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IN THE
COURT OF APPEALS OF INDIANA

JOSHUA D. LOVE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A04-0904-CR-200
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry Shewmaker, Judge
Cause No. 20C01-0805-MR-1

October 23, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Joshua D. Love ("Love") was convicted in Elkhart Circuit Court of murder and sentenced to sixty-three years incarceration. Love appeals and presents three issues, which we restate as:

I. Whether the trial court erred in denying Love's motion for continuance;

II. Whether the trial court erred in denying Love's motion for mistrial; and

III. Whether the sentence imposed by the trial court is inappropriate.

We affirm.

Facts and Procedural History

At approximately 1:00 a.m. on March 8, 2008, Gerald Wenger was driving his pickup truck in the area near the Middlebury apartment complex in Elkhart, Indiana, looking to purchase cocaine. Defendant Love, who was then eighteen years old, was at this apartment complex with his then thirteen-year-old companion, Dentrell Brown ("Brown"). Love and Brown encountered Wenger, entered his truck, and attempted to sell Wenger fake cocaine. When Wenger discovered that the cocaine was fake, he became angry, and an argument ensued. Wenger got out of his truck and made a threat to report Love and Brown to the police. Brown and Love followed Wenger out of the truck. Brown struck Wenger with a .45 caliber pistol, causing the pistol to fire and graze Wenger. Love then shot Wenger in the head with a 9 mm handgun. Wenger's legs stiffened, and he fell forward. Wenger died as a result of this gunshot wound. Love took a knife and wallet from Wenger's body, got in Wenger's truck with Brown, and drove a short distance away. Love and Brown returned to the truck the following evening and

wiped it down with a "wax glove" in an attempt to remove any fingerprints that might link them with Wenger's murder. Tr. p. 619.

Around 2:00 a.m. on the morning of the murder, Elkhart police responded to a report of gunshots in the area of the Middlebury apartment complex. The first officer on the scene noticed a dead body, later identified as Wenger, lying on a sidewalk. Two bullet casings were also found near Wenger's body: one from a .45 bullet and the other from a 9 mm bullet. An autopsy revealed that Wenger had been shot in the head with a 9 mm bullet that entered just above his left ear. The autopsy results further indicated that Wenger had been shot at a distance of at least three feet. The bullet from the fatal shot caused immediate, severe brain injury, which caused Wenger's legs to become rigid.

Police later found Wenger's pickup truck approximately six blocks away from where his body had been found. The truck had been seen by local residents shortly after the shooting. One resident saw two individuals near the truck on the night following the shooting. When the two individuals noticed that they had been seen, they ran away. When police investigated the truck, they found only two identifiable prints inside the truck, both of which were Wenger's.

As the police continued their investigation, they interviewed residents near the location of the shooting, including those who lived in the Middlebury apartment complex. One resident told police that Love and Brown had been to her apartment and that Brown had a handgun. Another resident told police that she had seen Love and Brown at her apartment on the night of the shooting and that, as Love and Brown left, they retrieved a handgun from a hallway light fixture. Another resident hesitantly told police that Brown

was trying to sell a 9 mm handgun that Brown claimed to have been used in a murder. This resident also overheard Brown claiming to have killed Wenger and overheard Love and Brown talking about disposing of a .45 caliber handgun. Another witness told police that Brown had attempted to sell him a 9 mm handgun that "had a body on it," tr. pp. 481-82, but later claimed not to recall his conversation with Brown about the gun.

James Herring ("Herring") was incarcerated with Love after Wenger's murder. Love told Herring that he had entered Wenger's truck to sell him fake cocaine, and that when Wenger discovered the fake cocaine, an argument ensued, eventually resulting in Love shooting Wenger in the head. Herring testified that Love laughed about "how [Wenger]'s legs locked up and [he] fell forward" onto the sidewalk. Tr. p. 617. Love also admitted to Herring that he went through Wenger's pockets, drove away in his truck, and later returned to wipe the truck down.

