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**IN THE  
COURT OF APPEALS OF INDIANA**

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CORY C. CARTER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 45A05-0905-CR-258

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APPEAL FROM THE LAKE SUPERIOR COURT  
The Honorable Clarence D. Murray, Judge  
Cause No. 45G02-0711-MR-9

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**March 10, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## **Case Summary**

Cory C. Carter appeals his convictions for murder and Class A felony attempted murder and his sixty-year sentence for murder. We conclude that the trial court did not commit reversible error by finding no pattern of racial discrimination in the State's use of peremptory challenges during jury selection, not interrogating the jury about alleged concerns for safety, excluding evidence, and refusing Carter's tendered jury instructions. Further concluding that the trial court did not abuse its discretion in sentencing him, we affirm.

## **Facts and Procedural History**

In September 1997 in Gary, Indiana, Carter and Vernon Bateman approached Kevin Taylor about whether Kevin had hit Bateman's girlfriend. Later that same day, Kevin and his older brother Frank Taylor were involved in an altercation with Carter, Bateman, and another person. Kevin fired multiple shots, two of which struck Carter's legs. That night, Kevin and Frank left for Milwaukee, Wisconsin. Kevin was charged with attempted murder and aggravated battery, but no arrest was made because the Gary Police Department could not locate him.

About two weeks later, Kevin and Frank returned to Gary because Kevin wanted to turn himself in. They did not go directly to the police station but instead visited Lorenzo Lee at his home. Lee's girlfriend and children were also in the home.<sup>1</sup> At some point during the visit, Carter entered Lee's home, cocked a shotgun, pointed it at Kevin

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<sup>1</sup> It is unclear from the record whether there was more than one child in the home at the time of the crime. *See* Tr. p. 396 (When asked who was at Lee's home, Frank responded, "It was me, my little brother Kevin, L[ee] and his girlfriend and his daughter, daughter, child, baby, one of them."). As the trial court and the parties indicate that there were "children" in the home, *e.g.*, *id.* at 1074, 1077, 1084, we assume there was more than one child.

and Frank, and ordered them outside. Kevin and Frank, both unarmed, complied, and Kevin began talking to Carter. Carter shot Kevin, from a distance of three to four feet, and Kevin fell to the ground. Carter then fired at Frank. The bullet struck Frank's right forearm, and Frank ran through the home and climbed out a window. After a few minutes, Frank returned to the front of the home where Kevin was lying on the ground. Carter had fled.

Frank identified Carter as the shooter when Officer Billy Shelton of the Gary Police Department spoke with him at the scene. While at the hospital, Frank again identified Carter as the shooter to Officer Shelton and separately to Officer Bruce Outlaw. When Officer Outlaw showed Frank a photo array, Frank identified the photo of Carter. Officer Outlaw later testified that the severity of Frank's gunshot wound prevented him from signing his selection on the photo array: "[I]t appeared that the flesh may have got off the bone of his arm. I think the shotgun blast took the flesh off of his arm, it was pretty much hanging off." Tr. p. 646. Officer Outlaw made a handwritten note that Frank had identified photo number four.

Frank learned at the hospital that his brother Kevin died from the gunshot wound. When Frank was released from the hospital, he went to Milwaukee. Carter was arrested in October 1997. However, because Frank's identification of Carter was not in a formal written statement authenticated by Frank's signature and because Officer Outlaw was unable to locate Frank after he left the hospital, no charges were filed against Carter.

Ten years later, in 2007, Saron Foley, who was serving a sentence for a 1998 rape conviction, contacted prison officials about Kevin's murder. Officer James Gonzales

took a signed statement from Foley, who identified Carter as the person who shot Kevin and Frank. When shown a photo lineup, Foley identified the photo of Carter. Officer Gonzales then located Frank in Milwaukee, who again identified Carter as the shooter. When shown a photo lineup, Frank identified the photo of Carter.

The State charged Carter with murder<sup>2</sup> and Class A felony attempted murder.<sup>3</sup> During voir dire, the jury pool included six prospective black jurors. Three of the six prospective black jurors were struck for cause. The State exercised peremptory strikes for two of the remaining prospective black jurors, Juror #35 and Juror #55. Juror #35 stated that he had a deferral for domestic battery two or three years prior and that he had a cousin who had been charged or convicted of “[b]reaking and entering and stabb[ing] someone.” *Id.* at 125. Juror #55 had a brother who was convicted of auto theft and a handgun offense. Juror #55 also had a cousin, who he called his best friend, who was murdered in 2008 in Gary, Indiana, when perpetrators ambushed his cousin’s car. No one was charged with his cousin’s murder. When asked about the Gary Police Department, he responded, “They can try harder. That’s all I can say. I mean, living in that area, they can try harder because I see them disregard a lot of stuff.” *Id.* at 205. He also indicated that he needed “hard proof” to convict. *Id.* at 207.

