

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

De'Torio Ty Lurentus Berneard
Fleming,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 6, 2023
Court of Appeals Case No.
22A-CR-2741

Appeal from the
Madison Circuit Court

The Honorable
Mark K. Dudley, Judge

Trial Court Cause No.
48C06-2101-MR-22

Memorandum Decision by Judge Foley
Chief Judge Altice and Judge May concur.

Foley, Judge.

[1] De'Torio Ty Lurentus Berneard Fleming (“Fleming”) was convicted after a jury trial of murder,¹ a felony, and attempted armed robbery,² as a Level 3 felony and his sentence was enhanced due to the use of a firearm in the commission of the crimes. The trial court sentenced Fleming to an aggregate sentence of sixty-four years executed in the Indiana Department of Correction. Fleming appeals and raises the following issues for our review:

- I. Whether the trial court abused its discretion when it admitted a photograph of Fleming’s hands taken during trial; and
- II. Whether the trial court abused its discretion when it sentenced Fleming.

[2] We affirm.

Facts and Procedural History

[3] On January 3, 2021, Andon Oliver (“Oliver”) was in contact with Fleming over Facebook Messenger about selling marijuana to Fleming. After agreeing on the sale of a quarter of an ounce for sixty-five dollars, Fleming told Oliver to drive to Fairview Apartments in Anderson, Indiana to make the exchange. At that time, Oliver’s girlfriend, Leawna Rogers (“Rogers”), arrived at their home, and Oliver told her that he was “going to make a play,” meaning he was going to

¹ Ind. Code § 35-42-1-1(1).

² I.C. § 35-42-5-1(a)(1); I.C. § 35-41-5-1.

sell drugs. Tr. Vol. II p. 109. Rogers asked if she could come along and get food afterwards, and Oliver agreed she could come with him. As they were en route to the apartment complex in Oliver's car, Rogers overheard Fleming and Oliver talking on the phone because Oliver had the call on speakerphone. Rogers heard Fleming ask Oliver if he had any "poles," or guns, for sale, to which Oliver replied that he did not "mess with them" anymore. *Id.* at 113. Rogers also heard Fleming ask Oliver if it was just him and Rogers in the car, and Oliver confirmed that it was just him and Rogers.

- [4] When Oliver and Rogers arrived, Fleming was standing on the sidewalk outside of the apartments. Fleming approached the car, and Oliver handed him a "nug of weed"³ to examine. *Id.* at 114. While Fleming was looking at the marijuana, Rogers noticed that Fleming's fingernails were "super, super short." *Id.* at 123. As Fleming handed the marijuana back to Oliver, Fleming said it looked like "good weed." *Id.* at 114–15. Before any exchange of money for the marijuana could occur, Fleming pulled out a gun, pointed it at Oliver, and demanded that Oliver "give him all of the weed." *Id.* at 115. Oliver replied, "[b]ro, are you serious," and Fleming told Oliver to "[g]ive me your shit or I'm going to shoot you." *Id.* Oliver stated, "[p]lease don't do this," then put the car into drive, and attempted to drive away. *Id.* at 115–16.

³ A "nug of weed" is a small ball of marijuana. Tr. Vol. II p. 114.

- [5] As Oliver was driving away, Fleming fired a shot toward Oliver's car. The bullet struck Oliver in the chest. Rogers heard the gunshot, and she looked backward and saw Fleming. Rogers then ducked down, and Oliver told her that he had been shot. Oliver lost control of the car, and the car hit a concrete wall and traveled over the curb, through a chain link fence, and into a nearby baseball diamond. When the car came to a stop in the baseball field, Rogers called 911. Paramedics arrived at the scene and, in assessing Oliver's condition, they found a penetrating wound to the right side of his chest. They performed lifesaving procedures and transported him to the hospital for emergency treatment. Despite these efforts, Oliver died from his injury.
- [6] After Rogers called 911, Anderson Police Department Officer Bill Richardson ("Officer Richardson") was dispatched and arrived at the scene. He spoke with Rogers, who told him that Fleming shot Oliver. She showed Officer Richardson the conversation Oliver and Fleming had on Facebook Messenger setting up the drug deal. Rogers also showed the officer Fleming's picture from social media. After speaking with Officer Richardson, Rogers gave him the cellphone and its passcode so that the officer could access the messages.
- [7] Detective Chris Frazier ("Detective Frazier") of the Anderson Police Department interviewed Rogers later at the police station and afterwards, he obtained an arrest warrant for Fleming. On January 4, 2021, Detective Frazier received information that Fleming might be at his grandfather's residence, which was his primary place of residence. The police went there to attempt to apprehend Fleming, but Fleming's grandfather told Detective Frazier that he

had not seen Fleming “for a while.” Tr. Vol. III p. 14. Shortly after speaking with the police, Fleming’s grandfather noticed that his handgun was missing. He then called the Anderson Police Department and made a police report that the gun had been stolen.

