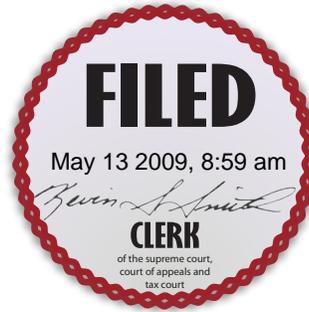


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

**MARCE GONZALEZ, JR.**  
Dyer, Indiana

**GREGORY F. ZOELLER**  
Attorney General of Indiana

**ZACHARY J. STOCK**  
Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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COREY LEE PERKINS,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 45A03-0811-CR-529

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APPEAL FROM THE LAKE SUPERIOR COURT  
The Honorable Thomas P. Stefaniak, Jr., Judge  
Cause No. 45G04-0804-FA-15

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**May 13, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## Case Summary

Corey Lee Perkins appeals his conviction and sentence for class A felony attempted murder. We affirm.

### Issues

Perkins raises three issues, which we restate as follows:

- I. Whether the State presented sufficient evidence to rebut Perkins's alibi defense;
- II. Whether the trial court erred in denying his motion for mistrial; and
- III. Whether his sentence is inappropriate in light of the nature of the offense and his character.

### Facts and Procedural History<sup>1</sup>

Perkins had a romantic relationship with Jackie Montantes, and they had two children together. While still involved with Perkins, Montantes began a relationship with Kameron Rodgers. In March of 2008, Montantes and Rodgers became "serious." Tr. at 77. When Perkins found out, he became angry. Armed with a shotgun, he went to Montantes's East Chicago apartment. He wanted Montantes to invite Rodgers to her apartment, so Perkins could "blow his head off." *Id.* at 89. Montantes refused. Perkins pointed the gun at her and told her that he would blow her head off, too. *Id.* at 90. Montantes locked herself and her children in her bedroom until Perkins left several hours later.

On April 7, 2008, Montantes left work and picked up her children. As she drove

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<sup>1</sup> We direct Perkins's attorney's attention to Indiana Appellate Rule 46(A)(10), which provides, "The brief shall include any written opinion, memorandum of decision or findings of fact and conclusions thereon relating to the issues raised on appeal. When sentence is at issue in a criminal appeal, the brief shall contain a copy of the sentencing order."

home, Perkins attempted to flag her down. Montantes wanted to avoid Perkins, so she decided not to return home immediately. Instead, she went to the Harbor Food Center parking lot. While she was sitting in her parked car with her children, Perkins suddenly appeared, reached in her partially opened window, and grabbed her car keys out of the ignition. He got in the car, and the two began to argue. At some point, they both noticed that Rodgers was in the back seat of a car in the same parking lot. Perkins drove Montantes's car over to Rodgers and told him that he "was going to blow [his] ... head off." *Id.* at 16. Perkins told the driver of the car that if Rodgers was still in his car when Perkins returned, he would "shoot this ... car up too." *Id.* Perkins drove away with Montantes and her children.

At approximately 3:00 a.m., on April 10, 2008, Rodgers arrived at Montantes's apartment after a night of drinking with friends. He went to sleep. At about 7:05 a.m., Montantes and her children left, leaving Rodgers, who was still asleep, alone in the apartment. Sometime between 7:05 a.m. and 7:28 a.m., Rodgers was awakened by the sound of someone ascending the stairs. Rodgers opened his eyes and saw Perkins. Rodgers sat up. Perkins shot him with a sawed-off shotgun and ran away. Rodgers saw a hole in his chest. He had a four-by-six inch wound that was about one and one-half inches deep.

Rodgers called 911 and mentioned Perkins's name to the emergency dispatcher. Shortly after 7:30 a.m., paramedics arrived and took Rodgers to the hospital. Before Rodgers was taken to surgery, a detective asked him if he knew the name of the person who shot him. Rodgers responded "quickly and clearly" that "Corey Perkins" had shot him. *Id.* at 241. The detective warned Rodgers that his injuries were life-threatening and asked Rodgers if he was

“positive that Corey Perkins was the person that shot him.” *Id.* at 242. Rodgers nodded and said, “yes.” *Id.* Rodgers ultimately survived and testified against Perkins at trial.

