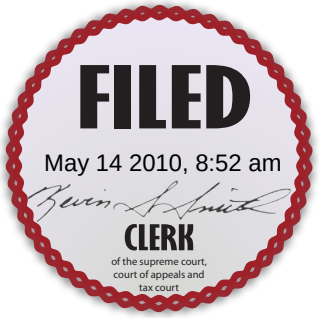

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IN THE
COURT OF APPEALS OF INDIANA

YALANDA SUE PARRISH,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 10A05-0909-CR-530
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE CLARK CIRCUIT COURT
The Honorable Daniel E. Moore, Judge
Cause No. 10C01-0807-FB-327

May 14, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Yalanda Sue Parrish appeals her conviction after a jury trial of aggravated battery as a Class B felony as well as the sentence imposed thereon. Parrish raises two issues which we restate as: 1) whether the trial court erred in denying her request for a mistrial, and 2) whether the trial court abused its discretion when it sentenced her. Concluding Parrish was not placed in grave peril, and the trial court did not err in sentencing her to a ten-year advisory sentence, we affirm.

Facts and Procedural History

The facts most favorable to the verdict reveal that at approximately 2:30 p.m. on June 17, 2008, Parrish and her fifteen-year-old son were returning to their home in Jeffersonville in Parrish's black SUV. As they approached the intersection of 10th Street and Sportsman Drive, Parrish noticed a motorcycle in the adjacent lane. The motorcycle's driver was 52-year-old Wesley Mosier, a handicapped former Marine. He had just purchased the fourteen-year-old motorcycle, and this was only the second time he had ridden it.

As Mosier and Parrish continued eastbound down 10th Street, Parrish moved to Mosier's lane and began following him very closely. When Mosier moved to the adjacent lane, Parrish moved too. At one point, Mosier drove between a line of cars to get as far away as possible from Parrish, who continued to follow him closely. However, when Mosier looked up, Parrish was behind him again. When Mosier reached the stoplight at 10th Street and Allison Lane, he was in the right turn lane. While the light was red, Mosier got off of his motorcycle, and walked back to the SUV "to see what was

going on." Transcript at 131. He did not know whether he had offended the driver or whether he was having problems with a brake light. Mosier tapped on the SUV driver's window and asked if he had done something wrong. Parrish opened the door to her SUV and knocked Mosier back from the vehicle with it. Mosier raised his hands into the air and began to step back from the vehicle. Parrish told Mosier it was his lucky day because he was going to die. She pulled out a gun and shot Mosier in the chest. Mosier fell to his knees and attempted to crawl to the side of the road.

Mosier was subsequently transported to the University of Louisville Hospital by ambulance. Doctors cut Mosier open from the bottom of his neck to below his navel so that they could determine the extent of his internal injuries. Mosier's pericardial sac, which surrounds his heart, was hit by the bullet as were his diaphragm and liver. Doctors packed his internal organs to stop the bleeding, stapled shut the incision, and placed Mosier in a medically induced coma so that he could be placed on a ventilator. Two days later, doctors were able to open Mosier back up and remove the packing because the bleeding had stopped. Mosier was hospitalized for eleven days. He continues to suffer pain from the injury and requires an additional surgery to remove the bullet that remains lodged in his back.

In July 2008, a grand jury returned an indictment charging Parrish with aggravated battery as a Class B felony and criminal recklessness as a Class C felony. A four-day jury trial was held in July 2009. Before trial, Parrish filed a motion in limine seeking to exclude testimony that her son jumped out of the SUV after the shooting, grabbed Mosier by the hair, and began kicking and hitting him while he was on the ground. The trial

court granted the motion, and the parties agreed that the assault could be referred to only as a confrontation. All details of the confrontation were to be excluded.

