

MEMORANDUM DECISION

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ATTORNEY FOR APPELLANT

Matthew M. Kubacki
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Megan M. Smith
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Deon M. Sanders,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff.

March 29, 2022

Court of Appeals Case No.
21A-CR-1520

Appeal from the Allen Superior
Court

The Honorable Frances C. Gull,
Judge

Trial Court Cause No.
02D05-1808-F3-48

Pyle, Judge.

Statement of the Case

[1] Deon Sanders (“Sanders”) appeals his convictions, following a jury trial, of Level 3 felony aggravated battery¹ and Level 5 felony carrying a handgun without a license.² Sanders also appeals his thirty-year aggregate sentence. He argues that: (1) the trial court erred when it entered a judgment of conviction and sentence for carrying a handgun without a license as a Level 5 felony instead of as a Class A misdemeanor; (2) the trial court committed fundamental error in instructing the jury; and (3) his thirty-year aggregate sentence is inappropriate. Concluding that the trial court erred when it entered a judgment of conviction and sentence for carrying a handgun without a license as a Level 5 felony, we reverse the Level 5 felony conviction and sentence. Further, we remand with instructions for the trial court to vacate the Level 5 felony conviction and sentence and to enter a judgment of conviction and sentence for carrying a handgun without a license as a Class A misdemeanor. Also concluding that any error in the trial court’s instructions to the jury was not fundamental and that Sanders’ thirty-year aggregate sentence is not inappropriate, we affirm Sanders’ Level 3 felony aggravated battery conviction, Class A misdemeanor carrying a handgun without a license conviction, and thirty-year aggregate sentence.

¹ IND. CODE § 35-42-2-1.5.

² I.C. § 35-47-2-1.

[2] Affirmed in part, reversed in part, and remanded with instructions.

Issues

1. Whether the trial court erred when it entered a judgment of conviction and sentence for carrying a handgun without a license as a Level 5 felony instead of as a Class A Misdemeanor.
2. Whether the trial court committed fundamental error in instructing the jury.
3. Whether Sanders' thirty-year aggregate sentence is inappropriate.

Facts

[3] In July 2018, James Bartley (“Bartley”) and his girlfriend, Shantel Lamb (“Lamb”), attended a gathering at a relative’s home. While several female guests visited inside the home, Bartley went outside to ride a hoverboard around the neighborhood. While he was on the hoverboard, Bartley “noticed a gentleman like looking at [him] like something was wrong.” (Tr. Vol. 2 at 187). When Bartley got closer to the man, Bartley realized that it was Sanders, who is the father of one of Lamb’s children. Sanders told Bartley that it was Sanders’ block and that Bartley was on Sanders’ side of town. When Bartley responded that “it was a free country,” Sanders reached behind his back, pulled out a gun, and shot Bartley in the side. (Tr. Vol. 2 at 188). Bartley immediately fell to the ground. Sanders then walked over to Bartley and fired several more shots at Bartley while Bartley was incapacitated. When the gun jammed, Sanders hit Bartley in the head with the gun and left the scene.

[4] Bartley, who heard sirens in the distance, called Lamb and told her that “[h]er baby daddy [had] just shot [him].” (Tr. Vol. 2 at 189). When Lamb asked Bartley to be more specific, Bartley responded, “[Sanders].” (Tr. Vol. 2 at 201). Bartley, who suffered life-threatening injuries, was transported to the nearest trauma hospital by ambulance. Doctors discovered that Bartley had three gunshot wounds, one to his side, one to his left thigh, and one to his foot. During emergency surgery, the physician discovered that Bartley had a through and through injury to his colon that had to be immediately repaired “[b]ecause if you have a hole in your colon and you leak stool in your belly, you can die.” (Tr. Vol. 3 at 49). Following surgery, Bartley identified Sanders in a photo array.

[5] In August 2018, the State charged Sanders with Level 3 felony aggravated battery and Level 5 felony battery. The State also charged Sanders in a two-part information with carrying a handgun without a license, which is a Class A misdemeanor, and Level 5 felony carrying a handgun without a license with a prior conviction for carrying a handgun without a license. The State later charged Sanders with an enhancement for using a firearm during the offense.

