

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Dominique L. Barbour,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

March 3, 2023

Court of Appeals Case No.
22A-CR-1515

Appeal from the Marion Superior
Court

The Honorable Grant W.
Hawkins, Judge

The Honorable Peggy Hart,
Magistrate

Trial Court Cause No.
49D31-2104-F6-12420

Memorandum Decision by Chief Judge Altice
Judges Brown and Tavitas concur.

Altice, Chief Judge.

Case Summary

- [1] Dominique L. Barbour was convicted, following a jury trial, of two counts of Level 6 felony intimidation. During deliberations, the jury sent out a note asking to view two pieces of photographic evidence. In response, and by agreement of the parties, the court ordered that all the admitted evidence, seven exhibits, be shown to the jurors in open court. The State further requested that, because the perpetrator's identity was at issue, Barbour remove his face mask that he had worn, by choice, for almost all of trial. The trial court granted the request, and, on appeal, Barbour asserts the following restated issue: Did the trial court invade the province of the jury when, over Barbour's objection, the court granted the State's request to have Barbour remove his face mask for one minute before sending the jury back to resume deliberations?
- [2] We affirm.

Facts & Procedural History

- [3] On the morning of February 21, 2021, Jessica Cuenca and Maricela Carrizosa Felix were working at an Indianapolis Subway restaurant. A female customer entered the restaurant, accompanied by a male, later determined to be Barbour. The woman asked Cuenca for a teriyaki power bowl with "just meat." *Transcript Vol. 2* at 183. When Felix informed the female customer that there would be an upcharge for double meat, she became angry, gesturing, stomping, and yelling derogatory insults at Cuenca. Felix told the pair to leave the

restaurant, but Barbour approached and shouted at Cuenca that he was going to “beat [her] ass” and could pull out a gun. *Id.* at 190. Felix motioned Cuenca away from the counter area to a back room, while Felix remained to deal with the angry customers. Barbour walked to the end of the counter, picked up and moved the rope barrier out of the way, and opened the swinging counter door that led into the employees’ area behind the counter. He approached Felix and ordered her to make the food. Barbour then walked out of the employees’ area and exited the restaurant, while making statements indicating he was going to get his gun. The female customer left shortly thereafter, and Felix locked the door behind them. Both Cuenca and Felix were afraid due to Barbour’s threats and conduct, and Cuenca called the police.

[4] Indianapolis Metropolitan Police Department initially responded to the call, and a few days later, on February 25, Indiana State Police (ISP) Detective Joshua Graves became involved in the case. Detective Graves took over the investigation and, among other things, spoke separately with Cuenca and Felix. Felix advised Detective Graves about the store’s security camera system and provided him with access to footage of the February 21 incident. From still images taken from that video, an ISP analyst matched Barbour, through facial recognition software, to his Bureau of Motor Vehicles (BMV) photo. Detective Graves then created a photo array using the BMV photo. Felix selected Barbour in the array, but Cuenca identified another person.

[5] The State charged Defendant with two counts of Level 6 felony intimidation, one for Cuenca and one for Felix. At the May 2022 jury trial, it was a personal

choice as to whether to wear a face mask, and the court so advised the jury.

Barbour chose to wear a mask.

[6] Before the first witness was called and while the jury was out of the courtroom, the State requested that Barbour be required to remove his mask during Felix’s testimony to allow her the opportunity to identify him, and Barbour stated that he had no objection to doing so.¹ To avoid having Barbour pull down his mask at the specific point of identification in Felix’s testimony, which the State was concerned might be viewed as prejudicial to the defense – as if stating “here I am” – the agreed procedure was that Barbour would have his mask already removed before Felix entered the courtroom to begin her testimony. *Transcript Vol. 2* at 160. Upon the court’s inquiry, Barbour confirmed that he would be “arguing identity” at trial. *Id.* at 162. The court then ordered Barbour to keep his mask removed during the entirety of Felix’s testimony, which would include the playing of the security camera video. Barbour did so, and Felix identified Barbour as the male customer from the February 21 incident.

