

STATEMENT OF THE CASE

Appellant-Defendant John A. Huntzinger appeals the trial court's denial of his motion to correct error after his conviction of check fraud, a Class C felony. He also appeals his sentence. We affirm.

ISSUES

Huntzinger raises two issues for our review, which we restate as:

- I. Whether the trial court committed reversible error in denying Huntzinger's motion to correct error.
- II. Whether the sentence imposed was inappropriate.

FACTS AND PROCEDURAL HISTORY

Prior to trial on this matter, Huntzinger, an agricultural engineer, purchased chemicals and then sold the products to large family-farming operations. One of Huntzinger's customers was the Paxton Family Farm.

In April of 2006, Huntzinger placed three large orders with Big Rivers Agri Supply and paid for the orders with checks. Specifically, on April 11, 2006, Huntzinger issued a check for \$32,505.80; on April 17, 2006, he issued a check for \$18,599.04; and, on April 26, 2006, he issued a check for \$17,852.07, all drawn upon the same account at Union Federal Bank and all payable to Big Rivers. All three checks were returned due to insufficient funds, and after initial attempts to work out payment failed, the State charged

Huntzinger with one count of Class C felony check fraud. After the issuance of the charge, but before trial, Huntzinger paid the debt.

During voir dire of the jury pool, in Huntzinger's presence, Juror Patty Paxton stated that her husband sold chemicals to farmers and that Huntzinger's name sounded familiar to her. Paxton stated that she did not know Huntzinger personally and that her family farmed for the family of the county prosecutor. On the juror questionnaire, Paxton identified her husband's name and listed him as self-employed. When asked whether she could render her decision on the evidence and put everything else aside, Paxton said, "I don't know" and added that she was a tax preparer and this was her busiest time of the year. At the end of the voir dire process, Paxton was selected to sit on the jury.

When the jury returned to the jury room upon completion of voir dire, a juror, believed to be Paxton, informed the bailiff that she recognized Huntzinger. The bailiff informed the trial court, which did not take any action because this information had been disclosed during voir dire. (Trial Court's Finding of Fact # 10; Appellant's App. at 41). After the evidence was presented and the jury returned to the jury room for deliberations, a juror, again presumed to be Paxton, asked the bailiff, "Why am I here?" Again, the jury took no action because "nothing new was presented." (Trial Court's Finding of Fact #

12; Appellant's App. at 42). However, the trial court did state to defense counsel that it was surprised that the defense kept a juror who knew Huntzinger. (Trial Court's Finding of Fact #13; Appellant's App. at 42). Huntzinger's counsel stated that he and Huntzinger knew of the juror and did not have a problem with her presence. (Trial Court's Finding of Fact #14; Appellant's App. at 42). The jury found Huntzinger guilty of fraud.

Huntzinger filed a motion to correct error in which he claimed that Paxton had failed to inform court staff that she had an interest in Paxton Farms and that "she thereby caused [Huntzinger's] right to an impartial jury to be infringed." (Appellant's App. at 12). A hearing was held on the motion, and Paxton testified that she was married to Joseph Paxton, the owner of a farm with which Huntzinger had extensive dealings, and that during the trial she twice talked to the bailiff. Huntzinger testified that he was aware at trial that one or more of the checks at issue were for goods to be delivered to the Paxton Family Farm and that prior to the jury's verdict, he did not raise any issue pertaining to Paxton. Huntzinger further testified that he remembered Paxton's testimony regarding her husband and was aware that she was the wife of one of his 125 customers. The trial court noted that during the jury selection process, Huntzinger frequently spoke

with his counsel, made notes, and again took time at the end of voir dire to speak with counsel. After this hearing, Huntzinger withdrew his motion to correct error.

Huntzinger filed a second motion to correct error, arguing that when Paxton asked questions of the bailiff, the trial court should have held a hearing and/or excused Paxton. The trial court issued an order with findings of fact and concluded error, if any, was invited by Huntzinger. The trial court denied the motion to correct error.

The trial court sentenced Huntzinger to four years suspended to probation. For the first two years of probation, Huntzinger was placed on electronic monitored home detention. Huntzinger now appeals.

