

STATEMENT OF THE CASE

Appellant-Defendant, Adam M. Wagner (Wagner), appeals his convictions and sentence for murder, a felony, Ind. Code § 35-42-1-1, criminal recklessness, as a Class D felony, I.C. § 35-42-2-2, carrying a handgun without a license, as a Class A misdemeanor, I.C. §§ 35-47-2-1 and 23, and the enhancement of his sentence for his use of a firearm in the commission of an offense resulting in death or serious bodily injury, I.C. § 35-50-2-11.

We affirm.

ISSUES

Wagner raises three issues, which we restate as:

- (1) Whether the trial court abused its discretion when it permitted a witness to testify in contravention of the witness separation order;
- (2) Whether the trial court abused its discretion by instructing the jury on the issue of self-defense; and
- (3) Whether his sentence is inappropriate when his character and the nature of his offenses are considered.

FACTS AND PROCEDURAL HISTORY

On Friday, December 14, 2007, at approximately 7:00 p.m., Dwan Gentry (Gentry) and three of his friends drove to a Family Video store in Fort Wayne, Indiana, to return a video game and pick up a new one. While their car was parked, Wagner, driving another car, pulled into the parking lot and parked his car perpendicular behind the car Gentry was driving. In addition to Wagner, there were two passengers in the car Wagner was driving. A

passenger from the car Gentry was driving approached Wagner and exchanged words with him. Gentry exited his vehicle also. Some witnesses testified that Gentry and the passenger from his car yelled, cussed at, and argued with the people in the car that Wagner was driving. Other witnesses testified that no arguing took place and no heated words were exchanged. Wagner pulled out a firearm and shot at Gentry, striking him at least two times. Gentry died from his gunshot wounds. Another bullet entered a nearby parked car, and one more went through the front window of the video store. Wagner drove away from the scene, but was apprehended shortly thereafter.

On December 19, 2007, the State filed an Information charging Wagner with: murder, a felony, I.C. § 35-42-1-1; criminal recklessness, as a Class D felony, I.C. § 35-42-2-2; carrying a handgun without a license, as a Class A misdemeanor, I.C. §§ 35-47-2-1, 23; and sought an additional fixed term of imprisonment pursuant to I.C. § 35-50-2-11 because Wagner had used a firearm in the commission of a felony which resulted in death or serious bodily injury.

Prior to the trial, the State and Wagner each filed proposed jury instructions. The State's proposed instructions included three instructions dealing with self-defense. Wagner filed only one proposed instruction on reckless homicide, a lesser included offense of murder. Both the State and Wagner agreed to a separation of witnesses, and the trial court ordered that the separation of witnesses would begin at opening statements.

On April 29, 2008, the trial court commenced a jury trial. At the close of the State's case-in-chief, Wagner requested a directed verdict, which was denied by the trial court.

Afterward, the State moved to reopen its case-in-chief so that additional testimony from a previous witness could be heard. Over Wagner's objection, the trial court granted the State's motion and permitted the additional testimony. Wagner requested a mistrial, and the trial court denied that request. Wagner then requested that the judge recuse herself, and the trial court ruled that there was no basis for recusal. The witness then testified, and her additional testimony consisted solely of an explanation that burn marks found on Gentry's shorts were from smoking and had been present prior to the date of the shooting.

At the close of evidence, Wagner and the State discussed the proposed final jury instructions with the trial court. The State requested that self-defense instructions be given because certain evidence had put such a defense in play. Wagner objected to the giving of instructions on self-defense contending that the instructions could confuse the jury since that theory had not been advanced by Wagner. The trial court overruled Wagner's objection and gave two instructions on self-defense with other final jury instructions, which included an instruction on reckless homicide as a lesser included offense of murder. After final instructions, the jury convened to deliberate and returned a verdict finding Wagner guilty as charged.

