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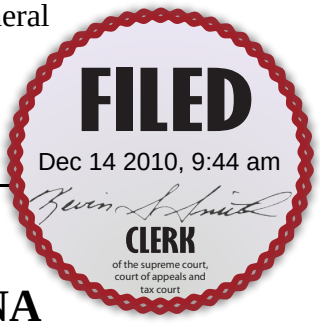

IN THE COURT OF APPEALS OF INDIANA

QUENTIN S. PHIPPS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A01-1002-CR-46
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable Robert J. Pigman, Judge
Cause No. 82C01-0806-FA-675

December 14, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Quentin S. Phipps was convicted after a jury trial of attempted murder[1] as a Class A felony, attempted armed robbery[2] as a Class B felony, escape[3] as a Class C felony, auto theft[4] as a Class D felony, and three counts of criminal recklessness,[5] each as a Class D felony. He was given a sixty-two-year aggregate sentence. He appeals, raising the following restated issues:

I. Whether the trial court erred when it found Phipps competent to stand trial;

II. Whether sufficient evidence was presented to support Phipps's conviction for attempted murder;

III. Whether the trial court committed fundamental error in its preliminary jury instructions; and

IV. Whether Phipps's sentence was an abuse of discretion or inappropriate.

We affirm.

FACTS AND PROCEDURAL HISTORY

On June 24, 2008, Phipps and his girlfriend, Brittany Pirtle, met Kenneth Walker at Walker's cousin's apartment in Evansville. *Tr.* at 129-30. Phipps and Walker began to discuss committing a robbery, and the discussion continued the next day when Phipps and Pirtle returned to the apartment. *Id.* at 193. Phipps told Walker he had a "lick" that could

[1] *See* Ind. Code §§ 35-42-1-1, 35-41-5-1.

[2] *See* Ind. Code §§ 35-42-5-1, 35-41-5-1.

[3] *See* Ind. Code § 35-44-3-5(a).

[4] *See* Ind. Code § 35-43-4-2.5.

[5] *See* Ind. Code § 35-42-2-2.

get each of them between ten and fifteen thousand dollars.[6] *Id.* at 192.

That night at about 2:30 a.m., Phipps and Walker walked to 206 Jefferson Street armed with a double-barrel shotgun and a single-shot rifle. *Id.* at 198. Phipps told Walker to knock on the door, ask for a fake person, and say he heard about some dope. *Id.* at 203. Phipps also stated that when someone opened the door, he was going to shoot. *Id.* After Walker knocked, Ta'Shea and Tianisha Mayes came to see who was at their door. *Id.* at 51. Tianisha opened the door, and Phipps immediately shot her in the upper thigh. *Id.* at 54. Ta'Shea's two-month-old daughter and the girls' friend, Roscoe Brown, were lying on a bed near the door, and the bullet that injured Tianisha passed through the mattress on which the two were lying. *Id.* at 58.

Phipps pushed the door open and chased Tianisha through the house and out the back door. *Id.* at 52. Phipps caught up to her, held her at gunpoint, and told her repeatedly he would kill her and asked, "Bitch, where's the money?" *Id.* at 52-55. Tianisha responded that they worked at a hotel and did not have any money. *Id.* at 53.

Walker was inside holding Ta'Shea at gunpoint and told her everyone would die if she did not give him money. *Id.* at 96-98. Phipps then came back into the house and stated that if they did not get money, even the baby would die. *Id.* at 104. Phipps and Walker continued demanding money for approximately twenty minutes before leaving. *Id.* at 99. During this time, Roscoe recognized Phipps as Quentin "from the eastside." *Id.* at 100.

[6] Although "lick" has various colloquial meanings, it generally refers to obtaining something unlawfully, through theft or robbery.

Walker and Phipps were separately arrested. Phipps was handcuffed and secured in the backseat of a police car. *Id.* at 259. As Evansville Police Officer Tyson Bond stepped away from the vehicle to complete his report, Phipps jumped into the front seat of the vehicle and attempted to drive away, but crashed the car into a utility pole and a parked car. *Id.* 260-263. Phipps ran from the vehicle and hid in a nearby yard for approximately thirty minutes before being re-captured. *Id.*

The State charged Phipps with attempted murder, attempted armed robbery, escape, auto theft, and three counts of criminal recklessness. Prior to trial, Phipps moved for examination in order to determine if he was competent to stand trial. The trial court appointed psychiatrist James Given and psychologist David Cerling to examine Phipps. *Appellant's App.* at 108-09. Dr. Cerling found that Phipps's ability to consult with his counsel was impaired. *Comp. Tr.* at 53-54. Dr. Given found that Phipps had a sufficient ability to consult with counsel and that he had a rational and factual understanding of the proceeding. *Id.* at 6-7. Each doctor testified at the competency hearing, and the trial court found Phipps competent to stand trial. *Id.* at 91-92. A jury trial was held, and Phipps was convicted on all counts and was sentenced to sixty-two years. *Id.* at 417-18. Phipps now appeals. Additional facts will be added as necessary.

