

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Antonio Dion Lane, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 30, 2022

Court of Appeals Case No.
22A-CR-275

Appeal from the Hendricks Circuit
Court

The Honorable Daniel F. Zielinski,
Judge

Trial Court Cause No.
32C01-2105-MR-4

Bailey, Judge.

Case Summary

[1] Antonio Lane (“Lane”) was convicted of Murder, a felony,¹ Attempted Murder, a Level 1 felony,² and two counts of Criminal Recklessness, as Level 5 felonies.³ In bifurcated proceedings, the jury determined that Lane was subject to a criminal organization sentencing enhancement. On appeal, Lane challenges his aggregate sentence, the sentencing enhancement, and his conviction for the second count of Criminal Recklessness. We affirm.

Issues

[2] Lane presents four issues for review:

- I. Whether sufficient evidence supports the criminal organization sentencing enhancement;
- II. Whether the criminal organization sentencing enhancement violates Article 1, Section 16 of the Indiana Constitution as applied to a juvenile;
- III. Whether Lane’s multiple convictions for Criminal Recklessness violate Indiana’s prohibition against double jeopardy; and

¹ Ind. Code § 35-42-1-1.

² I.C. §§ 35-42-1-1, 35-41-5-1.

³ I.C. § 35-42-2-2(b)(2)(A).

- IV. Whether his aggregate sentence of one hundred and thirty-years is inappropriate.

Facts and Procedural History

- [3] In 2020, David Lowery (“Lowery”) was killed. Some of Lowery’s friends or associates formed a group they called Davo in Lowery’s honor, conducting activities as a subset of a group called IMG. Individuals who identified as “Davo” members included Lane, Kamarion Moody (“Moody”), Tyreontay Jackson (“Jackson”), Javon Irvin (“Irvin”), and Jeremy Perez (“Perez”). Freddie Hegwood, also known as “Duece,” (“Hegwood”) and Victor Griffin (“Griffin”) were members of My Brother’s Keeper, a subset of the Kutthroat Gang (also known as “KTG”). Indianapolis gang task force members considered IMG and KTG to be rival gangs.
- [4] In November and December of 2020, members of IMG and KTG were exchanging text messages with taunting and threatening content. Some of these individuals posted to their Instagram accounts song lyrics of the same nature. One taunting video depicted a created image of a severed head being tossed around. Incident to these communications, Lane, Jackson, and Moody continually prodded Hegwood to use his cell phone to share his location.
- [5] On December 15, 2020, Hegwood posted to his Instagram account a video in which he claimed that, if he were to be killed, he was “going to find Davo and beat his ass.” (Tr. Vol. III, pg. 178.) That afternoon, Hegwood and Griffin were at a Marathon gas station located at 56th Street and Georgetown in

Indianapolis, where they remained for approximately one-half hour. At 2:31 p.m., having learned of Hegwood's location, Irvin sent a text message to Perez, stating, "Follow them. It's only Duece and Victor." (*Id.* at 232.)

[6] Hegwood left the gas station and drove his red Jeep, in which Griffin was a passenger, to the Branches neighborhood in Brownsburg. He parked in front of a residence on McClain Drive. According to cell phone mapping data, the cell phones of Lane, Jackson, Moody, and Perez traveled to this same area. At around 3:00 p.m., as neighborhood children were exiting a school bus, shots rang out. The disembarking children ran to safe shelter in a nearby open garage. Several bullets entered the residence of Keith Vandewalle, who was not at home.

[7] Michael Robertson ("Robertson"), a veteran familiar with gunfire, heard the sound of approximately twenty to thirty shots from semi-automatic weapons and ran from his home to investigate. At that time, a black vehicle was leaving the neighborhood. Robertson and his wife, Crystal, realized that Hegwood had been wounded; they and other neighbors attempted to render assistance to him. However, Hegwood had sustained a fatal gunshot wound to his head.

[8] Griffin had escaped the gunfire. He told bystanders that a black Impala had been involved. Griffin initially told investigating officers that the shooters were

four black men; however, he ceased cooperating with law enforcement efforts and made no identification linking any particular suspect to the crimes.⁴

[9] Fifty-one days later, Brownsburg police officers seized a black Impala registered to Moody's mother and conducted a search of that vehicle. From a vent in the vehicle, officers recovered two shell casings matching those found at the crime scene. Officers also traced Hegwood's cell phone communications and social media history. With FBI assistance, they conducted an intensive search of cell phone location records.

