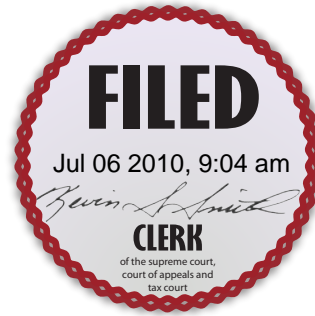


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

BENJAMIN L. UNDERWOOD,

Appellant/Defendant,

vs.

STATE OF INDIANA,

Appellee/Plaintiff.

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No. 20A05-0912-CR-707

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0903-MR-2

July 6, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Benjamin Underwood appeals from his convictions of and sentences for Murder,¹ a felony, and Class B felony Conspiracy to Commit Aggravated Battery.² Underwood contends that the trial court abused its discretion in denying his motion for mistrial, his convictions violated constitutional prohibitions against double jeopardy, and his sentence is inappropriately harsh. We affirm.

FACTS AND PROCEDURAL HISTORY

At some point on the evening of March 16, 2009, Kyana Bonner got into an altercation with her boyfriend Ricky Hines. At some point, Hines threw K.U., the two-year-old child that Bonner had had with former boyfriend Underwood, “across the floor” into a table. Tr. p. 520. After Bonner left with her K.U. and her niece, she found Underwood and told him that Hines had “put his hands on” K.U. Tr. p. 527. Bonner’s intent was to “get[Hines’s] ass beat” and to have Underwood do it. Tr. p. 527. Brandon and Daniel Roby and Tierre Dean witnessed the conversation. Brandon Roby described Bonner as being in “a rage[,]” Dean described her as “hysterical” and “like blowing up[,]” and Daniel observed that she was “crying and she was yelling and screaming.” Tr. pp. 283, 325, 358. As a result of the conversation, Underwood became visibly upset and Dean vainly attempted to calm him down by putting his hands on him.

Bonner, her niece, K.U., and Underwood drove to Hines’s home in a pickup truck, and Bonner called Hines on a mobile telephone and told him to come outside. When Hines came outside, he and Underwood began to fight. Meanwhile, a car containing

¹ Ind. Code § 35-42-1-1 (2008).

² Ind. Code §§ 35-42-2-1.5 (2008); 35-41-5-2 (2008).

Brandon, Daniel, and Dean pulled up. Brandon, who knew where Hines lived, had thought it a good idea to go “[s]o nothing would happen.” Tr. p. 290. At some point, Underwood had Hines on the ground and was choking him when Bonner caused Underwood to release him. Hines picked up a “big brick in his hand” and was “maneuvering it around” Underwood, but not blocking his retreat. Tr. p. 296. As the two men were yelling at each other, “Underwood pulled out a gun, and everybody was yelling no.” Tr. p. 297. Underwood hesitated and looked toward the car containing the Robys and Dean, but then looked back at Hines and shot him. As Hines turned and ran, Underwood shot him again, and Hines died of the multiple gunshot wounds. K.U., who was seated in the nearby pickup truck, was able to see the entire incident.

On March 30, 2009, the State charged Underwood with Murder and Class B felony conspiracy to commit aggravated battery. During Underwood’s jury trial, he testified that the first gunshot had come from a car containing Brandon and Dean and that Daniel had fired the second. Underwood further testified that he, the Robys, Dean, Bonner, Bonner’s niece, and K.U. drove to a Marathon gas station and then ultimately on to Chicago. On cross-examination, the following exchange took place:

Q [W]here did you stop along the way?

A I said at the gas station.

Q Just at the gas station?

A Yes, ma’am.

Q And that was the Marathon?

A Yes.

Q Which Marathon?

A On Franklin and Indiana.

Q Okay. And you remember how we talked earlier, the detectives did about being able to corroborate or contradict. Did you get that video

from the gas station to show all six of you together there at that gas station?

A No ma'am. Ain't nobody get out.

Q Your car pulled up, didn't it?

A Yeah. Brandon did.

Q So that would be a fact that could be corroborated for this jury to verify what you're saying.

[Underwood's counsel]: Your honor, may we approach?

THE COURT: You may.

(An off-the-record discussion was held at the bench.)

THE COURT: All right. The record should reflect that the defendant has made a motion for a mistrial.

....

The motion for mistrial has been denied by the Court. This is cross-examination. [Prosecutor], you may proceed.

....

Q Thank you. So, Mr. Underwood, according to your story, there might be evidence out there that documents all of you guys [in] Brandon Roby's car at this Marathon station.

A No ma'am. I was not in Brandon Roby's car. Only person[s] that was in Brandon Roby's car was Tierre Dean and Brandon Roby.

Q Okay. And then where were you?

A In the truck still, ma'am.

Q Where were you seated in the truck?

A In the passenger [seat].

Q Okay. Inside the cab?

A Yes, ma'am.

Q And so when the truck then pulled into the Marathon station don't you think that would have been recorded too?

A Ma'am, I – yes, ma'am; yes, ma'am.

