

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Mark Allen Lehman,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

July 26, 2023

Court of Appeals Case No.
22A-CR-1047

Appeal from the Vanderburgh
Circuit Court

The Honorable Celia Pauli,
Magistrate

Trial Court Cause No.
82C01-2112-F5-6781

Memorandum Decision by Judge Pyle

Judges Bradford and Kenworthy concur.

Pyle, Judge.

Statement of the Case

[1] Mark A. Lehman (“Lehman”) appeals his conviction, following a jury trial, for Level 6 felony domestic battery.¹ Lehman argues that the trial court abused its discretion when it: (1) denied his motion for a mistrial; and (2) refused to give his proposed jury instruction. Concluding that the trial court did not abuse its discretion, we affirm the trial court’s judgment.

[2] We affirm.

Issues

1. Whether the trial court abused its discretion when it denied Lehman’s motion for a mistrial.
2. Whether the trial court abused its discretion when it refused to give Lehman’s proposed jury instruction.

Facts

[3] Lehman is married to E.L. (“E.L.”). In December 2021, Lehman struck E.L. on her head with a ceramic elephant with enough force that the ceramic elephant shattered. Lehman then called 911 and told the operator that his “wife [had] just hit her head[.]” (Tr. Vol. 2 at 198). When Paramedic Ashley Harper (“Paramedic Harper”) and her partner (collectively, “Paramedics”) arrived, they found E.L. screaming hysterically and covered in blood. E.L. was “slouched” on the ground and was “holding a towel against her head[.]” (Tr.

¹ IND. CODE § 35-42-2-1.3.

Vol. 2 at 200). Paramedic Harper also found a medium-sized shattered ceramic elephant scattered about the room, along with one of the elephant's tusks two feet away from E.L., and blood all over the floor. Paramedics lifted E.L. onto the stretcher because E.L. could not walk. Lehman told Paramedic Harper that he and E.L. were having sexual intercourse and E.L. fell into the elephant statue. However, Lehman and E.L. were both fully clothed.

[4] Paramedics loaded E.L. into an ambulance. Lehman rode in the front passenger seat of the ambulance, and E.L. and Paramedic Harper rode in the back. In the ambulance, E.L. grabbed Paramedic Harper's arm, shook it, and pointed at Lehman. When Paramedic Harper asked E.L. if Lehman had done this, E.L. said yes. E.L. also told Paramedic Harper, "[Lehman is] going to kill me[.]" (Tr. Vol. 2 at 210). When the ambulance arrived at the hospital, Paramedic Harper relayed what E.L. had told her to emergency department personnel.

[5] Paramedics took E.L. into the treatment area of the hospital, and Lehman was sent to the waiting room. E.L. was crying, anxious, and would not speak. Nurse Kimberly Adams ("Nurse Adams") was part of E.L.'s treatment team. E.L., after calming down, told Nurse Adams that her pain was a ten out of ten. E.L. also told Nurse Adams, "Oh my god, oh my god, I shouldn't have told[.]" (Tr. Vol. 2 at 226). E.L. also said, "there are guns in the house, [Lehman] will kill me." (Tr. Vol. 2 at 226). E.L. had a scalp laceration, and a physician used three staples to close the wound.

[6] After E.L.'s wounds had been treated, Social Worker Mallorie Will ("Social Worker Will") spoke with E.L. E.L. told Social Worker Will that she "didn't remember much about what [had] happened[.]" (Tr. Vol. 2 at 243). E.L. told Social Worker Will that she remembered waking up on the ground with blood on her head and Lehman standing over her screaming "what did I do" over and over. (Tr. Vol. 2 at 243). E.L. also told Social Worker Will that Lehman had instructed her to say that Lehman had thrown a backpack full of glass at her while she had not been paying attention. Finally, E.L. told Social Worker Will multiple times that "if [Lehman] goes to jail and gets released, he will kill me[.]" (Tr. Vol. 2 at 244). Police officers arrived at the hospital and arrested Lehman. E.L. was discharged and sent home with her mother.

[7] The State charged Lehman with Level 5 felony domestic battery causing serious bodily injury and Level 6 felony domestic battery. The trial court held a jury trial in March 2022. The jury heard the facts as set forth above. Additionally, Paramedic Harper testified that when she had asked E.L. if Lehman had done this, E.L. said yes. Paramedic Harper also testified that E.L. had told her, "[Lehman is] going to kill me[.]" (Tr. Vol. 2 at 210). Lehman did not object to this testimony.

[8] Nurse Adams testified that E.L. had told her, "Oh my god, oh my god, I should [not] have told[.]" (Tr. Vol. 2 at 226). Nurse Adams further testified that E.L. had said, "there are guns in the house, [Lehman] will kill me." (Tr. Vol. 2 at 226).

