

STATEMENT OF THE CASE

Wesley D. Willis appeals his convictions for voluntary manslaughter as a class A felony;¹ attempted murder, a class A felony;² and two counts of criminal recklessness as class C felonies.³ He also appeals his sentences for voluntary manslaughter and both counts of criminal recklessness.

We affirm.

ISSUES

1. Whether the trial court abused its discretion in admitting evidence.
2. Whether the prosecutor committed misconduct.
3. Whether the trial court's conduct deprived Willis of a fair trial.
4. Whether the trial court erred in sentencing Willis.

FACTS

Before September of 2009, Willis and Jeff Coleman, Jr. had been friends for approximately four years. During their friendship, Willis had visited Coleman several times at Coleman's father's home at 1110 Milton Street in South Bend.

Around the latter part of August of 2009, however, Coleman and Willis were not "get[ting] along" because Coleman believed Willis had stolen a safe. (Tr. 353). The safe contained approximately \$5,400.00, which belonged to Coleman and his friend, Robert

¹ Ind. Code § 35-42-1-3.

² I.C. §§ 35-41-5-1; 35-42-1-1.

³ I.C. § 35-42-2-2.

Torres. Torres lived in apartment 105 at 2630 Prairie Avenue in South Bend. Torres had kept the safe in his apartment; only Torres knew the safe's combination.

On or about September 1, 2009, Willis telephoned Coleman and "said that if [Coleman] wanted [the safe], [he] had to come get it back or as a matter of fact give him the combination and he'll give [Coleman] half" of the money inside the safe. (Tr. 363). Coleman threatened Willis if he failed to return the safe. Willis responded that he would drop off the safe, and they could have "a shootout over" it. (Tr. 365). Coleman told him to "drop it off." (Tr. 365).

On the night of September 1, 2009, Coleman and Torres were riding around in Torres' vehicle. As they reached the intersection of Dubail and Pulaski Streets, Coleman saw Willis in a red car on Pulaski Street. Coleman then "hopped out and fired twelve rounds out of [his] gun." (Tr. 369). When Coleman "heard more shots" coming from his left, he "just got in the car and pulled off." (Tr. 369).

Shortly thereafter, several officers from the South Bend Police Department responded to a report of shots fired in the area. Officers found several shell casings in the middle of Dubail Street, near an alley. Officers also noticed bullet holes in a garage and privacy fence located in the back yard of a residence on Pulaski Street.

Officers ascertained that "the shots had come from a house" located at 1714 South Pulaski Street. (Tr. 123). Shameka Scroggins, a cousin of Willis and an acquaintance of Coleman, lived at the house. Willis often visited the home; Scroggins' brother, Dion Winston, also known by the nickname, "Sas," regularly stayed there. (Tr. 423). With

Scroggins' permission, officers searched her back yard, where they discovered and collected several more shell casings.

Two nights later, at approximately 10:45 p.m., Scroggins heard multiple "shots go around the house." (Tr. 435). That same night, Coleman received a telephone call from Willis' brother, Frank.⁴ Frank threatened Coleman, stating: "When we see you, you're through. We're not going to no houses. We're not shooting at no cars. When we see you, you're through. Do you want to shoot up houses? When we see you, you're through. We're not doing that." (Tr. 380). Coleman, who was in a "vehicle riding around" when he received the telephone call, told Frank to "come find him." (Tr. 381). Coleman believed he heard Willis' voice in the background.

Also on the night of September 3, 2009, Leticia Casarez went to the home of Coleman's father, Jeff Coleman, Sr. ("Coleman, Sr.") at 1110 Milton Street to visit and "hav[e] a drink." (Tr. 446). Several people, including Casarez; Casarez's sister, Veronica Perez; Angelica Garcia; Andre Owens; and Coleman, Sr. congregated in the house's enclosed porch, adjacent to the living room.

Shortly before 11:30 p.m., Casarez left the porch to use the bathroom. While she was in the bathroom, she heard gunshots. "At first," she heard "just three," followed by "non-stop" gunshots. (Tr. 447). Casarez ran to the porch, where she saw her sister "[l]ying on the floor" of the porch. (Tr. 449). Perez was mortally injured by multiple

⁴ The record does not identify Frank's last name.

gunshot wounds. Casarez “grabbed [Perez] because she wouldn’t move, and [she] pulled her into the hallway of the living room.” (Tr. 451).

Owens was sitting in the enclosed porch when he heard “maybe six to seven shots” (Tr. 455). He sustained a bullet wound to his right leg, near the knee.

