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ATTORNEY FOR APPELLANT:

JOSEPH M. CLEARY
Hammerle & Cleary
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

SCOTT L. BARNHART
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ISAAC JONES,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 49A04-0812-CR-714
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William Young, Judge
Cause No. 49G20-0701-FB-4299

September 17, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Isaac Jones appeals his conviction for attempted murder. For our review, Jones raises three issues, which we restate as: 1) whether the trial court abused its discretion when it replaced a dismissed juror with an alternate and allowed the jury to continue deliberation; 2) whether the trial court abused its discretion when it admitted evidence of a robbery; and 3) whether the trial court abused its discretion when it admitted evidence of Jones's drug dealing. We conclude the trial court did not abuse its discretion when it replaced the dismissed juror with an alternate or when it admitted evidence of a robbery. In addition, we conclude even if the trial court abused its discretion when it admitted evidence of Jones's drug dealing, the admission of the evidence amounts to harmless error. Therefore, we affirm Jones's conviction.

Facts and Procedural History

Alicia Kimmons often hung out at an apartment on 38th Street in Indianapolis, where she smoked crack cocaine. Jones, whom Kimmons knew only as Peewee, also hung out at the apartment. Jones and Kimmons often smoked crack together. In early December of 2006, Kimmons was at the apartment with Jones and others. Sometime after Kimmons left, Jones and Damon Starks, the co-defendant in this case,[1] were allegedly robbed. Kimmons testified she heard Jones and Starks "got robbed … [a]nd they thought I had something to do with it." Transcript at 211. Don Juan McGee, the lessee of the apartment, and LaTanya Hudson, a friend of Kimmons, each also testified to hearing that Jones and Starks thought Kimmons had "set them up" for the robbery. Id. at 371.

[1] Starks was acquitted of attempted murder by the jury and took no part in this appeal.

On the early morning of December 6, 2006, Kimmons was at the home of a man known to her as "Mississippi." Two men stepped into the doorway and asked Kimmons how she was and where she had been. Kimmons responded she had been staying with her mother. The two men then asked Kimmons to come for a ride. Kimmons said she had to use the bathroom first and got up from her chair. As Kimmons walked toward the bathroom, she heard Mississippi open his bedroom door and turned to look for him. Kimmons then saw Starks pull out a gun and hand it to Jones who shot Kimmons three or four times in her back and right side. Kimmons recognized Jones as the shooter and testified he was wearing a black coat with a fur-lined hood, the same coat that he usually wore. In the hospital, Kimmons identified Jones as the shooter to police and identified him from a photo array.

On January 10, 2007, the State charged Jones with aggravated battery, a Class B felony, and carrying a handgun without a license, a Class A misdemeanor. On February 12, 2007, the State amended the aggravated battery charge to attempted murder. Prior to trial the State dismissed the carrying a handgun without a license charge. Following a jury trial, Jones was convicted of attempted murder and sentenced to forty years. Jones now appeals.

Discussion and Decision

I. Juror Replacement

A. Standard of Review

Generally, trial courts have significant leeway in determining whether to replace a juror with an alternate, and we will reverse that decision only for an abuse of discretion.

Jeter v. State, 888 N.E.2d 1257, 1265 (Ind. 2008). However, "removal of a juror after deliberations have begun raises concerns that are distinct from those raised by the pre-deliberations removal of a juror." Lichti v. State, 827 N.E.2d 82, 91 (Ind. Ct. App. 2005) (citing Riggs v. State, 809 N.E.2d 322, 327 (Ind. 2004)), aff'd in relevant part, 835 N.E.2d 478 (Ind. 2005). Therefore, although the removal and replacement of a juror during deliberations is still within the trial court's discretion, "that discretion is more limited." Id.

B. Analysis

The Indiana Constitution guarantees a defendant the right to an impartial jury. Ind. Const. Art. I, § XIII. However, a defendant is not entitled to a jury "of his precise choosing where the issue is merely replacing a regular juror with an alternate." Jeter, 888 N.E.2d at 1265. In criminal cases, a trial court shall determine the number of alternate jurors to be seated to replace jurors who become or are found to be unable or disqualified to perform their duties prior to the return of a verdict. Ind. Jury Rule 16(a); Ind. Trial Rule 47(B). Alternate jurors are presumed to be fair and equally qualified to the task of deciding the outcome of the case. Jervis v. State, 679 N.E.2d 875, 882 (Ind. 1997). However, once deliberations have begun, the discharge of a juror is "only warranted in the most extreme situations where it can be shown that the removal of the juror is necessary for the integrity of the process, does not prejudice the deliberations of the rest of the panel, and does not impair the parties [sic] right to a trial by jury." Lichti, 827 N.E.2d at 91 (quoting Riggs, 809 N.E.2d at 327-28).

