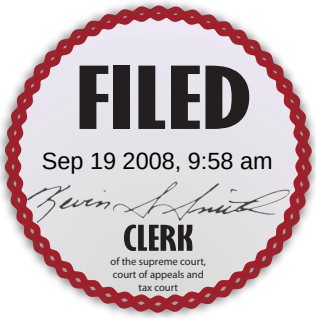

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IN THE COURT OF APPEALS OF INDIANA

LARRY CRAIG,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0712-CR-1083
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila Carlisle, Judge
Cause No. 49G03-0607-MR-134344

September 19, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Larry Craig appeals his convictions of and sentences for murder,[1] attempted murder,[2] and carrying a handgun without a license.[3] Craig did not waive his right to a jury trial on the enhancement of the handgun offense to a Class C felony. Therefore, we vacate that conviction and remand for the trial court to enter a conviction of carrying a handgun without a license as a Class A misdemeanor and to resentence Craig accordingly. We affirm in all other respects.

FACTS AND PROCEDURAL HISTORY

In January 2006, Jeremie Chrust began purchasing cocaine from Craig approximately once a week. Chrust's girlfriend, Sharon Smith, usually accompanied Chrust when he purchased drugs.

On July 20, 2006, Chrust and Smith gave Craig a ride to a liquor store. On the way, Chrust told Craig that Smith was pregnant. That evening, Craig asked Chrust and Smith to take Antwan Smith to a convenience store. Antwan Smith dealt drugs with Craig and was known in the neighborhood as "Shorty."

When Chrust and Smith brought Shorty back, Craig and several others were searching for fourteen grams of Craig's cocaine that were missing. Chrust and Smith were told to get out of the van, and the van was searched. When the cocaine was not found in the van, Shorty ordered Chrust and Smith to remove their clothing. Shorty asked Selina Porter to do a cavity search on Chrust and Smith. Porter checked Chrust's rectum, then inserted her fingers in Smith's rectum and vagina. Porter did not find

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[1] Ind. Code § 35-42-1-1.
[2] Ind. Code § 35-41-5-1.
[3] Ind. Code §§ 35-47-2-1, -23.

anything, but Shorty was not satisfied, and performed his own cavity search. Shorty did not find the drugs, either.

Craig told Shorty, "[D]on't let them go anywhere . . . . I'm going to get the pistol." (Tr. at 217.) Craig returned and shot Chrust once from close range, and then shot Smith three times. Chrust and Smith fled down an alley, and Craig pursued them. Craig shot Smith in the back, and she blacked out.

When Officer Joshua Barker arrived at the scene, Smith was able to tell him, "Larry did it." (*Id*. at 122.) Smith was taken to the hospital, and a few minutes after she arrived, she told Detective Todd Lappin that Craig had shot her and Chrust. She identified Craig in a photographic array.

Smith sustained extensive damage to her intestines and the nerves on the right side of her body. Chrust was found three hours after the shooting. He had bled to death.

Craig was arrested on July 21, 2006. Craig told Detective Lehn he had been at a barbeque at his sister's house on the previous evening. Craig claimed a man who resembled him, James Thorton, had committed the offenses. Detective Lehn searched police records for James Thorton. He found one man by that name who was incarcerated at the time of the shooting, and another who was much older and did not resemble Craig.

Craig was charged with murder, attempted murder, and carrying a handgun without a license. The handgun offense was charged as a Class C felony due to a prior conviction. *See* Ind. Code § 35-47-2-23(c)(2)(B) (offense is a Class C felony if defendant has been convicted of a felony within fifteen years of the offense). The jury found Craig guilty of murder, attempted murder, and carrying a handgun without a license as a Class

A misdemeanor. Craig stipulated that he had a prior conviction. The trial court dismissed the jury, found the stipulated evidence supported the enhancement, and entered judgment for a Class C felony.

DISCUSSION AND DECISION

Craig argues the trial court erred by: (1) denying his motion for a mistrial; (2) entering judgment on carrying a handgun without a license as a Class C felony when Craig had not waived his right to a trial by jury; and (3) imposing consecutive sentences. Craig also argues his sentence is inappropriate.

1. Motion for Mistrial

The State intended to call Craig's mother, Kim Craig, as its last witness. Kim was subpoenaed, but she was not present when the State was ready to call her to the stand. Kim eventually arrived, and when the trial court attempted to swear her in, the following exchange occurred:

> THE COURT: Ma'am, please stand and raise your right hand[.] Do you solemnly swear or affirm the testimony you're about to give will be the truth, the whole truth and nothing but the truth so help you God?
> WITNESS: Judge, I don't want to testify because I didn't know . . .
> THE COURT: Ma'am . . .
> WITNESS: That [the prosecutor] . . .
> THE COURT: No, ma'am, don't keep talking, don't keep talking.
> WITNESS: I don't want to testify for the State against my son.
> THE COURT: Ma'am, do you swear or affirm . . .
> WITNESS: I don't want to testify.
> THE COURT: I heard that, ma'am . . .
> WITNESS: I don't want to testify and I'm not saying anything.
> THE COURT: Ma'am, okay. Sit down. Jurors, out of the courtroom.