Q So there could have been documentation to follow-up on what you said and prove to this jury that that's how it really worked, isn't there?

A Yes, ma'am.

Q Okay. But that's very different than what we've heard throughout the entire trial, isn't it?

A Yes, ma'am.

Tr. pp. 617-19.

On October 7, 2009, the jury found Underwood guilty as charged. On November 5, 2009, the trial court sentenced Underwood to sixty-four years of incarceration for

murder and ten years for conspiracy to commit aggravated battery, both sentences to be served concurrently. The trial court found, as aggravating circumstances, that Underwood shot Hines as Hines was running away, K.U. had a “front row seat” to the murder, Underwood injected himself into Bonner and Hines’s conflict, the shooting occurred when the fight was essentially over, Underwood was armed with a handgun and Hines with a brick, Underwood’s criminal history, Underwood’s failure to admit to cocaine use despite a juvenile adjudication related to cocaine, Underwood’s flight to Florida following the murder, Underwood’s attempt to blame the murder on others, and his adoption of a plan to manipulate the law to mislead to jury. The trial court found, as mitigating circumstances, the statements at sentencing of Underwood and his counsel and his age of twenty years. The trial court found that the presence of K.U. and Underwood’s plan to manipulate the law were “severe aggravators[.]” Tr. p. 74.

DISCUSSION AND DECISION

I. Whether the Trial Court Abused its Discretion in Denying Underwood’s Motion for Mistrial

Underwood contends that the State improperly shifted the burden of proof to him during its cross-examination of him when it asked whether he had obtained a videotape from the Marathon station that might corroborate his claim that was there shortly after Hines’s shooting. Underwood argues that the trial court abused its discretion in denying his mistrial motion based on this alleged misconduct.

We review a trial court’s decision to deny a mistrial for abuse of discretion because the trial court is in “the best position to gauge the surrounding circumstances of an event and its impact on the jury.” *McManus v. State*, 814 N.E.2d 253, 260 (Ind. 2004). A mistrial is

appropriate only when the questioned conduct is “so prejudicial and inflammatory that [the defendant] was placed in a position of grave peril to which he should not have been subjected.” *Mickens v. State*, 742 N.E.2d 927, 929 (Ind. 2001) (quoting *Gregory v. State*, 540 N.E.2d 585, 589 (Ind. 1989)). The gravity of the peril is measured by the conduct’s probable persuasive effect on the jury. *Id.*

Pittman v. State, 885 N.E.2d 1246, 1255 (Ind. 2008).

We conclude that the State’s cross-examination was not misconduct at all, much less misconduct so inflammatory as to warrant a mistrial. The prosecutor’s questions regarding the lack of physical evidence that might corroborate Underwood’s version of events was simply a challenge to the strength of the evidence supporting Underwood’s version, namely, his testimony. At no point did the prosecutor suggest that Underwood was required to come forward with corroborating evidence or that the jury must convict if he did not. At most, the prosecutor was merely pointing out weaknesses in Underwood’s case, which, it seems to us, is precisely the purpose of cross-examination.

We reached a similar conclusion in *Terry v. State*, 857 N.E.2d 396 (Ind. Ct. App. 2006), *trans. denied*. In that case, the question was whether Terry’s trial counsel was ineffective for failing to object to a prosecutor’s comment that Terry failed to produce any one of the allegedly fifteen to twenty persons who might have corroborated the alibi evidence that he presented at trial. *Id.* at 405. We found this comment to be unobjectionable:

[T]he prosecutor in this case merely commented on the weight of the evidence presented by Terry, and neither commented on Terry’s failure to testify nor impermissibly shifted the burden of proof. The prosecutor merely pointed out the weakness of Terry’s alibi defense, and in no way insinuated that Terry was required to provide such a defense or that the jury must believe Terry’s alibi in order to acquit Terry.

Id. As in *Terry*, the prosecutor here merely pointed out a weakness in Underwood's evidence and did not suggest that he was required to present any evidence or that it had to be believed order to acquit. The trial court did not abuse its discretion in denying Underwood's motion for mistrial.

II. Whether Underwood's Convictions Violate Prohibitions Against Double Jeopardy

Underwood contends that his convictions for murder and conspiracy to commit aggravated battery violate Indiana constitutional prohibitions against double jeopardy. In *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999), the Indiana Supreme Court held "that two or more offenses are the 'same offense' in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to ... the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense." *Id.* at 49-50. The *Richardson* court stated the actual evidence test as follows:

To show that two challenged offenses constitute the "same offense" in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.

Id. at 53. The Indiana Supreme Court has also explained that, when applying the actual evidence test, the question

is not merely whether the evidentiary facts used to establish one of the essential elements of one offense may also have been used to establish *one* of the essential elements of a second challenged offense. In other words, under the *Richardson* actual evidence test, the Indiana Double Jeopardy Clause is not violated when the evidentiary facts establishing the essential

elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense.

Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002). In determining what evidence the trier of fact used to establish the essential elements of an offense, “we consider the evidence, charging information, final jury instructions ... and arguments of counsel.” *Rutherford v. State*, 866 N.E.2d 867, 871 (Ind. Ct. App. 2007).

