

Alfred Solomon appeals his convictions for murder and robbery resulting in serious bodily injury as a class A felony. Solomon raises three issues, which we consolidate and restate as:

- I. Whether the trial court erred in admitting and excluding certain evidence; and
- II. Whether the trial court committed reversible error when it denied the jury's requests for more information during deliberations.

We affirm.

The relevant facts follow. In 1979, thirty-six-year-old Solomon, his twenty-six-year-old wife Debra, and his two-year-old daughter Heather lived in Beaver Dam, Indiana. Every weekend, the family visited Solomon's mother in Anderson, Indiana. The drive from Beaver Dam to Anderson took the Solomons through Marion, Indiana. Solomon frequently stopped in Marion to purchase marijuana because he had difficulty finding it in Beaver Dam. Solomon's friends, Greg and Becki Gardner, assured Solomon they could always find marijuana for him in Marion. On two separate occasions in February 1979, Gardner and his wife each took Solomon to twenty-two-year-old Terry Headley's apartment to purchase marijuana. Both times, Headley refused to sell marijuana to Solomon.

Also, in February 1979, Solomon, his wife, and his daughter drove to North Manchester, Indiana. Solomon left his wife and daughter in the car and went into an upstairs apartment near the local police station. When he returned to the car, he had a handgun he had stolen from the apartment. Solomon explained that he had noticed the gun one night while he was smoking marijuana at the apartment with a friend.

On March 2, 1979, Solomon and his family were on their way to Anderson to visit Solomon's mother when they stopped in Silver Lake so that Solomon could purchase a bottle of gin, which he started drinking immediately. Before the family passed through Marion, Solomon stopped at a K-Mart, where he purchased a clothesline and a roll of tape. At Solomon's request, Debra cut the clothesline into pieces. As the family drove around Marion, Solomon showed Debra a Burger Chef where he wanted her to wait for him later. He then drove to a nearby neighborhood, stopped the car, got out, and told Debra to go back to the Burger Chef and wait for him while he bought some marijuana.

Debra drove back to the Burger Chef and waited for Solomon. While she was there, Solomon walked to Headley's apartment. When Solomon got to the apartment, he tied Headley up with the pieces of clothesline, wrapped the tape he purchased around Headley's head, and superficially cut Headley's neck with a knife he found in the kitchen. Solomon then put a pillow against Headley's head to muffle sounds and shot Headley twice in the head. Solomon took some money from Headley and drove Headley's car to a shopping center next to the Burger Chef where Debra was waiting. Solomon left the car in the parking lot where it was subsequently found.

As he and his family left Burger Chef, Solomon told Debra that he had just killed Headley and that he bet she never thought he could do something like that. Solomon told Debra that he had to go back to Headley's apartment to retrieve a wallet that he thought he might have touched. While Solomon went back inside Headley's house, Debra waited in the car. Richard Pickeral and his father were walking in the area. Pickeral noticed Solomon emerge from Headley's house and run to his waiting car. Pickeral also noticed

that Solomon had collar-length hair, a mustache, and was wearing a brown leather jacket. When Solomon got back to his car, he and his family drove to Anderson. Debra noticed that Solomon had blood on his hands. The following day, Solomon and his family drove to the countryside near Anderson. Solomon stopped and threw the gun he had stolen in North Manchester and had used to kill Headley into a creek. He burned his clothes and threw his shoes into a field.

Headley's fiancée found his body when she returned home from work. His throat had been superficially cut, his hands and feet were bound, and he had been shot with .35 caliber bullets, which could be loaded into a .38 special cartridge. Marion Police Department officers interviewed Solomon and Debra after the murder. Although Solomon was a suspect, he and Debra denied any knowledge of the crime. When Debra was arrested on a prostitution charge in 1980, the police interviewed her again about the murder, but she continued to deny any knowledge of it. However, when Debra was arrested again in 1990 for prescription fraud, she told police that she had information about Headley's murder.

After Debra met with Marion Police Department officers and told them that Solomon had murdered Headley, the officers drove Debra around the surrounding area to find the places where Solomon had first stolen the gun and then disposed of it. The officers learned that on February 9, 1979, the North Manchester Police Department received a report that a .38 special gun had been stolen from a second-story apartment located one half of a block east of the police station. That same gun was found in a nearby creek in June 1979. This information corroborated Debra's account of the theft

and disposal of the gun. The gun was destroyed before any connection was made to Headley's murder.

In 2001, Solomon briefly moved in with Debra and their daughter, Heather. Heather asked her father if he had really killed a man. Solomon responded that he would "go to his grave denying it." Transcript at 761. Another time, Heather asked Solomon if he thought he would make it to heaven after taking someone's life, and Solomon responded that he had asked God to forgive him and that he felt that he had been saved.

