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IN THE COURT OF APPEALS OF INDIANA

Demarcus D. Bush,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 9, 2023

Court of Appeals Case No. 22A-CR-79

Appeal from the Marion Superior Court

The Honorable Shatrese M. Flowers, Judge

Trial Court Cause No. 49D28-1908-F1-31627

Opinion by Judge Bailey
Chief Judge Altice and Judge Riley concur.

Bailey, Judge.

Case Summary

[1] Demarcus Bush appeals his conviction of rape, as a Level 3 felony.[1] We reverse with instructions and remand for a new trial.

Issues

[2] Bush raises two issues which we restate as the following dispositive issues:

I. Whether Bush invited the alleged trial error, thus prohibiting appellate review of his double jeopardy claim.

II. Whether the trial court committed fundamental error by removing Bush from the court room during the giving of final jury instructions.

Facts and Procedural History

[3] On August 12, 2019, the State charged Bush with having committed four crimes against then-eighteen-year-old D.M. on July 25, 2019. Count I, rape as a Level 1 felony,[2] asserted that Bush "did knowingly or intentionally have other sexual conduct with [D.M.], when [D.M.] was compelled by force or the imminent threat of force, and Bush being armed with a deadly weapon, that is, a handgun." App. v. II at 60-61. Count II, criminal confinement as a Level 3 felony,[3] alleged that Bush confined D.M. while being armed with a deadly

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[1] Ind. Code § 35-42-4-1(a)(1) (2019).

[2] I.C. § 35-42-4-1(a)(1) and (b)(1), (2).

[3] I.C. § 35-42-3-3(a) and (b)(3).

weapon. Count III, rape as a Level 3 felony, asserted that Bush "did knowingly or intentionally have other sexual conduct with [D.M.], when [D.M.] was compelled by force or the imminent threat of force." *Id*. at 61. Count IV alleged Bush pointed a firearm at D.M., as a Level 6 felony.[4]

[4] Bush had a jury trial on the four charges relating to D.M. on April 19 through 21 of 2021. Neither the preliminary jury instructions, the State's opening statement to the jury, nor the final jury instructions mentioned what specific sex acts constituted the sexual conduct charged in Counts I—rape as a Level 1 felony—and II—rape as a Level 3 felony. However, in the State's closing statement, the prosecutor stated, "The Defendant raped D.M. by performing oral sex on him when he was held at gunpoint." Supp. Tr. v. III at 230. The prosecutor then discussed "Count II[,] … criminal confinement." *Id*. at 230-31. The State next stated:

> Count III, rape. This is a separate rape, a separate act of sexual conduct. D.M. told you he was raped twice. After the oral sex was completed on him, the Defendant told him, get down on all fours and arch your back. He then licked his anus and forcefully penetrated him. Now, D.M. told you, he felt compelled by force, all the things that have already happened. At this point, he is in survival mode. But at that point, he doesn't know where the gun is. He's not sure. He's turned around, forced down on his knees, down on his hands, and forcefully penetrated.

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[4] I.C. § 35-47-4-3(b).

Id. at 231. Finally, the prosecutor discussed "Count IV, pointing a firearm." *Id*.

[5] On April 21, 2021, the jury returned its verdict. On "Count I" the jury found Bush "NOT GUILTY of Rape." App. v. III at 229. The jury also found Bush "NOT GUILTY" of Counts II (criminal confinement) and IV (pointing a firearm). *Id*. at 230, 232. However, the jury entered no verdict on "Count III … Rape/F3." *Id*. at 231.

[6] A jury retrial on remaining Count III, rape as a Level 3 felony, began on November 1, 2021. Preliminary jury instruction number five repeated the language used in the charging information regarding Count III but did not specify what particular sex act was at issue for Count III. In its opening statement, the State said Bush used "deadly force, a gun," in committing the rape alleged in Count III, and the prosecutor stated that Bush "rapes [D.M.] by performing oral sex on [D.M.]," and "rapes him again by penetrating [D.M.'] anus with his penis." Tr. v. III at 136. The State did not specify in its opening statement which sex act constituted the level 3 felony rape at issue in the case.

