MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Christopher M. Dillard,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 19, 2021

Court of Appeals Case No. 20A-CR-190

Appeal from the Porter Superior Court

The Honorable Jeffrey W. Clymer, Judge

Trial Court Cause No. 64D02-1704-MR-3918

Weissmann, Judge.

[1] Christopher M. Dillard challenges his conviction for murdering Nicole Gland, a twenty-three-year-old co-worker. Dillard stabbed Gland twenty-two times in a savage attack that continued after her death and fractured her skull into pieces. Dillard contends the trial court erroneously denied his motion for change of venue based on prejudicial pretrial publicity and his motion to dismiss based on the failure of police to preserve a knife belatedly discovered at the murder scene. Dillard also asserts the trial court erroneously admitted evidence indicating that while his murder charge was pending, he stated, "I have no problem killing." Finally, Dillard attacks his sentence of sixty-five years imprisonment. Finding no error, we affirm Dillard's murder conviction and sentence.

Facts

[2] In April 2017, Dillard and Gland both worked at a Chesterton bar known as the "Upper Deck." At the time, Dillard was leading an increasingly erratic life, using and dealing drugs and disappearing from his home and workplace for lengthy periods. When Dillard told his girlfriend that he needed one of her kitchen knives for protection, Dillard's girlfriend became especially concerned.

[3] Eventually, Dillard's girlfriend confronted Dillard about his actions and also reported her concerns to the Upper Deck's owner. An Upper Deck bartender separately reported to the owner that Dillard had disappeared during his shift. These reports led the owner to tell Dillard on April 18, 2017, to "take a break" from the bar that weekend.

[4] That evening Dillard went to another bar and stated that "those bitches will get theirs," without identifying whom he was threatening. Tr. Vol. VI p. 113. Dillard later returned to the Upper Deck and briefly spoke to Gland. He then proceeded to a third bar, where he appeared upset. Before leaving that bar, Dillard indicated he would park his car at the Upper Deck and walk home.

[5] Within the next hour, Dillard brutally attacked Gland after she closed the Upper Deck. He stabbed her twenty-two times with a sharp knife and struck her so hard that her skull fractured into pieces. After leaving Gland's lifeless body in her car, Dillard changed clothes and drove to a nearby casino. Dillard told his girlfriend he had "messed up" and could not return home. Tr. Vol. V p. 127. When Gland's body was discovered in her car later that morning, her purse, cell phone, and keys were missing.

[6] Police quickly arrested Dillard, who made incriminating statements during the ensuing interrogation. After the State charged Dillard with murder, Dillard moved to suppress evidence of those statements. The trial court only granted part of his motion, prompting Dillard to file an interlocutory appeal. This Court ruled the trial court erred in suppressing Dillard's statements made prior to his first request for counsel but that Dillard's subsequent statements to police must be suppressed. *Dillard v. State*, No. 17A-CR-3050, slip op. at 26-27 (Ind. Ct. App. Sept. 7, 2018), *trans. denied*.

[7] On remand, Dillard filed a motion for change of venue based on prejudicial pretrial publicity. The trial court denied that motion but employed other

measures aimed at obtaining an impartial jury including expanded jury questionnaires. The trial court also denied Dillard's motion to dismiss, which was based on the State's failure to preserve a knife found at the scene of the murder months later. At Dillard's jury trial, over Dillard's objection, the trial court also admitted evidence that while his murder charge was pending, Dillard stated, "I have no problem killing." The jury found Dillard guilty of murdering Gland. The trial court sentenced Dillard to the maximum of sixty-five years imprisonment.

Discussion and Decision

[8] On appeal Dillard does not contend the State failed to prove he committed murder. Instead, Dillard argues the trial court erroneously refused to move his jury trial outside Porter County or import a jury from another county due to pretrial publicity. He also argues the trial court should have dismissed the murder charge because police allegedly destroyed or lost exculpatory evidence. Finally, Dillard challenges the admission of evidence at his jury trial and imposition of the maximum sentence. We find no error in the trial court's rulings and imposition of sentence and therefore affirm.

