

Appellant-defendant Sylvester Thomas appeals his conviction and sentence for Felony-Murder,¹ a felony. Specifically, Thomas argues that the trial court abused its discretion when it denied his motion to dismiss. In addition, Thomas maintains that he was denied his right of confrontation under the United States and Indiana Constitutions when the trial court admitted a witness deposition in place of in-court testimony. Furthermore, Thomas contends that the trial court erroneously admitted hearsay evidence through recordings of telephone conversations.

Thomas also argues that the trial court abused its discretion when it denied his motion for mistrial that was made on the grounds of prosecutorial misconduct. Additionally, Thomas asserts that he was denied a fair trial under the United States and Indiana Constitutions when the trial court engaged in lengthy questioning of the jurors without him being present. Likewise, Thomas contends that he was denied a fair trial when the trial court denied his motion for mistrial on the basis of jury contamination.

Furthermore, Thomas maintains that the trial court should have vacated the jury's verdict finding him guilty of attempted robbery instead of merging it into his conviction for felony-murder. Finally, Thomas argues that his sixty-year sentence is inappropriate in light of the nature of the offense and his character. Finding no error, we affirm the judgment of the trial court.

FACTS

Around 11:45 p.m. on January 7, 2008, police and emergency personnel responded to a report that someone had been shot at an Indianapolis apartment complex.

¹ Ind. Code § 35-42-1-1(2).

They found Emanuel Jenkins lying on the parking lot outside one of the apartment buildings, suffering from a fatal gunshot wound to his chest.

The police immediately began an investigation. Detective Christine Mannina of the Indianapolis-Metropolitan Police Department interviewed a bystander, Shon Hudson, who told her that he had been inside Jenkins's apartment when he heard a knock at the door followed by two gunshots.

Detective Mannina also interviewed Tasia Lee, who lived with her son in the adjacent apartment. Lee told Detective Mannina that before the shooting, two men had entered her apartment and held her at gunpoint. After Lee became extremely upset and scared, the men told her that "they did not want her but wanted her neighbors." Appellant's App. p. 26. Lee watched while one of the men went to Jenkins's apartment and knocked on the door. Shortly thereafter, the second man jumped from her apartment into the hallway and began firing his handgun.

The next day, on January 8, 2008, Lee notified Detective Mannina that the shooter had come to her place of employment wearing a jacket with either "Thomas Sylvester" or "Sylvester Thomas" written on it. *Id.* at 29. Lee identified Thomas from a photo array as the person who did the shooting.

On January 31, 2008, the State charged Thomas with one count of murder, two counts of criminal confinement, and one count of possession of a firearm by a serious violent offender under Cause Number 49G01-0802-MR-28025 (MR-28025). Forensic testing identified Thomas's DNA on cigarettes left in an ashtray in Lee's apartment. In addition, Lee's telephone records indicated that on the day of the shooting, she had

received several calls from Alan Thomas, Thomas's brother and an inmate at the Marion County Jail. When confronted with this evidence, Lee admitted that Alan was her boyfriend and that Thomas had been in her apartment just before the shooting.

On February 9, 2009, the day scheduled for Thomas's trial in MR-28025, Hudson admitted that on the day of the shooting, there was a high-stakes dice game occurring in Jenkins's apartment. Hudson told the police that after the door of Jenkins's apartment was opened, someone ordered the occupants to lie on the floor, and he realized that someone was trying to rob the players of the dice game. In an attempt to thwart the robbery, Hudson fired a gun towards the door of the apartment.

After receiving this new information, the State dismissed the charges in MR-28025. The next day, on February 10, 2009, the State charged Thomas with Count I, felony-murder; Count II, attempted robbery; and Count III, possession of a firearm by a serious violent felon under Cause Number 49G01-0902-MR-24145 (MR-24145).

On April 22, 2009, five days before Thomas's trial was to begin, Thomas filed a motion to dismiss the charges against him, which the trial court denied. The first part of Thomas's bifurcated trial commenced on April 27, 2009. On April 29, a jury found Thomas guilty on Counts I and II. The second part of Thomas's trial commenced on May 8, 2009, and the trial court found Thomas not guilty on Count III.

On May 8, 2009, the trial court held a sentencing hearing, where it merged Count II into Count I. The trial court noted that the nature of the offense, specifically, shooting randomly into an apartment full of people, was an aggravating circumstance. The trial court also concluded that Thomas's criminal history was an aggravating factor.

In mitigation, the trial court noted the hardship on Thomas's family, but declined to give it significant weight in light of the hardship on the victim's family. The trial court also observed that Thomas was a "smart man," but stated that despite his potential, "it all comes down to these circumstances and your having been convicted of this crime." Tr. p. 785. The trial court sentenced Thomas to sixty years imprisonment. Thomas now appeals.

DISCUSSION AND DECISION

I. Motion to Dismiss

Thomas argues that the trial court abused its discretion when it denied his motion to dismiss. Specifically, Thomas contends that he was prejudiced when the State filed new charges under MR-24145 after dismissing the charges under MR-28025.

Because Thomas bore the burden of proving the facts necessary to support his motion to dismiss, he now appeals from a negative judgment. Hollowell v. State, 773 N.E.2d 326, 330 (Ind. Ct. App. 2002). And, an appellate court will reverse a negative judgment only if the evidence is without conflict and leads inescapably to the conclusion that the defendant was entitled to dismissal. Mendoza v. State, 869 N.E.2d 546, 551 (Ind. Ct. App. 2007).

