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# ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR12-132

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| PHETPHOUTHONE LEE VILAYVANH<br>APPELLANT | Opinion Delivered October 10, 2012 |
| V. | APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT [NO. CR-2010-1164] |
| | HONORABLE STEPHEN TABOR, JUDGE |
| STATE OF ARKANSAS<br>APPELLEE | AFFIRMED |

JOHN MAUZY PITTMAN, Judge

Appellant was found guilty by a jury of breaking or entering and was sentenced to six years' imprisonment in the Arkansas Department of Correction. He argues on appeal that the trial court erred in denying his motion for a mistrial based on an asserted discovery violation and in failing to order that a second mental-competency examination be conducted after trial had begun. We find no error, and we affirm.

Appellant was found to have broken into an automobile in a parking lot at St. Edward's Hospital and taken a wallet belonging to the car's owner. The owner testified that he was a hospital employee and that a coworker informed him that the window of his vehicle had been "smashed in." The owner then went out to look at his car and found that the front passenger window was broken, that his front passenger seat was covered with glass, and that

his wallet was missing from the front console. The owner testified that he had never seen appellant prior to trial.

Michael Walker, a security guard at the hospital, testified that he reviewed a surveillance video on November 13, 2010, after receiving a complaint about the theft. Walker said that the video showed a man circle the exterior of the vehicle, then lean into the passenger-side window of the vehicle and leave the area. Walker stated that he could not make out the features of the man in the video.

Officer Carson Addis, a patrolman with the Fort Smith Police Department, testified that he encountered appellant when he responded to a call reporting suspicious conduct on November 15, 2010. Officer Addis said that he first saw appellant walking southbound through a cemetery but, when he approached, appellant began walking northbound. Appellant began acting extremely nervous and agitated as Officer Addis talked to him, and the officer requested identification. Appellant denied having any identification, but Officer Addis could plainly see an ID card in a bag carried by appellant. Inspecting the ID card, Officer Addis found that it belonged to the owner of the vehicle that had been broken into at the St. Edward's parking lot. The bag carried by appellant also contained a wallet belonging to that vehicle's owner and a screwdriver. Appellant told Officer Addis that the ID card belonged to a friend, and that he was taking it home to him. Learning from police dispatch that a wallet containing that ID card had been reported stolen, Officer Addis placed appellant under arrest. Appellant was taken to the Sebastian County Detention Center. Shortly thereafter, appellant executed a written waiver of *Miranda* rights and gave a statement to Detective Larry

Phillips at the Fort Smith Police Department, ultimately admitting that he had broken into the car. A video recording of the interview was introduced into evidence.

We first address appellant's argument that the trial court erred in denying his motion for mistrial based on an asserted discovery violation, that being the State's failure to provide defense counsel with a copy of the parking-lot surveillance video. The existence of such a copy was suggested by the testimony of Michael Walker, the security officer at St. Edward's Hospital. On cross-examination, Walker testified that, as far as he knew, no one had kept the surveillance video and the hospital no longer had it. He explained on redirect that the hospital maintains video on the server for only three months. On re-cross, the following ensued:

> COUNSEL FOR DEFENDANT: Did anyone from law enforcement ask you to keep the video?
>
> WALKER: No. We did make a copy of the video and it was given to the police department.
>
> COUNSEL FOR DEFENDANT: Who did you give it to?
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> WALKER: One of the officers. I don't recall the name. He came in the next day, when the video was saved on DVR and it was handed to him.
>
> COUNSEL FOR DEFENDANT Your Honor, may we approach? At this point the defense would move for a mistrial. There's something in discovery that was there that I missed, but Your Honor, my understanding was that they just didn't have the tape, nobody had it. And actually, this is the first time I've heard about that there was a copy of the tape.
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> COUNSEL FOR THE STATE: It does not exist, Your Honor. I've asked Detective Phillips. I've emailed Ricky Brooks, the evidence custodian. There's nothing in evidence of a surveillance video. He doesn't know who he gave it to, they don't have it. I've tried to find it. That's why I had him come in.

> THE COURT: Well, all I can do is direct them to see if they've found it.
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> COUNSEL FOR DEFENDANT: Your Honor, I won't request any—if the Court denies a mistrial, I won't make any other requests of the Court.
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> THE COURT: Well, based on what I know, I can't grant your motion. The State is representing that she made a diligent inquiry, and the police made a diligent inquiry based on hers, and they weren't able to locate one. Now if it's discovered that it was there, you know, if there's a motion for a new trial or you file some kind of motion, that's a different kettle of fish. But based on what I know, it's denied.

