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IN THE COURT OF APPEALS OF INDIANA

Devon L. Sterling,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 21, 2022

Court of Appeals Case No. 22A-CR-25

Appeal from the Madison Circuit Court

The Honorable David A. Happe, Judge

Trial Court Cause No. 48C04-1902-MR-425

Tavitas, Judge.

Case Summary

[1] Following a jury trial, Devon Sterling was convicted of murder, a felony, and being a prisoner in possession of a deadly weapon, a Level 4 felony. Sterling appeals and claims that: (1) the trial court abused its discretion by failing to

dismiss an alternate juror; (2) the trial court abused its discretion by excluding a defense witness; and (3) the trial court's verdict forms were improper. We disagree and, accordingly, affirm.

Issues

I. Whether the trial court abused its discretion by failing to dismiss an alternate juror.

II. Whether the trial court abused its discretion by excluding a defense witness.

III. Whether the trial court's verdict forms, which listed guilty as the first option and not guilty as the second option, were improper.

Facts

[2] In the summer of 2018, Sterling and Ezekiel Jones were both inmates at the Pendleton Correctional Facility. Sterling and Jones did not get along, and they had fought previously. Sterling believed that Jones wanted to kill him. On July 11, 2018, Sterling was permitted to leave his cell house and go to the commissary. One of the correctional officers told Sterling to return to his assigned area, but Sterling refused. Shortly thereafter, the correctional officer heard a "thud." Tr. Vol. II pp. 235. When he turned around, the officer saw Jones lying on his back and bleeding profusely from the neck.

[3] Video of the incident showed Sterling approach Jones from behind, stab Jones once in the neck with an object, and quickly leave the area. The correctional

officers attempted to stop Jones's bleeding, and medical staff soon appeared and transported Jones to the infirmary, where Jones was eventually pronounced dead. During a subsequent search, investigators found a shiv—a makeshift knife—located in a railing above a prison cell, which matched the shiv held by Sterling in the video. DNA analysis of the shiv returned too many contributors to obtain a match with Sterling. Sterling's recorded telephone calls included one to his mother in which he stated that Jones had been stabbed. Sterling also told his mother not to be angry with him. Jones never stated to his mother that he acted in self-defense. Instead, he told his mother that he was sorry.

[4] On February 13, 2019, the State charged Sterling with Jones's murder and with being a prisoner in possession of a deadly weapon, a Level 4 felony. A jury trial was held in November 2021. At trial, Sterling testified on his own behalf and claimed that Jones wanted to kill him and tried to kill him in the past by attacking him with a knife. Sterling also claimed that Jones was a gang member and that Jones and his fellow gang members repeatedly threatened Sterling. Sterling claimed that he obtained the shiv for protection on the advice of another inmate. Sterling claimed that, as he passed Jones, Jones turned to attack him, but Sterling was able to strike first by stabbing Jones once in the neck. Sterling claimed that he threw his weapon in the toilet and that the recovered shiv was not the one he used.

[5] During the trial, the bailiff informed the trial court that the alternate juror may have read about the case in a local newspaper. The trial court questioned the alternate juror under oath outside the presence of the other jurors. The juror

indicated that she had read an article about the case but could only recall from the article that Sterling may be from Fort Wayne. Sterling moved to strike the alternate juror, but the trial court denied the motion, and the trial continued.

[6] Sterling also attempted to call a witness, Melvin Sanders, a fellow inmate of Sterling and Jones. During an offer of proof, Sanders testified that Jones had threatened to kill Sterling. The trial court excluded this testimony because Sanders's statement had not been disclosed to the State during discovery and because the statement was improper character evidence.

[7] At the conclusion of the trial, the jury found Sterling guilty as charged. The trial court subsequently sentenced Sterling to sixty-five years executed for the murder conviction and a concurrent twelve-year sentence for the conviction for possession of a deadly weapon conviction. Sterling now appeals.

Discussion and Decision

I. Alternate Juror

[8] Sterling first argues that the trial court abused its discretion by failing to dismiss the alternate juror after the alternate indicated that she had read an article about the case before she was selected as a juror. We disagree.