The State is authorized to move for dismissal of the charges at any time before sentencing. Ind. Code § 35-34-1-13(a). Generally, the State may file new charges after dismissing the previous charges "if it can be done without prejudicing the substantial rights of the accused." Hollowell, 773 N.E.2d at 330. Accordingly, the essential element

of this court's review is whether the new charges substantially prejudiced the defendant. Davenport v. State, 689 N.E.2d 1226, 1229 (Ind. 1997).

Whether a defendant has been substantially prejudiced "is a fact-sensitive inquiry, not readily amenable to bright-line rules." Johnson v. State, 740 N.E.2d 118, 120 n.3 (Ind. 2001). Nevertheless, a defendant is generally not substantially prejudiced when "he can receive a fair trial on the same facts and employ the same defense in the second trial as in the first." Hollowell, 773 N.E.2d at 330.

Thomas directs this court to Davenport in support of his assertion that the trial court should have granted his motion to dismiss. In Davenport, the defendant had initially been charged with one count of murder. 689 N.E.2d at 1229. Four days before trial, the State filed a motion to amend the information so that it could add charges of felony murder, attempted robbery, and auto theft. Id. The trial court denied the motion; however, less than a week later, the State dismissed the murder charge and refiled it, along with the three new charges. Id.

Our Supreme Court reversed the conviction on the three additional charges, reasoning that "[w]hile courts have allowed the State significant latitude in filing a second information, the State cannot go so far as to abuse its power and prejudice a defendant's substantial rights." Id. at 1230. The Davenport Court continued that "[b]ecause of a sleight of hand, the State was able to escape the ruling of the original court and pursue the case on the charges the State had sought to add belatedly." Id. On rehearing, the Court opined that the State might have been allowed to refile the murder charge with the additional charges at an earlier stage before the defendant had finished

significant preparation for trial, but that it could not happen on the “very eve of trial.” 696 N.E.2d 870, 871-72 (Ind. 1998).

Thomas also directs our attention to Johnson. In that case, the defendant was initially charged with sexual misconduct. 740 N.E.2d at 119. The trial court excluded evidence relating to the defendant’s prior misconduct after the State had failed to provide formal notice of its intent to use the evidence. Id. at 120. The State responded by filing a motion to dismiss. Id. Over the defendant’s objection, the trial court granted the motion, and the State refiled the original charge and added ten additional counts, including two counts of rape, two counts of criminal deviate conduct, sexual misconduct, criminal confinement, battery, sexual battery, intimidation, and attempted promotion of prostitution. Id. The defendant moved for dismissal of all charges, but the trial court denied the motion. Id.

Our Supreme Court determined that the State had “exceeded the boundaries of fair play,” when, at the eleventh hour, it not only evaded an adverse evidentiary ruling, but also added ten new charges. Id. at 121. The Johnson Court reasoned:

If the State may circumvent an adverse evidentiary ruling by simply dismissing and refiled the original charge, and also “punish” the defendant for a successful procedural challenge by piling on additional charges, defendants will as practical matter be unable to avail themselves of legitimate procedural rights.

Id. The Court also noted that there had been no change in circumstances such as the discovery of new evidence or a honest mistake that justified the State’s actions. Id.

We find Davenport and Johnson distinguishable from the case herein. First, at the core of Davenport and Johnson was prosecutorial misconduct. Specifically, in both of

those cases, the State was trying to sidestep an adverse ruling. See State v. Klein, 702 N.E.2d 771, 776 (Ind. Ct. App. 1998) (noting that the dispositive fact in Davenport was “the abuse of prosecutorial discretion”). Moreover, in Johnson, the State went so far as to “punish the defendant for a successful procedural challenge by piling on additional charges.” 740 N.E.2d at 121.

Conversely, in the instant case, the State was not trying to avoid an adverse ruling or punish the defendant for a successful procedural challenge. Rather, the State had acquired new information from Hudson, namely, that Hudson had shot towards the doorway of Jenkins’s apartment in an attempt to thwart the robbery of a high stakes dice game. Accordingly, the State was forced to change its theory from what appears to be a knowing or intentional murder to felony murder, which occurs when an individual kills another while committing or attempting to commit certain enumerated felonies, including robbery.² See Indiana Code § 35-42-1-1(2) (stating that a person who “kills another . . . while committing or attempting to commit . . . robbery . . . commits murder, a felony). Moreover, the new information supported a new charge of attempted robbery.

Notwithstanding the above analysis, Thomas points out that as early as April 2008, the State possessed the recorded telephone conversations between Thomas and Alan and between Lee and Alan, which formed the basis of the attempted robbery charge. Therefore, Thomas argues, the State could have amended the information to include the

² We note that the record does not include the first set of charges and affidavit of probable cause. However, we can reasonably conclude that Thomas had been initially charged with intentional or knowing murder by reviewing Thomas’s motion to dismiss filed in the trial court.

attempted robbery count as early as April 2008 rather than waiting until February 9, 2009.

Although the State possessed the telephone conversations in April 2008, Hudson corroborated these conversations when he admitted that he had fired his gun to stop a robbery, allowing the State to present a stronger case for attempted robbery. Under these circumstances, we cannot say that the State acted improperly or abused its prosecutorial authority.

