ATTORNEY FOR APPELLANT:

CAROLYN B. BRIGGS
Lafayette, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MATTHEW D. FISHER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

BILLY RAY ISOM,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 06A04-0610-CR-607
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BOONE CIRCUIT COURT
The Honorable Steve David, Judge
Cause No. 06C01-0409-CM-207

November 8, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Billy Ray Isom appeals his conviction, after a jury trial, on one count of public indecency, a class A misdemeanor, and the sentence imposed by the trial court.

We affirm.

ISSUES

1. Whether the trial court erred when it denied Isom's motion for a mistrial after the State asked Isom, on cross-examination, whether he recalled stating during the book-in process that he was attracted to members of his own sex.

2. Whether the trial court abused its discretion when it allowed the State's law enforcement witness to answer a juror question about the nature of his investigation at the location of the misdemeanor offense by responding that the investigation concerned "inappropriate sexual activity." (Tr. 99).

3. Whether the trial court committed reversible error in responding to an inquiry from the jury.

4. Whether the 120-day sentence imposed is inappropriate.

FACTS

On September 15, 2004, the State charged Isom with one count of public indecency, a class A misdemeanor. Specifically, the State charged that on September 14, 2004, in Boone County, Isom had "knowingly, at Boone's Pond, a public place, fondle[d] his genitals." (App. 6). On September 22, 2006, Isom filed a motion requesting that the trial court "exclude in limine" evidence "of any other crimes or wrong doing [sic] of indecent exposure in Boone County" and "any uncharged conduct [sic] of Mr. Isom." (App. 27). No order on the motion is included in the record, but the trial court stated at trial that the State had agreed not to offer "any uncharged misconduct" evidence

concerning Isom and that "in the context of the investigation at Boone's Pond," the State could not elicit testimony about other arrests. (Tr. 74).

Isom was tried before a jury on September 25-26, 2006. Detective Hendrix testified that in the course of an ongoing investigation at Boone's Pond, at approximately 12:00 p.m., on September 14, 2004, he had pulled into the parking lot at the location, which is near an exit from northbound I-65 and includes a pond and some woods. Hendrix stayed in his vehicle for a short time, and subsequently observed Isom drive a truck into the lot, park it, and remain in the truck for a while. Hendrix testified that Isom then "exited his vehicle" and walked "in front of [Hendrix's] vehicle and he looked at [Hendrix], winked and smiled and then went on into the woods" nearby. (Tr. 33). Shortly thereafter, Hendrix followed on a path going about 200 feet into the woods until he "observed Mr. Isom standing next to a tree" but "not urinating . . . nor did he have his pants pulled down to below his ankles where he might be using the restroom." (Tr. 35).

Approaching with a side profile view of Isom, Hendrix asked Isom "how he was doin,'" and Isom "said fine" but kept his body turned away. *Id.* Hendrix then "said it was a nice day, [Isom] said yes, and at that point [Isom] turned around, exposed his penis to [Hendrix], had it in his hand, his right hand and was stroking it up and down." *Id.* Hendrix testified that Isom was "stroking" his penis "in a backward to forward motion" with "short strokes," and that Isom's penis was "fully out of his pants." (Tr. 36). Hendrix testified that as Isom "turned to [him] and was stroking his penis backwards and forwards [he] then asked [Isom] what he liked" and that Isom "told [him] him that he

would like for [Hendrix] to give him head." (Tr. 37). Hendrix informed Isom that he "was a police officer and that he was under arrest." *Id.*

At the conclusion of Hendrix's testimony, a jury question was submitted – inquiring about the nature of Hendrix's investigation at Boone's Pond. Outside the presence of the jury, Isom objected, asserting that the question implied that his presence was criminal activity on his part inasmuch as there was an investigation ongoing there. After the arguments on Isom's objection, the trial court "suggested" that Hendrix "testify in response to the question "that it was inappropriate sexual activity or that type of conduct." (Tr. 186).[1] In open court, the trial court then posed to Hendrix the juror's question: "what were you investigating at Boone's Pond on September 14th, what were you looking for, what was the type of crime or activity?" (Tr. 99). Hendrix answered, "Inappropriate sexual activity." *Id.*

