

Appellant-defendant James Lee appeals his convictions and sentence that was imposed for Robbery,¹ a class B felony, and Possession of a Firearm by a Serious Violent Felon,² a class B felony. Specifically, Lee argues that the trial court abused its discretion by issuing a jury instruction charging the jury that it should find Lee guilty if the State proved the elements of the offense beyond a reasonable doubt. In addition, Lee asserts that the trial court erred when it overruled his objection to a jury question asking for a police officer's opinion as to whether other potential suspects resembled Lee. Finally, Lee contends that the trial court abused its discretion when it sentenced Lee to two consecutive seventeen-year terms of imprisonment and that the total thirty-four-year sentence is inappropriate in light of the nature of the offenses and his character. Finding no error, we affirm the judgment of the trial court.

FACTS

Around 5:30 a.m. on April 9, 2008, Lori May was walking to her vehicle in Indianapolis when Lee forced May into her vehicle, pointed a gun at her stomach, and ordered her to take him to an ATM. May protested that she had no cash or an ATM card, and after Lee examined the contents of her purse and vehicle, he stole some cigarettes and fled.

May alerted the police and provided them with a description of Lee. Within a short period of time, two men matching that description were stopped, but May excluded

¹ Ind. Code § 35-42-5-1.

² Ind. Code § 35-47-4-5.

them. Several days later, May examined hundreds of pictures of potential suspects, but did not identify Lee.

On April 18, 2008, May saw Lee standing on the corner of Fourteenth and Pennsylvania Streets as she was driving home. Lee also saw May and made a mock shooting gesture with his hand as she drove passed him. May alerted the police, but they were unable to apprehend Lee that day. On April 20, 2008, May once again saw Lee standing on the same corner and called the police, who later detained Lee after he had fled.

On April 24, 2008, the State charged Lee with robbery, a class B felony, carrying a handgun without a license, a class A misdemeanor with a class C felony enhancement, and possession of a firearm by a serious violent felon, a class B felony.³ At Lee's jury trial, which commenced on June 30, 2008, May testified that during the offenses, Lee was "almost eerily calm, like he was very comfortable [with] what he was doing." Tr. p. 26. In addition, the jury submitted a question to Officer Shirey asking him whether Lee looked similar to the two men that May had previously excluded as suspects. Over Lee's objection, Officer Shirey testified that Lee closely resembled the second suspect shown to May.

The jury found Lee guilty of robbery and carrying a handgun without a license, a class A misdemeanor. Lee waived his right to a jury trial on the class C felony

³ The State also filed a habitual offender enhancement against Lee. However, after a bifurcated trial, the trial court ultimately declined to allow the State to amend its habitual offender allegation to conform to the evidence, so the enhancement is not an issue on appeal.

enhancement to carrying a handgun without a license and on possession of a firearm by a serious violent offender. The bench trial for both offenses was continued until the sentencing hearing, which commenced on July 10, 2008. The trial court found sufficient evidence to support the enhancement and to convict Lee of possession of a firearm by a serious violent offender; however, the trial court merged the two offenses.

During the sentencing portion of the hearing, the trial court determined that Lee's proposed mitigating circumstances of drug addiction and hardship on his dependents were insignificant because Lee had been given many opportunities to address his addiction in the past and there was insufficient evidence concerning the paternity of his children. In addition, the trial court found that Lee's criminal history was a significant aggravating factor. After concluding that the aggravating factors outweighed the mitigating factors, the trial court sentenced Lee to seventeen years on each conviction, to be served consecutively, for an aggregate term of thirty-four years in the Department of Correction. Lee now appeals.

DISCUSSION AND DECISION

I. Jury Instruction

Lee argues that the trial court erred when, over Lee's objection, it instructed the jury that it should find Lee guilty if the State proved all the elements of the offenses beyond a reasonable doubt. Lee maintains that the term "should" is perceived as

mandatory, which contradicts Article I, Section 19 of the Indiana Constitution, giving a defendant the right to have a jury determine the law and facts.⁴ Appellant's Br. p. 7.

The trial court has broad discretion in the manner of instructing the jury, and we will review its decision only for an abuse of discretion. Stringer v. State, 853 N.E.2d 543, 548 (Ind. Ct. App. 2006). In reviewing a challenge to a jury instruction, an appellate court must consider "whether the instruction correctly states the law, whether there was evidence in the record to support the giving of the instruction, and whether the substance of the tendered instruction is covered by other instructions." Hubbard v. State, 742 N.E.2d 919, 921 (Ind. 2001). Jury instructions are to be considered as a whole, and before a defendant is entitled to reversal, he must affirmatively show that the instructional error prejudiced his substantial rights. Stringer, 853 N.E.2d at 548.

As a general rule, a trial court may not issue a mandatory jury instruction. Pritchard v. State, 248 Ind. 566, 575, 230 N.E.2d 416, 421 (1967). In other words, it may not instruct the jury that it "shall" convict the defendant. Id. Mandatory instructions impinge upon the jury's right under Article I, Section 19 of the Indiana Constitution to determine the law and the facts of the case. Id.

