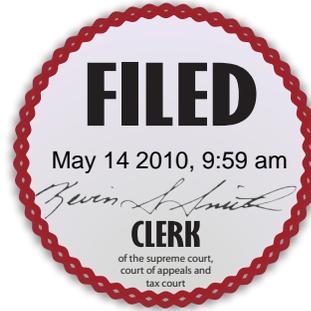


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

CHERIE THOMPSON,
Appellant- Defendant,

vs.

STATE OF INDIANA,
Appellee- Plaintiff,

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No. 49A02-0909-CR-852

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Reuben Hill, Judge
Cause No. 49F18-0812-FD-140324

May 14, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, Cherie Thompson was convicted of prostitution, a Class D felony, and sentenced to 545 days imprisonment with 365 days suspended to probation. Thompson raises two issues for our review, which we restate as: 1) whether the admission of a police officer's testimony that he was conducting a prostitution sweep when he encountered Thompson constituted fundamental error; and 2) whether Thompson's sentence is inappropriate in light of the nature of her offense and her character. Concluding the admission of the police officer's testimony did not constitute fundamental error and Thompson's sentence is not inappropriate, we affirm.

Facts and Procedural History

On June 7, 2008, Detective Ethan McGivern of the Indianapolis Metropolitan Police Department was working undercover on the west side of Indianapolis, conducting a countywide prostitution sweep. As part of the sweep and followed by a police car, Detective McGivern drove a pickup truck, dressed in plainclothes, and attempted to solicit prostitutes. When Detective McGivern made eye contact with Thompson, who was standing on the sidewalk, Thompson flagged him. Detective McGivern pulled his pickup truck over, and Thompson leaned inside and asked what he was looking for. Detective McGivern replied that he was "looking to get [his] groove on." Transcript at 11. Thompson smiled, laughed, and got inside Detective McGivern's pickup truck. After some negotiation, Thompson agreed to fellate Detective McGivern in exchange for twenty-five dollars. Thompson was subsequently arrested.

On June 8, 2008, the State charged Thompson with prostitution, a Class A misdemeanor enhanced to a Class D felony for two prior prostitution convictions. At Thompson's jury trial on July 8, 2009, Detective McGivern testified that he was conducting a countywide prostitution sweep the day he encountered Thompson. He explained that a prostitution sweep is when his supervisors "pick a day and say today all my detectives, we are going out on the whole county and we are just going to go to problem areas . . . that have been set forth by our supervisors to go into and saturate the area and just work on prostitution alone." Id. at 6-7. At no time during this testimony did Thompson object. The jury ultimately found Thompson guilty of prostitution, and Thompson pled guilty to the Class D felony enhancement. The trial court sentenced Thompson to 545 days imprisonment with 365 days suspended to probation. Thompson now appeals.

Discussion and Decision

I. Admissibility of Evidence

A. Standard of Review

Generally, we review a trial court's decision to admit testimony for an abuse of discretion. McHenry v. State, 820 N.E.2d 124, 128 (Ind. 2005). Thompson concedes, however, that no objection was made to the testimony at trial. "Failure to object to the admission of evidence at trial normally results in waiver and precludes appellate review unless its admission constitutes fundamental error." Cutter v. State, 725 N.E.2d 401, 406 (Ind. 2000). Thompson therefore argues the trial court's error in admitting Detective McGivern's testimony rises to the level of fundamental error. "To constitute

fundamental error, the 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.” Pittman v. State, 885 N.E.2d 1246, 1257 (Ind. 2008) (quotation omitted). “We have emphasized the narrow applicability of the fundamental error doctrine.” Taylor v. State, 717 N.E.2d 90, 93 (Ind. 1999). As such, the error must be substantially prejudicial—enough so that a fair trial is impossible. Brown v. State, 799 N.E.2d 1064, 1067 (Ind. 2003).

