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IN THE
COURT OF APPEALS OF INDIANA

JESSE J. HARRIS, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A02-1009-CR-1068
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable William C. Menges, Jr., Judge
Cause No. 34D01-0911-MR-1002

July 29, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Following a jury trial, Jesse J. Harris, Jr. was convicted of Murder,[1] a felony, and two counts of Attempted Murder,[2] class A felonies. The trial court sentenced Harris to an aggregate executed sentence of one hundred sixty-five years. On appeal, Harris presents five issues for our review:

1. Did the trial court err in denying Harris's motion for change of venue?

2. Did the trial court err in the manner in which the jury viewed the vehicle involved in the crime?

3. Did the trial court violate Harris's right to counsel under the Indiana Constitution by admitting into evidence statements made by Harris to his cell mate, who is as acting as an informant?

4. Did the State commit prosecutorial misconduct?

5. Is the sentence imposed inappropriate?

We affirm.

On April 4, 2008, Michael Yates (a/k/a "Fool" or "Foolish") and Launden "L-Stone" Luckett[3] attempted to rob Keith "Evil" Taylor at Taylor's apartment in the Gateway Gardens housing complex in Kokomo. Later that night, Harris (a/k/a "Baby Stone"), Luckett, Yates, and Yates's girlfriend, Shateeka Allen, were at Little Daddy's strip club in Kokomo. Harris was armed with a .40 caliber handgun, Yates was armed with a .22 caliber handgun, and Luckett was armed with a .45 caliber handgun.

Around 1:30 a.m. on April 5, 2008, Mark "PeeWee" Matthews called his friend, nineteen-year-old Abby Rethlake, and asked her to come pick him up. Abby agreed, and she

[1] Ind. Code Ann. § 35-42-1-1 (West, Westlaw current through 2011 Pub. Laws approved & effective through 6/28/2011).

and her friend, Morgan Vetter, drove in Abby's white, two-door Monte Carlo and picked up Matthews at Scotty's (another bar in Kokomo) and then took him to Little Daddy's. There, Matthews met up with his friends Keith Taylor and Tyrell "Stacks" Taylor.[4] Abby and Morgan waited outside Little Daddy's for Matthews to return.

Inside Little Daddy's tension between Matthews and his friends (the Taylor brothers) and Harris and his group of friends was high because it had become known that Luckett had been involved with the attempted robbery of Keith Taylor earlier that day (i.e., on the 4th). The rumor was that Matthews and the Taylor brothers were going to retaliate for the attempted robbery and that they were targeting Luckett. While still inside Little Daddy's, Harris told another individual that Matthews and the Taylor brothers were "on borrowed time." *Transcript* at 852. Harris, along with Yates and Luckett, devised a plan to kill Matthews and the Taylor brothers.

At the 3:00 a.m. closing time, Harris, Luckett, Yates, and Allen left Little Daddy's and got into a four-door Mazda 6 that Allen had rented that day. Allen got into the driver's seat, Yates got in the front passenger seat, and Luckett and Harris got in the back seat of the car. When Allen started the car and turned on the vehicle's lights, Yates told her to "hold up" because they wanted to wait for Matthews and the Taylor brothers to leave the club so they could follow them. *Id*. at 739. Eventually, Matthews and the Taylor brothers exited the club

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[2] I.C. § 35-42-1-1; I.C. § 35-41-5-1 (West, Westlaw current through 2011 Pub. Laws approved & effective through 6/28/2011) (attempt).
[3] Luckett was a member of the Blackstone gang from Chicago.
[4] Keith and Tyrell are brothers. Matthews and the Taylor brothers are from Detroit.

and got into the back seat of Abby's vehicle as she had agreed to take all three of them home. Abby drove and Morgan was seated in the front passenger seat.