In trial, Isom testified that he was traveling north on I-65 on his return from a business trip to Indianapolis when he had had suddenly become sick to his stomach. According to Isom, he pulled into the Boone's Pond area, parked, walked into a fairly open area, threw up, and returned to his truck "wringing wet with sweat" and feeling "like [he] was going to get diarrhea." (Tr. 227). While Isom sat in his truck, he testified, Hendrix "got out of his vehicle" and walked to a shrub "in front of [Isom's] truck," and "st[u]ck his hands in his pants rubbing himself and smiling at [Isom]," doing "that two or

[1] In a conference that summarized arguments on Isom's objection, the trial court noted that it had "already instructed [the jury] at least twice that there's only one charge" made by the State regarding any criminal office committed by Isom. (Tr. 189). It also stated that it would consider "a limiting instruction" in this regard should Isom proffer one. *Id.*

three times." (Tr. 228). Isom testified that Hendrix's actions disgusted him. Isom further testified that he then felt like he "was getting diarrhea and . . . like [he] was going to throw up again." (Tr. 229). He left his truck a second time and walked into the woods, where he saw Hendrix "standing in the path" with "his hand in his groin again rubbing himself." *Id.* Isom testified that he then turned and went on another path for about 300 feet; he was leaning against a tree when Hendrix "came from behind [him]" and "said something . . . like he was trying to be sexy" and then "came right up in [Isom]'s face." (Tr. 233, 234). Isom testified that he did not know whether his penis was outside his pants, explaining that he might have been "trying to pee" to "relieve the diarrhea pressure" but doubted that because "there was no time." (Tr. 235). Isom explained that if he had been trying to urinate, because he was not circumcised, he would have had "to literally pull" back on the front of his penis "to pee." (Tr. 236). However, Isom testified, he had had no sexual desire or interest at that time because he was too ill.

On cross-examination, the State asked Isom a series of questions about information provided by Isom at the time of his "book-in" at the jail.[2] Then the State asked whether Isom "recall[ed] telling them that yes you were attracted to members of your own sex"? (Tr. 267). Isom's counsel objected and moved for a mistrial, while Isom

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[2] In a conference outside the hearing of the jury, the State indicated that it was asking questions based upon a book-in document but that it did not intend to offer the document into evidence. The trial court observed that the document contained "jail management prisoner observation questions" such as "do you have bad headaches or dizzy spells, no, have you had fainting spells, seizures, blackouts, no, have you been attracted to members of the opposite, of the own [sic] sex, yes, do you have trouble controlling your temper, no, are you an easygoing person yes, yes, no, no, no, no, no, no. Never been in jail." (Tr. 275). The trial court further observed that Isom had "testified in cross-examination that he was interviewed and . . . concurred with some of these questions and some of these answers." *Id.*

The trial court ordered that the document be "made part of the court's record if for no other reason as [an] appellate exhibit." *Id.* However, the document is not included with the record submitted.

answered, "Never in my life did I say that." *Id.* Isom argued to the trial court that the question "asked him about his sexual proclivities which [wa]s absolutely prohibited by the motion in limine, uncharged misconduct" and "suggested he's a homosexual." (Tr. 268). The State responded that "someone's thought process" was not "uncharged misconduct." *Id.* It further argued that Isom had testified that Hendrix's repeated rubbing of himself had disgusted him. The trial court denied Isom's request for a mistrial. It asked whether there was "a suggested instruction" for "the jury when we come back," but none was offered. (Tr. 275). The trial court then ordered that if the State had "any more specific questions of the book-in document," it should ask first "whether or not he recalls being asked a particular question"; and it advised Isom's counsel that it could ask him "on redirect" whether he "remember[ed] being asked any questions at the jail." (Tr. 277).[3]

The jury retired to deliberate. Thereafter, the trial court advised counsel that "within five minutes of" the jury's "retiring to deliberate," the bailiff had informed the judge that "the jury wants the police report"; in response to which the judge "instructed [the bailiff] to go tell the jury that there is no police report admissible in evidence. They will not have a police report." (Tr. 348). The trial court advised counsel that it had "made that decision," without informing the State, Isom's counsel, or Isom of the matter. *Id.* Isom's counsel asserted that Isom "should have been notified." *Id.* Upon subsequent questioning, the bailiff reported under oath that the inquiry from the jury was verbal – not

[3] The trial court also advised Isom's counsel that it would have the "opportunity" to request "on redirect this entire [book-in] document admitted." (Tr. 273).

written, and that consistent with the instruction from the trial court, she had informed the jury that it could not have the police report "because it's not entered into evidence," and the jury was "to use everything they had in front of them." (Tr. 350).

