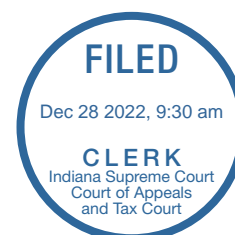


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Jermaine Martise Lamar,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 28, 2022

Court of Appeals Case No.
22A-CR-1435

Appeal from the Marion Superior
Court

The Honorable Angela Dow
Davis, Judge

Trial Court Cause No.
49D27-1912-MR-45958

Brown, Judge.

[1] Jermaine Martise Lamar appeals his convictions for murder and attempted murder. He argues that the trial court abused its discretion in denying his request for a competency evaluation and violated his right to allocution. We affirm.

Facts and Procedural History

[2] Lamar and A.J. began a relationship in 2012. On November 29, 2019, Lamar, A.J., and A.J.'s coworker, Latashia Sims left A.J.'s home in Lamar's truck and went to several places including a liquor store. They eventually arrived at the home of Lamar's friend, Swoop, where others were present. At some point, Lamar began "looking at [A.J.] weird." Transcript Volume II at 183. While A.J. was in the bathroom, the door flew open, and Lamar began cussing at her and accusing her of flirting with his friend. A.J. told Sims she was ready to go, and Lamar, A.J., and Sims left in Lamar's truck.

[3] Lamar yelled in A.J.'s face and accused her again of flirting with his friend while she sat in the front passenger seat and Sims sat behind her. A.J. became scared, tried "to play it off," and said: "[W]ell, why are you doing all this? [Y]ou must want to eff Tasha because you putting on a show." *Id.* at 185-186. A.J. sent Sims a text message telling her that Lamar was "weird and insecure," but Sims did not respond because she was asleep. *Id.* at 186. Lamar tried to snatch A.J.'s phone, and it fell to the floor of the truck. A.J. said: "[Y]ou got his number, call and ask him was I flirting with him." *Id.* Lamar pulled over, said "I don't give a eff," pulled out a gun, and shot Sims in her head. *Id.* A.J. turned for the door, and Lamar shot her through her ear.

- [4] At approximately 11:45 p.m., Lamar approached Hendricks County Sheriff's Deputy Corin McKee "rather fast" from behind and began flashing his bright lights sporadically. *Id.* at 157. Deputy McKee activated his emergency lights and pulled over, and Lamar pulled over behind him. Lamar informed Deputy McKee that someone had been shot and he needed to call an ambulance. Sims and A.J. were transported to different hospitals, and Sims was pronounced dead on November 30, 2019. An autopsy revealed that Sims died as a result of a "gunshot wound of the back of the neck." Transcript Volume III at 35.
- [5] On December 4, 2019, the State charged Lamar with: Count I, murder as a felony; Count II, attempted murder as a level 1 felony; and Count III, carrying a handgun without a license enhanced to a level 5 felony.
- [6] On December 5, 2019, the court held an initial hearing at which Lamar appeared in person. The court engaged in a colloquy with Lamar regarding his name, date of birth, education, ability to read, work history, and sources of income. When asked if he needed the court to read the charges to him or if he could read them and understand them on his own, Lamar answered: "I can read and understand them on my own." Transcript Volume II at 5. Lamar indicated he understood the penalty ranges for each of the offenses. He also indicated that he was an electrician and had been doing that work on and off since he was twenty-two years old. The court indicated it had granted the State's request for a no contact order and asked Lamar if he could explain his understanding of a no contact order. Lamar stated: "No contact. No being around." *Id.* at 9. After the court further explained a no contact order, Lamar

indicated that he understood it as well as the potential penalties for violating a no contact order.

- [7] On January 30, 2020, the court held a pretrial conference at which Lamar appeared in person and with counsel. Defense counsel indicated that he had met with Lamar “several times.” *Id.* at 13.
- [8] On October 21, 2020, Lamar’s counsel filed a Motion for Psychiatric Examination to Determine Competence to Stand Trial alleging that Lamar suffered a serious medical issue while in custody which resulted in his falling into a coma for several weeks, doctors recommended he undergo formal neuropsychiatric testing prior to standing trial, Lamar lost consciousness and returned to the hospital within the previous three weeks, and Lamar’s family raised concerns to counsel regarding his mental state and ability to recall events.
- [9] On October 22, 2020, the court held a final pretrial conference. The court indicated that Lamar was in custody in the Marion County Jail and was being represented by counsel. Defense counsel indicated that Lamar had a heart issue, had been in a coma, and “recovered more than they anticipated he would.” *Id.* at 19. He stated that Lamar’s doctors recommended that he be evaluated, he had lost consciousness a couple of times, and his family indicated that he had a “lot of trouble with recall in some of their conversations, but not all.” *Id.* He also stated: “Essentially, I think just because of his medical condition, I am not in a position to say 100 percent whether or not there are

any lingering issues here that could affect his ability to assist me in his defense.”