In 2009, sixty-eight-year-old Solomon was living with his ninety-year-old mother in Kentucky. On February 10, 2009, Marion Police Department Officers arrested Solomon and charged him with Headley's murder as well as robbery resulting in serious bodily injury. When he was taken into custody, Solomon told the officers that he knew that this day was coming and that he just wished they had waited until his mother died to arrest him. While he was in jail awaiting trial, Solomon called his mother and asked her if she had spoken to their pastor and if their church congregation knew about his arrest. Solomon told his mother to let the congregation know that he was in jail for something that had happened thirty years ago and that God had forgiven him.

Also while he was incarcerated, Solomon told another inmate that was arrested for murdering a man from whom he had tried to purchase marijuana. According to Solomon, he became angry when Headley refused to sell him marijuana because Headley thought he was a "snitch." Transcript at 745.

A jury convicted Solomon of murder and robbery resulting in serious bodily injury. The court sentenced him to sixty years for murder and forty-five years for robbery, to run

consecutive to each other for a total sentence of one hundred five years. Our discussion of the issues includes additional facts.

I.

The first issue is whether the trial court erred in both admitting Debra's testimony about inculpatory statements Solomon made to her during the course of their marriage and in excluding Solomon's evidence that others might have committed the crimes. Our standard of review for the admission of evidence is well settled. A trial court has broad discretion in ruling on the admission or exclusion of evidence. Kimbrough v. State, 911 N.E.2d 621, 631 (Ind. Ct. App. 2009). Such a ruling will be disturbed on review only upon a showing of an abuse of that discretion. Id. An abuse of discretion occurs if the court's decision is clearly against the logic and effect of the facts and circumstances before the court. Id.

A. Inculpatory Statements Solomon Made to Debra

Solomon first contends that the court erred in allowing Debra to testify about the incriminating statements he made to her about his involvement in the crimes, including his statement that he killed Headley. According to Solomon, this statement was a "privileged communication[] between the husband and the wife during the marriage." Appellant's Brief at 12. In support of his contention, Solomon directs us to Indiana Code section 34-1-14-5, the relevant statute at the time of the 1979 murder, which has since been repealed. That statute provided that the confidential communications between a husband and a wife were privileged. See Carlyle v. State, 428 N.E.2d 10, 12 (Ind. 1981) (explaining that privileged communications between husband and wife were restricted to

confidential communications and information gained by reason of the marital relationship).

However, evidentiary rules in effect at the time of trial are those that are applied to the case. See Hardin v. State, 611 N.E.2d 123, 128-129 (Ind. 1993) (noting that Federal Evidence Rule 404(b) was adopted in Lannan v. State, 600 N.E.2d 1334, 1339 (Ind. 1992), and was to be applied at any trial from that day forward, including the remand of defendant's case). Indiana Evidence Rule 501, which was in effect at the time of Solomon's 2009 trial, provides in relevant part that except as provided by statute, no person has a privilege to refuse to be a witness or to disclose any matter. Pursuant to Indiana Code section 34-46-3-1, a husband and wife shall not be required to testify as to communications made to each other. The Indiana Supreme Court has further clarified that although the marital privilege codified at Indiana Code section 34-46-3-1 prevents a court from requiring a spouse to testify as to confidential marital communications, it does not bar the spouse from testifying if the spouse chooses to do so. Glover v. State, 836 N.E.2d 414, 422 (Ind. 2005).

Accordingly, Debra was not barred from testifying about the incriminating statements Solomon made to her because she chose to do so. The trial court did not abuse its discretion in admitting Debra's statements into evidence.

B. Evidence Others Might Have Committed the Crimes

Solomon next argues that the trial court erred in excluding evidence that others might have committed the crimes. Specifically, Solomon offered evidence that an incarcerated John Sage told Grant County Prosecutor Richard Green that someone from

Detroit gave his brother, Bob Sage, an envelope full of money to kill Headley because Headley had “f---ed over” the wrong people. Appellant’s Appendix at 295. Green and the detectives investigating the case concluded that the information was not reliable. Solomon also offered evidence that police took a statement from a woman who stated that two men named Gordon and Bear were going to torture a drug dealer that shot their friend. According to the informant, Gordon and Bear planned to tie up the drug dealer, cut his neck with a razor blade, and then shoot him.

Evidence of a third-party motive tends to make it less probable that the defendant committed the crime, and is therefore relevant under Rule of Evidence 401. Pelley v. State, 901 N.E.2d 494, 505 (Ind. 2009). However, before evidence of a third party is admissible, the defendant must show some connection between the third party and the crime. Id.