Subsequently, the jury returned a verdict finding Isom guilty of one count of public indecency, a class A misdemeanor. At sentencing, on October 25, 2006, the trial court ordered Isom to serve 120 days in the county jail.

DECISION

1. Mistrial

Isom argues that the trial court erred when it denied his motion for a mistrial after the State asked Isom, on cross-examination, whether he recalled having stated that he was attracted to other men. The surrounding circumstances of that question being asked, the arguments of counsel, and comments by the trial court were previously noted in FACTS. Isom appears to argue that a mistrial was warranted because the State "interjected the issue of homosexuality into trial," an "inadmissible issue," and did so "with the intent that the jury would believe that [Isom] was a homosexual and did what homosexuals do -- fondle themselves in public parks." Isom's Br. at 5. However, Isom has neither provided the standard of review for the denial of a motion for mistrial, nor provided authority supporting his assertion that the motion should have been granted.

The decision to grant or deny a motion for a mistrial lies within the discretion of the trial court. *Booher v. State*, 773 N.E.2d 814, 821 (Ind. 2002). A mistrial is an extreme remedy granted only when no other method can rectify a situation. *Id.* Because the trial court is in the best position to evaluate the relevant circumstances of an event and

its impact on the jury, the trial court's determination of whether to grant a mistrial is afforded great deference on appeal. *Id.*

Further, although Isom's argument does not expressly so assert, he appears to contend that by asking the question, the State engaged in prosecutorial misconduct. In reviewing a properly preserved claim of prosecutorial misconduct, we determine (1) whether the prosecutor engaged in misconduct, and, if so, (2) 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. *Booher*, 773 N.E.2d at 817 (citing *Coleman v. State*, 750 N.E.2d 370, 374 (Ind. 2001)). The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct. *Id.*

Despite Isom's rhetorical argument, at trial the State argued nothing to suggest that "what homosexuals do" is "fondle themselves in public parks." Isom's Br. at 5. Both the State's opening argument and its closing argument focused solely on the actions that Hendrix testified to having seen Isom perform. Further, there was no testimony of any improper sexual activities by others at Boone's Pond. The trial court instructed the jury that Isom was charged with "one count of public indecency" (Tr. 2, 335), – "defined by law as follows: a person who knowingly or intentionally in a public place fondles the person's genitals" (Tr. 3, 336) – and that the jury's verdict "should be based only on the evidence admitted and the instructions on the law." (Tr. 6).

Isom testified, and part of his testimony included his experience of being booked at the jail. Further, during his direct testimony, Isom stated that Hendrix had repeatedly

engaged in rubbing his genital area while looking at Isom and that these actions had disgusted him. During cross-examination, the State asked Isom whether he recalled having stated that he was attracted to other men. Based upon the circumstances before the trial court, we do not find that it abused its discretion when it did not find that the probable persuasive effect of hearing this question placed Isom in a grave peril that could only be remedied by declaring a mistrial.

2. Juror Question

The trial court has inherent discretionary power on the admission of evidence. *McManus v. State*, 814 N.E.2d 253, 264 (Ind. 2004), *cert. denied*. The trial court's decisions in this regard are reviewed only for an abuse of that discretion. *Id.* In the setting of a trial court's decision to admit evidence, an abuse of discretion occurs when the trial court's decision is clearly erroneous and against the logic and effect of the facts and circumstances before the court. *Saunders v. State*, 848 N.E.2d 1117, 1122 (Ind. Ct. App. 2006) (citing *Carpenter v. State*, 786 N.E.2d 696, 702-03 (Ind. 2003)).

Isom also argues that the trial court erred when it allowed Hendrix to answer the juror question about the nature of the investigation being conducted at Boone's Pond. Specifically, Isom argues that it was error for the trial court to allow Hendrix to answer as he did because

> the question called for information of uncharged misconduct regarding unrelated sexual activity, violated the presumption of innocence, and diverted the jury from the issues of whether Bill Isom committed the

> offense of indecent exposure [sic[4]], and focused the jurors[’] attention of [sic] other acts of sexual misconduct by other persons unrelated to Bill’s events or arrests [sic].”

Isom’s Br. at 12.

