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IN THE
COURT OF APPEALS OF INDIANA

KEVIN MARTIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0707-CR-323
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Freese, Judge
Cause No. 71D03-0607-MR-12

December 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Kevin Martin appeals his conviction of and sentence for murder.[1] We affirm.

FACTS AND PROCEDURAL HISTORY

Martin lived with his girlfriend, Pearlie Dickerson, and her children in Dickerson's apartment. The apartment had two bedrooms. Martin and Dickerson shared one bedroom, and the children shared the other bedroom. On the morning of July 19, 2006, four of the children, J.D. (age sixteen), L.J. (age thirteen), A.D. (age twelve), and E.D. (age seven), were at home. Martin went into the children's bedroom to ask J.D. for a phone number. Martin became angry when J.D. said she did not know the number.

Dickerson intervened in the argument. She told J.D. to go take a shower and told A.D. to close the door to the children's room. While J.D. was in the shower, she could hear Martin and Dickerson yelling. The three other children also heard them yelling. After J.D. returned to her bedroom, the children heard three gunshots. They ran into the hallway, where they saw Dickerson knocking on the neighbor's door and asking for help. Three of the children saw Martin run away. E.D. did not see Martin, but he heard someone running down the stairs.

Gerald Cotton lived in the apartment next door. His goddaughter Siobhan McFadden was visiting him that morning. They heard the gunshots, and a few seconds later, they heard Dickerson knocking on Cotton's door. When McFadden opened the door, Dickerson said, "help me," and collapsed. (Tr. at 461.) McFadden also saw Martin

[1] Ind. Code § 35-42-1-1.

standing behind Dickerson with something in his hand. Other neighbors called 911. The police were dispatched to the scene at 11:45 a.m.

Dickerson had been shot three times. Bullets traveled through her heart, liver, and right lung. Dickerson died from these wounds.

J.D. found Martin's cell phone on the couch. At 11:59 a.m., Martin called his own phone from Emmitt Hinkle's apartment, and J.D. answered. She knew the caller was Martin because he asked how she had gotten his phone and because she recognized his voice. He hung up and then called a second time. Martin asked J.D. if Dickerson was "okay." (*Id*. at 526.) Martin called a third time and asked to which hospital Dickerson had been taken. An officer took the phone from J.D. and directed Martin to go to the police station. Martin told the officer he was in the area of Lincolnway West and Bendix and was on his way to work. In fact, this area was in a different part of town than Hinkle's apartment, and Martin's place of employment was not open that day.

Martin eventually did go to the police station, where he was arrested. He told police he had left Dickerson's apartment early in the morning, spent time walking around, and then went to Hinkle's apartment.

Police found a .38 magnum bullet near the place where Dickerson collapsed and two more in Dickerson's apartment. They also found a nine-millimeter Beretta handgun in Dickerson's apartment. J.D. testified the gun belonged to Martin. Officer Thomas Cameron testified the gun was registered to someone with the last name Martin, but he could not remember the owner's first name. Martin had left his cell phone, wallet, and work identification at Dickerson's apartment.

The police searched Hinkle's apartment and found a toolbox belonging to Martin. The toolbox contained .38 caliber bullets, although of a different type than was used in the shooting.

At trial, Martin testified he left Dickerson's apartment around 10:20 a.m. and walked toward Hinkle's apartment. He claimed he stopped at a shopping center on the way. He denied telling an officer he was in a different part of town and on his way to work. He also denied he had been in an argument with Dickerson earlier that morning.

After a three-day trial, the jury found Martin guilty of murder. He was sentenced to sixty-five years, which is the maximum penalty for murder when the State does not seek the death penalty or a life sentence.[2]

DISCUSSION AND DECISION

Martin challenges his conviction on several grounds: (1) the admission of the Beretta handgun and the bullets from the toolbox was fundamental error; (2) the trial court erred by not separating the witnesses; (3) the prosecutor committed misconduct; and (4) his counsel was ineffective. He also challenges his sentence.