B. Detective McGivern’s Testimony

Thompson argues the trial court committed fundamental error in admitting Detective McGivern’s testimony that he was on a countywide prostitution sweep when he encountered Thompson.¹ She argues the testimony is not relevant pursuant to Indiana Evidence Rule 401, and even if it is relevant, it is unfairly prejudicial pursuant to Evidence Rule 403. “Relevant evidence” is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Ind. Evidence Rule 401. Relevant evidence is generally admissible, see Evid. R. 402, but “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . .,” Evid. R. 403. “[I]n determining whether evidence is relevant and

¹ Thompson also argues that Detective McGivern’s testimony essentially violated a previous order in limine that barred any reference to the fact Detective McGivern was engaged in a “commercial sex investigation” at the time he encountered Thompson. Appellant’s Appendix at 38. We do not address this argument specifically however, since, as Thompson points out, the crux of the issue is the alleged error in admitting the testimony at trial rather than admitting testimony in violation of the previous order in limine. Francis v. State, 758 N.E.2d 528, 533 (Ind. 2001) (“If the trial court errs by admitting evidence, the exclusion of which was sought by the motion in limine, then the error is in admitting the evidence at trial in violation of an evidentiary rule, not in rescinding a previous order in limine.”).

admissible, this court must determine whether the evidence tends to prove or disprove a material fact in the case or sheds any light on the guilt or innocence of the accused.” Carnahan v. State, 681 N.E.2d 1164, 1166 (Ind. Ct. App. 1997).

By itself, that Detective McGivern was conducting a prostitution sweep when he encountered Thompson does not tend to prove or disprove that Thompson was committing the crime of prostitution. However, from a practical standpoint, evidence of happenings near in time and place which complete the story of the crime by proving its immediate context is admissible. Maldonado v. State, 265 Ind. 492, 495, 355 N.E.2d 843, 847 (1976) (citing McCormick, Evidence § 190 at 448 (1972)). Detective McGivern’s testimony was therefore relevant for the purpose of completing the story of how he came to be in contact with Thompson, especially given his testimony that he was traveling in an unmarked pickup truck wearing plainclothes.

Thompson nonetheless argues she was unfairly prejudiced by the testimony because it “suggest[ed] [] Thompson was involved in a county-wide prostitution operation.” Brief of Appellant at 6. Detective McGivern described the “vice sweep” as a day supervisors pick for focusing exclusively on one crime in problem areas of the county. There was no indication Thompson was a specific target of investigation. There is little chance the jury was misled or confused into believing Thompson was part of a larger criminal enterprise just because Detective McGivern testified police were saturating the county on the lookout for prostitution that day.² In addition, relevant

² Thompson’s unfair prejudice argument is also rather attenuated. For unfair prejudice to exist here the jury first had to understand Detective McGivern’s testimony to mean that Thompson was under ongoing investigation; second the jury had to make the inference that Thompson was guilty of some other uncharged crimes simply because she was under investigation; and lastly, the jury had to make the further inference that Thompson was guilty in this case simply because the jury believed that Thompson had committed other uncharged crimes. In other words,

context evidence as described above is admissible even if the evidence tends to establish the commission of other crimes not being prosecuted. Minnick v. State, 544 N.E.2d 471, 480 (Ind. 1989).³ In short, the testimony was relevant and was not unfairly prejudicial; therefore, there was no error in its admission, let alone fundamental error. Moreover, even if the trial court did err in admitting the testimony, given Detective McGivern’s testimony regarding his interaction with Thompson once they made contact, we cannot say his testimony regarding the sweep was so instrumental in a finding of guilt that a fair trial was impossible. Thompson has failed to demonstrate fundamental error in the trial court’s admission of this evidence.

II. Inappropriateness of Sentence

A. Standard of Review

“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.” Ind. Appellate Rule 7(B). In making this determination, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans denied; cf. McMahon v. State, 856 N.E.2d 743, 750 (Ind. Ct. App. 2006) (“[I]nappropriateness review should not be limited . . . to a simple rundown of the aggravating and mitigating circumstances found by the trial court.”). Nevertheless, the defendant bears the burden to “persuade the

the multiple steps involved in Thompson’s argument reduce the likelihood that unfair prejudice resulted from Detective McGivern’s testimony.

