IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 47481

STATE OF IDAHO,	)	
	)	**Filed: September 8, 2021**
Plaintiff-Respondent,	)	
	)	**Melanie Gagnepain, Clerk**
v.	)	
	)	**THIS IS AN UNPUBLISHED**
JOHN HUEY DANIELS,	)	**OPINION AND SHALL NOT**
	)	**BE CITED AS AUTHORITY**
Defendant-Appellant.	)	
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Thomas J. Ryan, District Judge.

Judgment of conviction for aggravated battery, affirmed.

Eric D. Fredericksen, State Appellate Public Defender; Ben P. McGreevy, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

BRAILSFORD, Judge

John Huey Daniels appeals from his judgment of conviction for aggravated battery, Idaho Code §§ 18-903(b), 18-907(b). He contends the district court erred by denying his motion for a mistrial. We affirm.

I.

FACTUAL AND PROCEDURAL BACKGROUND

In February 2019, multiple police officers responded to a shooting in Garden City. One officer arrived at the scene and found a victim, who had been shot in the abdomen. Another responding officer stopped a vehicle in Garden City matching the description of the suspect's vehicle. Daniels was driving that vehicle and had a female passenger. During a subsequent search of the vehicle, officers located a gun in the vehicle's passenger-door panel. The State

charged Daniels with felony aggravated battery. Daniels pled not guilty, and the case proceeded to trial.

At trial, the State presented the testimony of numerous witnesses, including Detective O'Gorman. Detective O'Gorman conducted a gunshot residue test on Daniels after apprehending him. After advising Daniels of his *Miranda*[1] rights, Detective O'Gorman interviewed Daniels and his female passenger separately. Detective O'Gorman testified that Daniels was initially "very adamant" he was not involved in the shooting. For example, Daniels claimed he had been at a friend's home in Garden City and was taking his female passenger to another friend's home. Further, when Detective O'Gorman told Daniels--as a ruse--that the gunshot residue test showed residue, Daniels explained that the prior evening he had fired a pistol he was considering purchasing.

When Detective O'Gorman told Daniels his passenger had indicated Daniels was the shooter, Daniels' story changed. Detective O'Gorman testified that, at that point, Daniels told Detective O'Gorman that Daniels picked up an individual named Jeff at a gas station in Garden City to give him a ride to Nampa. Jeff first needed to pick up his belongings from a friend's trailer; Jeff asked if Daniels had a gun; and Jeff stated he "needed backup." When Daniels arrived at the trailer, he learned it belonged to the victim with whom Daniels said he had a "beef." After Daniels entered the trailer with a gun in his pocket, the victim and another individual became aggressive towards Daniels, including hitting him. Daniels pulled the gun from his pocket, and it went off, shooting the victim.

During Detective O'Gorman's cross-examination, Daniels' counsel inquired about the "bad blood" between Daniels and the victim. In response, Detective O'Gorman testified about their gang affiliations, including Daniels' affiliation:

> Q. Then [Daniels] goes into why there's this bad blood, or you know, there was--
> A. Grief.
> Q. --grief between the two of them?
> A. Yes, sir.
> . . . .
> Q. [Y]ou wrote down in your police report about what [Daniels] characterized [the victim] to be a member of something?
> A. Yes, sir.

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[1] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

Q. Are you familiar with what he was talking about?
A. Yes, sir.
Q. And what was that?
A. He classified him as being a member of the SVC [Serious Violent Criminals], which is a gang.
Q. Okay.
A. Daniels also identified himself as an Aryan Knight dropout.
Q. Okay. So are you familiar with those two gangs and the animosity between the two?
A. Yes, sir.
Q. [B]ased on what you understood from Daniels, this bad blood was between taking something from SVC rather than just [the victim]; is that right?
A. I can't say what Mr. Daniels thought. What I got out of that, that it was obviously an issue with Mr. Daniels, because it was his concern that he was at his house.
Q. Okay.
A. And it wasn't a gang issue.

On re-direct examination, Detective O'Gorman clarified that Daniels referred to himself as an "Aryan Knight dropout":

Q. You said during the cross-examination, I think the quote was: Daniels referred to him as an Aryan Knight dropout. And I wanted to clarify, who's "him"?
A. Mr. Daniels.
Q. To himself?
A. Yes, sir.

Following Detective O'Gorman's re-cross-examination, Daniels moved for a mistrial based on Detective O'Gorman's testimony that Daniels was an "Aryan Knight dropout" and the fact that one juror was a current employee of the Idaho Department of Correction and another was a former IDOC employee. In support of the motion, Daniels' counsel stated:

> Both of these gangs are prison gangs. They're well known in the prison. And so now that this has come to light about [Daniels], these two jurors know that he's either been to prison or is in prison. And because of that, I'm moving for a mistrial.