[6] In May 2021, before jury selection began, the trial court asked the State if a trifurcated trial would be necessary to address: (1) the Level 3 and Level 5 battery charges and the carrying a handgun without a license charge; (2) the Level 5 felony carrying a handgun without a license charge; and (3) the firearm sentencing enhancement charge. The State responded that, if the jury convicted Sanders of aggravated battery and battery, the State would “leave the carrying a

firearm . . . as a misdemeanor and just proceed on the firearm enhancement.” (Tr. Vol. 2 at 7). The trial court responded, “that makes it easy, then[.] So, it’ll be a Class A misdemeanor . . . and then we go into part two, the firearm enhancement.” (Tr. Vol. 2 at 7). The State responded affirmatively.

[7] Following this colloquy, the trial court began the jury selection process by calling the first of three groups of prospective jurors. In each group, before the prospective jurors were questioned, the trial court asked the attorneys to introduce themselves and to read a list of the witnesses that they intended to call at trial. The trial court then read to the prospective jurors the charging informations and the statutory elements that the State would be required to prove. In addition, the trial court told the prospective jurors that the State had the burden of proof beyond a reasonable doubt and explained that burden of proof.

[8] Thereafter, both the State and defense counsel gave “mini-opening statements” to provide the prospective jurors with a general synopsis of the case. (Tr. Vol. 2 at 14, 58, 116). Following these statements, the trial court admonished the prospective jurors that, if they were selected to serve, they would have to keep an open mind and should not form an opinion about the case until deliberations had begun. The trial court also told the prospective jurors that, if they were selected to serve, they would have the opportunity to take notes at trial, to ask questions of witnesses, and, when on their lunch breaks, to have limited discussions about the evidence so long as they did not deliberate. The trial

court did not admonish the prospective jurors not to talk to anyone about the case.

[9] Three of the prospective jurors in the first group were selected to serve on the jury. They were excused at 10:18 a.m. and advised to return the following morning at 8:15. Seven of the prospective jurors in the second group were selected to serve on the jury. They were excused at 12:42 p.m. and also advised to return at 8:15 the following morning. Four of the prospective jurors in the third group were selected to serve on the jury. They were excused at 3:07 p.m. and ordered to return the following morning at 8:15.

[10] At the beginning of the two-day jury trial, the trial court swore in the jurors and read the preliminary instructions to them. One of the preliminary instructions admonished the jurors not to talk to the parties, the lawyers, any of the witnesses, members of the media, or anyone else about the case, including text messaging, email, Internet chat rooms, blogs, or social websites.

[11] During the trial, the jury heard the evidence as set forth above. In addition, Bartley testified that, as a result of the shooting, he is unable to move his left toes and left foot. Bartley further testified that he has no control over his bowels and must catheterize himself in order to urinate. Bartley also testified that he is in constant pain. In addition, Bartley made an in-court identification of Sanders as the shooter.

[12] The jury convicted Sanders of Level 3 felony aggravated battery, Level 5 felony battery, and carrying a handgun without a license as a Class A misdemeanor.

As the trial court and the State had previously discussed, the jury was not presented with the Level 5 felony carrying a handgun without a license charge. Instead, in a separate proceeding, the jury found that the State had proved the elements of the use-of-a-firearm enhancement beyond a reasonable doubt. Following the verdicts, the trial court stated that it would enter judgment of conviction on Level 3 felony aggravated battery, Level 5 felony battery, and Class A misdemeanor carrying a handgun without a license and accept the jury's firearms enhancement determination.

[13] At the June 2021 sentencing hearing, the State presented evidence that then-thirty-five-year-old Sanders has a twelve-year criminal history that includes two felony convictions, one for carrying a firearm during and in relation to a drug trafficking crime and the other for operating a vehicle while intoxicated with a prior conviction. Sanders also has eight misdemeanor convictions, including convictions for disorderly conduct, minor consuming alcohol, public intoxication, operating while intoxicated, carrying a handgun without a license, resisting law enforcement, refusal to identify, and operating a vehicle with an alcohol concentrate equivalent to .15% or more. In addition, Sanders' probation for one of his prior felony convictions had been revoked. Also at the sentencing hearing, Sanders' family members, friends, employer, and minister testified that they supported Sanders.

[14] At the end of the sentencing hearing, the trial court entered judgment of conviction for Level 3 aggravated battery. In addition, the trial court vacated the Level 5 felony battery because of double jeopardy concerns. The trial court

also entered judgments of conviction for Level 5 carrying a handgun without a license and for the use-of-a-firearm sentencing enhancement. The trial court further found Sanders' family and community support to be a mitigating factor. The trial court also found Sanders' criminal history, which included the two felony and eight misdemeanor convictions as well as a probation revocation, to be an aggravating factor. Thereafter, the trial court sentenced Sanders to fifteen (15) years for the Level 3 aggravated battery conviction, enhanced by fifteen (15) years for his use of a firearm during the aggravated battery offense. The trial court further sentenced Sanders to five (5) years for the Level 5 felony carrying a handgun without a license conviction. Lastly, the trial court ordered the five-year sentence for the Level 5 felony to run concurrent with the thirty-year sentence for aggravated battery, for an aggregate sentence of thirty (30) years.

