

Terrell Brandon Wofford (“Wofford”) was convicted after a jury trial of battery¹ as a Class A felony and was given a thirty-five-year executed sentence. He appeals, raising the following restated issues:

- I. Whether the trial court abused its discretion when it allowed witness testimony to be admitted concerning the possible cause of the victim’s injuries;
- II. Whether the trial court abused its discretion when it denied Wofford’s tendered final jury instruction defining negligence; and
- III. Whether the trial court abused its discretion when it sentenced Wofford.

We affirm.

FACTS AND PROCEDURAL HISTORY

In October 2007, three-year-old M.S. lived with his two siblings, his mother Shea Evans (“Evans”), and Wofford, her boyfriend, in an apartment in Hammond, Indiana. On October 30, 2007, after M.S. and the other children had eaten lunch, Evans’s sister stopped by the apartment to take Evans somewhere. While Evans got ready, her sister played with M.S., and he was smiling, acting “silly,” and laughing. *Tr.* at 287. When Evans and her sister left the apartment around 2:00 p.m., they left the children in the care of Wofford, and M.S. appeared normal and acted “fine.” *Id.* at 685.

Later that afternoon, the upstairs neighbor, Adrian Thomas (“Thomas”), was taking a nap when he was awakened by “booms” and the sound of children crying coming from Wofford’s apartment. *Id.* at 190. Thomas left his apartment about forty-

¹ See Ind. Code § 35-42-2-1(a)(5).

five minutes later and saw Wofford sitting on his porch, looking irritated. Thomas stopped to speak with Wofford, and a fifteen-year-old neighbor boy, A.W., came over to the two men. The three decided to smoke marijuana, and they went upstairs to Thomas's apartment.

After the marijuana was "pretty much gone," Wofford said he should go check on the children. He went down to his apartment, but soon came back to the bottom of the stairs and yelled, "something's wrong with my shorty." *Id.* at 195. Wofford borrowed A.W.'s phone and called 911. Thomas stayed upstairs to dissipate the marijuana smoke, and A.W. followed Wofford downstairs to his apartment. M.S. was limp, and his face was covered in vomit. A.W. saw Wofford attempt to do CPR on M.S.

Paramedics arrived and found Wofford's demeanor to be "pretty calm" and "non-excited." *Id.* at 70, 127. M.S. had partially-dried vomit around his mouth and on his clothes, he was not breathing and had no pulse, his body was cool to the touch, and he showed signs of oxygen deprivation. *Id.* at 71, 74-75, 129, 131, 133. When M.S. arrived at the hospital where there was better lighting, the paramedics were able to see bruising around his neck. *Id.* at 81, 140. The emergency room staff noticed bruising starting to appear "pretty much all over his body." *Id.* at 794. His body temperature was only ninety-two degrees, and he never showed any vital signs. M.S. was pronounced dead at the hospital. Shanell Manuel ("Manuel"), who worked at the Indiana Department of Child Services ("IDCS"), was called to the hospital due to M.S.'s death. Once there, she spoke with Wofford about what had occurred. He told her that he had spanked M.S. that day, that M.S. had lay down to take a nap, and that Wofford had then gone outside to the

porch. *Id.* at 825.

An autopsy of M.S. was performed the next day and revealed bruises on his chest, arms, legs, back, buttocks, and thighs, and around his ear and face. The doctor believed that the bruises had occurred less than eight hours before M.S.'s death. The autopsy also showed hemorrhaging in M.S.'s abdominal cavity, brain, lungs, and liver. The doctor observed a subdural hemorrhage that he believed was caused by external trauma to the head. *Id.* at 382. The most damaged organ was the liver; it had "multiple large lacerations" and was "almost torn in half." *Id.* at 460. The primary cause of M.S.'s death was massive hemorrhaging from the lacerated liver due to blunt force injuries of the abdomen. *Id.* at 389, 457-58. The doctor testified that force was necessary to cause the multiple lacerations and that he believed that physical abuse was the cause. *Id.* at 389.