Moreover, Thomas has failed to convince us that he was substantially prejudiced by the new charges, inasmuch as he had over two months to prepare for trial. Indeed, this court has held that a defendant was not substantially prejudiced when she was given only three and one-half weeks to prepare for trial under refiled charges. See Jones v. State, 701 N.E.2d 863, 870-71 (Ind. Ct. App. 1998) (holding that the defendant had not been substantially prejudiced when three weeks before trial, the State dismissed two counts of neglect of a dependent and refiled one count together with a new count of murder). Additionally, Thomas does not point to a defense that he had planned to use under the original charges, but could not use under the new charges. Furthermore, although Hudson came forth with new facts which led to the new charges, the relevant witnesses underlying the new charges were substantially similar as were the majority of the relevant facts. Consequently, the trial court did not err when it denied Thomas's motion to dismiss.

II. Right of Confrontation

Thomas argues that he was denied his right of confrontation under the United States and Indiana Constitutions when the trial court admitted a witness's deposition in lieu of in-court testimony. Specifically, Thomas argues that the State did not make a reasonable effort to secure the witness's appearance so as to support the trial court's conclusion that the witness was unavailable.

In Crawford v. Washington, 541 U.S. 36 (2004), the United States Supreme Court held that the Confrontation Clause of the Sixth Amendment "prohibits admission in a criminal trial of testimonial statements by a person who is absent from trial, unless the person is unavailable and the defendant had a prior opportunity to cross-examine the person." Fowler v. State, 829 N.E.2d 459, 464 (Ind. 2005), abrogated on other grounds by Giles v. California, --- U.S. ---, 128 S. Ct. 2678, 171 L.Ed.2d 488 (2008).

With regard to unavailability, our Supreme Court has provided that "[a] witness is unavailable for purposes of the Confrontation Clause requirement only if the prosecution has made a good faith effort to obtain the witness's presence at trial." Garner v. State, 777 N.E.2d 721, 724 (Ind. 2002). Additionally, the Garner Court stated that "[e]ven if there is only a remote possibility that an affirmative measure might produce the declarant at trial, the good faith obligation may demand effectuation." Id. at 724-25 (emphasis in original). "Reasonableness is the test that limits the extent of alternatives the State must exhaust." Id. at 725.

In the instant case, on April 27, 2009, the first day of Thomas's trial, the State informed the trial court that one of its witnesses had given birth the previous Saturday

and was still hospitalized. Apparently, the witness's pregnancy was no surprise to either party because it was noticeable during a deposition taken a month before by Thomas's counsel. In addition, the witness had experienced complications during delivery, and the State provided a medical record documenting her hospitalization.

After the first day of trial had concluded, the prosecutor spoke with the witness and learned that she had been released from the hospital. The witness stated that she would be able to testify the following day; however, later in the evening, the witness told Detective Christine Minka that she did not expect to testify the next day because her doctor had told her that she was not supposed to be on her feet for six weeks. After learning this information, the prosecutor called the witness and emphasized that her testimony was needed and offered to have Detective Minka bring her to court. The witness stated that she would come and testify.

On April 28, 2009, the second day of trial, Detective Minka gave sworn testimony that when she arrived at the witness's residence to escort her to the trial, the witness's mother told her that the witness "was sick as a dog and she'd been on Vicodin most of last night. . . ." Tr. p. 147. Detective Minka also testified that she had gathered the witness's hospital records, which were turned over to the trial court. According to Detective Minka, the hospital records did not contain the witness's diagnosis or the conditions of her release.

Following Detective Minka's testimony, the trial court concluded that based upon her testimony and the other evidence, the witness was "unavailable given her medical condition." *Id.* at 150. The trial court explained that although "[i]t's not exactly clear as

to what her complications may or may not be . . . I think the State has made a good faith due diligence attempt to get [the witness] into court. . . .” Id.

Although we acknowledge that the evidence was somewhat unclear, the trial court could reasonably infer that the witness was suffering from postpartum complications and was, perhaps, intoxicated from pain medication. Additionally, the prosecutor had contacted the witness several times to secure her attendance at trial and went so far as to send Detective Minka to escort her to the trial. Under these circumstances, we cannot say that the trial court’s conclusion that the witness was unavailable was erroneous.

Nevertheless, Thomas argues that the State did not make a good faith effort to secure the witness’s attendance at trial because it did not issue a subpoena when it became apparent that the witness might not testify. Thomas points out that the witness had failed to appear at other court hearings, therefore, “it is not unreasonable to make the State subpoena this witness to secure her attendance.” Appellant’s Br. p. 15. Thomas contends that because the State did not issue a subpoena, the trial court’s determination that the witness was unavailable is erroneous.

While we recognize that in some circumstances, a good-faith effort may require the State to issue a subpoena to secure a witness’s attendance at trial, the circumstances herein did not require it. As discussed above, the evidence tends to indicate that the witness was suffering from postpartum complications and was taking prescription pain medication. Accordingly, the trial court could reasonably determine that the State had made a good faith attempt to secure the witness’s presence at trial and did not err when it

concluded that the witness was unavailable and allowed a redacted version of her deposition to be admitted into evidence.³

III. Hearsay Evidence

Thomas argues that the trial court abused its discretion by admitting hearsay evidence, specifically, the telephone calls between Thomas and his brother, Alan, and between Lee and Alan, that were recorded while Alan was an inmate in the Marion County Jail. The decision to admit or exclude evidence is within the trial court's sound discretion. Bacher v. State, 686 N.E.2d 791, 793 (Ind. 1997). Accordingly, we will not reverse the trial court's decision to admit or exclude evidence absent an abuse of discretion. Becker v. State, 695 N.E.2d 968, 973 (Ind. Ct. App. 1998). An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. Myers v. State, 718 N.E.2d 783, 789 (Ind. Ct. App. 1999).

