MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Antonio West,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

July 24, 2023

Court of Appeals Case No. 22A-CR-1469

Appeal from the Lake Superior Court

The Honorable Michael S. Bergerson, Judge

Trial Court Cause No. 45G02-2109-MR-38

Memorandum Decision by Judge Tavitas
Judges Bailey and Kenworthy concur.

Tavitas, Judge.

Case Summary

[1] Antonio West appeals his conviction for murder, a felony, and the enhancement for the use of a firearm. West challenges the trial court's denial of his motions for a mistrial and the admission of certain statements that West made during an interrogation. We conclude that the trial court did not abuse its discretion by denying the motions for a mistrial or by admitting the statements. To the extent the trial court did abuse its discretion by admitting any of the statements, any error is harmless. Accordingly, we affirm.

Issues

West raises two issues, which we restate as:

I. Whether the trial court abused its discretion by denying West's motion for a mistrial.

II. Whether the trial court abused its discretion by admitting West's statements made during a police interrogation.

Facts

[2] Shawn Rhyan Pewitt was the father of Jessica Cunningham's child. Both Pewitt and Cunningham had significant drug addictions. Pewitt and Cunningham had known West for approximately two years.

[3] On September 7, 2021, Cunningham was smoking crack cocaine and met with West. They ended the day at West's apartment. Pewitt and Bob Morse,

Cunningham's roommate, arrived at West's apartment at approximately 11:00 p.m. to get Cunningham. Pewitt and West argued, and West told Pewitt that Cunningham "was staying." Tr. Vol. III p. 197. Pewitt and Morse then left. Cunningham continued smoking crack cocaine with West and owed him $400 for the drugs. Cunningham paid part of the debt by having sexual intercourse with West.

[4] The next day, West and Cunningham drove to Morse's residence to obtain a check to pay for the drugs that Cunningham used. Although Cunningham obtained a check, she and West were unable to cash it at the bank. Later, Morse told Cunningham that she was no longer welcome at his home. Cunningham retrieved her clothing and went with West to an appointment he had at the Social Security office. While West was at his appointment, Cunningham stayed in the car and used West's cell phone to call Pewitt. Cunningham told Pewitt that she needed money.

[5] West and Cunningham then returned to West's apartment, where Floyd Hobson joined them. The three used drugs together, and West told Hobson to go to the back room of the apartment. West and Cunningham then had sexual intercourse again in exchange for some of the drugs Cunningham used. A few minutes later, Cunningham heard "a banging on the door." *Id*. at 222. Pewitt was on the porch area and wanted Cunningham to leave with him. Hobson, who was still in the back room, heard another man's voice and then heard West say, "Get out of my f'ing apartment." Tr. Vol. IV p. 240.

[6] Cunningham saw West pull a gun out of his pants and shoot Pewitt. From the back room, Hobson heard the gunshot and then heard Cunningham screaming, "[Pewitt], breathe." *Id.* West then ran out the door. West saw a neighbor and told the neighbor to call 911 because "he shot someone." Tr. Vol. V p. 56. West then drove away.

[7] When officers arrived at the scene, Cunningham was holding an unresponsive Pewitt and screaming for help. Cunningham told the officers that "there was a verbal altercation between [West] and [Pewitt]" and that Pewitt was shot by West. Tr. Vol. III p. 150. Cunningham also called Pewitt's mother and told her that West shot Pewitt. Pewitt died as a result of his injury.

[8] On September 20, 2021, the State charged West with murder, a felony. The State also filed an enhancement due to the use of a firearm in commission of the offense. A jury trial was held in April 2022.[1] During West's cross examination of Cunningham, Cunningham called West "a gang member," and West objected. Tr. Vol. IV p. 13. The trial court struck Cunningham's statement and admonished the jury to disregard the statement. Later, West

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[1] We note that the transcript is replete with typographical errors, grammatical errors, and random capital letters. For example, the transcript contains the following:

> Your Honor, I am going to object because I wanted to explain at the side bar. Apparent lee this officer took some pictures of the body at the imagine see room. They are not awe top see pictures. So I am objecting in terms, I think that it's unnecessary to /EUFPB in/STKAEUT with grew some pictures. But I am also objecting to relevance. I am not understanding what the significant of the pictures at the hospital are when the awe top see was a significant picture in terms of cause and death and that.