DISCUSSION AND DECISION

I. DENIAL OF MOTION TO CORRECT ERROR

Huntzinger contends that the trial court committed reversible error when it did not hold a hearing to determine whether Paxton should be excused from the jury. In support of his contention, Paxton cites Ind. Code § 35-37-2-3, which states:

- (a) As part of the preliminary instructions, the court shall instruct the jurors that if a juror realizes, during the course of trial, that [s]he has personal knowledge of any fact material to the cause, [s]he shall inform the bailiff that [s]he believes [s]he has this knowledge at the next recess or upon adjournment, whichever is sooner. The bailiff shall inform the court of the juror's belief, and the court shall examine the juror under oath in the presence of the parties and outside the presence of the other jurors concerning h[er] personal knowledge of any material fact.

- (b) If the court finds that the juror has personal knowledge of a material fact, the juror shall be excused and the court shall replace the juror with an alternate. If there is no alternate juror, then the court shall discharge the jury without prejudice, unless the parties agree to submit the cause to the remaining jurors.

Article I, § 13 of the Indiana Constitution guarantees a defendant's right to an impartial jury; therefore, a biased juror must be dismissed. *May v. State*, 716 N.E.2d 419, 421 (Ind. 1999). Trial courts have broad discretion in determining whether to replace a juror with an alternate. *Id.* An abuse of discretion occurs only when the decision placed the defendant in substantial peril. *Harris v. State*, 659 N.E.2d 522, 525 (Ind. 1995).

In the present case, the trial court gave the jury instruction required by the aforementioned statute. As the trial court found, Paxton first told the bailiff that she knew, but had not met, Huntzinger, a fact that had already been revealed during voir dire. After the presentation of the evidence, Paxton then asked the bailiff why she was still on jury. There is no evidence that she informed the bailiff of any previously undisclosed conflict of interest or personal knowledge of a fact material to the cause. The judge reasoned that Paxton was again raising the issue of her already disclosed knowledge of Huntzinger's identity. The judge did express his surprise that Huntzinger and his attorney did not exercise a challenge, but they reassured him that they had no complaint. There is nothing in Paxton's communications to the bailiff that triggered the requirements of Ind. Code § 35-37-2-3.

Huntzinger points to Paxton's response to a long leading question at the hearing on the first motion to correct error as evidence that there was a conflict of interest.

Defense counsel asked Paxton whether she “became aware of anything during the trial you needed to alert the Bailiff to that—did you alert the Bailiff at any point that you felt that there was a conflict you had in this case?” (Tr. at 405). Paxton answered, “Twice.” *Id.* However, on cross-examination, Paxton explained that she actually alerted the bailiff that “I did recognize [Huntzinger], not that I knew him but I did recognize him, who he was[.]” (Tr. at 406). Paxton further stated that this is all she told the bailiff and that she had already revealed the same information during voir dire. (Tr. at 407-09). With reference to her second communication to the Bailiff, the record simply discloses that after she recognized that Paxton Farms, an entity owned by Paxton’s husband, was named as recipient of the chemicals on an exhibit, she again spoke with the bailiff and said, “I was asking why I was still on there?” (Tr. at 408). As we noted above, there is nothing in Paxton’s communication with the bailiff to indicate any conflict or undue knowledge that would trigger an examination pursuant to Ind. Code § 35-37-2-3.

Huntzinger contends that he was denied the right to a fair and impartial jury. He also contends that it was fundamental error for trial counsel to allow Paxton to remain on the jury. The trial court, however, found that Huntzinger knew of Paxton’s status as the wife of Huntzinger’s customer and that Huntzinger therefore invited any error. Specifically, the court found:

11. Upon completion of the evidence and after the jury had been given final instructions, the jury returned to the jury room for deliberations.
12. The bailiff again advised the court that the same juror [Paxton] stated to him, “why am I here?” Again, the Court took no action because nothing new was presented.

13. However, in the presence of [Huntzinger], the Court stated to counsel for the defense that the Court was surprised that he kept the juror that knew the defendant on the jury. At that time, counsel for defense turned and advised the Court that they knew who she was and were ok with it. The Court again took no action, being of the opinion that they knew what they were doing and it wasn't the Court's job to micromanage jury selection for lawyers.