The Indiana Rules of Evidence define hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Ind. Evidence rule 801(c). Generally, hearsay is not admissible. Evid. R. 802. Nevertheless, some out-of-court statements are either specifically excluded from the definition of hearsay or are considered exceptions to the general rule excluding hearsay evidence. Moreover, errors in the admission of hearsay

³ As stated earlier, Thomas also argues that he was denied his right of confrontation under the Indiana Constitution. Inasmuch as Thomas maintains that “[t]he analysis is the same for the right to face-to-face confrontation under Article 1, §13 of the Indiana Constitution,” appellant's br. p. 14, we need not conduct a separate analysis under the Indiana Constitution.

are considered harmless unless they affect the substantial rights of a party. Dorsey v. State, 802 N.E.2d 991, 994 (Ind. Ct. App. 2004).

A. Telephone Call between Lee, Alan, and Thomas

During the State's direct examination of Lee, portions of two telephone calls were played for the jury. These calls were made from the Marion County Jail on January 7, 2008, by Thomas's brother, Alan, to Lee's apartment. Lee was Alan's girlfriend at the time and arrangements had been made for Thomas to go to Lee's apartment so Alan could speak to him. Thomas objected to the telephone conversations being played for the jury, arguing that, except for his own statements, the conversations contained inadmissible hearsay.

After the first telephone conversation was played, the following colloquy occurred between the prosecutor and Lee:

[Prosecutor]: Tasia, whose voices were on the – that recording we just heard?

[Lee]: Sylvester and Alan and mine. . . .

[Prosecutor]: Were those calls made from your apartment?

[Lee]: Yes.

[Prosecutor]: On the evening of January 7, 2008?

[Lee]: Yes.

Tr. p. 487. Lee further testified as to which male voice belonged to whom. Then, the State played the second telephone conversation and asked Lee the following:

[Prosecutor]: Tasia, whose voices were on that recording?

[Lee]: Mine, Alan's and Sylvester's

[Prosecutor]: Okay. Those calls were made from your apartment?

[Lee]: Yes.

Id. at 489.

Thomas concedes that any statement made by him was admissible, inasmuch as Evidence Rule 801(d)(2) excludes from the definition of hearsay any statement made by a party-opponent. Additionally, Thomas states, and the State agrees, that the conversations “were being used to prove that Sylvester was in Ms. Lee’s apartment at certain times the evening of January 7.” Appellant’s Br. p. 19. Moreover, Thomas points out that “[t]he State’s purpose in playing the tapes to identify Sylvester as the man on the phone in Ms. Lee’s apartment was achieved when Ms. Lee identified Sylvester’s voice on the phone” Id. Put another way, Thomas and the State agree that the purpose of playing the conversations for the jury was to establish that Thomas was in Lee’s apartment during the evening of January 7, 2008, rather than to reveal the actual content of the conversations.

As stated earlier, hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Evid. R. 801(c) (emphasis added). Conversely, “out-of court statements that are offered for a purpose other than to prove the truth of the matter stated are not hearsay.” Patton v. State, 725 N.E.2d 462, 464 (Ind. Ct. App. 2000).

From Thomas’s own argument and the colloquies that occurred between the State and Lee, we can reasonably conclude that the telephone conversations were not admitted

for the truth of the matters asserted during the conversations. Indeed Thomas and the State agree that the factual statements made during the conversations were not relevant to any issue during Thomas's trial.⁴ Instead, the conversations were admitted to demonstrate that Thomas was present at Lee's apartment on January 7, 2008. Consequently, the trial court did not abuse its discretion when it admitted these recorded conversations.

B. Telephone Call Between Lee and Alan

During direct examination, Lee testified that she knew Thomas because he was her boyfriend's brother and that she knew that Thomas was planning to rob Jenkins. Thomas cross-examined Lee about inconsistencies between her trial testimony and her previous statements to Detective Mannina. On January 8, 2008, Lee told Detective Mannina that she did not know the two men who had held her hostage and that she had had no knowledge of where the robbery would occur.

It is undisputed that on redirect, the State introduced a third recording of a telephone conversation in which Lee says that there is something going on with her neighbor that she did not want to happen and that she is scared. Thomas objected to the recording, arguing that it contained inadmissible hearsay. The trial court overruled this objection, concluding that the recording contained present sense impressions, an exception from the general hearsay rule. See Evid. R. 803(1) (stating that a present sense

⁴ State's Exhibit 55 is purported to be an audio disk containing all the calls in which Alan participated while in the Marion County Jail. We note, however, that the disk is missing from its envelope in the exhibits. Consequently, we were unable to review the actual conversations. Nevertheless, from the colloquies that occurred after the phone conversations were played for the jury coupled with the parties' agreement that the actual content of the statements was irrelevant, we can reasonably conclude that the conversations were not used for the truth of the statements made during the conversations.

impression is “[a] statement describing or explaining a material event, condition, or transaction, made while the declarant was perceiving the event, condition or transaction, or immediately thereafter”).

