MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jasean Dale,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 25, 2022

Court of Appeals Case No. 21A-CR-1531

Appeal from the Marion Superior Court

The Honorable Mark D. Stoner, Judge

Trial Court Cause No. 49D32-1808-MR-28405

Bailey, Judge.

Case Summary

[1] Following a jury trial, Jesean Dale ("Dale") appeals his convictions for murder,[1] a felony, and robbery, as a Level 5 felony.[2]

[2] We affirm.

Issues

[3] Dale raises two issues, which we restate as follows:

I. Whether the trial court committed fundamental error in its response to a jury question raised during deliberations.

II. Whether Dale's statement to police was made involuntarily and therefore admitted in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the Indiana Constitution.

Facts and Procedural History

[4] On August 20, 2018, Dale, Jason Epeards ("Epeards"), and Juwaun Terry ("Terry") planned to rob a pizza delivery driver. Dale's cell phone was used to search for the address of an unoccupied house on Kristen Circle. Dale's cell phone was also used to place an online pizza order for delivery from Papa

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[1] Ind. Code § 35-42-1-1(1).

[2] I.C. § 35-42-5-1(a)(1).

John's to the unoccupied house on Kristen Circle. Dale, Epeards, and Terry drove to the house in Epeard's vehicle, which was equipped with an ignition interlock device that required a person to blow into it in order to start the vehicle. After a person blows into the device, it takes a picture of the inside of the vehicle, including the front and back seats. At 6:57 p.m. on August 20, the device in Epeards vehicle took a picture showing Epeards, Dale, and Terry in the vehicle. In the picture, the grip of a black assault rifle was visible in the back seat next to Dale.

[5] Lavon Drake ("Drake") was working at Papa John's Pizza and took the pizza delivery to the address on Kristen Circle. When Drake arrived at the front door, he was forced into the house and onto the floor at gunpoint. Dale took the pizza from Drake without paying for it. Drake was then shot six times and died from his wounds. Ballistics evidence recovered from the scene and from the autopsy showed that both a 9 mm and a .22 caliber firearm were fired.

[6] At 7:08 on August 20, the device on Epeards's vehicle took another picture which showed all three men in the vehicle again. A red pizza delivery warming bag was visible on the back seat by Dale. Terry and Dale took the pizza back to the apartment where Terry lived and ate it. Terry "got rid of" the rifle while Epeards kept the 9 mm handgun. Tr. v. III at 193. Later that night, Dale's cell phone was used to conduct Google searches for "Indianapolis shooting last night" and "Fox 59 new far-east side shooting." Tr. v. IV at 18-19; State's Ex. 158.

[7] Clinton Adkins ("Adkins"), the general manager at the Papa John's where Drake worked, became concerned when the store's online tracking system showed Drake had been at the delivery site for around fifteen minutes and Drake did not answer his phone when Adkins tried to call him. Adkins drove to the Kristen Circle address, where he found Drake's truck parked in the driveway but no sign of Dale. Adkins saw a "for sale" sign in front of the house and a realtor lock box on the front door. Tr. v. III at 18-20. Concerned by this discovery, Adkins called 911 at 7:44 p.m. When the first responding officer looked through a window of the house, he saw Drake lying dead on the floor. The back door to the unoccupied house was damaged and had been forced open.

[8] During a subsequent police canvas of surrounding houses, neighbors gave officers the description and license plate number of an unfamiliar vehicle they had seen in the area. Approximately one-half mile from the crime scene, officers found that car in the parking lot of the apartment complex in which Terry lived. Shortly after 10:00 p.m., a person got in the car and drove away. Officers stopped the car and discovered that Epeards was the driver. Inside the car, police found a loaded 9 mm Bersa pistol that was subsequently determined to have fired the spent 9 mm shell casings and bullet fragments recovered from the scene of the shooting. The officers arrested Epeards.

[9] At approximately 1:30 a.m. on August 21, law enforcement officers went to the apartment where Terry lived. The officers found Dale asleep on a floor in a bedroom, and they arrested Dale and Terry. Inside the refrigerator and oven of

the apartment, the officers found pizza boxes with a delivery label for the Kristen Circle address. Outside by the trash compactor, police found a red pizza delivery warming bag and a trash bag containing pizza boxes with a delivery label for the Kristen Circle address.

