

**MATHIAS, Judge**

Kohl Shallenberger (“Shallenberger”) was convicted in Howard Superior Court of Class A felony burglary and ordered to serve fifty years in the Department of Correction.

Shallenberger appeals his conviction and sentence raising two issues:

I. Whether the trial court committed fundamental error when it admitted into evidence surveillance videos and photographs without a proper foundation; and,

II. Whether the trial court abused its discretion when it sentenced Shallenberger without providing a detailed sentencing statement.

We affirm.

### **Facts and Procedural History**

On August 17, 2008, Shallenberger and his brother arrived at an International House of Pancakes (“IHOP”) restaurant at approximately 5:00 a.m. They ordered food, but left the restaurant after informing the waitress that they would be back shortly. Shallenberger and his brother then proceeded to the home of Richard and Lela Meoak, which is located near IHOP. The Meoaks, an elderly couple, were asleep when Shallenberger and his brother broke into the home. Lela awoke to see one of the brothers standing outside the bedroom door.

Lela woke Richard, and one brother rushed into the bedroom. He put a gun to Richard’s head and yelled, “give me your money.” Tr. p. 24. He then struck Richard repeatedly with the gun. Lela begged him not to hurt her husband. In response, he threatened Lela and told her to be quiet. The other brother then yelled from the hallway to give him the gun stating that he would shoot the couple. The brother who beat Richard went into the hallway for a moment, and during that time, Richard retrieved his gun from underneath his mattress.

One brother ran back into the bedroom and grabbed Richard's gun. The two men began to struggle and Lela screamed, "don't hurt him" several times. He pointed his gun at Lela and told her he would shoot her if she did not "shut up." Tr. p. 29. The brother and Richard continued to struggle, and the brother's gun fired into the wall above the bed. The two brothers then fled from the house.

Richard and Lela were unable to identify the men that broke into their home because it was too dark in their bedroom. Richard sustained injuries to the left side of his face and his hand.

At approximately 5:30 a.m., Shallenberger and his brother, returned to IHOP in a dark colored SUV. Shallenberger went into the restaurant and asked for their order to go. Shallenberger's brother remained in the vehicle and discharged a gun in the parking lot. He then ran into IHOP and said to Shallenberger, "hey, what's taking so long, come on, let's go." Tr. p. 101. The two brothers acted nervous and skittish.

A day or two later, Shallenberger had a conversation with Dustin Paul ("Paul") and admitted that he broke into an old man's house and "pistol-whipped" him. He also stated that his gun had discharged. Tr. pp. 127-30. Shallenberger told Paul that he and his brother had gone to IHOP, and his brother had fired a gun in the parking lot. Tr. pp. 131-32. Paul's girlfriend was present during the conversation and heard Shallenberger state that he beat the victim.

Shallenberger was charged with Class A felony burglary on October 6, 2008. On March 10, 2009, a jury trial commenced. During trial, the trial court admitted, without

objection, surveillance videos from IHOP's security cameras and still photographs taken from those videos.

The jury found Shallenberger guilty as charged. He was sentenced on April 21, 2009. The trial court considered Shallenberger's brutality against Richard and his act of holding a gun to Lela's head as aggravating circumstances. Tr. p. 378. The trial court sentenced Shallenberger to fifty years in the Department of Correction. Shallenberger now appeals.

### **I. Admission of the Videotapes and Photographs**

Shallenberger argues that the trial court committed fundamental error when it admitted into evidence IHOP's surveillance videos and photographs taken from those videos. Shallenberger failed to object at trial, and therefore, cannot claim that the trial court abused its discretion in admitting the videos and photographs. Kubsch v. State, 784 N.E.2d 905, 923 (Ind. 2003). Consequently, to avoid waiver, Shallenberger contends that the admission of the evidence constitutes fundamental error.

The fundamental error doctrine is extremely narrow. Rowe v. State, 867 N.E.2d 262, 266 (Ind. Ct. App. 2007). "To qualify as fundamental error, an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible." Id. The error must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process. Id.

Before we address Shallenberger's claim of fundamental error, we observe that before video and photographic evidence may be admitted, an adequate foundation must

be laid. Bergner v. State, 397 N.E.2d 1012, 1014 (Ind. Ct. App. 1979). “Our courts have consistently held this requires the testimony of a witness who can state the photograph is ‘a true and accurate representation of the things it is intended to depict.’” Id. (citation omitted). Generally, photographs and video recordings are treated as demonstrative evidence. “As such, a photograph [or video] is not evidence in itself, but is used merely as a nonverbal method of expressing a witness’ testimony and is admissible only when a witness can testify it is a true and accurate representation of a scene personally viewed by that witness.” Id. at 1015.