On April 15, 2008, the State charged Perkins with Count I, class A felony attempted murder; Count II, class B felony aggravated battery; Count III, class B felony burglary; Count IV, class C felony battery; and Count V, class D felony residential entry. Following a three-day trial, on August 20, 2008, a jury found Perkins guilty as charged.

On September 26, 2008, Perkins was sentenced. The trial court found that Counts II, III, IV, and V merged with Perkins’s attempted murder conviction and therefore did not enter judgment of conviction on those counts. The trial court sentenced Perkins to forty-eight years in the Department of Correction. In so doing, the trial court found no mitigating circumstances. The trial court found the following aggravating circumstances: (1) Perkins’s prior criminal record, including one felony conviction, six misdemeanor convictions, and numerous probation violations; (2) that prior leniency had not deterred Perkins’s criminal behavior; (3) and the nature of the crime, including the historical animosity between Perkins and Rodgers and Perkins’s prior threats to Rodgers. *Id.* at 424-27. Perkins appeals.

## **Discussion and Decision**

### ***I. Sufficiency of the Evidence***

At trial, Perkins presented an alibi defense through the testimony of his sister, Tami Carpenter. Carpenter testified that on April 9, 2008, Perkins came to her Whiting apartment at 9:30 p.m. and spent the night. *Id.* at 282. She woke up the next morning at her usual time, 5:00 a.m., drank coffee, and went on the computer. *Id.* at 285. She testified that she did not

hear or see anyone leave between 5:00 a.m. and 7:45 a.m. *Id.* at 286-87. According to Carpenter, Perkins did not have a key to her apartment. *Id.* at 284. Without a key, someone in the apartment would need to open the apartment door, go down a set of stairs, and open another door to permit someone to enter. *Id.* at 283-84. Her apartment did not have a back door. *Id.* at 284. Carpenter also testified that at approximately 9:00 a.m., Perkins left with her teenage son to pick up breakfast at McDonalds. *Id.* at 325. A few minutes later, Montantes called her to ask where Perkins was and told her that “[t]his boy just shot up my house[.]” *Id.* at 285. Carpenter thought that Montantes was “just playing games” because Perkins had left just ten minutes earlier. *Id.* at 286.

On appeal, Perkins asserts that the State failed to present sufficient evidence to rebut his alibi defense. In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. *Perez v. State*, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007), *trans. denied*. “We will consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment.” *Id.* at 213. ““The State is not required to rebut directly a defendant’s alibi. It may disprove the alibi by proving its own case in chief beyond a reasonable doubt.”” *Stephenson v. State*, 742 N.E.2d 463, 498 (Ind. 2001) (quoting *Lott v. State*, 690 N.E.2d 204, 209 (Ind. 1997)). “The jury may choose not to believe an alibi if the State’s evidence in chief is such to render disbelief reasonable.” *Lott*, 690 N.E.2d at 209.

The State contends that there was sufficient evidence to allow a reasonable fact-finder to reject the alibi defense and conclude beyond a reasonable doubt that Perkins attempted to murder Rodgers. We agree.

At trial, Rodgers testified that he saw Perkins at the top of the stairs and that Perkins shot him. Further, the record shows that, beginning with his 911-call, Rodgers had consistently and unequivocally identified Perkins as the shooter. A police detective testified that Rodgers identified Perkins as the shooter “quickly and clearly.” Tr. at 241. Rodgers affirmed that Perkins was the shooter in the face of warnings that his condition was life-threatening. In addition, there was ample evidence of motive. The record reveals that Perkins was so angry about Montantes’s relationship with Rodgers that on two occasions he had threatened to shoot Rodgers. Thus, there is substantial evidence of probative value that Perkins attempted to murder Rodgers.

