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IN THE
COURT OF APPEALS OF INDIANA

DESMOND TURNER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0810-CR-611
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION COUNTY SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No. 49G02-0701-FD-18395

April 29, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Desmond Turner appeals his conviction for class D felony battery on a law enforcement officer.[1] He contends that the court improperly advised the jury that it could discuss the entire case prior to the start of deliberations. He argues that "case" encompasses the parties and that, therefore, the jury was permitted to discuss unrelated prejudicial allegations against Turner. We disagree and therefore affirm.

Facts and Procedural History

The facts most favorable to the verdict reveal that on January 20, 2007, Turner was residing in the Marion County jail, Two West floor, cellblock Two-C. Tr. at 112. That morning, a deputy, who was pregnant, let Turner out of his cell for a shower. After warning Turner that he had five more minutes of shower time, the female deputy requested the assistance of other officers to conduct a shower change. *Id.* at 50. Deputy Michael Gunyon and Deputy Derek Jones responded. Deputy Gunyon entered the cellblock and Deputy Jones followed. Deputy Gunyon stopped at Turner's cell to see if he was inside, and "all of a sudden [Gunyon] was being hit." *Id*. at 64. Turner "whal[ed] away at" Deputy Gunyon, striking him with both fists, scratching him, and trying to "fishhook" him. *Id*. at 65-67, 89. As Deputy Gunyon and Turner struggled, Deputy Jones sprayed Turner with mace. *Id.* at 90. Turner and Deputy Gunyon fell on a table and then to the floor. *Id.* With the help of a third deputy, Deputies Gunyon and Jones subdued and handcuffed Turner. *Id*.

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[1] *See* Ind. Code § 35-42-2-1(a)(2)(A).

Turner's attack left Deputy Gunyon bleeding profusely from his nose and face. He suffered abrasions, a large bruise to his thigh, scratches, as well as black and swollen eyes. *Id*. at 70-73. Deputy Gunyon was taken for medical treatment, received pain relief, and was x-rayed. *Id*. at 74.

On January 31, 2007, the State charged Turner with battery on a law enforcement officer resulting in bodily injury. App. at 26. The State filed an amended information on June 19, 2008. *Id.* at 93-94. At the conclusion of a trial held on August 14, 2008, a jury found Turner guilty as charged. *Id*. at 141. The following month, the court ordered Turner to serve a three-year sentence. Tr. at 198.

Discussion and Decision

Before trial, the court reviewed the preliminary instructions that it planned to read. One of the instructions stated:

> During the trial, there will be periods of time when you will be allowed to separate such as recesses, rest periods, lunch periods and overnight. When you are outside of the jury room, you must not discuss the case among yourselves or with anyone else. *However, you may discuss the* ***evidence*** *with your fellow jurors in the jury room during recesses from trial when all are present as long as you reserve judgment about the outcome of the case until the deliberations begin.*
>
> From now until the trial is concluded, do not talk to any of the parties, their lawyers, or any of the witnesses.
>
> If anyone makes any attempt to talk to you concerning this case, you should report the fact to the court immediately.
>
> If there is information or discussion about the trial in newspapers, on radio, on television, on the internet, or among other people, you should not read, watch, or listen to these accounts. You must focus your attention to the court proceedings and reach a verdict solely upon the evidence and the law presented in this court.
>
> During the trial, you must not consume any alcohol or drugs that would affect your ability to hear the evidence fairly and impartially.

> You should keep an open mind and not reach a judgment about the outcome in this case until you have heard all the evidence, arguments of counsel, and the final instructions as to the law, and you begin your deliberations.

App. at 108 (italics and bold added). At that time, defense counsel objected to the third sentence of the instruction, arguing as follows:

> I realize that's part of the jury rules but it's our position and I think at this point that that is contrary to the instruction they get on the presumption of innocence that they are to presume the Defendant innocent throughout the trial. This does not tell fellow jurors – tell jurors that they should not try to convince other jurors as to the weight of the evidence, the credibility of the witness, it does not instruct them to keep in mind a presumption of innocence.

Tr. at 21. The trial court overruled Turner's objection, noted a continuing objection, and read the instruction to the jurors. *Id*. at 22.