(Tr. at 710-11.)

Craig moved for a mistrial, arguing "the jury is left with the presumption or assumption so prejudicial to Mr. Craig that he confided in his mother or she confronted him and he told her that either he was there and somehow involved or that he did it." (*Id*. at 717.) The trial court denied the motion and offered to give an admonition. Craig argued an admonition would not cure the prejudice.

The State indicated it no longer trusted Kim and rested its case. Craig called Kim, who testified she learned about the shooting from watching television. She confirmed that Craig did not admit to her that he was the shooter. Finally, she was asked to explain her outburst to the jury:

> Q . . . When you stated in front of the jury you didn't want . . . to testify against your son, why did you say that?
> A It really not against him but for the State.
> Q So you assume if you were called by the State as a witness you would be testifying against your son?
> A Yes . . .
>
> * * * * *
>
> Q And that did not mean that you knew something that would indicate Mr. Craig or that he had committed these crimes or that he had confessed to you?
>
> * * * * *
>
> A No . . .

(*Id*. at 739-40.)

"A mistrial is an extreme remedy warranted only when no other curative measure, such as an admonishment, will rectify the situation." *Simmons v. State*, 760 N.E.2d 1154, 1162 (Ind. Ct. App. 2002). "The determination of whether to grant a mistrial is within the trial court's discretion, and to prevail on appeal, the defendant must show that he was so prejudiced that he was placed in a position of grave peril to which he should not have

been subjected." *Olson v. State*, 563 N.E.2d 565, 571 (Ind. 1990). Peril is measured by the probable persuasive effect on the jury. *Gregory v. State*, 540 N.E.2d 585, 589 (Ind. 1989). We afford the trial court deference "because the trial court is in the best position to evaluate the relevant circumstances of an event and its impact on the jury." *Alvies v. State*, 795 N.E.2d 493, 506 (Ind. Ct. App. 2003), *trans. denied* 804 N.E.2d 758 (Ind. 2003. The appellant has the burden of demonstrating a mistrial is the only adequate remedy. *Gregory*, 540 N.E.2d at 589.

Craig was not placed in a position of grave peril. Craig argues the jury could infer only that Kim had received information from Craig about the crimes.[4] The trial court, to which we defer, disagreed:

> I took that statement to mean the State has called me as a witness and I don't want to be a witness for the State. . . . I in no way took it to mean, "oh, she must know something because the defendant told her something and she doesn't want to come in here and tell these jurors . . . ." It was a mom, her son is on trial, she's called by the State, she didn't want to be called by the State. That's the way I took [it] and I think in looking at the jurors, I don't think any of the jurors – I would be shocked if anyone made that leap in logic from the brief statement that was made in front of them.

(Tr. at 722.) Craig called Kim as his own witness, and she confirmed her previous statements meant only that she did not want to be the State's witness.

When police arrived on the scene of the crime, Smith told them, "Larry did it." (*Id*. at 122.) While she was in the hospital, Smith picked Craig out of a photographic

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[4] Craig suggests the prosecutor committed misconduct because "the State, as well as the trial court, knew full well that Mr. Craig's mother did not want to testify against him." (Appellant's Br. at 8.) Craig makes this argument for the first time on appeal, and it is waived. *Gill v. State*, 730 N.E.2d 709, 711 (Ind. 2000). Moreover, the record reflects Kim had attended each day of the trial up until the day she was to take the stand and had cooperated in giving a deposition.

array without hesitation. Two other eyewitnesses, Porter and Shorty, also identified Craig as the shooter. When Craig was arrested the day after the shooting, he claimed he had gone to a barbeque at his sister's house the previous day and spent the night there. However, at trial he admitted he had not been at his sister's and claimed to have forgotten his whereabouts because of heavy drinking and drug use. In light of the testimony of the three eyewitnesses, the inconsistency of Craig's alibi, and Kim's explanation of her statements, we believe any prejudice caused by her statements had only a slight impact on the jury.

2. Felony Enhancement

The Sixth Amendment to the United States Constitution and Article 1, Section 13 of the Indiana Constitution guarantee the right to a trial by jury. *Poore v. State*, 681 N.E.2d 204, 206 (Ind. 1997). A "defendant is presumed not to waive this right unless he affirmatively acts to do so." *Id*. at 207. "The defendant must express his personal desire to waive a jury trial and such a personal desire must be apparent from the court's record." *Id*. at 206. "It is fundamental error to deny a defendant a jury trial unless there is evidence of a knowing, voluntary and intelligent waiver of the right." *Jones v. State*, 810 N.E.2d 777, 779 (Ind. Ct. App. 2004).