At trial, several eyewitnesses testified about the events leading up to the shooting. Some of the witnesses testified that Parrish was following Mosier too closely, and others testified that it was Mosier who was cutting off Parrish and blocking her efforts to change lanes. During direct examination, Mosier testified that while he was on the ground after being shot, he remembered seeing someone exit the passenger side of Parrish's vehicle. The prosecutor asked Mosier if he was confronted by someone. Mosier responded that he was confronted by Parrish's passenger. Mosier then testified that as he tried to stop the bleeding after he was shot, his lungs filled up with blood and he could not breathe, and somebody had him by the hair and was kicking him. Parrish objected that Mosier's testimony violated the motion in limine and moved for a mistrial. The trial court denied the motion but, at Parrish's request, admonished the jury to disregard that portion of Mosier's testimony.

Although Parrish did not testify at trial, her police statement given the day of the shooting and her grand jury testimony were both admitted into evidence. In the police statement, Parrish told the officers that Mosier stared at her, stayed right next to her when she sped up, and slowed down when she slowed down. She also said that he spit on her car. According to Parrish, Mosier stopped his motorcycle in front of her and approached her car with his fist raised as if he was going to hit her. She explained that she shot him in self-defense. In the grand jury testimony, Parrish testified that Mosier almost ran her off the road. She also testified that although she knew Mosier was not armed, she shot

him because she was afraid he was going to hit her. During closing argument, the prosecutor pointed out that there were fifty different places along 10th Street from Sportsman Avenue to Allison Lane where Parrish could have turned off and gotten away from Mosier if he was harassing her as she claimed.

The jury found Parrish guilty of Class B felony aggravated battery and Class C felony criminal recklessness. The trial court entered judgment of conviction on aggravated battery and sentenced Parrish to a ten-year advisory sentence with three years of the sentence to be served on work release through community corrections. Parrish appeals her conviction and sentence.

Discussion and Decision

I. Denial of Parrish's Motion for a Mistrial

Parrish first argues that the trial court erred in denying her motion for a mistrial. A mistrial is an extreme remedy warranted only when no other curative measure will rectify the situation. Kirby v. State, 774 N.E.2d 523, 533 (Ind. Ct. App. 2002), trans. denied. The determination of whether to grant a mistrial is within the trial court's discretion, and we will reverse only for an abuse of that discretion. Id. An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the trial court. Id. at 534. We accord great deference to the trial court's decision as it is in the best position to gauge the circumstances and the probable impact upon the jury. Id.

When determining whether a mistrial is warranted, we must consider whether the defendant was placed in a position of grave peril to which she should not have been

subjected. Id. The gravity of the peril is determined by the probable persuasive effect of the matter complained of on the jury's decision. Id. Generally, a timely and accurate admonition is an adequate curative measure for any prejudice that results. Id.

Here, Parrish claims that she was placed in grave peril when Mosier testified that her son pulled Mosier's hair and kicked him while he was on the ground after being shot. According to Parrish, the "jury could conclude that if she raised a son who could attack a man under such circumstances she was of such poor character that she was capable of shooting the same man without justifiable cause." Appellant's Brief at 11.

However, our review of the evidence reveals that fifteen witnesses testified during this four-day trial. We agree with the State that Mosier's isolated testimony regarding Parrish's son, which had nothing to do with Parrish's conduct or the offenses with which she was charged, did not have a persuasive effect on the jury's decision and did not place Parrish in grave peril.

Further, at Parrish's request, the trial court admonished the jury to disregard this portion of Mosier's testimony. Parrish does not explain why the trial court's admonishment does not suffice in this case. This admonition was sufficient to cure any resulting prejudice. The trial court did not err in denying Parrish's motion for a mistrial. See Banks v. State, 761 N.E.2d 403, 405 (Ind. Ct. App. 2002), trans. denied, (holding a timely admonition sufficed and the trial court did not err in denying the motion for a mistrial).

I. Sentencing

A. Standard of Review

Parrish also argues that the trial court erred in sentencing her to a ten-year advisory sentence.[1] As long as the sentence imposed is within the statutory range, it is subject to review only for an abuse of discretion. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (2007). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. Id. A trial court abuses its discretion when it: 1) fails to issue any sentencing statement; 2) enters a sentencing statement that explains reasons for imposing a sentence, but the record does not support the reasons; 3) enters a sentencing statement that omits reasons 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.

