## MEMORANDUM DECISION




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# IN THE COURT OF APPEALS OF INDIANA

Darrell Scott Durham,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff*

April 12, 2023

Court of Appeals Case No. 22A-CR-872

Appeal from the Marion Superior Court

The Honorable Shatrese M. Flowers, Judge

The Honorable James K. Snyder, Magistrate

Trial Court Cause No. 49D28-2105-F4-16023

**Memorandum Decision by Chief Judge Altice**
Judges Brown and Tavitas concur.

**Altice, Chief Judge.**

## Case Summary

[1] Darrell S. Durham was convicted, following a jury trial, of Level 4 felony possession of a firearm by a serious violent felon (SVF), Level 5 felony domestic battery by means of a deadly weapon, Level 6 felony domestic battery, and Level 6 felony pointing a firearm. The court sentenced Durham to concurrent sentences, resulting in an aggregate sentence of nine years. Durham raises the following three restated issues on appeal:

> I. Did the trial court commit fundamental error when it admitted into evidence, pursuant to stipulation, a no contact order against Durham that mentioned that he had been charged with the offense of unlawful possession of a firearm by a SVF?
>
> II. Did the prosecutor commit prosecutorial misconduct in closing argument that rose to the level of fundamental error?
>
> III. Did the trial court abuse its discretion during sentencing by considering improper aggravators?

[2] We affirm.

## Facts & Procedural History

[3] In May 2021, Durham was living with his girlfriend, D.G., in the Atrium Village Apartments in Indianapolis. They have one child together, born earlier that year. On the morning of May 21, 2021, Patricia Wilson was at work at Golden Gardens adult day care that shares a parking lot with the Atrium

Village Apartments. Wilson heard yelling and screaming in the parking lot behind Golden Gardens, and she observed a woman – later determined by the jury to be D.G. – "running and screaming away from a man," who all parties now agree was Durham. *Transcript Vol. 2* at 198. Wilson saw Durham "chase[] her with a gun, and [] hit her with the gun." *Id*. Wilson called 911, and she and a coworker, Caylee Hair, continued to watch the altercation.

[4] At some point, D.G. got a baby out of a red SUV and was carrying it in her arms when Durham hit her in the head with the gun. He also pointed the gun at her "[a] number of times." *Id.* at 204. Eventually, D.G. ran over to a door at Golden Gardens, and Wilson saw blood on her forehead and the side of her face. Hair tended to her wounds, and Wilson helped her with the baby as they waited for police to arrive.

[5] Meanwhile, Indianapolis Metropolitan Police Department (IMPD) Officers Eric Baker and Freddie Haddad responded, separately, to a dispatch concerning a domestic "disturbance with a weapon" at the Atrium Village Apartments. *Transcript Vol 3* at 9. The dispatch had "a live feed" of the 911 call that was reporting a female in the parking lot with a baby in her arms and a male with a gun in his hand. *Id.* at 8. When Officer Haddad arrived, he saw a "hysterical" female with a baby in her arms run past him, and although he tried to stop her to get information, she "ran right to the other women," that is, to Wilson and Hair. *Id*. at 11. When Officer Baker arrived via another entrance, he observed a male chasing a female with a baby, and as he approached them, the male "took off running." *Transcript Vol. 2* at 220. After fifteen or twenty minutes of

several officers searching the area "for the male with a gun," one officer spotted a man – Durham – who matched the description provided in the 911 call. *Transcript Vol. 3* at 13. Police apprehended and searched Durham, who had on his person D.G.'s driver's license and debit card, as well as two cell phones. Durham did not have a gun on him.

[6] IMPD Detective Joshua Kemmerling with the Domestic Violence Unit was summoned to the scene and spoke to D.G. Detective Kemmerling observed a cut near her left eye and the bridge of her nose, as well as a scratch on her neck. He took a recorded statement from D.G. at the scene, in which she told him that she and Durham had argued that morning, and as she took their baby out of the SUV, Durham chased her and punched her in the face and head "multiple times." *Transcript Vol. 2* at 250. Detective Kemmerling also took statements at the scene from Wilson and Hair.

