



In this belated appeal, Rory Patton questions whether the admission of a letter at his sentencing hearing was fundamental error and whether his sentence is inappropriate. We affirm.

## **FACTS AND PROCEDURAL HISTORY**

On February 16, 2000, Patton argued with Kendall Watkins. Patton announced he needed to leave before he hurt someone and walked toward the door. Then, he turned around, pulled out a chrome revolver, and shot Watkins four or five times. Watkins died. Patton told police he had an anger problem, Watkins would not stop antagonizing him, and he intended to kill Watkins so Watkins could not come after him later.

The State charged Patton with murder and possession of a handgun without a license, a Class A misdemeanor. Patton and the State agreed he would plead guilty to murder with a sentencing cap of 55 years,<sup>1</sup> and the State would dismiss the second charge. The court accepted the plea agreement, convicted Patton of murder, and sentenced Patton to fifty-five years.

## **DISCUSSION AND DECISION**

### 1. Admission of Evidence

At the sentencing hearing, the prosecutor read into evidence an excerpt of a letter allegedly written by Patton, in which he describes his actions on the day of the murder.<sup>2</sup>

Patton now claims the admission of that letter was erroneous. Patton did not object to the

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<sup>1</sup> At the time of Patton's crime, the presumptive sentence for murder was 55 years. The court could subtract ten years for mitigators or add ten years for aggravators. *See* Ind. Code § 35-50-2-3 (2000).

<sup>2</sup> The author of the letter discusses being angry all day, obtaining a pistol, and obtaining marijuana. He claims: "I knew I was gonna hurt somebody. I was fed up and I didn't care no more." (Tr. at 23.) He asked Watkins to repay a debt. When Watkins refused, he needed to leave before Watkins lost his life. Watkins teased: "you probably got one bullet," (*id.*), so he shot Watkins multiple times.

prosecutor reading that letter into evidence and thereby waived any error. *See Charlton v. State*, 702 N.E.2d 1045, 1051 (Ind. 1998) (failure to object to prosecutor misconduct results in waiver).

To resurrect his right to object, Patton asserts the error was fundamental. Fundamental errors are those that deprive a defendant of fundamental due process and make a fair trial impossible. *Id.* However, Patton cannot demonstrate he was prejudiced by the admission of that evidence at his sentencing. The plea agreement capped Patton's sentence at 55 years. The State recommended the court impose a 55 year sentence. Patton's counsel, after asserting the only mitigator was Patton's young age, stated: "I will concur with the State's recommendation." (Tr. at 28-9.) As Patton did not urge the court to sentence him to less than 55 years, he cannot demonstrate prejudice in the admission of the letter.

Furthermore, the information in the letter read by the prosecutor was similar to the statements admitted via the factual basis at the guilty plea hearing<sup>3</sup> and the letter Patton wrote to the court.<sup>4</sup> We see no fundamental error in the admission of the letter allegedly

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<sup>3</sup> The factual basis included the following:

[A witness] saw Kendall Watkins and the Defendant Rory Patton arguing. During the course of the argument, the Defendant Rory Patton said that he had to leave before he hurt somebody. Then as he started to walk out the door, he pulled out a – a chrome revolver and shot Kendall Watkins four times. Police spoke to Rory Patton, the Defendant herein, and Rory explained that he had an anger problem and that Kendall Watkins kept antagonizing him. And they were arguing over money, and Rory shot Kendall five times, and intended on killing him because he did not want Kendall coming after him.

(Tr. at 11.)

<sup>4</sup> In a letter to the Court before sentencing, Patton wrote:

I'm a young man that been hurt and crossed to many times and was fed up. I didn't meen to kill that man I was lost that person I killed was a very very good friend but just to show you how the life I lived will have you and the things you do these are the consequences of

written by Patton.

2. Sentence<sup>5</sup>

The trial court has broad discretion to determine a sentence. *Henderson v. State*, 769 N.E.2d 172, 179 (Ind. 2002). That discretion includes the ability to increase or decrease the sentence from the presumptive based on aggravating or mitigating factors. *Id.* We will not modify the sentence imposed by the trial court unless a clear abuse of discretion has occurred. *Id.*

The trial court found three aggravators: Patton's criminal history, his need for correctional or rehabilitative treatment best provided by commitment to a penal facility, and the nature and circumstances of the crime. Patton claims only one of those aggravators, his juvenile history, is valid. We disagree.

Patton claims his alleged need for commitment to a penal facility is improper because the court failed to give "a specific and individualized reason" why Patton needed that commitment. (Appellant's Br. at 5.) However, while discussing this aggravator, the court said "prior attempts at rehabilitation through juvenile – the juvenile system, probation and parole have all failed. Whenever you were on those programs, you violated the program." (Tr. at 29.) Accordingly, the court provided an individualized reason for this aggravator, and his challenge to its validity fails.

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the game. You get tired of people hurting and disrespecting you and you don't have nobody to express your feelings to.

(Appellant's App. at 87) (errors and emphasis in original).

<sup>5</sup> Under Post-Conviction Rule 2(1), which permits belated direct appeals, "[a] belated appeal is treated as though it was filed within the time period for an appeal but is subject to the law that would have governed a timely appeal." *Gutermuth v. State*, 868 N.E.2d 427, 433 (Ind. 2007). Accordingly, we review Patton's sentencing by applying the law as it existed in 2000.

Similarly, Patton claims the court failed to explain why his crime was “more heinous than any other murder,” (Appellant’s Br. at 6), and without such explanation, Patton asserts, the “nature and circumstances” aggravator is improper. However, after announcing this aggravator at sentencing, the court explained:

This is – as the prosecutor says – is a totally senseless crime and is very sad and I’m very sorry to the family. There was no provocation whatsoever to induce you to commit this – this murder. And you killed your friend. As you stated in your letter – you murdered someone that you were very, very close to.

(Tr. at 29.) Patton’s challenge to this aggravator fails.

Patton’s remaining argument is the court’s three mitigators should have outweighed the one valid aggravator, such that he should have received a sentence less than the presumptive. Because there were three valid aggravators and three valid mitigators, we see no abuse of discretion in the court’s weighing of the aggravators and mitigators. Accordingly, we affirm.

Affirmed.

DARDEN, J., and CRONE, J., concur.