Mario Morris ("Morris") was also incarcerated with Love. Love told Morris that he had shot Wenger in the head after the two got into an argument regarding Love's attempt to sell fake cocaine. Morris said that Love told him that he took Wenger's wallet and knife and drove away in Wenger's truck. Morris also testified that Brown told him a similar story while the two were incarcerated together: that Brown met Wenger, attempted to sell him fake drugs, that an argument ensued, and that Brown struck Wenger in the head with his pistol, causing the pistol to discharge and graze Wenger. Morris's testimony regarding Brown's confession, however, did not mention Love. And Morris's testimony regarding Love's confession did not mention Brown.

On May 19, 2008, the State charged Love and Brown with murder. Love initially told the trial court that he planned to hire private counsel, but the trial court eventually granted Love's request for a public defender. On October 2, 2009, after filing several *pro se* motions, Love demanded to be allowed to represent himself, over the strenuous warnings of the trial court. The trial court granted Love's request to proceed *pro se* but ordered the previously-appointed public defender to act as Love's stand-by counsel. On January 22, 2009, Love informed the trial court that he no longer wished to represent himself and requested a public defender. The trial court granted Love's request and appointed his stand-by counsel as lead counsel once again. Love's trial counsel then moved for a continuance of the February 2, 2009 trial date, claiming that he had not received any of the State's discovery materials and that he had reservations about having less than two weeks to prepare for a murder trial. The State objected to any continuance. Noting that the next available trial date was over six months away and that any continuance would impact Love's co-defendant Brown, the trial court denied the request for a continuance.

On the first day of the jury trial, Love's counsel again requested a continuance, and the State again objected. In denying the request for a continuance, the trial court noted that Love's counsel had attended all pre-trial hearings as stand-by counsel. Following Morris's testimony, as set forth above, Love's trial counsel moved for a mistrial, claiming that permitting Morris to testify constituted a violation of Love's rights to confront witnesses as set forth in Bruton v. United States, 391 U.S. 123 (1968). The trial court denied the motion for mistrial. At the conclusion of the trial on February 5,

2009, the jury found Love and Brown guilty of murder. At a hearing on March 5, 2009, the trial court concluded that the aggravating factors outweighed the mitigating factors and sentenced Love to sixty-three years incarceration. Love now appeals.

I. Motion for Continuance

Love first claims that the trial court erred in denying his motion for a continuance. Rulings on non-statutory[1] motions for continuance lie within the discretion of the trial court and will be reversed only for an abuse of that discretion and resultant prejudice. Jackson v. State, 758 N.E.2d 1030, 1033 (Ind. Ct. App. 2001). A trial court abuses its discretion only where its decision is clearly against the logic and effect of the facts and circumstances before the court. Id. Continuances for additional time to prepare for trial are generally disfavored, and trial courts should grant such motions only where good cause is shown and such a continuance is in the interest of justice. Id.

Love argues that the trial court abused its discretion in denying his motion for continuance by analogizing his case to those in which counsel was appointed shortly before trial and had inadequate time to prepare. See, e.g., Sweet v. State, 117 N.E.2d 745 (Ind. 1954) (holding that appointing counsel four days before trial constituted deprivation of right to effective assistance of counsel) (citing Powell v. Alabama, 287 U.S. 45, 68-69

[1] Love does not claim that his motion for continuance fell within the parameters of Indiana Code section 35-36-7-1 (2004).

(1932) (holding that the right to effective assistance of counsel included the corollary right that counsel have adequate time to prepare)).[2]

Here, however, the trial court did not appoint new counsel shortly before trial. Instead, after initially granting Love's request to be represented by a public defender, the trial court granted Love's request to represent himself after strongly warning him about the dangers of self representation. Importantly, the trial court also appointed Love's public defender as stand-by counsel. Love's former counsel attended all subsequent hearings with Love as stand-by counsel. When Love finally requested counsel again on January 22, 2009, the trial court simply changed the status of Love's public defender from stand-by counsel to lead counsel.

This is not a situation where an attorney wholly unfamiliar with the case was appointed at the last minute. Instead, the very same attorney who had initially been Love's counsel and then attended all hearings with Love as stand-by counsel, was re-appointed as Love's lead counsel. Despite the trial court's warnings, Love insisted on representing himself until less than two weeks before trial. In other words, it was Love's last-minute change of mind regarding self-representation that resulted in any shortened time for his counsel to prepare. Further, as noted by the trial court, the next available trial date was over six months away.

