

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



IN THE Court of Appeals of Indiana

Keith D. Blake,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.



July 26, 2024

Court of Appeals Case No.
23A-CR-1048

Appeal from the
Porter Superior Court

The Honorable
Michael A. Fish, Judge

Trial Court Cause No.
64D01-2103-MR-2057

Memorandum Decision by Senior Judge Baker
Judges Bailey and May concur.

Baker, Senior Judge.

Statement of the Case

[1] Keith Blake appeals his convictions and sentences for reckless homicide and unlawful possession of a firearm by a serious violent felon, asserting that the trial court erroneously excluded certain evidence and that his sentence is inappropriate. Finding no error with the trial court's evidentiary ruling or Blake's sentence, we affirm.

Issues

[2] Blake presents two issues, which we restate as:

- I. Whether the trial court erred by excluding certain testimony of a State's witness.
- II. Whether Blake's sentence is inappropriate.

Facts and Procedural History

[3] Blake was acquainted with Jasmine Ward. Jasmine had a child whose paternity was not certain, and Noah Beller, the victim in this case, was one of the individuals who could have fathered the child. Noah submitted a DNA test

with swabs from himself, Jasmine, and the child and paid the \$160 testing fee, on the condition that he would be reimbursed if the child was not his.

- [4] When the test results confirmed Noah was not the father, he demanded reimbursement of the \$160 from Jasmine. Jasmine contacted Blake for the money to pay Noah, and then Jasmine; her boyfriend, Justin Morales; the child; Blake; Blake's daughter; and Blake's friend, Dawanda Baker, drove to meet Noah. When the group arrived, Noah and a friend were waiting on the driveway. Words were exchanged, and an altercation ensued in which Blake shot Noah. Noah died as a result.
- [5] The State charged Blake with murder; unlawful possession of a firearm by a serious violent felon, a Level 4 felony; and carrying a handgun without a license, a Class A misdemeanor. Appellant's App. Vol. II, p. 37. Additionally, the State requested a sentencing enhancement to the murder charge for Blake's use of a firearm in the commission of an offense that resulted in death and filed an enhanced charge of carrying a handgun without a license with a prior conviction. *Id.* at 39, 40.
- [6] A jury found Blake guilty of reckless homicide as a lesser-included offense of murder, a Level 5 felony, and carrying a handgun without a license. Outside the presence of the jury, Blake then pleaded guilty to the charge of possession of a firearm by a serious violent felon and the enhanced charge of carrying a handgun without a license with a prior conviction, as well as the sentencing enhancement of using a firearm in the commission of the offense.

[7] The court sentenced Blake to five years for his conviction of reckless homicide, enhanced by nineteen years for his use of a firearm in the commission of the offense. The court merged Blake's conviction of carrying a handgun without a license into his conviction of unlawful possession of a firearm by a serious violent felon and sentenced him to eleven years. The court ordered him to serve the sentences consecutively for an aggregate term of thirty-five years. Blake now appeals.

Discussion and Decision

I. Exclusion of Evidence

[8] At trial, Blake's friend Dawanda testified on behalf of the State. During cross examination, defense counsel asked her a question about a conversation between Jasmine and Blake in the car on the way to meet Noah. The State objected on the basis of hearsay, and the court sustained the objection. On appeal, Blake contends the trial court's exclusion of Dawanda's testimony was error because it denied the jury information about Blake's knowledge of Noah and his family's propensity for violence that was directly related to Blake's state of mind at the time of the incident and substantiated his claim of self-defense.

[9] We review challenges to the trial court's exclusion of evidence for an abuse of discretion. *Sloan v. State*, 224 N.E.3d 362, 367 (Ind. Ct. App. 2023), *trans. denied*. An abuse of discretion results from a decision that is clearly against the logic and effect of the facts and circumstances before the court. *Id.* Only when error in the exclusion of evidence affects a party's substantial rights will we

reverse the trial court's decision. *Angulo v. State*, 191 N.E.3d 958, 968 (Ind. Ct. App. 2022), *trans. denied*.

[10] "To preserve an issue for appeal with respect to the exclusion of evidence, a defendant must make an offer of proof at trial regarding the excluded evidence." *Id.* at 968-69. While beneficial to both the trial court and the parties, offers of proof are "invaluable" on appeal because reviewing courts cannot appropriately assess whether a court properly excluded evidence if the complaining party did not make an offer of proof. *Bedolla v. State*, 123 N.E.3d 661, 667 (Ind. 2019). Accordingly, a failure to make an offer of proof results in waiver of the claim. *Angulo*, 191 N.E.3d at 969. Here, Blake made no offer of proof at trial, and thus his claim is waived.