³ We note that both Maldonado and Minnick were decided before the enactment of the Indiana Evidence Rules in 1994 and were based on the common law doctrine of *res gestae*. “[A]lthough common law doctrine of ‘*res gestae*’ did not survive enactment of the Indiana Rules of Evidence, facts that are part of the story of the crime are admissible if relevant within the meaning of Evidence Rule 401.” Thompson v. State, 690 N.E.2d 224, 234 n.9 (Ind. 1997) (citing Swanson v. State, 666 N.E.2d 397 (Ind. 1996)).

appellate court that his or her sentence has met this inappropriateness standard of review.” Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). The advisory sentence “is the starting point the Legislature has selected as an appropriate sentence for the crime committed.” Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). “Therefore, when the trial court imposes the [advisory] sentence, the defendant bears a heavy burden in persuading us that his or her sentence is inappropriate.” McKinney v. State, 873 N.E.2d 630, 647 (Ind. Ct. App. 2007), trans. denied. “[W]hether 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.” Cardwell v. State, 895 N.E.2d 1219, 1224 (Ind. 2008).

B. Thompson’s Sentence

Thompson was convicted of a Class D felony. “A person who commits a Class D felony shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 ½) years.” Ind. Code § 35-50-2-7. The trial court sentenced Thompson to the advisory sentence of 545 days imprisonment with 365 days suspended to probation.⁴ Thompson argues both the nature of her offense and her character warrant a sentence less than the advisory.

⁴ The trial court is required to give a sentencing statement for any felony conviction, even if the advisory sentence is imposed. Ind. Code § 35-38-1-1.3 (“After a court has pronounced a sentence for a felony conviction, the court shall issue a statement of the court’s reasons for selecting the sentence that it imposes.”); Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007) (holding that “Indiana trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense”). The trial court here, however, did not give a sentencing statement describing the reasons for Thompson’s sentence. See Tr. at 44. Generally, this alone would constitute an abuse of the trial court’s discretion. Anglemyer, 868 N.E.2d at 490. Nevertheless, Thompson has not raised this argument on appeal but has instead argued the inappropriateness of her sentence on the merits. As such, we review the inappropriateness of Thompson’s sentence without regard to the trial court’s error. See Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007) (despite lack of a sentencing statement, court declined to remand to trial court for explanation of sentence and affirmed imposition of advisory sentence).

1. Nature of the Offense

The sentence is not inappropriate given the nature of Thompson's offense. The trial court imposed the advisory sentence, the starting point the legislature has selected for those offenders with two prior convictions of prostitution. Thompson points out her offense did not result in any violence and did not hurt the community at large since the offense took place between herself and a police officer. Pointing to the absence of what may have otherwise justified the trial court in imposing a sentence above the advisory does not support reducing Thompson's sentence below it.

2. Character of the Offender

The sentence is also not inappropriate given Thompson's character. In this case, Thompson's criminal history is particularly significant. "Significance [of a criminal history] varies based on the gravity, nature and number of prior offenses as they relate to the current offense." Wooley v. State, 716 N.E.2d 919, 929 n.4 (Ind. 1999). Since 1988, Thompson has intermittently, and with increasing frequency, come under the purview of the criminal justice system. She has been convicted six times prior to this of prostitution—the offense Thompson was convicted of in this case. She has also been convicted of public indecency and possession of paraphernalia and has had her probation revoked numerous times, including at least once for drug use. Thompson attempts to diminish the significance of her criminal history, which, she argues, was due to a combination of poverty and drug addiction, by pointing to the fact that she has made efforts to improve herself, has been drug free for a year prior to her sentencing hearing,

and has been attending drug treatment programs.⁵ While her efforts are certainly commendable, they suggest only steps in the right direction in contrast to a span of years during which Thompson was convicted of prostitution numerous times. Moreover, a year and a half imprisonment will add to the time Thompson remains drug free and further help her to quit her addiction. Thompson bears the burden of establishing her sentence is inappropriate in light of the nature of her offense and her character. We conclude she has failed to carry that burden here.

Conclusion

The trial court did not commit fundamental error in admitting Detective McGivern's testimony that he and other officers were on a prostitution sweep when he encountered Thompson. Further, Thompson's 545-day sentence is not inappropriate in light of the nature of her offense and her character. Therefore, the judgment of the trial court is affirmed.

Affirmed.

FRIEDLANDER, J., and KIRSCH, J., concur.

⁵ Thompson also argues that her sentence is inappropriate given the fact she has never been prosecuted for a violent crime. However, this argument is of no avail. The legislature has made prostitution in this circumstance a Class D felony and has recommended the advisory sentence for all such offenders, not just those previously convicted of a violent crime.