

STATEMENT OF THE CASE

Ronnie Lemar Jones appeals his conviction of attempted murder¹ and his adjudication as an habitual offender.²

We affirm.

ISSUES

1. Whether fundamental error occurred when no mistrial was declared after testimony by the investigating officer.
2. Whether the trial court abused its discretion in denying Jones' motion for a new trial.
3. Whether the trial court acted improperly in identifying Jones' criminal history as an aggravating circumstance while using two prior convictions as the basis for habitual offender enhancement.

FACTS

On February 28, 2010, at approximately 12:30 a.m., George Ladell Howell went to visit Jones. Another man, Anthony Williams ("Tony") was at Jones' residence, along with his sister and Jones' girlfriend, Grace Williams. While drinking alcoholic beverages, the three men played "chess and stuff." (Tr. 14). At one point, Howell heard Grace call out to Tony from another room, and Tony and Jones went back to the room to talk with her. Howell soon heard "scuffling and stuff," and he decided to leave. *Id.*

Howell was prevented from leaving by Jones' large dog, which grabbed Howell by the hand and held him. Howell then saw Jones and Tony enter the room. Jones grabbed a knife and cut Tony, who then ran out the back door. Howell requested that

¹ Ind. Code §§ 35-41-5-1 and 35-42-1-1(1).

² I.C. § 35-50-2-8.

Jones call the dog off him; however, instead of procuring Howell's release, Jones brandished a large knife. Howell pulled his hand out of the dog's mouth and grabbed a knife, but Jones pulled the knife from Howell's hand and began stabbing him. Howell attempted to fight off Jones with a skillet, but Jones continued to stab him. Howell began having trouble breathing and everything began to appear hazy to him. He then lost consciousness.

While Jones was stabbing Howell, someone called 911 and hung up. South Bend Police Officer Jamil Elwaer was dispatched to Jones' apartment; and as he arrived, he heard screaming coming from the residence. Officer Elwaer could see through the glass portions of the doors to the residence and observed Jones wielding a knife reverse grip style in his right hand. Several times, he heard Jones yelled "f***ing n****r, I got you" (Tr. 28). As Officer Elwaer went up the steps, he yelled for Jones to drop the knife, but Jones refused. Officer Elwaer heard another male voice say, "[H]elp me, I'm dying." (Tr. 30).

At about this time, Officer Elwaer saw Grace appear "out of nowhere," step between the officer and Jones, and begin to manipulate the lock on the inside door. Officer Elwaer then saw Jones lunge at the prone body of Howell, making several downward stabbing motions with the knife. Officer Elwaer observed that Howell looked helpless and that "[t]here was blood gushing out all over the place from his upper torso." (Tr. 34). Officer Elwaer determined to protect Howell by shooting Jones but was prevented from doing so because Grace was in the way.

Soon thereafter, Jones disappeared into another room and came back after a few seconds. Jones unlocked the door, and Officer Elwaer and other officers subdued him as he tried to run away. During and after the struggle, Jones kept screaming that he hoped Howell would die.

Officers began assisting Howell, who had sustained thirty-seven knife wounds. Howell was finally taken by ambulance to the hospital, where he received treatment that saved his life.

On March 10, 2010, the State charged Jones with Count 1, attempted murder. The charge was later amended to include a habitual offender count. During the jury trial, Officer Elwaer testified regarding what he saw at the crime scene. While Officer Elwaer was in the process of testifying about photographs of the scene, the following colloquy occurred:

Q: State's Exhibit 4, is this the area where you saw [Howell] lying?

A: Yes. His upper torso would have been right here. His head was a little farther. His feet were down here. It was very disturbing.

Q: Have you seen worse?

A. Nope. I have nightmares about this every night. I think about it every day.

[Defense Attorney]: I have an objection.

The COURT: I am going to sustain the objection.

[Defense Attorney]: It's self-serving.

The COURT: I am going to sustain the objection. Tell the jury you should disregard the officer's last comment.

(Tr. 32-33). With no further comment from the defense about Officer Elwaer's comments, the State continued with its questioning. The jury subsequently found Jones guilty of attempted murder, and he admitted that he was an habitual offender.

Later, Jones' new counsel filed a "Motion for Judgment N.O.V. Or Alternatively For A New Trial," alleging that Jones' trial counsel was ineffective because counsel had inadvertently left the microphone at defense counsel's desk in the "on" mode. (Jones' App. 11). He further alleged that the jury and others in the courtroom had overheard confidential conversations between Jones and his counsel. After hearings on the motion, the trial court denied the motion.³

After a sentencing hearing, the trial court found no mitigating circumstances. As aggravating circumstances, the trial court found the violent trend of Jones' criminal history and the nature and circumstances of the crime. The trial court sentenced Jones to forty years imprisonment for attempted murder and enhanced the sentence by thirty years because of the habitual offender finding. Jones now appeals.