Yates told Allen to follow the white Monte Carlo. Allen became uncomfortable as they drove through town, but no one would tell her what was going on. At the intersection of Ohio and Jefferson Streets, Allen pulled over, got out of the car, and started walking to her friend's house where her daughter was staying. Yates got into the driver's seat and Harris moved up to the front passenger seat while Luckett remained in the back seat of the Mazda. In the time it took for Yates and Harris to change seats, they had lost sight of the Monte Carlo. The three men started driving around in search of the vehicle. A few minutes later, they spotted the Monte Carlo as the Taylor brothers were walking up to a house near the intersection of Monroe and Purdum streets. Yates, Harris, and Luckett decided that the distance between the two vehicles was too far to shoot at them. Luckett noted that Matthews was still in the back seat of the Monte Carlo, so they decided to continue with their plan to kill Matthews. When Yates and/or Luckett asked about the fate of the two girls in the Monte Carlo, Harris said that they needed to kill them as well because they would be witnesses. The plan thus became to follow the Monte Carlo and kill all three occupants, those being Matthews, Abby, and Morgan.

After dropping off the Taylor brothers, Abby drove to the Meadowlawn Apartments where Matthews lived, but she drove past the entrance into the adjacent parking lot. As Abby continued ahead to turn around, Yates pulled into the parking lot and waited for the Monte Carlo to return. Abby was attempting to correct her position in a parking spot when Yates pulled the Mazda behind her car and blocked her car in. Luckett put on a black ski

mask, jumped out of the back seat of the Mazda, and approached the passenger window of the Monte Carlo. Morgan saw Luckett approaching and could see that there were two other men in the car that had blocked them in. Morgan screamed as she rolled up her window and yelled at Abby to go. Luckett opened fire with his .45 caliber handgun, shooting a total of eleven to twelve shots through the passenger window. Harris stood up out of the front passenger seat of the Mazda and began shooting his .40 caliber handgun into the rear of the Monte Carlo until his handgun was empty. Yates remained in the driver's seat.

When the shooting began, Matthews dove to the floor of the car while Abby and Morgan ducked for cover. When Luckett and Harris were done shooting, the screaming had stopped. Believing everyone in the Monte Carlo had been killed, Harris and Luckett got back into the Mazda and Yates quickly drove away. The passenger side of the Mazda struck the back of the Monte Carlo, causing damage to both vehicles.

Matthews, who was wounded on his face and leg, was able to crawl from the Monte Carlo and yell for help. Morgan, who was shot in the chest, abdomen, and leg, regained consciousness and stumbled from the car, crying for help. Some of Morgan's injuries were deemed life threatening and she spent over a week in the hospital. Abby sustained several gunshot wounds, the primary two of which entered her back. One of the bullets entered Abby's mid-back, perforated her lung, struck her collarbone, fractured her jaw, and entered her brain. Abby was revived at the local hospital and transported to Methodist Hospital in Indianapolis where she died. It was determined that the fatal wounds were inflicted by bullets from Harris's gun.

The following day, Harris, Yates, and Luckett went to Chicago to dispose of their handguns. Arrangements were also made for the damage to the Mazda to be repaired before it was returned to the rental company.

On November 4, 2009, Harris was charged by grand jury indictment with Count I, murder, a felony; Count II, conspiracy to commit murder, a class A felony;[5] Count III, attempted murder, a class A felony; Count IV, aggravated battery, a class B felony; and Count V, attempted murder, a class A felony. An initial hearing was held on November 20, 2009, at which time a public defender was appointed for Harris and an omnibus date was set for January 22, 2010. On December 3, 2009, Harris filed a Verified Motion for Change of Venue from County based on pre-trial publicity, which the trial court denied following a hearing. On December 23, 2009, Harris filed a motion to transfer the case to the Circuit Court of Howard County pursuant to a local rule. The trial court considered the motion for transfer, along with other subsequently filed defense motions, during a hearing on February 5, 2010. The trial court denied Harris's motion for transfer of the case.

On June 29, 2010, Harris filed a motion to suppress statements he made to a jailhouse informant, claiming that such statements were procured in violation of his constitutional right to counsel. Following a hearing on July 6, 2010, the trial court denied Harris's motion to suppress, finding, among other things, that Harris had not invoked his right to counsel. On July 9, 2010, Harris renewed his motions for change of venue and transfer to the Howard Circuit Court, both of which the trial court again denied.

[5] The State subsequently amended Count II.