[7] As officers did not locate a gun, an IMPD drone team arrived to search for it. A burgundy and black 9 mm handgun was discovered on the roof of the Atrium Village apartments, between where Wilson and Hair had seen Durham hitting D.G. and pointing a gun and where he was later found by the officers. Latent fingerprint and DNA evidence was collected from the gun. The latent fingerprint card was of "no value." *Transcript Vol. 3* at 24. Durham was excluded as a possible contributor to the first DNA swab and the second swab contained a mixture of at least two individuals; the major contributor was not Durham and due to insufficient sample data, no comparison could be made for the minor contributor.

[8] Later obtained recordings of jail phone calls reflects that Durham called D.G. around 12:48 p.m. on May 21, the day of his arrest. He asked D.G. why she told the police that he hit her, and she responded that other people at the scene told police what happened. *State's Exhibit 14* (01:29-02:19). D.G. also told Durham that her eye was split open and bleeding. Durham asked D.G., "do you love me" and she responded, "I love you but you just have a problem." *Id*. (4:00-4:14). D.G. stated that she could not trust him as he had pointed a gun in her face while she had a baby in her arms. She told him that he had hit her so hard that she "started f*ckin' hallucinating" and "didn't know what the f*ck was going on." *Id*. (4:40-4:59).

[9] On May 24, 2021, the State charged Durham with Level 4 felony unlawful possession of a firearm by a serious violent felon (Count I), Level 5 felony domestic battery by means of a deadly weapon (Count II), Level 5 felony battery by means of a deadly weapon (Count III), Level 6 felony domestic battery (Count IV), and Level 6 felony pointing a firearm (Count V). That day, the State also filed a request for the court to issue a no contact order prohibiting Durham from having any contact with D.G., their infant daughter, Wilson, and Hair. The next day, the court granted the request and issued a no contact order, and Durham was advised of it on May 26 during a video initial hearing.[1]

[1] The record indicates that the no contact order was lifted on June 29, 2021 at the request of D.G.

[10] On May 26, Durham called D.G. from jail and told her to say "it was a big misunderstanding" and that it was her weapon. *State's Exhibit 15* (May 26, 2021 call 15:05-15:13). On June 3, 2021, Durham told D.G. to tell the prosecutor's office that there was a third person, another woman, involved in the altercation that day and that the woman was angry about a social media posting of Durham and D.G.'s new baby. *Id.* (June 3 call 2:15-2:38).

[11] On June 9, 2021, the trial court granted the State's motion to amend the information to add four counts of Class A misdemeanor invasion of privacy (Count VI-IX) for alleged violations of the no contact order based on calls to D.G. on May 26, and June 2, 3, and 8. The State subsequently alleged that Durham was a habitual offender.

[12] On January 27, 2022, the State filed a motion for forfeiture by wrongdoing, in which the State requested that the trial court find that Durham forfeited the right to cross-examine D.G., arguing, "By repeatedly violating the No Contact Order and calling [D.G.] hundreds of times, [] Durham exerted coercive pressure over [D.G.] in an attempt to stop her from cooperating with the prosecution against him." *Appendix Vol. II* at 148. Specifically, the State alleged that jail records showed that Durham called D.G. 123 times between May 21 and June 29, 2021, and called her at an alternate number 137 times between those same dates, and in some of those calls, Durham "repeatedly tells [D.G.] to do a number of different things to try to get the charges against him dropped," including stating that it was a big misunderstanding, that it was her

weapon, and that a third person was involved in the alteration. *Appendix Vol. II* at 148. The trial court granted the State's motion after a hearing.

[13] A jury trial was held on March 9, 2022. Count I was bifurcated such that, in the first phase, the factfinder would decide whether Durham possessed the firearm, and in the second phase, the factfinder would decide whether Durham was a SVF.

