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IN THE COURT OF APPEALS OF INDIANA

THORMONN LAWRENCE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-1104-CR-152
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Frese, Judge
Cause No. 71D08-0810-FC-318

November 22, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Thormonn Lawrence (Lawrence), appeals his conviction for Count I, battery, a Class A misdemeanor, Ind. Code § 35-42-2-1(a)(1), and Count II, domestic battery, a Class D felony, I.C. § 35-42-2-1.3(b).

We affirm.

ISSUE

Lawrence raises one issue on appeal, which we restate as follows: Whether the trial court's comments during trial constituted fundamental error.

FACTS AND PROCEDURAL HISTORY

On January 9, 2008, after a period of separation, Lawrence and his wife, D.L., reconciled, and moved into Lawrence's parents' house along with their children. On January 10, 2008, Lawrence told D.L. that he wanted to speak to her privately. The couple went into a bedroom. There, Lawrence accused D.L. of speaking to another man on the telephone. D.L. denied it and Lawrence became angry. Lawrence struck D.L. multiple times in the face and the arm, causing blood vessels in her right eye to burst. Lawrence is six feet four inches tall and weighs 220 pounds and D.L. is five feet five inches tall. The couple's youngest child, T.L., walked into the bedroom at the end of the incident.

D.L. then went to the hospital to have her injuries examined. Hospital staff asked D.L. to quantify her pain on a scale of one to ten and D.L. responded that the pain was between ten and twelve. Hospital staff contacted the police and Lawrence was later

apprehended at his parents' home.

On October 10, 2008, the State filed an Information charging Lawrence with Count I, battery, a Class C felony, Ind. Code § 35-42-2-1(a)(3), and Count II, domestic battery, a Class D felony, I.C. § 35-42-2-1.3(b). On February 15, 2011, a jury trial was held. The jury found Lawrence guilty of the lesser-included offense of Class A misdemeanor battery, I.C. § 35-42-2-1(a)(1), and a Class D felony domestic battery. On March 29, 2011, the trial court sentenced Lawrence to two years of incarceration, but suspended Lawrence's sentence and ordered 18 months of probation.

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

DISCUSSION AND DECISION

The trial court made a number of *sua sponte* interventions during trial and in front of the jury. Lawrence contends that these comments demonstrate the trial court's partiality toward the State and denied Lawrence a fair trial.

"A trial before an impartial judge is an essential element of due process." *Everling v. State*, 929 N.E.2d 1281, 1287 (Ind. 2010)(citations omitted). Given the respect accorded to the judge by the jury, a judge must be strictly impartial and refrain from any action detracting therefrom. *Id*. at 1287-88. Yet, judges are presumed unbiased and unprejudiced. *Id*. at 1287. Rebutting this presumption requires that the judge's conduct evince "actual bias or prejudice that places the defendant in jeopardy." *Id*. In evaluating a trial judge's partiality, the reviewing court examines the trial judge's actions and demeanor, while acknowledging "the need for latitude to run the courtroom and maintain discipline and control of the trial." *Id*. at

1288 (internal citation omitted).

We note that Lawrence did not object at the time the trial court's comments were made, nor move for a mistrial. Generally, a contemporaneous objection is required to preserve the issue for appeal. *Ruggieri v. State*, 804 N.E.2d 859, 863 (Ind. Ct. App. 2004). Although Lawrence does not address this issue, we find that because no objections were made, Lawrence's claims are subject to review under the fundamental error doctrine. *Id.* The fundamental error doctrine represents an avenue for appellate review where claims would be otherwise foreclosed by procedural default. *Id.* The fundamental error doctrine is "extremely narrow," requiring an error "so prejudicial that a fair trial is impossible." *Id.* Blatant violations of basic principles, coupled with substantial potential or actual harm and denial of fundamental due process constitute fundamental error. *Id.* With these precepts in mind, we turn to each of Lawrence's four instances of alleged partiality.