A jury trial commenced on July 9, 2010. During *voir dire*, Harris objected to the State's use of cartoons to illustrate certain legal concepts, which objection was overruled. After the jury was sworn, Harris moved for a mistrial, asserting as grounds therefore the State's use of the cartoons. The trial court denied Harris's motion. On July 13, the trial was moved to a remote location where the white Monte Carlo was kept and where evidence was presented. The trial then resumed as scheduled in the regular courtroom. On July 16, 2010, at the conclusion of the evidence, the jury returned guilty verdicts on all counts. A sentencing hearing was held on August 10, 2010. The trial court did not enter judgment of convictions on Counts II and IV and sentenced Harris to the maximum term of sixty-five years for murder (Count I) and the maximum term of fifty years for each of the class A felony attempted murder convictions (Counts III and V). The court ordered each sentence served consecutively for an aggregate sentence of one hundred sixty-five years.

1.

Harris argues that the trial court erred in denying his motion to transfer this cause to the Circuit Court of Howard County. Specifically, Harris claims that he was prejudiced by the filing of the instant charges in the same court in which he had been sentenced in an unrelated matter, asserting that the trial court was "predisposed to determine [his] guilt." *Appellant's Brief* at 10.

Pursuant to Ind. Crim. Rule 12(B), a defendant may request a change of judge for bias or prejudice. There is no indication in the record that Harris made any request pursuant to Crim. R. 12(B). Further, other than his general assertion of prejudice, Harris has failed to cite any instance in the record that the trial court was biased or prejudiced. Harris simply

asserts that "[m]any of the court's questionable rulings support its prejudice toward Harris." *Id*.

By failing to cite any support for his argument and by failing to file a request for change of judge pursuant to Crim. R. 12(B), Harris has waived any argument that he was entitled to a change of judge because of bias or prejudice. *See Flowers v. State*, 738 N.E.2d 1051 (Ind. 2000) (ruling that defendant not entitled to change of judge where mandates of Crim. R. 12 have not been followed); *Davis v. State*, 835 N.E.2d 1102 (Ind. Ct. App. 2005), *trans. denied*; *see also* Ind. Appellate Rule 46(A)(8) (requiring contentions in appellant's brief be supported by cogent reasoning and citations to authorities, statutes, and the appendix or parts of the record on appeal).

To the extent Harris claims error in the trial court's alleged failure to follow a local rule regarding the assignment of cases and/or transfer of cases, Harris has again failed to establish any harm or resulting prejudice. Howard County Local Rule LR-CR2.2 Rule 29, adopted to prevent forum shopping by prosecutors, sets forth the procedure by which cases are assigned amongst the courts in the county. Harris contends that pursuant to the local rule, this case should have been assigned to the Howard County Circuit Court, not the Howard County Superior Court I. Harris further argues that the local rule mandates that this case be transferred to the Circuit Court.

"It is a cardinal rule of appellate review that the appellant bears the burden of showing reversible error by the record, as all presumptions are in favor of the trial court's judgment." *Marion-Adams Sch. Corp. v. Boone*, 840 N.E.2d 462, 468 (Ind. Ct. App. 2006). Here, even if we assume that the local rule was not complied with and further, that the local rule is

mandatory in nature, Harris has not cited any adverse consequences for failure to comply with the local rule. There is no dispute that the trial court in this case had jurisdiction to hear criminal cases arising in Howard County. Thus we cannot discern how Harris was harmed. Moreover, as noted above, Harris has not cited to nor alleged any particular prejudice or bias on the part of the trial court. Harris has wholly failed to carry his burden of showing reversible error.

2.

Harris contends that the trial court erred in the manner in which it conducted the jury's off-site view of the Monte Carlo. Specifically, Harris maintains that it was error for the trial court to allow testimony while the jury was viewing the vehicle outside of the courtroom.

During the State's case-in-chief, the courtroom equipment and personnel, the parties (including Harris), and the jury were transported to a remote place where the Monte Carlo was located. The Monte Carlo was not in the same condition as the night of the shooting because it had been modified with rods showing the trajectory of the bullets. While at the remote location, the jury received testimonial evidence from Officer Sean Kinney about the trajectory of the bullets that struck the vehicle. The Monte Carlo was admitted into evidence over Harris's objection.[6] The court then recessed and reconvened back in the regular courtroom, where the trial continued. At no time did Harris object to the procedure used for the off-site viewing of the Monte Carlo or the testimony related thereto.