Juan Martinez was sleeping in the upstairs bedroom of his mother’s house when he awoke to the sound of “three to five shots” outside his window, which overlooked an alley connecting Dayton Street to the north and Milton Street to the south. (Tr. 308). Martinez immediately went to the window and looked toward the alley, where he “saw a gentleman standing there firing a weapon.” (Tr. 309). The man was “African-American, clean-shaven,” tall, and had a “thin build.” (Tr. 313).

The man “fac[ed] Milton” Street as he fired the gun. (Tr. 311). After firing several rounds, the man “turned around and ran.” (Tr. 310). As the man “turned around to run toward Dayton,” he turned toward Martinez. (Tr. 313). A “bright light” within ten feet of the man allowed Martinez to see the man’s face clearly. (Tr. 313). Martinez later identified the man as Willis.

At about this time, David Perez was driving home from work. As he approached Dayton Street, he “heard four popping noises[.]” (Tr. 293). When he turned right at Dayton Street, he saw a white mini-van “parked in the middle of the street.” (Tr. 287). He had to “swerve to the right side of the street to go around it.” (Tr. 287). He noticed that the “back passenger sliding door” on the driver’s side “was open.” (Tr. 290). As he drove by the alley between Dayton and Milton Streets, and “the noses of [the] vans were

just past each other,” (tr. 292), he “saw a male figure pass in front of [his] van and jump into” the white mini-van. (Tr. 290). The mini-van then proceeded west toward Miami Street.

At approximately 11:30 p.m., South Bend Police Officer Jeremy Wright responded to a report of shots fired at 1110 Milton Street. He “saw several shell casings on the ground” in the north-south alley across from the residence. (Tr. 65). Officers subsequently collected twenty-two shell casings from the alley.

Officers also observed several bullet holes in the residence’s walls, caused by bullets passing through the exterior walls into the interior of the residence. Based on the trajectory of the bullets as they entered the walls, officers determined that the person firing the bullets “would have been located in the alley to the north of the residence.” (Tr. 215).

That same night, Nimrod Cabral and Yesenia Coria went to sleep in their second-floor apartment at 2630 Prairie Avenue. They lived in apartment 205, above Torres’ apartment.

At approximately 11:45 p.m., Coria heard “around twenty” gun shots coming from the parking lot in front of their apartment. (Tr. 538). Several bullets penetrated the apartment’s walls. Cabral, who was sleeping next to the apartment’s exterior wall, sustained a bullet wound to the stomach. Cabral immediately telephoned police.

After the shots ceased, Coria looked out the window, into the parking lot. She “saw a black guy running towards [a] car” (Tr. 540). The man appeared to be in his late teens. Coria noted that he was thin and had short hair.

Nicole Johnson awoke when she heard gunshots from the apartment complex’s parking lot. When she looked out her window, she saw a light-colored mini-van “leaving towards the exit” (Tr. 550).

Several South Bend police officers responded. The officers discovered thirteen shell casings in “the grass in front of the apartment building directly across from” apartment units 105 and 205. (Tr. 106).

In the early morning of September 4, 2009, Willis; Winston; Fred Burton, another cousin of Willis; and Willis’ brother, Frank, went to a residence at 115 Milton Street, where Jacques Thomas (“Jacques”) and Samuel Cortez Thomas (“Samuel”) lived. Christina Jackson also was staying there that night.

After Willis arrived at the residence, Jacques heard him say that “some bullshit went down,” (tr. 583); “they was [sic] shooting up some shit,” (tr. 585); and “we shot the mother fucker” (Tr. 591). He also noticed that Willis had a “big ass pistol,” with the “biggest” clip “on him.” (Tr. 585). Jacques believed the gun to “be between a 40 or 45” caliber weapon, as it was “as big as” Willis. (Tr. 592). Samuel heard Willis “talking about how they shot up his crib” and that he “did what [he] had to do[.]” (Tr. 620).

Ray Wolfenbarger, a forensic scientist, subsequently determined that the casings collected at the Milton Street address had been fired from a .40 caliber gun. He also

determined that the same gun had fired at least eight of the casings collected at the Prairie Avenue address and that the remaining casings had been fired from a “nine millimeter Lugar” (Tr. 716). He further determined that “[a]ll of the forty Smith & Wesson caliber casings” collected from the back yard of 1714 Pulaski Street were fired from the same gun that fired the shell casings collected in the alley between Milton and Dayton Streets, as well as those collected from the Prairie Avenue apartment complex. (Tr. 721).

On September 17, 2009, the State charged Willis with Count I, murder, a class A felony; Count II, attempted murder, a class A felony; Count III, criminal recklessness as a class C felony; Count IV, criminal recklessness as a class C felony; and Count V, battery, as a class C felony.

