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IN THE COURT OF APPEALS OF INDIANA

ORLANDO BRANSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A04-0701-CR-64
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Wayne J. Lennington, Judge
Cause No. 18C05-0511-MR-4

November 16, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Orlando Branson appeals from his conviction for Murder, a felony,[1] and his fifty-five-year sentence. Upon appeal, Branson alleges that he was denied a fair trial because of judicial misconduct, the evidence was insufficient to support his conviction for murder, and his sentence is inappropriate in light of his character and the nature of his offense. We affirm.

FACTS AND PROCEDURAL HISTORY

On November 13, 2005, Marco Hampton was fatally wounded after an altercation broke out at his home in Muncie between him and Orlando Branson. Five days later, on November 18, 2006, Orlando Branson was charged with Hampton's murder. Branson's case was tried before a jury starting on August 15, 2006, but the trial ended in a mistrial because of improper communications between jurors and the bailiff. The trial judge subsequently scheduled a new trial which began on October 10, 2006.

At trial, the parties presented evidence that multiple gunshots were fired during the altercation between Hampton and Branson. During the altercation, Branson was armed with a .40 caliber Smith and Wesson automatic handgun, and Hampton was armed with a Taurus 9-millimeter Millennium Series automatic handgun. Shots were fired from a 9-millimeter automatic handgun and a .40 caliber automatic handgun. Branson testified during the altercation he fired his weapon three to four times in the general direction of where Hampton was standing, but claimed he did so in self-defense.

[1] Ind. Code § 35-42-1-1(1) (2005).

After the jury found Branson guilty of murder, the trial court sentenced him to fifty-five years of incarceration. This appeal follows.

DISCUSSION AND DECISION

I. Judicial Misconduct

Branson claims that the trial court's actions crossed the barrier of impartiality and deprived him of a fair trial. Specifically, he alleges the trial court improperly notified prospective jurors that his previous trial had resulted in a mistrial, certain statements made by the court were prejudicial, and the trial court improperly chastised both the defendant and defense counsel before the jury.[2]

It is well-settled that a trial before an impartial judge is an essential element of due process. *Ruggieri v. State*, 804 N.E.2d 859, 863 (Ind. Ct. App. 2003) (citing *Abernathy v. State*, 524 N.E.2d 12, 13 (Ind. 1988)). The impartiality of a trial judge is especially important due to the great respect that a jury accords the trial judge and the added significance that a jury might give to any showing of partiality by the trial judge. *Id*.

In Indiana, the law presumes that a judge is unbiased and unprejudiced. *Timberlake v. State*, 753 N.E. 2d 591, 610 (Ind. 2001); *Haynes v. State*, 656 N.E.2d 505, 507 (Ind. Ct. App. 1995). In order to assess whether the trial judge has crossed the barrier of impartiality, this court examines both the trial judge's actions and demeanor. *Ruggieri*, 804 N.E.2d at 863; *see also*, *Timberlake v. State*, 690 N.E.2d 243, 256 (Ind.

[2] To the extent that Branson also challenges the trial court's notification to the jury that he would be attending to other matters during what the record reveals was his lunch break, Branson fails to develop this argument or allege any prejudice, so we need not consider it further.

1997). However, we must remember that a trial judge must also be given latitude to run his or her courtroom and maintain discipline and control of the trial. *Ruggieri*, 804 N.E.2d at 863; *see also*, *Timberlake*, 690 N.E.2d at 256. Even where the court's remarks display a degree of impatience, if, in the context of a particular trial, "they do not impart an appearance of partiality, they may be permissible to promote an orderly progression of events at trial." *Timberlake*, 690 N.E.2d at 256 (quoting *Rowe v. State*, 539 N.E.2d 474, 476 (Ind. 1989)). In order to successfully show bias on the trial court's behalf, a defendant must show the trial judge's action and demeanor crossed the barrier of impartiality and prejudiced the defendant's case. *Timberlake*, 690 N.E.2d at 256.

A. Notification of Prior Mistrial

Branson's first allegation of judicial misconduct stems from the trial judge's notification to prospective jurors during his introduction of the case that Branson's previous trial resulted in a mistrial. In doing so, the trial judge stated:

> [W]e had a mistrial. Neither side here had anything to do with that mistrial. I don't want you saying, "Oh, the State did that." No, the State didn't do it. The Defense didn't do it. It was done otherwise and it was through the Court system that it happened.… Now, I don't want you to have any misgiving about what these people did. They were trying the case, doing great, everything was fine. What happened was a very technical thing and I had to declare the mistrial. It's not their fault that anything, that that stopped … [n]one of them did anything. And I have nothing but the greatest of compliments for these two attorneys and the way they tried the case. There was no problem whatsoever. It was a technical thing and so I don't want you to bear any feelings towards anybody because that has nothing to do with the guilt or innocence of this defendant.