Here, the trial court sentenced Parrish as follows:

> And the aggravating and mitigating factors set forth in the statute have been reviewed. We do acknowledge that Ms. Parrish has no prior criminal record. We have to find that [im]position of a reduced sentence would depreciate the seriousness of the crime. . . . Both parties do agree that we're guided by the rules of law here and the legislature says that the minimum sentence that must be imposed is six years. So the court has considered several factors. . . .
>
> The Court's required, I believe, to look beyond the statute and look beyond the arguments of counsel. And so much of this trial involved arguments about who was right and who was wrong that day. . . . Both of these adults on the roadway that day were engaged in conduct that does not reflect mature adults with their vehicles. Between Sportsman Drive and Allison Lane there almost appeared to be a competition on the roadway. . . . I think that one of the lawyers at the closing statements said that there were

[1] Indiana Code section 35-50-2-5 provides that a person who commits a Class B felony shall be imprisoned for a fixed term of between six and twenty years, with the advisory sentence being ten years.

fifty stops to turn off between Sportsman Drive and Allison Lane. In fact, I counted them myself since the trial and had my staff double check me, and there were forty-eight options before that shooting occurred. Forty-eight places to turn off the road. . . .

Ms. Parrish, the evidence on her side of the case was there was a child with her. There was a gun under her seat and it was a hand gun and we have learned since trial that she has no firearms training [what] so ever. She's driving in a car in Clark County in Jeffersonville with a hand gun under her seat. Since the trial I actually have gone twice to the Thornton's parking lot, got out of my car and stood there and watched the traffic to understand what was going on this day because we saw the video tape at the Thornton's lot. Two huge driveways to turn into . . . before she chose the option to pull the gun. . . .

In analyzing the propriety of shooting a bullet from a gun towards another citizen . . . in daylight when so many ways [were] there to get away from that particular circumstance. The Court has thought about the path of that bullet, and if Mr. Mosier had moved given the setting of that intersection, where would that bullet go? There are cars on Holman's Lane which is a sloped road way and if Mr. Mosier hadn't taken the bullet, would the bullet have found somebody else? . . . I don't want to get into speculation but it is a concern the Court had when we get to a point where people disagree about traffic arguments or who's going to use the lane or who's doing what on the roadway and they decide that we're going to settle the traffic dispute by bullets and guns. And the Court as the representative of the community cannot find that to be acceptable conduct and in considering the nature of the crime and the aggravating circumstances in the statute as well as the mitigating circumstances, there are three things that I believe are very clear. That a bullet fired from a gun at another human being . . . . So the issue is a measurement of conduct against the laws and rules of society and whether we settle traffic disputes or anger at fellow motorists with guns and the Court cannot answer that question in the affirmative. Ms. Parrish, that day, shooting that gun put lives at stake and endangered people on the roadway that day, perhaps people even in the next lane, some of who[m] testified. . . .

There are rules of . . . law that have to [be] followed and with a young person in the car seeing this kind of conduct from an adult in addition to what occurred after the shooting . . . to sentence you to a lesser crime than I am going to announce today would depreciate the seriousness of the crime and would . . . not make the streets of Clark County or Jeffersonville safe if this was something that didn't carry with it a severe sanction. So the Court's going to sentence you to the Indiana Department of Corrections for a period of ten years and the Court's going to Order that the last three years of your sentence may be served in the Community

> Corrections Program on a Work Release Program as determined at that time. . . .

Sentencing Transcript at 39-49.

Parrish contends the trial court erred in considering matters outside the record and in using the sentencing process to send a personal philosophical message. She also contends that several of the trial court's aggravating factors were not supported by the evidence and that the court failed to find additional mitigating factors that were clearly supported by the record. We address each of her contentions in turn.