[8] Shortly after the shooting, Alexis Morgan (“Morgan”), Fleming’s cousin, encountered Fleming at a friend’s house. She noticed that his demeanor was different than usual and that there was “something off about him.” *Id.* at 143. Fleming seemed nervous, was not in a joking mood like normal, and was acting as if he had “a lot on his mind.” *Id.* at 150. After she parted ways with Fleming, Morgan learned that Fleming was a suspect in the shooting of Oliver. When later speaking with Fleming, Morgan asked him why he went to the Fairview Apartments that night, and Fleming told her that he went there “[t]o buy weed.” *Id.* at 148. Morgan told him it was in his best interest to turn himself in to the police, and Fleming agreed to do so.

[9] On January 5, 2021, Fleming turned himself in to the police department and was taken into custody. On the same date, Detective Frazier obtained a search warrant for Fleming’s grandfather’s house where he found a box of ammunition for a nine-millimeter handgun, a magazine belonging to a nine-millimeter handgun, and two cell phones, one of which was identified as belonging to Fleming. That same day, Oliver’s autopsy was conducted, and it was determined that the cause of his death was a gunshot wound to the torso.

[10] The State charged Fleming with murder, a felony, and Level 3 felony attempted armed robbery. The State also sought a sentencing enhancement because Fleming used a firearm in the commission of his offenses. On September 20, 2022, a jury trial was held. During the State's case in chief, the prosecutor requested permission from the trial court to have Fleming display his hands to the jury in light of Rogers's description that Fleming had "like really, really, really short fingernails." Tr. Vol. II p. 101. Fleming's counsel objected and argued that it had been two years since Rogers observed Fleming's fingernails. The trial court told the parties that it would not allow Fleming to be unshackled to allow him to approach the jury to display his hands. At that point, the State asked permission to take a photograph of Fleming's fingernails to display for the jury. Fleming's counsel again objected and argued that a photograph of Fleming's fingernails at this point would not be relevant and that it would be "highly prejudicial." *Id.* at 104. The trial court overruled the objection and gave the State permission to photograph Fleming's hands for use at trial. At the time the photograph of Fleming's hands was admitted into evidence, Fleming's counsel renewed his objection on the basis of relevance. The jury found Fleming guilty of murder and Level 3 felony attempted armed robbery. The jury also found that Fleming used a firearm in the commission of the offenses.

[11] On October 21, 2022, the trial court held the sentencing hearing. Fleming was sixteen years old at the time he committed the present crimes and eighteen years old at the time of sentencing. His presentence investigation report reflected that, as a juvenile, Fleming had been adjudicated a delinquent child

for conduct that, if committed by an adult, would have been two counts of Class B misdemeanor disorderly conduct, Class A misdemeanor battery resulting in bodily injury, Class A misdemeanor dangerous possession of a firearm, and Class A misdemeanor resisting law enforcement. As a result of these adjudications, Fleming had been placed on informal probation, formal probation, parental home detention, and day reporting. Fleming was on probation at the time he committed the instant offenses.

- [12] The trial court found as aggravating factors that Fleming had committed multiple offenses, was on probation at the time of the offenses, and had a history of juvenile delinquency. The trial court did not find any mitigating factors. The trial court acknowledged Fleming's young age but did not find the circumstance to be mitigating, explaining that "the system had intervened with" Fleming and had provided him with services to rehabilitate him and "address these [delinquency] issues." Tr. Vol. IV p. 40. The trial court stated that, despite this prior intervention, Fleming did not take advantage of the provided services or his "stable home" environment and has failed to alter his behavior. *Id.* at 41. The trial court sentenced Fleming to fifty-seven years for his murder conviction and fourteen years for his attempted armed robbery conviction with those sentences ordered to run concurrently. The trial court ordered that Fleming's fifty-seven-year sentence for murder be enhanced by seven years for the use of a firearm, resulting in an aggregate sentence of sixty-four years in the Indiana Department of Correction. Fleming now appeals.

