

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT

Bruce W. Graham
Graham Law Firm P.C.
Lafayette, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana
Jodi Kathryn Stein
Supervising Deputy Attorney
General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Cyrita Desiree Costello,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 16, 2022

Court of Appeals Case No.
21A-CR-1592

Appeal from the Tippecanoe
Circuit Court

The Honorable Sean M. Persin,
Judge

Trial Court Cause No.
79C01-2006-F5-97

Brown, Judge.

[1] Cyrita Desiree Costello appeals her convictions and sentence for intimidation as a level 5 felony, intimidation as a level 6 felony, and possession of marijuana as a class A misdemeanor. She claims the trial court should not have admitted a video recording and her sentence is inappropriate. We affirm.

Facts and Procedural History

[2] In June of 2020, Costello lived with Charles Simmons, who was seventy-three years old, in a duplex which he rented in Lafayette. Costello paid some rent, cooked, and did chores. Simmons took a trip to Chicago with Costello and her daughter and found that he was missing about \$400, he asked Costello about the money, and she went to the bank, gave him \$200, and promised to pay the rest. According to Simmons, on the way back from Chicago, Costello stated that she wanted to kill him. At about 4:00 a.m. on June 11, 2020, while Simmons was asleep in his bedroom, Costello knocked on the door and asked for a cigarette, which he gave her. He asked her “you going to rob me and kill me too?” Transcript Volume II at 124. Costello “went back—ran and got [a knife] and came back,” said “I sure want to kill you,” and swung the knife at him. *Id.* at 125, 127. Simmons called 911. He went to his vehicle in the driveway, and Costello locked herself in the residence.

[3] Police officers arrived at the residence and found Simmons in his vehicle. Emergency medical services were contacted, and Simmons was taken to the hospital in an ambulance where he was treated for a wound to his right chest. Costello refused to exit the residence. Officers forced the front door open, placed her in handcuffs, and escorted her to a police vehicle. Costello “was

very irate and upset” and “yelled out, a various number of things” including that the police “were going to kill her,” there “was weed inside,” Simmons “was dealing weed,” and “that she helps him sell the marijuana.” *Id.* at 191. The officers discovered marijuana in the residence on a table in the living room.

[4] As the police transported Costello to the jail, she was yelling, screaming, swearing, and calling the officers names. The officer who transported Costello stood near her while she was being booked at the jail. According to the officer, Costello was talking to corrections officers and “made the comment, words to the affect of, and the guy they say I stabbed, I just poked him.” *Id.* at 206. The officer also heard Costello state “that if God gave her a way, that she would kill all of us,” referring to the police officers. *Id.* As Costello was being escorted away from the officers, “she turned, looked over her shoulder, and basically said that if she ever . . . has the ability to get a gun, she’s going to the police department and she goes pow, pow, pow.” *Id.* at 206-207.

[5] On June 17, 2020, the State charged Costello with: Count I, battery by means of a deadly weapon as a level 5 felony; Count II, intimidation of Simmons with a deadly weapon as a level 5 felony; Count III, criminal recklessness as a level 6 felony; Count IV, intimidation of police officers as a level 6 felony; and Count V, possession of marijuana as a class B misdemeanor. Costello filed a notice of intent to assert self-defense at trial.

[6] In June 2021, the court held a jury trial at which Simmons, law enforcement officers, and Costello testified. The court admitted photographs of the interior

of Simmons's residence, blood on surfaces, and his injuries. Simmons testified that he had some marijuana in the house, that he and Costello used the same marijuana, and that, before he left the residence, it was concealed. A police officer testified that the evidence led police to the conclusion that the discovered marijuana was for personal use and there was no dealing.

[7] Costello testified that she moved in with Simmons in 2019 because she had just been released from jail and had nowhere to live. She testified: "I was his legs. I was his maid. I was his cook." *Id.* at 233. She testified she told Simmons that she was not interested in a romantic relationship but he persisted in his request. She testified that, on the day of the altercation, she woke up and noticed all the lights were on which was very unusual, she found Simmons in his bathroom masturbating, he looked very angry, and she went into the kitchen and started breakfast as usual and tried to act normal. She testified that she was cutting potatoes, went to his room with a knife in her hand to check on him, and saw him standing near his laptop computer. According to Costello, Simmons "was snatching the computer out, calling me B's, and the next thing you know he was swinging it, I was blocking and stuck him I guess." *Id.* at 240. She indicated that neither she nor Simmons knew he had been cut. She testified: "I hurried up and ran out of there (inaudible), and he's hollering, (inaudible), and he's gonna call the police and all that. I helped him to his car, to get to the hospital. I was afraid to come out because they had just killed George Floyd and they were going to kill me too. They had their guns all sticking out, pointing at me, at the door." *Id.*