[14] The State called D.G. as a witness and asked her about her relationship with Durham, the age of their child, and the address of her apartment with Durham. D.G. testified that she and Durham were currently engaged, had been in a relationship for five years, and had a one-year-old child together. She also claimed ownership of the handgun found by police. The State did not ask her any questions about the altercation, anticipating that she was not going to be truthful. On cross-examination, and over the State's objection, D.G. described what happened during the altercation, testifying that the woman seen fighting with Durham on May 21 was not her.

[15] Specifically, D.G. described that, on the morning in question, a woman named Sophia, who is the mother of one of Durham's children, banged on their apartment door, angry about a social media post of their baby. D.G. said that she tried to walk to her vehicle but Sophia "was trying to attack" her, and when she got to the vehicle, Sophia hit her. *Transcript Vol. 2* at 232. D.G. said that Durham, in defending D.G., was "tussling" with Sophia as she tried to push her way into D.G.'s vehicle. *Id*. D.G. testified that the glove compartment,

where her gun was located, fell open, so D.G. took it and threw it on the roof to get it out of the way of the altercation. D.G. testified that Durham never had a gun that day, and she denied that she suffered any injuries during the incident. D.G. initially stated that she had no recollection of speaking to officers or giving a recorded statement to police but on cross-examination testified that she did remember speaking to Detective Kemmerling and giving him a statement and acknowledged that it was "very different" from her trial testimony. *Id.* at 237.

[16] Wilson testified to her observations on the day in question, describing that she saw Durham "rais[e] his hand . . . with the gun in his hand" and strike the woman "in the head and . . . the face." *Id*. at 201. When asked if she had seen anyone else involved in the altercation, Wilson testified that she had not. Detective Kemmerling testified about his recorded interview with D.G., and he stated that he did not recall D.G. saying anything about another woman being present during the incident. Photographs of D.G.'s injuries to her head, face, and neck were admitted during his testimony.

[17] Following the State's witnesses, the State read aloud and published on the screen for the jury's viewing, certain previously-stipulated evidence, including the May 24, 2021 no contact order against Durham (State's Exhibit 24). The no contact order contained a statement that Durham "has been charged with" unlawful possession of a firearm by a SVF. *Exhibits Vol.* at 87.

[18] Thereafter, the State offered, and the trial court admitted over Durham's hearsay and foundation objections, Durham's jail phone calls on May 21 (State's Exhibit 14) and on May 26, June 3, and June 8 (State's Exhibit 15). The State requested to play only select portions for the jury – "no more than a minute or two of each call" – to avoid irrelevant and potentially prejudicial matters in the calls. *Transcript Vol. 3* at 38. As is relevant to this appeal, there was an exchange between the court and the State out of the jury's presence in which the State indicated that the calls of May 26, June 3, and June 8 were being admitted with regard to the invasion of privacy charges for violation of the no contact order, and the May 21 call was being admitted for impeachment of D.G. *See id.* at 38-39. Counsel for Durham objected to admission of the calls, urging, among other things, that the proper time to admit them would have been while D.G. was testifying. The court admitted the four calls, over Durham's objection, allowing the limited portions to be played for the jury. The court stated, "I am going to allow the fourth call [of May 21]" for the "impeachment of D.G., as well." *Id*. at 42.

[19] Following the conclusion of the State's evidence, the trial court granted Ind. Trial Rule 50 judgment on the evidence on three invasion of privacy charges, Counts VII, VIII, and IX.[2] Thereafter, and outside the presence of the jurors, counsel for Durham asked for clarification of whether the State would be allowed to refer to the phone calls, given that the invasion of privacy charges,

[2] Prior to the start of trial, the State dismissed Count VI, invasion of privacy.

stemming from violation of the no contact order, had been dismissed. The following exchange occurred:

> The Court: Well, the -- their charges are now gone as it relates to the no-contact order. However, *the May 21st call*, I think goes beyond that and *it's for impeachment purposes*.
>
> Defense Counsel: Okay.
>
> State: Well that's when *the June 3rd call* was made telling her a fabricated story.
>
> The Court: That's true. That also I did hear in that call as well. So it will be allowed. *Those will be referenced for those purposes*.

