

# MEMORANDUM DECISION

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# IN THE COURT OF APPEALS OF INDIANA

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Kyrell D. Cole,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

December 14, 2023

Court of Appeals Case No.  
22A-CR-2571

Appeal from the Madison Circuit  
Court

The Honorable Andrew R.  
Hopper, Judge

Trial Court Cause No.  
48C03-2011-MR-2672

**Memorandum Decision by Judge Kenworthy**  
Judges May and Tavitas concur.

**Kenworthy, Judge.**

## Case Summary

[1] Following a jury trial, Kyrell D. Cole was convicted of murder.<sup>1</sup> The trial court sentenced Cole to sixty years, enhanced by fifteen years for his use of a firearm<sup>2</sup> during his offense. Cole raises three issues for our review, which we restate and reorder as:

1. Did the trial court err in admitting into evidence portions of a witness's testimony?
2. Did the trial court abuse its discretion by failing to consider certain mitigating factors when it sentenced Cole?
3. Does Cole's sentence warrant revision under Indiana Appellate Rule 7(B)?

We affirm.

## Facts and Procedural History<sup>3</sup>

[2] Quincy Malone and his girlfriend, Sierra Thompson, lived together in Anderson, Indiana. Malone typically carried a handgun and was known to sell marijuana. In late October 2020, Malone was placed on house arrest. Around

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<sup>1</sup> Ind. Code § 35-42-1-1(1) (2018).

<sup>2</sup> I.C. § 35-50-2-11(g) (2016).

<sup>3</sup> We held oral argument in this case on November 14, 2023, at Munster High School in Munster, Indiana. We extend our appreciation to the faculty and staff for the invitation and hospitality. We also thank the Munster High School students for their attention and thoughtful questions. Lastly, we thank counsel for both parties for the quality of their arguments and for remaining after the argument to answer the students' questions.

the same time, Malone posted a Snapchat video displaying his and Thompson's cash.

- [3] In the afternoon of October 29, 2020, Cole and Demareyon Robinson went to Malone and Thompson's house to smoke marijuana. After he let Cole and Robinson in, Malone situated himself on a couch next to Thompson. Cole sat in a folding chair near Malone; and Robinson sat in a chair near the front door and across the room from the others.
- [4] Malone, Cole, and Robinson were each armed with a handgun. During their conversation, Cole showed Malone his gun and requested to see Malone's gun. Malone refused. As Malone and Cole discussed whether Malone was interested in purchasing Cole's gun, Robinson looked at his phone and Thompson "wasn't really paying too much attention." *Tr. Vol. 2* at 48.
- [5] Malone had installed four security cameras on the house's exterior—one on each corner. As positioned, the cameras provided live video footage of the house's front and back yards, including the front and back entrances, to a television located in the house's living room. As Malone and Cole spoke, Malone and Thompson noticed a man on the security footage wearing all black clothing and a mask. Another masked man was present but not immediately visible on the footage. One of the men wore a white mask and the other wore an orange mask. Soon after, one of the two masked men opened the front door, but did not enter. As that happened, Robinson stood up, pointed his gun at Malone, and said, "[D]on't move." *Id.* at 49. Just after Robinson gave his

instructions, shots rang out. Cole and Robinson fired at Malone and Malone returned fire. Malone was hit in his chest. Cole fled out the back door of the house. Robinson ran out the front door and was grazed by a bullet. During the brief firefight, Thompson hid under a blanket on the couch and could not see who shot Malone.

[6] Around the same time, Issac Drake—Malone and Thompson’s neighbor—walked home from work. As he neared his house, Drake saw two young men wearing masks and hoods standing on the steps outside his house. One of the masks was “bright orange.” *Id.* at 154. Thinking “something obviously wasn’t right,” Drake looked down at his phone while walking to avoid drawing their attention. *Id.* According to Drake, the men were “moving very, very nervously.” *Id.* When Drake looked up from his phone, the young men were gone. After he ensured nobody was at his house, Drake went inside.

