juror number ten specifically stated he would not have a problem adhering to the admonishment and being fair and impartial as a juror.

Examined differently, Esqueda was not placed in a position of grave peril because the State's evidence was so substantial. Multiple individuals testified about the various transactions the EICE unit conducted with Esqueda, including the CS who directly purchased drugs from Esqueda on most of the occasions leading to convictions. The

cocaine and methamphetamine purchased from Esqueda on each occasion were introduced as exhibits at trial. The State's evidence was thorough, detailed, and compelling. It is improbable that what juror number ten heard was persuasive.

Conclusion

We conclude the trial court did not abuse its discretion in denying Esqueda's motion for mistrial because the information juror number ten heard did not place Esqueda in a position of grave peril. Thus, we affirm the trial court's denial of Esqueda's motion for mistrial.

Affirmed.

NAJAM, J., and VAIDIK, J., concur.