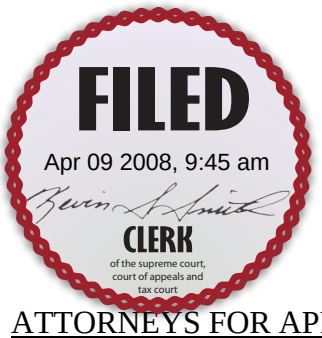

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IN THE
COURT OF APPEALS OF INDIANA

META I. JONES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A04-0706-CR-321
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Wayne J. Lennington, Judge
Cause No. 18C05-0611-FD-144

April 9, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Meta I. Jones appeals her convictions for Class D felony criminal recklessness and Class D felony residential entry. Specifically, she argues that the trial court erred in failing to give a certain preliminary instruction, excluding evidence of a telephone call, and failing to find two mitigators. Finding that the trial court did not abuse its discretion in the disposition of these issues, we affirm.

Facts and Procedural History[1]

The facts most favorable to the verdict reveal that on September 23, 2006, Angela Carter was living with her children as well as some other people in a house in Muncie, Indiana. Around 11:00 p.m., Jones, Niesha Willingham, and Jessica Gilmore went to Carter's house. Willingham knocked on the door and asked twelve-year-old E.C.,[2] who was holding a newborn baby, if she could speak with Carter. Other children were present in the home as well. When Carter came to the door, she immediately suspected trouble

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[1] We note that Jones' Statement of Facts is a witness by witness summary of the testimony presented at trial. Indiana Appellate Rule 46(A)(6)(c) provides, "The statement shall be in narrative form and shall not be a witness by witness summary of the testimony."

In addition, Jones included a copy of the presentence investigation report on white paper in her appendix. *See* Appellant's App. p. 73-81. We remind Jones that Indiana Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Administrative Rule 9(G)(1) shall be filed in accordance with HTrial Rule 5(G)H." 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 her appellant's appendix 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] Although the State claims that E.C. is Carter's daughter, the record makes clear that there is no relationship between the parties. In addition, the State refers to Willingham as "Williams," but the record reveals that Niesha's last name is Willingham.

and closed the door. The trio of women then forced their way through the door and into the house. Derrick Woods, a family friend, tried to push the women back out the door. However, the trio of women pulled knives and charged toward Carter. Jones yelled, "I'm going to kill [Carter] and the fu**ing kids." Tr. p. 111. Willingham and Gilmore made similar threats to Carter. According to Carter, Jones "was just going crazy with her knife. She didn't care who or where she was swinging at." *Id.* at 108. Woods tried to stop the women from reaching Carter, and Jones told Woods, "if you don't let me get to the bit**, I'll cut you." *Id.* at 116. Woods refused to move, and Jones cut his chest. At some point during the melee, Carter was able to call 911, prompting the trio of women to leave.

Thereafter, the State charged Jones with criminal recklessness as a Class D felony and residential entry, a Class D felony, both counts with respect to Carter. Following a jury trial, Jones was found guilty as charged. In sentencing Jones, the trial court found two mitigators, Jones' young age (twenty-three years old) and the fact that she did not have any felony convictions. As aggravators, the trial court found Jones' "tirade" following her conviction, the facts of the case, specifically Jones waving a knife around in the presence of a twelve-year-old girl holding a newborn baby as well as other children, Jones was on supervised probation at the time of this offense, and after committing this offense, Jones was charged with disorderly conduct. *Id.* at 298. The trial court sentenced Jones to the advisory term of eighteen months on each count, to be served concurrently. Jones now appeals.

Discussion and Decision

Jones raises three issues on appeal. First, she contends that the trial court erred in failing to give a preliminary instruction to the jurors that their votes must be individual and that their verdict must be unanimous. Second, she contends that the trial court erred in excluding evidence of a telephone call Carter allegedly made to Willingham earlier that day. Third, she contends that the trial court erred in failing to find two mitigators.

I. Preliminary Instruction

Jones contends that the trial court erred in failing to give a preliminary instruction to the jurors that their votes must be individual and that their verdict must be unanimous. Although the trial court gave this instruction as a final instruction,[3] Jones argues—without any citation to authority—that "[t]he very nature of this instruction is crucial to the operating of the entire jury system and the jury should be instructed prior to hearing all of the evidence." Appellant's Br. p. 13. The purpose of a jury instruction is to inform the jury of the law applicable to the facts without misleading it and to enable the jury to comprehend the case clearly and arrive at a just, fair, and correct verdict. *Overstreet v. State*, 783 N.E.2d 1140, 1163 (Ind. 2003). We review a trial court's refusal to give a tendered instruction for an abuse of discretion. *Springer v. State*, 798 N.E.2d 431, 433

[3] The final instruction, Instruction No. 10, provides, in part:

> To return a verdict, each of you must agree to it.
>
> Each of you must decide the case for yourself, but only after considering the evidence with the other jurors. It is your duty to consult with each other. You should try to agree on a verdict, if you can do so without compromising your individual judgment. Do not hesitate to re-examine your own views and change your mind if you believe you are wrong. But do not give up your honest belief just because the other jurors may disagree, or just to end the deliberations. After the verdict is read in court, you may be asked individually whether you agree with it.