[7] About ten minutes after his arrival, Drake prepared to take his dog outside. As he stepped through his front door, Drake heard multiple gunshots. He immediately ducked back inside his house and closed the door. Drake peered out his window and saw Cole and another man running from Malone and Thompson’s house. Drake watched as Cole ran through an alley next to Drake’s house carrying a gun. Drake poked his head out of his garage side door and shouted “he had seen [Cole’s] description and if . . . the police asked [he] was going to give it to them.” *Id.* at 156. Cole kept running.

- [8] Eventually, Cole entered a Pontiac Vibe located in a nearby parking lot. The Pontiac took off and stopped outside a house a few minutes later. The occupants exited the vehicle and ran away in different directions. Police later recovered and searched the Pontiac. Among other things, the police found an orange ski mask and two rounds of .40 caliber ammunition inside the vehicle.
- [9] After the shooting had stopped and Cole and Robinson had fled, Thompson called the police. Once law enforcement officers arrived, they began to tend to Malone's wound. Stippling—"little chunks of debris from the gun powder that get imbedded" in the skin following "close-range [gun]fire"—surrounded Malone's entry wound. *Tr. Vol. 3* at 84–85. Malone was transported to the hospital where he informed police he did not know who shot him. Malone later died from the gunshot wound to his chest.
- [10] During their investigation, the police located several shell casings in Malone and Thompson's living room. The police identified shell casings derived from three firearms. The police also obtained recordings of the security camera footage. The recovered video showed two men in masks approach the house's front door, Robinson flee out the front door carrying a handgun, and Cole exit the back door also carrying a handgun.
- [11] About two weeks later, the police interviewed Cole. During this interview, Cole claimed he ran out of the house when the orange-masked man opened Malone and Thompson's front door. Cole said he heard gunshots as he ran but maintained he did not shoot Malone.

[12] The State charged Cole with murder and later amended the charging information to include a firearm enhancement. Cole proceeded to trial. On the morning of the second day of Cole’s jury trial, the trial court held a hearing outside the presence of the jury. During this hearing, Drake testified he and Cole were briefly housed in the same “pod” of the Madison County Jail. *Tr. Vol. 2* at 109. Drake explained that during this two-day stint, Cole confronted him and indicated he knew Drake from his “paperwork.” *Id.* at 110. Drake further conveyed he heard Cole call him a snitch. And according to Drake, Cole threatened to kidnap him. *See id.* This was “enough to put [Drake] in fear of [his] life.” *Id.* Out of concern for his safety, Drake had informed a jail guard: “I don’t feel comfortable here. I think I should be moved because I’m on this guy’s case.” *Id.* at 117. Drake was relocated about a day later. Drake added that when discussing the situation with Detective Josh Senseney of the Anderson Police Department in April 2022, he “pretty much told [Detective Senseney] that . . . the jail . . . put me into the same pod with [Cole] and I thought that I was gonna get my . . . ass kicked.” *Id.* at 119. When questioned why he did not bring up his concerns earlier, Drake shared he “was just afraid.” *Id.* at 113.

[13] At the end of the hearing, Cole requested a limiting instruction.<sup>4</sup> Cole argued Drake should be permitted to testify only about the events he observed on

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<sup>4</sup> Although the parties and the trial court referred to Cole’s request as seeking a limiting instruction, in reality, Cole sought to have portions of Drake’s testimony deemed inadmissible. When Cole made this request, Drake had not yet testified in the presence of the jury.

October 29, 2020, and requested “there be no questioning or comments made by [Drake] spontaneously about any contact that he had with Kyrell Cole while in custody in the Madison County Jail.” *Id.* at 140–41. Cole claimed limiting Drake’s testimony was warranted because the testimony about the jail incident was “highly prejudicial.” *Id.* at 141. And Cole further claimed that by failing to disclose this portion of Drake’s testimony until the second day of Cole’s trial, the State had violated a “Standing Order of Discovery.” *See Appellant’s App. Vol. 2* at 37–39. This order required the State to provide Cole with “reasonable notice in advance of trial” of the general nature of any evidence of crimes, wrongs, or other acts it intended to introduce against Cole at trial. *Id.* Thus, according to Cole, not limiting the testimony would deny Cole “his rights of due process.” *Tr. Vol. 2* at 147. Cole claimed had the threats been disclosed, he could have “further investigate[d]” and been “prepared to address [Drake’s testimony] at trial.” *Id.* at 146.