*Id.* at 50 (emphases added).

[20] During closing argument, the State acknowledged that the collected DNA did not connect Durham to the gun found on the roof but argued, in part, "We're not saying it was that gun; it was a gun," and that the witness testimony established that "[h]e had a gun." *Id*. at 59. The State also referred to and relied on the May 21 phone call in which D.G. stated to Durham that he had pointed a gun at her and that he had hit her so hard that she did not know what was going on.

[21] The jury returned verdicts of guilty on Counts I, II, III, IV, and V. Durham waived his right to a jury trial for the second phase of Count I, and the trial court found that Durham was a SVF due to a prior conviction for robbery.

Thereafter, the trial court found Durham guilty of possession of a firearm by a SVF. The State dismissed the habitual offender enhancement.

[22] At the March 31, 2022 sentencing hearing, the trial court vacated the conviction on Count III on double-jeopardy grounds and entered judgment of conviction on Counts I, II, IV, and V. D.G. read a victim impact statement, stating that Durham has thirteen children who he helps to care and provide for, he helps take care of his ill mother, and he "still has a job that he could go back to." *Transcript Vol. 3* at 105. D.G. asked the court to place Durham on home detention so he could keep providing for his family.

[23] Durham's counsel argued that, although Durham has a criminal history, he had stayed out of trouble for eight years and had been successful on home detention in 2005. Counsel also noted that Durham, age thirty-four at the time of sentencing, was raised by his mother and grandmother because his father was an alcoholic who died in 2017 and that Durham was in foster care for a time when his mother went to jail when he was thirteen years old. Counsel shared that Durham reported having a very good relationship with his thirteen children, one of whom unfortunately passed away in February 2021. Durham was "in a very bad place after that" and "going through an incredibly hard time" at the time of this incident, drinking too much alcohol. *Id*. at 109. Counsel urged that the children would suffer financially and emotionally if Durham was incarcerated. Durham did not graduate from high school and does not have his GED. Durham gave a statement in allocution, urging that he was not a bad person but made mistakes due to drinking and that he was

"owning to what [he] did do, . . . but . . . never really had no weapon." *Id*. at 110.

[24] The State argued that Durham had a criminal history, he committed a crime of violence in the presence of a child, he violated the May 24 no contact order by continuing to call D.G. from jail, and he violated conditions of probation in multiple instances. He was on probation for possession of a firearm by a SVF when he committed the current offenses. The State noted that Durham was "on the run for eleven years" following the issuance of a 2012 arrest warrant and also had an active warrant "for over six years on his previous [SVF] conviction." *Id*. at 112.

[25] The court identified multiple aggravators, including Durham's criminal history and that during the pendency of this case, Durham violated the court's no contact order and "concocted plans to obstruct justice" in multiple ways, including having D.G. contact the witnesses to the incident. *Id*. at 116. The court opined that this case presents "the most egregious attempts at obstruction of justice I've ever seen" in over seven years on the bench. *Id*. at 122. The court found mitigators as well, including that Durham suffered hardship and trauma at the loss of his child and that he waived the right to a jury trial on the second phase of Count I, saving judicial time and resources.

[26] The trial court sentenced Durham to concurrent sentences as follows: nine years on Count I, with seven years executed in the Indiana Department of Correction (DOC) and two years on community corrections home detention;

four years on Count II; 545 days for Count IV; and 545 days on Count V. Durham now appeals. Additional facts will be supplied below as needed.

## Discussion & Decision

## I. Admission of No Contact Order

[27] Durham acknowledges that he stipulated to the admission of the May 24, 2021 no contact order, Exhibit 24, but asserts that its admission was fundamental error because it contained "the extremely prejudicial phrase 'serious violent felon.'" *Appellant's Brief* at 15. The State, in response, argues that the admission of Exhibit 24 was not error and even if it was, it was invited error. *See Miller v. State*, 188 N.E.3d 871, 874-75 (Ind. 2022) (stating review for fundamental error is unavailable to a defendant who has invited the error). The parties dispute whether it was, in fact, invited error, with Durham maintaining that "there was no evidence that the error was part of a deliberate and well-informed trial strategy" or counsel's "strategic maneuvering at trial" as required for invited error. *Reply Brief* at 4, 16. We need not resolve the invited error issue, however, because, even assuming it was not invited error, as Durham claims, we conclude as discussed below that any error was not fundamental.