[7] In its closing statement, the State once again stated that Bush had raped D.M. "orally" and "anally." Tr. v. IV at 159, 163. After describing the alleged anal rape, the State noted that D.M. "was held at gunpoint." *Id*. at 160. The State then discussed evidence regarding both anal and oral sex. In Bush's closing statement, his attorney also discussed the alleged existence of a gun and recounted facts related to both oral and anal sex.

[8] On November 2, Bush's counsel tendered proposed final instructions and moved that the instructions "be read to the jury prior to deliberations." App. v. IV at 35. Among those proposed instructions was the following, hereinafter referred to as the "Rape Instruction":

> The Defendant is accused in this case of having committed the crime of Rape on or about July 25, 2019.
>
> The State has presented evidence that the Defendant may have committed more than one act that constitutes Rape on or about July 25, 2019. Before you may find the Defendant guilty of the crime of Rape in this case:
>
> (1) You must all unanimously find and agree that the State proved beyond a reasonable doubt that Defendant committed all described acts of Rape on or about July 25, 2019.
>
> Or
>
> (2) You must all unanimously find and agree that the State proved beyond a reasonable doubt that the Defendant committed the act of Rape by performing oral sex on [D.M.] on or about July 25, 2019.
>
> Or
>
> (3) You must all unanimously find and agree that the State proved beyond a reasonable doubt that the Defendant committed the act of Rape by digitally penetrating the anus of [D.M.] on or about July 25, 2019.
>
> Or

> (4) You must all unanimously find and agree that the State proved beyond a reasonable doubt that the Defendant committed the act of Rape by penetrating the anus of [D.M.] with his penis on or about July 25, 2019.
>
> If you find the Defendant not guilty, your verdict does not have to specify the particular act of Rape that the Defendant committed or the time it was committed.

Id. at 39.

[9] Outside the presence of the jury and before final jury instructions were given, Bush's defense counsel reported to the trial court that Bush wanted to make a statement to the trial court and the jury. Bush told the trial court that he believed the prosecution of him was biased because he had been "acquitted of this same charge" and that he wanted to testify when the jury returned. Tr. v. IV at 138. When the trial court asked Bush if he wanted to be in the courtroom during closing arguments, Bush told the court that he did want to be present so he could "let the jury know" that he had been tried on "these counts multiple times." *Id*. at 141. The trial court advised Bush that if he did that there would be a mistrial. Bush responded that he could not contain himself and that he was "not going to cooperate." *Id*. at 143.

[10] The trial court cleared the courtroom to permit Bush and his attorneys to speak privately. After about thirty minutes, the trial court went back on the record and asked Bush if he wanted to testify. Bush responded, "I plead the Fifth." *Id*. at 146. Bush again requested to speak with his counsel, and the trial court

granted that request. Following Bush's second discussion with his counsel, the latter reported to the court that Bush disagreed with defense counsel about the court's ability to retry him on Count III, the Level 3 felony rape charge. Bush had indicated to his counsel that he did not want to testify, but that he wanted to be able to tell the jurors either when they entered the courtroom or during closing arguments that he had been "tried on this case previously." *Id*. at 148.

[11] Bush was brought back into court, the court went back on the record, and the judge asked Bush if he wished to testify. Bush replied, "I'm not saying I don't want to be here because I do want to get it over with, but I am demanding a mistrial because … I feel like everybody is being biased around me." *Id*. at 149. When asked the basis for his mistrial request, Bush stated, in part, that the prosecutor was "saying there's a weapon, and I'm not charged with a weapon." *Id*. at 150. The trial court denied Bush's motion for a mistrial.