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[2] Although Love briefly mentions Article 1, Section 13 of the Indiana Constitution, he does not develop an independent analysis supporting a separate standard under the state constitution; any state constitutional claim is therefore waived. See Lockett v. State, 747 N.E.2d 539, 541 (Ind. 2001).

Our supreme court in Lewis v. State, 730 N.E.2d 686, 689 (Ind. 2000) has explained that, "the right to counsel of choice must be exercised at the appropriate stage of the proceeding." (citations and internal quotations omitted). Continuances sought shortly before trial to hire a new attorney are disfavored because they cause substantial loss of time for jurors, lawyers, and the court. Id. Although Love was not seeking a continuance to hire a *new* attorney, he did seek a continuance due to his last-minute change of heart regarding self-representation.[3] Under these facts and circumstances, we cannot say that the trial court's decision to deny Love's motion for continuance was an abuse of discretion.

II. Motion for Mistrial

Love next claims that the trial court erred in denying his motion for mistrial. Specifically, Love claims that the trial court should have granted his motion for mistrial following the testimony of Morris, who was incarcerated with both Love and Brown. As set forth above, Morris testified that Love admitted that he shot Wenger in the head following an argument about Love's attempt to sell Wenger fake cocaine. Immediately thereafter, Morris testified that Brown admitted that he attempted to sell fake cocaine to Wenger, got into an argument with Wenger about the fake drugs, and hit Wenger in the head with a .45 caliber pistol, causing the pistol to fire and graze Wenger.

Morris's testimony about Love's confession did not directly implicate, or even mention, Love's co-defendant Brown. And Morris's testimony about Brown's

[3] Further, although Love broadly claims that having to prepare for trial in less than two weeks was prejudicial, he fails to specifically identify how he was harmed by the denial of his motion for continuance.

confession did not directly implicate, or even mention, Love's role in Wenger's death. Love claims, however, that Morris's testimony, when considered as a whole, constitutes a violation of the rule set forth in Bruton v. United States, 391 U.S. 123 (1968), and that the trial court therefore erred in denying his motion for mistrial made immediately following Morris's testimony.

We first observe that Love made no objection to Morris's testimony until Morris had fully testified regarding Love and Brown's confessions. Generally, a party must make a contemporaneous objection to the admission of evidence; otherwise, the issue is not properly preserved for appeal. Rembusch v. State, 836 N.E.2d 979, 982 (Ind. Ct. App. 2005), trans. denied. The purpose of the contemporaneous objection rule is to promote a fair trial by precluding a party from sitting idly by and appearing to assent to an offer of evidence or ruling by the court only to cry foul when the outcome goes against him. Id. at 982-83. Here, Love waited until the jury had heard Morris's testimony before moving for a mistrial. As such he has failed to properly preserve this issue for appeal.[4] See Phillips v. State, 673 N.E.2d 1200, 1203 (Ind. 1996) (holding that defendant failed to preserve Bruton issue by failing to object to admission of co-defendant's statements).

Waiver notwithstanding, we disagree with Love's claim that Morris's testimony constituted a Bruton violation and therefore required a mistrial. In Bruton, the United States Supreme Court held that in a joint trial, admission of one defendant's confession

[4] We cannot conclude that Love's subsequent motion for mistrial negated his obligation to lodge a timely objection to the admission of the testimony he now claims was improper. Indeed, crafting such an exception to this rule by allowing a party to move for a mistrial instead of objecting to the admission of evidence in a timely manner would effectively nullify the contemporaneous objection rule.

that implicates another defendant is a violation of the second defendant's Sixth Amendment right to confront witnesses. 391 U.S. at 124-26. Because the confessing defendant cannot be required to take the stand, the result is a denial of the other defendant's right to cross-examine. See id. at 137. However, the Court later clarified that a co-defendant's statements present a Bruton problem only if they *facially incriminate* the other defendant. Richardson v. Marsh, 481 U.S. 200, 211 (1987). Still, even indirect references to the non-confessing defendant can implicate Bruton. See, e.g., Gray v. Maryland, 523 U.S. 185, 192 (1998) (holding that co-defendant's redacted confession violated defendant's confrontation rights where the name of the defendant was replaced with the words "deleted," a blank space, or a similar symbol).