On appeal, Turner does not make the same weight and credibility argument regarding the above instruction.[2] Indeed, he does not actually challenge the *instruction*. Rather, he finds fault with the following, related *admonishment*, which was read before each of the three recesses during his battery trial:

> Remember during the course of the trial there will be periods of times when you'll be outside the presence of the courtroom for rest periods, other times when you'll be allowed to separate for lunch and over night, during all those times you're outside the courtroom, you must not talk about this case among yourselves or with anyone else. However, *you may discuss the* ***case*** *with your fellow jurors in the jury room as long as all are present and as long as you reserve judgment about the outcome of the case until the case has been submitted to you for your deliberation.* Don't read, view or listen to any publicity, keep an open mind, don't form or express an opinion during the

[2] This is wise because there is no prohibition on jurors discussing *evidence* with fellow jurors in the jury room during breaks when all are present and provided that judgment is reserved until deliberations begin.

> course of the trial and reach no conclusion about the case until it is finally submitted to you for your deliberation.

Id. at 82-83, 140-41, 156-57 (italics and bold added). Specifically, Turner complains that the word "case" has a much broader definition than the term "evidence." He contends that "case" includes not only evidence, but parties and arguments as well. In his particular situation, he asserts that this is especially problematic because in a separate cause he has been accused of killing seven people. He is concerned that the jurors may have discussed the well-publicized murder allegations[3] as part of this battery "case."

For a variety of reasons, Turner's appeal is unavailing. First, the jurors were instructed that they should shield themselves from information or discussion of the trial in newspapers, on the radio, on television, on the internet, or among other people. *See* App. at 108. They were further instructed that they "must focus [their] attention to the court proceedings and reach a verdict solely upon the evidence and law presented in this court" and disregard any and all information derived from other sources. *Id.* at 108, 120, 135. We assume that the jury followed the court's instructions. *Harris v. State*, 824 N.E.2d 432, 440 (Ind. Ct. App. 2005) ("We presume that the jury follows the trial court's instructions."). Second, the admonishment was neither new nor unusual, but tracked Indiana Criminal Pattern Jury Instruction 1.01. *Gravens v. State*, 836 N.E.2d 490, 493 (Ind. Ct. App. 2005) (noting that the preferred practice is to use pattern jury instructions), *trans. denied*. Third, for these purposes, our caselaw has not drawn a sharp line between "case" and "evidence." *See*

Buckner v. State, 857 N.E.2d 1011, 1016-17 (Ind. Ct. App. 2006) (concluding that "trial court did not abuse its discretion in instructing the jury that it could discuss the case prior to the close of the evidence and that giving Pattern Jury Instruction 1.01 was proper" and using case and evidence interchangeably); *see also Fuller v. State*, 852 N.E.2d 22, 24-25 (Ind. Ct. App. 2006), *trans. denied*.

Fourth, and perhaps, most importantly, defense counsel did not object for any reason on any of the three occasions that the now-questioned admonishment was read. Accordingly, fundamental error must be shown. *Cf. Taylor v. State*, 687 N.E.2d 606, 608-09 (Ind. Ct. App. 1997) (noting that a defendant who fails to object at trial to an issue (an instructional issue in that case) waives any claim of error on appeal unless the error rises to the level of fundamental error), *trans. denied.* Here, four officers, the female deputy who originally asked for assistance, Deputy Gunyon, Deputy Jones, and the deputy who helped subdue Turner, all confirmed that Turner was engaged in physical contact with Deputy Gunyon. Three of the deputies actually saw Turner hit Deputy Gunyon in the face with his fists. Uncontradicted testimonial and photographic evidence confirmed Deputy Gunyon's injuries. Given such overwhelming evidence of guilt, any possible error in the admonishment was harmless. Turner has not demonstrated fundamental error.

Affirmed.

BRADFORD, J., and BROWN, J., concur.

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[3] Incidentally, defense counsel sought a change of venue due to the other charges, known as the "Hamilton Street Murders." App. at 81; Tr. at 7. However, the motion was denied, and there is no indication that Turner appealed that denial.