No one struck the final prospective black juror, Juror #270, who was eight months pregnant, and she was consequently seated. However, after Juror #270 informed the trial court that she spoke with her obstetrician/gynecologist, who advised her against sitting on the panel, the trial court excused her due to her advanced pregnancy.

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<sup>2</sup> Ind. Code § 35-42-1-1.

<sup>3</sup> Ind. Code §§ 35-41-5-1, 35-42-1-1.

Carter raised a *Batson* challenge, but the trial court found that he had failed to make a prima facie showing of purposeful discrimination.

During trial, Carter moved to admit Officer Outlaw's handwritten note taken during his conversation with Frank at the hospital. The handwritten note stated that Frank picked photo number four in the photo array, but it did not specifically indicate that photo number four referred to Carter's photo. The photo array was lost and thus unavailable at trial. The State objected to the admission of Officer Outlaw's handwritten note, and the trial court sustained the objection.

Although Foley came forward in 2007 and identified Carter as the shooter in a signed statement, by trial in 2009 he recanted that statement. On direct examination, Foley answered questions from the State about the details he provided to Officer Gonzales in his signed statement. He also testified that he had lied in his statement to Officer Gonzales and that he did not witness the crime. Carter cross-examined Foley about his lie to Officer Gonzales and his 1998 rape conviction, and the State objected:

[STATE]: Judge, I'm going to object. As to the details as to the conviction, I believe the only thing that is permissible is the actual conviction, what it's for and the date.

[CARTER]: Your Honor, I wasn't going to ask about details of the crime. Obviously, there's a witness here that says he's lied. I think the jury would want to know why he lied and I think if we go through his conviction and his appeals process it would give him a motive for lying.

*Id.* at 800. The court sustained the objection.

Later in the trial, Officer Samuel Roberts testified that he took a witness statement from Lee and noted that statements are taken “[t]o have an account of what occurred from the victim or witness’[s] memory or experience that day.” *Id.* at 883. Carter moved

to admit Lee's statement. Lee was deceased at the time of trial. After the State made a hearsay objection, the trial court noted the statement's lack of trustworthiness and sustained the objection.

Before closing arguments and outside the presence of the jury, Carter requested that the trial court adopt one of his two tendered jury instructions regarding the lost photo array. The trial court found that both instructions were adequately covered by other instructions and refused them.

Still outside the presence of the jury, the trial court stated, "Now, we've had a number of people attend this trial. I'm aware that the jury has some concerns about safety." *Id.* at 911-12. Neither the State nor Carter indicated that they were aware of any concerns or requested the court to take any further actions. The trial court then requested that anything out of the ordinary be reported to the court.

The jury found Carter guilty of murder and Class A felony attempted murder. At sentencing, the trial court found the nature and circumstances of the crime to be significantly aggravating. Specifically, the trial court noted that Carter shot multiple victims at close range with a shotgun and that there were children in the home at the time of the crimes. The trial court also found Carter's criminal history and record of arrests as an aggravator. As a mitigator, the trial court noted that Kevin had shot Carter in the legs a couple of weeks before Carter shot Kevin and Frank. The trial court also noted that the crimes occurred as a "single episode of criminal conduct." Tr. p. 1085. After finding that the aggravators outweighed the mitigators, the trial court sentenced Carter to sixty

years for the murder of Kevin and a concurrent thirty years for the attempted murder of Frank.<sup>4</sup> Carter now appeals.

## **Discussion and Decision**

Carter asks us to review whether the trial court erred: (I) by finding no pattern of racial discrimination in the State's use of peremptory challenges during jury selection; (II) by not interrogating the jury about alleged concerns for safety; (III) by excluding Lee's statement, Officer Outlaw's handwritten note stating that Frank picked photo number four in the photo array, and testimony regarding Foley's exhaustion of appellate and post-conviction remedies; (IV) by refusing Carter's tendered jury instructions regarding the lost photo array; and (V) in sentencing him.