In the State’s charging information for conspiracy to commit aggravated battery, it alleged that Underwood,

with the intent to commit the felony of Aggravated Battery, did agree with another person, to-wit: Kyana Bonner, to commit the felony of Aggravated Battery, that is to knowingly inflict injury upon another person which created a substantial risk of death, and did engage in conduct constituting an overt act toward said Aggravated Battery by seeking out one Ricky Hines to confront and beat the said Ricky Hines while armed with a deadly weapon.

Appellant's App. p. 6. Underwood argues that the only evidence that establishes that he had the intent to inflict injury upon Hines creating a substantial risk of death was the evidence that he shot him. If this is so, then the overt act of shooting Hines would be an element of the conspiracy charge and also the act that formed the basis for the murder, for which Underwood was also convicted and punished. Under such circumstances, both convictions could not stand. *See Richardson*, 717 N.E.2d at 55 (Sullivan, J., concurring).

We cannot conclude that the jury relied exclusively on the evidence of the shooting to establish one of the essential elements of conspiracy to commit aggravated battery. First, the evidence that Underwood shot Hines is not the only evidence establishing his intent to inflict injury upon him creating a substantial risk of death.

Bonner testified that she asked Underwood to “beat [Hines’s] ass,” “put [Hines] to sleep[,]” and kill him. Tr. p. 528. Underwood’s willingness to accompany Bonner on her mission is evidence of his acquiescence in Bonner’s desires. The jury also heard evidence that Underwood told Bonner, “I’ll whoop his ass.” Tr. p. 485. Underwood’s statement, along with his willingness to accompany Bonner to confront Hines, raises an inference that, at the very least, Underwood intended to seriously hurt Hines. Moreover, the fact that Underwood had Hines confined on the ground and was choking him such that he appeared to be unable to breathe is further evidence that Underwood came to the fight intending to do Hines serious harm. The State produced ample independent evidence that Underwood intended to inflict injury upon Hines creating a substantial risk of death.

The State’s argument also makes it unlikely that the jury used the evidence of murder to convict Underwood for conspiracy to commit aggravated battery. In its final argument, the State did not argue that Underwood’s shooting of Hines established his intent to commit aggravated battery. Instead, the State specifically argued that Underwood’s anger following his talk with Bonner, his decision to accompany her, and the fact that he choked Hines such that he could not breathe established his intent. Finally, neither the charging information nor the final instructions indicate that the shooting establishes Underwood’s intent to commit aggravated battery. In light of the evidence, arguments, and instructions heard by the jury, Underwood has failed to demonstrate a reasonable possibility that it used evidence of the murder to establish one

of the essential elements of conspiracy to commit aggravated battery. Underwood's convictions do not violate prohibitions against double jeopardy.

III. Whether Underwood's Sentence is Inappropriate

Underwood argues that his aggregate sixty-four-year sentence is inappropriately harsh. We "may revise a sentence 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." Ind. Appellate Rule 7(B). "Although appellate review of sentences must give due consideration to the trial court's sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied." *Shouse v. State*, 849 N.E.2d 650, 660 (Ind. Ct. App. 2006), *trans. denied* (citations and quotation marks omitted).

The nature of Underwood's most serious offense, murder, seems to us to be somewhat more egregious than typical. First, Underwood murdered Hines in full view of Underwood's two-year-old son. K.U. was thereby put in harm's way, and, although, we have no way of knowing what the long-term effects will be on K.U. of witnessing his father murder Hines, they will not be positive. Second, the killing seemed particularly senseless and avoidable. As the trial court noted, the fight was essentially over, and Underwood seems to have more than accomplished his original stated goal of "whooping" Hines. Instead of leaving, however, Underwood drew a gun and, despite hearing and acknowledging the pleas of the others there, shot Hines twice, once as he was attempting to run away.

As for Underwood's character, we conclude that it also justifies an enhanced sentence. Although Underwood's criminal history is not lengthy, it nonetheless indicates dishonesty and contempt for the law. As a juvenile, Underwood had adjudications for false informing and cocaine possession and violated the terms of the probation that was imposed following the latter. As an adult, Underwood has a prior conviction for false informing. Underwood's comparatively brief criminal history would carry more mitigating weight if he were older, being only nineteen when he committed the instant crimes. Other circumstances also demonstrate Underwood's dishonesty and contempt for the law. Underwood fled the jurisdiction and had to be extradited to Indiana from Florida. Underwood demonstrably perjured himself at trial, testifying that he had never been convicted of false informing and that someone else had "used [his] name again."³ Tr. p. 615. In light of the egregious nature of his offenses and his character, Underwood has failed to convince us that his enhanced sentence is inappropriate.

The judgment of the trial court is affirmed.

RILEY, J., and MATHIAS, J., concur.

³ Underwood's counsel argued at sentencing that Underwood was under the impression at trial that his false informing conviction was actually a juvenile adjudication, but such a misapprehension would not lead one to testify that the person convicted was actually someone else.