1. Admission of Evidence

Martin argues the Beretta handgun and the bullets from the toolbox were irrelevant and prejudicial. Because he did not object to their admission at trial, he argues the error was fundamental. *See Johnson v. State*, 734 N.E.2d 530, 532 (Ind. 2000) (failure to object to admission of evidence at trial waives the issue on appeal). Fundamental error is

[2] Ind. Code § 35-50-2-3. The minimum sentence is forty-five years, and the advisory sentence is fifty-five years. *Id*.

error that is so prejudicial to the rights of the defendant that it makes a fair trial impossible. *Brown v. State*, 799 N.E.2d 1064, 1067 (Ind. 2003).

A trial court has broad discretion in determining the admissibility of evidence, and we review its decision for abuse of discretion. *Fentress v. State*, 863 N.E.2d 420, 422-23 (Ind. Ct. App. 2007). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ind. Evidence Rule 401. Irrelevant evidence is not admissible. Evid. R. 402. Even if relevant, evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Evid. R. 403. "Unfair prejudice addresses the way in which the jury is expected to respond to the evidence; it looks to the capacity of the evidence to persuade by illegitimate means, or the tendency of the evidence to suggest decision on an improper basis." *Ingram v. State*, 715 N.E.2d 405, 407 (Ind. 1999) (*quoting* 12 Robert Lowell Miller, Ind. Practice § 403.102 (1995)).

Martin asserts the Beretta handgun was not relevant, noting the State acknowledged it was not the weapon used to shoot Dickerson. However, the gun was relevant to show Martin was familiar with handguns. The admission of the gun was not unfairly prejudicial as the State clearly indicated to the jury it was not trying to prove it was the gun used in the murder.[3]

[3] Martin also argues the testimony of Officer Cameron, which was admitted without objection, was unfairly prejudicial because no foundation was laid for the results of the trace he conducted through the Bureau of Alcohol, Tobacco, and Firearms. In light of J.D.'s testimony the gun belonged to Martin, any

Martin argues the .38 caliber bullets found in the toolbox were not relevant because they were not the same kind of .38 caliber bullets used in the shooting. That Martin owned .38 caliber bullets supports an inference he had a .38 revolver. Martin has not demonstrated this inference is unfair. Neither the admission of the gun nor the bullets rendered a fair trial impossible.

2. Separation of Witnesses

Martin claims the trial court erred by denying his motion to separate the witnesses. Martin made the motion on the second day of the trial after testimony from eleven of the State's witnesses, including the doctor who performed the autopsy, eight officers who responded to the scene, McFadden, and E.D. The following exchange occurred:

> [Defense]: Prior to the beginning of the trial, I did not make a motion to separate the witnesses because all of their testimony was technical –
>
> THE COURT: Guess what? You don't do it now.
>
> [Defense]: I'm asking there be a separation of these witnesses who are supposedly at the scene when – I can ask for a separation of those witnesses. The first ones were all technical.
>
> THE COURT: . . . [T]here was a case where – I don't know how many witnesses testified. And true enough it was the State that asked, but the State then asked for a separation of witnesses. The Court granted it. Reversible error. So I'm not going to do it.
>
> The time to do that is at the beginning, and nobody did it. Now, if the State or you voluntarily direct your people not to be in the room, that's fine. If you don't, you don't.
>
> [Prosecutor]: Judge, just for the record, I can tell the Court that I had already advised the witnesses not to be talk[ing] to each other. They are not in the courtroom. They will not be in the courtroom when another witness testifies. Just so the record is clear, that has not actually happened.

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error in the admission of this evidence was not so prejudicial as to make a fair trial impossible. *See Brown*, 799 N.E.2d at 1067.

> THE COURT: And I am aware that no witness who has testified thus far has ever been in this courtroom during the proceedings. I know that.
>
> But as to your request, I'm not going to grant it. Because to do it in the middle of the trial I think is reversible error. Because then if I ordered it and then they finish up and then you want to put on witnesses, all your witnesses would be subject to a different order than the other witnesses are. I ain't going to do it. Besides which it wasn't just police witnesses that we've heard.

(Tr. at 505-07.)

Prior to the adoption of the Indiana Rules of Evidence, a motion for separation of witnesses had to be made before the first witness was called. *Kuchel v. State*, 501 N.E.2d 1045, 1047 (Ind. 1986). Separation of witnesses is now governed by Evid. R. 615, which states, "At the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of or discuss testimony with other witnesses, and it may make the order on its own motion." Rule 615 contains no mention of when the request must be made. *Anderson v. State*, 743 N.E.2d 1273, 1277 (Ind. Ct. App. 2001).