Further, Daniels' counsel asserted he did not elicit the testimony about Daniels' affiliation with the Aryan Knights, but acknowledged his follow-up question about gang animosity "may have been error."

In ruling on Daniels' mistrial motion, the district court noted that Daniels' counsel was aware of the "gang conflict . . . undercurrent" in the case and could have inquired during voir dire whether the two IDOC-related jurors were "familiar with any gang activity" in prison, but he

did not. Then, the court concluded that no "error or legal defect in the proceeding" had occurred because there was no indication the two jurors had shared any belief with other jurors that Daniels was in prison and because the court had already instructed the jurors "not to communicate any private or special knowledge about any of the facts of this case to your fellow jurors." Additionally, the court noted as another basis for denying Daniels' motion that "the subject of gang conflict was brought up by the defense."

In addition to Detective O'Gorman's testimony, the State also presented the testimony of the lead detective, two crime-scene investigators, the officer who arrived first on the scene of the shooting, the officer who stopped Daniels, a physician who treated the victim in the emergency room, and a witness who was present when the victim was shot. The defense presented Daniels' testimony and also the testimony of his passenger and of Daniels' former girlfriend. The jury found Daniels guilty. Daniels timely appeals.

II.
ANALYSIS

Daniels challenges the district court's denial of his motion for a mistrial. In support, Daniels construes the court's statement that he "brought up" "the subject of gang conflict" as ruling that he invited the error. Disputing this ruling, Daniels argues that a nonresponsive, volunteered statement cannot be an invited error, and he argues that "Detective O'Gorman's volunteered statement that [Daniels] identified himself as a former member of the Aryan Knights" was nonresponsive to "defense counsel's question on [the victim's] affiliations." In response, the State argues, among other things, that Daniels invited Detective O'Gorman's testimony that Daniels was an "Aryan Knight dropout."

The doctrine of invited error applies to estop a party from asserting an error when that party's conduct induces the commission of the error. *State v. Atkinson*, 124 Idaho 816, 819, 864 P.2d 654, 657 (Ct. App. 1993). The purpose of the doctrine is to prevent a party who caused or played an important role in prompting the trial court to take action from later challenging that decision on appeal. *State v. Barr*, 166 Idaho 783, 786, 463 P.3d 1286, 1289 (2020). In short, invited errors are not reversible. *State v. Gittins*, 129 Idaho 54, 58, 921 P.2d 754, 758 (Ct. App. 1996).

In support of the proposition that a witness's nonresponsive answer cannot be an invited error, Daniels relies on *State v. Simonson*, 112 Idaho 451, 732 P.2d 689 (Ct. App. 1987). In that

case, the State charged Simonson with felony injury to a child. *Id.* at 452, 732 P.2d at 690. Simonson eventually pled guilty but then later withdrew his guilty plea and proceeded to trial. *Id*. At trial, the child's mother testified and, during her testimony, Simonson's counsel pursued a line of questioning on cross-examination about the mother's continued contact and relationship with Simonson:

> [DEFENSE COUNSEL]: And you have had the kids with him since then?
> [WITNESS]: The kids live with me. When Larry comes over, the children are there.
> [DEFENSE COUNSEL]: You have gone places, I think you said, didn't you?
> [WITNESS]: Initially we did, before he pleaded guilty we went places. After he pleaded guilty and changed his plea--

Id. at 453, 732 P.2d at 691. Based on this testimony, Simonson moved for a mistrial. The district court, however, denied the motion and gave the jury a curative instruction to disregard the testimony. *Id.* On appeal, this Court held that an error occurred, noting the "statement was simply volunteered by the witness" and was not "likely [a] response to any inquiry put to the witness by defense counsel, and thus did not amount to invited error." *Id.* at 454, 732 P.2d at 692. Further, the Court concluded that the district court's cautionary instruction could not "have removed the effect of the prejudicial evidence from the minds of the jurors" and that the error was reversible. *Id.* at 458, 732 P.2d at 696.