We need not determine whether Lee’s statements to Alan qualify as present sense impressions, inasmuch as they were not hearsay requiring a qualifying exception to admit into evidence. Lee’s statements in the telephone conversation were admitted after her credibility had been attacked during cross-examination. Thus, the statements were not offered as substantive evidence that what Lee was saying was true, but instead, were offered for nonsubstantive, namely, rehabilitative purposes.

Notwithstanding the above analysis, Thomas argues that “[a]lthough defense counsel attacked Ms. Lee’s credibility with her prior statement to police in which she denied knowing who Sylvester was going to rob, nothing in the defense line of questioning implied that Ms. Lee had a motive to fabricate her testimony.” Appellant’s Br. p. 21. This argument confuses the use of prior consistent statements as substantive evidence, which is governed by Evidence Rule 801(d)(1)(B), and using prior consistent statements to rehabilitate a witness whose credibility has been attacked, which is governed by caselaw.

Evidence Rule 801(d)(1)(B) provides that out-of-court statements made by a witness who testifies at trial and is subject to cross-examination concerning the statements are admissible as substantive evidence if the statements are consistent with the witness’s trial testimony and are offered to rebut an express or implied charge against the witness of a recent fabrication. Moreland v. State, 701 N.E.2d 288, 291-92 (Ind. Ct. App.

1998). The prior consistent statement must have been made before the motive to fabricate arose. Evid. R. 801(d)(1)(B); Marshall v. State, 643 N.E.2d 957, 959 (Ind. Ct. App. 1994). Accordingly, if the requirements of Rule 801(d)(1)(B) are satisfied, prior consistent statements may be admitted for substantive purposes or, in other words, for the truth of the statements themselves.

By contrast, prior consistent statements may also be admitted for rehabilitation purposes after a witness's credibility has been attacked. Under these circumstances, the statements are not offered for their truth, but are offered to rehabilitate a witness whose credibility has been impeached with prior inconsistent statements. Bassett v. State, 895 N.E.2d 1201, 1213-14 (Ind. 2008); see also Thompson v. State, 223 Ind. 39, 41, 58 N.E.2d 112, 112 (1944) (recognizing that “[i]t has long been the rule,” that when a witness is impeached by prior inconsistent statements, “it is permissible” to rehabilitate the witness with prior consistent statements).

Here, Lee's prior statements made during her telephone conversation with Alan were introduced to rehabilitate her after she had been impeached by her inconsistent statements to Detective Mannina. Consequently, the prior consistent statements were not hearsay, and the trial court did not abuse its discretion when it admitted them into evidence.

C. Harmless Error

Even assuming solely for argument's sake that the telephone conversations contained inadmissible hearsay, any error in their admission was harmless. An error in the admission of evidence is harmless “if its probable impact on the jury, in light of all

the evidence in the case, is sufficiently minor that it did not affect the substantial rights of a party.” Willey v. State, 712 N.E.2d 434, 444 (Ind. 1999).

In the instant case, Lee testified at trial that Thomas was in her apartment multiple times on January 7, 2008. Additionally, Thomas’s DNA was found on cigarettes left in Lee’s apartment. Furthermore, Lee testified that she knew Thomas before January 7 because he was her boyfriend’s brother and that she knew that Thomas planned to rob Jenkins on January 7, 2008. Therefore, the information contained in the telephone conversations was merely cumulative of Lee’s in-court testimony and did not violate Thomas’s substantial rights.

IV. Prosecutorial Misconduct

Thomas contends that the trial court abused its discretion when it denied his motion for a mistrial. Thomas maintains that a mistrial was necessary because the prosecution repeatedly engaged in misconduct that prevented him from receiving a fair trial.

A mistrial is an “extreme remedy” that is warranted only when no other curative measure can remedy the situation. Kirby v. State, 774 N.E.2d 523, 533 (Ind. Ct. App. 2002). The decision whether to grant a motion for a mistrial is within the trial court’s sound discretion, and we will reverse only for an abuse of that discretion. Id. An abuse of discretion occurs if the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court. Gibson v. State, 733 N.E.2d 945, 951 (Ind. Ct. App. 2000).

When a defendant argues that the prosecutor engaged in misconduct, the appellate court must determine ““(1) whether the prosecutor engaged in misconduct, and if so, (2) whether the misconduct, under all the circumstances, placed the defendant in a position of grave peril to which he or she would not have been subjected.”” Baer v. State, 866 N.E.2d 752, 756 (Ind. 2007) (quoting Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006)). The gravity of the peril is determined by the probable persuasive effect on the jury’s decision “rather than the degree of impropriety of the conduct.” Id.

Thomas asserts that there were three instances of prosecutorial misconduct. The first occurred after the first audio tape was played for the jury and involved the following exchange:

[Prosecutor]: Can you identify for the jury whose voice was the defendant and whose voice was Alan?

[Lee]: The first voice that you heard – the first male’s voice that you heard was Sylvester’s and the second voice was Alan’s.

[Prosecutor]: For example, the one that says –

[Defense Counsel]: Judge, we’re gonna object cause, first of all, it’s leading and it’s rehashing. The tape speaks for itself.

[Prosecutor]: The tape doesn’t speak for itself cause the jury doesn’t know which voice was which person’s voice and that’s all we’re trying to clarify, Judge. I’m certain defense doesn’t want them to know that but it’s important for that distinction to be made.

