MEMORANDUM DECISION

ATTORNEYS FOR APPELLANT

Valerie K. Boots
Christopher Taylor-Price
Indianapolis, IN

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Ian McClean
Supervising Deputy Attorney General
Indianapolis, IN

IN THE COURT OF APPEALS OF INDIANA

Dwayne Lucas,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 25, 2022

Court of Appeals Case No. 21A-CR-2300

Appeal from the Marion Superior Court

The Honorable Cynthia L. Oetjen, Judge

Trial Court Cause No. 49D30-1910-MR-38854

Altice, Judge.

Case Summary

[1] Following a jury trial, Dwayne Lucas was convicted of two counts of murder and sentenced to consecutive terms of sixty years of imprisonment on each count. In this appeal, Lucas challenges whether the trial court abused its discretion in denying his post-trial motion for a mistrial.

[2] We affirm.

Facts & Procedural History

[3] On August 5, 2019, officers were called to the intersection of North Tibbs Avenue and Lafayette Road where victims, Miles Cross and Shainita Caffey, were shot and killed. Lucas was identified as one of the assailants by a combination of evidence, including: eyewitnesses at the scene of the murder; cell-phone location data placing him in the area when the shootings occurred; his fingerprints on the victim's vehicle; and evidence that Lucas was driving the car used by the murderers that same day. On July 7, 2021, at the conclusion of a two-day trial, a jury found Lucas guilty of both murders.

[4] On September 3, 2021, Lucas filed a motion for mistrial, alleging that one of the male jurors, "Juror Number 9," had a conversation with a member of Cross's family during the trial and that, as a result, he was denied fundamental due process. The trial court held a hearing on the matter, which spanned two days. On September 7, 2021, Lucas's wife, Kowayla Hubbard, testified that she witnessed the interaction on July 7 between Juror Number 9 and Diamond Hawthorne, someone Hubbard had seen in the courtroom and believed to be a

family member of one of the victims. Hubbard testified that she could not hear anything that was being said in the conversation.

[5] The trial court then heard from Hawthorne, who testified that Cross was the "god-dad" of her son. *Transcript Vol. IV* at 213. Hawthorne testified that she did not remember the conversation with Juror Number 9 until she was provided still photographs from the courthouse security video. Hawthorne then described the encounter as follows:

> A: So that day, I didn't have a lighter. All day, I was asking everybody for a lighter. If I seen them light a cigarette, I went up to you and asked could I use a lighter. And that particular person I got the phone call about, I went up to him and ask can I use his lighter. I lit my cigarette, and I walked off.
>
> Q: Did you have any conversation with him other than to bum a light?
>
> A: No, ma'am.
>
> Q: Did you in any way discuss the case with this gentleman?
>
> A: No, ma'am. I didn't even know who he was.
>
> Q: Okay. Did you have any other interactions with him that evening?
>
> A: No.

* **

> Q: After you get those cigarette lights, do you sit down on that little, I guess, stage area at that -- in that plaza; is that correct?
>
> A: Yes.
>
> Q: The juror walks by, and you turn around and you say something else to him. What do you say to him that second time?
>
> A: I didn't say nothing else to him. I seen him when I turned around. I don't know why I turned around. I seen him when I turned around, but I didn't say nothing else to him.

Id. at 214, 216.

[6] On October 7, 2021, Juror Number 9 testified regarding his memory of the interaction with Hawthorne. Juror Number 9 testified that he was not aware that Hawthorne was a member of the victim's family and that the conversation was about a cigarette. He did not remember having a second conversation with Hawthorne and had no explanation as to why she would have turned in his direction, stating:

> JUROR NUMBER 9: I don't know what was going on. Might have been some -- some kind of noise is what might have happened or something. I don't know. But I don't see me yelling, because I'd have to yell from there…
>
> THE COURT: Okay. So sir, you don't remember -- you didn't talk to anyone related to the facts of this case during -- while you were a juror in this trial; is that correct?

