



Christopher West appeals his convictions and sentence for two counts of dealing in cocaine as class B felonies<sup>1</sup> and one count of possession of cocaine as a class D felony.<sup>2</sup> West raises three issues, which we revise and restate as:

- I. Whether the trial court abused its discretion in instructing the jury on the defense of duress under the common law;
- II. Whether the trial court's conduct deprived him of a fair trial; and
- III. Whether West's sentence is inappropriate.

We affirm in part, reverse in part, and remand.

The relevant facts follow. On December 15, 2008, a confidential informant (the "C.I.") informed Fayette County Sheriff's Detective David Laughlin that he could obtain some cocaine from West's residence. Detective Laughlin met the C.I., searched him, and gave him \$180 and a recording device. The C.I. made a controlled buy of 2.85 grams of cocaine from West at West's residence sometime after 11:00 p.m.

Around midnight that same night, West stopped by the C.I.'s house and told him "he had some more to get rid of . . . ." Transcript at 300. West said that "he still had a small quantity of cocaine left if [he] knew anybody that wanted it or if [he] wanted anymore of it." Id. at 301. The C.I. told West that his "guys would be interested in it and not tonight." Id. The C.I. said that he would "get a hold of [West] tomorrow." Id. at 302. The next day, the C.I. contacted West, West told the C.I. to meet him at West's

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<sup>1</sup> Ind. Code § 35-48-4-1 (Supp. 2006).

<sup>2</sup> Ind. Code § 35-48-4-6 (Supp. 2006).

house, and the C.I. purchased 2.81 grams of cocaine from West at West's house. On February 12, 2009, the C.I. went to West's residence and returned with cocaine.

On April 13, 2009, the State charged West with: Count I, dealing in cocaine or narcotic drug as a class B felony on November 29, 2008; Count II, dealing in cocaine or narcotic drug as a class A felony on December 15, 2008; Count III, dealing in cocaine or narcotic drug as a class A felony on December 16, 2008; Count IV, dealing in cocaine or narcotic drug within 1000 feet of a youth program center as a class A felony on February 18, 2009; and Count V, dealing in cocaine or narcotic drug as a class B felony on February 12, 2009. On September 22, 2009, the State filed a motion to amend the charging information related to Counts II and III from class A felonies to class B felonies. The court granted the State's motion.

During the jury trial, West testified that he borrowed \$5,000 from Roy McQueen whom he had known for a number of years. According to West's testimony, West paid McQueen \$3,000 and told McQueen that he would give him \$2,000, and McQueen said "that was fine." Id. at 446. At some point, McQueen sent Gary Craft to West's house to pick up the money, and West told Craft that he had only \$250. Craft became "very violent" and pulled a gun on West. Id. at 447. Craft said "if [West] didn't have the money, they were gonna use [his] house once in a while . . . ." Id. at 448. West testified that he and his family were threatened. West identified two police officers that he saw with cocaine and testified that when he was arrested one of the officers whom he had seen with drugs pointed an assault rifle at him and "his face was saying don't f'in' say a

word.” Id. at 467. West also described a number of individuals who were involved in drug trafficking and how cocaine entered Fayette County.

At one point, West’s attorney indicated that he wanted to present West’s mother, Judy West, as a witness to testify regarding statements West made to her during a phone call from the jail. The prosecutor objected in part on hearsay grounds. The court sustained the prosecutor’s objection.

After the parties rested, the court discussed the proposed jury instructions. West proposed an instruction on the defense of duress based in part upon Ind. Code § 35-41-3-8. West’s proposed instruction stated in part: “This section does not apply to a person who recklessly, knowingly, or intentionally placed himself in a situation in which it was foreseeable that he would be subject to duress . . . .” Appellant’s Appendix at 93. The State proposed an instruction on duress which included the following statement: “Compulsion must arise without the negligence or fault of the defendant. (Love v. State[, 271 Ind. 473,] 393 N.E.2d 178 [(1979)]).” Id. at 99. West objected to the State’s instruction, and, after some discussion, the court gave the jury two instructions on duress, one based upon Ind. Code § 35-41-3-8 and one that the court called the “common law defense of duress.” Id. at 107. During closing argument, West’s attorney stated that there were two defenses of duress: a statutory defense and a common law defense.