As Daniels notes, this Court distinguished *Simonson* in *Atkinson*, 124 Idaho at 821, 864 at 659, to hold that a witness's responsive answer was an invited error. In that case, Atkinson and four other men--including William "Tennessee" Nothey, Sam Thurman, Donald Hastings, and Heinz Eppelman--climbed aboard a westbound train in Pocatello. *Id.* at 817, 864 P.2d at 655. Later, Atkinson threw Tennessee from the train in Power County. *Id.* Then, in Lincoln County, Atkinson threw Sam from the train, killing him, and Eppelman physically confronted Atkinson before jumping from the train. *Id.* Atkinson was charged in Power County with aggravated battery for throwing Tennessee from the train. *Id.*

At trial in *Atkinson*, the State called Eppelman to testify. *Id.* at 819, 864 P.2d at 657. Before his testimony, counsel for both parties and the district court had a discussion with Eppelman regarding Sam being thrown from the train. *Id.* at 819-20, 864 P.2d at 657-58. The court instructed Eppelman that "unless you're specifically asked a question about Sam or the circumstances involving his being thrown or falling from the train and his death, you are not to

bring up that subject." *Id.* at 820, 864 P.2d at 658. Regardless, on cross-examination, Eppelman testified Atkinson threw Sam off the train:

> Q. [T]here was some testimony from [Hastings] that at some point you went up and pushed [Atkinson] in the chest. Do you recall that?
> A. No, sir.
> Q. Okay, so he would be mistaken?
> A. Yes sir. I didn't--at this time I did not do that.
> Q. Did you at any time?
> A. Yes, sir.
> Q. When?
> A. After he threw Sam off.

Id. at 820-21, 864 P.2d at 658-59. Based in part on this testimony, Atkinson moved for a mistrial, which the district court denied. *Id.* at 818, 864 P.2d at 656.

On appeal, this Court ruled that if Eppelman's testimony was invited error, "it cannot be regarded as reversible error." *Id.* at 819, 864 P.2d at 657. The Court reviewed the discussion amongst Eppelman, the district court, and counsel before Eppelman testified and concluded that "the witness clearly indicated that if he was going to be asked about the altercation between himself and Atkinson, he would have to include Sam's ejection from the train because it was part of the entire sequence of events." *Id.* at 820, 864 P.2d at 658. Further, the Court concluded that "the witness gave an accurate, fair and responsive answer to defense counsel's question of 'When?'" and that "defense counsel's failure to know the answer to the question or his misunderstanding of the sequence of events does not excuse the invited nature of the error." *Id.* at 821, 864 P.2d at 659. The Court ruled that "a misstep on dangerous ground, where counsel has voluntarily ventured but is unsure of possible responses, may result in invited error, and if so, cannot then be grounds for a mistrial." *Id.* Finally, the Court distinguished *Simonson*, stating "the answer given was responsive, and, thus, the error was invited." *Id.*

Contrary to Daniels' assertion, this case is more akin to the invited error in *Atkinson* than to the witness's nonresponsive, voluntary answer in *Simonson*. As in *Atkinson*, Daniels' counsel was aware of the circumstances involving the subject matter he was raising--i.e., gang affiliations and animosity. For example, Daniels' counsel had forewarning that Daniels had a "beef" and "grief" with the victim, which Daniels' counsel characterized as "bad blood" when cross-examining Detective O'Gorman. Further, according to Detective O'Gorman's report of his interview with Daniels, Daniels disclosed that the victim was a SVC member and that Daniels was a former Aryan Knights member when describing the physical altercation between himself

and the victim.[2] Daniels' counsel specifically inquired about this statement in Detective O'Gorman's report: "[Y]ou wrote down in your police report about what [Daniels] characterized [the victim] to be a member of something?" to which Detective O'Gorman ultimately responded that the victim was a SVC member and that Daniels was a former Aryan Knights member. Thereafter, Daniels' counsel continued to inquire about "those two gangs and the animosity between the two" and the "bad blood."

Based on Daniels' counsel's knowledge of the "bad blood" between Daniels and the victim, the context in which counsel asked the question about the victim's gang affiliation, and counsel's continued questioning about the gang-related animosity between Daniels and the victim, we cannot conclude Detective O'Gorman's identification of Daniels as a former Aryan Knights member was volunteered. Although Detective O'Gorman's answer was technically nonresponsive to the specific question asked about the victim's gang affiliation, Daniels' focus on that question alone is too narrow and ignores that his counsel voluntarily ventured into a subject matter that might elicit a response about Daniels' gang affiliation, including possibly on re-direct examination to follow up on a subject about which Daniels had opened the door on cross-examination. Accordingly, we hold that Detective O'Gorman's identification of Daniels as an Aryan Knights member was invited error. *Compare Atkinson*, 124 Idaho at 821, 864 P.2d at 659 (ruling invited error may result where counsel "voluntarily ventured" into subject matter) *with Simonson*, 112 Idaho at 454, 732 P.2d at 689 (concluding statement was not "a likely response to *any* inquiry put to the witness by defense counsel") (emphasis added).

