MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Daniel R. Lytle, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

July 11, 2022

Court of Appeals Case No. 21A-CR-1833

Appeal from the Noble Superior Court

The Honorable Steven C. Hagen, Judge

Trial Court Cause No. 57D02-2007-CM-367

Molter, Judge.

[1] At Daniel R. Lytle, Jr.'s trial for Class A misdemeanor domestic battery, the trial court selected the alternate juror by randomly drawing a name of one of

the seven jurors selected for service from a cup provided by the bailiff. Lytle was convicted as charged, and on appeal, he contends the trial court's method of selecting the alternate juror was fundamental error and that he is entitled to a new trial. We disagree and affirm his conviction.

Facts and Procedural History

[2] In early July 2020, Lytle and his wife Jennifer were at their house in Noble County, Indiana, when Jennifer became upset because she had not recently seen her daughter. Jennifer became angry with Lytle because she felt he was not supporting her. They argued, and Lytle then slapped Jennifer in the face, chased her into the bedroom, and pushed her onto the bed.

[3] The State charged Lytle with Class A misdemeanor domestic battery, and his jury trial began on June 23, 2021. Before starting jury selection, the trial court said that each party had been provided with five peremptory challenges for the six-person jury, and that "we'll also seat a seventh person who will serve as an . . . alternate juror." Tr. Vol. II at 74. The trial court explained that each side would be given one additional peremptory strike to use on the seventh person seated. Jury selection took place in two rounds. After the first round of questions, three individuals were struck, and four individuals were selected to be on the jury. Three other prospective jurors were questioned and, after a conference at the bench, all three individuals were selected to be on the jury.

[4] Just before the trial ended, the bailiff reminded the trial court to select the alternate juror. The trial court responded that it would "pick somebody" when

the parties finished discussing the final jury instructions. Tr. Vol. III at 27. The trial court selected the alternate juror by picking a name from a cup that contained the names of the prospective alternate jurors. Lytle did not object to this method of selecting the alternate juror. After the parties made their closing arguments, the trial court read the final jury instructions and then informed one juror that he had been selected as the alternate juror.

[5] The jury found Lytle guilty as charged, and the trial court sentenced him to 365 days with 120 days executed and the remainder suspended to probation. Lytle now appeals.

Discussion and Decision

[6] Lytle claims the trial court's procedure for selecting the alternate juror—randomly picking a name from a cup—was contrary to law and violated his right to due process. Lytle admits he failed to raise this issue in the trial court and has waived this claim absent fundamental error. *See Treadway v. State*, 924 N.E.2d 621, 633 (Ind. 2010) (failure to object at trial waives the issue for review unless fundamental error occurred); *see also Miller v. State*, 623 N.E.2d 403, 412 (Ind. 1993) (noting that failure to object to the way the jury was chosen resulted in waiver.).

[7] Indiana Trial Rule 47(B) explains the process to select alternate jurors: "Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities and

privileges as the regular jurors." We agree with Lytle that the trial court did not follow the proper procedure for selecting the alternate juror, but to show that this error was fundamental, Lytle must show that the error was "a blatant violation of basic principles, the harm or potential for harm [was] substantial, and the resulting error denie[d] the defendant fundamental due process." *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006). "Irremediable prejudice to a defendant's fundamental right to a fair trial must be immediately apparent . . . ." *Allen v. State*, 686 N.E.2d 760, 776 n.13 (Ind. 1997).

Fundamental error allows appellate courts to correct the most "egregious" trial errors. *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014).

[8] The Indiana Supreme Court addressed a nearly identical situation in which the trial court selected two alternate jurors "by drawing lots." *Lowery v. State*, 640 N.E.2d 1031, 1039–40 (Ind. 1994). In addressing whether this prejudiced the defendant, the Court said that the "essential core value[s]" of the jury selection process are impartiality and the qualifications of the jurors. *Id*. at 1040. Therefore, "[i]n the absence of purposeful, nonrandom exclusion of prospective jurors, and with no showing of harm to the defendant, any technical noncompliance with the statutory requirements for jury selection does not amount to reversible error." *Id*. (quoting *Williams v. State*, 555 N.E.2d 133, 138 (Ind. 1990)). The Court found that there was no reason to believe that the selection of the alternate juror by drawing lots threatened those core values, so the departure from the normal procedure for selecting alternate jurors "carried no prejudice or harm." *Id*.