JUROR NUMBER 9: No, I didn't, Your Honor.

Id. at 240-41.

[7] At the conclusion of the hearing, the court denied the motion for mistrial. The court observed that Juror Number 9 was questioned, did not initially remember talking to anybody, and "specifically said that he did not speak to any person about this case while he was a juror in this case." *Id.* at 242. The court declined to call in the rest of the jurors for questioning given that "it was such a non-issue for [Juror Number 9], he was like, I don't – he did not remember [the encounter] at all." *Id*. That same day, the trial court sentenced Lucas to sixty years at the Indiana Department of Correction on each of the two murder convictions. *Transcript Vol. V* at 17. Lucas now appeals.

Discussion & Decision

[8] Lucas challenges the trial court's denial of his motion for a mistrial. Lucas argues that a mistrial was warranted because "having a juror in a pending criminal case talking in broad daylight to the victim's family member does equal harm – if not more – to the appearance of the fair and impartial administration of justice as does a juror talking with a witness." *Appellant's Brief* at 17. Lucas also claims that "the extra-judicial contact pertained to a matter before the jury." *Id.* at 21.

[9] The grant or denial of a motion for mistrial rests within the sound discretion of the trial court and is reviewed for an abuse of discretion. *Brittain v. State*, 68

N.E.3d 611, 619 (Ind. Ct. App. 2017), *trans. denied.* We afford the trial court great deference on appeal because the trial court is in the best position to evaluate the relevant circumstances of an event and its impact on the jury. *Id*. at 620. The grant of a mistrial is an extreme remedy that should be used only when no other curative measure will rectify the situation. *Kemper v. State*, 35 N.E.3d 306, 309 (Ind. Ct. App. 2015), *trans. denied*.

[10] In reviewing the denial of a motion for a mistrial, the defendant must demonstrate that the conduct complained of was both in error and had a probable persuasive effect on the jury's decision. *Pierce v. State*, 761 N.E.2d 821, 825 (Ind. 2002). More specifically, the appellant must establish that the questioned conduct was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected. *Gregory v. State*, 540 N.E.2d 585, 589 (Ind. 1989). Juror misconduct involving an out-of-court communication with an unauthorized person creates a rebuttable presumption of prejudice. *Stokes v. State*, 908 N.E.2d 295, 300 (Ind. Ct. App. 2009) (citing *Griffin v. State*, 754 N.E.2d 899, 901 (Ind. 2001), *reh'g granted on other grounds*, 763 N.E.2d 450 (Ind. 2002)).

[11] In *Ramirez v. State*, 7 N.E.3d 933 (Ind. 2014), our Supreme Court clarified how courts should apply the presumption of prejudice in cases with suspected jury taint. The Court explained:

> Defendants seeking a mistrial [in such cases] are entitled to the presumption of prejudice only after making two showings, by a preponderance of the evidence: (1) extra-judicial contact or

> communications between jurors and unauthorized persons occurred, and (2) the contact or communications pertained to the matter before the jury. *Currin [v. State]*, 497 N.E.2d [1045,] 1046 [(Ind. 1986)]. The burden then shifts to the State to rebut this presumption of prejudice by showing that any contact or communications were harmless. If the State does not rebut the presumption, the trial court must grant a new trial. On the other hand, if a defendant fails to make the initial two-part showing, the presumption does not apply. Instead, the trial court must apply the probable harm standard for juror misconduct, granting a new trial only if the misconduct is "gross and probably harmed" the defendant. *Henri v. Curto*, 908 N.E.2d 196, 202 (Ind. 2009) (internal quotation marks omitted). But in egregious cases where juror conduct fundamentally compromises the appearance of juror neutrality, trial courts should skip *Currin's* two-part inquiry, find irrebuttable prejudice, and immediately declare a mistrial. At all times, trial courts have discretion to decide whether a defendant has satisfied the initial two-part showing necessary to obtain the presumption of prejudice or a finding of irrebuttable prejudice.

Id. at 939 (some internal citations omitted).

