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ATTORNEY FOR APPELLANT:

MARK A. BATES
Office of the Public Defender
Crown Point, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

SCOTT L. BARNHART
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

SAMUEL A. MOORE,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 45A03-0604-CR-165

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
Cause No. 45G02-0502-FA-8

December 20, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Samuel A. Moore (“Moore”) appeals his convictions and sentence for three counts of Criminal Recklessness, two counts as Class D felonies and one count as a Class A misdemeanor,¹ and one count each of Resisting Law Enforcement,² Neglect of a Dependant³ and Auto Theft,⁴ Class D felonies. We affirm.

Issues

Moore presents two issues for review:

- I. Whether the replacement of a juror with an alternate during the trial was fundamental error; and
- II. Whether the trial court properly sentenced Moore to eight years imprisonment.

Facts and Procedural History

During February of 2005, Moore and his wife Andrea Moore (“Andrea”) were estranged and Andrea had obtained a protective order against Moore. Andrea was temporarily staying with her friend, Joyce Drew (“Drew”) at an apartment complex in Gary, Indiana. On the morning of February 25, 2005, Moore appeared at the apartment, demanding that Andrea come outside. When Andrea refused to do so, Moore dropped off his and Andrea’s two children on the doorstep. The children were without coats, adequate clothing, dry diapers or food.

¹ Ind. Code § 35-42-2-2.

² Ind. Code § 35-44-3-3.

³ Ind. Code § 35-46-1-4.

⁴ Ind. Code § 35-43-4-2.5.

Yolanda Brown (“Brown”), a Lake County Sheriff Correction Officer and a part-time cosmetologist, was at the apartment to style Drew’s hair. Brown looked out the window and discovered the children outside. When Brown brought the children in, Andrea began to cry, and Brown agreed to take her to get food and diapers. While Brown, Andrea and the children were shopping, Moore went to the home of his cousin and obtained a .38 caliber revolver. He then concealed himself near a bush across the street from Drew’s apartment.

Brown and Andrea returned from shopping, and Andrea exited Brown’s Ford Explorer. Moore ran up behind the vehicle, firing multiple shots from his handgun. He grabbed Andrea and demanded that she come home with him. The pair began to struggle. Moore struck Andrea, tore her clothing, and fired another shot as Andrea tried to escape into Drew’s apartment. Brown attempted to intervene, but Moore told her to “mind [her] own f’ing business, it didn’t have anything to do with [her], get back.” (Tr. 65.) Moore pointed his gun at Brown and she knocked the gun from Moore’s grasp. Brown was able to get one of the children out of her vehicle and into the apartment, but could not release the latch on the car seat occupied by the younger child.

Within minutes, Gary police officers arrived. Officer Sean Jones instructed Moore to show his hands, but he refused to comply. Moore climbed into the Explorer, with his child in the back seat, and took off. Officer Jones’ gunbelt was caught on the door, and he was dragged a short distance before he was able to spin around, free his belt, and shoot out the back passenger tire. Moore was undeterred, and continued to flee. At one point, the Explorer stalled and Officer Jones approached the vehicle. Moore restarted the vehicle, and

struck Officer Jones with it as he continued on. During the ensuing chase, Moore traveled at speeds up to ninety miles per hour. At times, he was traveling in the wrong direction on an interstate highway. Eventually, Moore crashed Brown's vehicle into a pole. Moore was then arrested, and his child was recovered unharmed.

On February 26, 2005, the State charged Moore with two counts of Attempted Murder, Class A felonies,⁵ two counts of Criminal Confinement, Class B felonies,⁶ and one count each of Neglect of a Dependent, Resisting Law Enforcement, Auto Theft and Criminal Recklessness. Moore's jury trial commenced on January 9, 2006. He was acquitted of Criminal Confinement but found guilty of two counts of Criminal Recklessness as lesser-included offenses of Attempted Murder, one as a Class D felony and one as a Class A misdemeanor. Additionally, Moore was found guilty of a separate count of Criminal Recklessness, a Class A misdemeanor, and one count each of Neglect of a Dependent, Resisting Law Enforcement and Auto Theft, Class D felonies.

On March 13, 2006, the trial court sentenced Moore to an aggregate term of eight years imprisonment.⁷ He now appeals.

Discussion and Decision

⁵ Ind. Code §§ 35-42-1-1, 35-41-5-1.

⁶ Ind. Code § 35-42-3-3.

⁷ Moore was sentenced to three years for Count I (Criminal Recklessness), one year for Count II (Criminal Recklessness), three years for Count V (Neglect of a Dependent), three years for Count VI (Resisting Law Enforcement), three years for Count VII (Auto Theft), and one year for Count VIII (Criminal Recklessness).

I. Replacement of Juror with Alternate

During the presentation of the State's witnesses, Juror No. 11 was replaced with an alternate juror. Moore opposed the substitution, but did not lodge a specific objection based upon the law or request a mistrial. He now argues that fundamental error occurred when "an informed, intelligent juror was removed from the panel." Appellant's Br. at 9.