Id.

[10] Upon questioning by the court, defense counsel indicated that he had two or three conversations with Lamar and one since Lamar’s hospital stay. The following exchange occurred:

THE COURT: Did he indicate in any way that he did not understand what you were telling him?

[Defense Counsel]: No, Judge. When I have spoken to him, he seemed to understand what I was talking to him about.

THE COURT: All right. Could he offer you any information about the circumstances of his case? Whatever his defense; I’m not wanting to know any details, just were you able to discuss the circumstances of his case, and was he able to give you information that you might need for it?

[Defense Counsel]: Yes. Essentially, he had given me, basically the same information that he had been.

THE COURT: All right. Well – and he understood what the process is in terms of what your job is, what the Prosecutor’s job is, what happens in the courtroom, what might happen during his trial; he understands those things?

[Defense Counsel]: I guess I didn’t go over the process in detail, but he didn’t – he didn’t say anything to me that indicate otherwise.

THE COURT: All right. Well, so I am – I’m not understanding why a competency would be necessary.

[Defense Counsel]: Well, like I said, when he was discharged, it was the recommendation of the doctors; that’s certainly a factor here. And then the fact that he continues to lose consciousness at

the jail, kind of those two things combined, along with the family's concerns. I basically found myself in a position where I figured it was better to be safe than sorry, given the nature of the charges.

THE COURT: Well – well, I understand the family's concern, and I . . . understand why the doctors are – might also be concerned, but those sound to me as if they're medical issues that need to be addressed medically, and I'm – I am – while there may be some things that affect his cognitive ability, I don't – it does not seem to affect his ability to understand what's going on, help you with fashioning a defense and knowing what happens in the courtroom. Without more, [defense counsel], I'm going to deny your request at this time. But if something else comes up that leads you to believe that he's no longer able to understand the process, understand what's going on, give you helpful information for working on his case, then I'm not – I don't see the basis for the competency eval. He does not sound to me as if he's not competent. He's just having some serious medical issues.

Id. at 20-21.

[11] In April 2022, the court held a jury trial. The State presented the testimony of multiple witnesses including A.J. and Deputy McKee. At the end of the first day of the trial, Lamar's counsel stated:

Judge, Mr. Lamar is on medications. He had a stroke while he was in custody. He did not get them this morning. He's shaking pretty bad. If and when he testifies tomorrow, we just – we need to make sure he gets those meds especially tomorrow. He said he believes he'll get them tonight when he gets back.

Transcript Volume III at 16. The court stated: “No problem. I will make a request that he gets his medication.” *Id.* It told Lamar to let it know in the morning if he did not receive his medication. Lamar replied: “Okay.” *Id.* The court stated: “And I’ll call and have them brought over to you.” *Id.* Lamar said: “All right. I appreciate it. Thank you.” *Id.* The following morning, the court confirmed with Lamar that he received his medication.

[12] After the State rested, Lamar testified that he worked on November 29, 2019, there was an argument in the bathroom at Swoop’s home, and they left fifteen or twenty minutes later. He stated that he pulled the truck over on a highway to use the restroom, Sims was sleeping, and a car pulled up with its lights off. He testified that two men with sweaters jumped out of the car, one of the men said “you know what time it is,” one of the men pulled him back before he could enter the truck, and the men started hitting him on the head and kicking him. *Id.* at 131. He stated that he reached up and grabbed a gun when he was being hit and the gun went off. He testified he struggled with one of the men for two or three minutes and a second shot went off. He stated that he jumped in the truck after the men left, saw A.J. bleeding, and drove until he flashed his lights at a police officer. During his testimony, his defense counsel stated that Lamar was “shaking pretty bad” and asked him if he had a medical condition that made him shake, and he answered affirmatively. *Id.* at 133.

[13] During deliberations, the jury asked multiple questions including about Lamar’s medical condition and when it originated. The court informed the jury that it had heard all of the evidence and it could not answer the questions.