Here, Love concedes that Morris's testimony regarding Brown's confession did not facially incriminate Love. See Appellant's Br. p. 16 (admitting that Morris's testimony may have been in "technical compliance with the Bruton rule" because Morris's testimony regarding Brown's confession "excluded any direct reference to Love."). Morris's testimony about Brown's confession did not even mention Love. Love nevertheless argues that the "logical effect" of the sum of Morris's testimony results in a violation of his right to confront witnesses. We disagree.

No Bruton violation occurs when a co-defendant's confession does not facially incriminate the other defendant and becomes incriminating only when linked with other evidence. Richardson, 481 U.S. at 211. Here, Morris's testimony regarding Brown's confession did not mention Love and is incriminating only when linked with Morris's testimony regarding Love's own confession—which itself is admissible without

implication of the Bruton rule. We decline Love's invitation to extend the Bruton rule to cover the current situation.[5]

III. Appropriate Sentence

Lastly, Love claims that his sixty-three year sentence is inappropriate. Pursuant to Indiana Appellate Rule 7(B), this court may revise a sentence otherwise authorized by statute if, "after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Although we have the power to review and revise sentences, "[t]he principal role of appellate review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived 'correct' result in each case." Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008). On appeal, it is the defendant's burden to persuade us that the sentence imposed by the trial court is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

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[5] Similarly, Morris's testimony regarding Brown's confession does not run afoul of Indiana Code section 35-34-1-11(b) (2004), which provides:

> Whenever two (2) or more defendants have been joined for trial in the same indictment or information and one (1) or more defendants move for a separate trial because another defendant has made an out-of-court statement *which makes reference* to the moving defendant but is not admissible as evidence against him, the court shall require the prosecutor to elect:
> (1) a joint trial at which the statement is not admitted into evidence;
> (2) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted; or
> (3) a separate trial for the moving defendant.

(emphasis added). Here, Brown's out-of-court statement, as related by Morris, did not *make reference* to Love, and Indiana Code section 35-34-1-11(b) is therefore inapposite.

Considering the nature of the offense, we note that Love shot Wenger in the head at close range because Wenger had threatened to tell the police that Love and his thirteen-year-old companion were selling fake cocaine. Love then stole Wenger's wallet and knife and drove Wenger's truck away. Love later returned and wiped the truck down to eliminate any fingerprints. When recounting Wenger's murder, Love laughed at the manner in which Wenger's legs locked up as a result of the immediate brain damage caused by the bullet from Love's gun. Love's act of shooting Wenger in the head was senseless, callous, and cold-blooded.

Considering the character of the offender, we observe that Love, although only eighteen years old at the time of the murder, had already amassed a significant juvenile and adult criminal record. Love's juvenile record began in 1998, when Love was nine years old and adjudicated to be a delinquent child for committing an act that would have been theft had he been an adult. Four years later, Love committed another theft and was committed to the Indiana Boys School. In 2005, shortly after being released from the Boys School, Love was waived into adult criminal court and pleaded guilty to two counts of receiving stolen property and one count of resisting law enforcement. Love was sentenced to probation, which he violated only two months later. In 2008, Love pleaded guilty to the federal offense of being a felon in possession of a firearm.

In short, Love has not met his burden of establishing that the trial court's decision to sentence him to sixty-three years incarceration is inappropriate in light of nature of the offense and the character of the offender. Love's sentence is entirely appropriate.

Conclusion

The trial court did not abuse its discretion in denying Love's motion to continue. Love failed to preserve his claim that Morris's testimony regarding Brown's confessions constituted a Bruton violation, and even if Love had preserved his claim, Brown's out-of-court statement did not facially incriminate Love. Lastly, Love's sixty-three year sentence is not inappropriate.

Affirmed.

DARDEN, J., and ROBB, J., concur.