Discussion and Decision

I. Admission of Photograph

- [13] Fleming argues that the trial court abused its discretion when it admitted into evidence the photograph of his hands taken during trial. The trial court has broad discretion to rule on the admissibility of evidence. *Thomas v. State*, 81 N.E.3d 621, 624 (Ind. 2017). Generally, evidentiary rulings are reviewed for an abuse of discretion, and we will reverse only when admission is clearly against the logic and effect of the facts and circumstances. *Id.*
- [14] Fleming first asserts that the photograph was not relevant. Indiana Evidence Rule 401 provides: “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” Irrelevant evidence is inadmissible. Ind. Evidence Rule 402. Moreover, “[g]enerally, photographs that . . . demonstrate the testimony of a witness are admissible.” *Burns v. State*, 59 N.E.3d 323, 327 (Ind. Ct. App. 2016)), *trans. denied*.
- [15] In the present case, Rogers testified that she witnessed the shooter and that his fingernails were “super, super short.” Tr. Vol. II p. 123. At the time the photograph was taken of his hands, Fleming had “really, really, really short fingernails.” *Id.* at 101. Because Fleming’s fingernails matched the description that Rogers gave of the shooter’s fingernails, the photograph of Fleming’s hands had the tendency to make it more probable that Fleming was the person who shot Oliver. Thus, the photograph of Fleming’s hands was relevant.

[16] Fleming next argues that the photograph was inadmissible because its probative value was substantially outweighed by the risk of unfair prejudice. Under Evidence Rule 403, “[t]he 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.” Whether there is a risk of unfair prejudice depends on “the capacity of the evidence to persuade by illegitimate means, or the tendency of the evidence to suggest decision on an improper basis.” *D.R.C. v. State*, 908 N.E.2d 215, 224 (Ind. 2009) (quoting *Ingram v. State*, 715 N.E.2d 405, 407 (Ind. 1999)).

[17] The photograph of Fleming’s fingernails was probative in that it corroborated Rogers’s observation of the distinctive look of the shooter’s fingernails at the time of the shooting. Moreover, the photograph did not have the tendency to persuade the jury to find Fleming guilty based on illegitimate means, nor did it have the tendency to suggest guilt based on an improper basis. At the time of the shooting, Rogers noticed that the shooter’s fingernails had the distinctive look of being “super, super short,” and at the time the photograph was taken of his hands during trial, Fleming had “really, really, really short fingernails.” Tr. Vol. II pp. at 101, 123. Because the photograph corroborated an observation by Rogers and did not pose a substantial risk of unfair prejudice, we conclude that the probative value of the photograph was not substantially outweighed by the risk of unfair prejudice. Thus, Evidence Rule 403 did not preclude admission of the photograph.

[18] Fleming asserts that the photograph was unfairly prejudicial because “there were no other photographs taken of anyone’s fingernails and there is an unknown number of people out there with short fingernails.” Appellant’s Br. p. 22. His argument, however, goes to the weight of the evidence and not its admissibility. At trial, Fleming was free to challenge the photograph by calling attention to the fact that the photograph had been taken almost two years after the shooting and that no photographs were taken of anyone else’s fingernails. We conclude that the evidence was relevant and that its probative value was not substantially outweighed by the risk of unfair prejudice, and therefore, the trial court did not abuse its discretion in admitting the photograph.

II. Sentencing

[19] Fleming argues the trial court abused its discretion when it sentenced him because it failed to find his age as a significant mitigating factor and because it found multiple counts as an aggravating factor. Sentencing decisions lie within the sound discretion of the trial court. *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). The trial court abuses its discretion when its 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 from them. *Hudson v. State*, 135 N.E.3d 973, 979 (Ind. Ct. App. 2019). In sentencing a person, a trial court can abuse its discretion in several ways, including: (1) failing to enter a sentencing statement; (2) entering a sentencing statement that includes aggravating and mitigating factors unsupported by the record; (3) entering a sentencing statement that omits reasons that are clearly supported by the

record; or (4) entering a sentencing statement that includes reasons improper as a matter of law. *Anglemyer v. State*, 868 N.E.2d 482, 490–91 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007).