The trial court commenced a four-day jury trial on December 7, 2009. As to Count I, the jury found Willis guilty of the lesser-included offense of voluntary manslaughter, a class A felony. As to the remaining counts, the jury found Willis guilty as charged. The trial court dismissed Count V and ordered a pre-sentence investigation report (“PSI”).

According to the PSI, Willis had been convicted of the following offenses in 2008: class D felony possession of marijuana, which ultimately was treated as a class A misdemeanor for purposes of sentencing; and class A misdemeanor carrying a handgun. The PSI further showed that Willis had been charged with class B felony battery in August of 2007, but that charge had been dismissed.

In addition, the State had charged Willis with criminal conversion on May 7, 2009; and possession of marijuana on June 15, 2009. The State, however, dismissed those charges. Furthermore, on July 12, 2009, the State charged Willis with class C misdemeanor operating motor vehicle while intoxicated; possession of marijuana; and class D felony possession of cocaine. As of the sentencing hearing, those charges remained pending.

The trial court held a sentencing hearing on May 6, 2010. The trial court found several mitigators, including Willis' "difficult childhood"; the undue hardship imprisonment will impose on Willis' family; and that Willis had graduated from high school. (Sent. Tr. 34).

The trial court found Willis' criminal history to be an aggravating circumstance. In so doing, the trial court noted that while Willis awaited sentencing on the possession of marijuana charge, he committed the offense of carrying a handgun. The trial court stated:

It's significant both in the sequence, the timing of the sequence, and it's significant in the nature of the offense. It is after all handguns that brought us into this courtroom today.

And for those reasons I felt while it's not a lengthy criminal history, it certainly is significant in terms of what these events are all about.

(Sent. Tr. 38). In addition, the trial court found the nature and circumstances of the offenses to be aggravating.

Finding that the aggravators outweighed the mitigators, the trial court sentenced Willis to fifty years on Count I, thirty years on Count II, and eight years on both Count III

and Count IV. Thereafter, the trial court imposed the sentences as follows: Count I to run consecutive to all counts; Counts II and III to run concurrently but consecutive to Counts I and IV; and Count IV to run consecutive to Counts I and II. Thus, Willis received an executed sentence of eighty-eight years.

Additional facts will be provided as necessary.

DECISION

1. Admission of Evidence

Willis asserts that the trial court abused its discretion in admitting certain testimony.

[T]he admission or exclusion of evidence is within the sound discretion of the trial court, and we will reverse the trial court's determination only for an abuse of that discretion. An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the trial court. In reviewing the admissibility of evidence, we consider only the evidence in favor of the trial court's ruling and any unrefuted evidence in the appellant's favor. As a rule, errors in the admission or exclusion of evidence are to be disregarded as harmless unless they affect the substantial rights of a party. In determining whether an evidentiary ruling affected a party's substantial rights, we assess the probable impact of the evidence on the trier of fact.

Redding v. State, 844 N.E.2d 1067, 1069 (Ind. Ct. App. 2006) (internal citations omitted).

The record shows that over Willis' objection, Charisse Ottbridge testified that on September 3, 2009, she spoke on the telephone with Burton "[m]ultiple" times. (Tr. 656). According to Ottbridge's testimony, she heard three "other voices in the background," but she could distinguish only Winston's voice as one of those voices. (Tr.

659). Ottbridge testified that she believed Burton was in a vehicle when she spoke with him.

She further testified that during her first conversation with Burton at approximately 10:00 p.m., he said he “was going looking for the guys,” which she “guess[ed]” meant “the guys who shot up their house[.]” (Tr. 668). She also testified that during a subsequent conversation, Burton informed her that he was “going to some guy named Ernest’s house.” (Tr. 670). He also said that “he was with [Winston] and [Willis] and the Ernest guy.” (Tr. 670).

She further testified that during one of the conversations, she “heard a boom and then the phone just went dead, like it hung up.” (Tr. 662-63). According to Ottbridge, the noise sounded like a gun being fired close to Burton.

Willis now argues that the admission of the foregoing testimony violated his Sixth Amendment right to confrontation and that the testimony constituted hearsay. We address his contentions in turn.

a. *Confrontation Clause*

The Sixth Amendment to the United States Constitution, made applicable to the states by the Due Process Clause of the Fourteenth Amendment, provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. CONST. amend. VI. “A witness’s testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.” *Pendergrass*

v. State, 913 N.E.2d 703, 705 (Ind. 2009) (citing *Crawford v. Washington*, 541 U.S. 36, 68 (2004)), *cert. denied*, 130 S. Ct. 3409 (2010).