[28] Fundamental error is extremely narrow and "applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *Wilson v. State*, 931 N.E.2d 914, 919 (Ind. Ct. App. 2010), *trans. denied*. Fundamental error has been defined as error that is so prejudicial to the

rights of a defendant that a fair trial is rendered impossible. *Id*. Durham maintains that where, as here, he was charged with multiple felonies other than possession of a firearm by a SVF, "the prejudicial use of the phrase 'serious violent felon' affected not only Count I, the SVF charge, but also his other charges for domestic battery and pointing a firearm," and thus, admission of Exhibit 24 made a fair trial impossible. *Appellant's Brief* at 17. We disagree.

[29] The admission of the unredacted Exhibit 24 was, at most, harmless error. Errors in the admission of evidence are to be disregarded and are not grounds for reversal unless they affect the substantial rights of the defendant. *Goldsberry v. State*, 821 N.E.2d 447, 458 (Ind. Ct. App. 2005); *see also* Ind. Trial Rule 61 and Ind. Appellate Rule 66(A). To determine whether a defendant's substantial rights have been impacted, we consider the probable impact of that evidence upon the jury. *Goldsberry*, 821 N.E.2d at 458. Here, there was substantial independent evidence of Durham's guilt, including that Wilson, a disinterested eyewitness, saw Durham chasing and hitting D.G. in the head with a gun, and pointing it at her multiple times. Hair also watched Durham chase D.G. with a gun as she screamed for help, and Hair tended to D.G.'s injuries while waiting for police. Upon his arrival, Officer Baker observed Durham chasing D.G. and then saw injuries to her head. On this record, the probable impact of a reference to a pending SVF charge in Exhibit 24 was minimal and did not affect Durham's substantial rights or make a fair trial impossible.

## II. Prosecutorial Misconduct - Closing Argument

[30] Durham contends that the State committed prosecutorial misconduct during closing argument. In reviewing a claim of prosecutorial misconduct, this Court determines (1) whether misconduct occurred, and if so, (2) whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she would not have been subjected otherwise. *Ryan v. State*, 9 N.E.3d 663, 667 (Ind. 2014) (quotations omitted). To determine whether misconduct occurred, the court considers case law and the Rules of Professional Conduct. *Id*. The gravity of the peril is measured by "the probable persuasive effect of the misconduct" on the jury's decision rather than the degree of impropriety of the conduct. *Id.*

[31] Recognizing that he did not request an admonishment or otherwise pose any objection to preserve his claim of prosecutorial misconduct, Durham asserts that alleged misconduct constituted fundamental error. *See Ryan*, 9 N.E.3d at 667 (if the claim is waived for failure to preserve it, the defendant must establish not only the grounds for prosecutorial misconduct but also that the prosecutorial misconduct constituted fundamental error). As stated above, fundamental error is an extremely narrow exception to the waiver rule and the defendant faces a "heavy burden." *Id*. To establish such error, the defendant must show that the trial judge erred in not *sua sponte* raising the issue because alleged errors constitute clearly blatant violations of basic and elementary principles of due process. *Ryan*, 9 N.E.3d at 668 (internal quotations omitted). In evaluating Durham's claim concerning prosecutorial misconduct, we "look

at the alleged misconduct in the context of the entire trial and all relevant information given to the jury, including the evidence admitted at trial, closing arguments, and jury instructions, to determine whether the misconduct had such an undeniable and substantial effect on the jury's decision that a fair trial was impossible." *Id*.

