

STATEMENT OF THE CASE

James M. Joyce appeals from his conviction and sentence for Battery, as a Class A felony, after a jury trial. Joyce presents five issues for review, namely:

1. Whether an alternate juror's comment during deliberations constituted juror misconduct warranting a new trial.
2. Whether the trial court abused its discretion when it admitted in evidence of the victim's prior injuries.
3. Whether the trial court committed fundamental error when it admitted in evidence certain autopsy photos of the child victim.
4. Whether the trial court abused its discretion when it imposed the presumptive sentence.
5. Whether Joyce's sentence is appropriate in light of his character and the nature of the offense.

We affirm.

FACTS AND PROCEDURAL HISTORY

In February 2004, Jessica Anderson and her twenty-month-old son C.W. lived with Joyce and his two young daughters in a mobile home in Vincennes. Joyce, an emergency medical technician ("EMT"), worked twenty-four-hour shifts and was then off the following forty-eight hours. Joyce and Anderson shared a single car.

On the morning of February 26, 2004, Joyce arrived home from work between 10 and 11 a.m. Anderson left the house around 1:30 p.m. to go to a haircut appointment. When she returned home, she and Joyce argued about which of them would drive Joyce's daughters to visit their mother. Joyce believed that C.W. was scheduled to visit his father that day, but Anderson had arranged for C.W. to visit her mother, whom Joyce did not want C.W. to see. Although they continued to argue, Anderson and Joyce eventually

decided that Anderson would drive Joyce's daughters to Princeton to see their mother while Joyce watched C.W.. Anderson left with the girls around 3:30 p.m.; Joyce punched and dented the car as she left. Then Joyce carried C.W. back into the mobile home.

At 4:13 p.m., Knox County dispatchers received a 911 call from Joyce, who reported that he had a four-year-old¹ boy who was having an asthma attack, gave his address, and stated that he was an EMT. During the call, Joyce gave rescue breaths to C.W.. But in the call Joyce made statements regarding C.W.'s condition "that were not normal for somebody who was having an asthma attack[,]” indicating that “he was breathing and then not breathing and then breathing.” Transcript at 950.

Medical assistance arrived three to four minutes after being dispatched. The first responders found C.W. lying on the floor, non-responsive, ashen, and limp with fixed eyes. Advanced EMT Donald Halter of the Vincennes Fire Department picked C.W. up and started CPR on the way to the ambulance. Halter and paramedic Mike Spaulding continued CPR before intubating C.W. en route to Good Samaritan Hospital (“GSH”).

When C.W. arrived at GSH, Dr. Carl Holt, the emergency room physician, found him to be exhibiting extensive posturing, a stiff muscle reaction indicative of significant brain injury and lack of brain activity, and seizing. Dr. Holt called Dr. Buehlman and Dr. Lazzara, C.W.'s pediatricians, for assistance. Dr. Lazzara arranged for C.W.'s transfer to Indianapolis while Dr. Buehlman addressed C.W.'s neurological status. Dr. Holt addressed respiration and stabilizing the child's condition. All three physicians noticed extensive bruising to C.W.'s body, including bruises on his thighs, ribs, and neck. The

¹ According to medical records, C.W. was nineteen months old at the time of his death, but Joyce told the 911 operator that the child in distress was four years old.

bruising, which was not typical of “toddler bruises” and had not been present when he first arrived in the emergency room, developed more extensively as the doctors continued to treat C.W.. Dr. Holt noted that C.W. was afebrile, his lungs were clear, and his chest x-ray revealed no pneumonia.² The initial CT scan showed no evidence of a skull fracture or bleeding on the brain, and neither C.W.’s medical history nor his lab results provided an explanation for his condition.

Anderson arrived at the mobile home around five p.m. but found no one there. A police officer arrived a short time later and drove Anderson to GSH, where she saw C.W.. Joyce, who had arrived at the hospital in the ambulance that had transported C.W., told Anderson that he was sorry. He later explained to Anderson that he had been running water for C.W.’s bath when he heard and felt a thump from the front room and found C.W. there seizing.