[10] On May 6, 2021, Lane was charged with Murder, Attempted Murder, and two counts of Criminal Recklessness. The State also alleged that, upon conviction, Lane was eligible for a firearm enhancement and a criminal organization enhancement. Lane's jury trial commenced on November 16, 2021. On November 19, 2021, the jury found Lane guilty of each alleged crime. The jury also found that the State had met its burden of proof with respect to the criminal organization enhancement.⁵

[11] On January 10, 2022, the trial court imposed upon Lane an aggregate sentence of one hundred and thirty years. This consisted of fifty-five years for Murder, consecutive to a twenty-year sentence for Attempted Murder, and concurrent to

⁴ At the sentencing hearing, there was testimony regarding an Indianapolis police investigation into a second shooting targeting Griffin, this one taking place in the yard of his residence.

⁵ The jury did not conclude that the firearm enhancement should be imposed.

two three-year sentences for the two counts of Criminal Recklessness, together with a mandatory fifty-five-year criminal organization enhancement.⁶ Lane now appeals.

Discussion and Decision

Criminal Organization Enhancement

[12] Lane does not challenge the sufficiency of the evidence to support his convictions; rather, he contends that the State presented insufficient evidence to support the enhancement of his sentence.

[13] Indiana Code Section 35-50-2-15 provides in relevant part:

(b) The state may seek, on a page separate from the rest of a charging instrument, to have a person who allegedly committed a felony offense sentenced to an additional fixed term of imprisonment if the state can show beyond a reasonable doubt that the person:

(1) knowingly or intentionally was a member of a criminal organization while committing the offense; and

(2) committed the felony offense:

⁶ “[T]he criminal gang enhancement statute unambiguously increases the punishment for all the felonies that underlie the enhancement.” *Jackson v. State*, 105 N.E.3d 1081, 1083 (Ind. 2018).

(A) at the direction of or in affiliation with a criminal organization; or

(B) with the intent to benefit, promote, or further the interests of a criminal organization, or for the purposes of increasing the person's own standing or position with a criminal organization.

(c) If the person is convicted of the felony offense in a jury trial, the jury shall reconvene to hear evidence in the enhancement hearing. If the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall hear evidence in the enhancement hearing.

d) If the jury (if the hearing is by jury) or the court (if the hearing is to the court alone) finds that the state has proved beyond a reasonable doubt that the person knowingly or intentionally was a member of a criminal organization while committing the felony offense and committed the felony offense at the direction of or in affiliation with a criminal organization as described in subsection (b), the court shall:

(1) sentence the person to an additional fixed term of imprisonment equal to the sentence imposed for the underlying felony, if the person is sentenced for only one (1) felony; or

(2) sentence the person to an additional fixed term of imprisonment equal to the longest sentence imposed for the underlying felonies, if the person is being sentenced for more than one (1) felony.

(e) A sentence imposed under this section shall run consecutively to the underlying sentence.

(f) A term of imprisonment imposed under this section may not be suspended.

(g) For purposes of subsection (c), evidence that a person was a member of a criminal organization or committed a felony at the direction of or in affiliation with a criminal organization may include the following:

(1) An admission of criminal organization membership by the person.

(2) A statement by:

(A) a member of the person's family;

(B) the person's guardian; or

(C) a reliable member of the criminal organization; stating the person is a member of a criminal organization.

(3) The person having tattoos identifying the person as a member of a criminal organization.

(4) The person having a style of dress that is particular to members of a criminal organization.

(5) The person associating with one (1) or more members of a criminal organization.

(6) Physical evidence indicating the person is a member of a criminal organization.

(7) An observation of the person in the company of a known criminal organization member on at least three (3) occasions.

(8) Communications authored by the person indicating criminal organization membership, promotion of the membership in a criminal organization, or responsibility for an offense committed by a criminal organization.

(9) The person's use of the hand signs of a criminal organization.

(10) The person's involvement in recruiting criminal organization members.

[14] A "criminal organization" is defined as "a formal or informal group with at least three (3) members that specifically (1) either: (A) promotes, sponsors, or assists in; (B) participates in; or (C) has as one (1) of its goals; or (2) requires as a condition of membership or continued membership; the commission of a felony, an act that would be a felony if committed by an adult, or a battery offense included in IC 35-42-2." I.C. §§ 35-50-2-1.4, 35-45-9-1.

[15] Accordingly, in order for the jury to adjudicate Lane eligible for the criminal organization enhancement, the State was required to prove that Lane had committed a felony while he was knowingly or intentionally a member of a criminal organization and that he had committed the offense at the direction of or in affiliation with a criminal organization. Ind. Code § 35-50-2-15(b). Lane asserts that the State failed to present sufficient evidence of either element.