- [14] The jury found Lamar guilty as charged, Lamar admitted he had a prior conviction, and the court found him guilty of the enhancement to Count III.
- [15] On June 6, 2022, the court held a sentencing hearing. Lamar’s counsel stated that the only corrections to the presentence investigation report were the “medications that he’s currently on under mental health and I guess, physical health.” *Id.* at 169. The court asked: “So, he had issues of mental health and he is getting those addressed?” *Id.* Defense counsel answered affirmatively. Defense counsel indicated that Lamar was on medications for heart health, seizures, blood pressure, and depression.
- [16] Defense counsel indicated that he believed Lamar would like to make a statement, and the court replied “Sure.” *Id.* at 176. The court stated in part: “You have an absolute right to . . . let the court know as what you want me to hear before I sentence you.” *Id.* Lamar stated:

I want to say that I’m not no monster. I didn’t mean nothing or nothing about what happened. I forgive – I forgave her (inaudible) what she said that I meant to shoot her, I didn’t. I didn’t do it. It was a robbery, and I was – I was stretched out on the ground outside the truck. I heard – hit upside the head with a gun.

Id. at 177. The following exchange then occurred:

THE COURT: Do you understand we’re not here to re-litigate?

A jury –

THE DEFENDANT: Right.

THE COURT: – found you guilty –

THE DEFENDANT: Right.

THE COURT: – of shooting her in the head and killing her friend in the back – in the back seat.

THE DEFENDANT: I wasn't able to reach her friend in the back seat. But yeah. But I didn't do it.

THE COURT: They just happened to use your gun?

THE DEFENDANT: Nope, it wasn't mine.

THE COURT: The DNA came off your gun –

THE DEFENDANT: It wasn't mine.

THE COURT: – with the same bullet that was in her head.

THE DEFENDANT: That was from me grabbing the gun and moving the gun out the [sic] way. I was fired up. I was hit in the head. (Inaudible) analyze people to check me.

THE COURT: Okay. You have a right to say whatever you want.

THE DEFENDANT: I know it.

THE COURT: The jury has found you guilty of murder.

THE DEFENDANT: Uh-huh. But –

THE COURT: Attempted murder and –

THE DEFENDANT: But –

THE COURT: – carrying a handgun without a license.

THE DEFENDANT: I was set up by the police, though.

THE COURT: You don't what?

THE DEFENDANT: I was set up by police.

THE COURT: The guy who – who just – you blinked your lights to get him to stop? Who was his first day on the job? I think you –

THE DEFENDANT: The (inaudible).

THE COURT: – opened the car door and he was so stunned, he’s, like, “What the f---?” On the video camera.

THE DEFENDANT: The (inaudible).

THE COURT: Do you remember that?

THE DEFENDANT: He – he kept me from seeing an ambulance.

THE COURT: Okay.

THE DEFENDANT: He checked me out his self.

THE COURT: Uh-huh. All right. You have a – you have a right to say whatever you want, but the jury found you guilty. That’s what I have to sentence you on.

THE DEFENDANT: But I was saying – but they ain’t – but they ain’t hearing the real story, though.

THE COURT: Okay. Well, we have –

THE DEFENDANT: (Inaudible).

THE COURT: – the video cam from the police officer who stopped right at the time. At no time did you tell –

THE DEFENDANT: If I was – if I was trying – you think I would run around with a gun in a truck?

THE COURT: All right. All right. I do believe that that officer was a little – it was, like, maybe his first month and he was very

shocked to see two shot people roll out of your car with you – that was shot with your gun, and you threw it in the back.

THE DEFENDANT: No.

THE COURT: And your fingerprints were on it.

THE DEFENDANT: Nope. Fingerprints wasn't on it.

[Defense Counsel]: DNA.

THE COURT: DNA. Your DNA, excuse me, your DNS [sic] was transferred to that gun.

THE DEFENDANT: From when I grabbed it and the dude almost shot me in the head.

THE COURT: And none – no one else's DNA was on that gun. All right. Anything else you want me to hear?

THE DEFENDANT: I'd like to correct an error.

[Defense Counsel]: What do you mean correct an error?

THE COURT: The court is bound by the jury's decision, and they unanimously agreed that you were guilty of murder, so that's what we're here for today. The murder and the attempt[ed] murder. Do – they could merge, don't have to. Is that the parties['] position?

[Prosecutor]: Are we done with the allocution? I just want to make sure.

THE COURT: I'm not sure. Do you have anything else that you want –

THE DEFENDANT: No, I don't.

THE COURT: Okay. All right.

Id. at 177-180.

[17] After some argument, the court asked: “Do you have anything else that you want to say?” *Id.* at 184. Defense counsel answered: “I have nothing else to add, Judge.” *Id.* While the court was pronouncing the sentence, Lamar said: “I didn’t do it.” *Id.* at 185. The court stated in part: “I understand that you are saying that you didn’t do it. I get that. But the jury found you guilty, and so the court has to sentence you” *Id.* The court vacated Count III and sentenced Lamar to consecutive terms of fifty-five years for Count I, murder, and twenty years for Count II, attempted murder.