Within two hours of his admission to GSH, C.W. was transported by lifeline helicopter to Methodist Hospital, where Dr. Jennifer Walthall assessed his condition. Anderson and Joyce also went to Indianapolis. Dr. Walthall determined that C.W.’s lungs were clear and pneumonia-free, but she detected flexure posturing, a sign of brain injury, and several large bruises on his body. After examining the child, Dr. Walthall told Anderson that she felt that Creighten had been beaten, shaken, and choked. Joyce told Anderson that he had heard a thump and then found C.W. seizing, but Anderson asked him to leave. Joyce complied.

² C.W. had a history of viral-induced asthma following a bout with pneumonia a year and a half earlier. But he had not been seen by his pediatricians for anything other than an ear infection in the preceding nine months.

In the early hours the following morning, February 28, Dr. Walthall informed Anderson that C.W.'s condition had deteriorated. Dr. Walthall believed that C.W.'s brain swelling had increased and that his brain had begun to herniate. The child was considered brain dead at that time. A formal ophthalmologic examination that morning revealed retinal hemorrhaging in both eyes, a condition that can appear hours after the infliction of trauma.

That same day, Joyce gave a voluntary statement to police, relating the events that he alleged caused C.W.'s injuries. Specifically, he said that he had started to run bath water for C.W. in the master bedroom while C.W. was in the front room. After hearing and feeling a thud, Joyce had returned to the front room and found C.W. seizing on the floor. C.W. had been nonresponsive, and Joyce had detected no pulse or respiration. Joyce had called 911 as he gave C.W. rescue breaths. When asked, Joyce denied that he had set C.W. on the counter and C.W. had then fallen. A few hours later, Joyce returned to the police station and claimed that he had indeed set C.W. on the kitchen counter, resulting in a fall. Joyce stated that he had not previously admitted to that because he was afraid Anderson would be angry with him.

On Sunday, February 29, C.W. was pronounced dead. Dr. Dean Hawley performed an autopsy on March 1. The autopsy revealed that C.W. had suffered bleeding in the back of his eyes, on his brain surface, and on his cervical spinal cord. C.W. had also sustained bruising to his ribs.³ Dr. Hawley opined that lack of oxygen to the brain, resulting from C.W.'s injuries, was the cause of death. He also testified that

³ C.W. also had deep bruises on his thighs, but Dr. Hawley did not tie those to the cause of death.

the overall pattern of injuries would best and simplest fit a violent shaking where the child is held from the back, the bruises on either [side] of the back represent thumbprints, the bruises around the left side of the body represent the fingerprints, the oscillation of the head back and forth causing the bleeding to the spine[,] the bleeding into the optic nerve[,] causing the bleeding into the retina[,] the bleeding over the surface of the brain[,] and it cause[d] the child to stop breathing and therefore develop brain death by not breathing.

Transcript at 1355.

On June 23, 2004, the State charged Joyce with battery, as a Class A felony. On September 1, 2006, the jury found Joyce guilty as charged, and the trial court entered a judgment of conviction. The following week, Joyce filed a motion to correct error, alleging juror misconduct. The trial court denied the motion after a hearing. On September 22, 2006, the trial court conducted a sentencing hearing. At the conclusion of the hearing, the trial court found no aggravating or mitigating factors and sentenced Joyce to the presumptive fixed term of thirty years, with eighty-four days of credit time. Joyce now appeals.

DISCUSSION AND DECISION

Issue One: Juror Misconduct

Joyce contends that the trial court abused its discretion when it denied his motion to correct error based on alleged juror misconduct. Specifically, he claims that an alternate juror's comment during deliberations pressured a juror's vote and, therefore, Joyce is entitled to a new trial. A defendant seeking a new trial because of juror misconduct must show that the misconduct (1) was gross and (2) probably harmed the defendant. Griffin v. State, 754 N.E.2d 899, 901 (Ind. 2001), aff'd after reh'g on other

grounds, 763 N.E.2d 450 (Ind. 2002).⁴ We review the trial court’s determination on these points only for abuse of discretion, with the burden on the appellant to show that the misconduct meets the prerequisites for a new trial. Griffin, 754 N.E.2d at 901.