The right to confrontation, however, only applies to “testimonial” statements. *Ramirez v. State*, 928 N.E.2d 214, 217 (Ind. 2010) (citing *Davis v. Washington*, 547 U.S. 813, 821 (2006)), *trans. denied*. Without specifically defining what constitutes “testimonial” evidence, the Supreme Court has determined that there are “[v]arious formulations of” a “core class of ‘testimonial’ statements,” *Crawford*, 541 U.S. at 51, including:

- (1) ex parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;
- (2) extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;
- (3) statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Pendergrass, 913 N.E.2d at 706 (citing *Crawford*, 541 U.S. at 51-52). The Supreme Court further “clarified that the testimonial statements are those that are substitutes for live testimony” *Pendergrass*, 913 N.E.2d at 706 (citing *Davis*, 547 U.S. at 830). By excluding testimonial statements, *Crawford* “emphasize[s] that the Sixth Amendment’s very essence is to protect against abuses of government officials.” *Pendergrass*, 913 N.E.2d at 706.

In this case, we agree with the State that Burton's statements to Ottbridge were not testimonial in nature. Burton's statements clearly were not ex-parte in-court testimony; extrajudicial statements; or "made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial," where, for example, he did not make the statements to a government official or during the course of an investigation. See *Pendergrass*, 913 N.E.2d at 706 (citing *Crawford*, 541 U.S. at 51-52). Finding that the admission of Burton's statements did not violate Willis' Sixth Amendment right, we address his argument that the statements constituted inadmissible hearsay.

b. *Hearsay*

"Hearsay' is a statement . . . offered in evidence to prove the truth of the matter asserted." Ind. Evidence Rule 801(c). Generally, hearsay is inadmissible. Evid. R. 802. The State argues that the statements do not constitute hearsay as they were made by a co-conspirator.

A statement is not hearsay if it is "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." Evid. R. 801(d)(2)(E).

For a statement to be admissible under Rule 801(d)(2)(E), the State must prove that there is "independent evidence" of the conspiracy. This means that the State must show, by a preponderance of the evidence, (1) the existence of a conspiracy between the declarant and the party against whom the statement is offered and (2) that the statement was made in the course and in furtherance of the conspiracy.

Roush v. State, 875 N.E.2d 801, 808 (Ind. Ct. App. 2007) (internal citations omitted).

Willis maintains that the State failed to “establish either a conspiracy or the participation of Burton or Willis in the conspiracy by a preponderance of the evidence.” Willis’ Br. at 8. He further maintains that Burton’s statements “were not made in furtherance of the conspiracy.” *Id.* at 8-9.

We do not decide whether the trial court improperly admitted the statements made to Ottbridge because we conclude any error to be harmless.

No error in the admission of evidence is grounds for setting aside a conviction unless such erroneous admission appears inconsistent with substantial justice or affects the substantial rights of the parties. 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.

Lafayette v. State, 917 N.E.2d 660, 668 (Ind. 2009) (internal citations omitted). “A reversal may be obtained only if the record as a whole discloses that the erroneously admitted evidence was likely to have had a prejudicial impact upon the mind of the average juror, thereby contributing to the verdict.” *Wales v. State*, 768 N.E.2d 513, 521 (Ind. Ct. App. 2002).

Here, Coleman testified that on September 3, 2009, he received a telephone call from Willis’ brother, during which Coleman heard Willis in the background. Willis’ brother threatened retaliation for Coleman shooting at Willis. Coleman told Willis’ brother to “come find him.” (Tr. 381). According to Coleman’s testimony, Willis knew where Coleman lived.

Shortly thereafter, Juan Martinez awoke to gun shots. When he looked out his window, he observed Willis, standing in the nearby alley, firing a gun in the direction of Milton Street. Willis subsequently fled. At approximately the same time, David Perez observed a white mini-van parked nearby on Dayton Street. He then saw an African-American male jump into the mini-van before it sped away.

Later that night, Coria and Cabral awoke to gunfire outside of their apartment; their apartment was located above the apartment of Torres, who had been involved in the shooting at Pulaski Street and from whom Willis had stolen a safe. Coria observed an African-American man matching Willis' description running in the parking lot adjacent to her apartment building. Nicole Johnson observed a light-colored mini-van leaving the parking lot.

Early the next morning, Jacques and Samuel heard Willis discussing a shooting; specifically, Willis indicated that he, his brother and cousins had "shot the mother fucker," (tr. 591), and "shot up his crib" (Tr. 620). Jacques also observed Willis carrying a large handgun, which Jacques believed to be a .40 caliber gun. Tests later determined that a .40 caliber handgun was used in the shootings on Milton Street and Prairie Avenue.