[Defense Counsel]: Judge –

[Court]: And I think she had made –

[Defense Counsel]: – inappropriate – request admission [sic] for the assistant prosecutor as an inappropriate argument.

[Court]: The – you have ask [sic] the question and I believe she has answered it.

Tr. p. 487-88 (emphasis by Thomas). After the second audio tape was played for the jury, the following exchange occurred:

[Prosecutor]: Did you hear him talking to his brother about –

[Defense Counsel]: Judge, objection, the tape speaks for itself. We have the conversation.

[Prosecutor]: No, Judge, the tapes don't speak for themselves because we haven't been permitted to admit all the tapes.

[Court]: Yeah, I think this is a different area of inquiry. I think he's permitted – it's permissible.

[Prosecutor]: Did you hear the defendant talking about –

[Defense Counsel]: Judge, may we approach?

SIDEBAR

[Defense Counsel]: Mr. Cummings has already said on the record statements about what we're trying to – want them to believe and now he's saying – he just made a statement about – well we – we – we couldn't play all the tapes we wanted to which frankly isn't true. We would ask that Mr. Cummings be admonished to quit making comments like that and if it continues we'll have no alternative but to ask for a mistrial. It's ridiculous

Tr. p. 490-91 (emphasis by Thomas). During redirect examination of Lee and after the third audio tape had been played, the following colloquy occurred:

[Prosecutor]: Let's finish that – right after you said no he said okay and then you said to finish your answer that you . . . he was talking about I was supposed to tell his brother something. Did I tell him –

[Defense Counsel]: Your honor, I'm gonna object. This is not in context.

[Prosecutor]: It's the very next question, Judge – I mean he doesn't want the jury to hear her answer.

[Court]: Well –

[Defense Counsel]: Judge, can we approach?

[Court]: Approach.

[Defense Counsel]: Approach – mistrial. This is the third time he's done that. They're inappropriate, unethical.

SIDEBAR

[Court]: Hang on – hang on, Gents.

[Prosecutor]: They know it's inappropriate and unethical to be screaming as you asked us to approach.

[Defense Counsel]: Judge, with regard to Mr. Cummings statement that, well, they don't want you to hear that we've ask[ed] the Court to admonish him not to make those comments. That's about the fourth time he's done it. It's extremely prejudicial and we are asking for a mistrial.

Tr. p. 568-70 (emphasis by Thomas). The trial court denied the motion for mistrial, but admonished the jury as follows:

Ladies and gentlemen, I'm gonna issue an admonishment which essentially that Mr. Cummings made some extraneous remarks regarding opposing counsel and that's not proper and cannot be tolerated. All his questions need to be directed at the witness so that wasn't the proper way for Mr. Cummings to handle it. You are so admonished and we may proceed with the next question.

Tr. p. 572. Defense counsel then moved for a mistrial on the ground that the admonishment was not adequate. The trial court denied this motion for mistrial.

Thomas argues that the prosecutor's repeated comments that the defense did not want the jury to hear evidence implied that the defense was trying to obscure the truth. Additionally, Thomas contends that the prosecutor's comment that he had not been permitted to admit all the tapes implied that the prosecutor had information that the jury did not have that would show that Thomas was guilty.

This court has stated that the prosecutor may not characterize his role as the sole presenter of truth while the defense counsel's role is to obscure the truth and seek an acquittal. Lainhart v. State, 916 N.E.2d 924, 932 (Ind. Ct. App. 2009); Bardonner v. State, 587 N.E.2d 1353, 1360 (Ind. Ct. App. 1992). If the jurors believe that only the prosecutor is presenting the truth, they may evaluate the evidence from his or her perspective. Bardonner, 587 N.E.2d at 1361-62. Furthermore, it is improper for the prosecutor to imply that he has knowledge of evidence that would tend to prove that the defendant is guilty. Johnson v. State, 453 N.E.2d 365, 369 (Ind. Ct. App. 1983).

While we discourage comments such as those made by the prosecutor, there are several factors that distinguish the prosecutor's comments herein from the cases in which the prosecutor's conduct warranted a mistrial. For instance, the prosecutor did not directly tell the jury that his purpose was to present the truth while defense counsel's purpose was to represent his client's interests. See Bardonner, 587 N.E.2d at 1362 (holding that prosecutor's comments during voir dire that his job was to seek the truth while defense counsel would do anything to hide the truth placed the defendant in grave peril, thus warranting a new trial). Additionally, the comments at issue herein were not prolonged, but rather, were brief responses to the defense's objections. See Cooper v.

State, 854 N.E.2d 831, 841 (Ind. 2006) (concluding that a new sentencing hearing was necessary where the cumulative effect of the prosecutor’s “drumbeat repetition assailing [the defendant’s] character. . . . hampered the jury’s ability to decide dispassionately”); see also Miller v. State, 623 N.E.2d 403, 408 (Ind. 1993) (concluding that a new trial was not warranted where “the prosecutor’s remarks were not as extended and not as pointed as those in Bardonner”). Because of these distinguishing factors, we cannot say that the prosecutor’s statements placed Thomas in grave peril. Consequently, this argument fails.

V. Jury Questions and Contamination

Thomas contends that he was denied a fair trial in violation of the Fourteenth Amendment to the United States Constitution and Article I, section 13 of the Indiana Constitution when the trial court engaged in questioning of the jurors without Thomas being present. Additionally, Thomas maintains that the trial court erred when it denied his motion for a mistrial because of jury contamination caused by one juror’s concern for her safety.