On May 30, 2008, the trial court conducted a sentencing hearing. The trial court found the nature and circumstances of the crime to be an aggravating factor because there were multiple victims of his crimes. The trial court found Wagner's apology to Gentry's family and lack of criminal history to be mitigating factors. Based on these considerations, the trial court sentenced Wagner to fifty-five years for murder, enhanced by five years

because the death was the result of Wagner's use of a firearm, two years for criminal recklessness, and one year for carrying a handgun without a license, all to be served consecutively for an aggregate sentence of sixty-three years.

Wagner now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Witness Separation Order

Wagner argues that the trial court abused its discretion by permitting the State to recall its witness, Sachel Sutton (Sutton), after the close of its case-in-chief. Wagner explains that after the State finished questioning Sutton during its case-in-chief, Wagner permitted her to remain in court during the remainder of the trial. He contends, therefore, that the State's act of recalling the witness violated the order for separation of witnesses.

Indiana Evidence Rule 615, "Separation of Witnesses," provides for the exclusion of witnesses "so that they cannot hear the testimony of or discuss testimony with other witnesses."

The purpose of a witness separation order is to prevent the testimony of one witness from influencing another. In the absence of connivance or collusion by the prosecutor, the court has discretion in allowing a witness to testify after the violation of a separation order. We will not disturb that exercise of discretion unless there is a showing of prejudice tantamount to an abuse of discretion.

Corley v. State, 663 N.E.2d 175, (Ind. Ct. App. 1996) (citations omitted). When a violation of a witness separation order occurs, prejudice is presumed, which presumption can be

overcome if the non-movant can show there was no prejudice. *Stafford v. State*, 736 N.E.2d 326, 331 (Ind. Ct. App. 2000), *trans. denied*.

When the State moved to have its case-in-chief reopened to permit Sutton to testify again, Wagner made a lengthy objection based upon the separation of witnesses order. However, Wagner has made no claim of connivance or collusion by the prosecutor. Nor has Wagner made any assertion that Sutton's testimony about the burns on Gentry's shorts was influenced by any testimony from another witness. It appears from the record that Wagner had permitted Sutton to remain in the court room after her initial testimony.¹ Therefore, we cannot say that the trial court abused its discretion by allowing the State to recall Sutton as a witness.

II. *Jury Instruction*

Wagner contends that the trial court committed reversible error by instructing the jury on the law of self-defense. Specifically, Wagner argues that the trial court should not have issued the self-defense instructions because advancing a theory of self-defense was not a part of his defense strategy, and the instructions could have confused the jury.

It is well established that instructing the jury is within the sole discretion of the trial court. As such, we will reverse a trial court's decision regarding jury instructions only for an abuse of discretion. Before a defendant is entitled to a reversal, he must affirmatively show that the instructional error prejudiced his substantial rights.

¹ When Sutton's first round of testimony concluded, she was simply asked to step down from the witness stand and the State called its next witness. No further comment was made on the record regarding Sutton remaining in the court room. However, Wagner's counsel later stated that he "was gracious enough to allow the young lady to sit in during the entire course of the trial, at the request of [the State's attorney]." (Transcript p. 477).

Glenn v. State, 884 N.E.2d 347, 357 (Ind. Ct. App. 2008), *trans. denied*. Jury instructions serve to inform the jury of the law applicable to the facts presented at trial, enabling it to comprehend the case sufficiently to arrive at a just and correct verdict. *Hamilton v. Hamilton*, 858 N.E.2d 1032, 1035 (Ind. Ct. App. 2006), *reh'g denied, trans. denied*. In evaluating the propriety of a given instruction, we consider: (1) whether the instruction correctly states the law, (2) whether there is evidence in the record supporting the instruction, and (3) whether the substance of the instruction is covered by other instructions. *Id.*

The trial court gave two instructions on self-defense, which together stated as follows:

The defense of self-defense is defined by law as follows:

A person is justified in using reasonable force against another person to protect himself or a third person from what he reasonable [sic] believes to be the imminent use of unlawful force. However, a person is justified in using deadly force only if he reasonably believes that that force is necessary to prevent serious bodily injury to himself or a third person or the commission of a forcible felony. No person in this State shall be placed in legal jeopardy of any kind whatsoever for protecting himself or his family by reasonable means necessary[.]