In Griffin, some of the jurors in a carjacking case sought to break a deadlock by asking the alternate juror’s opinion. The alternate answered that she believed the defendant to be guilty, reasoning that the victim’s identification was reliable based on his twenty-minute conversation with Griffin before the carjacking.⁵ Subsequently, one juror stated by affidavit that the alternate juror’s comment affected her vote.

Griffin appealed, claiming that he was entitled to a new trial because of juror misconduct. In support, he submitted the affidavit of a juror who stated that the alternate’s comment affected a juror’s vote. Our supreme court determined that the juror’s affidavit was admissible under Indiana Evidence Rule 606(b)(3) to show that the alternate improperly participated in jury instructions. Id. at 901. However, the juror’s statement in the affidavit that the alternate’s input “affected” her decision was not part of the analysis governing Griffin’s request for a new trial. Id. at 903. Instead, the court held that the trial court should have “consider[ed] the alternate’s conduct in the overall trial context.” Id. The court then concluded:

⁴ Joyce contends that juror misconduct involving an out-of-court communication with an unauthorized person creates a rebuttable presumption of prejudice. Appellant’s Brief at 9. In support, he cites Griffin. But Griffin does not support Joyce’s position. Indeed, Joyce acknowledges that in Griffin our supreme court, although referencing that presumption, does not seem to apply it. Instead, we review for gross misconduct and probable harm. See Griffin, 754 N.E.2d at 901; see also Hall v. State, 796 N.E.2d 388, 396 (Ind. Ct. App. 2003), trans. denied. We are constrained to follow precedent. Therefore, we apply the two-step test applied in Griffin.

⁵ The alternate juror’s comment also violated a jury instruction that prohibited the alternate juror’s participation in the deliberations.

The alternate did not add any fresh perspective to the discussion; the other jurors were well aware that the State's case relied on a strong eyewitness identification. It is difficult to believe that if eleven other jurors favored conviction, the twelfth only acceded because the alternate also favored conviction when the majority solicited one more view.

Id. Thus, although the alternate's comment constituted an outside influence under Rule 606(b), her "only influence was adding one more 'me, too' to the collective voice of the jury majority." Id. As a result, the court held that Griffin was not entitled to a new trial because he had shown neither gross misconduct nor probable harm. Id.

Here, Joyce contends that he is entitled to a new trial because the alternate juror participated in deliberations. In support he tenders a sworn statement given by Juror Number 2 ("Juror No. 2"), who claimed that the other jurors continuously pressured her to vote guilty. And when Juror No. 2 told the other jurors that she had doubt about Joyce's guilt, the alternate juror said, "[h]ow could you possibly live with yourself with a decision like that." Appellant's App. at 236.

The facts in the present case are similar to those in Griffin, but less egregious. In both cases, a single juror alleged that the other jurors pressured her to vote guilty and that the alternate juror gave an opinion that reflected on the defendant's guilt. In both cases, the alternate juror's comments constituted an outside influence. See Griffin, 754 N.E.2d at 903 ("An alternate is not, of course, a member of the jury, and he or she qualifies as an outside influence under Rule 606(b)."). The alternate juror in Griffin directly addressed the evidence and her opinion of guilt, but her "me, too" vote, amid the other eleven guilty votes in Griffin, did not constitute gross misconduct or demonstrate probable harm. Here, too, the alternate did not discuss the evidence at all and only impliedly expressed

an opinion regarding Joyce's guilt. Thus, the alternate's comment in this case did not constitute gross misconduct or demonstrate probable harm considering that the rest of the jury was prepared to vote to convict. See Griffin, 754 N.E.2d at 903. As such, the trial court did not abuse its discretion when it denied Joyce's motion to correct error based on alleged juror misconduct.