Anderson requested separation of witnesses soon after the State began questioning its first witness. The trial court denied the motion because it was not made before the testimony began. Noting Rule 615 contains no mention of when the request must be made, we stated, "Ideally, a motion for separation of witnesses will be made before any witness testifies. However, a motion sometime after testimony has begun may be permissible as long as basic notions of fundamental fairness are not offended." *Id*. We found the motion should have been granted because there had been testimony from only one witness on general background information. However, we found the error was

harmless because there was no evidence any witnesses were in the courtroom during the testimony of any other witness.

Even assuming it would have been fair to order separation of witnesses on the second day of Martin's trial after eleven witnesses had testified, any error was harmless. The State made a record that the witnesses had been separated up to that point and that it would continue to separate the witnesses. Nothing in the record indicates the witnesses were not separated.

3. Prosecutorial Misconduct

Martin claims the prosecutor cross-examined him in a manner that constituted prosecutorial misconduct. During his testimony, Martin claimed he left Dickerson's apartment early in the morning, went to a shopping center to look for music he might want to buy, and then went to Hinkle's apartment. The prosecutor cross-examined Martin on this testimony:

> [Prosecutor:] How were you going to buy the music if you didn't have your wallet?
>
> [Martin:] Because it's like – I could call Pearlie and I could get the money from Pearlie same way if I got the money.
>
> [Prosecutor:] Who was going to get the money?
>
> [Martin:] All I had to do was call Pearlie, and the same way I could get the money from Pearlie if I had the same she could get it from me.
>
> [Prosecutor:] Well, what would she do? Would she walk down there?
>
> [Martin:] Well, Pearlie had to go to work every day, and I'd be the one that walk [sic] her to Blockbuster. And everybody know [sic] that.
>
> [Prosecutor:] So she would walk money down to you, or she would drive a car?
>
> [Martin:] If I – I don't get what you [sic] saying, man.
>
> [Prosecutor:] Sure. You said that if you saw some stuff you were going to call Pearlie. Right?

> [Martin:] I mean if I seen [sic] something I had wanted and I didn't have no [sic] money, I could call Pearlie. If she got [sic] the money, she'd let me get it. The same way if I got [sic] the money, I'd let her get it.
>
> [Prosecutor:] State's 44. That's your cell phone. Right?
>
> [Martin:] Yes, it is.
>
> [Prosecutor:] How were you going to call Pearlie if your cell phone was at [Pearlie's apartment]?
>
> [Martin:] How was I going to call her?
>
> [Prosecutor:] Well, you said if you saw something you liked, you would call Pearlie. Right?
>
> [Martin:] Emmitt's house is right there.
>
> [Prosecutor:] You were going to walk to Emmitt's house to call?
>
> [Martin:] That's common sense. That's where I was on my way to. Why do you think I went that way? I don't know nobody [sic] else –
>
> [Prosecutor:] Why do I think you went there? *Sir, I think you went here because you shot this lady.*
>
> THE COURT: Easy. That's out. That's out. That's a very improper response.
>
> [Martin:] I don't care what you say.
>
> THE COURT: First of all, this person, the prosecutor asks questions. He doesn't answer them. He's not a witness. And that was an improper statement. And even though he took the opportunity to answer what he was asked, disregard that.

(Tr. at 841-43) (emphasis added).

Martin contends the prosecutor committed misconduct by badgering him and stating his belief that Martin shot Dickerson. We review claims of prosecutorial misconduct using a two-part analysis. *Jenkins v. State*, 695 N.E.2d 158, 160 (Ind. Ct. App. 1998). We must determine: (1) whether the prosecutor committed misconduct, and (2) whether the misconduct placed the defendant in a position of grave peril to which he should not have been subjected. *Id*. Peril is measured by the probable persuasive effect of the misconduct on the jury's decision, not the degree of the impropriety of the conduct. *Robinson v. State*, 693 N.E.2d 548, 551 (Ind. 1998).