During the prosecutor’s rebuttal argument, West’s attorney objected twice to the prosecutor’s statements. West’s attorney objected again, and the trial court overruled the objection. West’s attorney objected a fourth time, and the trial court stated:

Okay, this is enough. No more objections during the thing. You brought the issue up. We made those rulings outside the presence of the jury. We're not going to go into them. This is improper. You don't object during closing statements unless is [sic] done wrong to you. She has not done anything wrong.

Transcript at 555. West's attorney again objected, and the trial court stated: "One more outburst like that and I'll find you in contempt. We'll deal with this afterwards." Id. at 556.

The jury found West guilty of Count II, dealing in cocaine as a class B felony, Count III, dealing in cocaine as a class B felony, and the lesser included charge of possession of cocaine as a class D felony under Count V. The jury found West not guilty of Counts I and IV.

At the sentencing hearing, the State presented officers who testified that no gun was ever pointed at West. The court found the hardship on West's family due to his incarceration as a mitigator. The court stated that "I don't know if that's really too much of a hardship because anybody who goes off to prison for more than a couple of years, it's a hardship to everybody." Id. at 650-651. The court observed that "perjury committed during the trial in front of a jury to avoid or dispel a fact is an aggravating factor." Id. at 652. The court then stated: "Also your testimony as to your knowledge and involvement in the drug trafficking here in Fayette County, I consider to be an aggravating factor as well . . . ." Id. The court also found West's convictions in Franklin County as an aggravator.

The court sentenced West to fifteen years for Counts II and III, and three years for possession of cocaine as a class D felony under Count V. The court ordered the sentences to be served consecutively for an aggregate sentence of thirty-three years.

I.

The first issue is whether the trial court abused its discretion in instructing the jury on the defense of duress under the common law. Generally, “[t]he purpose of an instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict.” Overstreet v. State, 783 N.E.2d 1140, 1163 (Ind. 2003), cert. denied, 540 U.S. 1150, 124 S. Ct. 1145 (2004). Instruction of the jury is generally within the discretion of the trial court and is reviewed only for an abuse of that discretion. Id. at 1163-1164. To constitute an abuse of discretion, the instruction given must be erroneous, and the instructions taken as a whole must misstate the law or otherwise mislead the jury. Benefiel v. State, 716 N.E.2d 906, 914 (Ind. 1999), reh’g denied, cert. denied, 531 U.S. 830, 121 S. Ct. 83 (2000). Before a defendant is entitled to a reversal, he or she must affirmatively show that the erroneous instruction prejudiced his substantial rights. Gantt v. State, 825 N.E.2d 874, 877 (Ind. Ct. App. 2005). An error is to be disregarded as harmless unless it affects the substantial rights of a party. Oatts v. State, 899 N.E.2d 714, 727 (Ind. Ct. App. 2009); Ind. Trial Rule 61.

West proposed the following instruction:

Duress is an absolute and complete defense to the crimes as charged in this case if you find that the prohibited conduct of a defendant was compelled to do so by threat of imminent serious bodily injury to himself or another person.

Compulsion exists only if the force, threat, or circumstances are such as would render a person of reasonable firmness incapable of resisting the pressure.

*This section does not apply to a person who recklessly, knowingly, or intentionally placed himself in a situation in which it was foreseeable that he would be subject to duress;* or committed an offense against the person as defined in IC 35-42 – which consists of Homicide, Battery, Kidnapping, confinement, Sex Crimes, and Robbery.

The State has the burden of disproving this defense beyond a reasonable doubt.