Lawrence points first to the trial court's interruption during his opening argument. Lawrence's counsel discussed the meaning of "extreme pain" in the context of "serious bodily injury," an element required to convict Lawrence of a Class C felony battery.[1] The trial court interjected as follows:

> [DEFENSE COUNSEL]: As a matter of fact when [D.L. testifies] in this case, you'll hear she was asked by [the State,] from one to ten with ten being extreme pain, what pain did [D.L.] feel? Her answer was not ten which is what the State would need to prove. She said it was seven. It was less than

[1] I.C. § 35-42-2-1(a) defines a Class B misdemeanor battery as a knowing or intentional touching of a person "in a rude, insolent, or angry manner." The offense is a Class A misdemeanor if the battery "results in bodily injury." I.C. § 35-42-2-1(a)(1). The offense is a Class C felony, however, if the battery results in "serious bodily injury." I.C. § 35-42-2-1(a)(3). Serious bodily injury is defined under I.C. § 35-42-1-25(3) to include bodily injury that causes extreme pain.

> extreme pain. And remember, if the State doesn't prove […]
> [TRIAL COURT]: Members of the jury, in opening statements an attorney is entitled to say what he thinks the evidence will be but it is not the time for argument. And unless you hear evidence from an expert on a definition of extreme pain, then I submit to you that there's going to be no evidence, expert testimony to assist you on extreme pain. And I'm sorry to interrupt, but this is not the time for argument.

(Transcript pp. 190-91).

Lawrence asserts that the trial court's interruption "seemed to suggest that defense counsel bore some burden of providing expert testimony on the issue of extreme pain." (Appellant's Br. p. 3). We cannot agree. The trial court has discretion to control the scope and content of opening statements. *Splunge v. State*, 526 N.E.2d 977, 981 (Ind. 1988), *cert. denied*, 490 U.S. 1110 (1989). We find the trial court's comments to be in the form of an admonishment, albeit made *sua sponte*. Lawrence's counsel was arguing whether D.L.'s pain constituted extreme pain. The trial court's comments address the bounds of a permissible opening statement and do not demonstrate partiality toward the State. Further, Lawrence actually prevailed on this issue. Though charged with Class C felony battery, which requires a battery resulting in serious bodily injury, the jury instead convicted Lawrence of a Class A misdemeanor battery, which requires only bodily injury. *Compare* I.C. §35-42-2-1(a)(3) *with* I.C. § 35-42-2-1(a)(1)(A). Thus, Lawrence has failed to demonstrate that the trial court's comments influenced the jury. *See Ruggieri*, 804 N.E.2d at 863-64.

Next, Lawrence points to two trial court interventions during his cross-examination of D.L. Lawrence cross-examined D.L. on her deposition testimony, focusing on whether the

couple's minor son was present during the battery.[2] During the cross-examination, the following colloquies took place:

> [DEFENSE COUNSEL]: And he said: Okay. So he was present when the incident was going on? And you said?
> [D.L.]: He walked into the room at the end of the incident.
> [DEFENSE COUNSEL]: Okay. So is it safe to say that your memory of that event was better over a year ago than it is today here in 2011?
> [D.L.]: Yes.
> [DEFENSE COUNSEL]: So what you said back in your deposition was that [T.L.] had walked in after […].
> [TRIAL COURT]: She didn't say the word "after." She used the words "at the end," which is not the same as the word "after."
>
> * * *
>
> [DEFENSE COUNSEL]: Okay. Thank you. Now, I assume you didn't lie in that deposition and commit perjury, did you?
> [D.L.]: Yeah, I did.
> [DEFENSE COUNSEL]: You did commit perjury?
> [D.L.]: Yes, I did.
> [DEFENSE COUNSEL]: All right. So you were sworn to tell the truth but you lied then.
> [TRIAL COURT]: Asked and answered.

