MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Karl Woodall,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 10, 2021

Court of Appeals Case No. 20A-CR-862

Appeal from the Marion Superior Court

The Honorable Lisa F. Borges, Judge

Trial Court Cause No. 49G04-1705-MR-19090

Bailey, Judge.

Case Summary

[1] Karl Woodall ("Woodall") was brought to trial upon a charge of Murder, a felony.[1] Over Woodall's objection, the trial court granted the State's motion for a mistrial on grounds of jury taint. Woodall was convicted in a second trial and now appeals. We affirm.

Issues

[2] Woodall presents three issues for review:

I. Whether he was subjected to procedural double jeopardy upon retrial because a mistrial had been declared without a manifest necessity;

II. Whether the giving of a preliminary instruction reciting the charge, inclusive of the prosecutorial affirmation, was fundamental error; and

III. Whether he was denied his right of allocution, thus entitling him to a new sentencing hearing.

Facts and Procedural History

[3] On March 5, 2017, Woodall arrived at the Indianapolis apartment of David Patrick ("Patrick"), driving a rental van. Woodall asked Patrick, who had a reputation as a "collector," to go for a ride and Patrick agreed. (Tr. Vol. III, pg.

[1] Ind. Code § 35-42-1-1.

26.) Woodall drove to a residence on the east side of Indianapolis, at some point explaining to Patrick that he was looking for J.S. and intended to collect upon a claimed debt for drugs and a pistol. Initially, J.S. was not home. Woodall left and returned during the early morning hours of March 6, and this time he backed the van into J.S.'s driveway and parked. Patrick could see a man (who would later be identified as J.S.) standing outside the residence, wearing a headlamp.

[4] Woodall got out and conversed with J.S. while Patrick, who was intoxicated, stayed in the van. After several minutes, Woodall came back to the van and grabbed a shotgun. He explained to Patrick that J.S. "wanted more protection" and Patrick protested, "are you stupid – he already owes you money." (*Id.* at 29.) Patrick leaned his head against the window for another five to ten minutes before he was startled by a gunshot. Patrick looked in the rearview mirror to see "a man melt down like butter." (*Id.*) Woodall jumped back in the van, exclaiming that "he blowed [sic] this dude's brains out." (*Id.* at 30.)

[5] Woodall soon realized that he had left behind a borrowed cell phone. He drove back to retrieve the phone, only to discover that police were already on the scene. Police investigators were able to identify Woodall as the last person having possession of the cell phone left at the murder scene. On March 30, 2017, Woodall was arrested.

[6] On May 23, 2017, Woodall was charged with the murder of J.S.[2] He was brought to trial before a jury on February 24, 2020. On the second day of the trial, the bailiff reported to the trial court that a juror had discussed with other jurors the possibility that Patrick, the State's eyewitness, was the same David Patrick responsible for a failed extortion scheme on Facebook. After the juror corroborated her reported interactions, the trial court granted the State's motion for a mistrial.

[7] Woodall was tried before a second jury on March 2 and 3, 2020 and convicted as charged. On March 11, 2020, the trial court conducted a sentencing hearing. Before articulating its findings of aggravators and mitigators, the trial court made inquiry as to Woodall's exercise of his right of allocution. Defense counsel advised the trial court that Woodall did not wish to make a statement. Woodall was sentenced to sixty years imprisonment. He now appeals.

Discussion and Decision

Mistrial

[8] When the jury returned from lunch on the second day of the first trial, the trial court questioned Juror 11 as to whether the juror had recognized a witness and engaged in related communications with other jurors. Juror 11 revealed some

[2] In a separate cause, Woodall was charged with having committed another murder on or about March 26, 2017.

suspicion related to Patrick. Approximately two years earlier, the Facebook account belonging to Juror 11 had been hacked and her family pictures appeared with the name of David Patrick and a solicitation for money for an emergency fund. Juror 11 was asked whether she had shared her suspicion with other jurors and she answered, "absolutely." (Supp. Tr. pg. 100.) She explained that she had sought advice from the others about "what to do." (*Id.*) The State moved for a mistrial and defense counsel objected. The trial court concluded that there had been "besmirchment" of the name of the State's eyewitness "shared with everybody" and thus granted the motion for a mistrial. (*Id.* at 103.) Woodall argues that the trial court erred by granting the State's motion for a mistrial, so that the subsequent trial violated the prohibition against double jeopardy.[3]