DISCUSSION AND DECISION

I. Competency

Phipps argues that the trial court erred when it determined he was competent to stand trial. He asserts that this determination was error because, in Dr. Cerling's opinion, Phipps

was not competent to understand and assist his counsel at trial.

A trial court's determination of competency will only be reversed if it was clearly erroneous. *Brewer v. State*, 646 N.E.2d 1382, 1385 (Ind. 1995). "Where the evidence is in conflict, we will normally only reverse this decision if it was clearly erroneous, unsupported by the facts and circumstances before the court and the reasonable conclusions that can be drawn therefrom." *Id.* To be competent to stand trial, a defendant must be able to understand the nature of the proceedings and to assist in the preparation of his defense. *Timberlake v. State*, 753 N.E.2d 591, 598 (Ind. 2001) (citing Ind. Code § 35-36-3-1).

Here, Dr. Given, testified that Phipps was competent to stand trial. Although Dr. Cerling reached a different conclusion, it was for the trial court to resolve this conflict in the evidence. The trial court's finding was supported by sufficient evidence and was not clearly erroneous.

II. Sufficiency of the Evidence

Phipps contends that insufficient evidence was presented to support his conviction for attempted murder. Specifically, he contends insufficient evidence was presented to show he acted with the specific intent to kill.

Our standard of reviewing claims of sufficiency of the evidence is well settled. When reviewing the sufficiency of the evidence, we consider only the probative evidence and reasonable inferences supporting the verdict. *Mork v. State*, 912 N.E.2d 408, 411 (Ind. Ct. App. 2009) (citing *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007)). We do not reweigh the evidence or assess witness credibility. *Id.* We consider conflicting evidence most favorably

to the trial court's ruling. *Id.* We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id.* It is not necessary that the evidence overcome every reasonable hypothesis of innocence. *Id.* The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. *Id.* A conviction may be based upon circumstantial evidence alone. *Bockler v. State*, 908 N.E.2d 342, 346 (Ind. Ct. App. 2009).

The evidence here showed that Phipps, kneeling just in front of the door of the victim's house, told Walker that after someone opened the door Phipps was going to shoot the person. When Tianisha opened the door, Phipps shot directly at her, striking her in the upper thigh. The deliberate use of a deadly weapon in a manner reasonably likely to cause death is sufficient to support an inference of intent to kill. *Rhinehardt v. State*, 477 N.E.2d 89, 93 (Ind. 1985), *overruled on other grounds by Stout v. State*, 528 N.E.2d 476 (Ind. 1988). Therefore, sufficient evidence was presented to support Phipps's conviction for attempted murder.

III. Jury Instructions

Phipps next contends that the Trial Court's Preliminary Instruction No. 4 misstated the necessary *mens rea* for attempted murder. Further, failure to object to an instruction at trial typically results in waiver of the issue on appeal unless the erroneous instruction constituted fundamental error.[7] *Clay v. State*, 766 N.E.2d 33, 36 (Ind. Ct. App. 2002). To qualify as

[7] Phipps also claims that his objection to a juror question regarding specific intent was sufficient to preserve the claimed error in the trial court's preliminary instructions. Because Phipps failed to object to the trial court's preliminary instruction, any error is waived unless it is fundamental. *See Grady v. State*, 925 N.E.2d 8 (Ind. Ct. App. 2010).

fundamental error, an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible. *Id.*

The manner of instructing a jury is left to the sound discretion of the trial court. *Patton v. State*, 837 N.E.2d 576, 579 (Ind. Ct. App. 2005). Its ruling will not be reversed unless the instructional error is such that the charge to the jury misstates the law or otherwise misleads the jury. *Id.* Jury instructions must be considered as a whole and in reference to each other. *Id.* In reviewing a trial court's decision to give or refuse a tendered instruction, 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, he must affirmatively show the instructional error prejudiced his substantial rights. *Id.*

In its Preliminary Instruction 4, the trial court instructed the jury as follows:

> In this case, the State of Indiana has charged the defendant with Attempted Murder, a class A felony. Count 1 of the Information reads as follows: The undersigned, being duly sworn upon his/her oath, says that in Vanderburgh County, State of Indiana, on or about June 25, 2008, Quentin S. Phills did attempt to commit the crime of Murder by knowingly shooting Tianisha Mayes, which conduct constituted a substantial step toward the commission of said crime of Murder.

(Appellant App., p. 124).

Phipps contends that the Instruction constituted fundamental error because it misstates the *mens rea* required for Attempted Murder. Phipps is correct that the necessary *mens rea* for attempted murder is acting with the specific intent to kill another person. *Spradlin v.*

State, 569 N.E.2d 948, 950 (Ind. 1991). He is incorrect that this instruction constituted fundamental error.