[6] Harris's specific objection was that it served no additional purpose to allow the jury to view the vehicle because there were ample photographs of the car that could have been used to aid the jury in understanding Officer Kinney's testimony regarding bullet trajectory. On appeal, Harris does not challenge the admission of the vehicle into evidence.

Harris's argument on appeal is based upon his mischaracterization of the procedure used here as a jury view pursuant to Ind. Code Ann. § 35-37-2-5 (West, Westlaw current through 2011 Pub. Laws approved & effective through 6/28/2011). That statute provides:

> Whenever:
> (1) the court believes that it is proper; or
> (2) a party to the case makes a motion;
> for the jury to have a view of the place in which any material fact occurred, the court may order the jury to be conducted in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury is absent for this reason, no person, other than the officer and the person appointed to show them the place, may speak to the jurors on any subject connected with the trial.

A jury's view of a place is not intended as evidence, but is simply to aid the jury in understanding the evidence. *Johnson v. State*, 472 N.E.2d 892 (Ind. 1985). By its own terms, the statute refers to the procedure to be used when a jury views a "place." The situation presented here relates to the manner in which the trial court accommodated the admission of an oversized item of evidence, i.e., the car Abby was driving on the night in question. The jury was not taken to view a place, but rather the trial court moved the entire trial, including court equipment, personnel, and the parties, to a remote location to accommodate an item of evidence too big to be presented in the regular courtroom. I.C. § 35-37-2-5, therefore, does not govern the procedure to be followed.

In this vein, we note that a trial court must be given wide latitude to run the courtroom and maintain discipline and control of the trial. *Morgan v. State*, 934 N.E.2d 1246 (Ind. Ct. App. 2010). Furthermore, "'[a] trial judge has the responsibility to direct the trial in a manner that facilitates the ascertainment of truth, ensures fairness, and obtains economy of time and effort commensurate with the rights of society and the criminal defendant.'"

Lindsey v. State, 877 N.E.2d 190, 195 (Ind. Ct. App. 2007) (quoting *Fosha v. State*, 747 N.E.2d 549, 553-54 (Ind. 2001), *overruled on other grounds by Gutermuth v. State*, 868 N.E.2d 427 (Ind. 2007)) (discussing discovery issues), *trans. denied*. Here, the trial court was meticulous in taking precautions so as not to taint the jury. For instance, among other things, the trial court considered timing and transportation of the defendant and the jury to and from the remote location so they would not cross paths. The remote location was set up in the same manner as a regular courtroom. Further, contrary to Harris's claims, we find that allowing the jury to view a car with the dowel rods indicating bullet trajectory did not serve to "stok[e] the flames of passion within the jurors." *Appellant's Brief* at 13. Harris has failed to establish error in the procedure employed by the trial court to accommodate the admission of oversized evidence.

We also reject Harris's analogy to receiving evidence by close circuit television pursuant to the protected person statute. *See* I.C. § 35-37-4-8 (West, Westlaw current through 2011 Pub. Laws approved & effective through 6/28/2011). Here, the judge, all parties, including Harris, and the jury were present during Officer Kinney's testimony, albeit that the testimony was presented at a remote location.

3.

Harris argues that the trial court erred in admitting into evidence statements he made to a fellow inmate, asserting such statements were procured in violation of his right to counsel under the Indiana Constitution. The admission of evidence is within the sound discretion of the trial court whose decision thereon will not be reversed absent a showing of manifest abuse of discretion resulting in the denial of a fair trial. *Johnson v. State*, 831

N.E.2d 163 (Ind. Ct. App. 2005), *trans. denied*. A decision is an abuse of discretion if it is clearly against the logic and effect of the facts and circumstances before the court. *Id.* We consider the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor. *Id*.

During his investigation, Detective Banush learned that Harris was a suspect in Abby's murder. In early April 2009, Detective Banush was informed that Harris was incarcerated in Illinois. A few days after that, Detective Banush was informed that Harris was talking to a fellow inmate, Edward Ledezma, about a murder that had occurred in Kokomo. Detective Banush made arrangements to place a prison informant (Ledezma) in a cell with Harris and also obtained an order authorizing the use of an eavesdropping device. Detective Banush drove to Illinois to interview Harris.