Given the evidence and testimony, we cannot say that the probable impact of the admission of the statements affected Willis' substantial rights or prejudiced him. Therefore, any error in admitting the evidence must be disregarded as harmless.⁵

2. Prosecutorial Misconduct

Citing to Rule 3.7 of the Rules of Professional Conduct, which provides that a “lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness,” Willis asserts that the prosecutor committed misconduct by “frequently cross examin[ing] [his] own witnesses by suggesting to them that they had made previous statements to police or even the prosecuting attorney that were inconsistent with their trial testimony.” Willis’ Br. at 9.

In reviewing a properly preserved claim of prosecutorial misconduct, we determine (1) whether the prosecutor engaged in misconduct, 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. Whether a prosecutor’s argument constitutes misconduct is measured by reference to case law and the Rules of Professional Conduct. The gravity of 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.

⁵ We note that in affirming the trial court’s admission of evidence, we may do so “on any legal theory supported by the record.” *Edwards v. State*, 724 N.E.2d 616, 620-21 (Ind. Ct. App. 2000). “It does not matter if the trial court’s stated reasons for its ruling are incorrect or even absent. As long as the decision itself is correct we will uphold it.” *Taylor v. State*, 615 N.E.2d 907, 912 (Ind. Ct. App. 1993).

Generally, hearsay evidence is inadmissible pursuant to Evidence Rule 802. However, an exception to the hearsay rule applies to a “statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health)[.]” Evid. R. 803(3). Thus, “state-of-mind declarations are admissible under Rule 803(3) when offered to prove or explain acts or conduct of the declarant[.]” *Camm v. State*, 908 N.E.2d 215, 228 (Ind. 2009), *reh’g denied*. We find that Burton’s statements regarding his intentions that night come within the purview of Evidence Rule 803(3). *See id.* at 230 (finding that the State was entitled to rely on Evidence Rule 803(3) where the trial court admitted testimony illustrating plan or intent to act).

Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006) (internal citations omitted).

In support of his contention that the prosecutor committed misconduct, Willis cites to the following testimony of Jackson, Jacques, and Ottbridge.

a. *Christina Jackson*

The State elicited testimony from Jackson that on the morning of September 4, 2009, she encountered Willis and Winston in the residence at 115 Milton Street. When the State asked whether she heard Willis say anything about “[w]hat they had done that night,” she replied, “We had learned what they had done before he even came over.” (Tr. 561). She, however, denied that Willis said “anything about what they did that night[.]” (Tr. 561). The State then attempted to elicit testimony from Jackson regarding statements she made to the police regarding what she may have heard Willis say. Jackson denied making statements to the police “about overhearing Wesley Willis and what he said he had done that evening and seen that evening,” (tr. 563), or that she heard him “say anything about Prairie” Avenue. (Tr. 564). Jackson denied making several other statements to the police, including that Willis had said, “we went there and aired out them mother fuckers,” (tr. 573), and that “she got hit[.]” (Tr. 574).

When asked whether she remembered telling the police and prosecutor differently “just last week,” (tr. 574), Willis objected on the grounds that the prosecutor was “impeaching his own witness for the sole purpose of introducing impeaching evidence as evidence.” (Tr. 575). The trial court overruled the objection but admonished the jury as

follows: “what any counsel says is not testimony. So a question is not testimony. Neither is argument testimony.” (Tr. 576).

b. *Jacques Thomas*

In response to the State’s question, Jacques initially denied that Willis said “I think I shot the mother fucker” (Tr. 588). The State then asked, “Do you remember talking to these guys⁶ and telling these guys that,” to which Willis replied, “Yeah, I do remember talking to them, but he didn’t say I think I shot the mother fucker.” (Tr. 588).

The State then questioned Jacques as follows:

Q Did he ever tell you that he went outside and got to firing?

A Which location? I don’t even know what you’re talking about?

Q Okay. Prairie.

A I don’t know nothing about the Prairie or—like I said, I didn’t even know this was the Miami shooting until you all—they came and got me.

Q Didn’t you tell the officers that he said we went to Prairie, we went to Miami?

A No, I never said that.

(Tr. 589-90).

Jacques later admitted that Willis had said “something like” “we shot the mother fucker[.]” (Tr. 591) (emphasis added). He also testified that Willis said, “we went to Miami,” and “we went to Prairie[.]” (Tr. 591) (emphasis added).

⁶ Presumably, police officers or representatives of the prosecutor’s office.

On cross-examination, Willis' counsel elicited testimony from Jacques that after the shootings, officers "raided" Jacques' house, where they found guns and drugs. (Tr. 597). After officers searched the residence, he consented to an interview with police. Willis' counsel then questioned Jacques as follows:

Q And [Sergeant Kaps] reminded you that there were federal agents right down the hall from where you were being interviewed and that if you didn't start talking to them and giving them something that you were going to buy yourself a federal case?