[14] Following argument, the trial court stated: “[I]n lieu of the limiting instruction, the Court is happy to give the Defense time yet this morning to explore that potential testimony with Mr. Drake and prepare in whatever fashion they believe necessary, any adequate response to that information.” *Id.* at 148. The trial court granted Cole thirty minutes to interview Drake. Cole did not request a continuance or move for a mistrial. The jury returned and Cole’s jury trial resumed. Over Cole’s renewed objection, the trial court permitted Drake to testify about his interactions with Cole while in jail.

[15] The jury found Cole guilty as charged. During his sentencing hearing, Cole claimed his young age, diminished mental capacity, learning disability, and low IQ were mitigating factors. After considering aggravating and mitigating factors, the trial court sentenced Cole to sixty years for murder with a fifteen-year firearm enhancement. Cole now appeals his conviction and accompanying seventy-five-year sentence. Additional facts are provided when necessary.

## 1. Cole Waived Appellate Review of His Evidentiary Claim

[16] Cole contends the trial court erred by admitting the evidence regarding Drake's relationship and interaction with Cole in the Madison County Jail. Cole argues that, in violation of the trial court's discovery order, he was not provided with this evidence or notice of the State's intent to offer evidence of other bad acts under Indiana Evidence Rule 404(b). The State counters, arguing Cole waived his evidentiary claim because he failed to request a continuance during his trial.

[17] Trial courts have broad discretion in dealing with discovery violations, including the late disclosure of evidence. *Berry v. State*, 715 N.E.2d 864, 866 (Ind. 1999). We may reverse a trial court only for an abuse of discretion "involving clear error and resulting prejudice." *Id.* Typically, the proper remedy for a discovery violation is a continuance. *Id.* "If a *continuance* would have cured the harm that arose by the discovery violation, *failure to request* one results in waiver." *Alcantar v. State*, 70 N.E.3d 353, 356 (Ind. Ct. App. 2016) (emphasis added).



[18] Assuming there was a discovery violation, Cole waived his claim by failing to request a continuance. After Drake testified during a hearing outside the presence of the jury, Cole sought to exclude portions of Drake's testimony because it was "highly prejudicial" and would deny him due process. *Tr. Vol. 2* at 141, 147. Cole did not request a continuance. In fact, while arguing why the testimony was inadmissible, defense counsel noted how a continuance could have cured the late discovery. According to Cole, if he had learned about Drake's testimony earlier, he could have "further investigate[d]" and "prepared to address [the testimony] at trial." *Id.* at 146; *see also Appellant's Br.* at 16 ("Had Cole been provided with reasonable notice of the State's intent to introduce the 404(b) evidence he could have taken additional steps to fully investigate the allegations including obtaining security footage from the jail, interviewing others present at the time the alleged conduct occurred, and the like."). Rather than request a continuance, Cole accepted the trial court's offer of thirty minutes to interview Drake about his testimony. Thus, Cole waived appellate review of this issue because he failed to request a continuance even though one would have cured the alleged discovery violation. *See Alcantar*, 70 N.E.3d at 356.

[19] Waiver notwithstanding, any error in admitting the evidence was harmless given the substantial independent evidence of Cole's guilt. Accordingly, we can be certain there is no substantial likelihood Drake's testimony regarding Cole's threats contributed to Cole's conviction. *Barker v. State*, 695 N.E.2d 925, 931 (Ind. 1998) ("The improper admission of evidence is harmless error when the

conviction is supported by such substantial independent evidence of guilt as to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction.”).

## **2. The Trial Court Did Not Abuse Its Discretion When Sentencing Cole**

[20] Next, Cole contends the trial court erred because it failed to “recognize mitigating factors supported by the record.” *Appellant’s Br.* at 20. The alleged omitted mitigators include Cole’s young age, “diminished mental capacity, learning disabilities, and low IQ.”<sup>5</sup> *Id.*

[21] Sentencing decisions lie within the sound discretion of the trial court and we review such decisions only for an abuse of discretion. *Owen v. State*, 210 N.E.3d 256, 269 (Ind. 2023); *Cotto v. State*, 829 N.E.2d 520, 525 (Ind. 2005) (“The finding of mitigating factors is within the discretion of the trial court.”). A 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 therefrom.” *Owen*, 210 N.E.3d at 269 (quoting *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007)). There are several ways a trial court may abuse its discretion, including: failing to enter a sentencing statement; providing reasons not supported by the record or