Tr. at 644.

We first note that Branson did not object to this statement at trial. Generally, a contemporaneous objection is required to preserve an issue for appeal. *Ruggieri*, 804 N.E.2d at 863. Therefore, since a contemporaneous objection at trial is required to preserve an issue for appeal, Branson's failure to make such an objection has resulted in a waiver of his right to raise this issue on appeal. *See Ruggieri*, 804 N.E.2d at 863. Further, even if this issue had been preserved and assuming, *arguendo*, that it was error for the trial judge to inform prospective jurors of the prior mistrial, Branson makes no specific allegation of prejudice. The trial court's comments emphasized that the mistrial was the result of a technicality and was not partial to either side as evidenced by the trial court's praise of the manner in which both the prosecution and the defense had tried the case to that point. Given the court's emphasis that the mistrial occurred solely because of a technicality and its praise of both attorneys' work, we are unable to agree that the trial court's statement notifying prospective jurors of the previous mistrial prejudiced Branson.

B. Admonition to the Jury

Next, Branson objects to the trial court's admonition to the jury at the conclusion of trial, claiming that the trial judge suggested to jurors that they had a limited amount of time to deliberate before arriving at a verdict. The statement in question reads:

> [T]omorrow it will go to you for your decision and that means that you may not get out of here once I – once I send you out to deliberate. You're here until it's done which means you may be here late into the night tomorrow night. We have to be out of this Jury room by tomorrow because we don't have enough Jury Rooms. … So, we've got to finish tomorrow. And, we will. So, I – you need to make arrangements that you may not be out of here at four o'clock tomorrow.

Tr. at 1201. Branson argues that this statement was an improper *Allen* charge, in violation of *Allen v. United States*, 164 U.S. 492 (1896). However, we are unpersuaded by this argument. An *Allen* charge is a supplemental instruction suggesting to an apparently deadlocked jury that it should reach a verdict, or a similar admonishment, which might encourage the jury to unduly compromise the verdict. *Clark v. State*, 597 N.E.2d 4, 7 (Ind. Ct. App. 1992), *trans. denied*. "This danger is not present, however, when the trial court has no reason to believe that the jury is deadlocked." *Id*. at 7. "There can be no *Allen* violation in the absence of some evidence suggesting that the jury was deadlocked when an alleged *Allen* charge was read." *Id*. at 7, 8. In the present case, the jury had not yet received final instructions or begun to deliberate. The trial judge's statement therefore does not constitute an impermissible *Allen* charge.

Further, Branson fails to acknowledge, that the trial court corrected any potential error associated with the above mentioned admonition by making a second admonition to the jury the next morning which stated:

> Yesterday, the girls told me that I was too harsh in telling you that we had to get done today. I don't have to get done today. The purpose is the Jury Room we're using is for Superior – Circuit Court 4. We don't have a Jury Room. And, they've got a Jury coming in, in the morning. So, what I was saying that we had to get done is, if we don't get done or if you're still deliberating, we'll find another Jury Room somewhere else and move you. … So, I didn't mean to imply to you that you had to do this within any specific time. Once I give it to you for you to make the determination, it's however long it takes the twelve of you to agree on a verdict or to indicate that you cannot agree.

Tr. at 1331-1332.

A proper admonition to the jury is presumed to cure any alleged error, and Branson has failed to demonstrate otherwise. *See Ruggieri*, 804 N.E.2d at 864. We therefore agree with the State that any alleged error resulting from the trial court's first admonishment was cured by the second admonishment and that the record does not support a finding on partiality of this basis.

C. Chastisement of Branson

Branson next contends that the trial judge improperly chastised him in front of the jury and made statements before the jury suggesting that he was saying things that hurt his case. At one point, the trial judge told Branson,

> [w]ait a minute. Mr. Branson, I'm trying to keep you from getting into a problem here. … When you volunteer information, you go talking about something that nobody asked you about. If you say something that hurts your case, it's going to stay in … then it's evidence and it's going to be considered by the Jury … it's also important that you not volunteer information that could be used against you.

