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# IN THE COURT OF APPEALS OF INDIANA

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| ANTHONY G. MASON, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 49A04-0906-CR-362 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 16
The Honorable Kimberly J. Brown, Judge
The Honorable Israel Nunez-Cruz, Commissioner
Cause Nos. 49G16-0902-FD-27897, 49G16-0903-FD-31123,
and 49G16-0904-FD-41742

**February 10, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**RILEY, Judge**

## STATEMENT OF THE CASE

Appellant-Defendant, Anthony Mason (Mason), appeals his conviction for battery, a Class D felony, Ind. Code § 35-42-2-1.3; and resisting law enforcement, a Class A misdemeanor; I.C. § 35-44-3-3(a)(1), under cause number 49G16-0902-FD-27897 (27897). Mason also appeals his sentence after a plea of guilty to two (2) Counts of invasion of privacy, Class D felonies, I.C. § 35-46-1-15.1, under cause numbers 49G16-0903-FD-31123 (31123) and 49G16-0904-FD-41742(41742).

We affirm.

## ISSUES

Mason raises two issues for our review, which we restate as follows:

(1) Whether the trial court abused its discretion when it denied Mason's motion for mistrial during the jury trial in cause number 27897; and

(2) Whether his sentence received for cause numbers 31123 and 41742 is appropriate in light of the nature of his offense and his character.

## FACTS AND PROCEDURAL HISTORY

Mason and Wife have been married since the summer of 1992 and have three children together: an eleven-year old son, A.M., and five-year old twin daughters. On the evening of February 24, 2009, Mason, his Wife, and their children were all watching television together in A.M.'s room. Mason and Wife had a disagreement, and Wife left A.M.'s bedroom and went to their master bedroom. Mason followed her into the bedroom and a verbal fight escalated about an incident that occurred in the past. Mason and Wife started pushing each

other, and eventually Wife grabbed a few items and went into the twins' room. Mason followed her and the two continued to argue while all of the children were in the room with them. At some point, Mason slapped Wife on the right side of her face. Wife told Mason to move out of their house and find another place to live, to which he responded by choking her for about 5 to 10 seconds and stated, "If I can't have you, nobody else will." (Transcript p. 60). A.M. intervened by separating them.

Immediately after the incident, Mason left the house and Wife proceeded to call the police. After she was off the phone with the police, A.M. got on the phone with his father and persuaded him to come back home. Mason came back home and he and Wife continued to argue. When Officer David Jackson (Officer Jackson) of the Indianapolis Metropolitan Police Department arrived on the scene, he could "hear a loud voictress (sic) chaotic situation originating from [their house]" so he had the 911 operator call the house to let them know he was there. (Tr. p. 137). Mason answered the phone and when he saw that the police were at the door, he prevented Wife from going downstairs to answer the door. Wife went into the master bedroom, opened the window and yelled to Officer Jackson that Mason would not let her down the stairs. Eventually, Wife made her way downstairs and went out the front door to talk with Officer Jackson; Mason followed her and attempted to prevent her from doing so. After Mason refused to obey Officer Jackson's orders, Mason was tasered.

On February 25, 2009, the State filed an Information, under cause number 27897, charging Mason with: Count I, criminal confinement, a Class D felony, I.C. § 35-42-3-3; Count II, battery, a Class A misdemeanor, I.C. § 35-42-2-1; Count III, domestic battery, a

Class A misdemeanor, however enhanced to a D felony for a prior conviction, I.C. § 35-42-2-1.3; Count IV, resisting law enforcement, a Class A misdemeanor, I.C. § 35-44-3-3(a)(1); and Count V, domestic battery, a Class D felony, I.C. § 35-42-2-1.3.

The trial court ordered that as part of a pretrial protective order and his release, Mason was to have no contact with Wife or the children. Four days later, Mason violated the no-contact order by calling Wife. On March 9, 2009, the State filed an additional Information, under cause number 31123, charging him with Count I, invasion of privacy, as a Class D felony, I.C. § 35-46-1-15.1.

On March 11, 2009, Mason again broke the no-contact order by mailing a letter for Wife to her parent's house and asking them to deliver messages. In the letter, Mason urged Wife not to testify against him. Additionally, Mason communicated with Wife by sending letters to their house addressed to him but intended for her, asking her not to testify. As a result, on April 29, 2009, the State filed an another Information, under cause number 41742, charging him with Count I, attempted obstruction of justice, a Class D felony, I.C. §§ 35-44-3-4; 41-5-1; and Counts II, III, IV, V and VI, invasion of privacy, as Class D felonies, I.C. § 35-46-1-15.1. On that same day, the State filed an additional Information on cause number 27897, for Count VII, resisting law enforcement, I.C. § 35-44-3-3.