I. Motion for Change of Venue Properly Denied

[9] Dillard first claims the trial court erroneously denied his motion for change of venue based on pretrial publicity. This Court reviews rulings on motions for change of venue under an abuse of discretion standard. *Myers v. State*, 887 N.E.2d 170, 181 (Ind. Ct. App. 2008). To prove an abuse of discretion, the

defendant must demonstrate the existence of two distinct elements: (1) prejudicial pretrial publicity; and (2) the inability of jurors to render an impartial verdict. *Ward v. State*, 810 N.E.2d 1042, 1049 (Ind. 2004). Prejudicial pretrial publicity contains inflammatory material which would be inadmissible at the defendant's trial or contains misstatements or distortions of the evidence given at trial. *Id.*

[10] The trial court acknowledged that Dillard established the existence of prejudicial pretrial publicity. Tr. Vol. II p. 34. Therefore, the only issue on appeal is whether the jurors were able to render an impartial verdict in spite of that publicity.

A. Waiver

[11] As a preliminary matter, the State claims Dillard waived any error in the denial of his motion for change of venue by failing to establish that he exhausted his preemptory challenges during jury selection. *See generally Myers*, 887 N.E.2d at 181. In his reply brief, Dillard acknowledges the record does not demonstrate whether he exhausted his peremptory challenges but claims exhaustion is irrelevant.

[12] According to Dillard, the exhaustion of peremptory challenges is only required for review of constitutionally-based motions for change of venue and not for motions made under Indiana Code § 35-36-6-1. That statute allows the filing of a verified motion for change of venue alleging that "bias or prejudice against the defendant exists in that county." And Indiana Criminal Rule 12 requires

that a motion for change of venue be accompanied by an affidavit "setting forth facts in support of the constitutional or statutory basis or bases for the change." Dillard suggests the use of the disjunctive "or" in that rule acknowledges the separate nature of a constitutionally-based change of venue request.

[13] Dillard has waived this claim. In the Brief of Appellant, Dillard's change of venue arguments are constitutionally based only; he does not mention Indiana Code § 35-36-6-1 as a basis for relief. A party waives a claim by raising it for the first time in a reply brief. *Sisson v. State*, 985 N.E.2d 1, 14 (Ind. Ct. App. 2012).

[14] In addition, Dillard cites no authority for his argument that Indiana Code § 35-36-6-1 grants a substantive right to a change of venue based on pretrial publicity that differs from its constitutional counterpart. By raising I.C. § 35-36-6-1 on appeal belatedly and by failing to support that argument with authority, Dillard has waived this claim. *See* Ind. Appellate Rule 46(A)(8)(a) (requiring cogent reasoning and citations to authorities support contentions in briefs); *Sisson*, 985 N.E.2d at 14.

[15] Regardless, Dillard misconstrues the requirement of peremptory challenge exhaustion, which relates both to invited error and the burden imposed on the change of venue movant. To prevail on a claim of abuse of discretion under Indiana Code § 35-36-6-1, Dillard was required to establish the existence of community bias or prejudice that prevented a fair trial: specifically, that potential jurors were unable to set aside their preconceived notions of guilt, if any, and to render a verdict on the evidence. *Schoffstall v. State*, 488 N.E.2d 349,

352 (Ind. Ct. App. 1986). In doing so, Dillard had to overcome the presumption that the jurors were truthful when they testified that they had no bias. *Id.*

[16] Peremptory challenges "'permit litigants to assist the government in the selection of an impartial trier of fact.'" *Merritt v. Evansville-Vanderburgh School Corp.*, 765 N.E.2d 1232, 1235 (Ind. 2002) (citing *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614 (1991)). The Indiana Supreme Court repeatedly has ruled that "to prove that an error occurred in the denial of a motion for change of venue from the county, the defendant must show that he exhausted his peremptory challenges in an effort to secure juror impartiality and also that the jury was so prejudiced against him that it was unable to render a verdict in accordance with the evidence." *Bixler v. State*, 471 N.E.2d 1093, 1100 (Ind. 1984). Essentially, a defendant who leaves peremptory challenges on the table when the jury is seated is assumed to accept the jurors as impartial.

[17] The Indiana appellate courts never have limited this exhaustion requirement to motions for change of venue which do not cite Indiana Code § 35-36-6-1. Instead, Indiana common law makes clear that "[b]y failing to make the maximum permissible effort to secure juror impartiality," Dillard "may not now claim that the trial court's denial of his motion for change of venue was in error." *Myers*, 887 N.E.2d at 181.