Further, we reject Daniels' assertion that Detective O'Gorman's challenged statement prejudiced the trial's outcome. *See* I.C.R. 29.1(a) (providing for mistrial if conduct occurs "that is prejudicial to the defendant and deprives the defendant of a fair trial"). Daniels' prejudice argument strings together several assumptions unsupported by the evidence. These assumptions include that: (1) "the Aryan Knights was a prison gang that was well known in the prison"; (2) as a result, the two IDOC-related jurors "learned [Daniels] was a former prison gang member" when Detective O'Gorman stated Daniels was an "Aryan Knight dropout"; and (3) the

[2] Daniels' presentence investigative report contains Detective O'Gorman's report of his interview with Daniels. This interview was also videotaped and a portion of that video was admitted in evidence, although the admitted video does not contain the portion in which Daniels disclosed gang affiliations.

two jurors "likely" "knew of the nature of the Aryan Knights [and] the implications of [Daniels] identifying himself as an Aryan Knight dropout."

Daniels' assertion of prejudice is unpersuasive for several reasons. First, that the two IDOC-related jurors knew anything about prison gang activity is speculative. Second, that they understood Daniels' former gang affiliation necessarily meant he was or had been in prison is also speculative. Third, even assuming this speculation were true, the district court specifically instructed the jurors at the beginning of trial "not to communicate any private or special knowledge about any of the facts of this case to your fellow jurors." We presume that the jury followed this instruction. Thus, to the extent the two IDOC-related jurors "knew" Daniels had been an Aryan Knight in prison and the implication of that membership, we presume neither juror shared that knowledge with any other juror. *See State v. Kilby*, 130 Idaho 747, 751, 947 P.2d 420, 424 (Ct. App. 1997) (presuming jury followed court instructions); *State v. Hudson*, 129 Idaho 478, 481, 927 P.2d 451, 454 (Ct. App. 1996) (same).

Daniels attempts to overcome this presumption by arguing the district court gave conflicting instructions to the jury. Specifically, Daniels contends the following instruction conflicted with the instruction not to share "private or special knowledge about the facts of the case":

> You bring with you to this courtroom all the experience and background of your lives. In your everyday affairs, you determine for yourselves whom you believe, what you believe, and how much weight to attach to what you were told. The same considerations that you use in your everyday dealings in making these decisions are the considerations which you should apply in your deliberations.

The State notes Daniels did not assert before the district court that this instruction conflicted with the other instruction not to share private or special knowledge about the facts of the case, and thus Daniels failed to preserve it for appeal. We agree. *See State v. Gonzalez*, 165 Idaho 95, 99, 439 P.3d 1267, 1271 (2019) (noting party fails to preserve appellate issue unless both issue and party's position on issue are raised before trial court). Moreover, we conclude the instructions are not conflicting. Instructing the jurors not to share "private or special knowledge" about the *facts* of the case is entirely different than instructing the jurors to use their everyday experience and background to assess credibility and to determine the weight of evidence. As a result, Daniels' argument that the instructions are conflicting fails to overcome the presumption that the two IDOC-related jurors followed the court's instruction not to share any knowledge they may have had about Daniels' imprisonment and gang affiliation.

Finally, we reject Daniels' argument that Detective O'Gorman's challenged statement was "highly prejudicial" evidence, which was inadmissible under Idaho Rule of Evidence 404(b). Contrary to Daniels' assertion that this Rule 404(b) argument is merely a "refined issue" on appeal, he did not preserve this argument for appeal. Rather, Daniels never raised any challenge to Detective O'Gorman's statement under Rule 404(b) before the district court. As a result, the parties did not argue and the court did not consider whether the State was required to provide reasonable notice of its intent to introduce evidence of Daniels' gang affiliation; whether sufficient evidence existed to show that affiliation; whether the affiliation was relevant to a disputed factual issue; whether its probative value substantially outweighed the danger of unfair prejudice; and whether the evidence was admissible for any permissible use identified in Rule 404(b)(2). *See* I.R.E. 404(b) (addressing admissibility of prior acts); *State v. Grist*, 147 Idaho 49, 54, 205 P.3d 1185, 1190 (2009) (discussing analysis to determine admissibility under Rule 404(b)). Accordingly, we decline to address Daniels' Rule 404(b) argument. *See Gonzalez*, 165 Idaho at 99, 439 P.3d at 1271 (declining to address appellate issue unless both issue and party's position on issue are raised before trial court).

III.
CONCLUSION

We hold that the district court did not err by denying Daniels' motion for a mistrial because he invited the error he challenges. Moreover, we conclude that even if Daniels did not invite the error, it is not reversible error. Accordingly, we affirm the judgment of conviction.

Judge GRATTON and Judge LORELLO **CONCUR**.