On April 30, 2009, a jury trial was held on cause number 27897. Prior to the trial, Mason filed a *motion in limine*, asking the trial court to prohibit the State and its witnesses from mentioning the pretrial no-contact order. The trial court granted that portion of the *motion in limine*. At the end of trial, the jury found him guilty of: Count II, battery, a Class

A misdemeanor; Count III, domestic battery, a Class A misdemeanor;[1] and Count V, resisting law enforcement, a Class A misdemeanor. He was found not guilty on all remaining charges.

On May 28, 2009, Mason entered into two separate, although identical, plea agreements for cause numbers 31123 and 41742, whereby he agreed to plead guilty to two Counts of invasion of privacy in exchange for the State dismissing the remaining six Counts under cause number 41742. Pursuant to the terms of the plea agreement, sentencing was left to the discretion of the trial court. On June 1, 2009, the trial court sentenced Mason to the following: with respect to cause number 27897, three years for battery, with half of the sentence to be executed and the other half to be served on probation, and one year for resisting law enforcement, with sentences to run concurrently. With respect to cause numbers 31123 and 41742, the trial court sentenced Mason to 545 days for invasion of privacy, to run consecutively to cause number 27897, for an aggregate sentence of four and a half years executed, with one and a half years on probation.

Mason now appeals. Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

### I. *Admission of Testimony*

Mason contends that the trial court abused its discretion by denying his motion to strike Wife's testimony about the no-contact order and then by also denying his subsequent motion for mistrial after she violated his *motion in limine*. Specifically, he argues that

[1] Mason waived his right to have a jury hear the second phase of his trial and stipulated that he had a previous conviction for domestic battery. As a result, the trial court convicted him a domestic battery as a Class D felony.

mention of the pretrial no-contact order "create[d] the highly prejudicial inference Mason was dangerous and a continuing threat to his [W]ife." (Appellant's Br. p. 11). As a result, Mason maintains that by "refusing to strike the testimony . . . and by then denying the motion for a mistrial, [he] was placed in a position of grave peril." (Appellant's Br. p. 11).

First addressing Mason's request for a mistrial, we note that whether to grant or deny a motion for mistrial is a decision left to the sound discretion of the trial court. *Agilera v. State*, 862 N.E.2d 298, 307 (Ind. Ct. App. 2007). We will reverse the trial court's ruling only upon an abuse of discretion. *Id.* We afford the trial court such deference on appeal because the trial court is in the best position to evaluate the relevant circumstances of an event and its impact on the jury. *Id*. To prevail on appeal from the denial of a motion for mistrial, the appellant must demonstrate that the statement or conduct in question was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected. *Agilera*, 862 N.E.2d at 307. We determine the gravity of the peril based upon the probable persuasive effect of the misconduct on the jury's decision rather than upon the degree of impropriety of the conduct. *Id*. at 307-08. However, this court has recognized that a mistrial is an extreme sanction warranted only when no other cure can be expected to rectify the situation. *Nunley v. State*, 916 N.E.2d 712, 721 (Ind. Ct. App. 2009). Even where a witness violates a *motion in limine*, a trial court may determine that a mistrial is not warranted and, instead, admonish the jury to disregard the improper testimony. *Evans v. State*, 855 N.E.2d 378, 386 (Ind. Ct. App. 2006).

In his brief, Mason concedes that an admonishment to the jury would have been a sufficient remedy to rectify the error. Thus, we need not determine whether the trial court abused its discretion in denying his motion for mistrial. Instead, we determine whether the trial court abused its discretion by allowing the State to violate Mason's *motion in limine* without admonishment to the jury.

It is well settled that the granting of a *motion in limine* does not determine the ultimate admissibility of the evidence. *Bova v. Gary*, 843 N.E.2d 952, 955 (Ind. Ct. App. 2006). The purpose for a ruling *in limine* is to prevent the presentation of potentially prejudicial evidence until the trial court can rule on the admissibility of the evidence in the context of the trial itself. *Id*. If the trial court errs by admitting evidence that a party sought to exclude by a *motion in limine*, the error lies in the admission of evidence at trial, not in a violation of the trial court's pretrial ruling. *Willingham v. State*, 794 N.E.2d 1110, 1116 (Ind. Ct. App. 2003). Evidentiary rulings of a trial court are afforded great deference on appeal and are overturned only upon a showing of an abuse of discretion. *Id.*

We first note that despite the fact that Mason did not specifically ask the trial court to admonish the jury, he has adequately preserved his argument on appeal by requesting that Wife's testimony be stricken from the record. The record established that the trial court granted Mason's *motion in limine*, preventing the State and its witnesses from mentioning the pretrial no-contact order. During Wife's direct examination, she testified that after she received a letter from Mason, she notified the State's attorney "to let [him] know that the contact had been broken." (Tr. p. 71). In response to this testimony, Mason objected, moved

to strike the testimony and moved for a mistrial. Outside the presence of the jury, the trial court replayed the testimony and then instructed the State "to inform the witness of the court's order, so that it's very clear that she knows what she can, and cannot testify to, not with respect just [with] this provision, but all provisions of the court's Motion in Limine []." (Tr. p. 73). The trial court denied Mason's motion to strike the testimony and subsequent motion for mistrial.