For example, in Joyner v. State, 678 N.E.2d 386, 389 (Ind. 1997), Joyner wished to present evidence that a third party committed the murder for which he was charged. Specifically, Joyner wished to present evidence that a third party was having an affair with the victim, worked with the victim, had engaged in sexual relations with the victim the day before her disappearance, had argued with the victim the day of her disappearance, and had been tardy to work and falsified his time card the day after the disappearance. The defendant had already presented expert testimony that a hair sample found inside the plastic bag covering the victim’s head excluded the victim and the defendant, but was a ninety-eight to ninety-nine percent probability match to the third party. Under these circumstances, the Indiana Supreme Court determined that the

defendant had sufficiently connected the third party to the crime, and the excluded evidence could have established motive and opportunity. Id. at 390. The Court therefore reversed the trial court's exclusion of evidence and remanded for a new trial. Id.

In contrast, the Court rejected a similar claim in Lashbrook v. State, 762 N.E.2d 756, 757 (Ind. 2002), where the defendant wished to present evidence that a third party had said the victim "was gonna die." The Court held that "[i]n stark contrast to Joyner, the defendant presents no material evidence that [the third party] was connected to the crime. The phrase allegedly uttered by the [the third party] does not tend to show that [he] committed the murder." Id. at 758.

The facts in the case before us are more analogous to those in Lashbrook than those in Joyner. Specifically, much of the evidence offered by Solomon would have been inadmissible as hearsay and all of it was speculative. There was no material evidence that a third party was connected to the crime. Based upon the record and under these circumstances, we conclude that the trial court did not abuse its discretion in excluding this evidence.

II.

The second issue is whether the court committed reversible error when it denied the jury's requests for more information during deliberations. Specifically, during deliberations, the jury sent the trial court the following note: "We would like to see the testimony of Rick Perrell." Transcript at 1387. However, no one named Rick Perrell testified during Solomon's trial. Consequently, the trial court "told the bailiff since there

was no Rick Perrell, . . . they'd have to remember the testimony in the case from their memory.” Id. at 1388.

Later, the jurors asked if they could “have the written transcript of the phone transcripts of [Solomon] and his mother.” Id. The trial court responded that “there was no transcript, but if they wanted to . . . re-hear the testimony of that, then we would have to return, get everybody back and bring them into Court and replay that testimony.” Id. The jurors did not want that done.

Solomon contends that the trial court’s handling of these requests violated his right to be present under both Article 1, Section 13 of the Indiana Constitution and Indiana Code section 34-36-1-6. We address each of his contentions in turn.

The Indiana Supreme Court has set forth an established procedure for the trial court to follow when the deliberating jury makes a request for additional guidance during its deliberations. Dickenson v. State, 835 N.E.2d 542, 551-552 (Ind. Ct. App. 2005) (citing Stephenson v. State, 742 N.E.2d 463, 492 (Ind. 2001), cert. denied, 534 U.S. 1105 (2002)), trans. denied. Specifically, the trial court should:

notify the parties so they may be present in court and informed of the court’s proposed response to the jury before the judge ever communicates with the jury. When this procedure is not followed, it is an ex parte communication and such communications between the judge and the jury without informing the defendant are forbidden. However, although an ex parte communication creates a presumption of error, such presumption is rebuttable and does not constitute per se grounds for reversal. When a trial judge responds to the jury’s request by denying it, any inference of prejudice is rebutted and any error deemed harmless.

Dickenson, 835 N.E.2d at 551 (quoting Stephenson, 742 N.E.2d at 492).

Here, the trial court erroneously communicated with the jury without notifying the parties. This was an ex parte communication that created a presumption of error. See Dickenson, 835 N.E.2d at 551. However, the judge did not supplement the jury's instructions. Rather, the court twice denied the jury's request for additional information. Therefore, the inference of prejudice was rebutted and any error resulting from these communications was harmless. See Stephenson, 742 N.E.2d at 492 (holding that judge-jury communication outside the defendant's presence was harmless error where the court denied jury's request to listen to the defendant's taped statement for a second time and to review depositions already read into evidence).

Solomon also contends that this ex parte communication violated Indiana Code section 34-36-1-6, which provides as follows:

If, after the jury retires for deliberation:

- (1) there is disagreement among the jury as to any part of the testimony;
or
- (2) the jury desires to be informed of any point of law arising in the case;

the jury may request the officer to conduct them into court, where the information shall be given in the presence of, or after notice to, the parties or the attorneys representing the parties.

However, this statute does not require the presence of or notice to the parties or their attorneys whenever the trial court responds to a jury request. Pendergrass v. State, 702 N.E.2d 716, 720 (Ind. 1998). Rather, notice or presence is required when information is given. Id. (emphasis in the original). Because no information was given to the

deliberating jury in this case, the statute was not violated. See id. We find no reversible error.

For the foregoing reasons, we affirm Solomon's convictions.

Affirmed.

ROBB, C.J., and RILEY, J., concur.