A Yeah, he said that.

Q He said that. And that's when you started telling them about [Willis] and all this other stuff. Right?

A Yeah, I told him.

(Tr. 599).

c. Charisse Ottbridge

When asked whether she "hear[d] any other voices in the background," (tr. 658), during her telephone conversation with Burton, Ottbridge replied that she recognized Winston's voice but could not remember whether she recognized other voices; just that she knew she "heard other voices." (Tr. 659). The State then questioned Ottbridge regarding prior statements she may have made to the police:

Q . . . When you talked to the police and when you talked to Ms. Battles and I, do you recall telling either the police or Ms. Battles and I that you heard a different voice?

A I'll be honest with you. I cannot remember.

.....

Q Do you recall if you told Ms. Battles that you had heard another voice on the phone when you were talking with Fred Burton that evening?

....

A I remember saying I talked to my cousin Fred. I heard [Winston]'s voice, and I heard other voices but I—I don't remember.

....

Q And didn't you tell her that you heard [Willis'] voice?

A It was my cousin [Winston].

....

Q My question is: Did you tell her that you heard [Willis'] voice?

A I don't remember saying that. I remember you asking me if I heard him in the background. If I recall I could have sworn I said I couldn't—I don't know for sure.

(Tr. 660-62).

A review of the record shows that Willis objected to the State's examination of Jackson. The trial court then gave an admonishment to the jury. Willis, however, did not move for mistrial. Willis further failed to object to the State's examination of Jacques and Ottbridge.

When an improper argument is alleged to have been made, the correct procedure is to request the trial court to admonish the jury. If the party is not satisfied with the admonishment, then he or she should move for mistrial. Failure to request an admonishment or to move for mistrial results in waiver. Where a claim of prosecutorial misconduct has not been properly preserved, our standard for review is different from that of a properly preserved claim. More specifically, the defendant must establish not only the grounds for the misconduct but also the additional grounds for

fundamental error. Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue. It is error that makes “a fair trial impossible or constitute[s] clearly blatant violations of basic and elementary principles of due process . . . present[ing] an undeniable and substantial potential for harm.”

Cooper v. State, 854 N.E.2d at 835.

Willis has failed to properly preserve his claim of prosecutorial misconduct. Accordingly, Willis must establish not only the grounds for prosecutorial misconduct but also the grounds for fundamental error. *See Cooper*, 854 N.E.2d at 835; *Booher v. State*, 773 N.E.2d 814, 818 (Ind. 2002).

The record shows that Willis’ counsel extensively cross-examined Jacques as to a possible motive for lying to the police; Jacques testified as to incriminating statements made by Willis and that he saw Willis with a gun the morning after the shootings. Jackson testified that she “had learned what [Willis] had done before he even came over.” (Tr. 561). Ottbridge adamantly denied informing authorities that she had heard Willis’ voice in the background.

Given this testimony, along with the additional evidence in this case, we find that Willis’ claims of prosecutorial misconduct do not constitute fundamental error. The State’s implied assertions that the witnesses’ testimony differed from their statements to police did not make a fair trial impossible or constitute blatant violations of basic and elementary principles of due process. We therefore find no reversible error.

3. Trial Court's Conduct

Willis next asserts that the trial court's conduct deprived him of a fair trial by creating the appearance of bias toward the State.

A trial before an impartial judge is an essential element of due process. The impartiality of a trial judge is especially important due to the great respect that a jury accords the judge and the added significance that a jury might give to any showing of partiality by the judge.

. . . [T]he jurors' customary respect for the judge "can lead them to accord great and perhaps decisive significance to the judge's every word and intimation. It is therefore essential that the judge refrain from any actions indicating any position other than strict impartiality."

In assessing a trial judge's partiality, we examine the judge's actions and demeanor while recognizing the need for latitude to run the courtroom and maintain discipline and control of the trial. . . . Bias and prejudice violate a defendant's due process right to a fair trial only where there is an undisputed claim or where the judge expressed an opinion of the controversy over which the judge was presiding.

Everling v. State, 929 N.E.2d 1281, 1287-88 (Ind. 2010) (internal citations omitted).

"[N]ot all untoward remarks by a judge constitute reversible error." *Cook v. State*, 734 N.E.2d 563, 567 (Ind. 2000). Rather, to constitute reversible error, the "remarks must harm the complaining party or interfere with the right to a fair trial." *Id.* "Just as important, '[t]he court does not engage in improper advocacy by stopping improper cross-examination on its own motion.'" *Id.* (quoting *Bruce v. State*, 268 Ind. 180, 375 N.E.2d 1042, 1066 (1978)).