[16] When reviewing the sufficiency of the evidence to support a sentencing enhancement, our standard of review is that applicable to other sufficiency claims. *Garcia-Berrios v. State*, 147 N.E.3d 339, 344 (Ind. Ct. App. 2020). That is:

we look only at the probative evidence and reasonable inferences supporting the [adjudication.] We do not assess the credibility of witnesses or reweigh the evidence. We will affirm the conviction unless no reasonable fact-finder could find the elements of the [allegation] proven beyond a reasonable doubt.

Love v. State, 73 N.E.3d 693, 696 (Ind. 2017) (internal citation omitted).

[17] Marcos Garcia testified that he was a task force officer serving Indianapolis and surrounding areas; he had received an FBI certification on gang affiliation identification. Based upon his review of social media communications, the use of the hashtag Davo gang, and display of purple heart emojis, Officer Garcia opined that Lane, Moody, and Jackson were affiliated with Davo and IMG. Perez appeared to have an affiliation with IMG. Officer Garcia testified that KTG and IMG were known to be rival gangs. He explained that groups “having a beef” would typically use social media for taunts. (Tr. Vol. II, pg. 221.)

[18] Detective Charles Tyree testified and summarized his review of Facebook and Instagram postings related to the group self-titled Davo gang. The Davo hashtag was used by Perez, Lane, Jackson, and Moody. Davo was considered a subset of IMG, a rival of KTG, to which Hegwood and Griffin belonged.

According to text message exchanges and social media postings, taunting between the rivals took place over several months. Detective Tyree described one video as depicting Hegwood standing outside Moody's Indianapolis residence on the day before Hegwood was killed and a second video depicting Lane outside Griffin's home on another occasion. Detective Tyree perceived the uninvited appearances as assuming a threatening posture.

[19] On the day of the shooting, Hegwood posted a video of himself claiming that, if he were killed, he would "find Davo and beat his ass." (Tr. Vol. III, pg. 178.) Jackson and Moody were recipients of a group message, stating "Duece a dead man on David." (*Id.* at 209.) At 2:21 p.m., when his cell phone was in the area of Georgetown Road, Irvin texted Perez that he needed to drop "Tone" off; he followed that text with: "follow them. It's only Deuce and Victor." (Tr. Vol. III, pg. 232.) The directive was sent at 2:31 p.m. Lane's cell phone, in unison with the cell phones of Perez, Jackson, and Moody, moved to a Brownsburg area where Hegwood's cell phone was also present. Hegwood was ambushed at 3:01 p.m. The testimony and documentary evidence with respect to membership, social media communications, ongoing conflict, and timing of events is sufficient to permit a reasonable juror to infer that Lane was knowingly or intentionally a member of a criminal organization and had committed his offenses at the direction of or in affiliation with that criminal organization.

Cruel and Unusual Punishment

[20] Article 1, Section 16 of the Indiana Constitution provides:

Excessive bail shall not be required. Excessive fines shall not be imposed. Cruel and unusual punishments shall not be inflicted. All penalties shall be proportioned to the nature of the offense.

As Lane observes, “[t]his provision goes beyond the protection against cruel and unusual punishment contained in the Eighth Amendment to the U.S. Constitution.” *Connor v. State*, 626 N.E.2d 803, 806 (Ind. 1993). According to Lane,

The imposition of the criminal gang enhancement for juvenile offenders convicted of murder is unconstitutionally disproportionate in every case. This enhancement imposes a mandatory de facto life sentence without parole in every murder case for which criminal gang activity is found.

Appellant’s Brief at 20.

[21] Lane did not present his constitutional challenge at his trial. A defendant who fails to raise a constitutional challenge in the trial court has waived the claim of unconstitutionality for appellate review. *See McCallister v. State*, 91 N.E.3d 554, 563 (Ind. 2018). That said, even if we were inclined to consider a sentence including a lengthy criminal gang enhancement to be a mandatory de facto life sentence without parole, as Lane urges, our Indiana Supreme Court has concluded otherwise. *See Wilson v. State*, 157 N.E.3d 1163, 1184 (Ind. 2020) (identifying, in the context of an Eighth Amendment challenge, an enhanced juvenile sentence of 181 years as a “term of years” sentence as opposed to a “juvenile life-without-parole” sentence). *See also Garcia-Berrios*, 147 N.E.3d at 345 (rejecting a challenge under Article 1, Section 16 by holding that the

criminal organization enhancement, which is based upon the level of the underlying felony, “is graduated and proportioned to the nature of the offense”).