Appellant's Appendix at 93 (emphasis added). The State proposed an instruction on duress which included the following statement: "Compulsion must arise without the negligence or fault of the defendant. (Love v. State 393 N.E.2d 178)." Id. at 99.

The court's Final Instruction 16 stated:

The defense of duress is defined by law as follows:

It is a defense that the person who engaged in the prohibited conduct was compelled to do so by threat of imminent serious bodily injury to himself or another person. With respect to offenses other than felonies, it is a defense that the person who engaged in the prohibited conduct was compelled to do so by force or threat of force. Compulsion under this section exists only if the force, threat, or circumstances are such as would render a person of reasonable firmness incapable of resisting the pressure.

*This section does not apply to a person who:*

*recklessly, knowingly, or intentionally placed himself in a situation in which it was foreseeable that he would be subject to duress;* or committed the offense of homicide, battery,

recklessness, provocation, kidnapping, confinement, sex crimes or robbery.

The State has the burden of disproving this defense beyond a reasonable doubt.

Id. at 106-107 (emphasis added). The court's Final Instruction 17 stated:

There is a common law defense of duress as follows: The compulsion which will excuse a criminal act must be clear and conclusive. *Such compulsion must arise without the negligence or fault of the defendant who claims this defense.* Furthermore, the alternative which the defendant is faced with must be instant and imminent. Compulsion to commit a crime by threats of violence sufficient to induce a well-grounded apprehension of death or serious bodily harm in case of refusal will excuse the defendant.

Id. at 107 (emphasis added).

On appeal, West argues that "Final Instruction 17 erroneously states the law on a duress defense when it states: 'Such compulsion must arise without the negligence or fault of the defendant who claims this defense.'" Appellant's Brief at 12. West argues that Instruction 17 "lowers the level of culpability to 'negligence or fault.'" Id. West argues that Instruction 17 "made it harder for [him] to establish a duress defense because it is easier for the State to show he acted negligently or with fault than it is to show he acted recklessly, knowingly or intentionally." Id. The State argues that "the trial court provided thorough instructions for the jury to make its determination." Appellee's Brief at 12. The State also argues that "[e]ven if the trial court had erred, such error would only be harmless." Id. The State argues that "[w]hile [West] initially objected to the instruction, he accepted the trial court's amendment to the State's tendered instruction," "[t]hus, any potential confusion was alleviated, and [West] has failed to demonstrate that

the instruction ‘prejudiced his substantial rights.’” Id. In his reply brief, West argues that he objected to the language in the original instruction because the standard of negligence or fault was more harmful to the defendant in this situation than the current defense allowed and that “[d]efense counsel while less displeased with the court’s instruction than the State’s tendered instruction, did not withdraw his objection.” Appellant’s Reply Brief at 3.

Initially, we observe that Final Instruction 16 was properly based upon Ind. Code § 35-41-3-8.<sup>3</sup> Final Instruction 17 was an alternate theory of defense, which West’s counsel addressed during his closing argument. Specifically, West’s counsel stated:

Let’s talk about the defense of duress. Now the guys that wrote our laws in the legislature have a statutory duress and the Court will give you an instruction on common law duress. Two different defenses. The common law case, the case law is about as old as I am, or actually it’s a lot older. I think it might date back for over 100 years. Uh, let me talk about the statutory duress. Instruction number 16, the defense of duress is defined by law as follows, it is a defense that the person who engaged in the prohibited conduct, delivering cocaine as prohibited, possessing cocaine as prohibited.

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<sup>3</sup> Ind. Code § 35-41-3-8 provides:

- (a) It is a defense that the person who engaged in the prohibited conduct was compelled to do so by threat of imminent serious bodily injury to himself or another person. With respect to offenses other than felonies, it is a defense that the person who engaged in the prohibited conduct was compelled to do so by force or threat of force. Compulsion under this section exists only if the force, threat, or circumstances are such as would render a person of reasonable firmness incapable of resisting the pressure.
- (b) This section does not apply to a person who:
  - (1) recklessly, knowingly, or intentionally placed himself in a situation in which it was foreseeable that he would be subjected to duress; or
  - (2) committed an offense against the person as defined in IC 35-42.

