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IN THE
COURT OF APPEALS OF INDIANA

ANTWANE WALKER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0904-CR-344
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Paula E. Lopossa, Senior Judge
Cause No. 49G02-0812-FA-288159

December 8, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Antwane Walker ("Walker") appeals his convictions for Attempted Robbery, as a Class A felony,[1] one count of Robbery, as a Class B felony,[2] five counts of Attempted Robbery, as Class B felonies,[3] Criminal Recklessness, as a Class C felony,[4] and Dangerous Possession of a Firearm, as a Class A misdemeanor.[5] We affirm his convictions, but reverse the attorney's fee order and remand for further proceedings.

Issues

Walker presents two issues for review:

I. Whether he was entitled to a mistrial; and

II. Whether the order for payment of a statutory supplemental public defender services fee is erroneous.

Facts and Procedural History

During the evening of December 18, 2008, several people were present at Big Engine Entertainment, a recording studio in Indianapolis, while a recording was being made. Five armed men entered the building and robbed some of the occupants at gunpoint. Multiple shots were fired, and Collin Moore suffered a gunshot wound to his abdomen. Several witnesses identified Walker as one of the robbers. He had been observed running backwards, firing a semi-automatic handgun into the building.

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[1] Ind. Code §§ 35-42-5-1, 35-41-5-1.
[2] Ind. Code § 35-42-5-1.
[3] Ind. Code §§ 35-42-5-1, 35-41-5-1.
[4] Ind. Code § 35-42-2-2.
[5] Ind. Code § 35-47-10-5.

As a result of those events, the State brought robbery, attempted robbery, criminal recklessness, and handgun possession charges against Walker and four co-defendants. On March 9, 2009, he was brought to trial before a jury. He was found guilty as charged, and received an aggregate sentence of twenty years. This appeal ensued.

Discussion and Decision

I. Mistrial

During the trial of this case, several of the jurors were made aware that Walker and his co-defendants were incarcerated when a deputy sheriff retrieving coffee supplies in the jury room inadvertently left behind paperwork disclosing the defendants' cellblock locations. Walker's motion for a mistrial was denied, and he did not request or receive an admonition to the jury. He now contends he was denied a fair trial because the jury should have remained insulated from prejudicial reminders of his incarceration.

The decision whether to grant or deny a mistrial lies within the sound discretion of the trial court, as that court is best positioned to assess the circumstances of an error and its probable impact upon the jury. Lucio v. State, 907 N.E.2d 1008, 1010 (Ind. 2009). We review only for an abuse of that discretion. Id. "A mistrial is an extreme remedy that is warranted only when less severe remedies will not satisfactorily correct the error." Warren v. State, 725 N.E.2d 828, 833 (Ind. 2000). The appellant bears the burden of showing that the denial of the mistrial motion placed him in grave peril to which he should not have been subjected. Myers v. State, 887 N.E.2d 170, 189 (Ind. Ct. App. 2008), trans. denied. He also must show that no other action could have remedied the perilous situation into which he was

placed. Id. The gravity of the peril is assessed by the probable persuasive effect of the matter complained of upon the jury's decision. Kirby v. State, 774 N.E.2d 523, 534 (Ind. Ct. App. 2002), trans. denied.

Here, the trial court appropriately interviewed the exposed jurors, each of whom in turn assured the trial court that their decision would not be affected by his or her knowledge of the defendants' incarceration. Additionally, some jurors advised the trial court that they had already deduced that the defendants were in custody as opposed to being free on bond because there were five defendants and five deputies in the courtroom during earlier proceedings. Given the jurors' assurances to the trial court, and the overwhelming evidence against Walker (his identification by several witnesses, including some of his relatives, as one of the Big Engine Entertainment robbers), we are not convinced that the jury was likely persuaded by knowledge of the defendants' incarceration. Walker has not demonstrated his entitlement to a mistrial.

II. Order for Payment of Supplemental Public Defender Services Fee

Walker challenges the order that he pay $100 as a supplemental public defender services fee, and requests a remand for reconsideration, because the trial court made no finding that Walker was able to pay the fee. Indiana Code Section 35-33-7-6(c)(1) provides:

> If the court finds that the person is able to pay part of the cost of representation by the assigned counsel, the court shall order the person to pay the following:
> (1) For a felony action, a fee of one hundred dollars ($100).

Because Walker was convicted of felonies, he may be eligible for assessment of the $100 statutory fee. Nevertheless, the convicted person must be "able to pay." A court must

explicitly find that a defendant can pay the fees imposed under Indiana Code Section 35-33-7-6. Banks v. State, 847 N.E.2d 1050, 1052 (Ind. Ct. App. 2006), trans. denied. Here, we are directed to no such finding in the record. Consequently, we must remand with instructions that the trial court reconsider the $100 supplemental public defender services fee in light of the statutory limitations.

Conclusion

Walker's convictions are affirmed. We remand for reconsideration of the supplemental public defender services fee.

Affirmed in part, reversed in part, and remanded.

BAKER, C.J., and ROBB, J., concur.