### **I. *Batson* Challenge**

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<sup>4</sup> The trial court stated at sentencing,

Defense counsel's argument with respect to a single episode of criminal conduct in this case is well taken. These were violent offenses, but these crimes occurred in a matter of seconds, if not minutes; and I think that is something that the Court has to consider here in terms of concurrent versus consecutive sentencing.

Tr. p. 1085. The trial court's sentencing order then states,

The sentence of imprisonment is to be served concurrently to each other because the offenses, although violent were committed in a single episode of criminal conduct and as previously noted, there is an unusual mitigator in this case in that the defendant was shot by the victim a few days before the instant offense was committed.

Appellant's App. p. 40. It appears that the trial court believed that concurrent sentences were required. "[E]xcept for crimes of violence, the total of the consecutive terms of imprisonment . . . to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the presumptive sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted." Ind. Code § 35-50-1-2(c) (Supp. 1997). At the time of the crimes, murder was a crime of violence under Section 35-50-1-2(a) but attempted murder was not. In *Ellis v. State*, our Supreme Court interpreted the statute to exempt from the sentencing limitation consecutive sentencing between a crime of violence and those that are not crimes of violence. 736 N.E.2d 731, 737 (Ind. 2000). Therefore, although the State does not cross-appeal, consecutive sentences were permitted.

Carter first contends that the trial court clearly erred by finding no pattern of racial discrimination in the State's use of peremptory challenges during jury selection. The United States Supreme Court has determined that the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution forbids a prosecutor "to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). To determine whether a peremptory strike has been used improperly to disqualify a potential juror on the basis of race, the *Batson* Court set forth a three-step test. *Jeter v. State*, 888 N.E.2d 1257, 1263 (Ind. 2008), *cert. denied*, 129 S.Ct. 645 (2008). First, the party raising the *Batson* challenge must make a prima facie showing that the other party exercised a peremptory strike on the basis of race. *Id.* (citing *Batson*, 476 U.S. at 96). To make such a prima facie showing, the party raising the challenge must demonstrate that the other party used peremptory strikes to remove members of a cognizable racial group from the jury pool and that the facts and circumstances raise an inference that the strikes were used to exclude potential jury members from the jury because of their race. *Brown v. State*, 751 N.E.2d 664, 667 (Ind. 2001). Second, the burden then shifts to the party exercising the peremptory strike to present a race-neutral explanation for striking the juror. *Id.* (citing *Batson*, 476 U.S. at 97). The State need not wait until the defendant has made a prima facie showing but may proffer its race-neutral explanation at the time of the challenge. *See Koo v. State*, 640 N.E.2d 95, 99 (Ind. Ct. App. 1994), *reh'g denied, trans. denied*. As long as the explanation is facially valid and no discriminatory intent is inherent in the



explanation, the reason offered will be deemed race-neutral. *Brown*, 751 N.E.2d at 667-68. Finally, the trial court must then decide whether the party making the *Batson* challenge has carried its burden of proving purposeful discrimination. *Jeter*, 888 N.E.2d at 1263 (citing *Batson*, 476 U.S. at 98). A trial court's decision concerning whether a peremptory strike is discriminatory is accorded great deference, and we will set aside the decision only if clearly erroneous. *Williams v. State*, 830 N.E.2d 107, 110 (Ind. Ct. App. 2005), *trans. denied*.

The removal of some black jurors by peremptory strike does not, by itself, raise an inference of racial discrimination. *Hardister v. State*, 849 N.E.2d 563, 576 (Ind. 2006) (citing *McCormick v. State*, 803 N.E.2d 1108, 1111 (Ind. 2004)). In *Hardister*, our Supreme Court determined that where the defense had presented evidence that the State exercised five of six peremptory challenges to strike potential black jurors, but did not strike the two remaining black jurors, one of whom was struck by the defense, no prima facie case of discrimination had been established. *Id.* at 576-77. Here, three of the six prospective black jurors were struck for cause. The *Batson* analysis does not consider challenges for cause. *See, e.g., United States v. Elliott*, 89 F.3d 1360, 1364-65 (8th Cir. 1996) ("*Batson* applies only to peremptory strikes. We know of no case that has extrapolated the *Batson* framework to for-cause strikes."); *United States v. Blackman*, 66 F.3d 1572, 1575 n.3 (11th Cir. 1995) ("[N]o authority suggests *Batson* extends to the area of challenges for cause."). The State exercised peremptory strikes for Juror #35 and Juror #55, and no one struck Juror #270, who was seated but then removed only after the trial court excused her due to her advanced pregnancy. In light of the fact that the State did

not object to the seating of Juror #270, the State's removal of Juror #35 and Juror #55 by peremptory strike is not enough to give rise to an inference of racial discrimination.