[8] Costello indicated that she did not dispute that she stabbed Simmons with the kitchen knife, “[b]ut that was at the same time that [she was] struck with the computer.” *Id.* She testified that she heard Simmons call the police, she helped him to his car, and “next thing I know I was surrounded by cops, with guns.” *Id.* at 242. She acknowledged that she locked herself inside the residence. She testified that “a male officer, tall, blond, he stepped up to me and he rubbed me very intimately between my legs and I said why are you rubbing my vagina like that and he cuffed my breasts and said he was frisking me,” “[t]here was a female officer also there, they all watched as he molested me right there,” “[h]e looked me into my eyes and let me know I nothing and he was going to get away with it, because he was a cop,” “I felt so ashamed and humiliated,” “all of these people (inaudible) watched them do this, a female officer and nobody protected me and I was angry,” “I was angry so I made threats and I said things that I would kill the police because I was angry, not that I meant it,” and “I was hurt. No one was there for me and no one would listen to me.” *Id.* at 244-245.

[9] On cross-examination, the prosecutor asked Costello if she had conversations with law enforcement after she exited the house, and she replied “[n]o, not until after I was molested.” Transcript Volume III at 2. She testified: “And they also had video cam, that they have video cam of him molesting me, rubbing between my vagina, cuffing my breasts.” *Id.* at 3. She stated “[t]he officer that molested me, that searched me” was not in the courtroom and he “was a tall, blonde officer.” *Id.* at 7-8. When asked if she was aware officers were wearing body cameras, she answered “[y]es, that’s why I stated that they showed when I

asked him rubbing my vagina like that, it should be on body cam.”¹ *Id.* at 8. When asked if she told the officers Simmons had attacked her, she replied “[t]ried to” and “[t]hey would not listen to me.” *Id.* at 9. When asked “this was at what point,” she replied “when they called my cell phone and was trying to get me to come outside.” *Id.* When asked if there was a second time, she said “when I stepped outside that’s when the tall blonde officer molested me.” *Id.* at 9-10. The prosecutor stated “my question was, at that point, is that when you tried to tell officers about what happened,” and Costello replied “I tried to,” “I didn’t get a chance, after he---,” “I didn’t get a chance to say anything. I don’t know what I was saying. I was out of my mind after he . . . rubbed and physically rubbed and took my . . . personal rights away.” *Id.* at 10.

[10] Outside the presence of the jury, the prosecutor indicated the State wished to introduce a video which showed “when [Costello] comes out of the house after the door’s kicked in, and they order her out of the house to when she’s put in the back of the squad car.” *Id.* at 12. The court watched the video. Costello’s counsel objected and stated “that the totality of the video does a good job of showing my client under a negative light,” the video was “more prejudicial than it is probative,” and “I realize it’s rebuttal evidence but I don’t know that without any sponsoring witness that there’s a foundation.” *Id.* at 13. The prosecutor argued the video was “for impeachment purposes, because

¹ Costello also stated: “They get rid of evidence all the time.” Transcript Volume III at 8. The court struck the statement from the record and stated it shall not be considered by the jurors.

[Costello] does allege that she's fondled and groped in this video," "[t]he video shows otherwise," and Costello "also testified that she didn't make any statements to law enforcement." *Id.* at 14.