Tr. Vol. IV pp. 128-29 (errors in original).

twice moved for a mistrial due to the statement, and the trial court denied both motions.

[9] West also objected to the admission of portions of his recorded interrogation with officers, including, according to West, references to marijuana use, prostitution, past incarceration, and trial strategy. West objected based upon Indiana Evidence Rules 401, 403, and 609. The State agreed to remove two of the challenged parts of the statement. The redacted interrogation was admitted as State's Exhibit 79 over West's objection.

[10] The jury found West guilty as charged. The trial court then sentenced West to sixty years for murder enhanced by fifteen years for his use of a firearm. West now appeals.

Discussion and Decision

I. Denial of West's Motion for a Mistrial

[11] West challenges the trial court's denials of his motions for mistrial. "Whether to grant or deny a motion for a mistrial lies within the sound discretion of the trial court." *Isom v. State*, 31 N.E.3d 469, 480 (Ind. 2015). "We afford great deference to the trial court's decision and review the decision solely for abuse of that discretion." *Id.* Our Supreme Court has held that "'[a] mistrial is an extreme remedy that is only justified when other remedial measures are insufficient to rectify the situation.'" *Id.* at 481 (quoting *Mickens v. State*, 742 N.E.2d 927, 929 (Ind. 2001)). "'[T]he denial of a mistrial lies within the sound discretion of the trial court, and reversal is required only if the defendant demonstrates that he was so prejudiced that he was placed in a position of grave

peril.'" *Inman v. State*, 4 N.E.3d 190, 198 (Ind. 2014) (quoting *Gill v. State*, 730 N.E.2d 709, 712 (Ind. 2000)). "'The gravity of the peril turns on the probable persuasive effect of the misconduct on the jury's decision, not on the degree of impropriety of the conduct.'" *Id.* (quoting *Clark v. State*, 695 N.E.2d 999, 1004 (Ind. Ct. App. 1998), *trans. denied*).

[12] West's motions concern a statement made by Cunningham during West's cross examination of her. The following discussion occurred:

> Q. So you didn't go into the Walgreens and support [sic] to security that [] in fact that you needed help?
>
> A. He's a gang member. There's other people that retaliate at any time –

Tr. Vol. IV 13. West moved to strike the statement, which the trial court granted. The trial court then admonished the jury as follows:

> The last response by the witness is stricken from the record, and I want to advise the jury, admonish the jury not to consider the last statement made by the witness with respect to any affiliation the Defendant may - was alluded to by this particular witness of being a member of any gang. There's no evidence introduced of that and so. Certainly, it's inappropriate for this witness to say something like that and you are admonished and directed. Not to consider it in any way.

Id. at 14-15.

[13] After Cunningham's cross examination, West moved for a mistrial based upon Cunningham's statement that he was a gang member. The trial court denied

the motion for a mistrial. At the conclusion of the State's case, West again moved for a mistrial. The trial court again denied the motion for a mistrial and stated:

> The Court's going to rely upon the admonishment previously given to the jury to disregard that statement. The Court does not believe that that statement was intentionally made as some type of evidential harpoon against the Defendant, but was made in the throws of intense cross examination. The jury has been advised not to consider it [] and has been advised on numerous occasions that they can only make a decision in this particular case on evidence that has been admitted, and I'm going to rely upon the jury in following their oaths in that regard as they have been [] instructed and will be instructed.

Tr. Vol. VI p. 145.

[14] Our Supreme Court has held that, where the trial court has admonished the jury not to consider the challenged testimony, we presume that the jury followed the trial court's instructions and that the admonishment cured any error. *Isom*, 31 N.E.3d at 481. "'[A] clear instruction, together with strong presumptions that juries follow courts' instructions and that an admonition cures any error, severely undercuts the defendant's position [regarding a motion for mistrial].'" *Id.* (quoting *Lucio v. State*, 907 N.E.2d 1008, 1010-11 (Ind. 2009)).

[15] The trial court here admonished the jury not to consider Cunningham's statement, and we presume that the jury followed that instruction. West does not explain why the admonishment was insufficient or point to any evidence that the jury failed to follow the trial court's admonishment. We are not

persuaded the trial court abused its discretion in denying West's motions for mistrial.