Manuel contacted the coroner and learned the extent of the injuries to M.S. When Manuel was discussing the autopsy results with Wofford, he asked what "lacerated" meant. *Id.* at 844. Manuel asked him if she could demonstrate it to him, and he said she could. *Id.* She put her fist on his stomach and turned him around and put her fist on his kidney area to explain to him what "blunt force trauma was and how a laceration can occur." *Id.* at 861. Wofford responded to this demonstration by putting his head down and saying that he "didn't do nothing." *Id.*

The State charged Wofford with murder, neglect of a dependent as a Class A felony, and battery as a Class A felony. A jury trial was held, and a jury found him guilty of reckless homicide, a Class C felony, which is a lesser-included offense of murder, neglect of a dependent as a Class A felony, and battery as a Class A felony. The trial

court entered judgment only on battery as a Class A felony. The trial court found the victim's age, the fact that Wofford had a temper, that prior leniency had not deterred his criminal behavior, and that he was in need of correctional and rehabilitative treatment that can best be provided by commitment to a penal facility as aggravating factors. It found that Wofford had not previously had the benefit of prolonged or short-term imprisonment and he is likely to respond affirmatively to incarceration as a mitigating circumstance. The trial court sentenced Wofford to thirty-five years executed in the Indiana Department of Correction. Wofford now appeals.

DISCUSSION AND DECISION

I. Admission of Evidence

The admission of evidence is within the sound discretion of the trial court, and we will reverse only on a showing of abuse of discretion. *McClendon v. State*, 910 N.E.2d 826, 832 (Ind. Ct. App. 2009), *trans. denied*; *Goldsberry v. State*, 821 N.E.2d 447, 453-54 (Ind. Ct. App. 2005). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the trial court. *McClendon*, 910 N.E.2d at 832; *Goldsberry*, 821 N.E.2d at 454. Even if the trial court's decision was an abuse of discretion, we will not reverse if the admission constituted harmless error. *Beer v. State*, 885 N.E.2d 33, 41 (Ind. Ct. App. 2008).

Wofford argues that the trial court abused its discretion when it admitted the testimony of Manuel regarding how she demonstrated to Wofford "the manner in which [M.S.'s] injuries might have occurred." *Appellant's Br.* at 10. He contends that this testimony was not admissible evidence because it was not relevant. Specifically, his

argument is that no other evidence was presented to show that the injuries were incurred in the manner described by Manuel, and therefore, the evidence did not have a 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. He also claims that Manuel should not have been allowed to demonstrate how M.S.'s injuries may have occurred without foundational evidence showing that she possessed some special knowledge making her an expert. Wofford further argues that, even if the evidence was relevant, it was unfairly prejudicial and should not have been admitted.

“Relevant evidence” means 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. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. Evid. R. 403. “Generally, ‘[a] timely and accurate admonition is presumed to cure any error in the admission of evidence.’” *Hollingsworth v. State*, 907 N.E.2d 1026, 1031 (Ind. Ct. App. 2009) (quoting *Banks v. State*, 761 N.E.2d 403, 405 (Ind. 2002)).

Here, the trial court admitted the testimony of Manuel, an IDCS worker, that when she was discussing the autopsy results with Wofford, he asked what lacerated meant, and she demonstrated to him how the blunt force trauma of a punch could cause lacerations to internal organs. *Tr.* at 844, 861. In her testimony, Manuel did not actually demonstrate the punches to the jury, but only described how she demonstrated them to Wofford. She

testified that after she demonstrated the blunt force trauma to him, Wofford put his head down and said he “didn’t do nothing.” *Id.* at 861. The State advised the trial court that it was proffering the evidence to show Wofford’s consciousness of guilt. *Id.* at 848.

Initially, we note that, although Wofford contends that the testimony at issue was admitted to “demonstrate how the injuries may have occurred,” his assertion is incorrect. *Appellant’s Br.* at 10. In her testimony, Manuel merely explained how she demonstrated how the blunt force trauma of a punch could cause lacerations to internal organs; she did not actually perform a demonstration of such at trial. *Tr.* at 861. The testimony was also not admitted to demonstrate how the injuries may have occurred, but was admitted only to show Wofford’s consciousness of guilt and reaction to Manuel’s demonstration. *Id.* at 848. Assuming without deciding that the testimony was erroneously admitted, the trial court instructed the jury to consider the testimony only for the limited purpose of what Manuel said to Wofford and his reaction:

Objection overruled. Ladies and gentlemen, you are about to see a demonstration. The demonstration is not being offered for any evidence whatsoever as to the mechanism of injury.

The testimony is being admitted by this Court, not for you to accept that, that is, in fact, the way the injury occurred. It is being offered to show what this witness said to [Wofford] and what [Wofford’s] reaction was after hearing that. And you are only to receive that evidence for that limited purpose.

Id. at 860-61.² Therefore, as the trial court properly admonished the jury to limit its consideration of the evidence to a purpose, which Wofford does not now challenge, the

² Although the trial court informed the jury that it was going to see a demonstration, this did not actually occur. As previously stated, the jury only heard testimony of Manuel regarding what she had demonstrated to Wofford.

evidence was properly admitted.