During voir dire, Juror Saylor informed the trial court that she had to pick up a ride in Greenwood every evening between five and five-thirty. The trial judge indicated to her that court would be done by four o'clock each day. During its final instructions, the trial court specifically instructed the alternate jurors: "[Y]ou will retire to the jury room, but unless, and until we excuse a juror and you are instructed to serve, you are not to take part in the deliberations." Appellant's Appendix at 103. As the jury deliberated on the final day of the trial, it became clear court would not conclude by four o'clock that day. Therefore, the trial court reconvened the parties and explained his intention to excuse Juror Saylor and replace her with an alternate juror. Jones did not object to the replacement of Juror Saylor with an alternate and did not move for a mistrial.

The trial court then spoke directly to Juror Saylor and the alternate juror. After dismissing Juror Saylor, the court instructed the alternate juror:

> "[Y]ou are no longer an alternate. You are a member of the jury and you will join in deliberations. You've been in there with them. You know where they are, what they've been talking about. And you will now be a member of the jury and free to deliberate with them."

Tr. at 512. The trial court also instructed the bailiff to notify the jury the alternate juror had become a member of the jury. Jones did not object to the trial court instructing the alternate juror to join in with the deliberations rather than instructing the jury to begin deliberations anew.

Prior to trial, Juror Saylor informed the court of the time constraints on her ability to serve on the jury. The trial court accepted these constraints and assured her court would be finished by four o'clock each day. However, when it became clear the jury would not conclude its deliberations in time for court to conclude by four o'clock, the

trial court was faced with a difficult decision: require Juror Saylor to stay and deliberate, causing her to miss her obligation; interrupt the jury's deliberative process; or replace Juror Saylor with an alternate.

We reviewed a similar choice in Lichti. There, the trial court faced the prospect of a sequestered jury's need to continue deliberations on a Sunday. Two jurors indicated their religious beliefs would not allow them to participate in the deliberations on a Sunday. The trial court, not wishing to delay deliberations until Monday, removed the two jurors and replaced them with alternates. This court affirmed the trial court's decision reasoning there was no suggestion that the conduct of the excused jurors improperly influenced the rest of the jury and it was highly unlikely the remaining jurors would misconstrue the reason why the jurors were dismissed. Lichti, 827 N.E.2d at 92. In addition, this court pointed out, "there was no possibility that the trial court's action could have been misconstrued as an implied agreement or disagreement with those juror's substantive views of the case, as those views were unknown to the judge and formed no basis for their dismissal." Id. (contrast with Riggs v. State, 809 N.E.2d 322, 327-29 (Ind. 2004) (removal of juror improper if only done to remove an obstacle to unanimity) and Threats v. State, 582 N.E.2d 396, 398-401 (Ind. Ct. App. 1991) (removal of a juror who revealed for the first time during deliberations that he knew the defendant's wife created a reasonable risk that the juror's conduct had prejudiced other members of the jury, requiring the trial court to question the remaining jurors to ensure they could remain impartial)).

Similarly here, the trial court had no knowledge of Juror Saylor's views on the case or of any circumstances of the ongoing deliberations. Rather, the trial court made a decision to replace Juror Saylor solely so that she could meet her obligations rather than interrupt the integrity of the jury's deliberations by dismissing them and reconvening them the following morning. In addition, there is no evidence that the replacement of Juror Saylor with an alternate prejudiced the deliberations of the rest of the jury or impaired Jones's right to a trial by jury. The alternate juror had been present in the jury room for the entirety of the deliberations up to that point, although presumably he had not participated in the deliberations. However, once he became a member of the jury, the alternate juror was free to voice any and all opinions he had developed while observing the jury. There is no risk the jury may have misconstrued the trial court's replacement of Juror Saylor as anything other than what it was. Therefore, the trial court did not abuse its discretion when it dismissed Juror Saylor, replaced her with an alternate juror, and instructed the jury to continue its deliberations.

II. Admission of Evidence

A. Standard of Review

The admission or exclusion of evidence is within the sound discretion of the trial court, and we review the trial court's decision only for an abuse of that discretion. Marshall v. State, 893 N.E.2d 1170, 1174 (Ind. Ct. App. 2008). A trial court abuses its discretion only if its decision is clearly against the logic and effect of the facts and circumstances before the court. Id. We will reverse only when a manifest abuse of discretion denies the defendant a fair trial. Id.