Here, Willis cites to several purported instances of improper conduct. Specifically, Willis maintains that the trial court refused to allow Willis to introduce

evidence that Coleman lied to police regarding the location of his gun and that Coleman's father directed police to the gun. Willis, however, admits that ultimately "this evidence did come in." Willis' Br. at 14. Thus, we cannot say that the trial court's actions interfered with Willis' right to a fair trial.

Willis also cites to instances where the trial court limited cross-examination as to whether Detective Alex Arendt believed Willis was "shooting at something other than the house," (tr. 254), or "intending to shoot some object other than the house," (tr. 255); and whether, if all of the porch's blinds were closed at the time of the shooting, rather than just two blinds closed, as the police found them, it would change Detective Arendt's previous testimony regarding visibility from the alley into the porch.⁷ (Tr. 248).

Finding that the cross-examination called for speculation and might invade the province of the jury, the trial court refused to allow the questions. We cannot say that the trial court engaged in improper advocacy by limiting the line of questioning, which called for speculation or conjecture.

The trial court also sua sponte interposed an objection during Willis' cross-examination of Coleman regarding whether he had committed a crime by shooting at Willis. The trial court, however, allowed Willis to ask Coleman whether he believed he received consideration for this testimony.

In addition, the trial court attempted to limit Willis' cross-examination of Jacques on the basis that Jacques might incriminate himself when Willis sought an admission that

⁷ Detective Arendt had testified that one could "see into the [porch] windows from" the alley. (Tr. 192).

Jacques was “working off a beef with the feds” (Tr. 594). The trial court, however, allowed testimony that Jacques’ house had been raided; officers discovered guns and drugs during the raid; and officers informed Jacques that “there were federal agents right down the hall . . . and that if [Jacques] didn’t start talking to them and giving them something,” he was “going to buy [him]self a federal case[.]” (Tr. 599).

The record reveals that the admonishments took place outside of the jury’s presence, and the trial court allowed Willis to rephrase his questions and proceed with cross-examination. We therefore cannot say that the trial court crossed the barrier of impartiality and prejudiced Willis’ case.

Finally, outside of the jury’s presence, during the State’s examination of Jackson, the trial court stated, “I don’t like obfuscation of justice. . . .” (Tr. 571). The trial court also suggested that Jackson review a tape recording of her interview with police to refresh her memory.⁸

Even if we were to find the trial court’s remark regarding the “obfuscation of justice” improper, we cannot say that it prejudiced Willis as it was made outside of the jury’s presence. (Tr. 571). We also cannot say that the isolated comment regarding “obfuscation of justice” during a four-day trial demonstrated a lack of impartiality. (Tr. 571).

⁸ Willis further argues that “the trial court frequently made suggestions to the prosecutor about how to proceed.” Willis’ Br. at 16. Willis, however, fails to adhere to Indiana Appellate Rule 46(A)(8)(a), which requires that each contention be supported by citations to the “the Appendix or parts of the Record on Appeal relied on, in accordance with Rule 22.” Appellate Rule 22 provides that “[a]ny factual statement shall be supported by a citation to the page where it appears in an Appendix, and if not contained in an Appendix, to the page it appears in the Transcript or exhibits”

As to the trial court's suggestion that Jackson review a tape recording, we note that the State declined to have Jackson review the tape and proceeded with its examination of Jackson. There is no indication in the record that this remark, or any other remarks by the trial court, harmed Willis or interfered with his right to a fair trial.

4. Sentencing

Willis asserts that the trial court erred in sentencing him. Specifically, he argues that trial court abused its discretion in imposing a consecutive sentence for Count IV, criminal recklessness, and that his sentences for voluntary manslaughter and criminal recklessness are inappropriate.

a. *Consecutive sentence*

Asserting that his crimes arose from a single episode of criminal conduct, Willis maintains that the trial court abused its discretion in ordering that the sentence of eight years on Count IV be served consecutive to the sentences imposed on Counts I and II. We disagree.

We review a trial court's sentencing decision for an abuse of discretion. *Plummer v. State*, 851 N.E.2d 387, 390 (Ind. Ct. App. 2006). "When sentencing a defendant on multiple counts, an Indiana trial judge may impose a consecutive sentence if he or she finds at least one aggravator." *Smylie v. State*, 823 N.E.2d 679, 686 (Ind. 2005), *cert. denied*, 546 U.S. 976 (2005).

Indiana Code section 35-50-1-2(c), however, provides, in part, that

except for crimes of violence, the total of the consecutive terms of imprisonment . . . to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.