Issue Two: Prior Injury Evidence

Joyce next contends that the trial court abused its discretion in admitting State's Exhibit 77, a report prepared by Joyce's expert witness, because the report referenced C.W.'s prior injuries. In particular, Joyce alleges that prior injury evidence was not relevant to whether it was more likely than not that Joyce had caused C.W.'s death by battery. The decision to admit or exclude evidence is within the sound discretion of the trial court and is afforded great deference on appeal. Davidson v. Bailey, 826 N.E.2d 80, 85 (Ind. Ct. App. 2005) (quoting Bacher v. State, 686 N.E.2d 791, 793 (Ind. 1997), aff'd on other grounds after remand, 722 N.E.2d 799 (Ind. 2000)). A decision will be reversed only for a manifest abuse of that discretion. Id. An abuse of discretion occurs if the trial court's decision is against the logic and effect of the facts and circumstances before the court. Sullivan Builders & Design, Inc. v. Home Lumber of New Haven, Inc., 834 N.E.2d 129, 134 (Ind. Ct. App. 2005), trans. denied. We will not reverse the trial court's admission of evidence absent a showing of prejudice. Id. A trial error may not require reversal where its probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor so as not to affect a party's substantial rights. Ind. Trial Rule 61; Bassett v. State, 795 N.E.2d 1050, 1054 (Ind. 2003).

Here, the trial court granted Joyce's pretrial motion in limine, prohibiting the admission of evidence of previous injuries sustained by C.W. After the defense expert, Dr. John Plunkett, testified at trial that C.W. had died of natural causes and that there was no of trauma, the State sought to admit Dr. Plunkett's written report to rebut that theory. The report contained the following paragraph:

I do not know how to interpret the results of the two skeletal surveys. The survey at [GSH] was reported as "normal". The examination at Methodist indicated a "metaphyseal fracture of the medial left distal humerus", and "periosteal reaction of the medial border of the left ulna and top of the left scapula". There were no fractures documented in the autopsy.

State's Ex. 77.

Joyce objected to the admission of the report, citing the order granting his motion in limine regarding evidence of prior injuries, and argued that he had not received notice that other crimes or wrongs would be offered into evidence at trial. He also argued that admission of the report would create a prejudicial inference of child abuse. The State responded that the report was being offered to show C.W.'s physical condition at the time of death and to counter Dr. Plunkett's testimony that C.W. died of natural causes, namely, due to hyponatremia (low sodium) or lack of oxygen secondary to pneumonia. The trial court admitted the report but instructed counsel not to speculate on the nature of the injuries.

The trial court properly admitted Dr. Plunkett's report over Joyce's objection. See Duncan v. State, 166 Ind. App. 302, 335 N.E.2d 827, 838 (1975) ("A cross-examiner may seek to impeach the credibility of a witness by questioning the witness about prior statements he, or she, has made that contradict the testimony given by the witness at

trial.”) But even if we were to accept Joyce’s argument that the report should not have been admitted at trial, any error was harmless in light of all the evidence admitted at trial. There was no evidence that C.W. was acting ill before he was left alone with Joyce. Joyce and C.W. were alone for less than an hour before Joyce called 911. In that call, Joyce, an EMT: misreported C.W.’s age; said he believed C.W. was having an asthma attack; and alternately reported that C.W. was or was not breathing, an unusual circumstance for an asthma attack. Further, Joyce initially told police that he had found C.W. on the floor of the front room, but later reported that C.W. had fallen from the kitchen counter.

