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IN THE
COURT OF APPEALS OF INDIANA

CARL C. TUCKER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 05A05-1010-CR-779
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BLACKFORD CIRCUIT COURT
The Honorable Dean A. Young, Judge
Cause No. 05C01-0908-FC-35

May 19, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Carl C. Tucker appeals his convictions for Class C felony operating a motor vehicle while privileges are forfeited for life and Class A misdemeanor resisting law enforcement and his aggregate sentence of eight years. Concluding that the trial court did not abuse its discretion in not dismissing a juror and not declaring a mistrial and in sentencing Tucker, we affirm.

Facts and Procedural History

Hartford City Police Department Officers Steven Hurd and Aaron Ferrell worked the night shift on July 12, 2009. Around 3:00 a.m., the officers were inside a Pak-A-Sak in Hartford City when Tucker walked in. Because Tucker looked at the officers in a "surprised" and "shocked" manner, Tr. p. 25, 27, they thought he was "suspicious" and decided to follow him after he made his purchase and left the store. *Id.* at 28. Tucker left in a red Kia Rio, and Officers Hurd and Ferrell followed in their patrol car.

When Tucker began swerving, the officers decided to pull him over and activated their lights. Instead of stopping, Tucker sped off. When the officers caught up to the Kia Rio, the car was sitting in the road with the driver's door open and a pair of sandals on the ground. Tucker was running through someone's yard. Officer Hurd yelled, "Stop. Police." *Id.* at 31. But Tucker did not stop. Both officers chased Tucker on foot, but they were unable to catch up with him. The officers called for the K-9 unit, but they could not locate Tucker either. As the officers walked back to their patrol car, they came into contact with Billie Glass, who happened to be the owner of the Kia Rio and Tucker's

girlfriend. A meeting was set up with Tucker at the police station, at which point he was arrested.

The State charged Tucker with Class C felony operating a motor vehicle while privileges are forfeited for life, Ind. Code § 9-30-10-17, and Class A misdemeanor resisting law enforcement, *id.* § 35-44-3-3(a)(3). Tucker's jury trial began in August 2010. Twelve jurors were selected and seated. For reasons unknown from the record, no alternate jurors were chosen. After presentation of the evidence but before deliberations began, juror P.Z. informed the bailiff that she was "feeling some difficulty with respect to her continuation as a juror in this case." Tr. p. 161. The following colloquy occurred outside the presence of the other eleven jurors:

> [P.Z.]: My concern is, uhm, the current address of . . . Billie Glass and Carl Tucker. They've just moved onto my route. I didn't know the current address, but I do deliver their mail. Uhm, so, I have to see them on a regular basis, and they will see my vehicle and whatnot, and I'm afraid if we come out with a verdict that is not likeable, uhm, that I will be the one that will be seen on a daily basis.
>
> COURT: Did you recognize Mr. Tucker when doing the jury selection process?
>
> [P.Z.]: No, sir, which I apologize for that, because I was going off the previous address. I thought that they were still in the city. Uhm, I thought I recognized the name, but I didn't recognize the faces, the face or any name. Uhm, and they just recently moved onto the route. We have 600 people that we deliver to on that particular one. It's the biggest route. And they just recently moved there.
>
> COURT: We have no alternates in this case, uhm, [P.Z.]. If we excuse you, it would result in a mistrial and the entire process having to be repeated. Is your concern of such a degree that you simply cannot set it aside and sit in fair judgment?
>
> [P.Z.]: Yes, sir. I apologize, but I'm afraid I would be the one that they would see if, if it does come out with a negative verdict today.

* * * * *

COURT: Okay. Is your fear such that you cannot put it aside? Do you have any reasonable basis for that fear? Has there ever been any kind of contact between them and you that would put you in fear or make you think that . . . . Because the fact that you've been on this jury and one of the person's [sic] that's going to be called as a possible juror has been known to counsel for some days now and has there been anything done that supports that fear that they might do something?

[P.Z.]: No, nothing. But I live in the State alone with my daughter in a very desolate area. Nobody would ever . . . I do have fears of . . . I have fears aside of them, but I live in the State by myself with my daughter and I have no family, nobody here.

* * * * *

COURT: Are you willing to try to sit and determine whether you can sit in fair judgment on the case and to deliberate with the others? All the evidence is in at this point in time. Certainly, I'm not asking about your persuasion or belief one way or the other, but is this something that you could sit and listen with all the jurors and hear what they have to say and render a true and just verdict based only on the evidence as opposed to any self-interest or belief that you have?

* * * * *

[P.Z.]: Uhm, I think I, yes, I think I can deliver a fair verdict on the case by itself. It's just the aftermath that I have a problem with.

COURT: What if the Court were to make certain admonishments to the parties, however the case turns out, that nobody is to contact . . . As a matter of fact, you'll be instructed that you're not obligated to discuss your verdict with any person. Your, uh, your name will not be associated in any trial order as a juror. Uh, the counsel have to give back all the juror questionnaires that contain all the addresses and all copies and if the Court further admonishes that there's not to be any contact, directly or indirectly, through any person or through third persons with you, would that give you the comfort level that might be necessary to go back there and render a verdict?

[P.Z.]: Yes.

> COURT: Because I'm sure you understand the difficulty that we have here, because this case is concluded and it costs a lot of money and a lot of time . . .
>
> [P.Z.]: Yes, sir.
>
> COURT: . . . and I know you appreciate your duty. I just want to make sure that you can be fair to both sides and render a verdict based just on the evidence, if you are allowed to stay. Can you do that?
>
> [P.Z.]: Yes, I can.