[20] Fleming first asserts that the trial court abused its discretion by failing to find that his age was a significant mitigating factor. An allegation that the trial court failed to identify or find a mitigating circumstance requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Davis v. State*, 173 N.E.3d 700, 704 (Ind. Ct. App. 2021) (citing *Rascoe v. State*, 736 N.E.2d 246, 249 (Ind. 2000)). The trial court is not obligated to accept the defendant's contentions as to what constitutes a mitigating circumstance. *Id.* Regarding the defendant's age, our Supreme Court explained that "[f]ocusing on chronological age is a common shorthand for measuring culpability, but for people in their teens and early twenties it is frequently not the end of the inquiry." *Ellis v. State*, 736 N.E.2d 731, 736 (Ind. 2001). That is, "[t]here are both relatively old offenders who seem clueless and relatively young ones who appear hardened and purposeful." *Id.* Thus, "age is not a per se mitigating factor[,] let alone "automatically a significant mitigating factor." *Gross v. State*, 769 N.E.2d 1136, 1141 n.4 (Ind. 2002). A defendant must establish a nexus between his age and his culpability, and the failure to do so means that a defendant has not shown that his age was a significant mitigator. *See id.*

[21] Although acknowledging Fleming's age during sentencing, the trial court chose to not find this circumstance to be a mitigating factor. Specifically, the trial

court found that the juvenile justice system had previously intervened with Fleming and that he had been provided services through the system. The trial court also found that Fleming had a stable home and a guardian that was present and available to him. The trial court found that Fleming had made choices to not change his behavior and that he “wanted to live that lifestyle and . . . made that choice.” Tr. Vol. IV p. 41. These statements indicate the trial court implicitly found that Fleming was more like the “relatively young [offenders] who appear hardened and purposeful.” *Ellis*, 736 N.E.2d at 736. The evidence at trial established that Fleming set up a drug deal with the intent to rob Oliver. In setting up the meeting with Oliver, Fleming ensured that Oliver was unarmed and that only Oliver and Rogers were in the car. When Oliver refused to give Fleming all of the marijuana, Fleming did not allow Oliver to just drive away and, instead, chose to shoot him. We conclude that the trial court did not abuse its discretion when it did not find Fleming’s age to be a mitigating factor.

[22] Fleming next argues that the trial court abused its discretion when it found that there were multiple counts as an aggravating factor. He asserts that this was an improper aggravating factor because, although he was convicted of two counts, attempted armed robbery and murder, the attempted armed robbery was a material element of the murder because Fleming was convicted of felony murder with the attempted armed robbery forming the felony. “Where a trial court’s reason for imposing a sentence greater than the advisory sentence includes material elements of the offense, absent something unique about the

circumstances that would justify deviating from the advisory sentence, that reason is ‘improper as a matter of law.’” *Gomillia v. State*, 13 N.E.3d 846, 852–53 (Ind. 2014) (quoting *Anglemyer*, 868 N.E.2d at 491). Here, the trial court specifically found that there was nothing unique in the nature and circumstances of Fleming’s crimes that it found aggravating. Therefore, to the extent that the trial court found that Fleming’s commission of multiple counts, which included the attempted armed robbery that formed the base felony for felony murder, was an aggravating factor, we conclude that it was an abuse of discretion.

[23] However, that is not the end of our inquiry. Our Supreme Court has held that “[e]ven when a trial court improperly applies an aggravator, a sentence enhancement may be upheld if other valid aggravators exist.” *McCain v. State*, 148 N.E.3d 977, 984 (Ind. 2020). “A single aggravating circumstance is enough to justify an enhancement or the imposition of consecutive sentences.” *McCann v. State*, 749 N.E.2d 1116, 1121 (Ind. 2001). “When an improper aggravator is used, we remand for resentencing only ‘if we cannot say with confidence that the trial court would have imposed the same sentence if it considered the proper aggravating and mitigating circumstances.’” *Id.* Here, the trial court found two other proper aggravators—Fleming’s history with the criminal justice system and that he was on probation at the time he committed the instant offenses—that Fleming does not challenge. Given Fleming’s history with the juvenile justice system that demonstrated an escalation in delinquent acts and the fact that he was on probation for gun-related delinquent conduct at the time he

committed the present offense, we are confident that the trial court would have imposed the same sentence even without consideration of the fact that Fleming had multiple counts. Accordingly, even though the trial court may have incorrectly found multiple counts as an aggravating factor, remand for resentencing is unnecessary. We, therefore, conclude that the trial court did not abuse its discretion when it sentenced Fleming.

Conclusion

[24] We conclude that the trial court did not abuse its discretion when it admitted the photograph of Fleming's hands taken during the trial into evidence. We also conclude that the trial court did not abuse its discretion when it sentenced Fleming.

[25] Affirmed.

Altice, C.J., and May, J., concur.