MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Cortez D. Jones,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 13, 2022

Court of Appeals Case No. 21A-CR-2447

Appeal from the Madison Circuit Court

The Honorable David A. Happe, Judge

Trial Court Cause No. 48C04-1809-F5-2457

Molter, Judge.

[1] Cortez D. Jones was charged with Level 5 felony battery with a deadly weapon. Before the second day of trial, a juror saw two officers escort Jones into the

courthouse while Jones was shackled. Jones asked for a mistrial, and the trial court denied the request. At the close of evidence, the State asked for an instruction on attempted battery with a deadly weapon, and the trial court granted the State's request. The jury then convicted Jones of attempted battery with a deadly weapon. On appeal, Jones argues that (1) the denial of his motion for mistrial was an abuse of discretion because it deprived him of a fair trial, and (2) reading the instruction on attempted battery with a deadly weapon violated his due process right to notice about the charge he faced and undermined his ability to prepare an effective defense. We disagree and affirm Jones's conviction.

[2]

Facts and Procedural History

[3] In May 2018, Jones and Gregory Sherels were inmates at the Pendleton Correctional Facility. On May 30, correctional officers Brandon Richey and Phillip Inman escorted Sherels to the downstairs of the facility where Jones was waiting, blocking the staircase, and armed with a shank. Sherels ran back upstairs while Jones chased him and made stabbing motions at Sherels. Sherels reached the top of the staircase, and as Jones made a stabbing thrust at Sherels, Sherels jumped over the railing onto the staircase.

[4] Sherels had a superficial laceration under his left arm and a small puncture wound under the laceration, which looked "fresh." Tr. at 96–97, 128–29. There was no blood on the wound or on Sherels's shirt, and the shirt was not

ripped or cut. The events occurred quickly, and neither officer saw the shank contact Sherels's body.

[5] The State charged Jones with Level 5 felony battery by means of a deadly weapon. On the morning of the second day of trial, one of the jurors saw officers escort Jones into the courthouse while in restraints. Minutes later, the trial court and the parties questioned the juror outside the presence of the other jurors. The juror confirmed that she saw Jones "in passing" as he entered the courthouse. She was not paying much attention to Jones and only noticed that he was with two guards. When asked whether she noticed anything different about Jones's appearance, she said Jones was wearing an orange jumpsuit yesterday and was wearing a white shirt today, but otherwise she noticed nothing "remarkable" about him. *Id*. at 77–78. She told no other juror that she saw Jones enter the courthouse that day. Jones moved for a mistrial, arguing he was prejudiced by the juror seeing him escorted into the courthouse with two guards. The trial court denied the motion, finding that it was normal to see a person on trial escorted by guards into a courthouse and that Jones presented no evidence that the juror noticed his restraints.

[6] At the close of evidence, the State requested a lesser-included offense instruction on attempted battery by means of a deadly weapon. Jones objected, arguing that because he was charged only with battery by means of a deadly weapon, the State had not properly notified him that he could also be convicted of attempted battery with a deadly weapon and that this lack of notice violated his constitutional rights.

[7] The trial court overruled Jones's objection and instructed the jury on attempted battery by means of a deadly weapon. It found that because attempted battery by means of a deadly weapon is, by statute, an inherently included offense of battery by means of a deadly weapon, Jones had sufficient notice about a charge for attempted battery by means of a deadly weapon, and a corresponding instruction could be given. The jury then found Jones guilty of Level 5 felony attempted battery by means of a deadly weapon. The trial court later sentenced Jones to a fully executed six-year sentence in the Indiana Department of Correction. Jones now appeals.

Discussion and Decision

I. Denial of Motion for Mistrial

[8] Jones claims the trial court erred in denying his motion for mistrial. The decision to grant or deny a motion for a mistrial lies within the discretion of the trial court. *Booher v. State*, 773 N.E.2d 814, 820 (Ind. 2002). A mistrial is an extreme remedy granted only when no other method can rectify the situation. *Id*. Because the trial court is in the best position to evaluate the relevant circumstances of an event and its impact on the jury, its determination of whether to grant a mistrial is afforded great deference on appeal. *Id*.

[9] Under some circumstances, a defendant's right to an impartial and fair trial is compromised when jurors observe the defendant in restraints. *See Malott v. State*, 485 N.E.2d 879, 882 (Ind. 1985), *abrogated on other grounds by Richardson v. State*, 717 N.E.2d 32 (Ind. 1999), *overruled by Wadle v. State*, 151 N.E.3d 227

(Ind. 2020). In *Malott*, prospective jurors saw Malott walk into the courtroom while shackled, so he asked the trial court to discharge the jury and declare a mistrial. *Id*. at 881–82. The trial court denied the motions but allowed the parties to address this issue with prospective jurors during voir dire, which, our Supreme Court concluded sufficiently "minimized any potential for prejudice." *Id*. at 882.