. . . The section does not apply to a person recklessly, knowingly or intentionally place [sic] himself in a situation in which it's foreseeable that he would subject himself to duress or committed basically a crime against a person like homicide, battery, so on. . . . Instruction number 17 deals with the common law defense of duress. So you have a couple of different duress concepts that you can use to justify not guilty. . . . The common law defense talks about such compulsion must arise without the negligence or fault of the defendant (inaudible) this defense. Negligence is a little different than recklessness in the statutory sense.

Transcript at 548-550.

Given that Final Instruction 16 was properly based upon Ind. Code § 35-41-3-8 and that Final Instruction 17 constituted an alternate theory of defense, we cannot say that West's substantial rights were prejudiced based upon all the information that was provided to the jury. Accordingly, we conclude that any error was harmless.<sup>4</sup>

## II.

The next issue is whether the court violated West's due process right to a fair trial. Indiana law presumes that a judge is unbiased and unprejudiced. Everling v. State, 929 N.E.2d 1281, 1287 (Ind. 2010); Ind. Judicial Conduct Canon 2.2 ("A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."). To rebut this presumption, a defendant must establish from the judge's conduct actual bias or prejudice that places the defendant in jeopardy. Everling, 929 N.E.2d at 1287. A trial before an impartial judge is an essential element of due process. Id. The impartiality of a trial judge is especially important due to the great respect that a jury accords the

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<sup>4</sup> We do not address whether Final Instruction 17 was a correct statement of the law.

judge and the added significance that a jury might give to any showing of partiality by the judge. Id. at 1287-1288.

“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.” Id. at 1288. “Even where the court’s remarks display a degree of impatience, if in the context of a particular trial they do not impart an appearance of partiality, they may be permissible to promote an orderly progression of events at trial.” Timberlake v. State, 690 N.E.2d 243, 256 (Ind. 1997) (quoting Rowe v. State, 539 N.E.2d 474, 476 (Ind. 1989)), reh’g denied, cert. denied, 525 U.S. 1073, 119 S. Ct. 808 (1999). “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, 929 N.E.2d at 1288.

The following exchange occurred during the prosecutor’s rebuttal:

[Prosecutor Jones]: . . . As [West] last night told you that this is all he knows about this organization, but today his attorney is telling you this is just the tip of the iceberg. This is the truth. My client told you the truth, and the whole truth, and nothing but the truth. Her informant didn’t. Told me the truth, where’s the rest of the iceberg that he knows about? If he doesn’t know about it, he can’t know there’s an iceberg.

[West’s Attorney]: Judge, I object. I noted that he only know [sic] of the tip of the iceberg, not that he knew of information that he wasn’t disclosing, that what he was only [sic] the tip of the iceberg.

JUDGE: He said it was the tip of the iceberg and he didn’t say anything else yesterday.

[Prosecutor Jones]: . . . . I've been accused, not through testimony, you never heard from Mr. West that I'm afraid of his ex-wives, and I'm not telling you that I am. I'm not testifying now. I'm not allowed to testify, but his attorney objected. I never said that . . .

[West's Attorney]: I'm going to object Judge, the objection's not even evidence.

JUDGE: She can comment on the evidence and the objection . . .

[West's Attorney]: If she's going to quote me then . . .

JUDGE: Was part of the record.

[West's Attorney]: Then I should be allowed to respond.

JUDGE: No, until she says something that was improper, you don't get to respond. So continue Miss Jones.

[Prosecutor Jones]: . . . . Even on closing you've been told that Joey and Scott are good guys, then believe them.

[West's Attorney]: Judge, I object. She fails to include Phillips' testimony which is different from the Joey 2.

JUDGE: Objection overruled.