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<sup>5</sup> Cole’s educational records, based on testing conducted by education professionals, like school psychologists, show Cole’s IQ is around 70. *See Ex. Vol. 1* at 175. Cole’s score “falls within the Mild Cognitive Disability range.” *Id.* at 205.

improper as a matter of law; or “omit[ting] reasons that are clearly supported by the record and advanced for consideration.” *Anglemyer*, 868 N.E.2d at 490–91. But a trial court does not have “any obligation to ‘weigh’ aggravating and mitigating factors against each other when imposing a sentence[.]” *Id.* at 491. So, a trial court cannot abuse its discretion in failing to “properly weigh” aggravating and mitigating factors. *Id.* (noting such review of the merits of a sentence may only be done based on Appellate Rule 7(B)).

[22] Cole argues the trial court’s sentencing statement “does not provide the Court’s evaluation of those [aggravating and mitigating] factors present here and fails to recognize mitigating factors clearly within the record.” *Appellant’s Br.* at 20. “An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record.” *Anglemyer*, 868 N.E.2d at 493. If the trial court does not find the existence of a mitigating factor after it has been argued by counsel, however, the trial court need not explain why it has determined that factor does not exist. *Id.* And the trial court is “not obligated to accept the defendant’s contentions as to what constitutes a mitigating circumstance.” *Rascoe v. State*, 736 N.E.2d 246, 249 (Ind. 2000).

[23] When discussing aggravating and mitigating factors during Cole’s sentencing hearing, the trial court conveyed: “The Court finds an [sic] aggravation the significant criminal history that Mr. Cole brings as a very young man. To be of such a young age and have juvenile history that Mr. Cole brings is an aggravator that the Court gives significant weight too [sic].” *Tr. Vol. 4* at 107.

The court further explained, “[a]s far as mitigation Mr. Cole has not taken responsibility for his actions even – even today. So, the Court does not find that as a mitigator. And the Court finds no mitigation here.” *Id.* at 108.

[24] The trial court’s statement encompasses consideration of Cole’s young age—relating it to Cole’s juvenile history. The statement also suffices as consideration of the other mitigators presented by Cole.<sup>6</sup> In essence, we read the trial court’s statement to mean it considered the factors put forward by Cole and concluded they did not mitigate his offense. The trial court was not required to elaborate regarding why it determined the alleged mitigating factors did not exist.<sup>7</sup> See *Anglemyer*, 868 N.E.2d at 493. Thus, the trial court did not abuse its discretion when sentencing Cole.<sup>8</sup>

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<sup>6</sup> If the court’s statement is not sufficient, however, it is unclear how Cole’s diminished mental capacity, learning disabilities, and low IQ are “both significant and clearly supported by the record.” *Anglemyer*, 868 N.E.2d at 493. Factors that bear on the mitigating weight, if any, afforded to a mental impairment at sentencing include: “(1) the extent of the defendant’s inability to control his or her behavior due to the disorder or impairment; (2) overall limitations on functioning; (3) the duration of the mental [impairment]; and (4) the extent of any nexus between the disorder or impairment and the commission of the crime.” *Weeks v. State*, 697 N.E.2d 28, 30 (Ind. 1998). Here, although Cole received special education while in high school and had a below average IQ, Cole has not established he could not control his behavior, that there were limitations on his ability to function, or that there was a nexus between his mental condition and the crime.

<sup>7</sup> Although the trial court was not required to elaborate regarding why it determined the alleged mitigating factors did not exist, it certainly aids appellate review when the trial court, at a minimum, mentions the possible mitigating factors argued by defense counsel during sentencing. The trial court can then give the mitigating factor(s) as much or as little weight as it sees fit.