[12] Lucas argues that Juror Number 9's contact with Hawthorne "fundamentally compromised the appearance of juror neutrality" such that the trial court should have found irrebuttable prejudice and declared a mistrial. *Appellant's Brief* at 12. In support, he cites *May v. State*, 716 N.E.2d 419, 420 (Ind. 1999), where our Supreme Court held that a conversation between a witness and a juror that was contemporaneous to the trial proceeding was fundamentally harmful to the appearance of a fair and impartial administration of justice. *May* is distinguishable, however, as it involved a conversation during a lunch break between a juror and an officer who was also a witness. The juror in *May*

personally knew the officer/witness and asked him to come over to his house the following weekend to watch a pay-per-view boxing match. In this case, Juror Number 9 did not know Hawthorne, and Hawthorne was not a witness in the case. Juror Number 9's brief and innocuous communication with Hawthorne did not fundamentally compromise the appearance of juror neutrality, and thus a finding of irrebuttable prejudice was not warranted.

[13] We next address whether the alleged juror misconduct created a rebuttable presumption of prejudice. Lucas was entitled to that presumption only if he established the *Currin* two-part test by a preponderance of the evidence. Lucas argues that the first element is met because Juror Number 9 had extra-judicial contact and communication with Hawthorne, who he characterizes as an unauthorized person and a family member of one of the victims. As the State observes, "unauthorized persons" are not defined in *Ramirez* for purposes of determining jury misconduct. We observe, however, that Jury Rule 20(b)(7) requires trial courts to instruct jurors that when out of the courtroom they are not to "talk to any of the parties, their lawyers, any of the witnesses, or members of the media, or anyone else about the case." The jurors were so instructed in this case. *See Appellant's Appendix Volume III* at 70. Furthermore, Hawthorne's vague descript of Lucas being her son's "god-dad" does not establish that Hawthorne and Cross were family, as Lucas claims. Lucas failed to show by a preponderance of the evidence that Hawthorne was an unauthorized person.

[14] And even if Hawthorne was an unauthorized person, there is no evidence that the limited contact and communication she had with Juror Number 9 pertained to a matter before the jury. That is, Juror Number 9 testified that he did not discuss anything related to the case with anyone outside of the court room. The trial court believed Juror Number 9, and we will not second guess a trial court's estimation of the facts and circumstances. *Treadway v. State*, 924 N.E.2d 621, 628 (Ind. 2010).

[15] Lucas highlights that Juror Number 9 acknowledged that, while serving on the jury, he may have told people "outside the courtroom" that he "had jury duty." *Transcript Volume IV* at 236. Lucas presumes Juror Number 9 made that statement to Hawthorne and that said statement pertained to a matter before the jury, namely his trial. We reject this argument. First, Juror Number 9 did not say he made the statement to Hawthorne. Indeed, he testified that when Hawthorne asked him for a light for her cigarette, he did not have any conversation with her about the case. Second, merely stating that one has jury duty is a general statement and does not pertain to matters before the jury.[1]

[16] Because Lucas did not meet his burden of showing by a preponderance of evidence that Juror Number 9 had contact with an unauthorized person during

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[1] Lucas also argues that, based on the alleged evasiveness of Juror Number 9 and bias of Hawthorne, the trial court was required to permit Lucas to interview the remaining jurors regarding possible taint caused by the communication. Like the trial court, we do not feel that such a procedure was necessary given the innocuous contact in this case. *See Ramirez*, 7 N.E.3d at 940 (("Trial courts must investigate suspected jury taint by thoroughly interviewing jurors collectively and individually, *if necessary*.") (Emphasis supplied)).

which anything about the merits of the case was discussed, Lucas is not entitled to the presumption of prejudice. Further, he has failed to show the existence of gross misconduct that probably harmed him. Accordingly, the trial court did not abuse its discretion in denying Lucas's post-trial motion for a mistrial.

[17] Judgment affirmed.

Vaidik, J. and Crone, J., concur.