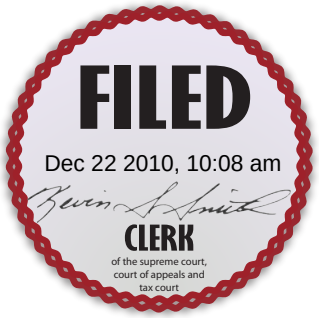

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IN THE
COURT OF APPEALS OF INDIANA

LARRELL ALEXANDER,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 34A04-1003-CR-250
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable William C. Menges, Jr., Judge
Cause No. 34D01-0809-FA-676

December 22, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, Larrell Alexander appeals his convictions and sentence for dealing in cocaine, a Class B felony, and resisting law enforcement, a Class A misdemeanor. On appeal he raises three issues, which we restate as: 1) whether the trial court abused its discretion in denying his motion for mistrial following dismissal of Juror No. 4, 2) whether the State improperly shifted the burden of proof to Alexander, and 3) whether his sentence is inappropriate. Concluding the trial court did not abuse its discretion in denying a motion for mistrial, the State did not shift the burden of proof to Alexander, and the sentence is not inappropriate, we affirm.

Facts and Procedural History

In 2008, a confidential informant to the Kokomo Police Department conducted a controlled purchase of cocaine from Alexander. Following Alexander's sale to the informant and Alexander's return to his own vehicle, Kokomo Police Officer Chad Van Camp initiated a traffic stop. Alexander exited his vehicle and fled on foot. Officer Van Camp and his police canine chased Alexander, and upon catching up to him, tackling him, and arresting him, Officer Van Camp suffered a bone contusion in his elbow and injury to his shoulder which required shoulder surgery. Alexander was charged with one count of dealing in cocaine as a Class A felony, two counts of dealing in cocaine as Class B felonies, and one count of resisting law enforcement.

At trial, following the State's presentation of two witnesses, Juror No. 4 indicated to the bailiff that he recognized a courtroom spectator, and subsequently the trial court and counsel for Alexander and the State questioned Juror No. 4 outside the presence of

other jurors. Juror No. 4 testified he met the spectator about ten years ago as they both worked for Chrysler, she had been to his home, and he "would consider her a friend." Id. at 67. He further testified he knows the spectator has a son named "Larell," (sic) and he believed the defendant to be her son. Id. In response to a question as to whether any of this would affect Juror No. 4's ability to remain fair and impartial, he replied "I don't think so." Id. at 68.

The State asserted its doubt the juror could remain fair and impartial because he recognized the spectator as a friend who had been to his home, and moved for the juror's dismissal. Over Alexander's objection, the trial court dismissed Juror No. 4 because the relationship between Juror No. 4 and Alexander is "close enough." Id. at 69. Alexander moved for a mistrial, which the trial court denied.

The jury found Alexander guilty of one count of dealing in cocaine as a Class B felony and of resisting law enforcement. The trial court sentenced Alexander to twenty years for dealing cocaine and one year for resisting law enforcement, to run consecutively, for a total of twenty-one years executed. Alexander now appeals.

Discussion and Decision

I. Mistrial

A. Standard of Review

"[D]eclaration of a mistrial is an extreme action and is warranted only when no other action can be expected to remedy the situation." Bedwell v. State, 481 N.E.2d 1090, 1093 (Ind. 1985). The decision whether to grant a motion for mistrial lies within the sound discretion of the trial court. Palmer v. State, 486 N.E.2d 477, 483 (Ind. 1985).

To establish that denial of such motion was an abuse of discretion, "the appellant must demonstrate that he was placed in a position of grave peril to which he should not have been subjected." Id.

B. Dismissal of Juror No. 4

Alexander argues the trial court erred in denying his motion for mistrial after dismissing a juror mid-trial. Alexander first asserts mistrial is appropriate because Juror No. 4 had returned to the jury room for over three minutes after being separated and questioned by the trial court and counsel for Alexander and the State. Although not explicit, this assertion appears to argue mistrial was required because the juror may have discussed the matter with other jurors. The record provides no evidence of such, and in fact, Juror No. 4 later testified he had not spoken to other jurors about the matter. With no reason to disbelieve this testimony, especially in light of Alexander's lack of explicit argument to this effect, we find Alexander's assertion unpersuasive.

Further, this situation is akin to Faust v. State, 642 N.E.2d 1371 (Ind. 1994). In Faust, the defendant argued it was improper for a bailiff to excuse a juror for sleeping during the trial without bringing her into the courtroom because the way the bailiff addressed her may have impacted remaining jurors. Our supreme court acknowledged the juror was not excused for bias or prejudice, and stated, even if "for the sake of argument that all of the jurors heard the bailiff tell her why she was being excused, we see no possible harm from such information." Id. at 1373. Similarly, even if for the sake of argument other jurors discovered why Juror No. 4 was dismissed, this would not have harmed Alexander because a reasonable juror would understand that the appearance of

impropriety, even without intentional bias or prejudice, might be sufficient reason for the trial court to dismiss a juror; and even if not, any animosity would not be attributed to the defendant.