[9] During Social Worker Will's testimony, the State asked her about her involvement in E.L.'s care. Social Worker Will testified that she had been told that "the medic could not give information over the phone" when the ambulance was coming in "due to a safety issue of who was possibly riding in the back of the ambulance[.]" (Tr. Vol. 2 at 239). Lehman objected and requested to discuss his objection outside of the presence of the jury. During this recess, Lehman's counsel stated the following:

I object to her testifying about whether people told her about possible safety issues. It's completely nonresponsive to the question, it's an evidentiary harpoon, it's just typical of this series of witnesses who want to come up here and lay blame and dirty [Lehman] up for no apparent reason other than their own agendas. Now, she was called in to examine [E.L.], that's all the jury needs to know, that's all she needs to say. She doesn't have to talk about what some other unknown person said to her about safety concerns and I think it's entirely improper. I object to it. I move for a mistrial. And I ask that the jury be instructed to disregard her last comment and that she be instructed to answer the question and not volunteer information about what other people told her about possible safety concerns.

(Tr. Vol. 2 at 239-40). The trial court then asked the State to respond to Lehman's objection based on hearsay. The trial court ultimately sustained Lehman's hearsay objection and directed Social Worker Will to not testify about what other people had said to her, except for statements made by E.L.

[10] When the trial court asked the State to respond to Lehman's request for a mistrial, the State responded that a mistrial was inappropriate. The State further noted that the trial court had sustained the objection, so the trial court

should admonish the jury and inform it to disregard the previous testimony. The trial court denied Lehman's motion for a mistrial. When the trial court asked if anything else needed to be discussed, Lehman's counsel responded, "[n]ot from me, Your Honor." (Tr. Vol. 2 at 241).

[11] When the jury returned to the courtroom, the trial court gave the following admonishment:

Ladies and gentlemen, when we were last in the courtroom there was an objection which I needed to rule on and I needed a hearing outside the presence of you all. The Court has sustained that objection, so the last statement from [Social Worker Will] regarding other statements to the witness that she recited, I'm instructing you to disregard those statements and not to consider those in any way. You are each charged with enforcing this so if someone does consider this or bring[s] this up during deliberations you are each charged with bringing this to the bailiff's attention[.]

(Tr. Vol. 2 at 242).

[12] When testimony resumed, Social Worker Will also testified that E.L. had told her that Lehman had instructed E.L. to say that Lehman had thrown a backpack full of glass at her while she had not been paying attention. Social Worker Will further testified that E.L. had told her multiple times that "if [Lehman] goes to jail and gets released, he will kill me[.]" (Tr. Vol. 2 at 244). Lehman did not object to this testimony.

[13] E.L. testified that she did not remember any events from the night of her injury. Specifically, E.L. testified that she did not recall the events leading to her injury, the events in the ambulance, or anything that she had said at the hospital.

[14] Before the case was submitted to the jury, Lehman proposed an additional jury instruction to be included with the pattern instructions. The proposed instruction read as follows:

Defendant's Instruction No. 4

The statute defining battery sets forth a scienter, or state of mind, requirement: the State must prove a defendant acted knowingly or intentionally. An intent to touch another person in a rude, insolent, or angry manner, or knowledge that one is touching another person in a rude, insolent, or angry manner is a different state of mind than that in an accidental touching. An accidental touching is one committed without intent to touch in a rude insolent or angry manner.

In order to convict [Lehman] of domestic battery, the State must have proven beyond a reasonable doubt that the defendant acted knowingly or intentionally to touch in a rude, insolent or angry manner.

(App. Vol. 2 at 103). Lehman argued that this instruction was necessary because it was not covered by any other instruction. The State argued that the pattern instructions adequately addressed Lehman's concerns and that his proposed instruction should not be given to the jury. The trial court ruled that the proposed instruction would not be included because the pattern instructions "correctly and adequately define[d] both knowingly and intentionally[.]" (Tr.

Vol. 3 at 30). Specifically, the trial court noted instruction number five, which provided that “[a] person engages in conduct ‘intentionally’ if, when he engages in the conduct, it is his conscious objective to do so. A person engages in conduct ‘knowingly’ if, when he engages in the conduct, he is aware of a high probability that he is doing so.” (App. Vol. 2 at 81).

[15] At the conclusion of the jury trial, the jury found Lehman guilty of Level 6 felony domestic battery. At his sentencing hearing, the trial court ordered that Lehman serve two (2) years at the Indiana Department of Correction. Lehman now appeals.

Decision

[16] Lehman argues that the trial court abused its discretion when it: (1) denied his motion for mistrial; and (2) refused his proposed jury instruction. We address each of his arguments in turn.