14. There was no evidence that [Paxton] "had personal knowledge of material fact, or otherwise became unable or disqualified to perform her duties."

* * *

17. At no time did defense ask to remove [Paxton] and replace her with the alternate.

* * *

20. [Huntzinger] and his attorney were in a much better position to know of the relationship between [Huntzinger] and [Paxton], and were fully aware of her relationship with a client of [Huntzinger's].

21. [Huntzinger] and his attorney were repeatedly conversing during the trial and [Huntzinger] was making numerous notes.

22. Many times, a party elects to keep people on a jury because they feel that person would work to their advantage. This is a reasonable trial strategy used by parties and their attorneys.

23. [Huntzinger] and his counsel invited error, if any, by allowing [Paxton] to remain on the jury and cannot now, after an unfavorable result, cry foul.

(Appellant's App. at 42).

In order to establish that he was denied a fair and impartial jury, Huntzinger must show that the trial court's decision placed him in substantial peril. *Harris*, 659 N.E.2d at 525. There is no doubt that Huntzinger knew that Paxton was the wife of one of his customers, and he accepted that fact by not challenging her presence on the jury.

Furthermore, Huntzinger has not shown how Paxton Family Farms' position as recipient of the farm chemicals and Paxton's position as wife of Paxton Family Farms' owner created any potential for substantial peril in a case where Huntzinger was being prosecuted for defrauding Big Rivers.

With regard to Huntzinger's fundamental error claim, we note fundamental error must constitute a blatant violation of basic principles, the harm, or potential for harm, must be substantial, and the resulting error must deny the defendant fundamental due process. *Wilson v. State*, 514 N.E.2d 282, 284 (Ind. 1987). We further note that an error must be so prejudicial to the rights of the defendant so as to make a fair trial impossible. *Willey v. State*, 712 N.E.2d 434, 444-45 (Ind. 1999). As the court observed, Huntzinger was involved in the voir dire process and concurred with the choice to leave Paxton on the jury. The trial court further observed that it appeared to be Huntzinger and his attorney's strategy to work the "relationship" to Huntzinger's advantage, a good strategy that did not work in this case. We cannot say that Huntzinger was denied a fair trial by his counsel's use of a viable strategy.

II. SENTENCING

The trial court sentenced Huntzinger to the four-year advisory sentence for a Class C felony.¹ The trial court suspended the sentence and placed Huntzinger on probation for the four years. As a condition of probation for the first two years, the trial court placed

¹ Ind. Code § 35-50-2-6 provides that a person who commits a Class C felony "shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years."

Huntzinger on electronic monitored home detention. Huntzinger argues that imposition of the home detention is inappropriate.

A sentence authorized by statute will not be revised unless the sentence is inappropriate in light of the nature of the offense and the character of the offender. Indiana Appellate Rule 7(B). We must not merely substitute our opinion for that of the trial court. *Sallee v. State*, 777 N.E.2d 1204, 1216 (Ind. Ct. App. 2002), *trans. denied*. In determining the appropriateness of a sentence, a court of review may consider any factors appearing in the record. *Roney v. State*, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), *trans. denied*. The “nature of the offense” portion of the appropriateness review concerns the advisory sentence for the class of crimes to which the offense belongs; therefore, the advisory sentence is the starting point in the appellate court’s sentence review. *Anglemyer v. State*, 868 N.E.2d at 491. The “character of the offender” portion of the sentence review involves consideration of the aggravating and mitigating circumstances and general considerations. *Williams v. State*, 840 N.E.2d 433, 439-40 (Ind. Ct. App. 2006).

With reference to the nature of the offense, we note that Huntzinger wrote fraudulent checks in the significant amount of \$68,956.91. Although Huntzinger eventually paid the money plus statutory interest, he did not do so until more than a year after the offense was committed.

With reference to Huntzinger’s character, we note that he has previously violated probation. In light of this previous violation, we believe it was not inappropriate for the trial court to order home detention for a period of two years.

Given the nature of the offense and the character of the offender, we do not find the sentence imposed to be inappropriate.

Affirmed.

DARDEN, J., and NAJAM, J., concur.