Discussion

I.

[18] The first issue is whether the trial court abused its discretion in denying Lamar’s request for a competency evaluation. Lamar argues the court was presented with substantial evidence indicating his competency was at issue. He asserts that the court was presented with evidence of his hospitalizations, a request from his doctors that he undergo a neuropsychiatric examination, letters and concerns from his family about his memory, and testimony from his attorney that he had not discussed in detail whether he understood the proceedings.¹

¹ Lamar cites to a letter from his aunt filed on August 28, 2020, which alleged that he suffered “a heart attack/seizures” since his incarceration and was in the intensive care unit for thirty-one days beginning in June 2020 and requested that he be released on house arrest to continue his rehabilitation. Appellant’s Appendix Volume II at 82. He also cites to a letter from his mother filed on October 13, 2020, which asserted that he has “many health issues,” “is going down rapidly,” and was “not the same since the coma,” and requested that he be released on house arrest. *Id.* at 88.

[19] “When a defendant files a motion for a competency determination, the trial court must follow the procedures of Ind. Code chapter 35-36-3.” *State v. Coats*, 3 N.E.3d 528, 531 (Ind. 2014), *cert. denied*, 574 U.S. 1088, 135 S. Ct. 971 (2015). Ind. Code § 35-36-3-1(a) provides:

If at any time before the final submission of any criminal case to the court or the jury trying the case, the court has reasonable grounds for believing that the defendant lacks the ability to understand the proceedings and assist in the preparation of a defense, the court shall immediately fix a time for a hearing to determine whether the defendant has that ability. The court shall appoint two (2) or three (3) competent, disinterested . . . psychiatrists[,] . . . psychologists[,] . . . or . . . physicians . . . who have expertise in determining competency.

[20] Ind. Code § 35-36-3-1(b) provides:

At the hearing, other evidence relevant to whether the defendant has the ability to understand the proceedings and assist in the preparation of the defendant’s defense may be introduced. If the court finds that the defendant has the ability to understand the proceedings and assist in the preparation of the defendant’s defense, the trial shall proceed. If the court finds that the defendant lacks this ability, it shall delay or continue the trial and order the defendant committed to the division of mental health and addiction. The division of mental health and addiction shall provide competency restoration services

[21] “A court is required to hold a hearing to determine the defendant’s competency to stand trial only when it is confronted with evidence creating a reasonable doubt about the defendant’s competency.” *Haviland v. State*, 677 N.E.2d 509, 516 (Ind. 1997), *reh’g denied*. “Whether reasonable grounds exist to order an

evaluation of competency is a decision assigned to the sound discretion of the trial court, reviewable only for an abuse of discretion.” *Id.*

[22] The record reveals that the trial court engaged in a colloquy with Lamar during the December 5, 2019 hearing during which Lamar indicated he had gone as far as the twelfth grade and had worked as an electrician. During the October 22, 2020 pretrial conference, defense counsel stated that he was not in a position “to say 100 percent whether or not there are any lingering issues here that could affect [Lamar’s] ability to assist [him] in his defense.” Transcript Volume II at 19. Defense counsel indicated he had two or three conversations with Lamar and one since his hospital stay. He stated that Lamar did not indicate in any way that he did not understand what he was telling him, Lamar “seemed to understand what [he] was talking to him about,” he was able to discuss the circumstances of the case with Lamar, Lamar was able to give him information that he might need for the case, and Lamar did not say anything to him that would indicate he did not understand the process of what happens in the courtroom and what might happen during trial. *Id.* at 20. We also observe that, after the court denied Lamar’s request for a competency evaluation, it stated that “if something else comes up that leads you to believe that he’s no longer able to understand the process, understand what’s going on, give you helpful information for working on his case, then I’m not – I don’t see the basis for the competency eval.” *Id.* at 21. Lamar’s counsel did not raise the issue again. Lamar also testified at trial and his testimony appeared rational and lucid. To the extent Lamar asserts that he presented the trial court with

evidence that his doctors requested that he undergo a neuropsychiatric examination, we note that he cites to only the comments of his trial counsel at the hearing as well as the assertion in the motion. Under the circumstances, we cannot say the trial court abused its discretion in denying Lamar's motion for a competency evaluation. *See Campbell v. State*, 732 N.E.2d 197, 202-203 (Ind. Ct. App. 2000) (observing that defendant cited no authority for the proposition that a layperson's contention that an individual is incompetent should be conclusive and binding upon a trial court with respect to holding a competency hearing under Ind. Code § 35-36-3-1, the defendant's mother was unable to state that any court had ever adjudged him incompetent, there was substantial evidence in the record that he was able to comprehend and assist in the proceedings without difficulty in light of his own testimony which appeared to be rational and lucid, and concluding that reversal of the trial court's decision not to appoint mental health professionals to evaluate him or conduct a hearing into the defendant's competence was not warranted).