[9] The Fifth Amendment to the United States Constitution prohibits the State from placing a defendant in jeopardy twice for the same offense. *Brown v. State*, 703 N.E.2d 1010, 1015 (Ind. 1998). Jeopardy attaches when a jury has been selected and sworn. *Id*. at 1014. And "[o]nce jeopardy has attached, the trial court may not grant a mistrial over a defendant's objection unless 'manifest necessity' for the mistrial is found." *Id.* at 1015 (quoting *Arizona v. Washington*,

[3] Recently, the Indiana Supreme Court expressly overruled the constitutional test of *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999), with respect to resolving claims of substantive double jeopardy. *See Wadle v. State*, 151 N.E.3d 227, 248 (Ind. 2020). However, the Court recognized that the *Richardson* actual evidence test had continued applicability to bar procedural double jeopardy (successive prosecution for the same offense) and stated that, because Wadle's case did not present a question of procedural double jeopardy, the Court "expressly reserved any conclusion on whether to overrule *Richardson* in that context." *Id.* at 248, n. 15.

434 U.S. 497, 505 (1978)). Absent manifest necessity, the discharge of the jury operates as an acquittal to bar further prosecution. *Id*.

[10] Nevertheless, our Supreme Court has explained that an explicit finding of manifest necessity is unnecessary and manifest necessity does not mean that a mistrial had to be necessary in "'a strict, literal sense.'" *Jackson v. State*, 925 N.E.2d 369, 373 (Ind. 2010) (quoting *Washington*, 434 U.S. at 511). Nor is the trial court required to state that it considered alternative solutions but found them inadequate. *Id.* Rather, "only a 'high degree' of necessity is required to conclude that a mistrial is appropriate." *Id.* (quoting *Washington*, 434 U.S. at 506). Moreover, "the reviewing court must 'accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by [an] improper comment.'" *Id.* (quoting *Washington*, 434 U.S. at 511). Accordingly, the decision whether to grant a motion for mistrial rests within the sound discretion of the trial court. *Pavey v. State*, 764 N.E.2d 692, 698 (Ind. Ct. App. 2002), *trans. denied*.

[11] A variety of factors may bear on the need for a mistrial. *Jackson*, 925 N.E.2d at 373. One significant factor is the extent to which the need for the mistrial is attributable to the State. *Id.* If the reason is attributable to the State, it must demonstrate a "much higher" degree of necessity for the mistrial. *Id.* Another factor is the necessity of the mistrial in light of the steps taken by the trial court to avoid the mistrial. *Id.* at 374. This factor encompasses considerations such as whether the trial court provided counsel the opportunity to be heard, considered alternatives, and made its decision after adequate reflection. *Id.* A

third factor to consider is the burden imposed by a mistrial. *Id.* The relevant focus is upon "the values underlying the protection against double jeopardy – the burden on the accused, the associated stigmatization as one accused, and the increased risk of wrongful conviction." *Id.* These values should be weighed against allowing the State "'one complete opportunity for a conviction.'" *Id.* (quoting *Brown*, 703 N.E.2d at 1016). Moreover, the values underlying double jeopardy protection "'are not as great when the trial is terminated shortly after jeopardy has attached as opposed to at a later stage in the trial.'" *Id.* (quoting *Brown*, 703 N.E.2d at 1016).

[12] Woodall and the State agree that the prompting of a mistrial was not attributable to the State, but instead to juror communication notwithstanding the court's instructions. Jurors were directed, in the preliminary instructions, to report any concern of witness recognition directly to the bailiff and to refrain from case-related discussions with other jurors prior to deliberation. Woodall does not point to other action the trial court could have taken to prevent the conduct of Juror 11. He suggests that, once the communication came to light, the trial court might have admonished the jurors. But the trial court's commentary indicates that the court was persuaded that the widely disseminated "besmirchment" of the State's sole eyewitness left the court "no choice" and could not be adequately addressed by a lesser response than mistrial. (Supp. Tr., pg. 103-4.)

[13] Woodall points to the fact that the mistrial was declared well into the presentation of the State's evidence and asserts that he was denied a

"potentially favorable verdict." Appellant's Brief at 33. Woodall suggests that Patrick's testimony and demeanor at the first trial was such that the jury might have concluded that Patrick, not Woodall, killed J.S. According to Woodall, the State had the opportunity to secure a conviction, fell short with its purported eyewitness testimony, and should not be given another bite at the apple.