[11] The court found "she's opened the door" and the probative value of the evidence outweighed any prejudice to Costello. *Id.* Costello's counsel argued "I understand the Court's ruling so far as the second half of the video, of Ms. Costello being patted down and the comment about hey, I help him deal marijuana, but the first two and a half minutes of her standing in the yard screaming George Floyd, basically just kind of paints her as an angry black woman who is going to make this a racial issue," "I don't know that that's probative to anything that the State's showing, it just makes her look like an angry black woman," and "I would be willing to agree that the second half would meet those purposes." *Id.* The court stated, "if you only show a small segment there's a possibility that the jurors come to the conclusion that she was molested on some other occasion." *Id.* at 14-15. The prosecutor argued that Costello "did mention at two, also at two points she attempted to talk to law enforcement, which was at the beginning when they kicked in the door, and then towards the car," "she's testified today that she never had an opportunity to talk to law enforcement" and "[s]he tried to talk but she couldn't talk," and "[w]e hear her talking the whole time. She chooses to yell George Floyd, George Floyd, instead of what she claims to have done on the stand." *Id.* at 15. The court found "she's charged with intimidation on law enforcement, she's testified the way they treated her . . . "I think the jurors get to see, I mean, she's

testified and given her version and the officers have as well, I think this video is perhaps the best evidence of what occurred on that day.” *Id.* Costello indicated that she had an opportunity to review the body camera footage and that it was a fair and accurate depiction of what happened. The court admitted the video as State’s Exhibit 26 and the video was played for the jury. The jury found Costello not guilty on Count I and guilty on Counts II through V.

[12] At sentencing, Costello testified that she lived with her son, she had been diagnosed with “Bi-polar, depression, borderline schizophrenia,” and she was taking medications. *Id.* at 90. She indicated she had previously served sentences through community corrections, and when asked if she was successful, answered: “I, as far as I’m concerned, yes, I had them take me back to the jail. I didn’t like community corrections, you know, because they, they weren’t right in the things they were doing.” *Id.* at 91. When asked if the court should consider community corrections, she replied “[y]es, if they changed some of their rules because, well, I had a case manager . . . she got a job within two days and she put down that I should leave at 6:00 because it was a walk, I had to walk and it takes forty-five minutes to an hour and get the bus and I had to be at work at 8:00 o’clock,” “I had issues because some of them wouldn’t allow me to leave at 6:00. They said you can’t leave until 7:00,” and “[n]ow how am I going to get to work on time. So they had stuff that I couldn’t deal with. It almost made me lose my job so I just had them take me back to jail.” *Id.* at 93. Costello testified that, if she were at home, she would reside with her son and that her son was on probation. She testified that she did not need jail

time, she needed help, she would take classes for her anger issues and any classes to further her education, and she needed to be with her family.

[13] The prosecutor recommended a sentence of four years on Count II, two years on Count IV, and six months on Count V, with the sentences for Count IV to be served consecutive to Count II for an aggregate sentence of six years. The prosecutor requested that she serve four years in the Department of Correction, one year on community corrections, and one year on probation.

[14] In closing, Costello's counsel stated:

I don't know that probation or a substantial period of time on probation is really going to do anything but open Ms. Costello up to a future petition to revoke down the road. I feel the same way about community corrections. She's already testified that in the past, and I would remind the Court from the facts of the trial, that when she met the victim at the time she was going through a bout of homelessness and I think when you have someone who has mental health concerns, housing issues, giving them fifty hoops to jump through with probation and community corrections can become overwhelming and they end up right back in Court on a petition to execute or a petition to revoke probation.

And so my recommendation to the Court today, whatever the sentence is, that I think it would be beneficial for simply an executed sentence, she serve the time. She get out and she be done.

Id. at 104-105. Costello's counsel recommended concurrent sentences of three years on the level 5 felony, two years on the level 6 felony, and 180 days on the class B misdemeanor for a total sentence of three years, and "that all of that

time be executed in the Department of Corrections and basically when she's done with her time, she's done." *Id.* at 105.

[15] The trial court found the aggravating circumstances included Costello's criminal history, her violation of probation, and that the victim was at least sixty-five years old and unable to fully protect himself.² It found the mitigating circumstances included that Costello has a history of mental illness which may contribute to her impulsivity and inability to control her anger, that long-term incarceration would result in hardship on her family, and that she will have the support of her family upon release. The court found the aggravating circumstances outweighed the mitigating circumstances. It did not enter a conviction on Count III due to double jeopardy concerns. The court stated:

I agree with your attorney, he made a pretty good argument that community corrections isn't a good fit for you. I'm not saying you couldn't do it, I just have a feeling you'd be right back here in front of me. It's a tough program. And I just don't find that it's appropriate. I would also, I generally believe in a progressive penalty, if you're back in Court doing the same thing over and over again, generally, the penalty goes up. It's not like hey, Judge Williams gave me five hundred eleven days. Well, if I stab somebody I get five hundred and eleven days every time, right? No. If you keep coming back the penalty goes up. And I think it's appropriate to have a harsher penalty in this case.

