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ATTORNEY FOR APPELLANT:

MICHAEL R. FISHER
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JOBY D. JERRELLS
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ERNEST DAVIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-1102-CR-62
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
Cause No. 49G06-0904-MR-40572

October 27, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Ernest Davis ("Davis") was convicted after a jury trial of murder[1] and attempted robbery[2] as a Class C felony and was sentenced to an aggregate term of sixty-eight years in the Department of Correction. He appeals, raising the following restated issues:

I. Whether sufficient evidence was presented to support Davis's conviction for murder, specifically to rebut his claim that he acted in self-defense;

II. Whether the trial court abused its discretion when it failed to give a final jury instruction stating that possession of or dealing in marijuana was not a crime for which the commission of would negate self-defense; and

III. Whether Davis's sixty-eight-year sentence was inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

FACTS AND PROCEDURAL HISTORY

In 2009, Collie Rose ("Rose') lived with her son, Troy Taylor ("Troy"), and her grandson, Jerry Taylor ("Jerry"), on Riley Avenue in Indianapolis, Indiana in the home where she had lived for over forty years. On April 11, 2009, Rose picked up Jerry from work around 11:30 p.m. When Jerry and Rose arrived back home around midnight, Troy was in the living room playing his keyboard. Earlier in the evening, Jerry had spoken to Reginald Groce ("Groce"), who wanted to buy some marijuana from Jerry. Groce knew that Jerry had approximately $500 in cash and that Jerry was interested in using the money in a "marijuana related transaction." *Tr*. at 83. Jerry called Groce when he arrived home from work. Groce asked if Jerry "was off work" and told Jerry he was "out

[1] *See* Ind. Code § 35-42-1-1.

[2] *See* Ind. Code §§ 35-42-5-1, 35-41-5-1.

south" and unable to stop by, but would see him the next day. *Id*. at 84-85.

Rose went to bed, and Jerry went to his bedroom to listen to music and watch television. Jerry could see into the living room and could see Troy go to the front door. When Troy answered the door, a man, later identified as Davis, walked into the house, pointed a gun at Troy's head, and asked, "Where is the money at?" *Id*. at 78. Jerry, who was shocked and scared, ran into Rose's bedroom and shut the door. He told her to "hold the door" because "[t]hat man in there got a gun." *Id*. at 54. Jerry told Rose to go out the window, but she was unable to do so. Jerry heard his father say, "Open the door. This man has got a gun to my head." *Id*. at 79. Rose then told Jerry to go out the window while she sat on the floor and held the door with her feet. Jerry went out the window.

Rose could not call 911 because the phone was in the living room. Davis began pushing on Rose's door and yelling, "If you don't open the door, I'm going to shoot you." *Id*. at 56. Rose then thought she heard Troy say, "Jerry, come help me. Help me, Jerry. I need you." *Id*. at 57. She heard the front door open when Davis left. She left her bedroom and called 911. Jerry came back to the house, and he and Rose went into the kitchen where they saw Troy lying on the kitchen floor. Troy's mouth was moving, but he could not say anything. Police and emergency medical personnel arrived and administered CPR on Troy, but he died as a result of a bullet wound to the chest.

Indianapolis Metropolitan Police Detective Jeffrey Wager ("Detective Wager") arrived at approximately 1:54 a.m. and had another detective transport Jerry and Rose to the station to discuss what had occurred. When Jerry and Rose were leaving the house, Jerry saw Groce standing behind the yellow police tape in the front yard. Groce

attempted to attract Jerry's attention by calling his name. Jerry initially did not tell the police about the marijuana discussions he had with Groce because he was afraid he would be in trouble. Detective Wager received a call from a female friend of Jerry, who said that Jerry had told her about his conversations with Groce. Detective Wager interviewed Jerry on April 14, 2009, and at that time, Jerry told the detective about Groce. Detective Wager later interviewed Groce, who implicated Davis in the crime. The police located Davis at his residence and brought him to the police department, where he agreed to speak with the police. When Davis arrived at the police department, he had two small injuries to his back, one of which had a bandage over it. Davis admitted that he was at the house on the night of the crime, but claimed that he shot Troy in self-defense. He denied entering the house with his gun drawn and denied pushing on Rose's bedroom door.