B. Merits of Issue

[18] Regardless of Dillard's waiver, his change of venue claim fails. Dillard argues the "sum of the evidence before the trial court demonstrated a large amount of the veniremen prejudiced by the extensive inflammatory pretrial publicity." Appellant's Br. 16. This "evidence," according to Dillard, consisted of:

- voir dire testimony showing three of the jurors (out of twelve jurors and three alternatives) were exposed to press coverage of the case prior to voir dire;
- the statements by one of those three jurors to the effect that he was "fairly impartial," rather than impartial;
- another juror's experience in receiving a text message from a co-worker indicating that co-worker's wife worked with Gland's aunt;
- the trial court's admonishments advising the jury to disregard various articles published during the trial;
- a community petition signed by 1,449 people calling Dillard a "CONFESSED killer" and advocating the ouster of the Chesterton Police Chief due to his failure to honor Dillard's repeated request for a lawyer—a circumstance leading to the exclusion of Dillard's confession on appeal on constitutional grounds; and
- publicized statements criticizing or defending the failure of the Porter County Prosecutor's Office to have an attorney present during that police questioning of Dillard.

Id. at 9-16.

[19] Relying on *Ward*, Dillard claims such evidence was sufficient to establish the trial court's error in denying the change of venue. The Indiana Supreme Court in *Ward* recognized that jurors are presumed to be truthful when they testify they are able to set aside their beliefs and render a fair verdict. 810 N.E.2d at 1050. However, the Court found that presumption may be overcome through a showing of a general atmosphere of prejudice throughout the community. *Id.*

[20] The *Ward* Court found deep and bitter hostility reflected in the jury questionnaires, in which six of the jurors expressed their beliefs that Ward was guilty. *Id.* One of the jurors testified during voir dire that she did not know whether she could base her determination solely on the evidence at trial. *Id.* She further indicated she would have difficulty setting aside her belief as to Ward's guilt. *Id.* The Indiana Supreme Court determined the trial court abused its discretion in denying Ward's motion for change of venue to another county or, alternatively, to draw the jury from another county. *Id.*

[21] The circumstances in Dillard's case are quite different. Only three of the jurors were exposed to prejudicial pretrial publicity, and that exposure was limited. Tr. Vol. III, pp. 72-74, 91-92, 98. None of the regular or alternate jurors indicated a preconceived belief as to Dillard's guilt. The juror who professed to being "fairly impartial" also testified that he remembered little about the single article he read about Dillard's case and he had not formed an opinion as to Dillard's guilt or innocence. Tr. Vol. III, pp. 72-73. That juror, whom Dillard never challenged for cause, made no statements suggesting he could not render a fair and impartial verdict.

[22] Dillard merely has established limited jury exposure to prejudicial pretrial publicity. That is not enough. He also must demonstrate "the jurors were unable to disregard preconceived notions of guilt and render a verdict based on the evidence." *Johnson v. State*, 749 N.E.2d 1103, 1106 (Ind. 2001). As the jurors expressed no preconceived notions of guilt and had very limited exposure to prejudicial pretrial publicity, Dillard has failed to overcome the presumption that the jurors could render a fair verdict on the evidence. *See Ward*, 810 N.E.2d at 1050. Accordingly, we conclude the trial court did not abuse its discretion in denying Dillard's motion for change of venue.

II. Motion to Dismiss Properly Denied

[23] Dillard next challenges the trial court's denial of his motion to dismiss based on the State's failure to preserve a knife found at the scene of the murder approximately five months later. We find no error because the trial court correctly found Dillard did not meet his burden of proving police acted in bad faith.

[24] Cole Feitshans and Marshall Kennoy found the knife underneath a downspout in an area below the Upper Deck Bar's deck about five months after Gland's murder. Chesterton Police Department Detective Nicholas Brown responded to their report and viewed the knife had a short, serrated blade. Feitshans testified Brown photographed and placed the knife in a sealed evidence bag before leaving with it. Tr. Vol. II, pp. 135-138. Brown testified he viewed the knife but did not collect it. Tr. Vol. II, pp. 177-181. Brown believed the knife,

which did not match the description of the murder weapon developed through Gland's autopsy, likely dropped from the grill on the deck overhead because it had grease on it. Tr. Vol. II, pp. 177-181. Brown did not draft a report of the incident, and he has no photographs of it. Tr. Vol. II, pp. 178-179.