[10] Detectives John Breedlove ("Det. Breedlove") and Jeremy Ingram ("Det. Ingram") interviewed Dale at 3:41 a.m. on August 21. They read Dale his Miranda rights, Dale confirmed his understanding of his right, and Dale signed a form waiving his rights. Dale agreed to talk to the detectives. Both detectives had extensive experience dealing with intoxicated and high individuals, and neither saw any indication that Dale was under the influence of alcohol or drugs. Det. Ingram testified that he did not detect any odor of alcohol or marijuana on Dale's breath or person. Dale did not tell the detectives that he was under the influence of any drug or alcohol.

[11] Both detectives noticed that, during the interview, Dale was soft-spoken and appeared to be tired. However, both detectives noted that he was coherent, appeared to understand questions, gave responsive answers to those questions, and never appeared to be unaware of where he was or what he was doing. The entire interview lasted under forty-five minutes.

[12] In the recording of the August 21 interview with the detectives:

- Dale initially denied that he ever left Terry's apartment that evening;

- Dale later admitted that he was at the scene of the shooting that evening but claimed he never entered the unoccupied house on Kristen Circle;

- Dale subsequently admitted that he was inside the house and was the person who grabbed the pizza from Drake and carried it out to the car;

- Dale also admitted that he knew that Epeards and Terry were armed with guns and that the plan was to commit a robbery.

State's Jury Trial Ex. 152.

[13] The State charged Dale with murder, felony murder,[3] and robbery resulting in serious bodily injury, as a Level 5 felony.[4] While Dale was awaiting his jury trial, the trial court received a letter purportedly written by Terry. The letter stated that Dale was innocent and had nothing to do with the murder or robbery, that Terry and Epeards had picked Dale up after the shooting happened, and that Terry and Epeards had threatened Dale to force him to tell the police he was involved with the crime. Terry testified that he did not write, sign, or send that letter. Handwriting analysis found it was "virtually certain" that Dale wrote the letter. Tr. v. III at 218-19. Dale's DNA was the major

[3] I.C. § 35-42-1-1(2).

[4] Although the State originally filed the Robbery charge as a Level 2 felony, the charge was subsequently changed to a Level 5 felony.

profile found on the licked part of the envelope in which the letter had been delivered.

[14] Dale filed a motion to suppress his statement to police, alleging that he was intoxicated and had not knowingly and voluntarily waived his rights. At the suppression hearing, Dale testified that he drank about five cups of Hennessy between 7:30 and 9:00 p.m. that evening, had shared several marijuana joints with his friends, and had consumed two Percocet pills at around 7:45 p.m. He testified that he was intoxicated and "out of it" during the interview and that he had no memory of the interview at all. Tr. v. II at 79. Dale testified that he remembered what had happened that evening before the interview; it was not until he arrived in the interrogation room that his memory went "blank." *Id*. at 85. But Dale testified that he did remember that the officers did not ask him whether he was drunk or intoxicated during the interview. He also acknowledged that: he had not consumed any substances after 9:00 p.m. the evening of August 20; he did not tell the detectives he had consumed any alcohol or drugs; he had used marijuana on a daily basis for years before this and the amount he ingested that evening was the "regular amount" he used; that he had used Percocet pills for several months before August 20; and that August 20 was not the first time he had consumed alcohol. *Id*. at 82.

[15] After reviewing the video of the interview, the trial court denied Dale's motion to suppress. The court found that the State had proven beyond a reasonable doubt that Dale voluntarily waived his rights and that his statement during the

interview was voluntary. Dale renewed his suppression objection when his statement was admitted at trial.

[16] During deliberations following the conclusion of the trial, the jury sent a note to the court that said: "If a juror(s) agrees to Count II due to element #5 robbery, does Count I become automatically guilty due to the initial 4 elements being the same for 1-4?" App. at 180. The trial court showed the note to the attorneys for each side and consulted with them. The court proposed answering the note by saying, "The court cannot answer your questions. Please review your instructions and continue to deliberate." Tr. v. IV at 40. Dale's attorney approved that answer, and it was given to the jury.

[17] The jury's preliminary instructions advised the jury of the presumption of innocence, the essential elements of each offense, the State's burden to prove each element of an offense beyond a reasonable doubt in order to return a conviction, and the requirement that a verdict be unanimous. In addition, Preliminary Jury Instruction No. 9 stated:

> The crime of Murder is defined by statute as follows:
>
> A person who knowingly kills another human being commits Murder, a felony.
>
> To convict the Defendant, the State must prove each of the following elements beyond a reasonable doubt:
>
> 1. The Defendant, Jesean Dale,

2. did knowingly or intentionally,

3. kill,

4. another human being, to wit: Lavone Drake.