According to Isom, the very fact that there was a “sexual activity” investigation prejudiced him. *Id.* at 14. Isom contends that allowing Hendrix to answer the question about his investigation at Boone’s Pond “allowed” the State “to associate that location with homosexual criminal activity.” *Id.* However, the answer provided by Hendrix was simply that the investigation concerned “inappropriate sexual activity.” (Tr. 99). The answer provides no specifics of the impropriety, such as whether it involved offers of acts for money, the kind of sexual acts involved, or the sexual preference of those involved.

Isom argues that the prejudice posed must take into account that he was asked whether he recalled stating that he was attracted to men. However, Isom had not yet taken the stand and this question had not been asked at the time Hendrix was allowed to answer the question about the nature of the investigation.

Isom also suggests that the prejudice to which he was subjected by Hendrix’s answer indicating that the investigation concerned “sexual activity” in the area is analogous to that found by the Florida appellate court with respect to testimony of a defendant’s arrest “in a high crime area.” *Id.* at 15, citing *Latimore v. State*, 819 So.2d 956 (Fla. Ct. App. 2002). In *Latimore*, the jury heard “repeated[]” prosecutorial remarks indicating that a special “decoy operation” had been established in response to the “high

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[4] The information that charged Isom with public indecency, a class A misdemeanor, did not allege that he “appear[ed] in a state of nudity with the intent to arouse the sexual desires of the person or another person,” Ind. Code § 35-45-4-1(a)(3), but rather that he “fondle[d]” his genitals. I.C. § 35-45-4-1(a)(4).

number of auto burglaries in the area," as well as substantial testimony from law enforcement about the crime statistics in that regard. *Latimore* at 957. The Florida appellate court noted that "[i]n Florida, evidence that a criminal defendant was arrested in a high crime area is generally inadmissible" because such evidence "is usually considered irrelevant to the issue of guilt and unduly prejudicial because of its tendency to establish guilt by association." *Id.* at 958.

However, the facts here are distinguishable. Consistent with the trial court's order, there was no repeated testimony regarding any alleged actions by persons other than Isom, or of any charges brought against others for criminal activity – sexual or otherwise – at Boone's Pond. Hence, there was no testimony that Isom "was arrested in a high crime area." *Id.*

The trial court limited Hendrix's answer to the juror question concerning the nature of his investigation at Boone's Pond to "inappropriate sexual activity." (Tr. 99). No evidence regarding the sexual activities of others or the arrests of others at the location was heard by the jury. We do not find that the trial court abused its discretion when it allowed the limited response provided by Hendrix to the question.

3. Jury Communication

Isom argues that he was denied his "personal right" to be "present" and "notified of" of the inquiry by the jury during the initial phase of its deliberations. Isom's Br. at 19, citing Ind. Const. Art. 1, Sec. 13.[5] Isom contends that had he been consulted at the

[5] "In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury, in the county in which the offense shall have been committed; to be heard by himself and counsel; to

time of the inquiry, it might have been possible to "discover[] in a timely fashion the precise nature of" what the jury sought. Isom's Br. at 22. However, it is undisputed that as a result of the inquiry, nothing additional was provided to the jury. Moreover, the material given to the jury for its deliberations had been agreed upon by Isom.

Isom asserts that "case law is . . . well and long established" about what the trial court should have done. Isom's Br. at 20. Yet, he fails to provide citation to cases demonstrating that the trial court's actions in this regard warrant a new trial – the remedy he seeks.

In *Bouye v. State*, 699 N.E.2d 620 (Ind. 1998), the jury sent a note asking for a specific witness' testimony; without notifying the defendant or his counsel, the judge responded with a note stating that no transcript was available. Our Supreme Court explained that pursuant to the common law, in such circumstances,

> the proper procedure is for the judge to notify the parties so they may be in court and informed of the jury's proposed response to the jury before the judge ever communicates with the jury. When this procedure is not followed, it is an ex parte communication and such communications between the judge and the jury without informing the defendant are forbidden. However, although an ex parte communication creates a presumption of error, such presumption is rebuttable and does not constitute per se grounds for reversal.

Id. at 628 (emphasis in original) (citations omitted). Moreover, "[w]hen the trial judge responds to the jury's request by denying it, any inference of prejudice is rebutted and any error is deemed harmless." *Id.*

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demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor." Ind. Const. Art. 1, § 13(a).