During the second day of trial, Juror 11 expressed concerns because she teaches at the Marion County Jail, where Alan, Thomas’s brother, is an inmate. Juror 11 did not want inmates to know that she was on a jury. During questioning by the trial court, the prosecutor, and the defense counsel, Juror 11 stated that she was concerned for her safety. Juror 11 was excused, and the other jurors were questioned extensively to determine to what extent they were aware of Juror 11’s concerns. While the jurors were questioned individually, Thomas was removed from the courtroom over his objection.

A. Absence from Critical Stage

Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the accused has a right to be present

“whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge. . . . [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence and to that extent only.”

Ridley v. State, 690 N.E.2d 177, 180 (Ind. 1997) (quoting United States v. Gagnon, 470 U.S. 522 (1985)), overruled on other grounds by Whedon v. State, 765 N.E.2d 1276 (Ind. 2002). The burden is on the defendant to show how his presence would have contributed to a more reliable determination of the fact in issue.

Similarly, Article I, section 13 of the Indiana Constitution “protects a defendant’s right to be present at every stage of a criminal proceeding which requires the presence of the jury,” or, in other words, at every critical stage. Id. at 181. Unless a defendant expressly waives his right to be present at a critical stage, “a defendant’s absence raises an inference of prejudice. However, the inference can be rebutted by the State and may be harmless.” Id.

In Godby v. State, 736 N.E.2d 252 (Ind. 2000), our Supreme Court addressed a similar claim as the one presented herein. In Godby, two days into trial, a juror requested to speak with the judge. Id. at 255. The defendant was not present because he had been taken back to the jail for lunch; however, his attorneys and the prosecutor were available and accompanied the judge to confer with the juror. Id. The juror informed the judge and counsel that he recognized a man sitting with the victim’s family as someone with

whom he worked. Id. The juror stated that he was not influenced by this recognition, that he could render a fair and impartial verdict based solely on the evidence, and that he could continue as a juror. Id. at 255-56.

Defense counsel was given an opportunity to question the juror, and the judge instructed the juror to not discuss with the other jurors the fact that he recognized a possible member of the victim's family or that he had been questioned. Id. at 256. When the defendant returned from jail, the trial court instructed the defense counsel to discuss the matter with the defendant and advise the court if the defense wanted to make a record regarding the juror's revelations. Id. After discussing the matter, the defense stated that there was no need to bring the juror into the courtroom for the purpose of making a record. Id.

On appeal, the defendant argued that his right to be present at all critical stages of his trial was violated when the juror was privately interviewed by the trial court and counsel in his absence. Id. at 257. Relying on its decision in Ridley, our Supreme Court determined that "the defendant's alleged absences were not related to the presentation of witnesses or evidence and were essentially during non-substantive proceedings unrelated to the defendant's right of cross examination." Id. Additionally, the defendant had failed to demonstrate that "any of these proceedings were critical to the outcome of the trial or that his presence would have contributed to the fairness of the procedure." Id. Moreover, the proceedings at issue had not occurred "in the presence of the assembled jury or at any other critical proceeding." Id.

In the instant case, Thomas was not present when each juror was questioned individually by the trial court and counsel regarding the effect of Juror 11's concern for her safety if she continued to serve on the jury. As in Godby, Thomas's absence was during nonsubstantive proceedings that were not related to the presentation of witnesses and evidence; thus, Thomas's right of cross-examination was not implicated. In addition, the jurors were questioned individually rather than in the presence of the assembled jury. Moreover, although Thomas was not in the courtroom, his attorneys were, and Thomas does not contend that his attorneys were unable to consult with him. Under these circumstances, we cannot conclude that Thomas was denied a fair trial because he was not present when the jurors were individually questioned.

Notwithstanding the above analysis, Thomas argues that his presence was necessary to "accurately gauge the juror's reaction to him personally and thus determine whether the jury had been contaminated." Appellant's Br. p. 29. Put another way, Thomas argues that his presence could have contributed to a more reliable determination of whether the jury had been contaminated by the excused juror's fears for her safety.

Here, the trial court removed Thomas from the courtroom while each juror was individually questioned because it was "concerned the jury would not be candid with the defendant here in light of the nature of the discussions and in discussion of jail [and to] protect the integrity of the jury." Tr. p. 630. In light of the fact that Juror 11 was excused because she feared for her safety, we cannot say that this determination was without merit. Indeed, the jurors may not have been comfortable answering honestly with Thomas in the courtroom, and this would have impeded the trial court's ability to

determine whether or not the jury was contaminated. Consequently, Thomas has failed to demonstrate that his presence in the courtroom would have contributed to a more reliable determination, and Thomas was not denied a fair trial because he was not present in the courtroom while the jurors were individually questioned.

B. Contaminated Jury

In a related argument, Thomas claims that the trial court erred when it denied his motion for a mistrial on the grounds that the jury was contaminated. As stated earlier, the decision whether to grant a motion for mistrial is within the sound discretion of the trial court, and this court will reverse the trial court's determination only upon a showing of an abuse of that discretion. Kirby, 774 N.E.2d at 533.