Double Jeopardy

- [22] Lane contends that his multiple convictions for Criminal Recklessness violate Indiana’s constitutional protection against double jeopardy. This presents a question of law reviewed de novo. *Wadle v. State*, 151 N.E.3d 227, 237 (Ind. 2020).
- [23] Indiana Code Section 35-42-2-2(a) provides in relevant part: “A person who recklessly, knowingly, or intentionally performs an act that creates a substantial risk of bodily injury to another person commits criminal recklessness.” The offense is a Level 5 offense if “it is committed by shooting a firearm into an inhabited dwelling or other building or place where people are likely to gather.” I.C. § 35-42-2-2(b)(2). Lane was charged with, and convicted of, one count for shooting a firearm into an inhabited residence and one count for shooting where people were likely to gather, the school bus stop.
- [24] Here, a single statute was violated, but there were multiple victims. In *Powell v. State*, 151 N.E.3d 256, 261 (Ind. 2020), our Indiana Supreme Court “la[id] out the basic framework for analyzing claims of multiplicity—a branch of substantive double jeopardy based on “the charging of a single offense in several counts.” (quoting *Gerberding v. United States*, 471 F.2d 55, 58 (8th Cir. 1973)). That framework is:

Substantive double-jeopardy claims principally arise in one of two situations: (1) when a single criminal act or transaction violates multiple statutes with common elements, or (2) when a single criminal act or transaction violates a single statute and results in multiple injuries. *Wadle v. State*, 151 N.E.3d 227, 247-48 (Ind. 2020). Our decision today in *Wadle* implicates the former scenario; this case implicates the latter. The question here is not whether one offense is included in the other (attempted murder is clearly the same as attempted murder). See *Hurst v. State*, 464 N.E.2d 19, 21 (Ind. Ct. App. 1984). Instead, we ask whether “the same act may be twice punished” as “two counts of the same offense.” See *Kelly v. State*, 527 N.E.2d 1148, 1154 (Ind. Ct. App. 1988), *aff’d*, 539 N.E.2d 25, 26 (Ind. 1989).

Our legislature possesses the inherent authority, subject to certain constitutional limitations, to define crimes and fix punishments. *State v. Clark*, 247 Ind. 490, 495, 217 N.E.2d 588, 590-91 (1966). This prerogative extends to defining whether a single statutory offense will “subsist for a definite period or cover successive, similar occurrences.” *Hines v. State*, 30 N.E.3d 1216, 1220 (Ind. 2015). In resolving a claim of multiplicity, our task is to determine whether the statute permits punishment for a single course of criminal conduct or for certain discrete acts—the “successive, similar occurrences”—within that course of conduct. *Id.*; *Taylor*, 929 N.E.2d at 920. Put differently, we ask whether—and to what extent—the applicable statute permits the fragmentation of a defendant’s criminal act into distinct “units of prosecution.” Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 111–12. See also *Bell v. United States*, 349 U.S. 81, 82-83, 75 S. Ct. 620, 99 L.Ed. 905 (1955) (the legislative branch is responsible for defining the proper “unit of prosecution”).

This inquiry involves a two-step process.

First, we review the text of the statute itself. If the statute, whether expressly or by judicial construction, indicates a unit of prosecution, then we follow the legislature’s guidance and our analysis is complete. *See Hurst*, 464 N.E.2d at 21 (whether “multiple offenses of the same statute are committed during a single transaction” depends “on the definition of the particular crime involved”). But if the statute is ambiguous, then we proceed to the second step of our analysis.

Under this second step, a court must determine whether the facts—as presented in the charging instrument and as adduced at trial—indicate a single offense or whether they indicate distinguishable offenses. To answer this question, we ask whether the defendant’s actions are “so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction.” *Walker v. State*, 932 N.E.2d 733, 735 (Ind. Ct. App. 2010), *cited with approval by Hines*, 30 N.E.3d at 1219. If the defendant’s criminal acts are sufficiently distinct, then multiple convictions may stand; but if those acts are continuous and indistinguishable, a court may impose only a single conviction. *Armstead v. State*, 549 N.E.2d 400, 402 (Ind. Ct. App. 1990). Any doubt counsels “against turning a single transaction into multiple offenses.”

Id. at 263-65. The Criminal Recklessness statute does not expressly indicate a unit of prosecution. We thus proceed to determine whether the facts indicate “distinguishable offenses.” *See id.* at 264.