Isom argues in reply that this "was not a mere denial of the jury's request" but entailed "much more activity, and much more uncertainty, than a mere denial." Reply at 6. The record does not support the assertion. The jury requested the police report; it was told that it could not have it. Put another way, the jury's request was denied. We find no prejudice here.

4. Sentence

Finally, Isom argues that we should exercise our authority to review and revise the sentence imposed by the trial court. Specifically, Isom asks that based upon his lack of prior criminal convictions and the likelihood that he will respond affirmatively to probation, and the lack of any articulation by the trial court as to "why incarceration was appropriate" here, we should "remand his case for the imposition of a suspended sentence." Isom's Br. at 27, 28.

Our appellate authority with respect to sentencing is implemented through Indiana Appellate Rule 7(B), which provides, "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." It is the burden of the defendant appealing his sentence to "persuade the appellate court" that his sentence "has met th[e] inappropriateness standard of review." *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007) (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

The trial court ordered Isom to serve 120 days in jail. By statute, "[a] person who commits a Class A misdemeanor shall be imprisoned for a fixed term of not more than

one (1) year." Ind. Code § 35-50-3-2. In other words, the legislature has determined that the maximum term for a defendant convicted of a class A misdemeanor is one year. The sentence imposed here is less than one-third the maximum. The legislature has also provided that the "court may suspend any part of a sentence for a misdemeanor" and "place the person on probation." I.C. § 35-50-3-1. However, the trial court declined to suspend any portion of the sentence ordered.

In support of his argument that we should revise his sentence, Isom directs our attention to *Neale v. State*, 826 N.E.2d 635 (Ind. 2005), wherein an amended sentence was "imposed without further hearing" after Indiana's Supreme Court found "several mitigating circumstances" were "accorded little weight." Isom's Br. at 23. In *Neale*, the trial court had imposed the fifty-year "maximum sentence for a class A felony," which term included the maximum twenty-year enhancement of the thirty-year "standard or 'presumptive' sentence" for a class A felony offense. 826 N.E.2d at 636. The Supreme Court ordered an amended sentence of forty years, a sentence significantly greater than the standard sentence for the offense. We do not find *Neale* to require that we remand and order that the trial court impose a suspended sentence for Isom.

Isom also cites *Cotto v. State*, 829 N.E.2d 520, 524 (Ind. 2005), as authority for the proposition that a trial court's imposition of an executed sentence requires a sentencing statement that explains "why extended incarceration is appropriate." However, *Cotto* involved sentencing for a felony offense, and as Indiana's Supreme Court has more recently indicated in *Anglemyer v. State*, 868 N.E.2d 482, 485-86 (2007), the necessity of a sentencing statement derives from the legislative sentencing scheme for

felony offenses. Moreover, in *Anglemyer*, our Supreme Court expressly cited Indiana Code section 35-38-1-3, which applies when "sentencing a person for a felony," in support of its conclusion that "the trial court is required to give a statement of the court's reasons for selecting the sentence that it imposes." *Id.* at 490. Accordingly, the issue is simply whether the 120-day term of incarceration is inappropriate in light of the public indecency offense and Isom's character.

Isom argues, as he did to the trial court, that he had no prior criminal convictions, was fifty years-old, and had a lengthy marriage, children in college, a business to run, and long-term church and community involvement. He cites no authority, however, for the proposition that such entitles him to a totally suspended sentence.

Further, we note that Isom is not without any criminal history whatsoever. According to the pre-sentence investigation, a 1984 offense of false informing was dismissed after Isom completed forty hours of community service. This offense, one of dishonesty, does speak to the character of the offender. Further, as the State observed in its argument to the trial court regarding a possible sentence, Isom did not merely testify that he had not fondled himself as repeatedly described by Hendrix; rather Isom engaged in testimony constituting "a personal attack on the Officer" as to "what took place" at Boone's Pond. (Tr. 189). As the trial court stated, it is "a fair inference that the jury in finding [him] guilty beyond a reasonable doubt of public indecency, believed [Hendrix] and did not believe [Isom's] story." (Tr. 368). Also, Isom's testimony about Hendrix reflects on Isom's character.

Isom has "has not carried [his] burden" of persuading us that the 120-day sentence imposed, a sentence less than one-third of the maximum possible sentence, is inappropriate in light of the offense committed and his character. *Anglemyer*, 868 N.E.2d at 494.

Affirmed.

MAY, J., and CRONE, J., concur.