[9] The right to an impartial jury is a constitutional right that is an essential element of due process. *Pugh v. State*, 52 N.E.3d 955, 971-72 (Ind. Ct. App. 2016) (citing *Caruthers v. State*, 926 N.E.2d 1016, 1020 (Ind. 2010)). "Biased jurors must be dismissed, and when there is a suggestion that they have been

exposed to extrajudicial matters, the trial court should make a threshold assessment of the likelihood of resulting prejudice." *Id*. at 972 (citing *Caruthers*, 926 N.E.2d at 1020-21). If the trial court determines that there is no risk of substantial prejudice, it need not investigate further. *Id*. (citing *Caruthers*, 926 N.E.2d at 1021). If, however, the trial court finds the risk of prejudice is substantial, as opposed to remote or imaginary, "it should interrogate the jury collectively to determine who, if anyone, has been exposed, and then individually interrogate any such jurors away from the others." *Id*. If the trial court discovers any degree of exposure and the likely effect thereof, it must take appropriate action, including at least a collective admonishment. *Id*. "At all stages in this process, the trial court has the discretion to take whatever actions it deems necessary and appropriate." *Id*.

[10] Here, the bailiff informed the trial court that the alternate juror may have been exposed to local media coverage of the case prior to serving as an alternate juror. When the trial court learned this, it questioned the alternate juror outside the presence of the jury. The alternate indicated that, prior to serving on the jury, she had read an online article about the case but that the only information she could remember from the article was "something about Fort Wayne. So, I just . . . made the assumption that maybe [Sterling] was from Fort Wayne." Tr. Vol. III p. 197-98. The alternate also stated that, once she was selected as an alternate juror, she avoided media coverage of the trial as instructed by the trial court. *See id.* at 200 ("[O]nce you [the trial court judge] told us Monday to not look at anything, I have really tried really ha[r]d not to look at anything.").

When the trial court asked the alternate if she had mentioned the article with the other jurors, the alternate said that she had not but also stated:

> I did – I did say something about – Because they had said, after the phone conversation we heard with his mom, and they were asking about his mom not being here and I said, well I thought that he might be from the Fort Wayne area,[1] but I didn't know for sure. . . . But that's all I've said in the jury room.

Id. at 201.

[11] The trial court instructed the alternate not to mention to the jurors the article or anything else she may have learned from an outside source about the case or "anything . . . about the conversation that we've had here[.]" *Id*. The trial court denied Sterling's motion to excuse the alternate and stated: "I think that there's a fairly small risk here for having any other information she would share with other jurors. And she certainly denied having other knowledge based on the review of the article other than the city of origin being Fort Wayne." *Id*. at 207-08.

[12] The trial court did precisely what it should have done when confronted with the possibility that a juror had been exposed to extra-judicial information; the trial court made a "threshold assessment of the likelihood of resulting prejudice." *Pugh*, 52 N.E.3d at 972. The trial court determined that there was no risk of substantial prejudice because the alternate testified that she could only recall

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[1] The alternate's recollection was incorrect; the article actually stated that Sterling was from Indianapolis and that the victim, Jones, was from Fort Wayne. *See* Tr. Vol. III p. 208.

from the article that the defendant might be from Fort Wayne and that, although she told the other jurors the defendant might be from Fort Wayne, she had not directly mentioned the article to the other jurors. Because there was no risk of prejudice from this information, the trial court did not need to investigate the matter further. *Id*.

[13] Sterling claims that the trial court should have questioned the jurors individually to confirm whether the alternate had, in fact, mentioned anything else from the article. Sterling, however, does not appear to have made such a request to the trial court. It is well settled that "'[a] trial court cannot be found to have erred as to an issue or argument that it never had an opportunity to consider." *Partee v. State*, 184 N.E.3d 1225, 1233 (Ind. Ct. App. 2022) (quoting *Shorter v. State*, 144 N.E.3d 829, 841 (Ind. 2020)), *trans. denied*. "Thus, as a general rule, 'a party may not present an argument or issue on appeal unless the party raised that argument or issue before the trial court. In such circumstances the argument is waived.'" *Id*. Waiver notwithstanding, the trial court, after questioning the alternate juror, made a threshold determination that there was no substantial risk of prejudice, and was not required to investigate further. *Pugh*, 52 N.E.3d at 972 (citing *Caruthers*, 926 N.E.2d at 1021).