Despite the fact that the trial court could have chose to admonish the jury, we are unable to find that the trial court abused its discretion by failing to do so. Wife's testimony that she notified the State after she got a letter from Mason because 'contact had been broken' was vague and did not refer to a specific no-contact order. It is highly unlikely that the jury was able to make any inferences from this statement.

Additionally, even though Mason argues that mention of a no-contact order portrayed him in a negative light, the jury heard testimony from both Wife and A.M. that Mason hit Wife in front of their children. Wife testified that when Mason slapped her in the face, she was "in pain, and [she] started crying, and then one of the twins grabbed [her] hand, and was trying to intervene, and then [A.M. was] trying to intervene." (Tr. p. 58). A.M. testified that he had to pull his father off of his mother because he was choking her. Accordingly, we find that the trial court did not abuse its discretion by failing to admonish the jury.

### II. *Nature and Character*

Mason argues that his sentence is inappropriate in light of the nature of the offense and the character of the offender. Specifically, he argues that under both cause numbers

31123 and 41742, which include charges of invasion of privacy, given the "benign nature of the offense and his character as a hardworking and stable man," the sentence was inappropriate and should run concurrently to cause number 27897. (Appellant's Br. p. 13-14).

Although a trial court may have acted within its lawful discretion, Appellate Rule 7(B) provides that the appellate court may revise a sentence authorized by statute if the appellate court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). It is on this basis alone that a criminal defendant may now challenge his sentence where the trial court has entered a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing the particular sentence that is supported by the record, and the reasons are not improper as a matter of law. *Id*. The burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

With regard to the character of the offender, Mason argues that he took responsibility for his actions by pleading guilty and apologizing to his family, and that he is a dedicated family man who supports his children. First, we note that Mason committed this battery against his wife while he was on probation for committing the same offense—battery. The sentencing court also noted this fact, and stated, "And, if that wasn't enough, while this case was pending, while you were still on probation, what did you do? You violated this court's No Contact Order. Not once, but twice, you were only found guilty of twice," which the trial

court found to be an aggravating factor. (Tr. p. 321). This demonstrates that Mason is unable to abide by the law, especially while on probation. On the next issue, Mason did not accept responsibility for his actions—he repeatedly attempted to dissuade Wife from testifying against him, illustrating that he was unable to take responsibility for what he had done to his wife and also setting a bad example for his children. Additionally, during the trial, he stated that he believed the State's case "was based on lies." (Tr. p. 217). Clearly, Mason has not accepted responsibility for his actions as he claims.

With regard to the nature of the offense, Mason acknowledges that he violated the trial court's no-contact order, he argues that the phone call and letter were nothing more than a nuisance to Wife. While the nature of the offense was not particularly egregious, Mason is unable to follow the law. He violated the trial court's no-contact order not once, but twice. Under cause number 31123, during the phone call he made to Wife, she clearly stated that she did not want to talk to Mason. She told him, "[] I can't talk to you. Goodbye. Don't call me Anthony. I'm not talking to you." (Tr. p. 248). He forcefully responded that she was "going to screw [his] life up, []!" and "You going to screw me over like you did the last time!" (Tr. pp. 248, 249). It is clear that Wife did not view the call as benign, as she told him "You [sic] not going to hurt me, Anthony," especially in light of the fact that she testified that she is concerned for her safety after he is released from prison. (Tr. p. 249). Under cause number 41742, Mason violated the no-contact order by sending a letter to Wife's parent's house. Mason was well aware that he was not to have any contact with Wife,

yet he tried to circumvent the order by sending the letter to her parent's house and giving messages to give to her.

Ultimately, Mason has not persuaded us that his consecutive sentence is inappropriate based on the character of the offender or the nature of the offense.

## CONCLUSION

Based on the foregoing, we find that: (1) the trial court did not abuse its discretion by failing to admonish the jury; and (2) the sentence was appropriate considering the nature of the offender and offense.

Affirmed.

VAIDIK, J., and CRONE, J., concur.