(Tr. p. 218). Lawrence asserts that the trial court's comment "left the jury with the impression that the child must have been present during the final portion of the battery," and was therefore "tantamount to argument in favor of the State's case, without being prompted by any objection from the State." (Appellant's Br. p. 4). However, the "trial court may, in its discretion, intervene in the fact-finding process to promote clarity." *Ruggieri*, 804 N.E.2d at 864. Here, the trial judge corrected Lawrence's counsel's reiteration of D.L.'s testimony and later interposed an objection to assure orderly proceedings. Although in the latter instance

[2] I.C. § 35-42-2-1.3(a) defines Class A misdemeanor domestic battery as a knowing or intentional touching of a spouse in a "rude, insolent, or angry manner." However, the offense is a Class D felony if "committed in the physical presence of a child less than sixteen (16) years of age," with the perpetrator "knowing that the child was present and might be able to see or hear the offense." I.C. § 35-42-2-1.3(b)(2).

Lawrence claims that his specific question had not yet been asked and answered, we find this argument unpersuasive: perjury, by definition, means lying under oath. *See* I.C. § 35-44-2-1(a). The trial court's comments during Lawrence's cross-examination of D.L. thus demonstrate no partiality. *See Ruggieri*, 804 N.E.2d at 865.

Finally, Lawrence points to the following colloquy during his closing argument:

> [DEFENSE COUNSEL]: Now, there's one thing that [the prosecutor] didn't mention in his argument. He says that D.L. has been here reluctantly and her story changed because she was back together with [Lawrence]. But there's one other thing that changed, too, and that is that she's now been ordered to pay child support to [Lawrence]. And she denied vehemently that she wanted anything bad to happen to [Lawrence]. But sure enough when she testified back before she had the support obligation and he had custody of the kids, she was saying one thing, and now that that's happened, she walks in here [—] and nobody forced her to come in here. She came in on her own [].
> [TRIAL COURT]: She was under a subpoena, members of the jury. She was under a court order to appear like every witness is. It's unfair to say she came in here of her own will. Her own will is her thing. I'm not saying I'm [—] I'm not saying one way or the other. But I am saying that she was here under a subpoena. That's a court order.

(Tr. pp. 300-01). Lawrence argues that because he sought to rebut the State's argument that D.L. was a reluctant witness and therefore credible, the trial court's intervention strengthened the State's position and "encouraged the jury to side with [the State]." (Appellant's Br. p 5). Further, Lawrence alleges that the trial court's intervention was picked up by the State and used in its closing argument to Lawrence's detriment. However, the trial court's comments simply corrected Lawrence's counsel's remark that D.L. was not compelled to testify. The trial court then distinguished D.L.'s reluctance to testify from her compulsory attendance at trial by adding that D.L.'s will to testify "is her thing." (Tr. p. 301). We find that the trial

court's intervention here demonstrates no partiality.

Lawrence lastly argues that the instances of trial court intervention cumulatively established partiality and judicial bias against Lawrence. Lawrence directs our attention to two cases from our supreme court: *Everling* and *Brannum v. State*, 366 N.E.2d 1180 (Ind. 1977). However, these cases do not alter our analysis. In *Everling*, our supreme court found that the trial court made numerous comments about defense counsel demonstrating a lack of impartiality. *Everling*, 929 N.E.2d at 1283-87. The irregularities involved in *Everling* are not present in this case. Here, the trial court did not make disparaging remarks about defense counsel, engage in uneven treatment over late filings, issue improper rulings, or preclude witness testimony offered by the defendant. Indeed, the record contains the trial court's praise of Lawrence's counsel's attention to detail as well as an admonishment made in response to Lawrence's objection to prejudicial comments made by the State during its closing argument. Nor do we find *Brannum* applicable. In *Brannum*, our supreme court found that the trial court demonstrated judicial bias by challenging a juror's views on the death penalty during voir dire, by excluding a defense witness and offering an appraisal of that witness's testimony, and by *sua sponte* issuing an irregular jury instruction that in effect commented upon defense counsel's final argument. *Brannum*, 366 N.E.2d at 1181-185. None of these irregularities occurred in this case.