In making his *prima facie* case, Carter pointed out that "after all of the African-Americans were struck from the trial, then the State didn't find it that important to question any of the remaining . . . potential jurors about whether or not they would be concerned about the fact that one of the State's witnesses had a prior conviction." Tr. p. 282-83. Although *Batson* states that "the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose," 476 U.S. at 97, we note that it also states, "We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a *prima facie* case of discrimination against black jurors," *id.* Here, the trial court stated in its ruling:

[T]he defense has not made a *prima facie* showing of purposeful discrimination on the part of the State based on race. There's no pattern here and we're talking basically about two jurors. And what does weigh very heavily in my ruling is the fact that we had an African-American juror.

*Id.* at 299. The trial court thus did not find that the State's manner of questioning constituted any *prima facie* showing of racial discrimination. The trial court did not clearly err in finding that Carter failed to make the requisite *prima facie* showing that the State exercised the peremptory strikes of Juror #35 and Juror #55 on the basis of race.

Even if Carter had made the requisite *prima facie* showing, the State still would have prevailed over the *Batson* challenge. *Batson*'s second step requires only that the explanation given for the peremptory strike be facially race-neutral. Among the reasons

for its peremptory strike, the State indicated Juror #35's prior domestic battery charge. The use of a peremptory strike does not violate *Batson* where the challenged individual or a family member has had previous involvement with the criminal justice system.<sup>5</sup> *Douglas v. State*, 636 N.E.2d 197, 199 (Ind. Ct. App. 1994); *see also United States v. Evans*, 192 F.3d 698, 701 (7th Cir. 1999) (concluding that not wanting a person with a grand theft conviction to serve on the jury to be a race-neutral reason for a peremptory strike). Regarding Juror #55, the State noted that he had a brother with convictions for auto theft and a handgun offense, that his cousin was murdered, and that he expressed concerns about the Gary Police Department. These reasons are facially valid and no discriminatory intent is inherent; thus, they are race-neutral. The trial court did not err in denying Carter's *Batson* challenge.<sup>6</sup>

## II. Jury Concerns for Safety

Carter next contends that the trial court committed reversible error by failing to interrogate the jury about alleged concerns for safety.<sup>7</sup> Before closing arguments and

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<sup>5</sup> Specifically, in providing a race-neutral reason for the peremptory strike of Juror #35, the State said that "he did indicate he had a prior conviction as well." Tr. p. 297. Juror #35 said he had a conviction for domestic battery, *id.* at 128, and he also indicated the conviction was deferred, *id.* Although it is unclear from the transcript whether a judgment of conviction was ultimately entered, we note that it is irrelevant to our analysis as the State was referring to a previous involvement with the criminal justice system.

<sup>6</sup> Although Carter points out that a white juror was not stricken even though his uncle by marriage was a registered sex offender, Appellant's Reply Br. p. 4, he made no record of this fact while the trial court considered his *Batson* challenge. "Post-hoc justifications by reviewing courts will not suffice to meet th[e] second stage [of the *Batson* analysis]; the reasons must be those entertained when the challenge was exercised, rather than those that might be conjured up after the fact." 6 Wayne R. LaFave et al., *Criminal Procedure* § 22.3(d) (3d ed. 2007). In the same vein, we decline to account for Carter's post-hoc argument supporting his *Batson* challenge.

<sup>7</sup> We note that Carter relies on *Caruthers v. State*, 909 N.E.2d 500 (Ind. Ct. App. 2009), *trans. granted*, in his initial appellate brief, which was filed three days before our Supreme Court granted

outside the presence of the jury, the trial court stated, “Now, we’ve had a number of people attend this trial. I’m aware that the jury has some concerns about safety.” Tr. p. 911-12. Neither the State nor Carter indicated that they were aware of any concerns or requested the court to take any further actions. The trial court then requested that anything out of the ordinary be reported to the court.

The right to trial before an impartial factfinder is the cornerstone of our justice system. Article 1, Section 13 of the Indiana Constitution guarantees criminal defendants the right to trial by an impartial jury. This right is an essential element of due process. *Black v. State*, 829 N.E.2d 607, 610 (Ind. Ct. App. 2005), *trans. denied*. “It is of course fundamental to our system of jurisprudence and guaranteed by our federal and state constitutions that an accused in a criminal case is entitled to a trial by jury. This necessarily contemplates a fair and impartial trial before a panel of competent jurors.” *Hatfield v. State*, 243 Ind. 279, 282, 183 N.E.2d 198, 199 (1962).