B. Consideration of Matters Outside the Record

Parrish first contends that the trial court erred in considering matters outside the record. However, she has waived appellate review of this issue because she failed to object when the trial court made its statements about counting the number of stops to turn off on 10th Avenue between Sportsman Drive and Allison Lane and about visiting the Thornton's parking lot. See Hulfachor v. State, 813 N.E.2d 1204, 1207 (Ind. Ct. App. 2004) (holding that failure to object to consideration of evidence outside the record in determining a sentence results in waiver of the issue on appeal). Waiver notwithstanding, we find no error. At trial, the State mentioned that there were fifty different places along 10th Street from Sportsman Avenue to Allison Lane where Parrish could have turned off and gotten away from Mosier if he was harassing her as she claimed. In addition, the jury saw a videotape and pictures of Thornton's lot. Therefore, although trial court judges are strongly discouraged from undertaking their own investigations and visiting

crime scenes, the information that the trial court judge in this case received as a result of his visits had already been presented to the jury, and we find no error.

C. Personal Philosophical Message

Parrish also contends that the trial court erroneously used the sentencing process to send a personal philosophical message. In support of her contention, Parrish directs us to Scheckel v. State, 655 N.E.2d 506 (Ind. 1995), wherein the trial court stated as follows during the sentencing hearing:

> I have carefully reviewed the evidence presented regarding mitigating circumstances, the psychological and sociological significance of the testimony and the blame shifting nature of these disciplines. They present the current fad of "victimology" as a justification for any type of anti-social or destructive behavior.
>
> * * *
>
> Somewhere along the line a person must be held responsible for his own conduct, not society, not the government, and not the counselor's couch.
>
> The purpose of the criminal law then is to deter, punish, and rehabilitate in that order.
>
> Our elected Senators and House Members have put a value on a man's life. Should it be 60 years, 50 years, 40 years, 30 years? The mere mention of the sentencing range depreciates the value of life.

Id. at 508-09. On appeal, the Indiana Supreme Court held that the special judge's statements concerning the purposes of criminal punishment and the morality of the Legislature's sentencing statute revealed that the sentencing process was improperly used for sending a personal philosophical message. Id. at 510. The supreme court further held that the "vituperative tone and lack of specificity [of the sentencing statement] lead one to conclude that the special judge ignored the mitigating circumstances, failed to identify

and explain his use of the aggravating circumstances, and simply imposed the maximum sentence of sixty years on appellant." Id.

Here, however, the trial court set forth specific aggravating and mitigating factors and imposed the advisory sentence. The court's sentencing statement was not vituperative and did not lack specificity. Although the trial court judge commented on his role as the representative of the community and announced that anything less than the advisory sentence in this case would make the streets of Clark County unsafe, these comments did not send a personal philosophical message as did those in Scheckel.

Parrish also argues that the trial court was attempting to send a message to the community when it mentioned that Parrish was driving around Clark County with a handgun under the seat of her car and that she had not had firearms training. According to Parrish, she was not doing anything illegal because she had a valid handgun license. Our review of the evidence reveals that the court was simply expressing concern that Parrish had a handgun in her car that she had not been trained to use. The trial court was not attempting to convey a message to the community.

D. Aggravating Factors

The trial court in this case found three aggravating factors: 1) Parrish's use of a handgun; 2) Parrish's knowing commission of the offense in front of her son, a person less than eighteen years old who was not the victim of the offense; and 3) the imposition of a reduced sentence would depreciate the seriousness of the crime. Parrish concedes these are all valid aggravating factors. Instead, she argues that the evidence in this case does not support them. Again, we address each of her contentions in turn.

Parrish first argues that her use of a handgun is an invalid aggravating factor because the trial court failed to explain why this was an aggravating factor. However, as Parrish states in her appellate brief, the trial court found that Parrish's use of a handgun was an aggravating factor because Parrish put innocent lives at stake when she fired the gun out of the door of her car in a busy area. The trial court clearly explained why the use of a handgun was an aggravating factor in this case, and the evidence in the case supports this aggravating factor.

In addition, that Indiana Code Section 35-42-2-1.5 provides:

> A person who knowingly or intentionally inflicts injury on a person that creates a substantial risk of death or causes: (1) serious permanent disfigurement; (2) protracted loss or impairment of the function of a bodily member or organ; or (3) the loss of a fetus; commits aggravated battery, a Class B felony.