At the start of the interview, Detective Banush advised Harris of his rights and Harris signed an advisement of rights form as well as a form waiving his rights. Detective Banush questioned Harris about the shooting on April 5, 2008, and Harris denied any involvement. During the twenty-minute interview, Detective Banush confronted Harris with a statement by Luckett implicating Harris in the shooting/murder of Abby. According to Detective Banush, the interview ended with Detective Banush giving Harris his card and telling Harris to call if he wanted to talk more or if he wanted to talk to the prosecutor about making a deal. Harris testified during the suppression hearing that Detective Banush became frustrated with him during the interview and that Detective Banush asked Harris if he wanted to speak to an attorney. After the interview concluded, Harris was sent back to his cell where Ledezma (who was equipped with the eavesdropping device) was also being held. In a conversation

with Ledezma, which was recorded, Harris admitted to his involvement in the crime herein charged. Based on the evidence presented, the trial court found that Harris had not invoked his right to counsel and therefore found Harris's statements to Ledezma admissible.

On appeal, Harris's entire argument is premised upon his claim that he invoked his right to counsel. It is well established that a suspect must request to invoke the right to counsel and that such request must be clear and unequivocal. *Taylor v. State*, 689 N.E.2d 699 (Ind. 1997). Once an unequivocal request is made, subsequent questioning while in custody must cease until counsel is furnished. *Id*. Harris relies upon his own testimony during the suppression hearing to establish that he invoked his right to counsel. Harris maintains that Detective Banush became frustrated with him because he denied any involvement in the crime and that it was Detective Banush who asked Harris if he wished to speak with counsel. Detective Banush, on the other hand, did not testify that Harris invoked his right to counsel, but rather explained that his purpose in interviewing Harris was to let him know he was a suspect in the crime before sending him back to his cell where the jailhouse informant, equipped with a recording device, was waiting to discuss the shooting with Harris. Detective Banush testified that the interview with Harris ended when Detective Banush gave Harris his card and told him to call if he wanted to discuss the shooting further or if he wanted to talk to the prosecutor about a deal. To second-guess the trial court's determination that Harris did not clearly and unequivocally invoke his right to counsel would require us to reweigh the evidence and judge the credibility of witnesses, a task in which we will not engage on appeal. *See Kelley v. State*, 825 N.E.2d 420 (Ind. Ct. App. 2005). Having reviewed the record, we cannot say that the trial court abused its discretion in concluding that

Harris's statement to the jailhouse informant was admissible.

4.

Harris argues that the prosecutor engaged in misconduct during *voir dire* and during rebuttal closing arguments. In reviewing a claim of prosecutorial misconduct, we determine whether the prosecutor engaged in misconduct, and if so, whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he should not have been subjected. *Cooper v. State*, 854 N.E.2d 831 (Ind. 2006). The gravity of peril turns on the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct. *Id.* Absent clear error and resulting prejudice, a trial court's determination of violations and sanctions will be affirmed. *Overstreet v. State*, 783 N.E.2d 1140 (Ind. 2003). *See also Donnegan v. State*, 809 N.E.2d 966, 972 (Ind. Ct. App. 2004) ("[w]e accord great deference to the trial court's decision, as it is in the best position to gauge the circumstances and the probable impact on the jury"), *trans. denied.*

To preserve a claim of prosecutorial misconduct, a defendant must object and request an appropriate remedy, such as an admonishment. *Delarosa v. State*, 938 N.E.2d 690 (Ind. 2010). If the defendant is not satisfied with the admonishment, the defendant must request a new trial. *Id*. Failure to comply waives the claim of prosecutorial misconduct. *Id*. To avoid waiver, a defendant must establish that the conduct of the prosecutor rose to the level of fundamental error. *Etienne v. State*, 716 N.E.2d 457 (Ind. 1999). Fundamental error is an extremely narrow exception to the general rule that the failure to properly preserve a claim results in waiver. *Sobolewski v. State*, 889 N.E.2d 849 (Ind. Ct. App. 2008), *trans. denied*. Under the fundamental error standard, we will not reverse an instance of prosecutorial

misconduct unless we are convinced that the error made a fair trial impossible or constituted a blatant violation of basic and elementary principles of due process. *Id.*