[14] In both trials, Patrick gave consistent testimony. He admitted that he used controlled substances and was known as an enforcer or collector, and he opined that Woodall liked to take advantage of that reputation. Patrick acknowledged knowing of Woodall's plan to collect a debt from J.S. but maintained that he stayed in the van and did not interact with J.S. He testified that he heard a gunshot and looked in the rearview mirror to see J.S.'s body crumple. Patrick admitted that the shotgun used in the murder had been stored at his apartment, and he had personally cleaned it. Indeed, Patrick did not portray himself in a good light. But even had the jury concluded that Patrick was the triggerman, Woodall was not portrayed as an innocent man, but rather as an accomplice. We do not agree with Woodall that retrial better positioned the State to avoid an acquittal.

[15] In sum, the need for the mistrial was not attributable to the State, but to a juror who had acted in disregard of the trial court's explicit instructions. The trial court engaged in adequate reflection, ultimately concluding that a mistrial was warranted based upon the nature and breadth of the communication. The discourse between jurors potentially disparaged the State's sole eyewitness, who

had already admitted to significant criminality. Under these facts and circumstances, the trial court did not abuse its discretion by declaring a mistrial.

Jury Instruction

[16] Woodall next challenges one of the preliminary instructions given to the jury. Because instructing the jury is a matter within the sound discretion of the trial court, we will reverse a trial court's decision to tender or reject a jury instruction only if there is an abuse of that discretion. *Pattison v. State*, 54 N.E.3d 361, 365 (Ind. 2016). We determine whether the instruction states the law correctly, whether it is supported by record evidence, and whether its substance is covered by other instructions. *Id.* Jury instructions are to be considered as a whole and in reference to each other; error in a particular instruction will not result in reversal unless the entire jury charge misleads the jury as to the law in the case. *Id.* Here, because Woodall did not preserve his issue for appeal by a timely objection, he argues that the instructional error is fundamental. Fundamental error is extremely narrow and available only when the record reveals a clearly blatant violation of basic and elementary principles, where the harm or potential for harm cannot be denied, and which violation is so prejudicial to the rights of the defendant as to make a fair trial impossible. *Maul v. State*, 731 N.E.2d 438, 440-41 (Ind. 2000).

[17] When the jury was impaneled, the trial court read aloud the preliminary instructions, one of which included the language of the Information charging Woodall with murder. The trial court omitted the affirmation language (stating

that the undersigned affiant swore or affirmed under penalties of perjury) and affiant name, which had been included in the written form provided to jurors. Woodall contends that the inclusion of the affirmation language, in writing, amounted to fundamental error.

[18] In *Lynn v. State*, 60 N.E.3d 1135 (Ind. Ct. App. 2016), *trans. denied,* a panel of this Court considered a claim of fundamental error arising from the use of a pattern jury instruction substantially similar to the one given in this case. The instruction stated the charge together with affirmation language; we disapproved the inclusion of the latter:

> we are compelled to note that, as a general matter, we think that such affirmation language has no place in jury instructions and that the best practice is for trial courts to redact such language. Inclusion of affirmation language of this type raises several potential problems, including that it gives the semblance of attribution to the trial court or to an unknown affiant, who may or may not be available for cross-examination, as to the veracity of the factual basis for the charges. This is undesirable and completely avoidable. Thus, while the pattern jury instructions do not clearly require redaction, we strongly advise it.

Id. at 1138. Notwithstanding the preference for redaction of affirmation language, we concluded that there was no fundamental error given the instructions as a whole. *Id.* at 1139.

[19] In *Lynn,* the jury had been instructed that the charges were the formal method of bringing a defendant to trial, and the filing of charges was not to be considered as evidence of guilt. Also included were instructions on the

presumption of innocence and the State's burden of proof. The jury had been instructed that it was the sole judge of the evidence and facts, and they were told to consider the instructions as a whole. *Id.* We found that the challenged instruction did not invade the province of the jury nor did the affirmation language so affect the entire charge that the jury was misled. *Id.*

[20] In this case, the jury was advised that the murder charge was the formal method of bringing Woodall to trial, and the filing of a charge was not to be considered evidence of his guilt. The jury was instructed that Woodall was presumed innocent and the State had to prove each element of the murder charge beyond a reasonable doubt. The jury was told to consider the instructions as a whole and refrain from forming any opinion until deliberation had concluded. Also included among the instructions was the advisement that a jury functions as the exclusive judge of the evidence. Upon review of the instructions as a whole, we discern no fundamental error.

Right of Allocution

[21] Woodall claims that the trial court denied him the right to allocution. He further claims that the denial amounts to fundamental error and he is entitled to a new sentencing hearing.

