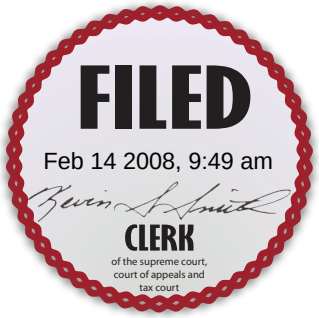

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IN THE
COURT OF APPEALS OF INDIANA

FREDDIE L. MCKNIGHT, III,	)	
Appellant-Defendant,	)	
vs.	)	No. 20A05-0708-CR-469
STATE OF INDIANA,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0606-FA-49

February 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Freddie L. McKnight III appeals his conviction and sentence for dealing in cocaine as a class A felony.[1] McKnight raises three issues, which we restate as:

I. Whether the trial court abused its discretion by failing to dismiss a juror;

II. Whether the trial court's admission of testimony regarding a drug house resulted in fundamental error; and

III. Whether the sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.[2]

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[1] Ind. Code § 35-48-4-1(b) (2004) (subsequently amended by Pub. L. No. 151-2006, § 22 (eff. July 1, 2006)).

[2] We note that McKnight included a copy of the presentence investigation report on white paper in an envelope attached to his appendix. We remind McKnight that Ind. Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Ind. Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Ind. Administrative Rule 9(G)(1)(b)(viii) states that "[a]ll pre-sentence reports pursuant to Ind. Code § 35-38-1-13" are "excluded from public access" and "confidential." The inclusion of the presentence investigation report printed on white paper in his appellant's appendix, even when placed in an envelope, is inconsistent with Trial Rule 5(G), which states, in pertinent part:

> Every document filed in a case shall separately identify information excluded from public access pursuant to Admin. R. 9(G)(1) as follows:
>
> (1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked "Not for Public Access" or "Confidential."
>
> (2) When only a portion of a document contains information excluded from public access pursuant to Administrative Rule 9(G)(1), said information shall be omitted [or redacted] from the filed document and set forth on a separate accompanying document on light green paper conspicuously marked "Not For Public Access" or "Confidential" and clearly designating [or identifying] the caption and number of the case and the document and location within the document to which the redacted material pertains.

The relevant facts follow. On May 31, 2006, a cooperating source working with Officer Shawn Turner of the Elkhart County Interdiction and Covert Enforcement Unit purchased 8.709 grams of cocaine freebase or crack from McKnight. As a result, the State charged McKnight with dealing in cocaine weighing three grams or more as a class A felony.

At the jury trial, after the jury was sworn but before opening arguments were made, a juror sent the trial court a note indicating that she was acquainted with Officer Turner's wife. The trial court questioned the juror individually as follows:

> THE COURT: . . . Now, the fact that you know Heather Turner, will that in any way effect your ability to be fair to Mr. McKnight and to the State of Indiana in this matter?
>
> [] JUROR: I don't believe so. I don't know her spouse very well. I only met him on one occasion, so I don't - - I feel like Heather is trustworthy. I assume she has a trustworthy spouse, but I still feel like I can be impartial.
>
> THE COURT: You still feel you can be impartial.
>
> [] JUROR: Sure.
>
> THE COURT: All right. The fact that you have met Shawn Turner, who may or may not be a witness in this matter, will that in any way effect your ability to be fair to both sides?
>
> [] JUROR: No.
>
> * * * * *
>
> [MCKNIGHT'S COUNSEL]: Ms. Bechtel [juror], my question would be having met Mr. Shawn Turner and knowing his wife and knowing her through a relationship that you had being at a church organization, do you think you'd give his testimony anymore credibility than anybody else that were - - who would take the stand?
>
> [] JUROR: I mean, I don't think so, no.

Transcript at 29-30. At that time, McKnight objected to the juror remaining on the jury. McKnight's counsel informed the trial court that he would have used a peremptory challenge on that particular juror if he had known of her relationship with Officer Turner's wife. The trial court overruled McKnight's objection because the juror said that she could be fair and impartial.