[15] Sanders now appeals his convictions and the aggregate thirty-year sentence.

Decision

[16] Sanders argues that: (1) the trial court erred when it entered a judgment of conviction and sentence for carrying a handgun without a license as a Level 5 felony instead of as a Class A misdemeanor; (2) the trial court committed fundamental error in instructing the jury; and (3) his thirty-year aggregate sentence is inappropriate. We address each of his contentions in turn.

1. Carrying a Handgun Without a License Conviction

[17] Sanders argues, and the State agrees, that the trial court erred when it entered a judgment of conviction and sentence for carrying a handgun without a license as a Level 5 felony instead of as a Class A misdemeanor. Our review of the record reveals that the State elected not to present evidence that Sanders had the requisite prior conviction that would have supported enhancing his Class A misdemeanor carrying a handgun without a license charge to a Level 5 felony. *See* IND. CODE § 35-47-2-1. Although the trial court stated at the end of the trial that it would enter judgment of conviction for carrying a handgun without a license as a Class A misdemeanor, at the sentencing hearing, the trial court erroneously entered judgment of conviction for carrying a handgun without a license as a Level 5 felony. In addition, the trial court erroneously sentenced Sanders for this Level 5 felony conviction. Accordingly, we reverse the trial court's judgment and sentence for carrying a handgun without a license as a Level 5 felony and remand this case to the trial court with instructions to vacate the Level 5 felony conviction and sentence and to enter a judgment of conviction and sentence for carrying a handgun without a license as Class A misdemeanor.

2. Jury Instructions

[18] Sanders next argues that the trial court committed fundamental error in instructing the jury. Instructing the jury is a matter within the trial court's

discretion. *Cardosi v. State*, 128 N.E.3d 1277, 1284 (Ind. 2019). We will reverse the trial court only if there is an abuse of that discretion. *Id.*

[19] IND. CODE § 35-37-2-4 provides, in relevant part, as follows:

The court shall admonish the jurors in the preliminary instruction, before separating for meals, and at the end of the day, that it is their duty not to converse among themselves or permit others to converse with them on any subject connected with the trial, or to form or express any opinion about the case until the cause is finally submitted to them.

As Sanders points out, the trial court failed to admonish the jurors at the end of the jury selection process that they were not to talk to others about the case.

[20] As a preliminary matter, we note that neither party has addressed the threshold question regarding whether INDIANA CODE § 35-37-2-4 applies to jurors who have been selected but not yet sworn. However, because this determination is not necessary to our resolution of this case, we save it for another day.

Specifically, even if the statute applies to jurors who have been selected but not yet sworn, Sanders concedes that he has waived appellate review of this issue.³ This is because Sanders failed to object to the inadequate admonishment on the day that the jurors were selected. *See Lake v. State*, 565 N.E.2d 332, 335 (Ind. 1991) (explaining that, “while the terms of the statute are mandatory in their

³ We further note that even if the statute does not apply to jurors who have been selected but not yet sworn, the best practice is for the trial court to admonish the selected jurors, before they leave the courtroom, that they should not discuss the case with others.

call for an admonition of the jurors at specific times, no error is preserved for appeal where there was no objection interposed at the time of the action complained of.”).

[21] “A claim that has been waived by a defendant’s failure to raise a contemporaneous objection can be reviewed on appeal if the reviewing court determines that a fundamental error occurred.” *Lyons v. State*, 993 N.E.2d 1192, 1194 (Ind. Ct. App. 2013) (internal citation omitted). However, the fundamental error exception 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 denied the defendant fundamental due process.” *Id.* (internal citation omitted). The error claimed must either “make a fair trial impossible” or constitute “clearly blatant violations of basic and elementary principles of due process.” *Id.* (internal citation omitted). This exception is only available in “egregious circumstances.” *Id.* at 1194-95 (internal citation omitted).