First, the Instruction by its terms set out only the contents of the charging information, not the elements of attempted murder. Second, the other instructions sufficiently informed the jury of the correct elements of attempted murder, including the required *mens rea*. Instruction No. 5 provided:

> A person attempts to commit a murder when, acting with the specific intent to kill another person, he engages in conduct that constitutes a substantial step toward killing that person.
>
> Before you may convict the Defendant of attempted murder, the State must have proved each of the following elements beyond a reasonable doubt:
>
> 1) The defendant
> 2) Acting with the specific intent to kill Tianisha Mayes
> 3) Did knowingly shoot Tianisha Mayes
> 4) Which was conduct constituting a substantial step toward the commission of the intended crime of killing Tianisha Mayes.
>
> If the State failed to prove each of these elements beyond a reasonable doubt, you should find the defendant not guilty.

Appellant's App. at 141.

In *Clay v. State*, 766 N.E.2d 33 (Ind. Ct. App. 2002), we held that an error in the wording of the required *mens rea* in one section of the jury instructions will not constitute fundamental error if the jury instructions as a whole sufficiently informed the jury of the correct *mens rea* requirement. *Id.* at 36. Here, the trial court's Instruction 5 correctly informs the jury that the State must prove that the defendant had the specific intent to kill the victim. Therefore, there was no fundamental error.

IV. Sentencing

Finally, Phipps contends that the trial court abused its discretion in sentencing him to an aggregate sentence of sixty-two years and that such sentence is inappropriate in light of the nature of the offense and the character of the offender.

A. Abuse of Discretion

Phipps argues that the trial court abused its discretion by failing to explain the mitigating and aggravating circumstances it considered and by failing to set out its reasons for imposing consecutive sentences.

Trial courts are required to enter sentencing statements whenever imposing 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 (Ind. 2007). 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.* Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Id.* 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.*

Here, at sentencing, the trial judge began by addressing the mitigating and aggravating factors. The lone mitigating factor was Phipps's low I.Q. The aggravating

factors discussed were Phipps's prior commitments to the Indiana Boys School and his unsuccessful rehabilitation; his prior felony convictions including possession of cocaine, robbery, residential entry, and intimidation; his violation of either parole or a community correction sentence in connection with each of his prior felonies; his prior misdemeanor crimes including intimidation, battery, and resisting law enforcement; and the circumstances of the event at issue on appeal. *Tr.* at 415-17. A trial court can impose consecutive sentences if warranted by the aggravating circumstances. *Townsend v. State*, 860 N.E.2d 1268, 1273 (Ind. Ct. App. 2007). The trial court's imposition of consecutive sentences was supported by aggravating circumstances clearly stated by the trial court and was not an abuse of its discretion.

Phipps also argues that the "trial court should have considered other mitigators" than only his low I.Q. *Appellant's Br.* at 21. Phipps, however, does not proffer what mitigating circumstances he believes were overlooked. A party waives an issue on appeal where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record. *Smith v. State*, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005); *see also* Ind. Appellate Rule 46(A)(8)(a).

B. Inappropriate Sentence

Phipps also argues that his sentence was inappropriate. "This court has authority to revise a sentence 'if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.'" *Spitler v. State*, 908 N.E.2d 694, 696 (Ind. Ct. App. 2009) (quoting Ind.

Appellate Rule 7(B)), *trans. denied*. "Although Indiana Appellate Rule 7(B) does not require us to be 'extremely' deferential to a trial court's sentencing decision, we still must give due consideration to that decision." *Patterson v. State*, 909 N.E.2d 1058, 1062-63 (Ind. Ct. App. 2009) (quoting *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007)). We understand and recognize the unique perspective a trial court brings to its sentencing decisions. *Id.* at 1063. The defendant bears the burden of persuading this court that his sentence is inappropriate. *Id.*

Phipps had an extensive juvenile record, including receiving stolen property, residential entry, criminal mischief, and resisting law enforcement. *Appellant's App.* at 177. He was placed at Indiana Boys School on at least two occasions. *Id.* As an adult, Phipps has five prior felony convictions and has violated probation or parole on at least four occasions. *Id.* at 178. The sentences are clearly not inappropriate in regard to Phipps's character.

The nature of the offense also supports the sentence. Phipps and Walker planned the robbery the day before it occurred. Both obtained firearms, and Phipps determined he would shoot whoever opened the door of the home. After shooting Tianisha in the thigh, he chased her out of the house and then brought her back in with the threat of killing her if she did not give him money. The same bullet that hit Tianisha also went through a mattress where an infant was sleeping endangering both the baby and another individual. Phipps also threatened to kill the infant. Once arrested, Phipps attempted to escape, stole a police vehicle which he wrecked, and then fled on foot.

Phipps's sentence was not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

RILEY, J., and BAILEY, J., concur.