Moreover, three doctors at GSH observed bruises appear and become more apparent during their evaluation of C.W.. Anderson testified that C.W. had been injured twice while in Joyce’s care. Before C.W. died, Dr. Walthall told Anderson that she believed C.W. had been abused. And Dr. Hawley, who performed the autopsy, testified:

There is a single mechanism that can explain the bruising under the arms, the bruises over the wall on the left side, the hemorrhage into the spinal cord, the hemorrhage into the eye sheath, the hemorrhage into the retina of the left eye, the damage that was done to the brain, the bleeding that was present over the surface of the brain before the brain died, all of those injuries can be explained by a single simple common mechanism. . . . The overall pattern of injuries would best and simplest fit a violent shaking where the child is held from the back, the bruises on either of the back represent thumbprints, the bruises around the left side of the body represent the fingerprints, the oscillation of the head back and forth causing the bleeding to the spine[,] the bleeding into the optic nerve[,] causing the bleeding into the retina[,] the bleeding over the surface of the brain[,] and it cause[d] the child to stop breathing and therefore develop brain death by not breathing.

Transcript at 1354-55.

There is ample evidence showing that C.W. was not ill and showed no sign of injury before he was left alone with Joyce and that he sustained severe injuries that ultimately caused his death. Joyce does not point to any testimony or counsel argument referring to the paragraph in the defense expert's report that mentions possible prior fractures, nor did our examination of the expert's testimony reveal any reference to prior fractures or the quoted paragraph from the report. Thus, we conclude that the admission of Dr. Plunkett's report, even if erroneous, was harmless in light of the substantial evidence that supports the verdict. See Stephens v. State, 735 N.E.2d 278, 283 (Ind. Ct. App. 2000), trans. denied.

Issue Three: Autopsy Photographs

Joyce next maintains that the trial court should not have admitted certain autopsy photographs into evidence. But Joyce's trial counsel did not object to the admission of those photographs at trial; thus, he has waived that argument for review. To avoid waiver, Joyce argues that the trial court's admission of certain autopsy photographs constituted fundamental error. We cannot agree.

Generally, a failure to object to error in a proceeding results in waiver. Brown v. State, 783 N.E.2d 1121, 1125 (Ind. 2003). Because the admission and exclusion of evidence falls within the sound discretion of the trial court, this court reviews the admission of photographic evidence only for abuse of discretion. Mitchell v. State, 726 N.E.2d 1228, 1237 (Ind. 2000). But the fundamental error exception to that rule permits reversal when there has been a "blatant violation of basic principles" that denies a

defendant ““fundamental due process.”” Goodwin v. State, 783 N.E.2d 686, 687 (Ind. 2003) (quoting Wilson v. State, 514 N.E.2d 282, 284 (Ind. 1987)).

Relevant evidence, including photographs, may be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice. Ind. Evidence Rule 403. “Even gory and revolting photographs may be admissible as long as they are relevant to some material issue or show scenes that a witness could describe orally.” Id. Photographs, even those gruesome in nature, are admissible if they act as interpretative aids for the jury and have strong probative value. Id.

Here, the trial court admitted State’s Exhibits 66, 68, 72, 74, and 76, all of which are autopsy photographs. The photographs show exposed muscle, the back of C.W.’s left eyeball, and the interior of the back of his neck in order to show the nature or depth of certain injuries. Joyce argues that such photographs of a “twenty-month-old child cut open layers deep” were of marginal probative value and were admitted only to inflame the passions of the jury. Appellant’s Brief at 15. But Dr. Hawley used those photographs as interpretive aids when he testified regarding his findings in the autopsy. Thus, the admission of those photographs cannot constitute a per se denial of fundamental due process. Thus, the error, if any, was harmless, and Joyce’s argument that the admission of the photographs constituted fundamental error must fail.

Issue Four: Presumptive Sentence

Joyce next contends that the trial court abused its discretion when it imposed the presumptive⁶ sentence of thirty years because he has no criminal history. We cannot

⁶ The sentencing statutes were amended in April 2005 to provide for an advisory sentence within a range. But the law that was in effect at the time of the commission of the crime controls the resolution

agree. Sentencing determinations are within the discretion of the trial court. Rodriguez v. State, 868 N.E.2d 551, 554 (Ind. Ct. App. 2007). If the trial court finds aggravating and mitigating circumstances, concludes they balance, and imposes the presumptive sentence, then pursuant to Indiana Code 35-38-1-3 the trial court must provide a statement of its reasons for imposing the presumptive sentence. Id.