[22] Here, Sanders specifically argues that because the selected jurors had been told the general facts of the case and the names of the parties the previous day, “[s]uch length of time . . . [was] ripe for selected jurors to discuss the matter with friends, family, do individualized research, etc.[,] due to the trial court’s failure to properly provide [an] admonishment.” (Sanders’ Br. 16). According to Sanders, the trial court’s failure to admonish the jury was “undoubtedly the starting point for potential substantial harm, beyond speculation,” and made a fair trial impossible. (Sanders’ Br. 16).

[23] We addressed a similar issue in *Lyons*, 993 N.E.2d at 1192, wherein Lyons argued that the trial court had committed fundamental error when it had failed to admonish the jury at the end of the first day of trial that they were not to form or express an opinion about the case until it had been given to them. In determining whether fundamental error had occurred, we noted that: (1) the jurors had been given a preliminary instruction that they were not to form or express an opinion until the case had been given to them; (2) the trial was only two days long, meaning that the trial court had missed only one opportunity to admonish the jurors; and (3) there had been no showing of harm or that the potential for harm was substantial where Lyons had pointed to nothing in the record indicating that the jury had made up its mind before receiving the case from the trial court. *Id.* at 1195. Based upon these facts and circumstances, we concluded that the trial court had not committed fundamental error.

[24] The facts of the case before us are similar to those in *Lyons*. First, after they had been sworn, the jurors were given a preliminary instruction not to talk to others about the case. Second, the trial, including the jury selection, was only three days long, and, according to Sanders, the trial court missed only one opportunity to admonish the jury following the jury selection process. Third, and most importantly, Sanders has made no showing of harm or that the potential for harm was substantial. Specifically, Sanders has not pointed to anything in the record indicating that the jurors spoke to others about the case or conducted individual research. Here, as in *Lyons*, we conclude that the trial court did not commit fundamental error in instructing the jury. *See id.* *See also*

Cardosi, 128 N.E.3d at 1285 (concluding that the trial court did not commit fundamental error in instructing the jury when the trial court admonished the jurors after jury selection and before adjournment on the first day, during the preliminary instructions, and at multiple times throughout the trial that they could discuss the case in the jury room together but that they could not discuss the case in any other instance).

3. Inappropriate Sentence

[25] Sanders also argues that his thirty-year sentence is inappropriate. Indiana Appellate Rule 7(B) provides that we may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. The defendant bears the burden of persuading this Court that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). Whether we regard a sentence as inappropriate turns on the “culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case.” *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008).

[26] When determining whether a sentence is inappropriate, we acknowledge that the advisory sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed. *Childress*, 848 N.E.2d at 1081. Here, Sanders was convicted of Level 3 felony aggravated battery and he was found to have knowingly or intentionally used a firearm during the commission of the offense. The sentencing range for a Level 3 felony is from three (3) to

sixteen (16) years, with an advisory sentence of nine (9) years. I.C. § 35-50-2-5. In addition, if a person knowingly or intentionally uses a firearm during the commission of certain offenses, including aggravated battery, the trial court may impose an additional fixed term of imprisonment between five and twenty years. I.C. § 35-50-2-11. Here, the trial court imposed a fifteen (15) year sentence for Sanders' Level 3 felony aggravated battery conviction, enhanced by fifteen (15) years for his use of a firearm, resulting in an aggregate sentence of thirty (30) years. This sentence is less than the possible maximum sentence of thirty-six (36) years.

[27] With regard to the nature of the offense, we note that Sanders shot Bartley, who was doing nothing more than riding a hoverboard. After the first shot had knocked Bartley to the ground, Sanders walked over to Bartley and fired additional shots at him while he was incapacitated. Then, when the gun jammed, Sanders hit Bartley in the head with it. As a result of this unprovoked attack, Bartley is partially paralyzed and is unable to control his bowels. In addition, Bartley must catheterize himself in order to urinate, and he is in constant pain.

[28] With regard to Sanders' character, we note that Sanders has a criminal history that spans twelve years and includes two felony convictions, one for carrying a firearm during and in relation to a drug trafficking crime and one for operating a vehicle while intoxicated with a prior conviction. Sanders also has eight misdemeanor convictions and one probation revocation. We note that Sanders' crimes have become progressively more serious and progressively more violent

over time. In addition, Sanders' criminal history reflects poorly on Sanders' character for the purposes of sentencing. *See Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007).

[29] Based on the nature of the offense and his character, Sanders has failed to persuade this Court that his aggregate thirty (30) year aggregate sentence is inappropriate.

[30] Affirmed in part, reversed in part, and remanded with instructions.

May, J., and Brown, J., concur.