In Harris v. State, 659 N.E.2d 522, 525 (Ind. 1995), our supreme court summarized Indiana law with regard to the replacement of jurors:

Article I, § VIII of the Indiana Constitution guarantees a defendant's right to an impartial jury; therefore, a biased juror must be dismissed. Indiana Trial Rule 47(B) in part provides that "[a]lternate 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." Trial courts have broad discretion in determining whether to replace a juror with an alternate, and we will only reverse such determinations where we find them to be arbitrary, capricious or an abuse of discretion . . . An abuse of discretion occurs only if the decision placed the defendant in substantial peril. [Citations omitted]

Appellate courts defer substantially to trial judges in this regard because the trial courts 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. Jervis v. State, 679 N.E.2d 875, 881-82 (Ind. 1997). A defendant is entitled as a matter of right only to an impartial jury, and not to one of his precise choosing where the issue is merely replacing a regular juror with an alternate. Id. at 882 (citing Whitehead v. State, 500 N.E.2d 149, 153 (Ind. 1986)). Alternate

Counts V, VI, and VII were concurrent, while Counts I, II, and VIII were consecutive to each other and to Counts V, VI and VII, providing for an aggregate sentence of eight years.

jurors are presumed to be fair and equally qualified to the task. Id. (citing French v. State, 521 N.E.2d 346, 349 (Ind.1988)).

Here, the State learned during the course of the trial that Gary police officers had previously arrested Juror No. 11 for possession of marijuana. The juror had failed to disclose this arrest when the State twice asked, in voir dire, whether any juror had been either arrested or convicted of a crime. Juror No. 11 admitted to the trial court that the State's investigative information was correct. Moreover, Detective Dawn Westerfield advised the trial court, in a recorded in-chambers hearing, that she observed Juror No. 11 and Moore engage in "definite nonverbal communication." (Tr. 341.) It is thus apparent that the removal of Juror No. 11 was not an arbitrary decision by the trial court.

Further, Moore lodged no complaint that the alternate was partial or biased. He merely expressed dissatisfaction that the only black male juror was being removed. However, the State noted without contradiction that a black female remained on the jury. The decision to remove Juror No. 11 and replace him with an alternate did not place Moore in substantial peril. No abuse of discretion occurred, much less fundamental error.

II. Sentence

Moore complains that his aggregate eight-year sentence is inappropriate in light of the nature of the offenses and his character. In particular, he points to his financial provision for his family, and the relative insignificance of his prior criminal history (consisting of one misdemeanor).

At the time of Moore's offenses, Indiana Code Section 35-50-2-7 provided that a

person who committed a Class D felony should be imprisoned for a fixed term of one and one-half years, with not more than one and one-half years added for aggravating circumstances and not more than one (1) year subtracted for mitigating circumstances. Indiana Code Section 35-50-3-2 provides that conviction for a Class A misdemeanor is punishable by up to one year in prison.

“[S]ubject to the legal parameters, sentencing determinations are generally within the discretion of the trial court.” Estes v. State, 827 N.E.2d 27, 29 (Ind. 2005). In some circumstances, however, we will revise a sentence that is authorized by statute. Indiana 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.”

Concerning the nature of the instant offenses, we observe that there were multiple victims. Moore armed himself with a weapon and awaited his wife’s return. He then endangered his wife, his minor child, law enforcement officers, and the public traveling on the roadway. He also stole a vehicle and totaled it in an effort to evade police officers.

The character of the offender is such that prior rehabilitative efforts failed. Like the instant offenses, his prior conviction for reckless endangerment involved the use of a deadly weapon. Moreover, his contact with Andrea was in violation of a no-contact order. Moore has not demonstrated that his sentence is inappropriate in light of the nature of his offenses and his character.

Moore also makes a cursory argument that consecutive sentences were in violation of statutory authority, because his offenses constituted a single episode of criminal conduct. An “episode of criminal conduct” is defined as “offenses or a connected series of offenses that are closely related in time, place, and circumstance.” Ind. Code § 35-50-1-2(b). Where a complete account of a crime can be given without referring to the other offense, the offenses are not a single “episode of criminal conduct.” Smith v. State, 770 N.E.2d 290, 294 (Ind. 2002) (citing Tedlock v. State, 656 N.E.2d 273, 275 (Ind. Ct. App. 1995)). Tedlock emphasizes the timing of the offenses, looking to whether the “simultaneous” and “contemporaneous” nature of the crimes would constitute a single episode of criminal conduct. Id.

In Newman v. State, 690 N.E.2d 735 (Ind. Ct. App. 1998), a separate panel of this Court considered whether the appellant’s consecutive sentences for Burglary, Escape, Resisting Law Enforcement and Driving while Suspended violated statutory authority because his actions constituted a single episode of criminal conduct. Newman had burglarized a tavern, and was sitting in his car when police officers arrived. He refused police orders to get out of his car and fled, ultimately crashing into a cement wall. At the hospital, he fled down a corridor. See id. at 736. This Court concluded that each of the crimes underlying the consecutive sentences occurred during a “distinct episode of criminal conduct” that could “be described without referring to the details of other charges.” Id. at 737. Newman properly did not receive a consecutive sentence for Theft. See id.

Likewise, Moore committed a series of offenses in a short span of time. The trial court determined that Moore's sentences for Neglect of a Dependent, Resisting Law Enforcement and Auto Theft should be served concurrently, because he simultaneously fled from officers while driving a stolen car, endangering his son. The crimes for which Moore received consecutive sentences, i.e., Criminal Recklessness involving Andrea, Criminal Recklessness involving Officer Jones, and Criminal Recklessness involving motorists, may be described without reference to each other. The trial court properly determined that Moore engaged in separate episodes of criminal conduct. His consecutive sentences do not contravene statutory authority.

Conclusion

The replacement of a juror with an alternate juror during the trial did not constitute an abuse of discretion by the trial court. Moore's eight-year aggregate sentence is not in contravention of statutory authority, nor is it inappropriate in light of the nature of the offenses or the character of the offender.

Affirmed.

VAIDIK, J., and BARNES, J., concur.