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IN THE
COURT OF APPEALS OF INDIANA

BOBBY R. KYLES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0811-CR-544
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-0709-FA-71

March 17, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Bobby Kyles appeals his conviction, after a jury trial, and sentence for attempted robbery, a class A felony.

We affirm.

ISSUES

1. Whether the trial court erred when it denied Kyles' motion to correct error.

2. Whether the sentence imposed is inappropriate.

FACTS

In the early morning hours of August 14, 2007, the car driven by James Stewart ran out of gas in Fort Wayne. He pushed the car off the street, retrieved a gas can from the trunk, and walked in search of gas. His sister, forty-nine year old Julie Miley, remained in the car – with the passenger window down – and waited for him to return. Three young black males approached the car. One of them demanded her money and displayed a gun. When Miley said she had no money, he roughly "felt into . . . [her] underclothes," "into [her] shorts, and into [her] bra, both sides of it." (Tr. 112, 113). The man then struck her two times on the right side of her head with the gun. Miley felt "sheer terror." (Tr. 117). Then he "leaned into the car over [her] face, put the gun to the side of [her] neck, point blank and pulled the trigger." (Tr. 114). Miley was shot; the bullet traveled through the left side of her neck and out her upper back. The man and his two companions ran away. Miley, in pain and blood pouring from her neck, ran into the street – where a passerby picked her up and placed a call to 9-1-1 at 2:07 a.m..

Miley was taken to the hospital for treatment. The next afternoon, Fort Wayne Police Department Detective Delonzo Myles spoke with her at the hospital. Myles showed Miley a photo array, and "instantly" identified Kyles as "the shooter." (Tr. 120, 118). She said that Kyles was the man who demanded money, struck her with the gun, and "shot [her]." (Tr. 119).

On September 27, 2007, the State charged Kyles with Count I, attempted robbery, as a class A felony; and Count II, battery, as a class C felony. On April 29-30, 2008, a jury trial was conducted. Miley testified to the foregoing. Miley also testified that during the hospital interview with Detective Myles, she believed that a second photo array included one of Kyles' companions, Lemuel Brewer. Miley testified that she was "certain" of her identification of "the shooter." (Tr. 136).

Lavonte Walker testified that on the evening of August 13, 2007, Kyles had been at his house. Walker further testified that between 11:30 p.m. and 12 midnight, Kyles, Jawuan Woodson, and Shanelle Stalling left in a car driven by Lucinda Crawford. Crawford and Stalling both testified that Kyles was driven directly to his residence, arriving within fifteen or twenty minutes after leaving Walker's house.

The jury returned verdicts finding Kyles guilty on both counts. At the sentencing hearing on May 23, 2008, the trial court found that Kyles' "conduct all amounted to . . . attempted robbery" and merged Count II into Count I. (Sent. Tr. 12). The trial court sentenced Kyles to a term of fifty years.

On June 17, 2008, Kyles filed a motion to correct error – which is not included in Kyles' record on appeal. The trial court held a hearing on August 4, 2008. Three trial

witnesses testified that they had recognized one of the jurors. Kyles' counsel argued to the trial court that the juror's "failing to disclose" knowledge of persons who were named as potential witnesses gave "rise to the argument that this juror was culpable of some misconduct in not disclosing that information and . . . taints the whole process and raises into question what may or may not have been shared during deliberations in this case." (Mot. Tr. 31). Kyle asked the trial court to set aside the judgment and order a new trial. The trial court denied Kyles' motion.

DECISION

1. Motion to Correct Error

At the hearing on August 4, 2008, the trial court heard the following. Stalling testified that she had attended Snider High School along with Crawford, Walker, and Woodson, and that Walker and Woodson "used to get in trouble." (Mot. Tr. 7, 8). Stalling further testified that during trial, she had recognized a female juror as having been employed at the school as a "teacher[']s aid[e]" who escorted students when they were in trouble. (Mot. Tr. 10).

Crawford testified that when she attended Snider from 2004-2007, Walker "always had to be walked back and forth for class" and was frequently in trouble. (Mot. Tr. 16). Crawford further testified that she recognized a juror whom she "remember[ed] . . . working at Snider," and "believe[d] she was one of the aid[es] that walked kids back and forth to class to make sure they got there in time." (Sent. Tr. 18). However, Crawford admitted that she had never seen the juror walking Walker to or from class. Crawford further testified that there were hundreds in her class, and that she did not know

the juror's name and would not expect the woman to know her name or that of Stalling, Walker, or Woodson.[1]

Walker testified that when he attended Snider in 2005, he "had a lot of problems" such as "referrals, discipline stuff," and had been expelled once and suspended more than twenty times. (Mot. Tr. 23). Walker also testified he recognized a juror and "remember[ed] she worked at Snider." (Mot. Tr. 27). Walker further testified that the juror was "either an escort or a lady that worked in attend . . . she wasn't a teacher." *Id.* (ellipsis in transcript). Walker believed the juror knew him "because [he] was like a popular kid when [he] was at Snider." *Id.*

The trial court took judicial notice that Snider High School was "a very large school," estimating its population as 2,000 – 2,500 students in "a three year facility." (Mot. Tr. 31). It found that based on the testimony of Stalling, Crawford, and Walker, the juror "wouldn't know" them, and that there was

> certainly not enough here to even suspect gross misconduct on the part of the juror. No evidence at all that would justify us imposing into the privacy or sanctity of what we create for jurors, citizens who are willing to come in and hear these cases.