If the State fails to prove each of these elements beyond a reasonable doubt, you must find the Defendant, Jesean Dale, not guilty of Murder, a felony, as charged in Count I.

App. at 166. Preliminary Instructions 10 and 11 defined "knowingly" and "intentionally." *Id*. at 167-68.

[18] Preliminary Jury Instruction No. 12 stated:

The crime of Murder is defined by statute as:

A person who kills another human being while committing or attempting to commit Robbery, commits Murder, a felony.

The crime of Robbery is defined by statute as follows;

A person who knowingly or intentionally takes property from another person or from the presence of another person by using or threatening the use of force on any person or by putting any person in fear, commits Robbery, a Level 5 felony.

To convict the Defendant, the State must prove each of the following elements beyond a reasonable doubt:

1. The Defendant, Jesean Dale,

2. did

3. kill

4. another human being, to wit: Lavone Drake

5. while committing or attempting to commit the offense of Robbery, that is: to knowingly or intentionally take property from the person or presence of Lavone Drake by using or threatening the use of force.

If the State fails to prove each of these elements beyond a reasonable doubt, you must find the Defendant, Jesean Dale, not guilty of Murder, a felony, as charged in Count II.

Id. at 169.

[19] Final Jury Instruction No. 1 stated:

LADIES AND GENTLEMEN OF THE JURY (and Alternate Juror):

The Court has previously instructed you with preliminary instructions covering the burden of proof, credibility of witnesses, the issues for trial, and the manner of weighing the evidence.

These instructions will not be re-read [sic] to you, but you should continue to consider them, as well as all of the previous instructions given, during your deliberations.

Id. at 189 (emphasis in original).

[20] The jury found Dale guilty as charged on all three counts. The trial court entered judgment of conviction for Count I, Murder, and Count III, Robbery, as a Level 5 felony. To avoid a double jeopardy violation, the trial court did not enter judgment of conviction on the felony Murder verdict, i.e., Count II. The court sentenced Dale to fifty-eight years in the Department of Correction ("DOC") for Murder, and six consecutive years in the DOC for Robbery, with four of those years suspended to probation. This appeal ensued.

Discussion and Decision

Response to Jury Question

[21] Dale asserts that the trial court committed fundamental error by failing to properly respond to one of the jury's questions during deliberations. Dale acknowledges that he did not object to the trial court's response and, therefore, waived his challenge to that response unless he can show that it resulted in fundamental error. *See, e.g.*, *Wright v. State*, 730 N.E.2d 713, 716 (Ind. 2000) ("Failure to object to a jury instruction results in waiver on appeal, unless giving the instruction was fundamental error."). Fundamental error is that which is a "substantial[,] blatant violation of basic principles" that is so prejudicial to a defendant's rights as to make a fair trial impossible. *Bartholomew v. State*, 119 N.E.3d 204, 211 (Ind. Ct. App. 2019) (quotation and citation omitted).

Invited Error

[22] However, as the State points out, Dale did not just fail to object to the trial court's response to the jury's question; Dale's counsel affirmatively approved that response. When the failure to object is accompanied by an affirmative request, it becomes invited error. *Batchelor v. State*, 119 N.E.3d 550, 556 (Ind. 2019). Under the doctrine of invited error, which is grounded in estoppel, "a party may not take advantage of an error that she commits, invites, or which is the natural consequence of her own neglect or misconduct." *Wright v. State*, 828 N.E.2d 904, 907 (Ind. 2005) (quotation and citation omitted). Thus, unlike waiver resulting only from a failure to object, invited error is generally not subject to fundamental error review. *Brewington v. State*, 7 N.E.3d 946, 974 (Ind. 2014).

[23] Here, the trial court showed the jury question to counsel for both parties, "consulted" with counsel regarding the question, and informed counsel of the trial court's proposed response to the jury. Tr. v. IV at 40. Both the prosecutor and Dale's counsel "approved" the response, and the trial court gave the response to the jury. *Id*. On the record, the trial court summarized the steps it had taken regarding the jury's question and asked each counsel for the parties if the summary "accurately restate[d] the record as you understand it." *Id*. Both counsel stated that the summary was accurate. Dale's reasons for agreeing to the response given to the jury could easily have been part of a deliberate strategy, such as allowing juror disagreement or confusion in the hopes of a hung jury.