A juror can potentially become biased or prejudiced as a result of threats or intimidation. A biased juror must be dismissed. *Morgan v. State*, 903 N.E.2d 1010, 1018 (Ind. Ct. App. 2009), *trans. denied*. In *Lindsey v. State*, 260 Ind. 351, 295 N.E.2d 819 (1973), our Supreme Court articulated the procedure a trial court must follow upon suggestion that the jury has been improperly exposed to prejudicial publicity. The *Lindsey* procedure was subsequently adopted by our Supreme Court to address the possibility that a juror had been exposed to extrajudicial comments. *Daniels v. State*, 264 Ind. 490, 346 N.E.2d 566 (1976) (citing the *Lindsey* procedure with approval where the

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transfer. Because transfer has been granted, *Caruthers* is now vacated and has no precedential value. See Ind. Appellate Rule 58(A); *Pinkston v. State*, 836 N.E.2d 453, 459 (Ind. Ct. App. 2005), *trans. denied*.

mother of the murder victim made threatening comments to the wife of one of the jurors). Pursuant to the *Lindsey* procedure, when an event occurs which may improperly influence the jury, the trial court should make a determination as to the likelihood of resulting prejudice. *Barnett v. State*, 916 N.E.2d 280, 284 (Ind. Ct. App. 2009) (citing *Lindsey*, 295 N.E.2d at 824), *trans. denied*. The trial court is obligated to take the remedial action of interrogating the jury only if it determines, in its discretion, that “the risk of prejudice appears substantial, as opposed to imaginary or remote only.” *Agnew v. State*, 677 N.E.2d 582, 584 (Ind. Ct. App. 1997) (quoting *Lindsey*, 295 N.E.2d at 824), *trans. denied*. If the trial court determines that the exposure to the improper influence does not raise a substantial risk of prejudice, it has no responsibility to interrogate the jurors or to take further remedial action. *See id.* The trial court is in the best position to gauge the surrounding circumstances of an event and its impact on the jury. *See Barnett*, 916 N.E.2d at 284 (explaining why a trial court is afforded great deference in determining whether to grant a mistrial).

Here, the only detail in the record indicating the alleged jury concern for safety is the trial court’s comment, “Now, we’ve had a number of people attend this trial. I’m aware that the jury has some concerns about safety,” Tr. p. 911-12, and its subsequent request to the parties that anything out of the ordinary be reported to the court. We thus have a suggestion of generalized concern but no specific or direct information. Neither the State nor Carter indicated that they were aware of any concerns or requested the court to take any further actions. There is no evidence in the trial record that the court believed protective measures were necessary. Although the trial court was obligated to interrogate

the jury if it believed the jury's concerns resulted in a substantial risk of prejudice, Carter presents no concrete evidence that the concerns were anything other than imaginary or remote. Based on the scant evidence of jury concern for safety, we cannot say that the trial court abused its discretion by failing to interrogate the jury about alleged concerns for safety.

### **III. Exclusion of Evidence**

Carter next contends that the trial court abused its discretion by excluding Lee's statement, Officer Outlaw's handwritten note stating that Frank picked photo number four in the photo array, and testimony regarding Foley's exhaustion of appellate and post-conviction remedies. The admission or exclusion of evidence is generally a determination entrusted to the trial court's sound discretion. *Carpenter v. State*, 786 N.E.2d 696, 702 (Ind. 2003). We will reverse a trial court's decision only for an abuse of discretion, that is, when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or it misinterprets the law. *Id.* at 702-03. Even if an evidentiary decision is an abuse of discretion, we will not reverse if the ruling constitutes harmless error. *See Combs v. State*, 895 N.E.2d 1252, 1255 (Ind. Ct. App. 2008), *trans. denied*. An error is harmless if it is sufficiently minor so as not to affect the substantial rights of the parties. Ind. Trial Rule 61; *Farmer v. State*, 908 N.E.2d 1192, 1199 (Ind. Ct. App. 2009).