However, under a “silent witness” theory, “videotapes and photographic evidence may be admitted as substantive evidence, rather than merely as demonstrative evidence.” Edwards v. State, 762 N.E.2d 128, 136 (Ind. Ct. App. 2002). In Bergner, this court established the foundational requirements for the admission of photographs offered as substantive evidence rather than demonstrative evidence under the “silent witness” theory. 397 N.E.2d at 1017. We held that there must be a strong showing of authenticity and competency including proof that the photograph has not been altered in any way. Id. This higher standard is applied in situations where there is no one who can testify as to its accuracy and authenticity because the photograph must “speak for itself” and “silent witnesses” cannot be cross-examined. Id. at 1015.

The surveillance videos and photographs at issue in this appeal were not offered as a “silent witness.” IHOP employees and an employee’s husband testified concerning Shallenberger’s presence and activities inside IHOP and outside in its parking lot. One of the IHOP employees personally knew Shallenberger and testified that he was present in

the restaurant on the morning of the burglary. Tr. pp. 113-14. We therefore conclude that the purpose of offering the surveillance videos and photographs was to bolster the testimony of the IHOP employees and to provide illustration of the events that occurred on the IHOP property on the date of the burglary.

However, even under the less stringent standard for demonstrative evidence, we cannot conclude that the State laid an adequate foundation for the admission of the IHOP surveillance videos and accompanying photographs. The videos and photographs were admitted through Detective Waymire who testified that the IHOP store manager played the surveillance videos for him and copied the videos to the detective's thumb drive. Tr. pp. 180-82. The Criminal Investigations Department then took still photographs from those videos, and enhanced those images. Tr. p. 203. The detective testified that the "still photographs and the data stream on that thumb drive accurately and adequately depict the video as [he] watched it" at IHOP. Tr. p. 182.

Because the store manager was not a witness in this case, there was no evidence presented to establish the accuracy of the surveillance videos, how the videos were compiled, or how the video equipment was maintained. Further, the State did not elicit testimony from any person from the Criminal Investigations Department to establish how the still photographs were made and the accuracy of such photographs. However, Shallenberger failed to object to the admission of the surveillance videos and photographs, and therefore, has raised this claim of fundamental error.

IHOP employees described Shallenberger's activities inside the IHOP and in its parking lot, and testified that Shallenberger left the restaurant for approximately twenty

or thirty minutes before returning for his food. Tr. pp. 83, 97-98, 114-16. Moreover, the State presented the testimony of a witness who stated that Shallenberger admitted to the burglary. Dustin Paul testified that Shallenberger admitted that he broke into an old man's house, "pistol-whipped" him, and his gun had discharged. Tr. pp. 127-30. Shallenberger also told Paul that he and his brother had gone to IHOP, and his brother had fired a gun in the parking lot. Tr. pp. 131-32. Given this evidence of Shallenberger's guilt and the IHOP employees' testimony, we cannot conclude that admission of the surveillance videos and photographs constitutes fundamental error. See Oldham v. State, 779 N.E.2d 1162, 1174 (Ind. Ct. App. 2002), trans. denied (stating that any error in the admission of evidence is generally harmless where the evidence is merely cumulative of other evidence).

## **II. Sentencing**

Shallenberger also argues that the trial court abused its discretion when it ordered him to serve fifty years in the Department of Correction without entering a detailed sentencing statement. Indiana trial courts are required to enter sentencing statements whenever imposing a 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. 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.

Under the advisory sentencing scheme, trial courts no longer have any obligation to weigh aggravating and mitigating factors against each other when imposing a sentence. Id. at 491. “[O]nce 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.’” Id. (citation omitted). “So long as the sentence is within the statutory range, it is subject to review only for abuse of discretion.” Id. at 490.