In sum, we find that none of the instances asserted by Lawrence demonstrate partiality by the trial court. The trial court's comments constituted an admonishment to the jury, clarification of testimony, and assurance of orderly proceedings. Even viewed cumulatively,

we cannot say that the trial court's comments constituted bias or transgressed "the borders of impartiality." *Ruggieri*, 804 N.E.2d at 866. Therefore, we conclude that Lawrence failed to demonstrate any prejudice to his rights.

CONCLUSION

We conclude that the trial court's comments during trial did not constitute fundamental error denying Lawrence due process.

AFFIRMED.

NAJAM, J. concurs
MAY, J. concurs in result with separate opinion

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STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	
	)	

MAY, Judge, concurring in result with separate opinion

While I agree the record does not demonstrate Lawrence received an unfair trial, I cannot agree "none of the instances asserted by Lawrence demonstrate partiality by the trial court." *Slip op*. at 9. Therefore, I concur in result with the majority, but write separately to express concern regarding two of the Judge's comments.

In *Smith v. State*, 770 N.E.2d 818, 823 (Ind. 2002), our Indiana Supreme Court held bias and prejudice by a judge place a defendant in jeopardy of receiving an unfair trial "where the judge expressed an opinion of the controversy over which the judge was presiding." Two of the judge's comments during Lawrence's trial expressed his opinion on

the merits of case in a manner that I believe was improper.

First, during cross-examination of D.L., defense counsel seemed to be preparing to impeach the witness based on inconsistent testimony, when the following exchange occurred between defense counsel, D.L., and the Judge:

> [Defense]: . . . So he was present when the incident was going on? And you said?
>
> [D.L.]: He walked into the room at the end of the incident.
>
> [Defense]: Okay. So is it safe to say that your memory of that event was better over a year ago than it is today here in 2011?
>
> [D.L.]: Yes.
>
> [Defense]: So what you said back in your deposition was that Tavion had walked in after –
>
> [Judge]: She didn't say the word "after." She used the words "at the end," which is not the same as "after."

(Tr. at 218.) The majority classified the Judge's comments as a correction of "Lawrence's counsel's reiteration of D.L.'s testimony," *Slip op*. at 6, and cited in support *Ruggieri v. State*, 804 N.E.2d 859, 864 (Ind. Ct. App. 2004), which states, the "trial court may, in its discretion, intervene in the fact-finding process to promote clarity." However, defense counsel's question referred to D.L.'s statement during her earlier deposition, not her trial testimony. Thus, it was improper for the judge to comment upon the difference between the words, "after" and "at the end" because defense counsel had not incorrectly reiterated D.L.'s testimony, and thus no clarification was needed.

Additionally, the following exchange occurred between defense counsel and the Judge during closing arguments:

> Defense Counsel: Now, there's one thing that [prosecuting attorney] didn't mention in his argument. He says that [D.L.] has been here reluctantly and her story changed because she was back together with [Lawrence]. But there's one other thing that changed, too, and that is that she's now been ordered to pay child support to [Lawrence]. And she denied vehemently that she wanted anything bad to happen to [Lawrence]. But sure enough when she testified back before she had the support obligation and he had custody of the kids, she was saying one thing, and now that that's happened, she walks in here – and nobody forced her to come in here. She came in on her own –
>
> Judge: She was under a subpoena, members of the jury. She was under a court order to appear like every witness is. It's unfair to say she came in here of her own will. Her own will is her thing. I'm not saying I'm – I'm not saying one way or the other. But I am saying that she was here under a subpoena. That's a court order.

(*Id*. at 300-301.) Like the earlier cited instance, the Judge begins well, with clarifying information for the jury, however, the statement, "It's unfair to say she came in here of her own will," (*id*. at 301), was an expression of the Judge's opinion regarding the willingness of the victim to testify. As such, I would consider that statement improper.

As I stated above, I do not believe either of these instances so prejudiced Lawrence as to deny him a fair trial, but I disagree with the majority's allegation that "none of the instances asserted by Lawrence demonstrate partiality by the trial court." *Slip op*. at 9. I therefore concur in result with separate opinion.