Harris's first claim of prosecutorial misconduct stems from the prosecutor's use of cartoons during the latter part of *voir dire*. Over Harris's objection, the prosecutor used cartoons to illustrate key legal concepts at issue in the case: transferred intent, accomplice liability, and the agreement necessary for conspiracy. After the jury was sworn in, Harris moved for a mistrial based upon the State's use of cartoons in what Harris claims was an effort by the State to indoctrinate the jurors. In one cartoon (State's Exhibit 1-B), illustrating accomplice liability, three men are depicted burglarizing a house. Two of the men are exiting the house, while the third is waiting in the getaway car. In a second cartoon (State's Exhibit 1-C), Peyton Manning is depicted calling out plays to the offensive line. This cartoon was used by the prosecutor to illustrate an agreement for purposes of establishing a conspiracy. In a third cartoon, State's Exhibit 1-A, transferred intent is demonstrated by a scene of a robbery in which a patron, rather than the store clerk, is shot.

A trial court has broad discretionary power to regulate the form and substance of *voir dire*. *Von Almen v. State*, 496 N.E.2d 55 (Ind. 1986). But the function of *voir dire* examination is not to educate jurors. Rather, it is to ascertain whether jurors can render a fair and impartial verdict in accordance with the law and the evidence. *Id.* Jurors are to be examined to eliminate bias but not to condition them to be receptive to the questioner's position. Questions that seek to shape a favorable jury by deliberate exposure to the substantive issues in the case are therefore improper. *Id.* Indeed, our Supreme Court has found it "repugnant to the cause of justice" to use *voir dire* to "cultivate[] and condition[],

both consciously and unconsciously, [prospective jurors] to be more receptive to the cause of the examiner." *Robinson v. State*, 260 Ind. 517, 520-21, 297 N.E.2d 409, 411-12 (1973). *See also Perryman v. State*, 830 N.E.2d 1005 (Ind. Ct. App. 2005).

Here, the State used the cartoons to discern whether the potential jurors understood the concepts of transferred intent and accomplice liability and whether they were confused about the nature of an agreement necessary to establish a conspiracy. The cartoons were factually unrelated to the case at hand and did not suggest prejudicial evidence that would not be adduced at trial. *See Steelman v. State*, 602 N.E.2d 152 (Ind. Ct. App. 1992). The cartoons – depicting a robbery, a burglary, and a football game – were less severe than the charges of murder, conspiracy to commit murder, and attempted murder for which Harris was being tried. Having reviewed the transcript of *voir dire*, we cannot say that the State improperly used the cartoons as a tool to indoctrinate the prospective jurors. In any event, it does not appear from the record that the cartoons played a key role in terms of helping the jurors understand the concepts so illustrated. There is no indication in the record that the prospective jurors were confused about or did not understand the concepts of transferred intent, accomplice liability, or conspiracy.

Moreover, we note that Harris has not shown how he was prejudiced by the State's use of cartoons during *voir dire*. The trial court fully instructed the jurors on the elements of the offenses and instructed the jurors that the unsworn statements and comments of counsel were not evidence, but that the jury must make its decision based only upon the testimony and evidence presented. Having reviewed the record, we cannot say that the prosecutor improperly indoctrinated the potential jurors by briefly directing the jury to consider the

cartoons so as to gage potential jurors' understanding of transferred intent, accomplice liability, and conspiracy.

Harris also argues the prosecutor engaged in misconduct during rebuttal closing arguments when the prosecutor stated:

> You know, every week it seems that there's, maybe, I don't know, four or five, ten, homicides in Chicago. I don't want that here. It's my job . . . to protect this community.

Transcript at 11012. Harris maintains that the prosecutor's comment in this regard heightened the role of the prosecutor while implicitly undermining the role of defense counsel. Harris asserts that the prosecutor's comments placed the State and its witnesses in the position of the "good guys" while painting Harris, his counsel, and Harris's friends as the "bad guys." *Appellant's Brief* at 21. Harris immediately objected to the prosecutor's statement and requested that the jury be admonished. The trial court agreed with the prosecutor's sentiment and overruled Harris's objection.