II. Admission of Evidence

[16] Next, West challenges the trial court's admission of certain statements that West made during his interrogation by police officers. We review challenges to the admission of evidence for an abuse of the trial court's discretion. *Combs v. State*, 168 N.E.3d 985, 990 (Ind. 2021), *cert. denied*. We will reverse only where the decision is clearly against the logic and effect of the facts and circumstances and the error affects a party's substantial rights. *Clark v. State*, 994 N.E.2d 252, 259-60 (Ind. 2013). "The effect of an error on a party's substantial rights turns on the probable impact of the impermissible evidence upon the jury in light of all the other evidence at trial." *Gonzales v. State*, 929 N.E.2d 699, 702 (Ind. 2010). "The improper admission of evidence is harmless error when the conviction is supported by such substantial independent evidence of guilt as to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction." *Pelissier v. State*, 122 N.E.3d 983, 988 (Ind. Ct. App. 2019)*, trans. denied*. "The erroneous admission of evidence may also be harmless if that evidence is cumulative of other evidence admitted." *Id.*

[17] West challenges the admission of four statements—references, according to West, to marijuana use, prostitution, past incarceration, and trial strategy. Each of these statements was made during his interrogation with police, and a

redacted interrogation was admitted as State's Exhibit 79 over West's objection. West objected based upon Indiana Evidence Rules 401, 403, and 609.

[18] Rule 401 provides: "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Rule 403 provides: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." Finally, Rule 609(a) provides:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or an attempt of a crime must be admitted but only if the crime committed or attempted is (1) murder, treason, rape, robbery, kidnapping, burglary, arson, or criminal confinement; or (2) a crime involving dishonesty or false statement, including perjury."

[19] On appeal, however, West claims that the first three statements were inadmissible as prior bad acts under Evidence Rule 404(b). "A party may not add to or change his grounds for objections in the reviewing court." *Treadway v. State*, 924 N.E.2d 621, 631 (Ind. 2010). "Any ground not raised at trial is not available on appeal." *Id.* Accordingly, West has waived his challenge to the admission of those three statements.

[20] Waiver notwithstanding, West's claims regarding Evidence Rule 404(b) fail. Evidence Rule 404(b) provides that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a

particular occasion the person acted in accordance with the character." Such evidence, however, "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."

[21] "When a trial court assesses the admissibility of 404(b) evidence, it must '(1) determine that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Rule 403.'" *Nicholson v. State*, 963 N.E.2d 1096, 1100 (Ind. 2012) (quoting *Ortiz v. State,* 716 N.E.2d 345, 350 (Ind. 1999)). In evaluating whether evidence is unfairly prejudicial and should have been excluded, "'courts will look for the dangers that the jury will (1) substantially overestimate the value of the evidence or (2) that the evidence will arouse or inflame the passions or sympathies of the jury.'" *Ward v. State*, 138 N.E.3d 268, 274 (Ind. Ct. App. 2019) (quoting *Duvall v. State*, 978 N.E.2d 417, 428 (Ind. Ct. App. 2012), *trans. denied*).

A. Marijuana

[22] West first argues that the trial court abused its discretion by admitting his statement regarding marijuana usage. In the interrogation, the officers asked West to tell them about his activities on the day of the murder, and West stated:

> I told you, I'm gonna answer what I'm gonna answer. And that, he talkin' bout, you know, you know, **I smoke my weed**. I do my thing. Come on, man, you talk about days ago. You know. I don't remember no days ago like that. But just so happens

> September 8th, yeah, that's the day of my scheduled social security appointment.

State's Ex. 79, Clip 2 at 4:03 (emphasis added).

[23] Cunningham testified that West provided her with crack cocaine, and Hobson testified that West and Cunningham were doing drugs at West's apartment. West's minor statement regarding smoking marijuana was merely cumulative of other evidence of his drug use. Accordingly, any error in the admission of the evidence was harmless. *See, e.g.*, *Pelissier*, 122 N.E.3d at 988 (holding that "any error in the admission of Vaughn's videotaped statements was harmless because the evidence in question was cumulative of other properly-admitted evidence").