On the other hand, Carpenter testified that Perkins was at her home and that she did not hear or see anyone leave her home between 5:00 a.m. and 7:45 a.m. Carpenter’s testimony notwithstanding, the victim’s identification of Perkins as the shooter is so strong that we cannot say it was unreasonable for the jury to disbelieve Perkins’s sister’s testimony. ““It is the province of the jury to hear the testimony given by the witnesses and to assess the truth and veracity of each witness.”” *White v. State*, 706 N.E.2d 1078, 1080 (Ind. 1999) (quoting *Wear v. State*, 593 N.E.2d 1179, 1179 (Ind. 1992)). Accordingly, we conclude that

there was sufficient evidence from which the jury could find beyond a reasonable doubt that Perkins committed attempted murder.<sup>2</sup>

## *II. Mistrial*

At trial, the following cross-examination of Carpenter occurred:

Q. At what point in time did you go to the police department to tell them that you knew he didn't commit this crime?

A. I never did.

Q. You never did?

A. No.

Q. Would you agree that you essentially held the keys to his freedom in that jail, correct?

By [DEFENSE COUNSEL]:

Objection, that is argumentative. That calls for a conclusion that she cannot give and improper form of questioning.

THE COURT:

Rephrase.

....

Q. When did you try to contact or visit [Perkins] in the jail to tell him that it was taken care of, you knew that you would be able to testify for him, you knew he didn't do it?

BY [DEFENSE COUNSEL]:

Objection, may we approach?

THE FOLLOWING PROCEEDINGS WERE HAD AT THE BENCH, OUTSIDE THE HEARING OF THE JURY.

BY [DEFENSE COUNSEL]:

I think she said, the prosecutor said "when did you go to the jail to tell him?" I object and I move for mistrial. Jurors should not be told in any shape, form, or way, that a defendant is in jail. It is prejudicial, that's why we have defendants dressed, if they follow our directions, nicely in street clothes. There was no reason to ask that question other than to prejudice the defendant.

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<sup>2</sup> Perkins's argument that Montantes and Rodgers shared a motivation to remove Perkins from their lives amounts to an invitation to reweigh the evidence, which we must not do. *See Perez*, 872 N.E.2d at 213.

...

THE COURT:

You know, as he sits here he sits here in street clothes, so from all, the question was obscure enough for the jury to conclude that, so the motion for mistrial is denied. Yet, it is an improper question, State, so the objection is sustained.

....

By [DEFENSE COUNSEL]:

I would ask the Court to instruct the jury to totally disregard the question, because it was an improper question.

Tr. at 296-99. The trial court then instructed the jury that the objection was sustained and that they were to “totally disregard” the last question that was asked. *Id.* at 299. The prosecutor continued his cross-examination:

Q. When did you tell Corey Perkins that you would testify for him?

A. I did not, I had not talked to my brother.

Q. When did you tell Corey Perkins’ attorney that you would testify for him?

A. When he contacted me.

Q. So you didn’t go out of your way to contact him?

A. I wouldn’t know who to contact, in this instance if he’s in jail, I wouldn’t know who to contact.

*Id.* at 300. Defense counsel then asked to approach the bench again and objected that the prosecutor’s line of questioning was “irrelevant and immaterial and it just brings up nonadmissible, prejudicial evidence.” *Id.* at 300-01. The trial court overruled his objection:

All right, there’s nothing improper that was asked. If she knew that she had information that was relevant to the charges and his whereabouts, as to why she didn’t come forward. He asked the question and it had nothing to do with the response that she gave. She brought it up. That’s your witness. So it’s overruled.

*Id.* at 301. The prosecutor continued questioning:

Q. So if I have this straight, at any point in time you made no effort to let this be known until the defense attorney contacted you?

A. Where I'm from, you can let anybody know, but nothing can be done until this time right here. It wasn't like they were going to let him out or anything.

Q. It wasn't like they were going to let him out?

A. At that time no.

Q. You could not have made a larger deal about this? You could not have gone to the papers –

BY [DEFENSE COUNSEL]:

Objection, oh, come on.

A. I'm not a drama queen, no, I did not.

BY THE COURT:

Hold on, ma'am.

BY [DEFENSE COUNSEL]:

Objection. This is totally improper comment actually, even by the prosecutor. It is irrelevant and immaterial.

THE COURT:

That objection is sustained.

BY [PROSECUTOR]:

Q. So in your mind, you've done everything you could until this point?

A. Yes.

*Id.* at 303-04.