The State charged Davis with murder, felony murder, attempted robbery as a Class A felony, conspiracy to commit robbery as a Class A felony, and unlawful possession of a firearm by a serious violent felon as a Class B felony. The State subsequently amended the charging information by dismissing the conspiracy to commit robbery charge and the unlawful possession of a firearm by a serious violent felon charge. On May 24, 2010, a jury trial was held, at the conclusion of which the jury found Davis guilty as charged. At the sentencing hearing, the trial court entered judgment only as to murder and to attempted robbery as a Class C felony because of double jeopardy concerns. The trial court sentenced Davis to sixty years for murder and eight years for attempted robbery, with the sentences to be served consecutively. Davis now appeals.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

This court reviews a challenge to sufficiency of the evidence to rebut a self-defense claim under the same standard as any sufficiency of the evidence claim. *Boyer v. State*, 883 N.E.2d 158, 162 (Ind. Ct. App. 2008) (citing *Sanders v. State*, 704 N.E.2d 119, 123 (Ind. 1999)). That is, the verdict will not be disturbed if there is sufficient evidence of probative value to support the conclusion of the trier of fact. *Id.* Stated differently, a reviewing court will reverse a conviction where the defendant claimed self-defense only if no reasonable person could say the State disproved self-defense beyond a reasonable doubt. *Id.* (citing *Taylor v. State*, 710 N.E.2d 921, 924 (Ind. 1999)). In conducting this review, we neither reweigh the evidence nor judge the credibility of the witnesses. *Id.*

Davis argues that the State failed to present sufficient evidence to support his conviction for murder because the evidence failed to disprove that he acted in self-defense. He contends that the evidence showed that Troy stabbed Davis at least twice in the back in a manner that would reasonably be expected to cause serious bodily injury or death and that this stabbing occurred prior to Davis shooting Troy. Davis asserts that the State failed to prove that either he was committing a crime, provoked the action by Troy, or that he was not in a place where he had the right to be. He therefore claims that the evidence was insufficient to rebut his claim of self-defense.

In order to convict Davis of murder, the State was required to prove that he knowingly or intentionally killed Troy. Ind. Code § 35-42-1-1. A person is justified in using reasonable force against another person to protect the person or a third person from

what the person reasonably believes to be the imminent use of unlawful force. Ind. Code § 35-41-3-2(a). However, a person is not justified in using force if:

> (1) the person is committing or is escaping after the commission of a crime;
>
> (2) the person provokes unlawful action by another person with intent to cause bodily injury to the other person; or
>
> (3) the person has entered into combat with anther or is the initial aggressor unless the person withdraws from the encounter and communicates to the other person the intent to do so and the other person nevertheless continues or threatens to continue unlawful action.

Ind. Code § 35-41-3-2(e).

In the present case, the evidence most favorable to the verdict showed that Jerry observed Troy answer the door, and Davis enter and point a gun at Troy's head. Davis asked Troy, "Where is the money at?" while still pointing the gun at Troy. *Tr*. at 78. Jerry then ran into Rose's bedroom and closed the door. He heard Troy say, "Open the door. This man has got a gun to my head." *Id*. at 79. As Rose was holding the bedroom door closed with her feet, she heard Davis say, "If you don't open the door, I'm going to shoot you." *Id*. at 56. After Rose heard the front door close as Davis left, she discovered Troy on the kitchen floor with a gunshot wound. The physical evidence showed that Troy died of a gunshot wound to the left side of the chest that exited on the right side of his back in a slightly downward direction. *Id*. at 253-54. The bullet was recovered from the refrigerator door. This evidence contradicted a claim that Davis shot Troy while they were wrestling on the floor and that he shot in an upward direction during such a fight.

From this evidence, the jury could reasonably infer that Davis shot Troy while

Davis was in the process of attempting to commit a robbery. Further, the jury could also reasonably infer that, even if Troy stabbed Davis during their confrontation, Davis provoked such action by pointing a gun at him in his home and demanding money. We therefore conclude that the evidence presented was sufficient to rebut Davis's claim of self-defense. Although Davis offers a different version of the events, his contentions are merely a request for this court to reweigh the evidence and judge the credibility of the witnesses, which we cannot do. *Boyer*, 883 N.E.2d at 162.

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)). A defendant is only entitled to a reversal if he affirmatively demonstrates that the instructional error prejudiced his substantial rights. *Hero v. State*, 765 N.E.2d 599, 602 (Ind. Ct. App. 2002), *trans. denied*. 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.*

Davis argues that the trial court erred when it failed to give a final jury instruction stating that possession of or dealing in marijuana was not a crime for which the

commission of would negate self-defense. He contends that the evidence in this case required the instruction regarding this issue to be given to the jury. Davis asserts that he contended at trial, which was supported by his statement to Detective Wager, that he went to the house to arrange to sell marijuana for Jerry. Therefore, he argues that, absent the proposed instruction, the jury could have concluded that dealing in marijuana satisfied the commission of a crime to rebut self-defense.