[32] Wilson claims that, in closing arguments, the prosecutor improperly (1) relied on the May 21 jail call as substantive evidence when it had been admitted only as impeachment evidence, and (2) argued to the jury that it could convict based on a gun that was never located or presented at trial.

[33] More specifically, Durham challenges the following as to the May 21 call:

> And lastly, Count V, Darrell Durham knowingly pointed a firearm at D.G. Once again, if you take away what she said – but if you actually listen to what she said in her jail call three hours after he got arrested, you were pointing a gun at me, [Durham]. . . . If you take her word for it that day, and Patricia Wilson's word that day, this is easy.
>
> ***
>
> How about the real story [D.G.] told when she thought it was just her and [Durham] talking privately in a phone call from the jail? She said you were pointing the gun at me, and you hit me so hard I was hallucinating; that's the real prior story in this case. I think that was the closest time D.G. came to telling the truth at any point from what we've heard today.

*Transcript Vol. 3* at 61, 70. Durham argues that "[t]he prosecutor should not have told the jury that it could rely on the May 21st call as substantive evidence" to prove the battery and pointing a firearm counts because the trial court admitted that phone call into evidence for impeachment purposes only and had ruled that the State would be allowed to refer to the May 21 call in closing "for impeachment purposes." *Reply Brief* at 12; *Transcript Vol. 3* at 42, 50.

[34] To the extent that the State's argument exceeded the limited use permitted by the trial court and thereby resulted in prosecutorial misconduct, considerable evidence was presented to establish both the battery and the pointing a firearm charges. Wilson testified that she saw Durham carrying a gun in his hand as he chased D.G. and that he pointed it at D.G. "a number of times." *Transcript Vol. 2* at 204. Wilson also saw Durham hit D.G. with the gun. The 911 call, where Wilson was reporting what she was observing, was played for the jury. Hair testified that she saw Durham with a gun and that he pointed it at D.G. *Id.* at 212. Wilson and Hair saw the wounds to D.G., and Hair provided D.G. with "first aid" while they waited for police. *Id*. at 213. Detective Kemmerling met with D.G. at the scene and observed the cuts and abrasions to her head and neck, and photographs of her injuries were admitted into evidence. On the record before us, we cannot say that Durham was subjected to grave peril by the prosecutor's statements or that a fair trial was impossible. Accordingly, we reject Durham's claim of fundamental error regarding the May 21 call in closing argument.

[35] Turning to the other alleged instance of misconduct, the State argued, in part, regarding Durham having a gun:

> So next, knowingly possess a firearm. And you're going to hear that there was no DNA; you heard that today. There was no DNA on that gun that was found on the roof. But first of all, it was that gun. *We're not saying it was that gun; it was a gun*. Patricia Wilson saw him, and she said for over six minutes that he was chasing her with a gun, pointing at her on numerous occasions, and striking her with it on numerous occasions. He had *a gun*.

*Transcript Vol. 3* at 59 (emphases added). Durham argues that the State's argument was improper because it suggested to the jury "that it could convict Durham of possession of a firearm by finding that he possessed a gun other than the one admitted into evidence." *Appellant's Brief* at 21.

[36] More specifically, Durham's argument is that both Count I, possession of a firearm by a SVF, and Count V, pointing a firearm, require proof that the defendant had a "firearm," defined by statute as a weapon that is capable of expelling, designed to expel, or that may readily be converted to expel a projectile by means of explosion and that, here, the State invited the jury to convict Durham based on a gun that was never located or shown to be an actual "firearm" as defined by statute. Ind. Code § 35-47-1-5. He asserts that "[t]he improper argument put [him] in a position where he could be convicted of two felonies, Count I and Count V, without proof of an essential element: that the gun was in fact a firearm." *Appellant's Brief* at 23. He further suggests that the prosecutor violated Rule 3.4 of the Indiana Rules of Professional

Conduct by arguing for a conviction based on evidence not presented at trial and thereby alluded to a matter that was not "supported by the evidence" as precluded by the rule. As a result of the prosecutor's argument, Durham maintains that he was put in a position of "grave peril" to which he would not otherwise have been subjected and had such a substantial effect on the jury that a fair trial was not possible. *Ryan*, 9 N.E.3d at 667. We disagree.