[22] The right to allocation is "the opportunity at sentencing for criminal defendants to offer statements in their own behalf before the trial judge pronounces sentence." *Biddinger v. State*, 868 N.E.2d 407, 410 (Ind. 2007). The right of allocution existed at common law since 1682 and was codified in Indiana in

1905. *Jones v. State*, 79 N.E.3d 911, 914 (Ind. Ct. App. 2017). Our Indiana Supreme Court has explained, "In Indiana, the purpose of the right of allocution is to give the trial court the opportunity to consider the facts and circumstances relevant to the sentencing of the defendant in the case before it." *Ross v. State*, 676 N.E.2d 339, 343 (Ind. 1996). As long as a defendant is provided with the opportunity to explain his view of the facts and circumstances, the purpose of the right of allocution has been accomplished. *Vicory v. State*, 802 N.E.2d 426, 430 (Ind. 2004). On appeal, "a defendant claiming that he was denied his right to allocution carries a strong burden in establishing his claim." *Id*. at 429 (internal citations omitted).

[23] The current codification of the right to allocution is as follows:

> When the defendant appears for sentencing, the court shall inform the defendant of the verdict of the jury or the finding of the court. The court shall afford counsel for the defendant an opportunity to speak on behalf of the defendant. The defendant may also make a statement personally in the defendant's own behalf and, before pronouncing sentence, the court shall ask the defendant whether the defendant wishes to make such a statement. Sentence shall then be pronounced, unless a sufficient cause is alleged or appears to the court for delay in sentencing.

I.C. § 35-38-1-5.

[24] To support his fundamental error argument, Woodall directs our attention to *Jones.* There, we concluded that the trial court committed fundamental error by failing to directly inquire whether Jones wished to exercise his right of allocution. 79 N.E.3d at 917. Jones was not personally addressed; the entirety

of the colloquy relative to Jones's exercise of his right to allocution was as follows:

> Court: Does your client wish to execute his right of allocution?
>
> Counsel: No, Judge.

Id. at 916. We explained, "It is loss of the opportunity to engage in or personally waive the opportunity for allocution that is the harm to be cured here – not deprivation of the opportunity to say a particular thing." *Id.*

[25] In *Jones*, the trial court explicitly directed its single inquiry to counsel. But in this case, the inquiry was compound:

> Court: Any allocution? Is there anything Mr. Woodall wants to say to me?

(Tr. Vol. III, pg. 218.) The broad call for "any allocution" is inclusive of Woodall. Thus, Woodall was afforded "the opportunity to explain his view of the facts and circumstances," *Vicory*, 802 N.E.2d at 430, and the statutory purpose was served. That said, inquiries leaving room for ambiguity do not represent best practices. *See Ross*, 676 N.E.2d at 344 (holding that "the trial court should unambiguously address the defendant and leave no question that the defendant was given an opportunity to speak on his own behalf"). The necessary colloquy related to the right of allocution is "minimally invasive" into the conduct of court proceedings. *Jones*, 79 N.E.3d at 916 (citing *Vicory*, 802 N.E.2d at 429). Because Woodall was informed of his right of allocution and

was personally invited to respond, he was not deprived of his statutory right or subjected to fundamental error.

[26] And where, as here, the defendant has not been subjected to total deprivation of the right of allocution, a harmless error analysis may be applied. *See* Ind. Appellate Rule 66 ("No error or defect in … anything done or omitted by the trial court … is ground for granting relief or reversal on appeal where its probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties"). *See also, Abd v. State*, 120 N.E.3d 1126, 1137 (Ind. Ct. App. 2019) (finding that the appellant had failed to persuade the Court that his substantial rights were prejudiced where he failed to make any argument as to prejudice). Like the appellant in *Abd*, Woodall has not argued that he would have made a statement that supplemented the evidence before the court at sentencing or the substance of the presentence investigation report.[4]

[4] Consistent with the objective of the allocution statute to give a defendant a voice in the sentencing process, the practical process of compiling and submitting into evidence a presentence investigation report ("PSI") also gives voice to a defendant's perspective. A defendant may participate in a PSI interview, be provided with a copy of the PSI, and offer corrections or additions at the sentencing hearing. *See* I.C. §§ 35-38-1-9, -12.

Conclusion

[27] Woodall was not subjected to procedural double jeopardy upon retrial. The trial court did not commit fundamental error in instructing the jury or in conducting the sentencing hearing.

[28] Affirmed.

May, J., and Robb, J., concur.