However, Indiana courts have held that the prohibition against mandatory instructions is not violated by the use of the word "should" if the trial court delineates the material allegations to be proved or instructs the jury that it is to determine the law and

⁴ Lee also maintains that the "should" instruction denied him due process under Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 12 of the Indiana Constitution. However, Lee failed to develop an argument to support this bald assertion or support it with citations to authority. Thus, he has waived the issue. See Lyles v. State, 834 N.E.2d 1035, 1050 (Ind. Ct. App. 2005) (holding that the defendant waived his argument under the U.S. and Indiana Constitutions because he failed to develop an argument or support it with citations to authority).

the facts of the case. Mitchem v. State, 503 N.E.2d 889, 891 (Ind. 1987); Womack v. State, 738 N.E.2d 320, 325-26 (Ind. Ct. App. 2000).

In the instant case, Preliminary Instructions Eight through Eleven instructed the jury as to the material allegations that that the State had to prove beyond a reasonable doubt. Appellant's App. p. 51-55. In addition, Preliminary Instruction Three provided that "[u]nder the Constitution of Indiana the jury has the right to determine both the law and the facts." Id. at 45. Similarly, Final Instruction Eight provided that "[y]our verdict should be based on the law and the facts as you find them. It should not be based on sympathy or bias." Id. at 72. Thus, the jury was instructed as to both the material allegations that the State needed to prove and that it determines the law and facts, and consequently, the use of the word "should" was not an abuse of discretion.

The above analysis notwithstanding, Lee points to Parker v State, 698 N.E.2d 737, 742 (Ind. 1998), for the proposition that instructing the jury that it "should" convict interferes with the defendant's right to have a jury determine both the law and the facts. Parker, however, is distinguishable from the instant case.

In Parker, the defendant challenged the trial court's instruction to the jury that it "should" find the defendant is a habitual offender if the State proved the predicate felonies. 698 N.E.2d at 741. Our Supreme Court held that even though the trial court had given two preliminary instructions informing the jury that it was the judge of the facts and the law, the instructions had been given at the beginning of the guilt phase portion of the trial and the jury did not reconvene for the habitual offender portion of the trial until two weeks after it had rendered its guilty verdict. Id. at 742-43. Thus, because

of the time gap, the preliminary instructions were inadequate to compensate for the “should” instruction. Id. at 743.

As stated earlier, the jury herein was instructed in both the preliminary and final instructions that it was charged with determining the facts and the law. Thus, the large time gap that was present in Parker is not present in this case, and Lee’s argument fails.

II. Jury Question

Lee contends that the trial court abused its discretion when it overruled his objection to a jury question that asked Officer Shirey, “does the Defendant look similar to the two men that you had stopped, either facially or physically?” Tr. p. 106. Specifically, Lee maintains that Officer’s Shirey’s response that Lee looked very much like the second person that he stopped was impermissible opinion testimony.

As an initial matter, the State argues that Lee waived his claim pertaining to this issue “by failing to raise to the trial court the ground of error argued on appeal.” Appellee’s Br. p. 11. A party may not raise one basis of error at the trial level and then raise another basis on appeal. Patton v. State, 837 N.E.2d 576, 579 (Ind. Ct. App. 2005). However, Lee responds that his argument on appeal is meant to show how he was prejudiced by the juror question.

On appeal, Lee argues that Officer’s Shirey’s testimony was improper under Indiana Evidence Rule 704(b), which provides that “[w]itnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions.” However, at trial, Lee objected on the ground that the testimony would not be helpful to the jury. This

appears to be an argument based upon Indiana Evidence Rule 701(b), which provides that opinion testimony by lay witnesses must be “helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue.” Therefore, because Lee argues a different basis of error on appeal, he has waived the issue.

Waiver notwithstanding, a trial court has broad discretion in ruling on the admissibility of evidence, and we will reverse only for an abuse of discretion. Washington v. State, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. Id. Even if the trial court erroneously admits evidence, we will not reverse if the admission was harmless error. Micheau v. State, 893 N.E.2d 1053, 1059 (Ind. Ct. App. 2008).

Here, Officer Shirey’s testimony did not express an opinion as to the truth or falsity of May’s testimony. In fact, Officer Shirey never mentioned May’s testimony when he answered the jury’s question. Cf. Hornbostel v. State, 757 N.E.2d 170, 182 (Ind. Ct. App. 2001) (holding that it was error for the trial court to allow the State to ask a police detective whether he believed the defendant’s assertions that he did not intend to kill the victim). Thus, Officer Shirey’s testimony was not improper opinion testimony under Indiana Evidence Rule 704(b).

III. Sentencing

A. Abuse of Discretion

Lee argues that the trial court abused its discretion by failing to set forth in its sentencing statement its reasons for imposing consecutive sentences.