Here, the trial court found no significant mitigators or aggravators and imposed the presumptive sentence. Joyce argues that the trial court should have given him less than the presumptive because he has no criminal history. But a finding of mitigating circumstances lies within the trial court's discretion. Widener v. State, 659 N.E.2d 529, 533 (Ind. 1995). If a sentencing statement includes a finding of aggravating or mitigating circumstances, then the statement must identify the significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. See Bryant v. State, 841 N.E.2d 1154, 1156 (Ind. 2006) (emphasis added).

In essence, the trial court, while acknowledging Joyce's lack of criminal history, did not find that factor to be significant so as to warrant identifying it as a mitigator. The trial court is not obligated to explain why it did not find a factor to be significantly mitigating, Chambliss v. State, 746 N.E.2d 73, 78 (Ind. 2001), and the sentencing court is not required to place the same value on a mitigating circumstance as does the defendant, Beason v. State, 690 N.E.2d 277, 283-84 (Ind. 1998). Joyce's lack of criminal history

of sentencing issues. Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007). Joyce committed the instant offenses in 2004. Therefore, we analyze the sentencing issues using the presumptive sentencing scheme in effect in 2004.

may be commendable, but it must be viewed in the context of this crime, which resulted in the death of a child by battery. In that light, we cannot say that the trial court abused its discretion when it did not find Joyce's lack of criminal history to be a significant mitigating circumstance.

Issue Five: Appellate Rule 7(B)

Joyce finally contends that his presumptive sentence is inappropriate in light of the nature of the offense and his character. Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution “authorize[] independent appellate review and revision of a sentence imposed by the trial court.” Anglemyer, 868 N.E.2d at 491 (quoting Childress, 848 N.E.2d at 1080). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. “The court may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the [c]ourt finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Ind. Appellate Rule 7(B). In conducting our review under Rule 7(B), we assess the trial court’s recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). However, “a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.” Anglemyer, 868 N.E.2d at 494 (quoting Childress, 848 N.E.2d at 1080) (alteration in original).

When the trial court imposes the presumptive sentence, the defendant bears a heavy burden in persuading us that his or her sentence is inappropriate. McKinney v. State, 2007 Ind. App. LEXIS 2124 at *36 (September 17, 2007) (citing Childress v. State, 848 N.E.2d 1073, 1081 (Ind. 2006) (presumptive sentence is the starting point the legislatures has selected as an appropriate sentence for the crime committed)). Here, Joyce claims that his presumptive sentence is inappropriate in light of his character. In that regard, Joyce refers to his lack of criminal history, his stable employment history throughout his adult life, and the fact that he was the custodial parent and primary caregiver for his two minor daughters. While Joyce's work history, lack of criminal history, and his position as custodial caretaker for his daughters are commendable, we cannot say that Joyce's thirty-year sentence is inappropriate in light of those factors.

Joyce also argues that his sentence is inappropriate in light of the nature of the offense. Specifically, he asserts that the nature of the offense was already taken into account when the offense was charged as a Class A felony. But Joyce confuses the classification of offenses, based on the elements charged and proved, with the nature or circumstances of the actual offense committed. The elements that were proved in order to convict Joyce of battery, as a Class A felony, do not encompass all of the facts and circumstances surrounding C.W.'s death, such as, for example, the facts that C.W. was only twenty months old, he and his mother were living as a family unit with Joyce at the time of the offense, he was in Joyce's sole care when he received the fatal injuries, and he died as a result of severe injuries that caused seizures and ultimately brain death.

Moreover, Joyce's argument renders meaningless the "nature of the offense" element of Rule 7(B). If the nature of the offense were reflected strictly in the class of the offense charged, then no sentence imposed within the range for that class of offense could be reviewed for inappropriateness based on the nature of the offense. We cannot say that the presumptive sentence is inappropriate in light of Joyce's character and the nature of the offense.

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.