Arkansas Rule of Criminal Procedure 17.1(d) requires the prosecuting attorney promptly to disclose to defense counsel any material or information within his knowledge, possession, or control which tends to negate the guilt of the defendant as to the offense charged. The prosecuting attorney is required by Ark. R. Crim. P. 17.3(a) to use diligent, good-faith efforts to obtain material in the possession of other government personnel that would be discoverable if in the possession of the prosecuting attorney; if the prosecuting attorney's efforts are not successful, the court shall issue suitable subpoenas or orders to cause such material to be made available to defense counsel. Ark. R. Crim. P. 17.3(b). When a party fails to comply with a discovery rule, it is within the trial court's discretion to order that party to permit the discovery or inspection of materials not previously disclosed; to grant a continuance; to prohibit the party from introducing the material; or to enter another order that the court deems proper under the circumstances. Ark. R. Crim. P. 19.7 (2012). Our role on appeal is to decide whether the trial court abused that discretion. *Hicks v. State*, 340 Ark. 605, 12 S.W.3d 219 (2000).

We find no abuse of discretion in the trial court's refusal to grant a mistrial in this case. Here, although there was nothing to show that the surveillance video was in fact exculpatory, the trial court plainly was ready to grant a continuance and to issue suitable orders to obtain the video recording for defense counsel; it is equally clear that defense counsel declined any remedy other than mistrial. Those remedies, however, could have settled the questions of whether a copy of the surveillance video was actually received by the police and, if so, whether the video was in fact exculpatory. Although appellant characterizes the surveillance video as exculpatory, it was appellant's burden to demonstrate prejudicial error, not merely to allege it. *Snell v. State*, 290 Ark. 503, 721 S.W.2d 628 (1986). A mistrial is the most extreme recourse open to a trial court for a discovery violation, and it is to be avoided except where the fundamental fairness of the trial itself is at stake. *Id.* Given that appellant refused lesser remedies that would have permitted the trial court to determine whether he had been prejudiced, denial of a mistrial was manifestly within the trial court's discretion.

Prior to appellant's trial, the court ordered him to undergo a forensic mental-health examination. The examination was completed approximately three months before trial. The examiner concluded that appellant had the capacity to understand the proceedings against him and to assist effectively in his own defense. *See* Ark. Code Ann. § 5-2-305 (Supp. 2011). Appellant now argues that the trial court erred in failing to suspend the proceedings *sua sponte* and order a *second* competency hearing based on appellant's actions shortly before and during trial. We do not agree.

Appellant's attorney requested no such examination, and this question is therefore being raised for the first time on appeal. A contemporaneous objection is generally required to preserve an issue, even one of constitutional dimensions, for appeal. *Anderson v. State*, 353 Ark. 384, 108 S.W.3d 592 (2003). It is possible that, under very rare and extreme circumstances, a trial court may be obliged to intervene *sua sponte* to correct a serious error. *See Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980). However, no such circumstances were present in this case. Although appellant appears to have required restraint at trial because he would stand at inappropriate times, and did assert that he did not understand the proceedings, these behaviors were entirely consistent with those observed during the videotaped interview following his arrest, after which appellant underwent the psychological examination mentioned above. In concluding that appellant was fit to stand trial, the psychologist who conducted the examination noted that appellant was extremely uncooperative, agitated, and angry. However, he further opined this was not the result of any mental illness, disease, or defect but was instead the result of willful and voluntary behavior. The psychologist reported:

> It is true that his attorney might have a difficult time with him, but this is a matter of voluntary refusal, and not the result of mental illness. He, in fact, has the capacity to assist in his own defense and we will not know how cooperative he will be with his attorney until he attends court. If he is not cooperative then, in my opinion, this will continue to be willful behavior, not the result of mental disease or defect.

On this record, we cannot say that the trial court erred in failing to order a second psychological exam *sua sponte*.

Affirmed.

GLADWIN and ROBBINS, JJ., agree.

*Kearney Law Office*, by: *Jason P. Kearney*, for appellant.

*Dustin McDaniel*, Att'y Gen., by: *Rachel Hurst Kemp*, Ass't Att'y Gen., for appellee.