Here, Davis proposed the following instruction:

> Possession of marijuana or dealing in marijuana by an accused standing alone is insufficient to constitute the "commission of a crime" as used within the definition of self-defense sufficient to prohibit assertion of self-defense by an accused.

Appellant's App. at 114. Later, however, when the trial court was setting the final jury instructions, Davis withdrew his request for the instruction. *Tr*. at 315-16. Generally, failure to object to jury instructions waives the issue on appeal. *Dickenson v. State*, 835 N.E.2d 542, 548 (Ind. Ct. App. 2005), *trans. denied*. Therefore, as Davis did not object when his proposed jury instruction was not given to the jury, and in fact, was the one who withdrew the instruction, we conclude that he has waived this argument.

Davis also argues that, even if the instruction is deemed to have been withdrawn, the failure to instruct the jury as to this issue was fundamental error. The "fundamental error" rule applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process. *Id*. at 548-49. For error to be "fundamental," prejudice to the defendant is required. *Hopkins v. State*, 782 N.E.2d 988, 991 (Ind. 2003).

Davis asserts that, without his proposed instruction, the jury could only logically conclude that his claim of self-defense was precluded by the trial court's final instruction that "a person may not use force if: [h]e is committing a crime that is directly and immediately connected to the confrontation . . . ." *Appellant's App*. at 127. He alleges it was impossible to determine whether the jury relied upon his contention that he was at the house to participate in a marijuana transaction when it denied his self-defense claim. Therefore, he argues that the failure to properly instruct the jury may have denied him a legitimate defense and violated due process. We do not agree.

In the present case, Davis was charged with attempted burglary and not dealing in or possession of marijuana. The evidence presented showed that he entered the house, with a gun drawn, pointed it at Troy's head, and demanded money. Our Supreme Court has stated that "there must be an immediate causal connection between the crime and the confrontation." *Mayes v. State*, 744 N.E.2d 390, 394 (Ind. 2001). "Stated differently, the evidence must show that but for the defendant committing a crime, the confrontation resulting in injury to the victim would not have occurred." *Id*. But for Davis's attempt to rob Troy, Troy would not have been shot and died. We therefore conclude that there was no fundamental error as to the failure to give an instruction stating that possession of or dealing in marijuana was not a crime for which the commission of would negate self-defense. The trial court did not abuse its discretion in instructing the jury.

III. Inappropriate Sentence

"This court has authority to revise a sentence '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.'" *Spitler v. State*, 908 N.E.2d 694, 696 (Ind. Ct. App. 2009) (quoting Ind. Appellate Rule 7(B)), *trans. denied*. "Although Indiana Appellate Rule 7(B) does not require us to be 'extremely' deferential to a trial court's sentencing decision, we still must give due consideration to that decision." *Patterson v. State*, 909 N.E.2d 1058, 1062-63 (Ind. Ct. App. 2009) (quoting *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007)). We understand and recognize the unique perspective a trial court brings to its sentencing decisions. *Id*. at 1063. The defendant bears the burden of persuading this court that his sentence is inappropriate. *Id*.

Davis argues that his sixty-eight-year aggregate sentence was inappropriate in light of the nature of the offense and his character. He contends that the circumstances of this offense, including that Troy stabbed Davis twice before the gun discharged, and Davis was trying to save his own life when he shot Troy, show that his sentence was not appropriate. Davis further claims that, although he has a significant criminal history, his age, poor health, and considerable intelligence show that his sentence was inappropriate in light of his character.

The sentencing range for murder is between forty-five years and sixty-five years, with the advisory sentence being fifty-five years. Ind. Code § 35-50-2-3. The sentencing range for a Class C felony is between two and eight years, with the advisory sentence being four years. Ind. Code § 35-50-2-6(a). Here, the trial court imposed a sixty-year sentence for murder and an eight-year sentence for Class C felony attempted robbery and ordered the sentences to be served consecutively.

As to the nature of the offense, Davis entered into the home of Rose, Jerry, and

Troy with a gun drawn and pointed it at Troy's head. He demanded to know where the money was and attempted to gain entry into Rose's bedroom by pushing on the door and threatening to shoot her if she did not open the door. After a struggle, Davis shot Troy in the chest, killing him.

As to Davis's character, he had an extensive criminal history that spanned five decades. His first felony conviction was for burglary in 1969, and he was later convicted of another burglary in 1974, a vehicle theft in 1974, robbery in 1984, armed robbery in 1985, and two counts of theft in 2007. The instant offenses constituted his eighth and ninth felony convictions. Davis was also on parole at the time of the present offenses. He is a life-long criminal whose extensive criminal history justified an enhanced sentence. We therefore conclude that Davis's sixty-eight-year aggregate sentence was not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

BAKER, J., and BROWN, J., concur.