Further, the testimony was merely cumulative of the testimony given by the medical experts. An error in the admission of evidence is not prejudicial if the evidence is merely cumulative of other evidence in the record. *Pavey v. State*, 764 N.E.2d 692, 703 (Ind. Ct. App. 2002), *trans. denied*. Manuel testified that she demonstrated to Wofford how an internal organ could be lacerated with blunt force trauma by punching the body. *Tr.* at 861. This testimony was the same as that given by two medical experts who both testified that the lacerations could have resulted from very forceful blows using a fist or kick from either the front or the back. *Id.* at 390, 478, 480. Thus, even if the jury considered Manuel's testimony for the purpose of showing how M.S.'s injuries could have occurred, the testimony was merely cumulative of other properly admitted evidence. The trial court did not abuse its discretion when it admitted Manuel's testimony, and even if the trial court had erred, such error was harmless as the testimony was cumulative.

II. Jury Instruction

The manner of instructing a jury lies largely within the sound discretion of the trial court, and we review only for an abuse of that discretion. *Stringer v. State*, 853 N.E.2d 543, 548 (Ind. Ct. App. 2006). An abuse of the trial court's discretion occurs "when 'the instructions as a whole mislead the jury as to the law in the case.'" *Ham v. State*, 826 N.E.2d 640, 641 (Ind. 2005) (quoting *Carter v. State*, 766 N.E.2d 377, 382 (Ind. 2002)). In determining whether a trial court properly refused an instruction, we consider the following: (1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the

substance of the tendered instruction is covered by other instructions that are given. *Id.*

Wofford argues that the trial court abused its discretion when it refused to give his tendered final jury instruction on the definition of negligence. He contends that one of his defenses at trial was that he may have negligently injured M.S. while performing CPR and that he was therefore entitled to an instruction on negligence because the trial court was required to give an instruction concerning his possible defense. Wofford asserts that it was an abuse of discretion for the trial court to give jury instructions defining the mental states required to find him guilty, but refuse his jury instruction on negligence, which would have made him not guilty.

At trial, Wofford tendered the following proposed jury instruction:

Negligence is the failure to do what a reasonably careful and prudent person would have done under the same or like circumstances, or the doing of something which a reasonably careful and prudent person would not have done under the same or like circumstances; in other words, negligence is the failure to exercise reasonable or ordinary care.

Mere negligence is not sufficient to show reckless disregard for the safety of others.

Appellant's App. at 76. The trial court refused to give this instruction to the jury.

The evidence showed that M.S., who was three years old, was left in the care of Wofford and suffered a severe beating, which resulted in bruising over most of his body, internal hemorrhaging, and lacerated internal organs, particularly his liver, which was "almost torn in half." *Tr.* at 460. The evidence did not support that Wofford's conduct was merely negligent and did not support giving his proffered jury instruction. Further, the substance of his tendered instruction was covered by the other instructions given by

the trial court. Among the instructions given by the trial court was one defining the defense of accident and instructing the jury it could find Wofford not guilty for only accidentally injuring M.S. *Appellant's App.* at 95. Additionally, the instructions given regarding the offenses all explained that the jury must find that Wofford had acted knowingly or intentionally, or in the case of reckless homicide, recklessly, in order to find him guilty. *Id.* at 83, 85, 86, 88, 90.

In *Springer v. State*, 798 N.E.2d 431 (Ind. 2003), our Supreme Court affirmed the trial court's denial of a negligence instruction and reasoned that negligence was an argument, not a legal defense, because the defendant argued that his actions did not meet the legal definition of recklessness. *Id.* at 435. The Court found that the defendant was "free to and did argue that he did no more than fail 'to exercise reasonable or ordinary care.'" *Id.* It further held that a negligence instruction would have been merely a statement that the State failed to prove that he acted recklessly. *Id.* We conclude that the same reasoning applied to the present case. Here, even though Wofford's proffered instruction was not given, his defense counsel provided the jury with the definition of negligence during closing argument and argued that Wofford's actions did not surpass mere negligence. *Tr.* at 1015, 1020-21, 1022. These arguments and information advising the jury that mere negligence was not sufficient to find Wofford guilty, together with the instructions given that informed the jury that it had to find knowing, intentional, or reckless action in order to find Wofford guilty, lead us to conclude that the substance of Wofford's proffered jury instruction was sufficiently covered by the instructions given. The trial court did not abuse its discretion when it refused to give his tendered jury

instruction.