Perkins argues that the trial court erred in denying his motion for mistrial. Our standard of review is well-settled:

A mistrial is an extreme remedy invoked only when no other curative measure can rectify the situation. A trial court's ruling on a motion for a mistrial is afforded great deference on appeal because the trial court is in the best position to evaluate the circumstances and their impact on the jury. Therefore, the trial court's determination will be reversed only where an abuse of its discretion can be established. To prevail, the appellant must establish that he was placed in a position of grave peril to which he should not have been subjected. Where the jury is admonished by the trial judge to disregard what occurred or other reasonable curative measures are taken, ordinarily the court's refusal to grant a mistrial is not reversible error.

*Vanzandt v. State*, 731 N.E.2d 450, 454 (Ind. Ct. App. 2000) (citations omitted), *trans. denied*. "The gravity of the peril is determined by considering the probable persuasive effect

of the misconduct on the jury's decision, not the degree of impropriety of the conduct.” *Gregory v. State*, 540 N.E.2d 585, 589 (Ind. 1989).

Although Perkins summarizes his argument in terms of the trial court's error in denying his motion for mistrial, he actually alleges that the grave peril to which he was subjected was created by the references to his incarceration both before and after his motion for mistrial. The State asserts that our review as to whether the trial court committed error is limited to the questions posed by the prosecutor before Perkins's motion for mistrial. The State argues that “a claim of prosecutorial misconduct is waived when the defendant ‘fails to immediately object, request an admonishment, and then move for mistrial.’” Appellee's Br. at 7 n.2 (quoting *Reynolds v. State*, 797 N.E.2d 864, 868 (Ind. Ct. App. 2003)). Perkins counters that we may review Carpenter's answers to the prosecutor's questions for fundamental error because “[a]n evidentiary harpoon which is a calculated response to questions crafted by a prosecutor, has been deemed fundamental error where no objection nor [sic] request for a mistrial was made.” Appellant's Reply Br. at 2 n.1 (citing *Houchen v. State*, 632 N.E.2d 791, 793-94 (Ind. Ct. App. 1994)).

Although we do not agree that Carpenter’s responses following the motion for mistrial constitute evidentiary harpoons,<sup>3</sup> we decline to find waiver because Perkins objected to Carpenter’s first response on the same basis that he advanced to support his motion for mistrial. Therefore, we will consider whether all the references to Perkins’s incarceration subjected him to grave peril such that reversible error was committed.

In support of his argument that he was subjected to grave peril, Perkins relies on *Houchen*. There, “the State’s witness, Detective Toney, a nineteen-year veteran of the Frankfort police department, twice deliberately introduced evidence at trial that Houchen had been offered a polygraph examination.” 632 N.E.2d at 793. The court observed that “the results of a polygraph examination, or the offer or refusal to take a polygraph examination, are not admissible in a criminal prosecution absent a waiver or stipulation by the parties.” *Id.* However, Houchen’s defense counsel had failed to object to Detective Toney’s comments, so the issue was not properly preserved for review. Nevertheless, the *Houchen* court found that

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<sup>3</sup> See *Williams v. State*, 512 N.E.2d 1087, 1090 (Ind. 1987) (“An evidentiary harpoon involves the deliberate use of improper evidence to prejudice the defendant in the eyes of the jury.”). In contrast, when an answer is volunteered and unresponsive, and there is no evidence the prosecutor deliberately sought to introduce testimony regarding the inadmissible evidence, the complained-of error does not constitute an evidentiary harpoon. *Id.* In the case at bar, the trial court believed that the prosecutor’s questions were directed towards exposing Carpenter’s delay in coming forward with her uniquely important information and that Carpenter’s response was not directly related to the prosecutor’s question. Tr. at 301. The trial court also noted that Carpenter was Perkins’s witness and overruled the objection. We agree with the trial court. The prosecutor’s questions were not intended to elicit information regarding Perkins’s incarceration, but to show that Carpenter did not immediately come forward with her information. Carpenter could easily have answered the question without mentioning that Perkins was in jail. As such, we conclude that Carpenter’s responses to the prosecutor’s questions cannot be characterized as evidentiary harpoons.

Detective Toney's comments constituted fundamental error that required reversal of Houchen's conviction. The court explained,

Toney was not a naive witness who was unaware of the prohibition against polygraph evidence and inadvertently introduced the subject. To the contrary, he was an experienced police officer more than aware of the prohibition. Nor was the evidence against Houchen so overwhelming that the improper reference could not have affected the verdict. Rather, the entire case hinged on the credibility of Houchen and Toney. Houchen was the only witness who testified on his behalf.