[12] The trial court stated it would allow Bush to testify, but Bush stated, "No." Bush stated, "I don't want to be at this trial. I don't want to proceed this [sic] trial today." *Id*. at 152. The court asked Bush, "You do not want to be at the trial?" and Bush replied that he did not want to "proceed" with the trial, in part "because [he had] been tried so many times on the same charges." *Id*. at 152-53. At that point, defense counsel stated, "[W]hat I am gathering from Mr. Bush is that the thought of going through another closing argument and hearing the same or similar statements from the State is just an overwhelming concept," and she agreed that "perhaps this is too much for him mentally, at this point, to

be present and to hear that." *Id*. at 153. Defense counsel then stated," I would not have an issue with Mr. Bush not being present for closing arguments." *Id*.

[13] After denying Bush's renewed request for a new trial, the trial court stated to defense counsel, "So counsel, you do not think it would be in your client's best interest mentally to sit here through closing arguments?" to which defense counsel replied, "I do not, Judge." *Id*. at 155. The trial court then ordered Bush to be taken to the holding cell, and counsel proceeded with closing arguments.

[14] The trial court gave the jury the Rape Instruction proposed by Bush's counsel as a final instruction, except that the court's final instruction modified the last sentence of the Rape Instruction to read that, if the jury found Bush "*guilty*," it did "not have to specify the particular act of Rape that the Defendant committed or the time it was committed." App. v. IV at 55 (emphasis added). Bush's counsel did not object to the modified instruction. The court also gave the jury instruction number 6, which stated the statutory definition of rape as a Level 3 felony, referring to "other sexual conduct" but not defining the conduct at issue in the case with any more specificity. *Id*. at 46. Jury instruction number 8 gave the legal definition of "other sexual conduct,"[5] i.e., "an act involving: a sex organ of a person and the mouth or anus of another person or the penetration of the sex organ or anus of a person by an object." *Id*. at 48.

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[5] I.C. § 35-31.5-2-221.5.

[15] The jury rendered its verdict in which it found Bush "GUILTY of Rape, a Level 3 [f]elony." App. v. IV at 57. Bush was not returned to the court room until after the jury rendered its verdict on Count III but before the start of the habitual offender phase. When he was returned to the court room but before the jury entered, Bush told the court that he had "been wanting to be present in the courtroom," and that "you all done wrote some bogus, bogus instructions." Tr. v. IV at 195, 196. Bush was found to be a habitual offender and was sentenced. This appeal ensued.

Discussion and Decision

Double Jeopardy/Invited Error

[16] Bush argues on appeal that his November 2021 trial violated the federal and state constitutional prohibitions against double jeopardy because he was tried a second time for a crime of which he had already been acquitted. Specifically, he asserts that he was acquitted in the April 2021 trial of rape as a Level 1 felony, which involved the alleged forceable oral sex he performed on D.M. at gunpoint on July 25, 2019, but the State tried him again in November 2021 for allegedly committing forced oral sex on D.M. at gunpoint rather than only presenting evidence regarding forced anal sex. However, we may not reach the merits of this claim because Bush invited the error.

[17] The doctrine of invited error, which is based on the legal principle of estoppel, forbids a party from taking advantage of an error that he or she commits, invites, or which is the natural consequence of his or her own neglect or

misconduct. *Durden v. State*, 99 N.E.3d 645, 651 (Ind. 2019). However, invited error is more than a "passive lack of objection standing alone." *Batchelor v. State*, 119 N.E.3d 550, 558 (Ind. 2019). Rather it is only "when a passive lack of objection … is coupled with counsel's active requests … [that] it becomes a question of invited error" rather than simple waiver. *Brewington v. State*, 7 N.E.3d 946, 974 (Ind. 2014). Unlike a mere failure to object to an alleged trial error, which results in waiver that "generally leaves open an appellant's claim to fundamental error review, invited error typically forecloses appellate review altogether," even when constitutional claims are at issue. *Batchelor*, 119 N.E.3d at 556; *see also Brewington*, 7 N.E.3d at 975 ("At bottom, then, fundamental error gives us leeway to mitigate the consequences of counsel's oversights, but invited error precludes relief from counsel's strategic decisions gone awry.") and 977 ("[E]ven constitutional errors may be invited.").