[Prosecutor Jones]: Why didn't I call Judy to tell you what Chris said to her? Well, Chris can tell you that. Why didn't they call Judy?

[West's Attorney]: I'm going to object Judge. We tried to call Judy.

JUDGE: Okay, this is enough. No more objections during the thing. You brought the issue up. We made those rulings outside the presence of the jury. We're not going to go into them. This is improper. You don't object during closing statements unless is [sic] done wrong to you. She has not done anything wrong.

[West's Attorney]: That was wrong, Judge. We did try to call her.

JUDGE: It was not.

[Prosecutor Jones]: . . . . You know, he told you that Scott and Joey are good guys, but he also said that are [sic] guys aren't credible. He said that we should bring in agents from somewhere else, credit agents.

[West's Attorney]: Judge, I object. It was undercover.

JUDGE: One more outburst like that and I'll find you in contempt. We'll deal with this afterwards.

Transcript at 551-556. After the prosecutor finished her rebuttal, counsel approached the bench, and the court informed West's attorney that he could make objections afterwards. The court then read the final instructions to the jury. After the jury left the courtroom for deliberation, the following exchange occurred:

JUDGE: [The prosecutor] did not state all of the evidence, but she doesn't have to. She – leaving out part of it, talking only referring on his buy tape was all she had to do. She did it in her first part and the fact that she referred in the second part and didn't refer to his testimony, you could have brought that up on your part, but I don't know what they do in Marion County, but down here we don't object constantly throughout. So uh, with that uh, we'll see you all after lunch and we'll be ordering lunch for the jurors here shortly.

[West's Attorney]: Judge, may we approach.

JUDGE: You may.

COUNSEL AT BENCH

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[West's Attorney]: Okay, thank you Judge. Judge, during closing argument it wasn't my intent to be disruptive or disorderly. I have certain rules that I have to follow to effectively represent the defendant and if there's something made, if there's comments made by the prosecutor in closing argument that are – state misconduct, or they misstate the law, or the facts, I'm supposed to object to it, and if I don't, then it can be a

fundamental error analysis. My intent was to protect the defendant's rights and after that point where you said I couldn't say anything else, the record shows where it said, if there's another outburst then there's contempt. There's other things I wanted to object to when the prosecutor, the remainder of her argument, but I didn't feel that I could, because I didn't want to raise the ire of the Court. I think the prosecutor mentioned evidence about the defendant, the defendant's lack of warning for his two kids. Uh, that there was talk about . . .

JUDGE: That was probably a fair comment on the evidence.

[West's Attorney]: And there was also talk about my objection on the ex-wife's objections are not appropriate for her to comment to the jury on, and whether or not she was friends with the ex-wife (inaudible) she was testifying. And I think duress, there might have been a misstatement of the law on duress. With regard to snitch, I don't think was [sic] fair for her to comment on that because I think it was a statement of misconduct to call the defendant a snitch, appeal to prejudice. She asked the defendant to explain things on, on cross-examination, and then used that information to make him look like a snitch, and there were other things that she said that I was frankly just a little bit chilled, actually I was extremely chilled in my ability to log to all the issues there were with her to state misconduct in a closing argument.

JUDGE: On appeal if he's convicted. [Prosecutor]?

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JUDGE: . . . . The comments that I heard were all appropriate comments upon the evidence.

Id. at 563-566.

West argues that the judge's comments prejudiced him because they were "adversarial to defense counsel and communicated to the jury defense counsel's objections were meritless and frivolous enough he could be punished," "attacked defense counsel's competence and 'most likely gave the jury an unfavorable impression of the

defense,”” and “had a chilling effect on defense counsel’s ability to make further objections during the closing argument.” Appellant’s Brief at 16-17 (quoting Everling, 929 N.E.2d at 1290). West points out that he “identified four things to which he would have objected” at the trial. Appellant’s Brief at 17. West concedes that he did not request an admonishment but argues that the court’s comments were fundamental error and denied West due process of law.