#### *A. Lee's Statement and Officer Outlaw's Handwritten Note*

Carter asserts that both Lee's statement and Officer Outlaw's handwritten note are admissible under Indiana Rule of Evidence 803(8), which is an exception to the hearsay rule:

**(8) Public Records and Reports.** Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations in any form, of a public office or agency, setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule: (a) investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case; (b) investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; (c) factual findings offered by the government in criminal cases; and (d) factual findings resulting from special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case.

Specifically, Carter contends that both Lee's statement and Officer Outlaw's handwritten note constitute investigative reports by police that may be admitted when offered by defendants in criminal cases.

At the outset, we note that Indiana Evidence Rule 103(a) provides that error may not be predicated upon a ruling excluding evidence unless a substantial right of the party is affected and "the substance of the evidence was made known to the court by a proper offer of proof, or was apparent from the context within which questions were asked." No offer of proof was provided by Carter. *See* Tr. p. 881-91. Although both the State and Carter discuss the substance of Lee's statement in their appellate briefs, *see* Appellant's Br. p. 21; Appellee's Br. p. 19, we note that the statement itself was never placed into the record, so we have no way of knowing what it actually said. We caution parties that

when the trial record does not contain the evidence in dispute, it is a considerable impediment to our review of the propriety of evidentiary rulings.

Having said that, Officer Roberts testified that he took a witness statement from Lee and noted that statements are taken “[t]o have an account of what occurred from the victim or witness’[s] memory or experience that day.” Tr. p. 883. Even if we assume without deciding that Lee’s statement is an investigative report under the public records exception to the hearsay rule, Lee’s statement constitutes hearsay within hearsay and is therefore inadmissible. The trial court did not abuse its discretion in excluding it.

Assuming, *arguendo*, that the trial court abused its discretion by excluding Officer Outlaw’s handwritten note, any such error is harmless. Although Carter contends that Officer Outlaw’s handwritten note “is solid evidence which is necessary to rebut the prejudice created by the several references to the non-existent photo array as containing C[ory]’s photograph,” Appellant’s Br. p. 23, Carter was permitted to cross-examine Officer Outlaw on the fact that his handwritten note indicated that Frank picked photo number four in the photo array but did not specifically indicate that photo number four was Carter’s photo. The jury thus received the same information that Carter wanted them to receive: that the handwritten note did not specifically indicate that photo number four was Carter’s photo. Moreover, Frank, who had known Carter since “about in the third grade,” Tr. p. 385, unequivocally identified Carter as the shooter in 1997 at the scene and at the hospital, in 2007 when speaking with Officer Gonzales, and in 2009 at trial. In light of Carter’s cross-examination of Officer Outlaw and the totality of the evidence



supporting Frank's identification of Carter as the shooter, we conclude that any error in the exclusion of Officer Outlaw's handwritten note was harmless.

*B. Testimony Regarding Foley's Exhaustion of Appellate and Post-Conviction Remedies*

Carter asserts that the trial court abused its discretion by excluding testimony regarding Foley's exhaustion of appellate and post-conviction remedies. Specifically, Carter asserts that the attempt to elicit such testimony "was an attempt to show bias on the part of Foley and certainly goes to establishing why he would have lied to the police when he said he was an eye witness to the murder." Appellant's Br. p. 28. Indiana Evidence Rule 616 specifies that "[f]or the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible."

Even if we were to decide that the trial court abused its discretion by excluding such testimony, any such error was harmless. By the time Foley was cross-examined, he had already testified on direct that he was in a juvenile correctional facility at the time of the crime and that he had lied about witnessing Carter as the shooter. As the jury already heard evidence from Foley that he lied in his statement, any testimony attempting to establish why Foley would have motive to lie became of little practical significance. Any error in the exclusion of testimony regarding Foley's exhaustion of appellate and post-conviction remedies was harmless.<sup>8</sup>

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<sup>8</sup> Tagged on to the end of his argument regarding the exclusion of testimony, Carter states, "The trial court's error was further compounded when it allowed [Officer] Gonzales, the lead investigator, to testify over objection that Foley's statement was taken in private for his safety." Appellant's Br. p. 28. Officer Gonzales "investigate[d] homicides, shootings, [and] a myriad of gun crimes." Tr. p. 826. We presume that his knowledge of precautionary measures taken when obtaining an inmate's statement was gleaned from his experience. Additionally, as the officer who took Foley's statement, Officer Gonzales

#### IV. Jury Instructions

Carter next contends that the trial court abused its discretion by refusing his tendered jury instructions regarding the lost photo array. His jury instructions indicated that the jury could draw an inference unfavorable to the State based on the lost photo array:

If you find that the police have intentionally, knowingly, recklessly, or negligently lost, destroyed, or failed to preserve evidence whose contents or quality are important to the issues of this case, then you should weigh the explanation if any given for the loss or unavailability of the evidence. If you find that such explanation is inadequate, then you may, but are not required to, draw an inference unfavorable to the State, which in itself may create a reasonable doubt as to the accused's guilt.