[37] A broader reading of the State's argument provides context. The State argued, more fully, as follows:

> So next, knowingly possess a firearm. And you're going to hear that there was no DNA; you heard that today. There was no DNA on that gun that was found on the roof. But first of all, it was that gun. We're not saying it was that gun; it was a gun. Patricia Wilson saw him, and she said for over six minutes that he was chasing her with a gun, pointing at her on numerous occasions, and striking her with it on numerous occasions. He had a gun.
>
> Kind of like when we talked about earlier, some of you were in the jury panel when I picked up my coffee cup and I sat it down, you know. Did you guys need my DNA on there? You saw me with it. Patricia Wilson told you that she saw him with a gun on multiple occasions for multiple minutes that day.
>
> And then, conveniently, that gun that belongs to D.G. was found on the roof of this building halfway between – there's where the car was and that's where he was apprehended – halfway in between where the fight started and where he was eventually apprehended with her ID and her debit card; that's a little too good to be coincidental. So that's unlawful possession of a firearm.

*Transcript Vol. 3* at 59-60. This indicates that the State was arguing for the jury to draw the inference that, although DNA evidence did not connect Durham to the black and burgundy gun found on the roof – which was admitted at trial – that gun was the same gun he was carrying when chasing and hitting D.G. Although the prosecutor's argument included the statement "We're not saying it was that gun; it was *a* gun[,]" such statement was preceded by: "But first of all, it was *that* gun." *Id*. at 59 (emphases added). To the extent that these somewhat-conflicting statements could be viewed as error or sought a conviction based on a gun not established to be a firearm, we find that such did not subject Durham to grave peril or deny him a fair trial. In sum, we find that the State's closing arguments regarding the gun did not amount to fundamental error.

## III. Sentencing

[38] Durham asserts that the trial court abused its discretion by considering improper aggravators, and he asks us to remand for a new sentencing hearing. Sentencing decisions rest within the sound discretion of the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. So long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Anglemyer*, 868 N.E.2d at 490. A trial court may abuse its discretion if it enters a sentencing statement that includes reasons that are improper as a matter of law. *Id*. "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." *Zavala v. State*, 138 N.E.3d 291, 298-99 (Ind. Ct. App. 2019), *trans. denied*. If an abuse of discretion occurs, remand is only necessary when the appellate court cannot say with confidence that the trial court would have imposed the same sentence if it had properly considered reasons that enjoy support in the record. *Ackerman v. State*, 51 N.E.3d 171, 194 (Ind. 2016).

[39] The sentencing range for a level 4 felony is two to twelve years, with the advisory being six. Ind. Code § 35-50-2-5.5. Here, for his conviction on Count I, the trial court sentenced Durham to nine years, with seven years in the DOC and two years on community corrections home detention. The court's sentence was thus within the statutory range. The court imposed terms of four years on Count II and 545 days each on Counts IV and V, all to run concurrently to Count I and to each other. Durham argues that the trial court abused its discretion "by relying on two aggravators that are improper as a matter of law and one aggravator that is not supported by the evidence." *Appellant's Brief* at 26.

[40] Durham first asserts that the trial court improperly relied on dismissed charges to establish that he has a history of violent offenses. Specifically, he challenges the following comments made by the court when addressing aggravators and mitigators:

> Mr. Durham . . . was on probation for a prior unlawful possession of a firearm by a [SVF] offense at the time that this very violent offense took place.

> *I reviewed the charges that were dismissed by way of plea agreement in that offense*, and it was killing a domestic animal and criminal recklessness, both as Level 6 felonies, that were the allegations that were dismissed by a plea for the unlawful possession of a firearm conviction[.] . . .
>
> *So that is a violent offense as well. He's got multiple violent offenses that have been dismissed*, multiple domestics that have been dismissed.