This court will simply not tolerate such a blatant and deliberate attempt to improperly influence the jury. Because one police officer took it upon himself to guarantee a conviction by tossing out an evidentiary harpoon that the jury could not ignore, the time and expense of this jury trial was for naught. The conviction must be reversed.

*Id.* at 794.

*Houchen* is not dispositive of this case. Among the significant differences between this case and *Houchen* is that here the witness was not a trained police officer testifying for the State, but rather the defendant's sister attempting to establish an alibi defense for Perkins. Additionally, in this case the trial court admonished the jury to disregard the prosecutor's question. "A prompt admonishment is presumed to cure error resulting from the admission of improper evidence." *Mauricio v. State*, 652 N.E.2d 869, 872 (Ind. Ct. App. 1995), *trans. denied*. Most importantly, the evidence of guilt, as we discussed earlier, was substantial. "When the jury's verdict is supported by independent evidence of guilt such that the reviewing court is satisfied that there was not a substantial likelihood that the evidence in question played a part in the defendant's conviction, any error in the admission of evidence is harmless." *Shaffer v. State*, 674 N.E.2d 1, 7 (Ind. Ct. App. 1996), *trans. denied* (1997). Accordingly, we find no reversible error.

### *III. Appropriateness of Sentence*

Finally, Perkins requests that we review and revise his forty-eight-year sentence. Article 7, Section 6 of the Indiana Constitution authorizes this Court to independently review and revise a sentence imposed by the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. Indiana Appellate Rule 7(B) states, “The Court may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” “Although appellate review of sentences must give due consideration to the trial court’s sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied.” *Purvis v. State*, 829 N.E.2d 572, 587 (Ind. Ct. App. 2005) (internal citations omitted), *trans. denied*. The defendant bears the burden of persuading us that the sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

The sentencing range for a class A felony is twenty to fifty years’ imprisonment, with an advisory sentence of thirty years. Ind. Code § 35-50-2-4. “When determining whether a sentence is inappropriate, we recognize that the advisory sentence ‘is the starting point the Legislature has selected as an appropriate sentence for the crime committed.’” *Filice v. State*, 886 N.E.2d 24, 39 (Ind. Ct. App. 2008) (quoting *Weiss v. State*, 848 N.E.2d 1070, 1072 (Ind. 2006)), *trans. denied*.

As to the nature of the crime, Perkins acknowledges that Rodgers suffered serious injuries and that such injuries may reasonably be considered to elevate the term of years above the advisory. Perkins shot Rodgers in the chest at fairly close range with a sawed off shotgun. Rodgers suffered an extensive wound to his chest. Without prompt modern medical care, Rodgers very likely would not have survived. Perkins was nearly successful in carrying out his purpose. In his victim impact statement, Rodgers stated that the shooting subjected his family to great agony because no one knew if he would live or die. Appellant's App. Vol. II at 9. He explained that his mother had to miss work to nurse him back to health. *Id.* He stated that he has been unable to find a job due to his injury because he has shortness of breath and cannot lift anything of significant weight. *Id.* Finally, he stated that he needs additional surgery. *Id.* We think the nature of the crime justifies a sentence above the advisory. *See Patterson v. State*, 846 N.E.2d 723, 731 (Ind. Ct. App. 2006) (finding that sentence was not inappropriate because of severity of victim's injury).

As to Perkins's character, he admits that his criminal history justifies some enhancement above the advisory. His prior felony conviction is for residential entry, and his misdemeanor convictions include such offenses as conversion, battery, criminal mischief, and resisting law enforcement. At thirty-two years of age, his criminal history stretches back sixteen years. The duration and repetitive nature of his criminal past show a manifest unwillingness to conform his behavior to the law. Thus, his character supports a sentence above the advisory. He argues that the regular visitation he had with his children and his trial attorney's opinion that he will respond positively to a period of incarceration reflect

favorably on his character. We are unpersuaded of the significance of these factors. We conclude that Perkins has failed to carry his burden to show that his forty-eight-year sentence is inappropriate.

Affirmed.

BRADFORD, J., and BROWN, J., concur.