² At trial, Simmons testified that he was disabled.

Id. at 110. The court sentenced Costello to concurrent terms of four years with three years executed and one year suspended to probation on Count II, two years on Count IV, and 180 days on Count V.

Discussion

I.

[16] Costello first claims the trial court erred in admitting State’s Exhibit 26 consisting of the body camera video and requests a new trial. She asserts the video shows her proclaiming loudly that the police were trying to kill her and repeating the name “George Floyd,” that “[i]t is hard to know the exact effect on the jury, but it seems clear that this evidence is extremely prejudicial,” and that her proclamations had nothing to do with her guilt or innocence and did not rebut her testimony. Appellant’s Brief at 13. The State maintains the court properly found that the video impeached and rebutted Costello’s testimony.

[17] The trial court has broad discretion to rule on the admissibility of evidence. *Garcia-Berrios v. State*, 147 N.E.3d 339, 343 (Ind. Ct. App. 2020) (citing *Bradley v. State*, 54 N.E.3d 996, 999 (Ind. 2016)), *review denied*. A trial court’s ruling on the admission of evidence is generally accorded a great deal of deference on appeal. *Id.* (citing *Hall v. State*, 36 N.E.3d 459, 466 (Ind. 2015), *reh’g denied*). We do not reweigh the evidence; rather, we consider only evidence that is either favorable to the ruling or unrefuted and favorable to the defendant. *Id.* (citing *Beasley v. State*, 46 N.E.3d 1232, 1235 (Ind. 2016)).

[18] “Opening the door refers to the principle that where one party introduces evidence of a particular fact, the opposing party is entitled to introduce evidence in explanation or rebuttal thereof, even though the rebuttal evidence otherwise would have been inadmissible.” *Id.* (citing *Wilder v. State*, 91 N.E.3d 1016, 1023 (Ind. Ct. App. 2018) (citing *Sampson v. State*, 38 N.E.3d 985, 992 n.4 (Ind. 2015))). Evidence which opens the door must leave the trier of fact with a false or misleading impression of the facts related. *Id.* When that happens, the State may introduce otherwise inadmissible evidence if it is a fair response to evidence elicited by the defendant. *Id.* Rebuttal evidence “is limited to that which tends to explain, contradict, or disprove evidence offered by the adverse party.” *Conley v. State*, 972 N.E.2d 864, 872 (Ind. 2012) (citation omitted), *reh’g denied*.

[19] Ind. Evidence Rule 403 provides: “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.” The trial court has wide latitude in weighing the probative value of the evidence against the possible prejudice of its admission. *Crain v. State*, 736 N.E.2d 1223, 1235 (Ind. 2000).

[20] The court watched the video outside the presence of the jury and found that Costello had opened the door and the probative value of the evidence outweighed any unfair prejudice to Costello. The court also noted that Costello had been charged with intimidation on law enforcement, she testified that her actions were a response to the officers’ conduct, and the video was “perhaps the

best evidence of what occurred on that day.” *Id.* at 15. Costello agreed the video was a fair and accurate depiction of what occurred. Costello’s testimony opened the door to the admission of the video as rebuttal evidence, and the court had wide latitude in weighing the probative value of the evidence against the possible prejudice of its admission. Based upon the record, and in light of the allegations against Costello and her claims, we cannot say the trial court abused its discretion in admitting the challenged video.

II.

[21] Costello next claims “the executed prison sentence was inappropriate given the nature of the offense and character of the offender.” Appellant’s Brief at 16. She argues “there is nothing particularly aggravating about the nature of the offense” and “the injuries sustained by Simmons were minimal.” *Id.* at 17. She notes the jury acquitted her on the battery offense. She argues her mental illness started at a very young age, her family came from minimal financial means, one of her children died as an infant, and she lost her oldest daughter to gun violence. She argues the IRAS evaluation placed her in the moderate category to reoffend and she reported a consistent work history back to 2016. She asserts “[a]ll things considered – it does not appear that a three-year prison sentence was appropriate given the nature of the offense, and extensive mental illness background and overall life history.” *Id.* at 20. She asks this Court to revise her sentence and order that the balance of her executed sentence be served through community corrections.