When a prosecutor allegedly commits misconduct, the correct procedure is to ask the trial court to admonish the jury. If the party is not satisfied with the admonition he or she should move for a mistrial. *Hand v. State*, 863 N.E.2d 386, 394 (Ind. Ct. App. 2007). Failure to do so results in waiver of the issue on appeal. *Id.* Because Martin did not move for a mistrial, he must establish both prosecutorial misconduct and fundamental error. *Booher v. State*, 773 N.E.2d 814, 818 (Ind. 2002).

We do not agree the prosecutor badgered Martin. Many of Martin's answers were unclear or unresponsive, and the prosecutor was attempting to obtain clarification.

We do agree with Martin, and the trial court, that it was improper for the prosecutor to state his personal opinion. *See Wells v. State*, 848 N.E.2d 1133, 1145 (Ind. Ct. App. 2006), *reh'g granted* 853 N.E.2d 143 (Ind. Ct. App. 2006), *trans. denied* 860 N.E.2d 595 (Ind. 2006), *cert. denied* 127 S. Ct. 1913 (2007). In *Wells*, the prosecutor stated he would not have prosecuted the case if there had been any credible evidence of a conspiracy to arrest the defendant. We found the comment was improper, but concluded Wells had not suffered grave peril. It was a single sentence in a closing argument that spanned eighty pages in the transcript, and the court immediately directed the jury to disregard the statement. In the final instructions, the jury was instructed that it was the exclusive judge of the evidence and unsworn statements of counsel were not evidence.

Similarly, the comment Martin complains of, while improper, was a single statement in a three-day trial. As in *Wells*, the trial court promptly instructed the jury to

disregard the statement.[4] Furthermore, in the final instructions, the trial court told the jury it was the judge of the evidence and reminded the jury not to consider statements that were ruled inadmissible. Martin was not placed in grave peril by the prosecutor's comment.

4. Assistance of Counsel

When reviewing a claim of ineffective assistance of counsel, we begin with a strong presumption counsel rendered adequate legal assistance. *Stevens v. State*, 770 N.E.2d 739, 746 (Ind. 2002), *cert. denied* 540 U.S. 830 (2003). To rebut this presumption, Martin must demonstrate two things:

> First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel's representation fell below an objective standard of reasonableness, and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Timberlake v. State, 753 N.E.2d 591, 603 (Ind. 2001) (citations omitted), *cert. denied* 537 U.S. 839 (2002). Counsel's performance is evaluated as a whole. *Woods v. State*, 701 N.E.2d 1208, 1211 (Ind. 1998), *cert. denied* 528 U.S. 861 (1999).

[4] Martin argues the trial court suggested Martin "brought this upon himself" by asking the question. (Appellant's Br. at 11.) We disagree. The court's statement told the jury to disregard the statement even though it was in response to Martin's question.

Martin argues counsel was ineffective because he did not object to the admission of the Beretta gun or the bullets from the toolbox. As explained above, Martin was not prejudiced by the admission of that evidence.

Martin claims counsel should have objected to the prosecutor's statement that he thought Martin shot Dickerson and should have moved for a mistrial. Counsel likely did not object because the trial court promptly admonished the jury. Although making a record of an objection and moving for a mistrial may have been the best practice, we cannot say there is a reasonable probability it would have resulted in a different outcome. If counsel had objected, the court presumably would have admonished the jury; that is what the court did anyway. A mistrial is an extreme remedy that is appropriate only when an admonition will not suffice. *Hampton v. State*, 873 N.E.2d 1074, 1078 (Ind. Ct. App. 2007). Martin has not demonstrated the isolated comment by the prosecutor, immediately followed by an admonition from the trial court, warranted a mistrial.

Martin also claims his counsel was ineffective because he elicited testimony Martin abused a previous girlfriend, which testimony would have been excluded because the State had not filed a notice of intent to introduce evidence of prior bad acts. While defense counsel cross-examined J.D. concerning her statement to the police, the following exchange occurred:

> [Defense:] You made a statement that he had shot his previous girlfriend. Did you make that statement?
> [J.D.:] Yes, he actually was beating his ex-girlfriend, yes.
> [Defense:] You said that he had shot his ex-girlfriend?
> [J.D.:] Yes.
> [Defense counsel:] Was there ever a police report made of that?