Use of a deadly weapon, such as the handgun in this case, is not an element of aggravated battery. Further, the trial court was not using this aggravating factor to comment on Mosier's injury, which is an element of the offense, but in relation to the broader possible consequences of firing a handgun in a busy area. The particular manner in which a crime is committed may serve as an aggravating factor. McKinney v. State, 873 N.E.2d 630, 645 (Ind. Ct. App. 2007), trans. denied. The trial court did not err in finding that Parrish's use of a handgun was an aggravating factor.

Parrish next argues that her commission of the offense in front of her sixteen-year-old son was not a valid aggravating factor in this case because she did not intentionally commit the crime. Indiana Code section 35-38-1-7.1(a)(4) provides that in determining what sentence to impose for a crime, the court can consider the person knowingly

committed the offense in the presence or within hearing of an individual who was less than eighteen at the time the person committed the offense who is not a victim of the offense. There is no statutory requirement that the crime be intentionally committed, and we decline to impose one. Parrish shot Mosier in the presence of her fifteen-year-old son. The evidence in this case supports this aggravating factor.

Lastly, Parrish argues that the trial court abused its discretion by erroneously considering the aggravating factor that the imposition of a reduced sentence would depreciate the seriousness of the crime. She is correct that the trial court may not consider this aggravating factor unless the record reflects the court considered imposing a shorter sentence than the advisory term. See Taylor v. State, 840 N.E.2d 324, 340 (Ind. 2006). She is also correct that the record in this case reveals that the trial court did not consider imposing a reduced sentence. The trial court therefore abused its discretion by considering this aggravating factor. Nevertheless, we find that such error was harmless because this factor clearly had a minimal impact on the trial court's sentencing decision given the other aggravating factor cited by the trial court. See McCann v. State, 749 N.E.2d 1116, 1120 (Ind. 2001) (holding even if trial court improperly found an aggravating factor, sentence was still proper in light of the additional valid aggravating factor).

E. Mitigating Factors

The trial court found that Parrish's lack of criminal history was a mitigating factor. She argues that there were additional mitigating factors that the trial court failed to find. The finding of mitigators is not mandatory and rests with the discretion of the trial court.

Ellis v. State, 736 N.E.2d 731, 736 (Ind. 2000). The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. Gross v. State, 769 N.E.2d 1136, 1140 (Ind. 2002). Further, a trial court is not obligated to explain why it did not find a factor to be significantly mitigating. Sherwood v. State, 749 N.E.2d 36, 38 (Ind. 2001). However, the trial court may not ignore facts in the record that would mitigate an offense, and a failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them. Id. An allegation that the trial court failed to find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999).

Parrish first argues that the trial court erred when it failed to find that the crime was the result of circumstances unlikely to recur and that she was likely to respond affirmatively to probation or short term imprisonment. However, our review does not reveal significant evidence to support these mitigators. They were therefore not clearly supported by the record and the trial court did not err in declining to accept Parrish's arguments in this regard. See Hillenburg v. State, 777 N.E.2d 99, 109 (Ind. Ct. App. 2002), trans. denied (holding that where our review does not reveal significant evidence to support the proffered mitigator, the mitigator is not clearly supported by the record).

Parrish next argues that the trial court erred when it failed to find: 1) Mosier induced or facilitated the offense; 2) Parrish acted under strong provocation; and 3) there were substantial grounds tending to excuse or justify the crime though failing to establish a defense. However, our review of the evidence reveals that Parrish knew that Mosier

did not have a weapon when he approached her SUV. After Parrish opened the door to her SUV and knocked Mosier back from the vehicle with it, Mosier raised his hands in the air and began to step back from the vehicle. Despite Mosier's retreat, Parrish pulled out a gun and immediately shot him in the chest. This evidence does not clearly support Parrish's proposed mitigators, and the trial court did not err in declining to accept Parrish's argument in this regard.

Conclusion

The trial court did not err in denying Parrish's motion for a mistrial or in sentencing her to a ten-year advisory sentence.

Affirmed.

FRIEDLANDER, J., and KIRSCH, J., concur.