Alexander next asserts that, even if the jurors were not informed by Juror No. 4 of the reason for his dismissal, they would wonder why a juror was dismissed. To the extent this is an argument that mistrial was required, we disagree. Again, we have no reason to believe jurors made impermissible assumptions about why Juror No. 4 was dismissed, especially without Alexander's explicit argument to this effect.

Alexander also states that "[i]t is unclear from the record, but one can assume that juror number four was a black male[,] [and] [i]t . . . appears from Defendant's counsel's objection, that juror number four was the only black male on the jury." Appellant's Brief at 5. Thereby, Alexander argues he was denied "a fair cross section of the community" as a jury. Id. However, the record is not developed as to the actual race of Juror No. 4. On appeal, Alexander is merely surmising that Juror No. 4 was a black male and the only one on the jury. This is insufficient for a successful Batson challenge, in part because a Batson challenge requires a showing that the juror is a member of a "cognizable racial group." See Jones v. State, 859 N.E.2d 1219, 1222 (Ind. Ct. App. 2007) (citation omitted), trans. denied.

Finally, Alexander asserts Juror No. 4 demonstrated his honesty by bringing his relationship to the spectator to the trial court's attention, and therefore his testimony that he could remain fair and impartial should have been accepted and he should not have been dismissed. We defer to the trial court's exercise of discretion in this regard, both as

to assessing the credibility of Juror No. 4 as a live-testifying witness and in the excusal of jurors generally. See Harris v. State, 659 N.E.2d 522, 525-26 (Ind. 1995) ("The trial court was in the best position to assess the honesty and integrity of Juror Number One and her ability to perform as a conscientious, impartial juror.").

For the reasons stated, we conclude the trial court did not abuse its discretion in dismissing Juror No. 4 and in denying Alexander's motion for mistrial.

II. Shifting the Burden of Proof

A. Standard of Review

Alexander argues the State impermissibly shifted to him the burden of proof by making improper argument to the jury in closing. Alexander concedes he did not timely object to these statements. Failure to timely object to an alleged error at trial constitutes waiver of that issue on appeal unless the error fits the "extremely narrow exception" of fundamental error. Hand v. State, 863 N.E.2d 386, 394 (Ind. Ct. App. 2007); see Lainhart v. State, 916 N.E.2d 924, 931 (Ind. Ct. App. 2009) (same, regarding prosecutorial misconduct). "To rise to the level of fundamental error, the error must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process." Maul v. State, 731 N.E.2d 438, 440 (Ind. 2000) (quotation omitted). "The standard for fundamental error is whether the error was so prejudicial to the rights of the defendant that a fair trial was impossible." Boatright v. State, 759 N.E.2d 1038, 1042 (Ind. 2001).

B. Alleged Misconduct

Alexander takes issue with the State's argument to the jury in closing: "You have to have evidence that shows there's a real possibility he's not guilty [to acquit]." Transcript at 262. Alexander contends the State repeatedly argued to the jury they must have sufficient evidence to acquit him.

Alexander is correct that the ultimate burden of proving each element of a criminal offense beyond a reasonable doubt rests with the State and never shifts to the defendant. Geljack v. State, 671 N.E.2d 163, 164 (Ind. Ct. App. 1996). We have held in some instances a particular legal doctrine may allow the burden of production of evidence to shift to the defendant, however. See, e.g., Tyson v. State, 619 N.E.2d 276, 294 (Ind. Ct. App. 1993), trans. denied, cert. denied, 510 U.S. 1176 (1994) (mistaken belief of fact).

We agree the statements Alexander refers us to do not implicate any such permissible shift of the burden of production and are near the fine line that separates proper and improper prosecutorial argument. However, reviewing the statements at issue in the context of the entire closing argument and the trial, and in light of our review only for fundamental error, we conclude Alexander has not demonstrated that these statements were so prejudicial to his rights as to make a fair trial impossible, and these statements probably did not have a persuasive effect on the jury's decision, nor does making them "constitute a clearly blatant violation of basic and elementary principles of due process." Lainhart, 916 N.E.2d at 931. There was also significant evidence of Alexander's guilt, which makes it unlikely the State's statements had a persuasive effect on the jury. Therefore, Alexander has failed to show fundamental error.