[24] Under similar circumstances, this court has had no difficulty in determining that any error in the response to the jury was invited error and therefore unavailable for challenge on review. In *Blanchard v. State*, 802 N.E.2d 14, 31 (Ind. Ct. App. 2004), for example, where defense counsel "expressly agreed" that a court response to a jury question was appropriate, we held the defendant waived any subsequent claim that the response was erroneous as it was invited error. *See also Durden v. State*, 99 N.E.3d 645, 656 (Ind. 2018) (holding defendant could not challenge on appeal an error in jury instructions that he and his counsel had invited by expressly agreeing to the instructions as part of a deliberate trial strategy).

[25] Dale may not now challenge as fundamental error the trial court's response to the jury's question because Dale invited any such error by expressly approving of the response. *Id*.

Analysis on Merits

[26] Waiver notwithstanding, we find no error in the trial court's response to the jury's question, much less fundamental error.

[27] Indiana Code Section 34-36-1-6[5] provides:

> If, after the jury retires for deliberation:

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[5] The parties agree that Indiana Jury Rule 28 is not applicable in this case, as the jury did not indicate to the court that it had "reached an impasse in its deliberations" such that the court should have inquired further of the jurors and proceeded accordingly.

> (1) there is a disagreement among the jurors as to any part of the testimony; or
>
> (2) the jury desires to be informed as to any point of law arising in the case;
>
> the jury may request the officer to conduct them into court, where the information required shall be given in the presence of, or after notice to, the parties or the attorneys representing the parties.

Generally, when a trial court, in the exercise of its discretion, determines that a jury question relates to a "point of law arising in the case" per the above statute, the court must answer the legal question using the procedures prescribed. *Id.*; *Foster v. State*, 698 N.E.2d 1166, 1170 (Ind. 1998).

[28] However, Indiana Code Section 35-37-2-2(6) provides: "…A charge of the court or any special instructions, when written and given by the court under this subdivision, may not be orally qualified, modified, or in any manner orally explained to the jury by the court…." Our Supreme Court has construed this statute, together with Indiana Code Section 34-36-1-6, to mean "when the jury indicates that it has a problem in its deliberations concerning an important issue of law on which they were previously instructed, the trial court generally should reread the instructions to the jury without further comment." *Foster*, 698

N.E.2d at 1170.[6] By following this general procedure, the trial court avoids risking an emphasis of a particular instruction or a particular aspect of the case and also avoids risking a suggestion of a resolution of the issue. *Foster*, 698 N.E.2d at 1170-71; *see also Ramirez v. State*, 174 N.E.3d 181, 198 (Ind. 2021) (noting, despite the greater flexibility courts have to respond to jury questions per Indiana Code Section 34-36-1-6(2), "supplemental jury instructions should be given cautiously due to their prejudicial potential").

[29] Here, the jury's question related to the elements of murder under Count I and the elements of felony murder under Count II. The jury was given separate instructions about the precise elements of each of those crimes in the preliminary jury instructions, which were made part of the final instructions. The jury instructions stated that the jury could not convict Dale of either of those crimes unless the State proved each of the specified elements of each crime beyond a reasonable doubt. Because the answer to the jury's question was contained in the jury instructions, it was not erroneous for the trial court to

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[6] We note that our Supreme Court has recently held that "a trial court is no longer required to identify a legal lacuna [or gap] in the final instructions before responding to a jury's question pertaining to 'any point of law arising in the case'" as that term is used in Indiana Code Section 34-36-1-6. *Ramirez v. State*, 174 N.E.3d 181, 197 (Ind. 2021). Rather, where the jury indicates that it is "at an impasse" per Jury Rule 28, the court has discretionary authority to "direct that further proceedings occur as appropriate," *Henri v. Curto*, 908 N.E.2d 196, 205 (Ind. 2009), regardless of whether the instructions contain a legal lacuna, *Ramirez*, 174 N.E.3d 197. However, it remains the general rule that, where the jury has not indicated it is at an impasse, the trial court should reread the instructions to the jury without further comment when the answer to the jury's question is contained in the jury instructions. *See Ronco v. State*, 862 N.E.2d 257, 259-60 (Ind. 2007) (noting a jury's question about a point of law is not the same as "an impasse" of the jury where the court may, in its discretion, answer the question of law per Jury Rule 28). Here, as the parties agree, the jury did not indicate, and the court did not find, that the jury was at an "impasse" such that Jury Rule 28 would apply.

respond to the jury's question by instructing the jury to reread all of the jury instructions. *See Foster*, 698 N.E.2d at 1170.