In reviewing the propriety of the prosecutor's remarks during closing argument, we will consider the statement in the context of the argument as a whole. *Hollowell v. State*, 707 N.E.2d 1014 (Ind. Ct. App. 1999). It is proper for a prosecutor to argue both law and fact during final argument and propound conclusions based upon his analysis of the evidence. *Id*.

Here, the evidence showed that Harris and Luckett were members of a Chicago gang and that Matthews and his friends were from Detroit. The altercation between the two groups occurred in Kokomo. A fair reading of the prosecutor's closing statement is that the prosecutor was of the opinion that these offenses were gang-related. The prosecutor's comment that it was his job to protect the community from gang-related activities is not an

improper description of his role in the community. The prosecutor's statement amounted to nothing more than the prosecutor's opinion that this was a gang-related murder in Kokomo and that Harris should be held accountable. Harris has failed to establish that the prosecutor's remarks amounted to prosecutorial misconduct. To be sure, even if the brief statement was deemed improper, Harris was not placed in a position of grave peril because the evidence against him was overwhelming.

5.

Harris argues that his aggregate sentence of one hundred sixty-five years is inappropriate.[7] We have the constitutional authority to revise a sentence if, after careful consideration of the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. See Ind. Appellate Rule 7(B); *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. Even if a trial court follows the appropriate procedure in arriving at its sentence, we maintain the constitutional power to revise a sentence we find inappropriate. *Hope v. State*, 834 N.E.2d 713 (Ind. Ct. App. 2005). Although we are not required under App. R. 7(B) to be "extremely" deferential to a trial court's sentencing decision, we recognize the unique perspective a trial court brings to such determinations. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). Our Supreme Court has provided the following guidance for our review of sentences: "[A]ppellate 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, 1225 (Ind. 2008). The burden of persuading us that the sentence is inappropriate is on the defendant. *Rutherford v. State*, 866 N.E.2d 867.

As to the nature of the offense, Harris simply notes the severity of the crimes for which he was convicted and provides no further comment as to how such should impact his

[7] Harris argued for the imposition of the advisory sentence for each conviction and that such sentences be served concurrently for a total aggregate sentence of fifty-five years.

sentence. We note that the evidence showed that Harris, along with Yates and Luckett, decided to kill Matthews and the Taylor brothers. While following Abby's Monte Carlo, Harris voiced his position that they needed to kill Abby and Morgan as well because they would be witnesses. As Luckett jumped out of the back seat of the car and opened fire through the passenger door, Harris got out of the front passenger seat and began shooting through the back of Abby's car. As soon as the shooting was over, Harris and Luckett got back into the car and Yates quickly drove away from the scene. The following day Harris took steps to conceal his participation by traveling to Chicago to dispose of the guns used in the shooting. The evidence showed that it was a bullet fired from Harris's gun that inflicted the fatal wound on Abby. The nature of the offenses, in which an innocent young girl was killed and another seriously injured, warranted the maximum sentences. As the trial court noted, but for the fact that Harris and Luckett were bad shots, three people would be dead.

With regard to the character of the offender, we note that by the age of twenty-four, when these offenses were committed, Harris had already accumulated three felony convictions and several misdemeanor convictions, as well as a number of arrests. Shortly after these offenses were committed, Harris was arrested and convicted of a fourth felony in Illinois and two additional misdemeanor charges in Indiana. On appeal, Harris asks that we give due consideration to the fact that nearly all of his contacts with the criminal system have been the result of his drug dependency. While we acknowledge that many of Harris's prior convictions involve substance abuse, we refuse to find that such excuses mollify what has amounted to a life of crime. Harris has failed to take advantage of leniency afforded him through probation and parole. Indeed, at the time of the instant offenses Harris was on

probation or parole and on bond. Most telling of Harris's character is his callous calculation that Abby and Morgan, innocents in the wrong place at the wrong time, had to be killed because they would be witnesses to the murder of Matthews. Harris has demonstrated that he has no regard for the laws of society and that he has no respect for human life. Harris's character does not support imposition of a lesser sentence.

Having considered the nature of the offense and the character of the offender, we conclude that Harris's one hundred sixty-five year sentence for murdering Abby Rethlake, attempting to murder Morgan Vetter, and attempting to murder Matthews is not inappropriate.

Judgment affirmed.

BROWN, J., concurs.

BAILEY, J., concurs in part and concurs in result in part.