> [J.D.:] I don't know. Because we had seen – the last time we seen [sic] her is when we heard they had moved, when we heard that she getting [sic] into the hospital.
>
> [Defense counsel:] I see. And you had personal knowledge of these things happening. Correct?
>
> [J.D.:] Yes, I was actually there – well, told to me.

(Tr. at 548-49.) The court then advised the jury that this testimony could be considered only for purposes of determining J.D.'s credibility.

This exchange was part of an attempt by counsel to discredit J.D. and show she was lying because she did not like Martin. Pursuing this line of questioning may have damaged Martin's character more than J.D.'s; however, Martin cannot demonstrate prejudice. All four of the children heard Martin arguing with Dickerson before the shooting. At least four witnesses saw Martin at the scene of the crime within seconds of the shooting. McFadden saw Martin had something in his hand. Cotton knew when anyone was coming or going from the apartment building because his door would shake, and he testified he was certain no one but Martin had been on the scene. All these witnesses identified Martin as the shooter. In light of the overwhelming evidence of Martin's guilt and the court's instruction to the jury, we cannot say there is a reasonable probability the outcome of the trial would have been different if counsel had not introduced the issue of previous abuse. *See Young v. State*, 746 N.E.2d 920, 926 (Ind. 2001) (declining to reverse conviction based on ineffective assistance of counsel where evidence of guilt was overwhelming).

5. Martin's Sentence

Martin argues the aggravators found by the trial court were improper and his sentence is inappropriate. Sentencing decisions "rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion." *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *reh'g granted on other grounds* 2007 WL 3151747 (Oct. 30, 2007). "An abuse of discretion occurs if the decision is 'clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.'" *Id*. (*quoting K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2005)). A trial court may abuse its discretion by finding aggravators that are not supported by the record or are improper as a matter of law. *Id*. at 490-91.

> Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution "authorize[] independent appellate review of a sentence imposed by the trial court." This appellate authority is implemented through Appellate Rule 7(B), which provides that the "Court 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."

Id. at 491 (citations omitted). We recognize the special expertise of the trial court in making sentencing decisions. *Barber v. State*, 863 N.E.2d 1199, 1208 (Ind. Ct. App. 2007), *trans. denied* __ N.E.2d __ (Ind. 2007). The defendant bears the burden of persuading us the sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

During its sentencing colloquy, the court noted the crime was committed within the hearing of four children. Although they did not see the shooting, they saw their mother dying. The court found the harm to Dickerson's family "profound." (Sentencing Tr. at 41.) The court also noted Dickerson had taken Martin into her home and found he had "adopted a quasi role of step-parent, step authority figure." (*Id*. at 42.) The court cited Martin's criminal record as an aggravator. As a mitigating circumstance, the court found Martin had finished high school despite having a troubled youth.

Martin argues it was improper to consider the harm to the children, because such a finding suggests some lives are worth more than others.[5] However, the record does not reflect that the trial court treated the harm to the children as a separate aggravator. It discussed the harm to the children in conjunction with the fact the crime was committed within the presence of an individual less than eighteen years of age who is not the victim of the offense. *See* Ind. Code § 35-38-1-7.1(a)(4). The court's discussion simply underscored the fact that this aggravator is entitled to significant weight because the crime was committed in the hearing range of four children, who also saw their mother bleeding to death.

There is little evidence Martin "adopted a quasi role as step-parent." (Sentencing Tr. at 42.) However, even without this aggravator, we cannot say the sentence is

[5] Martin asserts the trial court inappropriately found the harm to the victim as an aggravator, because the harm suffered by the victim in this case was not greater than that suffered by any other murder victim. The court noted that one of the factors a trial court may voluntarily consider is that the "harm, injury, loss, or damage suffered by the victim of an offense was: (A) significant; and (B) greater than the elements necessary to prove the commission of the offense." Ind. Code § 35-38-1-7.1(a)(1). However, the trial court did not address this factor, but instead proceeded to talk about the harm to the children.

inappropriate. Martin has two prior felony convictions; one felony was committed while he was on probation. In light of his criminal history and the fact that four children heard and witnessed aspects of the crime, we do not find his sentence inappropriate.

Affirmed.

DARDEN, J., and CRONE, J., concur.