The State concedes Craig did not waive his right to a jury trial on the felony enhancement of his conviction of carrying a handgun without a license. Craig requests that his conviction be vacated, while the State argues we should vacate the Class C felony and remand for resentencing on the offense as a Class A misdemeanor. Craig does not challenge the jury's guilty verdict on the Class A misdemeanor. Therefore, we vacate the

Class C felony and remand for the trial court to enter judgment of conviction as a Class A misdemeanor and resentence Craig accordingly. *See Holeton v. State*, 853 N.E.2d 539 (Ind. Ct. App. 2006) (vacating conviction of domestic battery as a Class D felony and remanding with instruction to enter judgment of conviction as a Class A misdemeanor where conviction from another state was used to enhance the offense, contrary to the statute defining the offense).

3. Consecutive Sentences

To impose consecutive sentences, a trial court must find at least one aggravating circumstance. *Ortiz v. State*, 766 N.E.2d 370, 377 (Ind. 2002). Craig acknowledges our Supreme Court has held the imposition of consecutive sentences does not implicate *Blakely v. Washington*, 542 U.S. 296 (2004). *Bryant v. State*, 841 N.E.2d 1154, 1157 (Ind. 2006); *Smylie v. State*, 823 N.E.2d 679, 686 (Ind. 2005), *cert. denied* 546 U.S. 976 (2005). Nevertheless, he argues we should hold the trial court engaged in unconstitutional judicial fact-finding, noting the United States Supreme Court granted certiorari on March 17, 2008 in *Oregon v. Ice* to address this issue. *See* 128 S. Ct. 1657 (2008). However, we remain bound by *Bryant* and *Smylie*. *See Dragon v. State*, 774 N.E.2d 103, 107 (Ind. Ct. App. 2002) ("We are bound by the decisions of our supreme court."), *trans. denied* 783 N.E.2d 687 (Ind. 2003).[5]

[5] We note the trial court found at least two aggravators that would be permissible under *Blakely*: Craig's prior convictions and the fact that there were two victims. *Blakely*, 542 U.S. at 301 (prior conviction need not be submitted to jury) and 304 (facts reflected in the jury verdict may be used in sentencing). Craig was charged with the murder of Chrust and the attempted murder of Smith; that the jury found him guilty of both necessarily means the jury found there were two victims.

4. Appropriateness of Sentence

Craig argues his sentence is inappropriate. We may revise a sentence if it is "inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We give deference to the trial court's decision, recognizing its special expertise in making sentencing decisions. *Barber v. State*, 863 N.E.2d 1199, 1208 (Ind. Ct. App. 2007), *trans. denied* 878 N.E.2d 208 (Ind. 2007). The defendant bears the burden of persuading us the sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

Craig was given the maximum sentence: sixty-five years for murder, served consecutively to fifty years for attempted murder.[6] Maximum sentences are generally most appropriate for the worst offenders. *Buchanan v. State*, 767 N.E.2d 967, 973 (Ind. 2002).

> This is not, however, a guideline to determine whether a worse offender could be imagined. Despite the nature of any particular offense and offender, it will always be possible to identify or hypothesize a significantly more despicable scenario. Although maximum sentences are ordinarily appropriate for the worst offenders, we refer generally to the *class* of offenses and offenders that warrant the maximum punishment. But such class encompasses a considerable variety of offenses and offenders.

Id. (emphasis in original).

Craig makes no argument concerning the nature of the offenses. He killed Chrust and shot Smith because he believed they had stolen cocaine from him, although the

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[6] The statutory range for murder sentences is forty-five to sixty-five years. Ind. Code § 35-50-2-3. Attempted murder is a Class A felony, Ind. Code § 35-41-5-1(a), and the statutory sentencing range is twenty to fifty years. Ind. Code § 35-50-2-4. The trial court had imposed a six-year, concurrent sentence on the Class C felony handgun offense.

invasive searches Craig and his associates conducted did not confirm his suspicion. He shot both victims multiple times and continued to shoot at them as they were fleeing. He knew one of his victims was pregnant. The child was not harmed, but Smith suffered damage to her intestines and the nerves along the right side of her body.

As to his character, Craig argues he "is a father and a cherished family member" and should be given "some life before he dies." (Appellant's Br. at 17.) We acknowledge the support shown by Craig's family; however, Craig's actions speak more to his character than does family support. Craig was twenty-five when he committed the current offenses; however, he already had seven juvenile adjudications and seven convictions as an adult. Craig was convicted in 2000 and 2005 of possession of cocaine, and he admitted at trial that he continued to deal drugs until at least June of 2006. He also admitted using drugs on the day of the offenses. Craig was on parole when he committed the current offenses. As a juvenile, he failed a diversion program, home detention, a tutoring program, intensive probation, and electronic monitoring. As an adult, his probation was revoked twice.

We have found consecutive sentences appropriate when there is more than one victim. *Green v. State*, 870 N.E.2d 560, 568 (Ind. Ct. App. 2007). Given the brutality of the offenses, Craig's criminal history, and his admitted drug activity, we cannot say the maximum sentence was inappropriate.

Affirmed in part, vacated in part, and remanded.

MATHIAS, J., and VAIDIK, J., concur.