During the testimony of William Wargo, chief investigator for the Elkhart County Prosecutor's Office, the jury asked Wargo why the officers did not wear rubber gloves. Wargo described that the "control officer" is generally in the undercover vehicle right outside of the residence and could not wear gloves there. Id. at 169. During the prosecutor's follow up questioning, Wargo noted the following:

> It's very common in a drug house to have persons who are observing people coming and going. We refer to it as counter surveillance. We do surveillance on drug buys. It's very common for counter surveillance to be taking place. Persons watching who's coming and going.

Id. at 170. Wargo testified that the undercover officer wearing gloves would look suspicious to a "spotter." Id. at 171. McKnight did not object to Wargo's testimony.

The jury found McKnight guilty as charged. At the sentencing hearing, the trial court found McKnight's extensive criminal history as an aggravating factor. The trial court noted that "a multitude of alternative sentences have been attempted with [McKnight], all of which have proved unsuccessful in causing his rehabilitation as evidenced by his conviction in this action and further evidenced by the fact that he has four (4) remaining distribution of controlled substance cases pending." Appellant's Appendix at 95. The trial court found McKnight's addictions as a mitigating factor but

found that the aggravating circumstances outweighed the mitigating circumstances. The trial court sentenced McKnight to forty-eight years in the Indiana Department of Correction.

I.

The first issue is whether the trial court abused its discretion by failing to dismiss a juror. Article I, § 13, of the Indiana Constitution guarantees a defendant's right to an impartial jury; therefore, a biased juror must be dismissed. May v. State, 716 N.E.2d 419, 421 (Ind. 1999). Ind. Trial Rule 47(B) provides in part, "Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury returns its verdict, become or are found to be unable or disqualified to perform their duties."

> Generally, proof that a juror was biased against the defendant or lied on voir dire entitles the defendant to a new trial. A juror's bias may be actual or implied. Implied bias is attributed to a juror upon a finding of a certain relationship between the juror and a person connected to the case, regardless of actual partiality. Stated differently, a juror's relationship with one of the parties may raise a presumption of implied bias. Where an inference of implied bias arises, a trial court should analyze such potential bias by considering the nature of the connection and any indications of partiality. The court "must weigh the nature and extent of the relationship versus the ability of the juror to remain impartial."

Alvies v. State, 795 N.E.2d 493, 499 (Ind. Ct. App. 2003) (internal citations omitted), trans. denied.

"Trial courts have broad discretion in determining whether to replace a juror with an alternate." May, 716 N.E.2d at 421. Trial judges have "significant leeway" in making this determination because "they see jurors firsthand and are in a much better position to assess a juror's ability to serve without bias or intimidation and decide the case according

to law." Barnes v. State, 693 N.E.2d 520, 523 (Ind. 1998) (quoting Jervis v. State, 679 N.E.2d 875, 881-82 (Ind. 1997)). The decision to replace a juror with an alternate is reviewed for an abuse of discretion. Id. "An abuse of discretion occurs only if the decision placed the defendant in substantial peril." Harris v. State, 659 N.E.2d 522, 525 (Ind. 1995).

Here, the juror informed the trial court that she knew Officer Turner's wife through church and that she had met Officer Turner on one occasion. The evidence reveals that the juror had only a casual relationship with a witness's spouse and brought the matter to the trial court's attention as soon as she realized the connection. She then assured the trial court that she could still be impartial and fair. Although McKnight describes the juror's response to the trial court's questions as "hardly ringing assurances of an unswerving commitment to impartiality," we conclude that the trial court was in a much better position to determine the juror's credibility. Appellant's Brief at 9. Under these circumstances, the trial court did not abuse its discretion by denying McKnight's request to dismiss the juror. See, e.g., Alvies, 795 N.E.2d at 502 (holding that the trial court did not abuse its discretion by denying the defendant's motion to remove a juror where the juror had only a casual working relationship with one of the witnesses).