[25] Dillard filed a motion to dismiss, alleging the belatedly found knife was material exculpatory evidence which the State had a duty to preserve. App. Vol. II p. 201. Dillard alleged the State's failure to preserve the knife violated his right to due process, although he did not specify the source of that right. App. Vol. II p. 201.

[26] We initially observe that Dillard has waived this issue in several ways. First, he asserts in the final sentence of his argument that the State's failure to preserve such evidence violated his rights under the Fifth Amendment to the United States Constitution and Article I, § 12 of the Indiana Constitution. Appellant's Br. 24. He does not cite those provisions earlier in his argument or specify how those provisions relate to his claims. He also does not provide separate arguments under the state and federal constitutions as required. *See Russell v. State*, 993 N.E.2d 1176, 1179 (Ind. Ct. App. 2013).

[27] Most importantly, Dillard's substantive argument relies exclusively on *Roberson v. State*, 766 N.E.2d 1185 (Ind. Ct. App. 2002), a case which cites neither the Fifth Amendment nor Art. I, § 12. Instead, *Roberson* relies on the due process clause of the Fourteenth Amendment—a constitutional provision Dillard does not cite. Therefore, he has waived all of those constitutional issues. *See* Ind.

Appellate Rule 46(A)(8)(a) (requiring each contention in an appellate brief contain cogent reasoning and citation to supporting authority); *Russell,* 993 N.E.2d at 1179 (finding waiver in absence of separate federal and state constitutional analysis).

[28] Waiver notwithstanding, Dillard's argument under the federal constitution fails on the merits. When determining "what might loosely be called the area of constitutionally guaranteed access to evidence," our first task is to decide whether the unpreserved evidence was "potentially useful evidence" or "material exculpatory evidence." *Arizona v. Youngblood*, 488 U.S. 51, 55(1988). "Potentially useful evidence" is "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Id.* The State's failure to preserve potentially useful evidence does not violate the defendant's due process rights absent a showing by the defendant of bad faith by police. *Id.* at 57-58. No showing of bad faith by police is required for "material exculpatory evidence," which possesses an exculpatory character apparent before the evidence became unavailable. *Id.* at 57-58. The loss of material exculpatory evidence leaves the defendant unable to obtain comparable evidence by other reasonably available means. *Id.*

[29] The trial court found the knife to be "potentially useful," meaning Dillard was required to show bad faith by police. *See id.*; Tr. Vol. II p. 230. Noting the conflicting evidence as to both the knife's appearance and Detective Brown's actions in investigating it, the trial court determined Dillard had failed to satisfy

his burden of proving bad faith. Tr. Vol. II, pp. 230-231; *see Youngblood*, 488 U.S. at 57-58. On appeal, Dillard challenges only the latter ruling. He claims, without any supporting authority, that Detective Brown's failure to document or report his observations about the knife alone established bad faith.

[30] Bad faith is "not simply bad judgment or negligence, but rather implies the conscious doing of wrong because of dishonest purpose or moral obliquity." *Land v. State*, 802 N.E.2d 45, 49 (Ind. Ct. App. 2004), *trans. denied*. At most, Dillard established bad judgment or negligence by Brown. Brown testified that he concluded the knife was not associated with the murder because it had grease on it, was immediately below a deck with a grill on it, and it did not match the murder weapon described in Gland's autopsy. Further, Brown knew police had not unearthed the knife during their search with metal detectors immediately after the murder five months earlier, implying it had fallen onto the ground at some point after the crime. As Dillard failed to establish the necessary element of bad faith, the trial court did not abuse its discretion in denying his motion to dismiss.

III. Admission of Statement

[31] Dillard next challenges the trial court's admission of part of a correctional officer's testimony that Dillard stated, "I have no problem killing, if I ever get out I'd kill again." App. Vol. II p. 211. Over Dillard's objections, the trial court found the first portion of that statement—"I have no problem killing"—admissible as a statement of a party opponent under Indiana Evidence Rule

801(d)(2). Tr. Vol. IV, pp. 137-138; Tr. Vol. VIII, pp. 156-158, 179. That rule specifies that a statement "offered against an opposing party" and "made by the party" is not hearsay. Evid. R. 801(d)(2). Statements of a party opponent are admissible unless challenged successfully on non-hearsay grounds. *See Turner v. State,* 993 N.E.2d 640, 643 (Ind. Ct. App. 2013), *trans. denied*. The trial court excluded the remainder of Dillard's statement: "if I ever get out I'd kill again." Tr. Vol. IV p. 137. As admission of evidence is entrusted to the sound discretion of the trial court, we will reverse the trial court's ruling only upon finding an abuse of that discretion. *Dickey v. State*, 999 N.E.2d 919, 921 (Ind. Ct. App. 2013).