(Mo. Tr. 36, 36-37).

Kyles now argues to us that the trial court committed reversible error when it denied his motion to correct error. Specifically, he argues that because he presented "evidence that one of the jurors seated in his trial was acquainted with" witnesses Stalling, Crawford, Walker and Woodson, and the juror failed to disclose knowing them

[1] Woodson testified at trial but not at the hearing on the motion to correct error.

when their names were announced during voir dire, he therefore was "entitled to a new trial based upon a deprivation of the right to a fair and impartial jury" arising from the juror's "fail[ure] to disclose this potential source of bias." Kyles' Br. at 9. We are not persuaded.

Our Supreme Court has held that "[i]n certain circumstances, '[t]he failure of a juror to disclose a relationship to one of the parties may entitle the prejudiced party to a new trial.'" *Roberts v. State*, 894 N.E.2d 1018, 1022 (Ind. 2008) (quoting *Stephenson v. state*, 864 N.E.2d 1022, 1055 (Ind. 2007), *cert. denied*). "To obtain a new trial based on a claim of juror misconduct, the defendant must demonstrate that the misconduct was gross and likely harmed the defendant." *Id.* Further, the defendant must present specific and substantial evidence establishing that a juror was possibly biased. *Id.* The issue of juror misconduct is a matter within the trial court's discretion. *Id.* (citing *Lopez v. State*, 527 N.E.2d 1119, 1130 (Ind. 1988)).

None of the three witnesses provided testimony that the juror had known them. Walker's belief that the juror would know him because of his popularity is purely speculation -- inasmuch as he had only attended the large school for a single year, in 2005, which was two years before trial. Further, each of the three witnesses testified to having <u>no</u> personal interaction with the juror at the school. We agree with the trial court that merely because a juror had been employed in a school with thousands of students, such fails to establish specific and substantial evidence of the juror's bias against the witnesses. Accordingly, we find no abuse of discretion in the trial court's denial of Kyles' motion to correct error.

2. Inappropriate Sentence

The Indiana Constitution authorizes independent appellate review and revision of a sentence, authority implemented through Appellate Rule 7(B). *Anglemyer v. State*, 868 N.E.2d, 482, 491, *clarified on reh'g on other grounds*, 875 N.E.2d 218 (Ind. 2007). The Rule provides that a court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." *Id.* (quoting Ind. Appellate Rule 7(B)). "The burden is on the defendant to persuade" the appellate court that his or her sentence is inappropriate. *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006)).

Before imposing sentence, the trial court stated as follows:

> He strikes her several times trying to make a believer out of her, to force her to give him anything that she might have. She still doesn't have anything. That should be enough. It's clear that she didn't have anything so as indicated she was shot as a direct result of . . . I have no doubt that you assumed you were going to kill her because she could identify you as she did in this courtroom. And but for some stroke of luck she survived. There was no need to shoot her. There was no need to kill her to complete your robbery. That was truly extra surplus and as a result I'm going to find that that's a substantial, the nature of the circumstances of the case are substantial aggravating circumstances such that outweigh any other mitigating circumstances. I don't believe there are any, but as would negate any possible mitigating circumstances.

(Sent. Tr. 12-13).

Kyles asserts that his character is reflected by the fact that "he had but one juvenile delinquency adjudication and two adult misdemeanor offense convictions, none of which" were violent. Kyles' Br. at 14. Kyles' adjudication as a juvenile was for

disorderly conduct. On Kyles' first adult misdemeanor offense, he received a suspended sentence which was modified twice. On the second adult misdemeanor offense, he received a suspended sentence which was later revoked. Thus, although not extensive, his criminal history indicates that Kyles' character is disrespectful of the laws of society. Moreover, in the instant case, Kyles' character is further reflected by his physical denigration of the victim -- thrusting his hands inside her undergarments and striking her several times to the head with his gun.

As to the nature of the offense, Kyles argues that "the serious injury resulting from the shooting was already included as an element" in the charge, attempted robbery as a class A felony. *Id.* at 15. It is true that the charged offense alleged that Kyles' substantial step toward the commission of robbery was an action "resulting in serious bodily injury to Julie Miley, to wit: extreme pain and/or a substantial risk of death . . ." (App. 16). However, Miley testified to her extreme pain after having been shot in the neck, and the substantial risk of her death is patently clear from the injury she suffered. Hence, she suffered <u>both</u> extreme pain and a high probability of resulting death. In addition, the nature of the offense includes the fact that when it became obvious that the victim had no money, Kyles then placed the gun to her neck and shot her at point blank range. The trial court's statement properly reflects its consideration of the circumstances and the egregious nature of Kyles' action.

We do not find Kyles' sentence to be inappropriate in light of his character and the nature of the offense.

Affirmed.

RILEY, J., and VAIDIK, J., concur.