II.

The next issue is whether the trial court's admission of testimony regarding a drug house resulted in fundamental error.[3] Generally, we review the trial court's ruling on the admission of evidence for an abuse of discretion. Noojin v. State, 730 N.E.2d 672, 676 (Ind. 2000). McKnight, however, failed to object to the admission of the testimony at issue here. Thus, we will therefore only reverse if we find fundamental error. "The standard for fundamental error is whether the error was so prejudicial to the rights of the defendant that a fair trial was impossible." Boatright v. State, 759 N.E.2d 1038, 1042 (Ind. 2001).

McKnight complains that the trial court allowed Wargo to testify that McKnight operated a "drug house." Appellant's Brief at 16. McKnight contends that this was evidence of other bad acts, which should have been excluded under Ind. Evidence Rule 404(b). In fact, Wargo did not testify that McKnight operated a drug house. Rather, Wargo used the term "drug house" in describing surveillance practices in drug investigations and in explaining why the undercover officer did not use rubber gloves when handling the crack cocaine purchased from McKnight. Transcript at 170-171. Even if Wargo's testimony could be considered as implying that McKnight operated a "drug house," we conclude that the error did not make a fair trial impossible. McKnight was on trial for dealing cocaine from his residence. As the State notes, "describing

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[3] In this issue, McKnight also mentions that Wargo was allowed to testify over his objection. However, McKnight cited no authority and failed to develop a cogent argument. A party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority. Lyles v. State, 834 N.E.2d 1035, 1050 (Ind. Ct. App. 2005), reh'g denied, trans. denied. Consequently, McKnight has waived this issue.

[McKnight's] home as a 'drug house' when describing surveillance and investigation tactics of drug interdiction investigations at worst implies what the State has already charged – that a drug deal took place at the house." Appellee's Brief at 9. The admission of Wargo's testimony did not result in fundamental error. See, e.g., Pinkins v. State, 799 N.E.2d 1079, 1090 (Ind. Ct. App. 2003) (holding that the admission of evidence that the defendant patronized strip clubs did not result in fundamental error), trans. denied.

III.

The last issue is whether the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). McKnight argues that his forty-eight-year sentence should be reduced to "an amount nearer the advisory term." Appellant's Brief at 21.

Our review of the nature of the offense reveals that McKnight sold 8.709 grams of cocaine freebase or crack to a source that was cooperating with the Elkhart County Interdiction and Covert Enforcement Unit. Our review of the character of the offender reveals that McKnight has an extensive criminal history. The trial court noted that McKnight had "at least five (5) felony convictions four (4) of which involve controlled substances and two (2) of the four (4) involve some allegation of distribution of controlled substances." Appellant's Appendix at 95. The trial court also noted that

McKnight had "either 14 or 17 misdemeanor convictions" and "seven (7) juvenile cases." Id. Despite "a multitude of alternative sentences," McKnight had been unsuccessful in rehabilitation as evidenced by his current conviction and four other distribution of controlled substances cases that were pending at the time of sentencing. Id. McKnight has admitted to having addiction issues, which the trial court considered as a mitigator. McKnight argues that his addiction and hardship to his children warrant a lesser sentence. However, we note that, at the time of sentencing, McKnight had four children and was $12,000 in arrears in child support.

Given McKnight's extensive criminal history, we cannot say that the forty-eight year sentence is inappropriate in light of the nature of the offense and the character of the offender. See, e.g., Vazquez v. State, 839 N.E.2d 1229, 1235 (Ind. Ct. App. 2005) (concluding that the defendant's sentence of fifty years with five years suspended for conspiracy to commit dealing in cocaine as a class A felony was not inappropriate in light of the nature of the crime and his character), trans. denied.

For the foregoing reasons, we affirm McKnight's conviction and sentence for dealing in cocaine as a class A felony.

Affirmed.

BARNES, J. and VAIDIK, J. concur