[32] On appeal, Dillard claims the portion of his statement admitted at trial was not that of a "party opponent." He does not dispute that the statement meets the definition of a statement of a party opponent in Evidence Rule 801(d)(2). Instead, he relies exclusively on a definition of such a statement predating adoption of the Indiana Rules of Evidence. *See Hunter v. State*, 360 N.E.2d 588, 599 (Ind. Ct. App. 1977). *Hunter* described a statement of a party opponent as "a statement against the interest of a party which is inconsistent with a defense, or tends to establish or disprove a material fact." *Id.* That definition conflicts with the definition of a statement of a party opponent in Evidence Rule 801(d)(2), which does not require proof that the statement is inconsistent with a defense or tends to establish or disprove a material fact.

[33] Indiana Evidence Rule 101(b) specifies that the Indiana Rules of Evidence apply unless they do not "cover a specific evidence issue" and only then does

statutory or common law control. In this case, Dillard does not deny Evidence Rule 801(d)(2) applies. He simply seeks to add additional common law restrictions on statements of party opponents pre-dating the Indiana Rules of Evidence. Dillard offers no credible basis for finding that the conflicting definition of a statement of a party opponent in *Hunter* survived adoption of Evidence Rule 801(d)(2). Accordingly, we conclude Dillard has offered no grounds for finding the trial court abused its discretion in admitting his statement that "I have no problem killing."

IV. Sentencing

[34] Dillard's final claim concerns the sixty-five-year sentence imposed by the trial court. Dillard constructs his claim within the framework of Indiana Appellate Rule 7(B) by asserting his sentence is inappropriate in light of the nature of the offense and the character of the offender. However, Dillard proceeds to argue only that the trial court abused its discretion by relying on two improper reasons for his sentence. Dillard also does not respond to the State's claim that he has waived Appellate Rule 7(B) review. As Dillard has failed to offer any basis for finding his sentence is inappropriate in light of the nature of the offense and the character of the offender, we agree he has waived that claim. *See King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008) (noting an App. R. 7(B) "inappropriate sentence analysis does not involve an argument that the trial court abused its discretion in sentencing the defendant").

[35] As to his abuse of discretion claim, Dillard first asserts the trial court erroneously relied on Dillard's statement that he had no problem killing. Dillard's argument is premised entirely on the inadmissibility of Dillard's statement. Given our ruling that the statement was admissible, we find no error in the trial court's consideration of it at sentencing.

[36] Dillard's remaining argument is no more availing. He contends the trial court erroneously found as an aggravating circumstance that he committed the offense with bias due to Gland's practice of refusing his sexual advances—a potential aggravating circumstance under Indiana Code § 35-38-1-7.1(a)(12) as of July 1, 2019. *See* P.L.5-2019, Sec. 1 (adding as a statutory aggravating circumstance that "[t]he person committed the offense with bias due to the victim's or the group's real or perceived characteristic, trait, belief, practice, association, or other attribute the court chooses to consider . . .").

[37] Yet such a finding is not found in the trial court's written and oral sentencing statements. Tr. Vol. XI pp. 89-93; App. Vol. III, pp. 56-58. To the extent the trial court considered Gland's refusal of Dillard's sexual advances at sentencing, it did so as part of other aggravating circumstances: that Dillard committed the murder while committing or attempting to commit a felony and while lying in wait. Tr. Vol. XI, pp. 92-93; App. Vol. II p. 57.[1] As Dillard challenges an

[1] The trial court found, based on Dillard's statements and his possession of Gland's phone after the murder, that the felony Dillard was committing or attempting to commit during the murder was sexual deviate conduct, robbery, or drug dealing. Tr. Vol. XI, p. 92.

aggravating circumstance not found by the trial court, Dillard has established no sentencing error.

[38] We affirm the judgment of the trial court.

[39] Mathias, J., and Altice, J., concur.