[7] Following the State’s case in chief, during which Cuenca, Felix, and Detective Graves testified, Barbour moved for judgment on the evidence “regarding identification,” arguing, among other things, that Cuenca did not select him in

¹ The State explained that Felix would be testifying twice during trial; first for Felix to briefly identify the Subway surveillance video that she turned over to police, and a second time, later in trial, during which the State would be playing the security camera video of the incident and Felix would be identifying Barbour in the courtroom and on the video. The parties’ agreement was that Barbour would remove his mask during the second time that Felix took the witness stand.

the photo array and that there was not enough evidence presented to allow the jury to determine that Barbour was the perpetrator. *Id.* at 209. The State responded that Felix identified Barbour both in the photo array and in court, and “it’s a question of fact for the jury whether or not they believe he’s the person in the video.” *Id.* at 210. The trial court denied Barbour’s motion. During closing argument, Barbour argued, among other things, that the State failed to prove the element of identity: “They haven’t proven that they have the right man.” *Id.* at 235.

[8] After about twenty-five minutes of deliberating, the jury sent out a note, stating that the jurors would “like to see some of the evidence again,” specifically the picture of Barbour in the photo array and a still shot of the perpetrator taken from the surveillance video. *Id.* at 247. In response, and by agreement of the parties, the court allowed the jury to view all the evidence, consisting of seven exhibits, in sequential order as they came into evidence. Specifically, the court played in open court Exhibits 1, 2, and 3, which were the security videos, and Exhibits 4 through 7 were handed to the jurors to view without comment. Those consisted of the two photo arrays – one with Cuenca’s selection and the other with Felix’s – and two still shots obtained from the security video.

[9] Upon the conclusion of the jury’s review of the evidence but before they left to resume deliberating, the State requested a sidebar. The State asked that, because the identity of the perpetrator was at issue and because Barbour “had

his mask on almost the entire trial,”² Barbour be directed to “lower his mask so that [the jurors] can actually see his whole face.” *Transcript Vol. 3* at 6. Counsel for Barbour opposed this request, maintaining that doing so would draw attention to Barbour and, further, the evidence was closed. The State responded that, in a case such as this, where identity is at issue and the jurors needed to compare his face in the courtroom to what they saw on the security video, Barbour’s face “is the evidence” and asked for removal of the mask for “one minute at the most.” *Id.* at 8. The court overruled Barbour’s objection and granted the State’s request. So as to “not [] bring any attention to it,” the court ordered that Barbour’s counsel would quietly ask Barbour to lower his mask, the court would keep track of time and, at the expiration of one minute, would excuse the jury from the courtroom. *Id.* No announcement or remarks were made about the mask, and after one minute, the court dismissed the jury back to deliberations.

[10] The court thereafter made a record of what transpired, and Barbour’s counsel explained his objection:

[M]y objection was because the jury didn’t ask for it and because it was done at the end of the period where they were re-reviewing the evidence, I would contend that the solid minute of silence we just had kind of drew undue attention to something that the jury

² Felix’s testimony, during which Barbour had his mask removed was relatively brief – consisting of five and one-half pages of transcribed testimony and including the playing of one video (State’s Exhibit 3), which was less than five minutes in length.

was not considering until they did it. So they had an undue emphasis[.]

Id. at 10. The State reiterated why it made the request:

[T]he Defendant is part of the evidence for [the jurors] to compare the video to the Defendant [in person] to determine whether they think that's the same person. And that's why the State thought it was important because he has had a mask covering three fourths of his face almost the entire trial.

Id. at 11. The trial court explained that it had found the State's request for one minute without a mask to be "reasonable" and noted that it had taken specific steps to not draw attention to the matter or make it seem like "a big reveal." *Id.* at 10.

[11] The jury found Barbour guilty as charged, and the trial court sentenced him to a term of two years on each count, to be served concurrently, in the Marion County Jail. Barbour now appeals. Additional facts will be supplied below as necessary.