We initially observe that sentencing decisions rest within the trial court's sound discretion and are reviewed on appeal only for an abuse of that discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (2007). Trial courts are required to enter sentencing statements whenever imposing a sentence for a felony offense. 868 N.E.2d at 490. The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. Id. If the recitation includes the finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating factors and explain why each circumstance has been determined to be mitigating or aggravating. Id. A trial court may abuse its discretion by entering a sentencing statement that includes reasons for imposing a sentence not supported by the record, omits reasons clearly supported by the record, or includes reasons that are improper as a matter of law. Id. at 490-91.

At the sentencing hearing, Lee maintained that his long history of drug addiction and the hardship on his dependents were mitigating factors. In its oral sentencing statement, the trial court acknowledged that Lee did have a long history of drug addiction, but determined that it was not a significant mitigating factor because Lee "has had multiple opportunities to change his behavior through probation, through drug treatment programs and has not been successful." Tr. p. 221.

As for the hardship on Lee's dependents, the trial court observed that the record was silent as to the children's paternity and source of care. Therefore, the trial court concluded that the hardship on his dependents was not a significant mitigating factor either.

Turning to the aggravating factors, the trial court noted Lee's "significant criminal history." Id. at 222. Specifically, in May 1989, Lee was convicted of a misdemeanor driving offense. Lee's first drug conviction was a few months later in August 1989, and in October 1989, Lee had a drug-related common nuisance conviction. Id.

The trial court continued through Lee's criminal history, noting that his first felony conviction for possession of cocaine occurred in July 1990. Lee was allowed to avoid imprisonment and was placed on probation, which was revoked in August 1991. In August 1990, just one month after his possession of cocaine conviction, Lee had a misdemeanor battery conviction, for which he was placed on probation. Id. at 223. However, his probation was later revoked because he failed to comply with the terms of his probation.

In June 1993, Lee was convicted of dealing in cocaine, and in August 1998, he was convicted of carrying a handgun without a license. In April 2002, Lee was convicted of invasion of privacy. Id. He was placed on probation, which was subsequently revoked because he failed to complete domestic abuse counseling. In February 2004, Lee received his fourth and fifth felony convictions for criminal confinement and auto theft. Id. at 223-24.

After detailing Lee's criminal history, the trial court concluded that the "aggravating circumstances significantly outweigh the mitigating circumstances," and sentenced Lee to two consecutive terms of seventeen years for an aggregate term of thirty-four years imprisonment in the Department of Correction. Id. at 224. As outlined

above, the trial court provided detailed reasons for imposing consecutive terms, and this claim fails.

B. Inappropriate Sentence

Finally, Lee argues that his thirty-four-year sentence is inappropriate in light of the nature of the offenses and his character pursuant to Indiana Appellate Rule 7(B). In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Our Supreme Court has recently further articulated the role of appellate courts in reviewing a 7(B) challenge:

Ultimately the length of the aggregate sentence and how it is to be served are the issues that matter. . . . And whether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case. . . . There is thus no right answer as to the proper sentence in any given case. As a result, the role of an appellate court in reviewing a sentence is unlike its role in reviewing an appeal for legal error or sufficiency of evidence. . . .

The principal role of appellate review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived “correct” result in each case. In the case of some crimes, the number of counts that can be charged and proved is virtually entirely at the discretion of the prosecution. For that reason, appellate review should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count.

Cardwell v. State, 895 N.E.2d 1219, 1224-25 (Ind. 2008) (footnotes omitted).

Indiana Code section 35-50-2-5 provides that “[a] person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years.” Here, Lee was sentenced to seventeen years for each class B felony. Thus, Lee was sentenced to seven years more than the advisory sentence for each class B felony conviction.

As for the nature of the offenses, Lee approached May from behind as she was walking alone to her vehicle in the dark and pointed a gun at her stomach as he ordered her to drive to an ATM. His plan was thwarted only by the fact that May was not carrying her ATM card. In addition, after being victimized, May no longer wished to live where the incident had occurred and moved two weeks after the incident. Moreover, after the offenses, Lee attempted to intimidate May by making a shooting gesture at her as she drove past him.

As for Lee’s character, as previously discussed, Lee has a lengthy criminal history, and the instant offenses represent his sixth and seventh felony convictions. As a result of his prior convictions, Lee has received a variety of rehabilitative opportunities, but has failed to reform.

In addition, Lee has not successfully addressed his cocaine addiction. Lee has abused cocaine for twenty years and has participated in substance abuse counseling on at least two occasions, but has not been sober since 2004. Furthermore, although Lee claims to support ten children, he stated that drug abuse, which at times cost him \$500 a day, “wasn’t hurting nobody else.” Tr. p. 212; Green App. p. 10. The totality of the

nature of the offenses and Lee's character indicates that his aggregate thirty-four-year sentence is not inappropriate.

The judgment of the trial court is affirmed.

NAJAM, J., and KIRSCH, J., concur.