Tr. p. 914.

If you find from the evidence that there existed an item lost or destroyed and the state, through the police, lost or destroyed it, you may, but are not required to, infer that the information contained on or in the item would be, if available, adverse to the state and favorable to the accused.

*Id.* at 915.

The purpose of an instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict. *Overstreet v. State*, 783 N.E.2d 1140, 1163 (Ind. Ct. App. 2003). Instructing the jury lies within the sole discretion of the trial court, and considering the instructions as a whole and in reference to each other, we will not reverse for an abuse of that discretion unless the instructions mislead the jury as to the law in the case. *Carter v. State*, 766 N.E.2d 377, 382 (Ind. 2002), *reh'g denied*.

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had personal knowledge. The trial court did not abuse its discretion in admitting Officer Gonzales's testimony.

Assuming without deciding that the trial court abused its discretion by refusing Carter's tendered jury instructions regarding the lost photo array, any such error was harmless. Frank had known Carter since childhood and had identified Carter as the shooter in 1997 to Officer Shelton at the scene, again to Officer Shelton at the hospital, and to Officer Outlaw at the hospital. Ten years later, Frank identified Carter as the shooter and selected his photo in a photo lineup when contacted by Officer Gonzales. At trial in 2009 Frank maintained his identification of Carter as the shooter. The lost photo array had no bearing on Frank's identification of Carter.

## **V. Sentencing**

Finally, Carter contends that the trial court abused its discretion in imposing a sixty-year sentence for murder. Specifically, Carter argues that the trial court improperly used his criminal history and record of arrests as well as the nature and circumstances of his crime as aggravators.

It is well settled that the sentencing statute in effect at the time the crime is committed governs the sentence for the crime. *Gutermuth v. State*, 868 N.E.2d 427, 431 n.4 (Ind. 2007). At the time of the crimes in this case, the legislature had not yet amended Indiana's sentencing statute, and consequently, the presumptive sentencing scheme applies. At the time of Carter's crimes, murder had a presumptive sentence of fifty-five years, with no more than ten years added for aggravating circumstances and no more than ten years subtracted for mitigating circumstances. Ind. Code § 35-50-2-3(a) (Supp. 1997).

The United States Supreme Court held that the Sixth Amendment requires a jury to determine beyond a reasonable doubt the existence of aggravating factors used to increase the sentence for a crime above the presumptive sentence assigned by the legislature. *Blakely v. Washington*, 542 U.S. 296, 301 (2004). Our Supreme Court has since held that the rule announced in *Blakely* applies to Indiana's presumptive sentencing scheme. *Smylie v. State*, 823 N.E.2d 679, 690-91 (Ind. 2005). Thus, under *Blakely* and Indiana's former sentencing scheme, an aggravating circumstance is proper when it is: (1) a fact of prior conviction; (2) found by a jury beyond a reasonable doubt; (3) admitted by a defendant; or (4) in the course of a guilty plea where the defendant has waived his or her Sixth Amendment rights and stipulated to certain facts or consented to judicial factfinding. *Sullivan v. State*, 836 N.E.2d 1031, 1034 (Ind. Ct. App. 2005).

Sentencing determinations are within the trial court's discretion and are reviewed on appeal only for an abuse of that discretion. *Padgett v. State*, 875 N.E.2d 310, 316 (Ind. Ct. App. 2007), *trans. denied*. It is within the trial court's discretion to determine whether a presumptive sentence will be enhanced due to aggravating factors. *Id.* When a sentence is enhanced, the trial court must: (1) identify significant aggravating and mitigating circumstances; (2) state the specific reasons why each circumstance is aggravating or mitigating; and (3) evaluate and balance the mitigating against the aggravating circumstances to determine if the mitigating offset the aggravating factors. *Id.* As reasonable minds may differ due to the subjectivity of the sentencing process, it is generally inappropriate for us to substitute our opinions for those of the trial judge. *Id.*