West waived review of this issue by failing to request an admonishment or request a mistrial. See Mitchell v. State, 726 N.E.2d 1228, 1235 (Ind. 2000) (holding that “[t]he correct procedure to be employed when a judge makes an allegedly improper comment is to request an admonishment and, if further relief is desired, to move for a mistrial,” and that “[f]ailure to request an admonishment or move for a mistrial results in waiver of the issue”), reh’g denied, abrogated on other grounds by Beattie v. State, 924 N.E.2d 643 (Ind. 2010). To the extent that West claims fundamental error, the fundamental error doctrine has been described as extremely narrow. Mitchell, 726 N.E.2d at 1236. To qualify as fundamental error, “an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible.” Id. (citing Willey v. State, 712 N.E.2d 434, 444-445 (Ind. 1999)). To be fundamental error, an 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.” Id. (citing Wilson v. State, 514 N.E.2d 282, 284 (Ind. 1987)).

To the extent that West points out that he “identified four things to which he would have objected” at the trial, West does not develop this argument on appeal or explain how these “four things” prejudiced him. Appellant’s Brief at 17. Moreover, while the judge may have exhibited impatience, we cannot say the trial judge’s comments here were “so prejudicial to the rights of the defendant as to make a fair trial impossible.” Willey, 712 N.E.2d at 444-445. See Spaulding v. State, 533 N.E.2d 597, 603 (Ind. Ct. App. 1989) (noting that the trial court’s allegedly biased comment was part of the court’s explanation of its ruling and that the court’s comment did not appear to be intentionally designed to discredit, and holding that the trial court’s comment, while perhaps unnecessary, was not so egregious as to deny the defendant a fair trial or result in fundamental error), trans. denied; see also Timberlake, 690 N.E.2d at 256-257 (declining to find that a trial judge demonstrated partiality where the judge’s remarks displayed a degree of impatience). We cannot say that West has shown that the trial judge’s comments constituted fundamental error so as to warrant a new trial.

### III.

The next issue is whether West’s sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. 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.” Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State,

848 N.E.2d 1073, 1080 (Ind. 2006). West argues that the trial court's order that his sentences for Counts II and III be served consecutively are inappropriate under Beno v. State, 581 N.E.2d 922 (Ind. 1991), and Gregory v. State, 644 N.E.2d 543 (Ind. 1994), reh'g denied. West also argues that his sentence is inappropriate because it was enhanced.

Initially, we address whether West's sentence is inappropriate in light of Beno and Gregory. In Beno, the defendant participated in the sale of cocaine during two controlled buys on April 14 and April 18, 1989. 581 N.E.2d at 923. The two sales "were practically identical, except that the weight of the cocaine in the first sale was 3.1 grams, while the weight in the second was 2.9 grams." Id. The trial court sentenced the defendant to the maximum sentence for each offense and ordered that the sentences be served consecutively. Id. On appeal, the defendant argued that his sentence was manifestly unreasonable. Id.

The Indiana Supreme Court observed that the defendant was convicted of committing virtually identical crimes separated by only four days. Id. at 924. "Most importantly, the crimes were committed as a result of a police sting operation." Id. The Court held:

As a result of this operation, [the defendant] was hooked once. The State then chose to let out a little more line and hook [the defendant] for a second offense. There is nothing that would have prevented the State from conducting any number of additional buys and thereby hook [the defendant] for additional crimes with each subsequent sale. We understand the rationale behind conducting more than one buy during a sting operation, however, we do not consider it appropriate to then impose maximum and

consecutive sentences for each additional violation. If [the defendant], for instance, had sold drugs to different persons, or if he had provided a different type of drug during each buy, the consecutive sentences imposed might seem more appropriate. Here, however, because the crimes committed were nearly identical State-sponsored buys, consecutive sentences were inappropriate.

Id. The Court ordered that the defendant's sentence be reduced to the maximum term for each offense to be served concurrently. Id.