<sup>8</sup> Even if the trial court abused its discretion, remand would be unnecessary. “[R]emand for resentencing may be the appropriate remedy if [an appellate court] cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.” *Anglemyer*, 868 N.E.2d at 491 (emphasis omitted). The trial court found Cole’s juvenile history to be an aggravating factor. This factor alone was sufficient to impose Cole’s enhanced sentence. See *Garrett v. State*, 714 N.E.2d 618, 623 (Ind. 1999). Because we can say with confidence the trial court would have imposed

### 3. Cole’s Sentence Does Not Warrant 7(B) Revision

[25] Cole also asks us to revisit and revise his sentence.<sup>9</sup> Under Indiana Appellate Rule 7(B), we “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, [this] Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” We show the trial court “considerable deference” when reviewing a sentence under Appellate Rule 7(B). *Oberhansley v. State*, 208 N.E.3d 1261, 1267 (Ind. 2023) (quoting *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008)). “Such deference 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).

[26] “Whether we find a sentence inappropriate ‘turns on myriad factors that come to light in a given case’ and ultimately ‘boils down to our collective sense of what is appropriate.’” *State v. Stidham*, 157 N.E.3d 1185, 1195 (Ind. 2020) (quoting *Taylor v. State*, 86 N.E.3d 157, 165 (Ind. 2017), *cert. denied*). When conducting our review under Appellate Rule 7(B), we are not limited to the trial

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the same sentence even if it had considered Cole’s diminished mental capacity, learning disabilities, and low IQ as mitigating factors, remand would be unnecessary. See *Anglemyer*, 868 N.E.2d at 491.

<sup>9</sup> The trial court sentenced Cole to sixty years for murder, enhanced by fifteen years for use of a firearm. See I.C. § 35-50-2-3(a) (providing for a sentence of forty-five to sixty-five years for murder, with a fifty-five-year advisory sentence); see also I.C. § 35-50-2-11(g) (providing for an additional sentence of five to twenty years for use of a firearm in commission of an offense).

court's findings of aggravators and mitigators, and our principal role is to "leaven outliers rather than achieving a perceived correct sentence." *Id.* (quoting *Gibson v. State*, 51 N.E.3d 204, 215 (Ind. 2016), *cert. denied*).

[27] Beginning with the nature of Cole's offense, we observe Cole's conduct resulted in significant harm—Malone's death—and exposed others, like Thompson, to significant potential harm. Cole and Robinson went to Malone's house armed. Right after a masked man opened the front door, Robinson pulled out a gun and pointed it at Malone. Robinson instructed Malone not to move and several shots were fired. During the close and rapid exchange of gunfire between Malone, Cole, and Robinson, Malone was hit in the chest. Stippling around Malone's wound suggested it was caused by close-range gunfire. This further supports the State's position that Cole delivered the fatal shot.

[28] Amid the shootout in the living room, Cole and Robinson fled. One of the home's security cameras showed Cole sprinting out the back door. And Drake watched Cole flee and pass through a nearby alley. Cole carried his gun the entire time. Eventually, Cole entered a Pontiac Vibe, which was later recovered by the police. During their search of the Pontiac, police found, among other things, an orange ski mask, exactly like the mask worn by one of the two men who approached the house just before the firefight began. And lastly, when questioned by the police, Cole repeatedly lied about the events surrounding the shooting. The nature of Cole's offense weighs against revision.

[29] As to Cole’s character, we note he was seventeen at the time he committed his offense. But at the same time, we recognize he had accumulated a significant juvenile history by that age. Cole’s juvenile history includes five true findings of delinquency—three of which would have been felonies if committed by an adult—and five probation violations. Cole was also on pretrial release for a Level 3 felony armed robbery charge when he committed this offense. Plus, Cole has failed to take responsibility for his actions. Once Cole learned Drake was “on his paperwork” when the two were housed in jail together, Cole threatened him. *Tr. Vol. 2* at 111. This reflects poorly on Cole’s character. Although Cole has a learning disability and lower cognitive ability, the connection between his mental impairment and his serious offense is tenuous at best. Cole’s character weighs against revision.

[30] In sum, Cole’s above-advisory sentence for murder is not inappropriate in light of the nature of his offense and his character.

## **Conclusion**

[31] Cole waived appellate review of his evidentiary claim by failing to request a continuance at trial. Further, the trial court did not abuse its discretion when sentencing Cole and Cole’s seventy-five-year aggregate sentence is not inappropriate in light of the nature of his offense and his character.

[32] Affirmed.

May, J., and Tavitas, J., concur.