Dale's Statement to Law Enforcement

[30] Dale asserts that the trial court violated his constitutional right to be free from self-incrimination by admitting into evidence his statement to law enforcement, which Dale contends was an involuntary statement due to his intoxication. We review the decision to admit or exclude evidence for an abuse of discretion, and we afford the trial court great deference on appeal. *Ennik v. State*, 40 N.E.3d 868, 877 (Ind. Ct. App. 2015), *trans. denied*. We will reverse a trial court's ruling on the admission of evidence only if "it represents a manifest abuse of discretion that results in the denial of a fair trial." *Carpenter v. State*, 786 N.E.2d 696, 702 (Ind. 2003). We will not reweigh the evidence of voluntariness of a statement admitted into evidence, and we examine the evidence most favorable to the trial court's conclusion. *Pruitt v. State*, 834 N.E.2d 90, 115 (Ind. 2005). "If there is substantial evidence to support the trial court's conclusion, it will not be set aside." *Id*.

[31] Dale alleges his statement was involuntary because he was under the influence of drugs and alcohol during the interview with law enforcement.

> If voluntariness of a statement is challenged on the basis that the defendant was under the influence of drugs [or alcohol], the defendant has the burden to introduce evidence from which it could be concluded that the amount and nature of the drug consumed would produce an involuntary statement. The mere fact a statement is made by the defendant while under the

> influence of drugs, or that the defendant is mentally ill, does not render it inadmissible per se. Intoxication, drug use and mental illness are only factors to be considered by the trier of fact in determining whether a statement was voluntary.

Id. (citations omitted). Thus, "a confession made while voluntarily intoxicated may still be given knowingly and voluntarily." *Keith v. State*, 127 N.E.3d 1221, 1232 (Ind. Ct. App. 2019) (citing *Ellis v. State*, 707 N.E.2d 797, 802 (Ind. 1999)).

> A confession will only be deemed involuntary when a defendant is so intoxicated as to be not conscious of what he is doing or when it produces a state of mania. [*Ellis*, 707 N.E.2d at 802.] Any lesser degree of intoxication goes merely to the weight to be given to the confession, not to its admissibility. *Wilkes v. State*, 917 N.E.2d 675, 680 (Ind. 2009), *reh'g denied*.

Id.

[32] Here, Dale testified that he consumed alcohol, smoked marijuana, and took two Percocet pills between 7:30 and 9:00 p.m. on the evening of August 20, 2018. However, both of the detectives who interviewed Dale had extensive experience interacting with individuals who were drunk or high, and both detectives testified that Dale did not appear to be under the influence of either drugs or alcohol during the interview which began at 3:41 a.m. on August 21. Det. Ingram, who was sitting near Dale during the interview, further testified he did not smell either alcohol or marijuana on either Dale's breath or his person. Moreover, while Dale testified at the suppression hearing that he was intoxicated during the interview and did not remember the interview, he did not

testify that his intoxication caused him to be unaware of the questions and his responses.

[33] The detectives' testimony was substantial evidence supporting the trial court's conclusion that Dale's statement was voluntary because he was not intoxicated and/or high to the point that he was not conscious of what he was doing or saying during the interview. *See Wilkes v. State*, 917 N.E.2d 675, 680 (Ind. 2009) (holding that sufficient evidence supported the trial court's rejection of defendant's claim of involuntariness due to intoxication where the defendant did not claim his intoxication "caused him to be unaware of his statements during the interview, and the detectives who interrogated [the defendant] testified that he did not appear intoxicated"). Dale's contentions to the contrary are merely requests that we reweigh the evidence and judge witness credibility, which we may not do. *Pruitt*, 834 N.E.2d at 115. The trial court did not abuse its discretion when it determined that Dale's statement was voluntary and admissible.

Conclusion

[34] Dale waived his claim of fundamental error in the trial court response to the jury's question by inviting the error through his counsel's affirmative approval of the response. Waiver notwithstanding, the trial court's response to the jury's question was not erroneous at all, much less fundamentally erroneous; because the answer to the jury question was contained in the jury instructions, the trial court properly responded to the jury by instructing them to reread all of the jury

instructions. And the trial court did not abuse its discretion when it determined that Dale's interview with authorities was voluntary and admissible.

[35] Affirmed.

Mathias, J., and Altice, J., concur.