[18] To establish invited error, rather than mere waiver, "there must be some evidence that the error resulted from the appellant's affirmative actions as part of a deliberate, well-informed trial strategy." *Batchelor*, 119 N.E.3d at 558. Absent such evidence, "we are reluctant to find invited error based on the appellant's neglect or mere acquiescence *to an error introduced by the court or opposing counsel*." *Id*. (emphasis added). However, we have found invited error when the appellant's counsel affirmatively requests the error. Thus, in *Miller v. State*, for example, our Supreme Court found invited error in jury instructions where defense counsel had requested the instruction and thus "did far more than simply fail to object" to it. 188 N.E.3d 871, 875 (Ind. 2022). Similarly, in

Isom v. State, the Supreme Court found invited error when the allegedly erroneous jury instruction was affirmatively sought by the appellant. 170 N.E.3d 623, 646 (Ind. 2021) ("An unobjected-to instruction coupled with an active request for related instructions raises the question of invited error."); *see also, e.g.*, *Anderson v. State*, 141 N.E.3d 862, 866 (Ind. Ct. App. 2020) (finding invited error where the alleged error was the result of "the plain terms of Anderson's own plea agreement"), *trans. denied*.

[19] Here, Bush's trial counsel affirmatively requested the Rape Instruction that invited the jury to consider the same evidence of rape—i.e., forced oral sex—that was considered in Bush's April 2021 trial where he was acquitted of rape as a Level 1 felony. That is, the Rape Instruction proposed by Bush's counsel and accepted and used by the court stated that the jury could find Bush guilty of the Level 3 felony rape if it found he committed rape by anal sex *or* oral sex *or* both. Thus, Bush's counsel invited the alleged double jeopardy error, and we may not address that issue on appeal. *See Batchelor*, 119 N.E.3d at 556.

[20] Similarly, to the extent Bush claims the November 2021 trial impermissibly raised evidence of his use of a weapon—which formed the basis of the prior felony 1 rape charge of which he was acquitted—Bush invited that error not only by failing to object to the State's introduction and discussion of such evidence but by extensively questioning D.M. about a gun on cross-examination and repeatedly discussing the gun in his closing statement. *See, e.g.*, Tr. v. IV at 172 ("Let's talk about the gun because that is kind of the crux of things here. Without a gun, this presumably wouldn't have happened.").

[21] Because Bush invited the alleged double jeopardy error, that claimed error is not subject to appellate review.

Bush's Absence During Giving of Jury Instructions

[22] Bush asserts that the trial court committed fundamental error when it excluded him from the court room during the giving of jury instructions and the reading of the verdict. As Bush acknowledges, he waived his appeal of his exclusion from the court room by failing to object to it. Thus, he cannot succeed on this claim unless he can show fundamental error. *See, e.g.*, *Wells v. State*, 176 N.E.3d 977, 982 (Ind. Ct. App. 2021).

> "The 'fundamental error' exception is extremely narrow and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *Isom v. State*, 31 N.E.3d 469, 490 (Ind. 2015) (quoting *Halliburton v. State*, 1 N.E.3d 670, 678 (Ind. 2013)). "'The error claimed must either make a fair trial impossible or constitute clearly blatant violations of basic and elementary principles of due process.'" *Id*. (quoting *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010)).

Id.

[23] Bush contends that the trial court violated his constitutional right to be present during trial, as protected by the Due Process Clause of the Fourteenth

Amendment to the United States Constitution[6] and Article I, Section 13 of the Indiana Constitution. Under the Due Process Clause, a criminal defendant has a right to be present at any proceeding that is critical to the outcome of the trial and where the defendant's involuntary absence would thwart a fair and just hearing. *Ridley v. State*, 690 N.E.2d 177, 180 (Ind. 1997) (citing *Kentucky v. Stincer*, 482 U.S. 730, 737-38 (1987)), *overruled on other grounds by Whedon v. State*, 765 N.E.2d 1276, 1279 (Ind. 2002). Under Article I, Section 13, a defendant's absence from proceedings where the jury is present raises an inference of prejudice unless the defendant expressly waives his right to be present. *Id*. at 181. However, the inference may be rebutted by the State and may be harmless. *Id*.