[14] We find Sterling's citation to *Lindsey v. State*, 260 Ind. 351, 358, 295 N.E.2d 819, 823 (1973), to be unavailing, as the facts in *Lindsey* are quite different from those present here. In *Lindsey*, a local newspaper published a factually inaccurate article about the defendant during the middle of his trial for burglary. The article mentioned a rape, which was neither alleged nor proved by the

State. The defendant moved for a mistrial based on the article, and the trial court examined the jurors. This examination revealed that only four jurors had not seen the article, whereas "eight had had exposure that varied from mere awareness of the publication, which one juror had by reason of her husband's having mentioned it, to knowledge from having read a portion of it, to two jurors who had read the entire article." *Lindsey*, 260 Ind. at 355-56, 295 N.E.2d at 822. Only the two jurors who had read the entire article were questioned regarding whether the article had impacted their decision, and both denied that it had. *Id*. at 356.

[15] On appeal, our Supreme Court held that "whenever prejudicial publicity is brought to the attention of the court, at a minimum it must, at that time, interrogate the jury to determine its exposure, and that jurors acknowledging exposure should be examined individually to determine the extent of such exposure and the likelihood of prejudice resulting therefrom." *Id*. at 358, 295 N.E.2d at 823. The Court determined that the defendant had not been afforded such "minimal protection," and reversed and remanded for a new trial. *Id*. at 359-60, 295 N.E.2d at 824.

[16] In contrast, here, there was no prejudicial publicity, as the alternate juror testified that she was unable to recall anything about the article other than the inaccurate presumption that the defendant was from Fort Wayne. Under these circumstances, the trial court was not required to individually question each of the jurors. *See id*. at 358, 295 N.E.2d at 824 (holding that the trial court should interrogate the jury to determine if it has been exposed only "[i]f the risk of

prejudice appears substantial, as opposed to imaginary or remote only[.]"). We conclude, therefore, that the trial court did not abuse its discretion by failing to dismiss the alternate juror.

II. Exclusion of Defense Witness

[17] Sterling next contends that the trial court erred in excluding the testimony of one of his proposed witnesses, Melvin Sanders. Decisions regarding the admission and exclusion of evidence are left to the discretion of the trial court. *Heckard v. State*, 118 N.E.3d 823, 827-28 (Ind. Ct. App. 2019) (citing *Bowman v. State*, 51 N.E.3d 1174, 1180 (Ind. 2016)), *trans. denied*. We will not disturb the trial court's evidentiary rulings unless the defendant has shown an abuse of this discretion. *Id*. at 828 (citing *Bowman*, 51 N.E.3d at 1180). A trial court abuses its discretion only if its ruling is clearly against the logic and effect of the facts and circumstances. *Id*.

[18] Sanders, a fellow inmate at the prison, would have testified that, on more than one occasion, Jones told Sanders that Jones was going to kill or "get" Sterling and that "everybody" knew that Jones was going to kill Sterling. Tr. Vol. V p. 53. Sanders admitted, however, that he never conveyed Jones's statements to Sterling. Sterling claims that the trial court erred in striking Sanders's testimony because the testimony would have been probative of Jones's character and reputation for violence in the prison. He claims that Jones's alleged threats toward Sterling were admissible as specific acts, which were relevant to support the objective component of Sterling's claim of self-defense. *See Washington v. State*, 997 N.E.2d 342, 349 (Ind. 2013) (recognizing that the phrase "reasonably

believes" in the Indiana self-defense statute requires (1) a subjective component that the defendant actually believe that force was necessary to prevent serious bodily injury and (2) an objective component that a reasonable person under the circumstances would have such an actual belief) (citing *Littler v. State*, 871 N.E.2d 276, 279 (Ind. 2007))).