Tr. at 1187, 1188. We are unable to see how this statement and others like it suggest that the trial court improperly chastised Branson before the jury. The trial court made similar statements to one of the State's witnesses, Maurice Agnew, to limit his testimony to the scope of the question asked by counsel.[3] Branson has failed to show how such statements have prejudiced him. These statements arguably indicate that the trial judge was trying to

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[3] For example, at one point during trial, the trial judge made a similar statement to Agnew, stating:

> Now if you can't, it's ok, but I'm telling that what, we can't allow you to go back and tell the whole story again to bring it up there. If you remember at that point, you can say so. If you don't, you can say so. But you have to make a responsive answer to what she asked.

Tr. at 976.

help Branson by clarifying procedure. Therefore, we conclude that Branson has failed to show how these comments prejudiced him.

D. Chastisement of Defense Counsel

Branson's final allegation of judicial misconduct is that the trial court improperly chastised defense counsel before the jury. Branson's alleged chastisement is based on the following exchange:

> [THE COURT]: If it's asked and answered, that's it.
> [DEFENSE COUNSEL]: He's indicated two times.
> [THE COURT]: You're asking the same question twice.
> [DEFENSE COUNSEL]: I understand that, Judge. I guess I'm trying to understand in my mind cause I'm not understanding what he's telling me.
> [THE COURT]: Now don't tell me that. Listen to me.
> [DEFENSE COUNSEL]: That's fine.
> [THE COURT]: You don't ask the same question twice. She objected to it. It's out.

Tr. 997.

We have previously held that the trial court has a duty to conduct the trial in a manner calculated to promote the ascertainment of truth, fairness, and economy of time. *Ruggieri*, 804 N.E.2d at 865. Moreover, "'even where the trial court's remarks display a degree of impatience, if in the context of a particular trial they do not impart an appearance of partiality, they may be permissible to promote an orderly progression of events at trial.'" *Id*. at 865-66 (quoting *Marcum v. State*, 725 N.E.2d 852, 856 (Ind. 2000)).

In the instant case, we observe that the trial court's comments regarding defense counsel's line of questioning appeared to be made in the interest of promoting an orderly progression of the parties' arguments at trial. These statements were similar to

statements made to the prosecutor during various points of the State's line of questioning.[4] Given the fact that Branson failed to object to many of these remarks at trial as well as the fact that the trial court treated counsel for both parties similarly, we fail to see how Branson was prejudiced by such comments.

In sum, we find nothing in the record that prejudiced Branson's right to a fair trial. The trial court's remarks were directed at admonishing the jury, clarifying the issues, and ensuring timely and fair proceedings. Branson has failed to demonstrate that any of the trial court's comments compromised the trial court's impartiality, or that he suffered prejudice as a result.

II. Sufficiency of Evidence

A. Evidence Sufficient to Disprove Self-Defense and to Prove Murder

Branson claims that the evidence was insufficient to support his murder conviction because the evidence at trial was insufficient to both disprove his claim of self-defense and to prove that he knowingly committed murder. When reviewing the sufficiency of the evidence, we will not reweigh the evidence or judge the credibility of witnesses. *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind. 2001) (quoting *Harrison v. State*, 707

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[4] For example, at one point during the trial, the following exchanged occurred between the trial judge and the prosecutor:

> [THE COURT]: You cannot say it's his or you cannot imply to the Jury … [t]his gun is in for demonstrative purposes only and that's the end of it.
> [PROSECUTOR]: My only problem, Judge, is that I have a problem if you tell the Jury a lie.
> [THE COURT]: I ain't telling them a lie.
> [PROSECUTOR]: Well . . .
> [THE COURT]: What's the lie?
> [PROSECUTOR]: The gun was found. We're just not able to exhibit it to the Jury.
> [THE COURT]: Well, it's not - - it's not available at this trial.

Tr. at 1166-67.

N.E.2d 767, 788 (Ind. 1999)). We only consider the evidence most favorable to the judgment and the reasonable inferences that can be drawn therefrom. *Corbin v. State*, 840 N.E.2d 424, 428 (Ind. Ct. App. 2006). Moreover, we will affirm the trial court if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. *Alkhalidi*, 753 N.E.2d at 627.

When a defendant raises a claim of self-defense, he must prove three facts: (1) that he was in a place where he had a right to be; (2) that he acted without fault; and (3) that he had a reasonable fear or apprehension of death or great bodily harm. *Creager v. State*, 737 N.E.2d 771, 777 (Ind. App. 2000) (citing *Miller v. State*, 720 N.E.2d 696, 700 (Ind. 1999)). Once a defendant claims self-defense, the State has the burden of negating at least one of the necessary elements beyond a reasonable doubt and may do so by affirmatively showing that the defendant did not act in self-defense, or by simply relying upon the sufficiency of the evidence as presented in its case-in-chief. *Creager*, 737 N.E.2d at 777. Whether the State has met its burden is a question of fact for the jury. *Id*. The jury's conclusion is entitled to considerable deference upon appellate review and a conviction in spite of a claim of self-defense will be reversed only if no reasonable person could say that the claim was negated by the State beyond a reasonable doubt. *Taylor v. State*, 710 N.E.2d 921, 924 (Ind. 1999).