*Transcript Vol. 3* at 117-18 (emphases added). Durham argues that the court relied on the dismissed charges to show "that he had, in fact, committed those crimes" and had a violent history. *Id*. at 26. That mischaracterizes the court's remarks, as the trial court did not find that he had committed those offenses. Furthermore, we reject his claim that "[w]ithout considering the dismissed charges, the trial court would not have been able to reach this conclusion about a history of violence," *id*. at 27, as Durham has adult convictions for armed robbery and resisting law enforcement. In sum, we are not persuaded that the court's reference to the dismissed charges constituted an abuse of discretion.

[41] Next, Durham asserts that the trial court erred in considering the child's age as an aggravator because it was an element of Count IV, Level 6 felony domestic battery committed in the presence of a child, and in such circumstance the court was required to, but failed to, provide an explanation of particularized circumstances for why the child's age should be considered an aggravator. The State maintains, and we agree, that Durham's argument appears to be a misreading of the court's remarks, which were:

> I do find that *he committed a crime of violence in the presence of a child*, and that is a statutory aggravator as well. It was, quite frankly, one of the elements of the offense for Count IV, the Level 6 felony that he was convicted on.

*Transcript Vol. 3* at 119 (emphasis added). Count IV – the Level 6 domestic battery – is not a statutory "crime of violence." *See* Ind. Code §§ 35-50-1-2(a)(7) (listing crimes of violence to include domestic battery as a Level 2, 3, 4, or 5 felony). Thus, when the court was discussing that Durham "committed a crime of violence in the presence of a child," it was referring to Count II – the Level 5 domestic battery by means of deadly weapon, which *is* a crime of violence – not to Count IV, as Durham suggests. Indeed, the court's statements indicate it was distinguishing the crime of violence that was committed in the presence of a child from Count IV, where the presence of a child was an element of the offense. For these reasons, we find no abuse of discretion in the court's consideration of the child's age an aggravating factor.

[42] Lastly, he argues that the court "erred in finding that Durham directed D.G. to communicate with witnesses when there was no evidence presented to support this allegation." *Id.* at 28. He points out that the only information in the record concerning this matter was what the State alleged in its post-trial motion to place Durham in administrative deadlock,[3] which the court granted the same

[3] After trial but before sentencing, the State filed a motion on March 16, 2022, to place Durham in administrative deadlock, alleging that D.G. had attempted to contact Hair by text, InstaGram, and email on March 11 and March 13 and that D.G. had come to the prosecutor's office on March 11 claiming that the two women who testified at trial were not Wilson and Hair and were "imposters." *Appendix* at 192. Based

day without a hearing. Assuming without deciding that the trial court erred as Durham claims, we find no need to remand. Here, the court found multiple aggravators, including Durham's juvenile and criminal history, which included juvenile adjudications for, if committed by an adult, battery, disorderly conduct, public intoxication, operating a motor vehicle without ever receiving a license, and failure to stop after an accident. As an adult, Durham had convictions for two counts of Class B felony armed robbery, Class A misdemeanor resisting law enforcement, Class A misdemeanor possession of marijuana, Class D felony possession of marijuana, and Level 4 felony unlawful possession of a firearm by a SVF. The trial court also found as aggravating that Durham was on probation for the SVF conviction at the time he committed this offense. In addition, the court identified as an aggravator that Durham violated the no contact order on many occasions.

[43] The trial court relied on multiple proper aggravators, and we are confident the court would have imposed the same sentence, even excluding consideration of the challenged aggravators. *See Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002) (although trial court improperly considered one improper aggravator, confidence in the sentence was not diminished where the trial court also relied on six proper aggravating circumstances).

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on that information, and jail calls discussing Hair's contact information, the State alleged that Durham "is violating the No Contact Order" with respect to Hair by using D.G. "as an intermediary." *Id.* at 193. The trial court granted the motion and placed Durham in administrative deadlock without phone, mail, or visitation privileges. *Id.* at 195.

[44] Judgment affirmed.

Brown, J. and Tavitas, J., concur.