[22] Ind. 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 find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). The place that a sentence is to be served is an appropriate focus for application of our review and revise authority. *Biddinger v. State*, 868 N.E.2d 407, 414 (Ind. 2007) (citing *Hole v. State*, 851 N.E.2d 302, 304 n.4 (Ind. 2006) (recognizing that discretionary placement is subject to Ind. Appellate Rule 7(B) review)).

[23] Ind. Code § 35-50-2-6 provides that 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 § 35-50-2-7 provides that a person who commits a level 6 felony shall be imprisoned for a fixed term of between six months and two and one-half years with the advisory sentence being one year. Ind. Code § 35-50-3-3 provides that a person who commits a class B misdemeanor shall be imprisoned for a fixed term of not more than 180 days. The court sentenced Costello to an aggregate term of four years with three years executed and one year suspended to probation.

[24] Our review of the nature of the offenses reveals that Costello retrieved a knife, said she wanted to kill Simmons, and swung the knife at him. Simmons was later treated for a wound to his right chest. She refused to exit the residence, which contained marijuana, and threatened to kill law enforcement officers.

[25] Our review of the character of the offender reveals that, according to the presentence investigation report (“PSI”), Costello’s criminal history includes domestic battery as a misdemeanor in 2000, domestic battery as a misdemeanor in 2004, violations of protective orders as felonies in 2004 and 2005, criminal damage to property as a misdemeanor in 2006, battery resulting in moderate bodily injury as a level 6 felony and resisting law enforcement as a class A misdemeanor in 2018, and conversion as a class A misdemeanor in 2021. The PSI also states Costello, who was born in December 1965, has had a petition to revoke probation filed against her and found true. It states that a petition to execute community corrections sentence in custody was filed in December 2018 “due to [Costello] violating for Class ‘B’ Threatening on 12/14/18, and Tippecanoe County Community Corrections determining [she] was not medically fit to serve her time on Work Release.” Appellant’s Appendix Volume III at 9. The PSI further provides that Costello reported that she produced eleven children, one of whom is deceased after being shot and another of whom died as a result of sudden infant death syndrome. She reported that she was unemployed, received disability income, and had been employed from June of 2016 through December 2018 at Holiday Inn Express, Mike’s Cleaning Service, Indiana Packers, and Double Tree Hotel.

[26] With respect to her physical health, she reported that she was “beaten and left for dead” in 1997 and “beaten again” in 2008 resulting in a broken jaw and ribs. Appellant’s Appendix Volume III at 13. With respect to her mental health, the PSI states that Costello reported she was first diagnosed with bipolar disorder at

age eight or nine, she was diagnosed as depressive borderline schizophrenic between 1999 and 2003, she has memory issues, and she has experienced amnesia as the result of two instances of being physically assaulted. She reported that she is prescribed an antipsychotic and mood stabilizer, she participated in counseling with a psychiatrist for about a year, and she attempted suicide twice in her teen years and again in recent years. She reported she was remanded into custody due to threats of suicide after she was found guilty in the instant offenses and was later placed in a padded cell at the jail for four days. With respect to substance abuse, she reported she became an alcoholic in 1999 and rarely drinks.

[27] As to placement, Costello testified that she was previously placed on community corrections, she “had them take [her] back to the jail,” and “they weren’t right in the things they were doing.” Transcript Volume III at 91. She indicated that, if she were at home, she would reside with her son, who was on probation. Costello’s counsel stated “I don’t know that probation or a substantial period of time on probation is really going to do anything but open Ms. Costello up to a future petition to revoke down the road” and “I feel the same way about community corrections,” and he recommended that, “whatever the sentence is, . . . it would be beneficial for simply an executed sentence” and that “she serve the time . . . and she be done.” *Id.* at 104-105. The trial court agreed “that community corrections isn’t a good fit for” Costello and stated “I just have a feeling you’d be right back here in front of me,” “[i]t’s a tough program,” and “I just don’t find that it’s appropriate.” *Id.* at 110. The

PSI states that Costello's overall risk assessment score using the Indiana Risk Assessment System places her in the moderate risk to reoffend category.

[28] After due consideration, we conclude that Costello has not sustained her burden of establishing that her sentence, including her placement, is inappropriate in light of the nature of the offenses and her character.

[29] For the foregoing reasons, we affirm Costello's convictions and sentence.

[30] Affirmed.

May, J., and Pyle, J., concur.