Branson first contends that his conviction for murder should be overturned because the evidence, when considered in the light most favorable to the judgment, failed to establish that the State disproved one of the elements of self-defense beyond a

reasonable doubt. In support of his contention, Branson argues that the State failed to disprove his claim that he did not provoke, instigate, or willingly participate in the violence.

In the instant matter, the jury heard both the State's and Branson's accounts of the incident that led to Hampton's death. Agnew testified that Branson initiated the violence, while Branson testified that Hampton initiated the violence. The jury, after weighing both Agnew's and Branson's testimony, apparently disbelieved Branson's account of the incident and concluded, consistent with Agnew's account, that he did not act in self-defense. We defer to the jury's factual finding and therefore conclude that the evidence was sufficient to disprove Branson's self-defense claim.

Branson also contends that the evidence was insufficient to support his murder conviction. A person commits murder if he or she "knowingly or intentionally kills another human being." Ind. Code § 35-42-1-1(1). A person engages in conduct "knowingly" if, when he engages in the conduct, he is aware of a high probability that he is doing so. *Hawkins v. State*, 748 N.E.2d 362, 363 (Ind. 2001); Ind. Code § 35-41-2-2(b) (2005). A defendant's conviction will be affirmed if there is evidence of a probative value from which a reasonable trier of fact could infer guilt beyond a reasonable doubt. *Owens v. State*, 544 N.E.2d 1375, 1377 (Ind. 1989). One's intent to kill may be inferred from the use of a deadly weapon in a manner likely to cause death or great bodily harm. *Id*. Firing a gun in the direction of an individual is substantial evidence from which a jury may infer intent to kill. *Id*.

On cross-examination, Branson testified that he was familiar with the weapon with which he was armed, that he knew how to fire it, that he knew if fired, it would eject a bullet, and that he was aware how dangerous bullets can be when fired out of a gun. Branson also testified that he shot at least three or four shots during the altercation. We believe that based on this testimony, as well as additional evidence presented at trial, a reasonable person could infer that Branson, who pointed a gun at Hampton and shot it multiple times, had the requisite *mens rea* to support his murder conviction. *See id*.

On appeal, Branson's claims relating to the sufficiency of the evidence effectively amount to an invitation to reweigh the evidence and to reassess the credibility of the witnesses, which we decline to do. We therefore conclude that the evidence was sufficient to disprove Branson's claim of self-defense and to support his murder conviction.

III. Appropriateness of Sentence

Branson also claims that his fifty-five-year sentence is inappropriate in light of the nature of his offense and his character and asks that we exercise our authority under Appellate Rule 7(B) to reduce his sentence accordingly. This court has the constitutional authority to revise a sentence pursuant to Appellate Rule 7(B) if we find that it is inappropriate in light of the nature of the offense and the character of the offender; however, our review of any sentence is deferential to the trial court's decision. Ind. Appellate Rule 7(B); *Martin v. State*, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003). If the sentence imposed is lawful, we will not reverse unless the sentence is inappropriate based on the character of the offender and the nature of the offense. *Boner v. State*, 796 N.E.2d

1249, 1254 (Ind. Ct. App. 2003). The burden lies with the defendant to persuade this court that his or her sentence is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007) (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

Branson asserts that his sentence is inappropriate in light of his youthful age and his remorse. We disagree. We are not persuaded that the fifty-five-year advisory sentence is inappropriate in light of the nature of the offense in question. Branson's crime was one of violence, and another human being is dead because of his willful actions. Likewise, we are not persuaded that Branson's sentence is inappropriate in light of his character. Prior to the instant offense, Branson had a criminal history which included convictions for marijuana possession, and he was on probation at the time he killed Hampton. In light of the nature of the crime and Branson's criminal history, Branson has failed to persuade us that his sentence is inappropriate.

Based on the foregoing, we conclude that the defendant was not denied a fair trial by any alleged judicial misconduct, that the evidence was sufficient to sustain Branson's conviction, and that the fifty-five-year sentence imposed by the trial court was not inappropriate.

The judgment of the trial court is affirmed.

NAJAM, J., and MATHIAS, J., concur.