Discussion & Decision

[12] During this May 2022 trial, the wearing of a mask was a personal choice that Barbour chose to exercise. He asserts that the trial court invaded the province of the jury by "ordering [him] to remove his mask for one solid minute" and that the effect of the error was "magnified" because this occurred when the jury was not focusing "on anything else than Barbour's face." *Appellant's Brief* at 8, 10. In the circumstances of this case, we examine a trial court's decision to

allow the jury to view evidence after deliberations had begun for an abuse of discretion.³ See *Stokes v. State*, 801 N.E.2d 1263, 1269 (Ind. Ct. App. 2004) (applying abuse of discretion standard to review of the trial court’s decision to allow the jury to view exhibits in the deliberation room, not in open court, after deliberations began) *trans. denied*. Barbour’s claim is that his face was already made available to the jury at the agreed time during Felix’s testimony and that the trial court abused its discretion “by ordering the second reveal” of his face. *Appellant’s Brief* at 12, 13.

[13] In our consideration of the issue, we initially observe – and as Barbour points out – the Covid-19 pandemic brought “unprecedented challenges to our nation in a macro sense, and unique, unprecedented, challenges to our justice system in a micro sense.” *Id.* at 8-9. Indeed, “[o]ur judicial system and litigants have [] had to adjust in the pandemic era, often on the fly.” *Id.* at 9.

³ Ind. Code § 34-36-1-6 provides;

If, after the jury retires for deliberation:

- (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.

In the present case, where there was no disagreement as to testimony and the jury did not ask about a point of law, the statute is not applicable. See *Blanchard*, 802 N.E.2d 14, 31 (Ind. Ct. App. 2004) (stating that, where “the jury merely requested to be provided with videotape and viewing equipment,” the mandatory language of Ind. Code § 34-1-21-6, which was the predecessor to I.C. § 34-36-1-6, did not apply, and “the decision to allow the jury to view the videotape again is within the discretion of the trial court”); see also *Parks v. State*, 921 N.E.2d 826, 831-32 (Ind. Ct. App. 2010) (“[E]ven when the statute is not triggered, a court has discretion to replay testimony”), *trans. denied*.

[14] Turning to this case, Barbour argues that the trial court erroneously took the State’s “bait” and accepted “the State’s speculative theory” that identification was an issue for the jury such that it was appropriate for Barbour to unmask when the jury was re-viewing all the evidence. *Id.* at 10, 12. We reject this line of argument, as there is nothing speculative about the fact that identity – i.e., whether Barbour was the person seen in the video berating and threatening Cuenca and Felix – was a contested issue at trial. The defense argued, both when seeking judgment on the evidence and in closing arguments, that the State had failed to prove the identity element of the offense. And, although the question sent out by the jury “did not state identity was an issue, nor did it ask for Barbour to remove his mask,” *id.* at 10, it is evident from the jury’s request to see two specific photographs that the jurors desired to compare Barbour’s BMV photo used in the array to the still photo taken from the security camera footage in order to assess whether it was the same person.

[15] In response to the jury’s request to see certain evidence, the trial court directed that the jury view all seven admitted exhibits. The State urged, and the court agreed, that, where, as here, the identity of the male captured on video at Subway was at issue, Barbour’s face was also part of the evidence. We find no error in that determination. Indeed, as the State points out, “had it not been a time of Covid-19, [Barbour]’s face would have been in full view to the jury during the entire trial[.]” *Appellee’s Brief* at 11. Furthermore, the trial court crafted a procedure for the parties to follow so as not to draw undue attention, namely, subtle removal of the face covering, no announcement or remarks,

silent pause for one minute, before the court then excused the jury from the courtroom.

[16] While Barbour urges that he “did not agree to a second facial reveal, especially one unsolicited by the jury,” his agreement was not a necessary prerequisite to the court’s decision. *Appellant’s Brief* at 13. Rather, the inquiry is whether the trial court’s decision to allow the jury to view Barbour’s unmasked face, at the time and in the manner that it did so, was an abuse of discretion. On the facts and circumstances of this case, we conclude that it was not.

[17] Judgment affirmed.

Brown, J. and Tavitas, J., concur.