A trial court abuses its discretion if it (1) fails “to enter a sentencing statement at all[,]” (2) enters “a sentencing statement that explains reasons for imposing a sentence--including a finding of aggravating and mitigating factors if any--but the record does not support the reasons,” (3) enters a sentencing statement that “omits reasons that are clearly supported by the record and advanced for consideration,” or (4) considers reasons that “are improper as a matter of law.” Id. at 490-91. If the trial court has abused its discretion, we will remand for resentencing “if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.” Id. at 491. However, under the new statutory scheme, the relative weight or value assignable to reasons properly found, or to those which should have been found, is not subject to review for abuse of discretion. Id.

In this case, although the trial court’s sentencing order does not discuss aggravating and mitigating circumstances, the trial court’s oral statements during the sentencing hearing explain its reasons for imposing a fifty-year sentence. We are

permitted to consider such oral statements in determining whether the trial court abused its discretion. See McElroy v. State, 865 N.E.2d 584, 589 (Ind. 2007).

Specifically, after rejecting Shallenberger's proffered mitigator that he had dependent children, the trial court stated:

I want you to know that I sat here through the trial, as you well know, and if that decision would have been [left] to me I would have found you guilty within 30 seconds. There's no doubt in my mind. We had videos, testimony, it was one of the strongest cases I've ever seen. And, of course, I'm not going to hold it against you, there's no remorse. If you don't admit it we don't expect you to have remorse. But I have remorse for these folks. Mr. Meoak said nasty. The State gave . . . [its] ideas of why the violence in this act. As I recollect and it's certainly my impression now, you didn't even know it was a mistake at the time he was pistol-whipped. That leaves me with only one conclusion, it was fun and it certainly doesn't explain holding a gun to his wife's head. I have always considered burglary to be one of the most dangerous and most serious offenses there . . . are, especially of a home. That's just very reasonable. You put a weapon involved and somebody's going to get killed and I'm in amazement that didn't happen and it isn't worse than it was but for these people it is bad and it's not going to end. With a little hesitation I sentence you to 50 years in prison.

Tr. pp. 377-78.

First, we observe that although the trial court's sentencing statement is brief, it is adequate. The trial court discussed its rejection of Shallenberger's proposed mitigating circumstance, and it is clear that the court considered the circumstances of the crime as an aggravating circumstance. The court certainly could have stated with more clarity its reasons for imposing a fifty-year sentence, but its sentencing statement is detailed enough to permit meaningful appellate review.

Next, Shallenberger argues that the trial court improperly relied on his claims of innocence as an aggravator. To the contrary, the court clearly stated that because

Shallenberger did not admit to the crime, the court did not expect him to express remorse. See Tr. p. 377 (stating “of course, I’m not going to hold it against you, there’s no remorse”).

Shallenberger also argues that the trial court’s conclusion that burglary is generally a “dangerous” and “serious” offense is not a valid aggravating circumstance. While the trial court did make a generalized statement about burglary, the trial court considered the particular nature and circumstances of this crime as an aggravating circumstance, which was proper because the trial court explained why the circumstances of the crime were aggravating. See Smith v. State, 872 N.E.2d 169, 178-79 (Ind. Ct. App. 2007), trans. denied. The court considered as aggravating the excessive violence towards Shallenberger’s elderly victims. Specifically, the court noted the threat of violence toward Lela Meoak and the fact that Richard Meoak was “pistol-whipped” several times.<sup>1</sup>

For all of these reasons, we conclude that the trial court did not abuse its discretion in sentencing Shallenberger to a fifty-year sentence. Finally, we observe that Shallenberger cites to Appellate Rule 7(B), but does not raise any arguments concerning the nature of the offense or the character of the offender. Therefore, Shallenberger has waived his right to challenge his sentence as inappropriate. See Ind. Appellate Rule 46(A)(8).

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<sup>1</sup> Shallenberger also claims that there is no evidence that would support the trial court’s statement that Shallenberger “pistol-whipped” Richard Meoak because “it was fun.” The trial court made this statement during its consideration of the specific circumstances of the crime. While it is true that there is no direct evidence to support the court’s statement, we will not second guess the trial court’s impression of Shallenberger’s demeanor during trial and sentencing. Consequently, we cannot conclude that the trial court abused its discretion in making that statement.

## **Conclusion**

The trial court did not commit fundamental error when it admitted the cumulative IHOP surveillance videos and photographs that documented Shallenberger's presence and activities at IHOP the morning of the burglary. Further, the trial court did not abuse its discretion when it sentenced Shallenberger to fifty years for his Class A felony burglary conviction.

Affirmed.

BARNES, J., and BROWN, J., concur.