B. Hearsay Evidence of Prior Robbery

Hearsay is a statement made out-of-court that is offered into evidence to prove the truth of the fact or facts asserted in the statement itself. Ind. Evidence Rule 801(c); Simmons v. State, 760 N.E.2d 1154, 1159 (Ind. Ct. App. 2002). Hearsay is inadmissible unless it falls under an exception to the hearsay rule. Ind. Evid.R. 802. However, a statement is not hearsay if offered for some other purpose. Ortiz v. State, 741 N.E.2d 1203, 1207 (Ind. 2001).

Jones objects to the testimony of McGee and Hudson that Jones and Starks had been robbed a couple of days before the shooting and believed Kimmons had set up the robbery. Both McGee and Hudson testified they heard about the robbery and Jones's and Starks's beliefs from an unknown third party. These statements are not hearsay because they were not offered to prove that Jones and Starks were in fact robbed or that Kimmons set them up. Rather, the statements were offered as evidence of a motive for Jones to shoot Kimmons, namely that he believed she set up the robbery. Further, even if McGee's and Hudson's statements were improperly admitted, the error would be harmless because Kimmons testified that she heard Jones and Starks "supposedly got robbed. And they thought I had something to do with it." Jones neither objected to Kimmons testimony at trial nor argued its inadmissibility on appeal. Therefore, the trial court did not abuse its discretion when it admitted evidence of the robbery and Jones's belief that Kimmons set it up.

C. Prior Bad Acts

Indiana Evidence Rule 404(b) prohibits the admission of evidence of other crimes, wrongs, or acts to prove the character of a defendant in order to show action in conformity therewith. However, such evidence may be admissible for other purposes such as: "proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Id. Prior to trial, the State filed notice of intent to offer evidence that Jones and Starks used and sold crack cocaine and marijuana to prove motive and identity.

There is no independent evidence to support the State's claim that Jones's drug use and dealing served as a motive for the shooting. Rather, as discussed above, the State's evidence of motive for the shooting is that Jones was robbed and believed Kimmons set him up. The State does not allege the shooting was motivated by a drug deal gone bad or an unpaid debt such as might require the admission of evidence of Jones's drug dealing to support the motive. Therefore, the evidence is not admissible to prove motive.

The State also offered the evidence as proof of identity. "The identity exception in Rule 404(b) was crafted primarily for crimes so nearly identical that the modus operandi is virtually a 'signature.'" Allen v. State, 720 N.E.2d 707, 711 (Ind. 1999). "The rationale underlying this exception is that the modus operandi of the instant crime and the other bad acts are so similar and unique in nature that it is highly probable that the same person committed all of them." Browning v. State, 775 N.E.2d 1222, 1224 (Ind. Ct. App. 2002).

The State appears to present a different use of the identity exception here by offering evidence of Jones's prior drug use and dealing to establish a basis for Kimmons's ability to identify Jones as the shooter. We acknowledge the need to support Kimmons's identification of Jones given the fact that prior to the shooting she knew him only by the nickname Peewee. In that light, evidence that Jones and Kimmons routinely used drugs together is likely admissible. On the other hand, the evidence that Jones dealt crack cocaine and marijuana, especially where that evidence exceeds the scope of Jones's relationship with Kimmons, is unnecessary and prejudicial to Jones. As a result, the evidence is likely inadmissible. However, we need not decide the issue of admissibility because we hold even if the evidence was improperly admitted, the error was harmless.

An error in the admission of evidence is harmless unless it affects the substantial rights of the defendant. Wilson v. State, 770 N.E.2d 799, 802 (Ind. 2002). To determine whether the defendant's substantial rights were affected, we must consider the probable impact of the evidence upon the jury. Id. The question is not whether sufficient evidence supports the conviction absent the erroneously admitted evidence, but whether the erroneously admitted evidence likely had a prejudicial impact on the jury. Camm v. State, 812 N.E.2d 1127, 1137 (Ind. Ct. App. 2004), trans. denied.

Here, the evidence of Jones's guilt was overwhelming. Kimmons positively identified Jones to police by his nickname and identified him in a photo array. Kimmons also positively identified Jones as the shooter at the trial. In addition, Kimmons provided a detailed description of Jones's black coat with fur lined hood that matched the description of the coat Hudson testified she saw Jones wearing when she saw him just

after the shooting had occurred. Therefore, even if the evidence of Jones's drug use and dealing was admitted in error, the error was harmless.

Conclusion

The trial court did not abuse its discretion when it excused a juror and replaced her with an alternate after the jury began deliberating. The trial court also did not abuse its discretion when it admitted evidence of the robbery. Finally, even if the trial court abused its discretion by admitting evidence of Jones's drug use and dealing, such error was harmless in light of the evidence of Jones's guilt. Therefore we affirm Jones's conviction for attempted murder.

Affirmed.

DARDEN, J., and MATHIAS, J., concur.