In Gregory, the defendant sold cocaine to an informant on four separate occasions during a ten day period. 644 N.E.2d at 544. As the result of the government sting operation, the defendant was convicted of four counts of selling cocaine to the same police informant. Id. The trial court sentenced the defendant to the presumptive term of thirty years on each count and ordered each count to be served consecutively. Id. The Indiana Supreme Court addressed whether the consecutive sentences were manifestly unreasonable and held that “[c]onsecutive sentences are not appropriate when the State sponsors a series of virtually identical offenses.” Id. Specifically, the Court held:

As in Beno, Gregory sold the same drug to the same informant on several occasions over a short period of time. Presumably, the police could have set up any number of additional transactions, each time adding an additional count against Gregory. While the police may find it necessary to conduct a series of buys, the trial court should be leery of sentencing a defendant to consecutive terms for each count. We hold that on these facts, a sentence of 120 years was inappropriate.

Id. at 546. The Court remanded with instructions to sentence the defendant to one enhanced term of fifty years for count I and three presumptive terms of thirty years for counts II, III, and IV, to run concurrently. Id.

West argues that the C.I.'s claim that "West contacted him after the December 15 buy is uncorroborated and conflicts with evidence from the December 16 buy tape." Appellant's Brief at 20. West argues that "[t]he December 16 buy starts off with West accusing [the C.I.] of being an informant in the past," and "[i]t does not make sense to solicit business from someone you suspect could be setting you up." Id. at 20-21. West also argues that Beno and Gregory are instructive and appears to argue that the consecutive terms for Counts II and III should be ordered to be served concurrent with each other given the nearly identical nature of the cocaine sales to the same informant and the close temporal proximity. The State argues that Beno is distinguishable because the crimes were not virtually identical in that the basis of dealing in cocaine in Count II was initiated by the confidential informant and the basis of dealing in cocaine in Count III was initiated by West.

The record reveals that West sold cocaine to the C.I. on the evening of December 15, 2008, and the afternoon of December 16, 2008. Both buys involved a similar amount of cocaine, both occurred at West's residence, and the buys occurred within a short period of time. While West called the C.I. after the initial sale, the C.I. later called West to arrange the controlled buy. Similar to Beno and Gregory, we conclude that the offenses which formed the basis for Counts II and III were virtually identical. Based upon Beno and Gregory, we conclude that the imposition of consecutive sentences for Counts II and III was inappropriate under the circumstances. Accordingly, we reverse

the trial court's order that Counts II and III be served consecutively and order that the sentences be served concurrently for an aggregate sentence of eighteen years.

To the extent that West argues that his sentence was inappropriate because he received aggravated sentences, we disagree. Our review of the nature of the offense reveals that West sold the C.I. 2.85 grams of cocaine and 2.81 grams of cocaine, and later possessed cocaine on February 12, 2009. Our review of the character of the offender reveals that West was involved with the Boys and Girls Club, Shriners, and Kiwanis. West has two children and one baby that was born while West was incarcerated. West was convicted in March 2010 of fraudulent sale of securities, sale of unregistered securities, and being an unregistered investment advisor. We also observe that the trial court found that West had committed perjury during the trial as an aggravating factor.

After due consideration of the trial court's decision and having reversed the trial court's order that Counts II and III be served consecutively, we cannot say that the sentence of fifteen years for Counts II and III and three years for Count V is inappropriate in light of the nature of the offense and the character of the offender. See Field v. State, 843 N.E.2d 1008, 1012 (Ind. Ct. App. 2006) (concluding that the defendant's sentence of sixteen years for conspiracy to commit dealing in a schedule II controlled substance was not inappropriate), trans. denied.

For the foregoing reasons, we affirm West's convictions and reverse the trial court's imposition of consecutive sentences as to Counts II and III.

Affirmed in part, reversed in part, and remanded.

DARDEN, J., and BRADFORD, J., concur.