[19] We first note that, to the extent that Sanders would have testified as to what Jones told him, this out-of-court statement was inadmissible hearsay because it was proffered to prove the truth of the matter asserted in the statement, i.e., that Jones wanted to or was planning to kill Sterling. *See* Ind. Evidence Rule 801(c) (defining hearsay as a statement made by the declarant not while testifying at trial or a hearing that is offered in evidence to prove the truth of the matter asserted); Evid. R. 802 ("Hearsay is not admissible unless these rules or other law provides otherwise). Sterling makes no argument that any of the exceptions to the hearsay rule apply to Jones's out-of-court statements, and we are unable to discern any.[2] Thus, Sanders's testimony regarding Jones's statements was properly excluded by the trial court.

[2] Evidence Rule 803(21) provides that "[a] reputation among a person's associates or in the community concerning the person's character" is "not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness[.]" Jones's statements, as related by Sanders's proffered testimony, did not refer to Jones's reputation among his associates or in the community concerning his character. Instead, Jones's statements were direct threats against Sterling. Although one could infer from these statements that Jones had a violent reputation or character in the community, his statements were not themselves related to his own reputation or character in the community.

[20] The brunt of Sterling's argument is that Sanders's testimony was admissible as evidence of Jones's character and reputation for violence. The admission of character evidence is governed by Evidence Rule 404(a),[3] which provides:

> (1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.
>
> (2) Exceptions for a Defendant or Victim in a Criminal Case. **The following exceptions apply in a criminal case:**
>
> (A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;
>
> (B) subject to the limitations in Rule 412,[4] **a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted**, the prosecutor may offer evidence to rebut it; and
>
> (C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

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[3] Evidence Rule 404(b) generally prohibits the admission of evidence of crimes, wrongs, or other acts to prove a person's character to show action in conformity with that character. Neither party references this subsection of Rule 404. We note, nevertheless, that Jones's alleged statements that he wanted to kill Sterling were never communicated directly to Sterling. These statements were, accordingly, not "bad acts" to which Evidence Rule 404(b) would be applicable. *See Hicks v. State*, 690 N.E.2d 215, 221 n. 11 (Ind. 1997) (defendant's statements that he wanted to shoot his wife and wished she was dead were not "bad acts" because they were not direct threats to the victim but instead statements about his state of mind at the time and Evidence Rule 404(b) did not, therefore, apply).

[4] Evidence Rule 412 controls the admission of evidence regarding sexual behavior or sexual predisposition and has no bearing here.

> (3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(emphases added). Thus, although character evidence is generally inadmissible to prove that a person acted in conformity with that character on a particular occasion, in a criminal case, a defendant may offer evidence of the victim's character. Because Sterling's trial was a criminal case, evidence of a pertinent character trait of Jones would be admissible under Evidence Rule 404(a)(2)(B).

[21] If admissible, character evidence may be in two forms:

> (a) By Reputation or Opinion. **When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion.** On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct. If, in a criminal case, a defendant provides reasonable pretrial notice that the defendant intends to offer character evidence, the prosecution must provide the defendant with any relevant specific instances of conduct that the prosecution may use on cross-examination.
>
> (b) By Specific Instances of Conduct. **When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct**.

Evid. R. 405 (emphases added). Thus, if admissible, a person's character may be proved by reputation or opinion, and evidence regarding specific instances of

conduct are admissible only on cross-examination, unless the person's character or character trait are an essential element of a charge, claim, or defense.[5]

[22] Sanders's proffered testimony did not state an opinion regarding Jones's character or reputation. Instead, it referred to specific instances in which Jones threatened to kill or "get" Sterling.[6] Sanders's testimony would be admissible only if Jones's character was an essential element of Sterling's claim of self-defense. Our courts have long held, however, that the assertion of a claim of self-defense does not make the victim's character an essential element of a defense. *Guillen v. State*, 829 N.E.2d 142, 147 (Ind. Ct. App. 2005) (citing *Brooks v. State*, 683 N.E.2d 574, 577 (Ind. 1997)); *see also* Robert L. Miller, 12 IND. PRACTICE, Ind. Evidence 405.201 (4th ed. 2022 Update) ("The victim's character is not an essential element of a defense of self-defense in a criminal case."). Because Sanders's proffered testimony was not admissible character evidence but was instead inadmissible evidence of specific instances of conduct by Jones, the trial court did not err by excluding Sanders's proffered testimony.[7]