1. Mistrial

[17] Lehman argues that the trial court abused its discretion when it denied his motion for a mistrial. The denial of a motion for a mistrial rests within the sound discretion of the trial court, and we review the trial court’s decision only for an abuse of discretion. *Brittain v. State*, 68 N.E.3d 611, 619 (Ind. Ct. App. 2019), *trans. denied*. The trial court is entitled to great deference on appeal because the trial court is in the best position to evaluate the relevant circumstances of a given event and its probable impact on the jury. *Id.* at 620. To prevail on appeal from the denial of a motion for mistrial, a defendant must

demonstrate that the statement in question was so prejudicial that he was placed in a position of grave peril. *Id.* The gravity of the peril is measured by the challenged conduct’s probable persuasive effect on the jury’s decision, not the impropriety of the conduct. *Mickens v. State*, 742 N.E.2d 927, 929 (Ind. 2001). The question is not whether the absence of this persuasive effect would lead to an acquittal instead of a conviction, but rather whether “the evidence is close and the trial court fails to alleviate the prejudicial effect.” *Everroad v. State*, 571 N.E.2d 1240, 1244 (Ind. 1991). Granting a mistrial “is an extreme remedy that is warranted only when no other action can be expected to remedy the situation.” *Kemper v. State*, 35 N.E.3d 306, 309 (Ind. Ct. App. 2015), *trans. denied*. An admonishment by the trial court is presumed to cure any error. *Glover v. State*, 179 N.E.3d 526, 534 (Ind. Ct. App. 2021), *trans. denied*.

[18] Lehman first argues that the trial court abused its discretion when it denied his motion for a mistrial because he was put in grave peril. We disagree.

[19] Our review of the record reveals that the stricken statement made by Social Worker Will was that she had been made aware that “the medic could not give information over the phone” when the ambulance was coming in “due to a safety issue of who was possibly riding in the back of the ambulance[.]” (Tr. Vol. 2 at 239). After sustaining Lehman’s objection to this statement, the trial court gave a thorough admonishment to the jury. In its admonishment, the trial court instructed the jury not to use the stricken statement in any way and to notify the bailiff if any other juror relied on the stricken statement. We hold that the trial court’s admonishment to the jury was an adequate remedy for the

situation and that Lehman was not placed in grave peril. *See Glover*, 179 N.E.3d at 534 (holding that an admonishment by the trial court is presumed to cure any error). Thus, the trial court did not abuse its discretion when it denied Lehman’s motion for a mistrial.²

2. Jury Instruction

[20] Lehman also argues that the trial court abused its discretion when it refused his proposed jury instruction. Instructing a jury is left to the sound discretion of the trial court and is reviewed only for an abuse of discretion. *Patterson v. State*, 11 N.E.3d 1036, 1040 (Ind. Ct. App. 2014). On review, we evaluate a trial court’s refusal of a proposed jury instruction in three steps: (1) we determine whether the proposed instruction correctly states the law; (2) we determine whether the evidence supports giving the instruction; and (3) we determine whether the substance of the instruction was covered by other instructions. *Id.* In doing so, we consider the instructions as a whole and in reference to each other and do not reverse the trial court for an abuse of discretion unless the instructions as a whole mislead the jury as to the law in the case. *McCowan v. State*, 27 N.E.3d 763-64 (Ind. 2015).

² Lehman also argues that the admonishment was insufficient because the trial court “failed to instruct the jury that the evidence could not be used as evidence of [Lehman]’s character or that the evidence was irrelevant.” (Lehman’s Br. 21). We disagree. Our review of the record reveals that the trial court’s admonishment instructed the jury not to use the stricken statement in any way. Thus, we hold that the admonishment was sufficient to cure any error.

[21] Lehman asserts that his proposed instruction was a correct statement of the law, the evidence supported giving the instruction, and the substance of the instruction was not covered by any other instruction. We need not address his first two assertions because our review of the record reveals that instruction number five covers the intent required for domestic battery. See *O'Connell v. State*, 970 N.E.2d 168, 173-74 (Ind. Ct. App. 2012) (holding that “[e]ven if an instruction is a correct statement of the law and finds some support in the evidence, a trial court may in its discretion refuse a tendered instruction if it is covered in substance by other instructions”) (footnote omitted).

[22] Lehman argues that instruction number five “does not cover the substance of [Lehman]’s tendered instruction on the difference between an accidental touching and a rude, angry, or insolent touching.” (Lehman’s Br. 24). In other words, he argues that instruction number five does not adequately address the intent element of the charged crime. We disagree.

[23] Our review of the record reveals that instruction number five covers the intent required for domestic battery. Specifically, instruction number five provides that “[a] person engages in conduct ‘intentionally’ if, when he engages in the conduct, it is his conscious objective to do so. A person engages in conduct ‘knowingly’ if, when he engages in the conduct, he is aware of a high probability that he is doing so.” (App. Vol. 2 at 81). Lehman’s proposed instruction attempts to distinguish an accidental touching from an intentional touching. In other words, his proposed instruction reiterates the intent requirement. The pattern instructions already clearly define what an

intentional touching is, and, thus, the substance of Lehman's proposed instruction is already covered by instruction number five. Accordingly, we hold that the trial court did not abuse its discretion when it rejected Lehman's proposed jury instruction.

[24] Affirmed.

Bradford, J., and Kenworthy, J., concur.