An “‘episode of criminal conduct’ means offenses or a connected series of offenses that are closely related in time, place, and circumstance.” I.C. § 35-50-1-2(b). “‘In determining whether multiple offenses constitute an episode of criminal conduct, the focus is on the timing of the offenses and the simultaneous and contemporaneous nature, if any, of the crimes.’” *Gilliam v. State*, 901 N.E.2d 72, 75 (Ind. Ct. App. 2009) (quoting *Williams v. State*, 891 N.E.2d 621, 631 (Ind. Ct. App. 2008)).

Another often-used test is whether a complete account of one charge can be related without referring to details of the other charge. *See id.* Although this test “‘can provide additional guidance,’” it is not “‘a critical ingredient’” in determining whether a defendant’s conduct constitutes an episode of criminal conduct. *Harris v. State*, 861 N.E.2d 1182, 1188 (Ind. 2007) (quoting *Reed v. State*, 856 N.E.2d 1189, 1200 (Ind. 2006)). “‘Rather, the statute speaks in less absolute terms’” *Id.*

Here, the record shows that at some time prior to 11:30 p.m. on September 3, 2009, Willis fired multiple gun shots at Coleman’s house on Milton Street, an “‘inhabited dwelling” where several people were gathered. *See* I.C. § 35-42-2-2(c) (defining class C felony criminal recklessness as “‘shooting a firearm into an inhabited dwelling or other building or place where people are likely to gather”’). Willis then drove to the Prairie

Avenue address, where, at least fifteen minutes after the Milton Street-shooting, he fired additional gun shots at Torres' apartment building.

Given the facts, Willis has failed to demonstrate that the two shootings were simultaneous and contemporaneous in nature. As the trial court found at least one valid aggravating circumstance, we find no abuse of discretion in imposing consecutive sentences.

b. *Inappropriate sentence*

Willis also asserts that his sentences for voluntary manslaughter and for both counts of criminal recklessness are inappropriate. We disagree.

We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). It is the defendant's burden to "persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007) (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007).

In determining whether a sentence is inappropriate, 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. The advisory sentence for a class A felony is thirty years, with a potential maximum sentence of fifty years. I.C. § 35-50-2-3. The advisory sentence for a class C felony is four years, with a potential maximum sentence of eight years. I.C. § 35-50-2-6. The trial court sentenced Willis to the maximum

sentence for voluntary manslaughter, as a class A felony, and for both counts of class C felony criminal recklessness.

Willis argues that his conduct and character do not support the maximum sentences. Generally, “[m]aximum sentences are reserved for the worst offenders and offenses.” *Johnson v. State*, 830 N.E.2d 895, 898 (Ind. 2005).

With regard to the worst offense and worst offender principle, however, we have previously explained as follows:

There is a danger in applying [this principle because] [i]f we were to take this language literally, we would reserve the maximum punishment for only the single most heinous offense. In order to determine whether an offense fits that description, we would be required to compare the facts of the case before us with either those of other cases that have been previously decided,--or more problematically--with hypothetical facts calculated to provide a “worst-case scenario” template against which the instant facts can be measured. If the latter were done, one could always envision a way in which the instant facts could be worse. In such case, the worst manifestation of any offense would be hypothetical and not real, and the maximum sentence would never be justified.

This leads us to conclude the following with respect to deciding whether a case is among the very worst offenses and a defendant among the very worst offenders, thus justifying the maximum sentence: We should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant’s character.

Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002).

Regarding the nature of his offenses, the record shows that Willis stole a safe and money from his then-friends, Coleman and Torres. In retaliation, Coleman attempted to shoot Willis. Willis then escalated the situation by firing multiple bullets at Coleman’s

home with a handgun, with no regard for its occupants. Willis' gunfire struck Owens in the leg and mortally wounded Perez.

Willis then left the Milton Street address and proceeded to Torres' apartment building, where he fired additional gunshots multiple times, again with no regard for the apartments' occupants. Willis' gunfire struck Cabral as he slept in an upstairs bedroom. As a result, Cabral spent one week in the hospital and caused him to move his family from their apartment because they were "[s]cared." (Tr. 532).

Regarding his character, it is true that Willis' criminal history is not the worst; however, he has a prior conviction from 2008 for carrying a handgun. Thus, the instant offenses are not his first offense involving a gun.

The record also reflects several dismissed charges and arrests, including felonies, with some charges being dismissed only three months prior to the current offenses. Also, several other charges were still pending against Willis when he committed the instant offenses and remain pending. A defendant's record of arrests "may be relevant to the trial court's assessment of the defendant's character in terms of the risk that he will commit another crime." *Cotto v. State*, 829 N.E.2d 520, 526 (Ind. 2005). Given the nature of Willis' offense and his character, we are not persuaded that his sentence is inappropriate.

Affirmed.

NAJAM, J., and BAILEY, J., concur.