[11] Waiver notwithstanding, even if the trial court abused its discretion by excluding Dawanda's testimony, the exclusion would be harmless because evidence had already been entered tending to show Noah and his family's proclivity for violence. Even where testimony is wrongfully excluded, the exclusion is harmless error where the evidence is merely cumulative of other evidence presented. *Burkins v. State*, 219 N.E.3d 735, 744 (Ind. Ct. App. 2023) (quoting *Sylvester v. State*, 698 N.E.2d 1126, 1130 (Ind. 1998)), *trans. denied*. The jury had already heard Justin acknowledge on cross examination that Jasmine was telling stories in the car "about how Noah beat the crap out of her before" on several different occasions. Tr. Vol. IV, p. 178. Justin also acknowledged that Jasmine told about a time when Noah's brother pulled a gun on her and threatened her. Defense counsel then pointedly asked, "Jasmine is telling the

story in the vehicle that Keith is in about being threatened or having a gun pulled out on her and being threatened with a gun?” *Id.* at 179. Justin replied in the affirmative. Because the jury had already been presented with this evidence, the trial court’s exclusion of other evidence to that effect, even if erroneous, can only be considered harmless. The trial court did not err.

II. Inappropriate Sentence

[12] Blake argues his sentence is inappropriate and excessive. Indiana Appellate Rule 7(B) provides that we may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, we determine that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Thompson v. State*, 5 N.E.3d 383, 391 (Ind. Ct. App. 2014) (quoting *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007)). Our Supreme Court has long said that sentencing is ““principally a discretionary function in which the trial court’s judgment should receive considerable deference.”” *Lane v. State*, 232 N.E.3d 119, 122 (Ind. 2024) (quoting *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008)).

[13] Whether a sentence is inappropriate 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.”” *Id.* (quoting *Cardwell*, 895 N.E.2d at 1224). The defendant bears the burden of persuading the appellate court that his sentence is inappropriate. *Reynolds v. State*, 142 N.E.3d 928, 944 (Ind. Ct. App. 2020), *trans. denied*. To meet this burden, the defendant must

show that his sentence is inappropriate with “‘compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality) and the defendant’s character (such as substantial virtuous traits or persistent examples of good character).’” *Littlefield v. State*, 215 N.E.3d 1081, 1089 (Ind. Ct. App. 2023) (quoting *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015)), *trans. denied*.

A. Nature of the Offense

[14] The advisory sentence is the starting point selected by the legislature as an appropriate sentence for the crime. *Littlefield*, 215 N.E.3d at 1089. When a sentence deviates from the advisory sentence, “we consider whether there is anything more or less egregious about the offense as committed by the defendant that distinguishes it from the typical offense accounted for by our legislature when it set the advisory sentence.” *Madden v. State*, 162 N.E.3d 549, 564 (Ind. Ct. App. 2021).

[15] Here, a jury found Blake guilty of reckless homicide, a Level 5 felony. A person who commits a Level 5 felony shall be imprisoned for a fixed term of between one and six years, with the advisory sentence being three years. Ind. Code § 35-50-2-6 (2014). Additionally, he pleaded guilty to the firearm sentence enhancement, which provides for an additional term of between five and twenty years. Ind. Code § 35-50-2-11(g) (2016). The court sentenced Blake to five years for his Level 5 felony, enhanced by nineteen years.

[16] Blake also pleaded guilty to unlawful possession of a firearm by a serious violent felon, a Level 4 felony, for which the range is between two and twelve years, with an advisory sentence of six years. Ind. Code § 35-50-2-5.5 (2014). The court sentenced Blake to eleven years for the Level 4 felony and ordered him to serve the sentence consecutively to his sentence for reckless homicide. Blake’s aggregate term of thirty-five years is slightly below the maximum of thirty-eight years.

[17] The nature of the offense is found in the details and circumstances surrounding the offense and the defendant’s participation therein. *Perry v. State*, 78 N.E.3d 1, 13 (Ind. Ct. App. 2017). Blake attempts to minimize the egregiousness of his offenses by reiterating his version of the altercation. He asserts that Noah “initiated physical contact” with him, “only one to two shots were fired,” and Noah “died almost immediately after being shot.” Appellant’s Br. p. 18. Yet, he offers no compelling evidence of restraint, regard, and lack of brutality to override the deference we accord the trial court’s decision.

[18] Our assessment of the nature of the offense reveals that Blake made the decision to take a gun to the meeting, he actively and willingly participated in the confrontation, and, worst of all, he unnecessarily escalated the violence of the altercation by firing the gun and killing a young man. The trial court summed it up best when it told Blake at sentencing: “[Y]ou decided to insert yourself into the affairs of these kids where you had absolutely no business whatsoever. . . . [and] [y]ou brought a gun to a fist fight.” Tr. Vol. VIII, p. 4.

[19] Blake also asserts that his sentence is inappropriate due to the court's aggravator that the harm, injury, loss, or damage suffered by the victim was significant and greater than the elements necessary to prove commission of the offense. He reasons that the injury here (i.e., death) is an element of the offense and that nothing in the record suggests the nature of the offense/death was the result of conduct more egregious than what was necessary to prove the offense.