Article I, section 13 of the Indiana Constitution provides that “[i]n all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury.” Accordingly, a biased jury must be dismissed. Harris v. State, 659 N.E.2d 522, 525 (Ind. 1995). Whether to excuse a juror for bias rests within the sound discretion of the trial court, and “[w]e will sustain the trial court's decision unless it is illogical or arbitrary.” Joyner v. State, 736 N.E.2d 232, 238 (Ind. 2000).

Here, after Juror 11 was excused, the defense moved for individual voir dire of the jury, which the trial court granted. During the individual questioning, five jurors stated that they knew that Juror 11 was concerned for her safety because she worked at the jail, and all five stated that this had no impact on how they would decide the case. The remaining seven jurors were aware to varying degrees that Juror 11's job as a teacher at the jail had something to do with why she was excused. Under these circumstances, we

cannot say that the trial court abused its discretion when it concluded that the jury was not contaminated and denied Thomas's motion for a mistrial.

VI. Double Jeopardy

Thomas maintains that “[t]he trial court erroneously merged the attempted robbery conviction with the felony murder conviction instead of vacating the attempted robbery conviction.” Appellant’s Br. p. 31. This court has recognized that “it is a violation of double jeopardy to convict and sentence a defendant for both felony murder and the underlying [felony] because the conviction for felony murder could not be had without proof of [the underlying felony].” Glenn v. State, 884 N.E.2d 347, 357 (Ind. Ct. App. 2008), trans. denied. Nevertheless, our Supreme Court has stated that “[w]here the court merges the lesser-included offense without imposing judgment, there is no need to remand on appeal to ‘vacate.’” Green v. State, 856 N.E.2d 703, 704 (Ind. 2006) (emphasis added).

In Green, the defendant pleaded guilty to attempted robbery, conspiracy to commit robbery, burglary, and conspiracy to commit burglary. Id. At the sentencing hearing, the trial court stated that the attempted robbery and conspiracy to commit robbery ““merge[d] . . . so that only one sentence can be imposed between the two counts.”” Id. (quoting tr. p. 166).

On appeal to our Supreme Court, the issue was whether the merger was inadequate such that the case had to be remanded to the trial court with instructions to vacate the conspiracy conviction. Id. The Green Court held that the merger was not inadequate, explaining that “a defendant’s constitutional rights are violated when a court enters

judgment twice for the same offense, but not when a defendant is simply found guilty of a particular count.” Id. Moreover, “a merged offense for which a defendant is found guilty, but on which there is neither a judgment nor a sentence, is ‘unproblematic’ as far as double jeopardy is concerned.” Id. (quoting Carter v. State, 750 N.E.2d 778, 781 (Ind. 2001)).

Here, at the sentencing hearing, the trial court stated that “Count 2 will be merged into Count 1, the murder count, and we’ll proceed on that count and that count alone.” Tr. p. 765. Additionally, although the Chronological Case Summary states that judgment of conviction was entered for felony murder and attempted robbery, the “Abstract of Judgment,” (Abstract) which was signed by the trial judge, indicates that a judgment of conviction was entered only for felony murder. Appellant’s App. p. 24. Likewise, the Abstract shows that Thomas was sentenced only on the felony murder count. Under these circumstances, there is no need to order the trial court to vacate because it appears that a judgment of conviction was not entered for attempted robbery. Cf. Glenn, 884 N.E.2d at 358 (remanding with instructions to vacate where the trial court entered judgments of conviction and imposed sentences for felony murder and robbery resulting in serious bodily injury, the underlying felony).

VII. Inappropriate Sentence

Finally, Thomas argues that his sixty-year sentence is inappropriate in light of the nature of the offense and his character. Under Indiana Appellate Rule 7(B), an appellate court may revise a sentence that is “inappropriate in light of the nature of the offense and the character of the offender.” The defendant carries the burden to convince this court

that the sentence imposed is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)).

Indiana Code section 35-50-2-3 provides that “[a] person who commits murder shall be imprisoned for a fixed term of between forty-five (45) and sixty-five (65) years, with the advisory sentence being fifty-five (55) years.” Here, Thomas was sentenced to sixty years, which is five years more than the advisory sentence and five years less than the maximum sentence.

As for the nature of the offense, Jenkins was shot and fatally wounded while Thomas and his accomplice attempted to rob the participants of a high stakes dice game occurring in Jenkins’s apartment. Indeed, Thomas randomly shot into a room full of people, showing no concern for their lives. Additionally, the evidence indicates that this was not a crime of opportunity, but rather, was thoughtfully planned in advance.

As for Thomas’s character, when he was only thirteen years old, he was adjudicated a delinquent for committing an act that would have been battery if committed by an adult. When Thomas was seventeen, he was adjudicated for an act that would have been resisting law enforcement if committed by an adult. Less than one year later, in August 2000, Thomas was arrested for robbery and carrying a handgun without a license and was eventually sentenced to sixteen years. While in prison, Thomas was disciplined for numerous offenses, including introduction of a dangerous weapon and tampering with or possessing tools to alter locks.

Thomas was paroled on April 24, 2007, but was arrested soon thereafter for criminal recklessness with a motor vehicle. The instant offenses occurred less than one

year later, while Thomas was still on parole. While we commend Thomas for obtaining a college degree, his record indicates that he has no regard for the law or even the lives of other individuals. Consequently, in light of the nature of the offense and Thomas's character, he has failed to convince us that his sixty-year sentence is inappropriate, and we decline to revise the sentence.

The judgment of the trial court is affirmed.

BAILEY, J., and ROBB, J., concur.