Appellant's App. p. 70.

(Ind. 2003), *reh'g denied*. We consider: (1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions that are given. *Id.* Before a defendant is entitled to a reversal, she must affirmatively show that the instructional error prejudiced her substantial rights. *Hancock v. State*, 737 N.E.2d 791, 794 (Ind. Ct. App. 2000).

We start with Criminal Rule 8(F), which provides: "When the jury has been sworn the court shall instruct in writing as to the issues for trial, the burden of proof, the credibility of witnesses, and the manner of weighing the testimony to be received." Thus, Criminal Rule 8(F) does not require the trial court to give a preliminary instruction to the jurors that their votes must be individual and that their verdict must be unanimous. Moreover, this instruction was given during final instructions, where it is better suited to aid the jurors in the deliberative process.[4] *See Phillips v. State*, 550 N.E.2d 1290, 1296 (Ind. 1990) ("[T]his Court has noted that where the jury has been fully instructed on all the issues, the order in which it hears the instructions and the evidence provides no basis for a claim of error."), *reh'g denied*. As such, Jones can establish neither error nor prejudice. The trial court did not abuse its discretion by not giving a preliminary instruction on this topic.

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[4] In fact, in denying Jones' request to give this as a preliminary instruction, the trial court noted:

> I don't think that's necessary because they're not going to deliberate nor vote until they come to the end and in the final instructions, I tell them that it must be a unanimous decision. I tell them that they must freely converse with their other jurors and that type of thing, so that's, I don't see any reason that that needs to be in the preliminary.

Tr. p. 15.

II. Admission of Evidence

Next, Jones contends that the trial court erred in excluding testimony from Willingham that she received a telephone call earlier that day, presumably from Carter, threatening Willingham's child.[5] Jones concedes that the content of the telephone call[6] is hearsay but claims that she was admitting it not for the truth of the matter asserted but rather to explain why she went to Carter's house later that night. The State responds that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice and was properly excluded.

Indiana Evidence Rule 403 provides in relevant part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Evaluation of whether the probative value of an evidentiary matter is substantially outweighed by the danger of unfair prejudice "is a discretionary task best performed by the trial court." *Dunlap v. State*, 761 N.E.2d 837, 842 (Ind. 2002). Such rulings are reviewed for abuse of discretion. *See id.*

The probative value of the content of the telephone call is, as Jones concedes, to explain why she went to Carter's house. The prejudicial impact in admitting this evidence is that Carter threatened another person's child, which does not provide Jones with a defense to the crimes she committed against Carter. We agree with the trial court that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice and therefore affirm on this issue.

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[5] According to Carter, Carter's child and Willingham's child share the same father.

[6] Willingham testified at trial that on the day of the offense, she received a telephone call from someone she "believed" to be Carter, but the trial court did not admit the content of the telephone call into evidence. *Id*. at 148.

III. Sentence

Last, Jones contends that the trial court erred in failing to identify two mitigators. Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 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.* There are several ways a trial court may abuse its discretion. *Id.* Here, Jones asserts that the court abused its discretion because its sentencing statement omits reasons that are clearly supported by the record and advanced for consideration. *See id.* at 491. Specifically, Jones argues that the court should have identified as mitigators the undue hardship on her three children as well as the two other children living with her and that she had recently enrolled at Indiana Business College.

As for the undue hardship on Jones' dependents, we note that jail is always a hardship on dependents. *Vazquez v. State*, 839 N.E.2d 1229, 1234 (Ind. Ct. App. 2005), *trans. denied*; *see also Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999) ("Many persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship."). Indeed, this mitigator can properly be assigned no weight when the defendant fails to show why incarceration for a particular term will cause more hardship than incarceration for a shorter term. *Weaver v. State*, 845 N.E.2d 1066, 1074 (Ind. Ct. App. 2006), *trans. denied*. Here, Jones was sentenced to concurrent, advisory terms of

eighteen months, and she does not argue how the advisory sentence will cause more hardship to her dependents than the minimum sentence. As for Jones' educational plans, she registered for classes merely one week before sentencing. The trial court did not abuse its discretion in declining to find these as mitigators.

Affirmed.

SHARPNACK, J., and BARNES, J., concur.