[24] Bush had a right to be present during the giving of final jury instructions, and his absence from those proceedings was not voluntary.[7] Bush's counsel specifically agreed that Bush should be absent during the closing arguments but made no such agreement regarding any of the following proceedings. And the giving of jury instructions—in particular, the Rape Instruction—was critical to

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[6] Bush does not allege a violation of the Sixth Amendment right to confrontation because he correctly acknowledges that the Sixth Amendment only applies to the confrontation of witnesses and evidence, and such confrontation is not the basis of Bush's claim here. *See, e.g.*, *Stephenson v. State*, 742 N.E.2d 463, 491 (Ind. 2001).

[7] Nor was Bush's absence based on his alleged disruptive behavior, as the State suggests. *See* Appellee Br. at 22-23 (citing *Illinois v. Allen*, 397 U.S. 337, 343 (1970), for proposition that a defendant forfeits his right to be present at trial if he continues to engage in disruptive behavior after being warned that it will result in his removal). Rather, the record establishes that Bush was removed from the court room because his counsel and the trial court believed that Bush did not want to be present during closing arguments. In fact, when Bush was eventually returned to the court room, the trial court specifically told Bush, "[P]lease be advised that you have to maintain good conduct, just like you have the last two days of this trial." Tr. v. IV at 195.

the outcome of Bush's case, as the instruction expressly permitted the jury to find Bush guilty based on evidence of forced oral sex, a crime for which Bush arguably had been acquitted in April of 2021.

[25] Moreover, Bush's absence from the giving of jury instructions thwarted a fair and just hearing. Had Bush been present for the reading of those instructions, he very likely would have objected to the Rape Instruction on the grounds that it invited the jury to convict him of a crime of which he already had been acquitted, as the record discloses that he previously made that argument to the court and expressed a desire to make that argument to the jury. In addition, after he was brought back into the court room, Bush stated that he had wanted to be present during the proceedings and that the jury instructions were "bogus." Tr. v. IV at 196. Thus, it is likely that Bush would have raised the issue of double jeopardy had he been present for the jury instruction phase of the hearing, and he thereby might have avoided the invited error that occurred. *See Miles v. State*, 53 N.E.2d 779, 780 (Ind. 1944) (in discussing the importance of a defendant's presence during instruction of the jury, noting one reason is that the defendant "may not be well represented by counsel and himself may be able to inform counsel or the court of some prejudicial misstatement of law."). Bush has shown that his exclusion from the jury instruction proceedings[8] constituted a blatant violation of basic principles, the harm or potential for

[8] Because we find this case must be reversed due to Bush's absence during instruction of the jury, we do not reach Bush's claim that reversal is also required due to his absence from the reading of the verdict.

harm was substantial, and the resulting error denied him fundamental due process. *See Wells*, 176 N.E.3d at 982. The error in excluding Bush was not harmless, and the State has not overcome the presumption that his absence was prejudicial. *See Ridley*, 690 N.E.2d at 181.

Conclusion

[26] Although Bush's double jeopardy claim is not subject to appellate review due to invited error, Bush has shown that the court committed fundamental error when it excluded him from the proceedings during which the jury was instructed. Therefore, we reverse and remand with instructions to vacate the conviction and hold a new trial.[9]

[27] Reversed and remanded.

Altice, C.J., and Riley, J., concur.

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[9] As Bush recognizes, retrial is proper in these circumstances. *See Bellamy v. State*, 765 N.E.2d 520, 521 (Ind. 2002) ("A new trial is a form of relief available when the trial conducted contains reversible error.").