B. Prostitution

Next, West argues that the trial court abused its discretion by admitting West's statement regarding "prostitution." When questioned regarding his relationship with Cunningham, West stated that Cunningham was "one of [his] girlfriends." State's Ex. 79, Clip 3 at 1:17. When questioned about the last time he went to his apartment, West responded that "I got a bunch of women, man. **I'm a pimp boy** n*****. I'ma keep it real. I got a bunch a girls. So I ain't always where I should be. And I got my own crib you know so I move around." State's Ex. 79, Clip 3 at 4:13 (emphasis added). West later told the officers that he lets his "female friends" stay at his apartment. *Id*. at 4:26.

[24] West argues that his statement that he was "a pimp prostituting women" was inadmissible. Appellant's Br. p. 19. The State, however, argues that the

statement that West was a "pimp boy" does not reference prostitution. Rather, the statement was "colloquial reference to being 'a player' or someone have [sic] numerous romantic or intimate relationships." Appellee's Br. p. 17. We agree with the State. Taken as a whole, West's comments indicate that he has numerous girlfriends, not that he engages in prostituting women. Accordingly, the statement does not refer to other criminal conduct or bad acts by West, and the trial court did not abuse its discretion by admitting the statement. *See, e.g.*, *Johnson v. State*, 832 N.E.2d 985, 999 (Ind. Ct. App. 2005) (holding that statements did not constitute uncharged misconduct on the part of the defendant or portray his character in order to show action in conformity therewith), *trans. denied*.

C. Past Incarceration

[25] West argues that the trial court abused its discretion by admitting his statement regarding his past incarcerations. While explaining that he allows his friends to stay at his apartment, West stated that "its [sic] an open book. **I been gone too long**, man. I ain't got to lie." State's Ex. 79, Clip 3 at 4:48 (emphasis added). This statement, however, does not imply that West has been previously incarcerated. Nothing in the statement mentions prior incarceration, other criminal conduct, or bad acts by West. Accordingly, we cannot say the trial court abused its discretion by admitting the statement.

D. Trial Strategy

[26] Finally, West claims that the trial court abused its discretion by admitting his statements made during the interrogation regarding his trial strategy. West

contends that these statements were not relevant under Indiana Evidence Rule 401 and, even if relevant, were unduly prejudicial.

[27] According to West,

> [W]est stated in his custodial interview that a jury should be picked, that he would request a speedy trial (Ex. 79; Video 9: 6:15-6:25; Video 10:08-15; Video 11:40-45), that he could exercise his 5th Amendment Right to remain silent at trial (Ex. 79; Video 9 6:40-6:50), and other matters pertaining to his trial strategy. (Ex. 79; Video 4:13:50-60). These irrelevant statements should have not been played to the jury over Defendant's objections. (Tr. Vol. 4, p. 171).

Appellant's Br. p. 22.

[28] The State, however, argues that West was not discussing trial tactics in his interrogation; rather, the statements were admitted as part of West's claims to the officers that he was not at his residence at the time of the shooting and that he had an alibi. West "told detectives that he would elect a fast and speedy trial, not as a discussion of trial tactics[,] but as a means of informing detectives that they did not have the right person and that he believed their investigation was lacking." Appellee's Br. p. 21. West said that "the detective and any witness who testified that he was at home the day of the murder will be charged with perjury because he had an alibi." *Id.*

[29] We need not address whether the statements were admissible because, even if these statements were not relevant, we conclude that any error in the admission was harmless. Although West repeatedly claimed that he was at the social

security office, not at home, during the shooting, a social security office employee testified that West's appointment ended well before the shooting happened. Cunningham testified that West shot Pewitt; Hobson testified that he heard the altercation between West and Pewitt and heard the gunshot; and a neighbor testified that West was fleeing the scene and that West said he shot someone. Under these circumstances, any error in the admission of West's statements regarding trial tactics was harmless error. *See, e.g.*, *Anderson v. State*, 961 N.E.2d 19, 28 (Ind. Ct. App. 2012) ("[I]f the State has presented other overwhelming evidence of the defendant's guilt, then an erroneously admitted statement may be deemed harmless."), *trans. denied*.

Conclusion

[30] The trial court did not abuse its discretion by denying West's two motions for mistrial, and the trial court did not abuse its discretion by admitting West's statements made during his interrogation. To the extent the trial court erred by admitting any of the statements, any error was harmless. Accordingly, we affirm West's convictions.

[31] Affirmed.

Bailey, J., and Kenworthy, J., concur.