Id. at 162-65. The court then asked the parties if there was anything else, and they each responded no. Final arguments were conducted after which the jury retired for deliberations. The jury found Tucker guilty of both counts.

A sentencing hearing was then held. The court found no mitigators and the following aggravators: (1) Tucker has a history of delinquent and criminal behavior, including eleven felonies and eight misdemeanors; (2) Tucker was on probation at the time of these offenses; and (3) Tucker has violated the terms of his probation or home detention on several occasions, and reduction of Tucker's sentence or imposition of a suspended sentence would seriously depreciate the nature and circumstances of these offenses. Appellant's App. p. 66. The court sentenced Tucker to eight years for the Class C felony and one year for the Class A misdemeanor, to be served concurrently.

Tucker now appeals.

Discussion and Decision

Tucker raises two issues on appeal. First, he contends that the trial court erred by not removing a juror and then by not declaring a mistrial because of the absence of an

alternate juror. Second, he contends that the trial court erred by not finding any mitigators.

I. Removal of Juror and Mistrial

Tucker contends that the trial court abused its discretion (1) by not removing juror P.Z. because she feared him if the jury were to find him guilty and (2) by not declaring a mistrial because there was no alternate juror to replace P.Z. We first note that Tucker neither objected to P.Z. remaining on the jury nor requested a mistrial. Moreover, Tucker does not allege fundamental error on appeal. Therefore, Tucker has waived this issue for review.

Waiver notwithstanding, Indiana Trial Rule 47(B) states, in pertinent part, "Alternate 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 significant leeway under Indiana Trial Rule 47(B) in determining whether to replace a juror with an alternate, and we reverse only for an abuse of discretion. *Riggs v. State*, 809 N.E.2d 322, 327 (Ind. 2004). We defer substantially to trial judges on this point because they 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 the 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, Ind. Const. art. 1, § XIII, and not to one of his precise choosing where the issue is merely replacing a regular juror with an alternate. *Id.* at 882. A biased juror, however, must be dismissed. *Caruthers v. State*, 926 N.E.2d 1016, 1020 (Ind. 2010).

Here, the record provides adequate justification for the trial court's ruling which allowed P.Z. to remain on the jury. P.Z. said that she did not recognize Tucker because he recently moved onto her mail route. Importantly, P.Z. conceded that Tucker had given her no reason to fear him. Instead, P.Z. explained that because she and her daughter lived alone in a desolate area and she had other fears, she projected those fears onto Tucker should the jury return guilty verdicts against him. Despite those unfounded fears, P.Z. believed she could deliver "fair" verdicts based on the evidence in the case; it was just the "aftermath" of the case she was worried about. The trial court therefore proposed a solution to P.Z.: (1) P.Z.'s name would not be associated in any trial order as a juror; (2) counsel would have to return all juror questionnaires containing the jurors' addresses; and (3) the court would admonish the parties not to contact the jurors, either directly or indirectly. P.Z. was satisfied with these precautions. The trial court then confirmed with P.Z. that she could be fair to both sides and render a verdict based on the evidence. Although the trial court was no doubt concerned with the costs of conducting a new trial due to the fact that there was no alternate juror to replace P.Z., the court took considerable steps to ensure that P.Z. could be impartial and unbiased if she remained on the jury. *Cf. LeFlore v. State*, 823 N.E.2d 1205, 1208 (Ind. Ct. App. 2005) (trial court did not err in removing juror during deliberations when juror testified that she was unable to vote her conscience and could not serve), *trans. denied*. This remedied the situation. The trial court therefore did not abuse its discretion in allowing P.Z. to remain on the jury. Accordingly, there was no need to declare a mistrial. *See Warren v. State*, 725 N.E.2d

828, 833 (Ind. 2000) ("A mistrial is an extreme remedy that is warranted only when less severe remedies will not satisfactorily correct the error.").

II. Sentencing

Tucker next contends that the trial court abused its discretion in failing to identify any 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 it 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.* One way in which a court may abuse its discretion is by entering a sentencing statement that omits reasons that are clearly supported by the record and advanced for consideration. *Id.* at 490-91. A trial court is not obligated to accept a defendant's claim as to what constitutes a mitigating circumstance. *Rascoe v. State*, 736 N.E.2d 246, 249 (Ind. 2000). The relative weight given to aggravators and mitigators is not subject to appellate review. *J.S. v. State*, 928 N.E.2d 576, 579 (Ind. 2010).

Tucker specifically argues that the trial court abused its discretion in failing to identify as a mitigator the undue hardship to his three dependents. However, he has failed to include the transcript from his sentencing hearing. Therefore, we are unable to determine whether this mitigator is both significant and clearly supported by the record. *See Anglemyer*, 868 N.E.2d at 493.

In any event, there is no requirement that a trial court find a defendant's incarceration would result in undue hardship to his dependents. *Roney v. State*, 872

N.E.2d 192, 204 (Ind. Ct. App. 2007), *trans. denied.* As our Supreme Court has observed, "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." *Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999). To support use of this mitigator, there generally should be some evidence that the hardship to be suffered by a dependent is more severe than that suffered by any child whose parent is incarcerated. *See Roney*, 872 N.E.2d at 205. Tucker has presented no such evidence here. The trial court did not abuse its discretion in not identifying this mitigator and in sentencing Tucker to an aggregate term of eight years.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.