#### *A. Criminal History and Record of Arrests*

In the trial court's sentencing order, it noted as an aggravating circumstance that Carter "has a history of misdemeanor and felony convictions and juvenile adjudications. The defendant has an extensive history of arrests." Appellant's App. p. 39. Carter argues that the trial court improperly considered: (1) a felony conviction for a crime committed after the instant crimes, (2) his juvenile adjudications for aiding a child molester and having a gun without a permit, and (3) his history of arrests. Criminal activity that occurs subsequent to the offense for which a defendant is being sentenced is a proper sentencing consideration. *Sauerheber v. State*, 698 N.E.2d 796, 806 (Ind. 1998). Carter's conviction for Class B felony armed robbery in 1998 was thus a proper sentencing consideration, and the fact that the felony conviction occurred after Kevin's murder does not require the trial court to attach any less significance to it. *See id.*

A defendant's criminal history, including juvenile adjudications, is a valid aggravating circumstance. Ind. Code § 35-38-1-7.1(a)(2) (stating that a court may consider as an aggravator a defendant's "history of criminal or delinquent behavior" in determining what sentence to impose for a crime); *Ryle v. State*, 842 N.E.2d 320, 321-23 (Ind. 2005) (holding that juvenile adjudications are an exception to the requirement that all facts used to enhance a sentence over the statutory maximum must be found by a jury beyond a reasonable doubt). While it is true that a trial court must consider the gravity, nature, and number of prior offenses in relation to the current offense, these considerations go to the weight of a defendant's criminal history when considering whether and to what extent a sentence should be enhanced. *Bryant v. State*, 841 N.E.2d 1154, 1156 (Ind. 2006).

A record of arrest by itself does not establish that a defendant committed a criminal offense and may not be properly considered as evidence of criminal history. *Cotto v. State*, 829 N.E.2d 520, 526 (Ind. 2005). However, it may reveal that a defendant has not been deterred even after having been subject to the police authority of the State, particularly if the record of arrest is lengthy. *Id.* A record of arrest may thus be relevant to the trial court's assessment of the defendant's character in terms of the risk that he or she will commit another crime. *Id.* Carter's "extensive history of arrests" was thus a valid aggravator. Although we note that it might have been preferable for the trial court to delineate Carter's history of arrests as a separate aggravator, we cannot say that the trial court abused its discretion.

#### *B. Nature and Circumstances of the Crime*

The trial court also found the nature and circumstances of the crimes to be a significant aggravating circumstance. It particularly noted that multiple victims were shot at close range with a shotgun and that there were children in the home at the time of the crimes. The trial court may find the nature and circumstances of the crime to be an aggravating circumstance. *Lemos v. State*, 746 N.E.2d 972, 975 (Ind. 2001). Regarding Carter's argument that there was only a single victim in each count, we agree with the State that the pertinent part of the trial court's consideration was that the victims were shot at close range with a shotgun.

Carter also argues that the fact that there were children in the home at the time of the crime was not found by a jury and thus improper under *Blakely*. When the State

made its argument at sentencing, it noted that there were children in the home at the time of the shootings. Carter objected:

There was testimony that there were children in the house, but there was no testimony that the children saw, knew, or heard anything. There was – nobody got up there and said the kids even knew what was going on. To argue that there were children present is an improper aggravator. There was no evidence that anybody else can say that Mr. Carter or anybody knew that there were children in the house. There was testimony that they were in a back bedroom, but there was no testimony the children were involved, knew, heard or saw, or in any way, shape or form are in any way aware of this. So I think that’s an improper aggravator.

Tr. p. 1076-77. A party may not object on one ground at trial and then raise a different ground on appeal. *Collins v. State*, 835 N.E.2d 1010, 1016 (Ind. Ct. App. 2005), *trans. denied*. Here, Carter’s objection was not based on *Blakely*, which was issued nearly five years before his sentencing hearing. Carter’s *Blakely* challenge is thus waived.

In any event, we are confident that the trial court would have imposed the same sentence had there been no children in the home at the time of the crime, particularly in light of Carter’s 1998 felony armed robbery conviction and the fact that Carter shot Kevin and Frank at close range with a shotgun. *See Drakulich v. State*, 877 N.E.2d 525, 535 (Ind. Ct. App. 2007) (“[W]e can say with confidence that the trial court would have imposed the same sentence if it considered only the proper aggravators.’ We conclude that any error . . . was harmless.”) (quoting *Robertson v. State*, 871 N.E.2d 280, 287 (Ind. 2007)), *trans. denied*.

Affirmed.

RILEY, J., and CRONE, J., concur.