DECISION

1. Fundamental Error

Jones contends that fundamental error requiring the *sua sponte* declaration of a mistrial occurred when Officer Elwaer testified about his reaction to what he saw at the crime scene. Jones argues that even though defense counsel objected and the jury was

³ Indiana Rule of Trial Procedure 50(e) abolishes the motion for judgment notwithstanding verdict. Accordingly, Jones' filing was treated as a motion for a new trial.

admonished, the “devastating harm to Jones’ case could not have been alleviated.” (Jones’ Br. at 11).

A mistrial is an extreme remedy granted only when no other method can rectify the situation. *Oliver v. State*, 755 N.E.2d 582, 585 (Ind. 2001). It is a remedy that is appropriate only when the defendant demonstrates that he was so prejudiced that he was placed in a position of grave peril. *Id.* The trial judge is in the best position to gauge the surrounding circumstances and the potential impact on the jury when deciding whether a mistrial is appropriate. *Id.* Where, as here, there was no request for a mistrial, the issue is generally waived on appeal. *Caruthers v. State*, 926 N.E.2d 1016, 1020 (Ind. 2010). We nevertheless sometimes entertain such claims under fundamental error, “meaning an error that makes a fair trial impossible or that constitutes a clearly blatant violation of basic and elementary principles of due process presenting an undeniable and substantial potential for harm.” *Id.*

Here, the jury heard testimony about seeping wounds, pooled blood and repeated stabbings. It also observed photographs exhibiting these gory details. In addition, the jury was admonished not to give any credit to Officer Elwaer’s comments. Given the jury’s exposure to the gore through testimony and photographs and the trial court’s admonishment, there is no possibility that Officer Elwaer’s comments resulted in prejudice placing Jones in grave peril, the deprivation of a fair trial, or a clearly blatant violation of basic and elementary principles of due process. Accordingly, no grant of a mistrial was required and no fundamental error occurred.

2. Motion for New Trial

Jones contends that the trial court abused its discretion in denying his motion for a new trial. He argues that the motion is based on newly discovered evidence that his trial counsel had inadvertently neglected to turn off the microphone at the defense table during confidential discussions and that this oversight had prejudiced him when the jury heard these confidential discussions between Jones and his counsel.

To obtain a new trial based on newly discovered evidence, a defendant must show, among other things, that “the evidence has been discovered since the trial.” *Kahlenbeck v. State*, 719 N.E.2d 1213, 1218 (Ind. 1999). Although determining the credibility of witnesses is normally the function of the jury, the trial court must assess the evidence when ruling on a motion for new trial based on alleged newly discovered evidence. *Allen v. State*, 716 N.E.2d 449, 456 (Ind. 1999). We review the trial court’s ruling for an abuse of discretion. *Id.*

Here, statements made into the microphone at the defense table were transmitted to a speaker located near the jury box. Jones cites evidence that he learned from St. Joseph Police Department Corporal James Winenger, who provided travel and courtroom security, that Winenger heard comments made by trial counsel to Jones, during a trial recess, through the speakers. Jones surmises that if Corporal Winenger heard the comments, then the jury may have also heard them. Corporal Winenger, however, also testified that the jury was not present during the recess. The trial court did not question whether the evidence was newly discovered; instead, it concluded that the jury did not

hear the comments and that a new trial was not warranted. We cannot say under the circumstances that the trial court abused its discretion in reaching its conclusion.

3. Sentencing

Jones contends that the trial court erred in finding that his criminal history, which includes the predicate offenses for the habitual offender finding, is an aggravating circumstance. Jones' criminal history includes robbery, kidnapping, two battery convictions (felony and misdemeanor), and criminal recklessness. The predicate offenses for the habitual offender findings are robbery and kidnapping.

In *Pedraza v. State*, 887 N.E.2d 77, 80 (Ind. 2008), our supreme court decided this issue, stating:

Under the 2005 statutory changes, trial courts do not “enhance” sentences upon finding such aggravators. Consequently, we conclude that when a trial court uses the same criminal history as an aggravator and as support for a habitual offender finding, it does not constitute impermissible double enhancement of the offender’s sentence.

Thus, the trial court did not err in using Jones’ criminal history (robbery and kidnapping) as aggravating circumstances and as support for the habitual offender finding.

Jones also contends that his sentence is inappropriate. A defendant bears the burden of persuading us that his sentence is inappropriate in light of both the nature of the offense and of his character. *Williams v. State*, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008). Because Jones does not allege that his sentence is inappropriate in light of either the nature of the offense or of his character, we must conclude that he has not met his burden.

CONCLUSION

Jones has failed to show that Officer Elwaer's comments necessitated the declaration of a mistrial or amounted to fundamental error. Furthermore, the trial court did not abuse its discretion in refusing to grant a new trial after it concluded that the jury had not heard confidential statements. Finally, the trial court did not abuse its discretion in finding Jones' criminal history to be an aggravating circumstance.

Affirmed.

RILEY, J., and BARNES, J., concur.