[25] In Count 3, the State alleged that Lane committed Criminal Recklessness by discharging a firearm into an inhabited dwelling. In Count 4, the State alleged that Lane committed Criminal Recklessness by discharging a firearm where people were likely to gather, the school bus stop. The State adduced testimony

that approximately twenty to thirty shots were discharged in rapid succession from semi-automatic weapons. At this time, children who were exiting a school bus ran for cover. Several shots entered the Vandewalle residence. As such, the evidence established that there were multiple victims of recklessness from the barrage of gunfire. The multiple convictions for multiple victims do not present a double jeopardy violation. See *Woodcock v. State*, 163 N.E.3d 863, 875 (Ind. Ct. App. 2021) (recognizing “if there are two separate victims there cannot be a double jeopardy problem as to the offenses they might have in common”).

Sentence

[26] Finally, Lane contends that his sentence is inappropriate. Upon conviction of Murder, Lane was subject to a sentence of forty-five years to sixty-five years, with an advisory sentence of fifty-five years. I.C. § 35-50-2-3. Upon conviction of Attempted Murder, a Level 1 felony, Lane was subject to a sentence of twenty years to forty years, with an advisory sentence of thirty years. I.C. § 35-50-2-4(b). Upon conviction of Criminal Recklessness, as a Level 5 felony, Lane was subject to a sentence of one to six years, with an advisory sentence of three years, for each count. I.C. § 35-50-2-6. Upon the jury’s determination of Lane’s eligibility for the criminal organization enhancement, Lane was subject to a mandatory and consecutive “additional fixed term of imprisonment equal to the longest sentence imposed for the underlying felonies.” I.C. 35-50-2-15(d). Accordingly, Lane’s maximum sentencing exposure was 182 years. He was sentenced to 130 years of imprisonment. In selecting that sentence, the

trial court found Lane's youth to be a mitigator and found as aggravators Lane's juvenile delinquency history, the preplanning involved, and the commission of the crimes in the presence of minors.

[27] Pursuant to Appellate Rule 7(B), 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.” Because sentencing is principally a discretionary function, we reserve our authority for “exceptional cases.” *Livingston v. State*, 113 N.E.3d 611, 613 (Ind. 2018). As our Supreme Court has explained, deference to the trial court “should prevail unless overcome by 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).” *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015). Ultimately, the defendant bears the burden of persuading us that the sentence is inappropriate. *Harris v. State*, 165 N.E.3d 91, 99 (Ind. 2021).

[28] The nature of Lane’s offenses involved a background of taunting, planning, and maneuvering Hegwood into a position to be killed. A barrage of gunfire was released upon a residential neighborhood, endangering many more than the deceased. As for the nature of the offense, Lane argues only that “this offense was not the most heinous murder.” Appellant’s Brief at 25. He points to no “compelling evidence portraying in a positive light the nature of the offense.” *Stephenson*, 29 N.E.3d at 122.

[29] As for the character of the offender, Lane asks that we consider that he was only seventeen years old, he had only a single juvenile adjudication, and he was a good student. Indeed, Lane did not have a lengthy history of contacts with the juvenile justice system. However, in addition to his juvenile delinquency adjudication, Lane had been arrested in Johnson County for possession of a firearm. That case was closed due to Lane's arrest for the instant offenses. Also, there was testimony that Lane had threatened to kill his girlfriend.

[30] As for Lane's age,

[t]here is no question that "age is a major factor that requires careful consideration" when conducting Rule 7(B) review. *Wilson v. State*, 157 N.E.3d 1163, 1182 (Ind. 2020). Indeed, caselaw has identified three primary differences between juvenile and adult offenders: (1) juveniles lack maturity; (2) juveniles are more susceptible to negative influences; and (3) juveniles have less developed character. *See, e.g., Brown v. State*, 10 N.E.3d 1, 7 (Ind. 2014). At the same time, these differences do not necessarily render lengthy sentences imposed on juveniles inappropriate. *See Wilson*, 157 N.E.3d at 1182 ("To be sure, lifetime imprisonment may sometimes be appropriate for a juvenile.")

Kerner v. State, 178 N.E.3d 1215, 1234 (Ind. 2021). Here, the trial court gave mitigating weight to Lane's youthfulness. Indeed, Lane received many years less than the maximum sentence to which he was exposed. At bottom, Lane has not demonstrated, in light of the nature of the offenses and his character, that his sentence is inappropriate.

Conclusion

[31] Sufficient evidence supports Lane's criminal organization sentencing enhancement. Lane has waived his constitutional argument. Lane's multiple convictions for Criminal Recklessness do not violate the double jeopardy protections of the Indiana Constitution. Lane has not shown that his sentence is inappropriate.

[32] Affirmed.

Mathias, J., and Bradford, C.J., concur.