[9] The same analysis applies here. By selecting the alternate juror by drawing a name from a cup, the trial court did not follow the proper procedure for selecting the alternate juror. *See* Ind. Trial Rule 47(B). But Lytle does not show, or even allege, that the trial court's method of choosing the alternate juror was a "purposeful and nonrandom exclusion" of other potential alternate jurors and that the selection process threatened the core values of jury qualifications and impartiality. *See Lowery*, 640 N.E.2d at 1040. Especially critical here, Lytle does not even allege any prejudice since ultimately the alternate juror was never seated as a voting member of the jury. As was true in *Lowery*, the trial court's method of selecting the alternate juror "carried no prejudice or harm." *Id*. Lytle has thus failed to show that the trial court committed an egregious error that denied his right to fundamental due process. *See Ryan*, 9 N.E.3d at 668; *Mathews*, 849 N.E.2d at 587.

[10] Lytle tries to distinguish *Lowery* by observing *Lowery* was handed down seven years before the Indiana Jury Rules went into effect in 2001. Thus, he argues that "the requirements of the Jury Rules could not have been factored into the Court's analysis in *Lowery*." Appellant's Br. at 14. But Lytle does not explain how the advent of the Jury Rules makes the analysis of *Lowery* obsolete. Lytle also fails to acknowledge that the provisions in Trial Rule 47(B), which describe how alternate jurors are to be selected, are the same as they were when *Lowery* was decided. Moreover, after the Jury Rules went into effect in 2001, our appellate courts have used fundamental error and prejudice analyses to address claims about jurors and jury selection procedures. *See, e.g.*, *Peppers v. State*, 152

N.E.3d 678, 686–87 (Ind. Ct. App. 2020) (no fundamental error from trial court conducting its own examination of prospective jurors); *Lyons v. State*, 993 N.E.2d 1192, 1195–96 (Ind. Ct. App. 2013) (no fundamental error from trial court's failure to advise alternate jurors to not participate in deliberations); *Leslie v. State*, 978 N.E.2d 486, 492 (Ind. Ct. App. 2012) (no fundamental error in failing to dismiss juror who was standing near defendant and defense counsel while they discussed trial strategy), *trans. denied*.

[11] Finally, Lytle argues the trial court's procedure for selecting the alternate juror violated his liberty interest in having the alternate juror selected properly. In support, he analogizes to *Hicks v. Oklahoma*, 447 U.S. 343 (1980). Under Oklahoma law, Hicks was entitled to have the jury fix his sentence. *Id*. at 345. The trial court instructed the jury it was required to impose a forty-year sentence because Hicks had been adjudicated as a habitual offender. *Id*. at 344–45. In a different case, the Oklahoma Court of Criminal Appeals struck down the habitual offender statute, so, on appeal, Hicks argued his sentence should be set aside. *Id*. at 345. The Court of Criminal Appeals admitted it had struck down the habitual offender statute but denied Hicks's request, reasoning Hicks was not prejudiced by the habitual offender instruction because Hicks's sentence was within the range of punishment the jury could have imposed anyway. *Id*. The United States Supreme Court disagreed, noting that if the trial court had properly instructed the jury, the jury could have imposed a sentence as short as ten years. *Id*. at 346. The Court found that Hicks had a liberty interest in having his personal liberty restricted only to the extent

determined by the jury in the exercise of its statutory discretion. *Id*. Thus, the trial court's instruction prejudiced Hicks and deprived him of his liberty interest in having the jury instructed in accordance with Oklahoma law. *Id*. at 345–46.

[12] *Hicks* has no bearing here. The prejudice in *Hicks* from the habitual offender instruction was apparent. But here, Lytle does not show, or even claim, that he was prejudiced by the trial court's method of choosing the alternate juror other than to make the conclusory statement that the procedure "violated his liberty interest in having [his] case tried before a jury selected per the court rules regarding jury selection." Appellant's Br. at 14. He makes no attempt to show how the facts and holding of *Hicks* are analogous to the nature of his claims here on appeal. The trial court's technical non-compliance with the procedure for selecting an alternate juror—picking a name from a cup—is different from the liberty interest at issue in *Hicks*. *See Williams*, 555 N.E.2d at 137–38 (trial court's selection of alternate juror from jury pool rather than the person sitting in the designated alternate juror's seat was technical non-compliance with statute about selection of alternate jurors and was not grounds for reversal.).

[13] Because Lytle has failed to show that the selection of the alternate juror was an egregious error that denied him fundamental due process and subjected him to prejudice, he has failed to demonstrate fundamental error. Accordingly, we affirm the trial court.

[14] Affirmed.

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