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[5] Sterling cites *Phillips v. State*, for the proposition that character may be "proved by evidence of specific conduct reflective of a particular character trait, by opinion testimony based on the witness's personal observations, or by testimony as to reputation generally." 550 N.E.2d 1290, 1297 (Ind. 1990) *abrogated in part on other grounds by Fry v. State*, 990 N.E.2d 429 (Ind. 2013). *Phillips* was decided before the adoption of the Indiana Rules of Evidence, which now govern the admission of character evidence.

[6] "[T]he victim's reputed character, propensity for violence, prior threats and acts, **if known by the defendant**, may be relevant to the issue of whether a defendant had fear of the victim prior to utilizing deadly force against him." *Brand v. State*, 766 N.E.2d 772, 780 (Ind. Ct. App. 2002) (emphasis added), *trans. denied*. Here, however, Sanders admitted that he never conveyed Jones's alleged threats to Sterling.

[7] The State also argues that the trial court properly excluded Sanders's testimony as a discovery sanction, because Sterling failed to produce Sanders's statement during discovery. Given our conclusion that the evidence was inadmissible, we need not address this issue.

[23] Furthermore, even if the exclusion of Sanders's testimony had been improper, it would have been harmless error. Sterling himself testified that Jones told him, "I [am] gonna kill you when I catch you." Tr. Vol. IV p. 161. And another fellow inmate, Nick Bigsby, testified that Sterling was fearful of Jones and that Bigsby heard another inmate, presumably Jones or one of Jones' friends, threaten Sterling. Accordingly, the jury was well aware of the beef between Jones and Sterling and heard evidence that Jones had threatened Sterling. "'Where the wrongfully excluded testimony is merely cumulative of other evidence presented, its exclusion is harmless error." *Pierce v. State*, 29 N.E.3d 1258, 1268 (Ind. 2015) (quoting *Sylvester v. State*, 698 N.E.2d 1126, 1130 (Ind. 1998)).

III. Jury Verdict Forms

[24] Lastly, Sterling argues that the trial court's jury verdict forms were unfair because the forms listed guilty as the first option and not guilty as the second option. Sterling asked the trial court to change the verdict forms to list not guilty as the first option and guilty as the second—a request the trial court denied. Sterling acknowledges that our Supreme Court has rejected this argument. In *Tonge v. State*, 575 N.E.2d 269 (Ind. 1991), the defendant claimed that the verdict forms were erroneous because they were on a single sheet with the guilty verdict on the top and the not guilty verdict below it. Our Supreme Court summarily rejected the defendant's argument that this was improper by stating, "[w]e cannot derogate the intelligence of a jury by assuming they would

be prejudiced by such an insignificant fact as the placement of the verdict forms on the sheet of paper." *Id*. at 270-71.

[25] Sterling claims that *Tonge* was wrongly decided and urges us to set a "bright line" rule that the option of not guilty must appear first on a verdict form. Sterling misunderstands our role as an intermediate appellate court. "As Indiana's intermediate appellate court, we are bound by Indiana Supreme Court precedent and are not at liberty to 'reconsider' that precedent." *Hill v. State*, 122 N.E.3d 979, 982 (Ind. Ct. App. 2019) (citing *Minor v. State*, 36 N.E.3d 1065, 1074 (Ind. Ct. App. 2015)). Because we have no authority to reconsider *Tonge*, Sterling's claim fails.

Conclusion

[26] The trial court did not abuse its discretion by failing to dismiss the alternate juror or by excluding Sanders's testimony. Sterling's claim regarding the verdict forms is unavailing. Accordingly, we affirm the judgment of the trial court.

[27] Affirmed.

Brown, J., and Altice, J., concur.