See Ind. Code § 35-42-1-5 (2014) (“A person who recklessly kills another human being commits reckless homicide[.]”).

[20] Our review under Rule 7(B), is not limited by the trial court's finding of aggravating and mitigating circumstances. *Hall v. State*, 177 N.E.3d 1183, 1197 (Ind. 2021). As long as a sentence is within the statutory range, the trial court may impose it without regard to aggravating or mitigating factors. *Smoots v. State*, 172 N.E.3d 1279, 1288 (Ind. Ct. App. 2021); *see also* Ind. Code § 35-38-1-7.1(d) (2019). Nevertheless, even if the court considered an improper aggravator, it found three additional aggravating circumstances, none of which Blake challenges. *See Buford v. State*, 139 N.E.3d 1074, 1081 (Ind. Ct. App. 2019) (stating that when court improperly applies aggravator but other valid aggravators exist, sentence enhancement may still be upheld).

[21] Finally, Blake claims that the imposition of consecutive, “near-maximum” sentences in light of the similarity of the offenses is inappropriate. Appellant's Br. p. 19. He reasons that because his sentence for his conviction of reckless homicide was increased by a near-maximum enhancement due to his use of a firearm, his sentence for his conviction of possession of a firearm by a serious

violent felon should not also be a near-maximum sentence as well as consecutive.

[22] In ordering Blake's aggravated and consecutive sentences, the trial court declared that the circumstances of this case "require a significantly aggravated sentence." Tr. Vol. VIII, p. 3. The court sentenced Blake based on the aggravating circumstances of his significant criminal history, the fact that he was on probation at the time of the offense, the fact that he violated the terms of his pretrial release, and the fact that this crime of violence was committed in the presence of the victim's siblings, as well as Blake's teenage daughter. A trial court may consider sentencing aggravators and mitigators when determining whether terms of imprisonment shall be served concurrently or consecutively. Ind. Code § 35-50-1-2(c) (2020). And "[a] single aggravating circumstance may support the imposition of consecutive sentences." *Davis v. State*, 142 N.E.3d 495, 506 (Ind. Ct. App. 2020). Moreover, appellate review should "'focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count.'" *Lane*, 232 N.E.3d at 122 (quoting *Cardwell*, 895 N.E.2d at 1225). Thus, we are not persuaded that the nature of these offenses warrants a revision of Blake's sentence.

B. Character of the Offender

[23] Our analysis of a defendant's character involves a broad consideration of a defendant's qualities, including age, criminal history, background, past rehabilitative efforts, and remorse. *Pitcher v. State*, 208 N.E.3d 656, 668 (Ind.

Ct. App. 2023). In examining a defendant's criminal history, the significance varies based on the gravity, nature, temporal proximity, and number of prior offenses in relation to the current offense. *Id.* However, even a minor criminal record reflects poorly on a defendant's character. *Id.* In addition, the fact that a defendant has committed an offense while on probation is a "substantial consideration" in our assessment of his character. *Rich v. State*, 890 N.E.2d 44, 54 (Ind. Ct. App. 2008), *trans. denied*.

[24] At sentencing, the court provided a summary of Blake's criminal history, stating that Blake had been a criminal for over half his life beginning with a juvenile adjudication before his fifteenth birthday. Just weeks before his twentieth birthday, Blake was imprisoned on three charges of Class B felony dealing cocaine. Blake was arrested for the current offenses less than eighteen months after he had been released from a decade in prison. He lied to the police during the investigation of these charges and told the others he was with to lie for him. While in jail awaiting trial, he was charged with another offense. Additionally, at the time of sentencing, Blake had charges pending in another county stemming from an incident two weeks prior to this altercation, for which he was on pretrial release at the time of these offenses. Further, he was on probation in a third county at the time of these offenses. The court also noted that in an "unsettling irony," one of Blake's historical convictions contained facts similar to the present case. Tr. Vol. VIII, p. 4. In the prior case, Blake was convicted of criminal recklessness with the use of a deadly weapon and inflicting serious

bodily injury. Blake offers no compelling evidence of a substantial virtuous trait or persistent example of good character.

[25] In sum, neither the nature of the offenses nor Blake's character renders his thirty-five-year sentence for killing a young man inappropriate.

Conclusion

[26] Based on the foregoing, we conclude the trial court did not abuse its discretion when it excluded the testimony of Dawanda Baker, and Blake's sentence is not inappropriate.

Bailey, J., and May, J., concur.

ATTORNEYS FOR APPELLANT

Nathaniel C. Henson
Devon A. DeMarco
Rhame, Elwood & McClure
Portage, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Robert M. Yoke
Deputy Attorney General
Indianapolis, Indiana