II.

[23] The next issue is whether the trial court improperly denied Lamar his right to allocution. Lamar argues that the trial court unfairly limited his ability to make a statement by continuously interrupting and arguing with him about the facts of the case and he had a right to maintain his innocence and speak freely. The State argues that Lamar waived his argument because he did not preserve an objection and specifically told the court that he had nothing else to say. It also

argues that, waiver notwithstanding, the court recognized the right of allocution and any error was harmless.

[24] Ind. Code § 35-38-1-5 provides:

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.

“[T]he ‘Indiana Constitution places a unique value upon the desire of an individual accused of a crime to speak out personally in the courtroom and state what in his mind constitutes a predicate for his innocence of the charges.’”

Strack v. State, 186 N.E.3d 99, 102 (Ind. 2022) (quoting *Biddinger v. State*, 868 N.E.2d 407, 412 (Ind. 2007) (quoting *Vicory v. State*, 802 N.E.2d 426, 429 (Ind. 2004))). Article 1, Section 13 of the Indiana Constitution provides: “In all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel[.]” A statement in allocution is not evidence and “‘is more in the nature of closing argument where the defendant is given the opportunity to speak for himself or herself’ to the trial court before the court pronounces the sentence.” *Strack*, 186 N.E.3d at 102 (quoting *Biddinger*, 868 N.E.2d at 413).

“Through allocution, the defendant may explain his or her views of the facts and circumstances without being ‘put to the rigors of cross-examination.’” *Id.*

(quoting *Biddinger*, 868 N.E.2d at 413). “As the Seventh Circuit has observed, ‘The right of allocution is minimally invasive of the sentencing proceeding; the requirement of providing the defendant a few moments of court time is slight.’” *Vicory*, 802 N.E.2d at 429 (quoting *United States v. Barnes*, 948 F.2d 325, 331 (7th Cir. 1991)).

[25] Because Lamar’s counsel did not object to the trial court’s advisement or colloquy with Lamar, we review only for fundamental error. *See Strack*, 186 N.E.3d at 103 (“Because [defense] counsel did not object to the trial court’s advisement or process, we review only for fundamental error.”). Fundamental error is an exception to the general rule that a party’s failure to object at trial results in a waiver of the issue on appeal.” *Id.* Fundamental error occurs only when the error makes a fair trial impossible or constitutes clearly blatant violations of basic and elementary principles of due process presenting an undeniable and substantial potential for harm. *Id.* Lamar bears the heavy burden of showing fundamental error on appeal. *See id.* “Likewise, ‘a defendant claiming that he was denied his right to allocution carries a strong burden in establishing his claim.’” *Id.* (quoting *Vicory*, 802 N.E.2d at 429).

[26] The record reveals that, while the trial court interrupted Lamar at multiple points during his statement and asked Lamar questions, it also informed him that he had “an absolute right to” make a statement. Transcript Volume III at 176. It told Lamar that he had “a right to say whatever you want,” and Lamar replied: “I know it.” *Id.* at 178. Lamar detailed his version of events to which he had previously testified at length. When the prosecutor asked if the

allocution was complete, the court asked Lamar if he had anything else he wanted to say, and Lamar answered: “No, I don’t.” *Id.* at 180. After some argument, the court asked: “Do you have anything else that you want to say?” *Id.* at 184. Defense counsel answered: “I have nothing else to add, Judge.” *Id.* In light of the record, we cannot say that reversal is warranted. *See Biddinger*, 868 N.E.2d at 412-413 (holding that, although the trial court erroneously denied allocution, any error was harmless because much of [the defendant’s] statement had already been introduced at trial and he “fail[ed] to establish how the excluded portion of his statement would have made a difference in the sentence the trial court imposed”); *Vicory*, 802 N.E.2d at 430 (finding that the trial court erred by not granting a defendant’s allocution request but finding reversal unnecessary because Vicory testified and “because he ha[d] not identified any statement or argument he would have made had the court permitted him to read his statement”).

[27] For the foregoing reasons, we affirm Lamar’s convictions.

[28] Affirmed.

Altice, J., and Tavitas, J., concur.