III. Inappropriate Sentence[1]

This court has authority to revise a sentence "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). In making this determination, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. Nevertheless, the defendant bears the burden to persuade this court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). "[W]hether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." Cardwell v. State, 895 N.E.2d 1219, 1224 (Ind. 2008).

As to sentencing regarding his dealing in cocaine conviction, the trial court stated:

> [T]he defendant was found guilty of Dealing in Cocaine as a Class B felony. The defendant has, was arrested 11 months after his release from the Department of Correction on another cocaine charge. As the probation department pointed out, he's been under the jurisdiction of the court for the last 5-1/2 years and he's 24 years old so basically all of his adult life he has been under the jurisdiction of the court. He has violated probation. He never reported to finish probation. I think his criminal history and violation of probation are aggravating factors. I don't find any mitigating factors and I think the aggravating factors outweigh the mitigating factors and justify an aggravated sentence in connection with Count II [(dealing in cocaine)].

Tr. at 278-79.

Alexander first argues the nature of his Class B felony dealing in cocaine offense warrants less than the maximum twenty years because the legislature has already

[1] Alexander's appellate brief discusses the appellate standard of review for trial court sentencing decisions as an abuse of discretion, but makes no argument to this effect. Alexander explicitly argues his sentence was inappropriate, citing Appellate Rule 7(B). These are two different arguments subject to separate analyses. Therefore we decline to review whether the trial court abused its discretion in sentencing and address only whether his sentence is inappropriate.

considered the severity of the crime and because there was no physical injury, pecuniary loss, or actual victim. Although his offense did not cause physical injury or pecuniary loss to an actual victim, this did not result from his careful avoidance or intention, but from the manner in which police and their informant conducted the controlled buy. Therefore, while the lack of pecuniary loss or an actual victim was a fortunate result, it does not reflect positively in our view on the nature of the offense. We also find it somewhat disingenuous for Alexander to argue lack of injury in the drug offense, because although his dealing cocaine did not result in physical injury, the incident as a whole involved a scuffle with an officer, which led to the officer's significant physical injury. We do agree, however, there was nothing extraordinary about the nature of this offense.

However, as to Alexander's character, his extensive criminal record leaves us unpersuaded his maximum sentence is inappropriate. Alexander explains his criminal record and the present offenses stem from his substance abuse, and that treatment rather than imprisonment would be appropriate. He also notes he completed two substance abuse prevention programs while this matter was pending. Alexander also refers us to case law which suggests a trial court must consider drug treatment as opposed to imprisonment when sentencing. See James v. State, 868 N.E.2d 543 (Ind. Ct. App. 2007); Jordan v. State, 787 N.E.2d 993 (Ind. Ct. App. 2003).

We find more compelling his multiple attempts and failures to seek and receive treatment and his extensive criminal record. In 2004, Alexander was convicted for possession of cocaine as a Class C felony, and was sentenced to four years suspended except for time served, with the balance on supervised probation. He was also ordered to

complete an alcohol and drug program and to attain a GED. The record is unclear if he completed the alcohol and drug program, but even if he has, his behavior since then demonstrates his failure to fully adopt its teachings. Further, he has not obtained a GED.

Three petitions to revoke this probation were filed. The first petition to revoke probation followed his conviction for possession of cocaine as Class D felony in 2005. For this conviction, he was sentenced to two years with six months executed and the remaining eighteen months suspended to probation, and again ordered to complete an alcohol and drug program. In 2006, within three months after release from prison, he was apprehended and forfeited his bond for a charge of possession of cannabis in Illinois. The second petition to revoke was filed in 2007, pursuant to a plea agreement for dismissal of a possession of marijuana charge. The third petition to revoke probation was filed as a result of the present case.

This record demonstrates not only multiple serious incidents of illegal conduct of a similar nature to the crime in this case, but also a history of failing to either attend drug treatment or to modify his behavior to avoid illegal substances, and of repeatedly violating his probation. At the time of sentencing, Alexander had been under the jurisdiction of the trial court for over five and one half years for various drug charges, including two prior felonies. Alexander also has a pending charge for dealing in cocaine, which allegedly occurred within two months after the present offenses – approximately the same time period Alexander informs us he attended and completed two drug treatment programs.

Therefore, although we are encouraged by Alexander's repeated and continuing attempts to resolve his substance abuse problem by seeking treatment, we cannot conclude either the term or placement of his sentence is inappropriate in light of the nature of the offense or his character.

Conclusion

The trial court did not abuse its discretion in denying Alexander's motion for mistrial following dismissal of a juror. Nor did Alexander demonstrate fundamental error in the State's closing argument to the jury. Further, Alexander's sentence is not inappropriate in light of the nature of the offense or his character.

Affirmed.

RILEY, J., and BROWN, J., concur.