III. Sentencing

Trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Id.* If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id.* Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Id.* An abuse of discretion occurs if the decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Id.*

One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. *Id.* Another example includes entering a sentencing statement that explains reasons for imposing a sentence, including mitigating and aggravating circumstances, which are not supported by the record. *Id.* at 490–91. A court may also abuse its discretion by citing reasons that are contrary to law. *Id.* at 491. A trial court may abuse its discretion by entering a sentencing statement that omits mitigating factors that are clearly supported by the record and advanced for consideration. *Id.* at 490-91. Because the trial court no longer has any obligation to "weigh" aggravating and mitigating factors against each other when imposing a sentence,

a trial court cannot now be said to have abused its discretion in failing to “properly weigh” such factors. *Id.* at 491. Once the trial court has entered a sentencing statement, which may or may not include the existence of aggravating and mitigating factors, it may then “impose any sentence that is . . . authorized by statute; and . . . permissible under the Constitution of the State of Indiana.” Ind. Code § 35-38-1-7.1(d).

Wofford argues that the trial court abused its discretion in sentencing him to a sentence higher than the advisory term when it found aggravating and mitigating circumstances. Specifically, he contends that the trial court erred when it found the following aggravating factors: (1) that prior leniency had not deterred Wofford’s criminal behavior in that he violated his probation and subsequently was convicted of a further offense; (2) that he was in need of correctional and rehabilitative treatment that could be best provided by commitment to a penal facility; and (3) the victim’s age. Wofford also claims that the trial court failed to give sufficient weight to numerous mitigating circumstances.³

Wofford first takes issue with the trial court finding that prior leniency had not deterred his criminal behavior to be an aggravating circumstance. In its sentencing statement, the trial court found this to be aggravating because, in the past, Wofford had been given probation for a prior felony conviction, which was later revoked and he was subsequently convicted of another offense. The evidence showed that Wofford was

³ Wofford also cites to Indiana Appellate Rule 7(B) but does not raise any argument that his sentence was inappropriate in light of the nature of the offense and the character of the offender. “A party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record.” *Wingate v. State*, 900 N.E.2d 468, 475 (Ind. Ct. App. 2009); *see also* Ind. Appellate Rule 46(A)(8). Wofford has therefore waived this issue.

convicted of felony possession of a controlled substance and was given probation, which he violated once and was later revoked. He was also subsequently convicted of disorderly conduct. We find that this was a proper aggravating factor.

Wofford next contends that it was error to find that he was in need of correctional and rehabilitative treatment that could be best provided by commitment to a penal facility because prior attempts at treatment had not been successful. He alleges this is because the court based the determination on his statements that when he was younger he was sent to a hospital because “they talkin’ about I was crazy. I just snap out sometimes” and interpreted them to mean that he would lose his temper. *Tr.* at 1087-88. The evidence in Wofford’s presentence investigation report stated that, around age twelve or thirteen, he was taken to a hospital because of the above statements and was again taken on a later occasion, but that he refused medication on both occasions. Further, when the trial court listed that Wofford was in need of treatment that could be best provided in a penal facility as an aggravating factor, it based it on the fact that because of Wofford’s prior criminal convictions and attempts to treat him for his temper had not been successful. The trial court did not abuse its discretion in finding this to be an aggravating circumstance.

Finally, Wofford argues that it was an abuse of discretion to find the victim’s age to be an aggravating circumstance because it was an element of the crime. Wofford was convicted of battery, which is elevated to a Class A felony when the battery results in the death of a person less than fourteen years of age and is committed by a person at least eighteen years of age. Ind. Code § 35-42-2-1(a)(5). Although generally the age of the victim may be not used as an aggravating circumstance, a trial court may consider the

particularized factual circumstances of the case to be an aggravating factor. *Edwards v. State*, 842 N.E.2d 849, 854 (Ind. Ct. App. 2006). In its sentencing statement, the trial court stated the nature and circumstances of Wofford's crimes to be, "[t]hat [M.S.], a three-year-old, was left in the care and custody of [Wofford,] . . . that [Wofford] fatally battered [M.S.] and the evidence . . . is that there was massive internal bleeding." *Tr.* at 1086-87. We conclude that the trial court did not abuse its discretion in finding the victim's age to be an aggravating factor.

To the extent that Wofford argues that the trial court failed to give adequate weight to mitigating circumstances, we remind him we may no longer review the weight a trial court assigns to aggravators and mitigators, because a trial court "no longer has any obligation to 'weigh' [them] against each other when imposing a sentence." *Anglemyer*, 868 N.E.2d at 491. Therefore, we conclude that the trial court did not abuse its discretion in sentencing Wofford.

Affirmed.

VAIDIK, J., and MATHIAS, J., concur.