A person is not justified in using force if:

1. He is committing, or is escaping after the commission of a crime;
2. He has entered into combat with another person or is the initial aggressor, unless he withdraws from the encounter and communicates to the other person his intent to do so and the other person nevertheless continues or threatens to continue unlawful action.

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

...

In all self[-]defense claims, the force employed must not be out of proportion to the apparent urgency of the situation.

(Appellant's App. pp. 135-36). Wagner makes no claim that the instructions given by the trial court on self-defense were incorrect statements of law, nor does he claim that they were covered by other instructions.

Wagner simply complains that these instructions on self-defense would serve to confuse the jury considering that his defense theory was that he was guilty of reckless homicide as opposed to murder. Wagner directs our attention to *Burnside v. State*, 858 N.E.2d 232, 241 (Ind. Ct. App. 2006), wherein we concluded that a combined jury instruction on murder, self-defense, and reckless homicide deprived the defendant of having the jury consider his guilt on the lesser included offense of reckless homicide. The instruction at issue in *Burnside* stated as follows:

If you find beyond a reasonable doubt that the State did prove beyond a reasonable doubt the existence of the four essential elements of the charge of murder, and you also find that the Defendant was acting in self-defense, and that he used deadly force, but you find that in his use of deadly force, the Defendant was acting recklessly, that is, that the Defendant was acting in plain, conscious, and unjustifiable disregard of harm that might result and that the disregard involved a substantial deviation from acceptable standards of conduct, you may find the Defendant guilty of reckless homicide, a Class C felony.

Id. at 240. The *Burnside* court concluded that this instruction informed the jury incorrectly that self-defense is a precondition to a reckless homicide verdict. *Id.* However, no similar instruction was given to the jury here.

Further, there was evidence that Wagner acted in self-defense. Wagner's brother, who was sitting in the backseat of the vehicle when Wagner shot Gentry, was called as a witness by the State and testified:

[State's Attorney]: What did you see? What did you see your brother do?

[Wagner's Brother]: Well . . . I seen dude not Gentry, the other guy, he lifted up his shirt, something shiny, and . . . and . .

[State's Attorney]: What?

[Wagner's Brother]: (Inaudible response.)

[State's Attorney]: Your brother started firing at that time didn't he?

[Wagner's Attorney]: Objection, leading Judge.

[Trial] Court: Overruled.

[Wagner's Brother]: In self[-]defense, yes sir.

[State's Attorney]: Did you[r] brother pull out a gun and start firing?

[Wagner's Brother]: I said in self[-]defense, yes sir.

[State's Attorney]: In self[-]defense?

[Wagner's Brother]: Yes sir.

(Tr. p. 268). In addition, the State called Wagner's girlfriend who was sitting in the front passenger seat next to Wagner at the time of the shooting. She testified as follows:

[State's Attorney]: So what happens? You stop there and what happens?

[Wagner's Girlfriend]: Tony . . . like I said, Tony comes up first. He has videos in his hands. He's getting ready to return

them. Then three other guys come up to the car with Tony. Yellin' at us, cussin' at us.

[State's Attorney]: All three of them . . . all of them at the same time?
All four?

[Wagner's Girlfriend]: All of them. All of them.

[State's Attorney]: Yellin' and screamin'?

[Wagner's Girlfriend]: Yes.

[State's Attorney]: You sure?

[Wagner's Girlfriend]: Positive.

[State's Attorney]: Okay. So what happen[ed] next?

[Wagner's Girlfriend]: I saw the butt of the gun. I was (unintelligible words) at Adam. We all saw the butt of the gun and that's when . . . you know, I was eight and [a] half months pregnant in the front seat so Adam shot him.

[State's Attorney]: You saw the butt of the gun where?