[10] Jones claims that, unlike the defendant in *Malott*, he did not have the opportunity through voir dire to minimize the prejudice caused by the juror seeing him "in an orange jumpsuit and shackle restraints" because voir dire had been completed the day before, so, unlike *Malott*, "the fairness and impartiality of [Jones's] trial was not adequately preserved . . . ." Appellant's Br. at 8–9. But Jones did have a chance to bring this issue to the trial court's attention, and the trial court, parties, and the juror discussed this incident outside the presence of the other jurors. That discussion revealed there was no indication the juror saw Jones in restraints or wearing an orange jumpsuit. The juror only saw Jones "in passing" as he entered the courthouse and only noticed that he was with two guards. She said Jones was wearing a white shirt, not an orange jumpsuit, and that there was nothing "remarkable" about him. Thus, Jones has not demonstrated any harm from his encounter with the juror. He established only that he was in the presence of the juror. *See Warr v. State*, 877 N.E.2d 817, 822 (Ind. Ct. App. 2007) (no actual harm where appellant could not show jurors saw her shackled), *trans. denied*. Therefore, the trial court did not abuse its discretion in denying Jones's motion for mistrial.

II. Instruction on Lesser Included Offense

[11] Jones claims his due process right to notice about the charge he faced was violated when the trial court instructed the jury on attempted battery by means of a deadly weapon. "In every criminal case, an accused is entitled to clear notice of the charge or charges against which the State summons him to defend." *Wright v. State*, 658 N.E.2d 563, 565 (Ind. 1995) (citing Ind. Const. art. 1, § 13). Clear notice allows an accused to prepare his defense. *Id*. When a defendant is convicted of a lesser included offense that was not separately charged by the State, we examine whether the accused was provided fair notice as to the crime against which he must defend. *Ledesma v. State*, 761 N.E.2d 896, 898 (Ind. Ct. App. 2002).

[12] Jones claims the instruction on attempted battery with a deadly weapon compromised his ability to prepare an effective defense. Had he been given proper notice, Jones contends he "would have asked different questions on voir dire, made different statements during opening statements, would have questioned the witnesses differently, and overall had a different strategy for the defense." Appellant's Br. at 10. Jones also contends the lack of notice unduly prejudiced him because the State had failed to present sufficient evidence to convict on the charge of battery with a deadly weapon yet was able to procure a conviction for attempted battery with a deadly weapon with an unexpected and eleventh-hour request for an instruction on that crime.

[13] "[Generally], every completed crime necessarily includes an attempt to commit it, so that, under a charge of a completed offense, an accused may be convicted

of the lesser offense of attempting to commit the crime charged . . . ." 42 C.J.S. *Indictments* § 317 (2022). Attempted battery with a deadly weapon is an included offense of battery with a deadly weapon because an attempted crime is an included offense of a completed crime. *See* Ind. Code § 35-31.5-2-168(2) ("Included offense" means an offense that: . . . (2) consists of an attempt to commit the offense charged or an offense otherwise included therein[.]"); *see also State ex rel. Camden v. Gibson Cir. Ct.*, 640 N.E.2d 696, 701 (Ind. 1994) ("Thus, by statute, an attempted crime is an included offense of the completed crime . . . ."). An offense is an inherently lesser included offense when it may be established by proof of the same material elements or less than all the material elements that define the "greater" crime charged." *Whitham v. State*, 49 N.E.3d 162, 168 (Ind. Ct. App. 2015), *trans. denied*. Thus, attempted battery with a deadly weapon is an inherently included offense of battery with a deadly weapon.

[14] "[T]he fact that a crime is . . . an inherently . . . included offense is sufficient notice to the defendant to be prepared to defend against that crime." *Ocelotl-Toxqui v. State*, 793 N.E.2d 271, 273 (Ind. Ct. App. 2003), *trans. denied*. Specific notice about an included offense is not required. *Id.*; *see also Chinda v. State*, 754 N.E.2d at 984 (holding that information charging attempted murder was sufficient to inform the defendant of the need to defend against the crime of neglect of a dependent), *trans. denied*.

[15] Because Indiana Code section 35-31.5-2-168(2) defines an attempt to commit a crime as an included offense of the charged crime, Jones was provided fair

notice that, when he was charged with battery by means of a deadly weapon, he potentially would have to defend against the charge of attempted battery by means of a deadly weapon. *See Ledesma*, 761 N.E.2d at 898, 900. As Jones was provided adequate notice, he was not unfairly prejudiced by the instruction or the State's ability to obtain a conviction for attempted battery with a deadly weapon, so his right to due process was not abridged.

[16] Affirmed.

Mathias, J., and Brown, J., concur.