[Wagner's Girlfriend]: That other dude had.

* * *

[State's Attorney]: All right. You see the butt of a gun and then what do you do?

[Wagner's Girlfriend]: They started talkin' . . . they started arguing. I saw the butt of the gun. They . . . was trying to open . . . had the door handle . . .

[State's Attorney]: Who?

[Wagner's Girlfriend]: I don't know them dudes.

[State's Attorney]: So they're pullin' on the door?

[Wagner's Girlfriend]: They're open . . . tryin' to open the door handle. Just one of them. The dude that's sittin' out there in the gray . . . beige dickie outfit. Him. He's the one that tried to open the door and then after that, that's when Adam shot him.

(Tr. pp. 234-36). The trial court concluded that this evidence supported giving the jury self-defense instructions, and we cannot say that the trial court abused its discretion by coming to this conclusion. We understand Wagner's desire to control to the best of his ability the defense theories that are developed in attempt to keep the jury focused. However, as we stated above, jury instructions serve to inform the jury of the law applicable to the facts presented at trial, and evidence that Wagner may have acted in self-defense was presented at trial.

III. *Appropriateness of Wagner's Sentence*

Wagner contends that his sentence is inappropriate when the nature of his offenses and his character are considered. Regardless of whether the trial court has sentenced the defendant within its discretion, we have the authority to independently review the appropriateness of a sentence authorized by statute through Appellate Rule 7(B). *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008). That rule permits us to revise a sentence 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. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. Where a defendant asks us to exercise our appropriateness review, 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). “Ultimately the length of the aggregate sentence and how it is to be served are the issues that matter.” *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). 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 a myriad of other considerations that come to light in a given case. *Id.*

The trial court sentenced Wagner to the advisory sentence for murder, fifty-five years. I.C. § 35-50-2-3. To that sentence, the trial court added an additional five years, pursuant to Indiana Code section 35-50-2-11, because Wagner used a firearm during the commission of the murder. Additionally, the trial court imposed a two-year sentence for Wagner’s criminal recklessness as a Class D felony, which is six months in excess of the advisory sentence for that crime, but one year less than the maximum sentence. I.C. § 35-50-2-7. Finally, the trial court sentenced Wagner to one year for carrying a handgun without a license as a Class A misdemeanor, which is the maximum sentence for that crime, and ordered all of the sentences to be served consecutively. I.C. § 35-50-3-2.

As for Wagner’s character, he first argues that his sentence is inappropriate because he had no prior criminal convictions. The trial court acknowledged Wagner’s lack of criminal history at the sentencing hearing and stated that it was a “substantial mitigating circumstance.” (Sentencing Tr. p. 25). However, the evidence at trial demonstrated that Wagner frequently smoked marijuana, and his girlfriend testified that he “always” carried a firearm despite the fact that he did not have a license to carry a firearm. (Tr. p. 234).

Therefore, we conclude that the fact that Wagner had not yet been convicted of a crime does not support a finding that his sentence is inappropriate.

Further, Wagner contends that his sentence is inappropriate because he has three dependent children. However, there is no evidence in the record that any of Wagner's children were actually supported by him. We fail to see how the fact that he fathered three children would demonstrate his good character.

As for the nature of Wagner's offense, Wagner fired a gun, which he possessed illegally, at least three times in the parking lot of a video store on a Friday evening. As the trial court expressed at sentencing, we are surprised that no additional people were injured by his actions considering the time of day and location of Wagner's crimes. Not only did a young man lose his life because of Wagner's actions that night, but Wagner's crime threatened the safety of all of the patrons of the video store and likely terrified all who were present when he committed his offenses.

Altogether, we are not convinced that Wagner's sentence is inappropriate when his character and the nature of his offenses are considered.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion when it permitted the State to recall a witness in contravention of the separation order. Nor did it abuse its discretion when it instructed the jury on the law of self-defense. Additionally,

we conclude that Wagner's sentence is not inappropriate when his character and the nature of his offenses are considered.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.