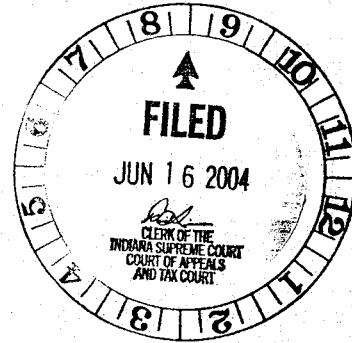


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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BRUCE G. HEATH, )

Appellant-Defendant, )

vs. )

No. 57A04-0307-CR-371 )

STATE OF INDIANA, )

Appellee-Plaintiff. )

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APPEAL FROM THE NOBLE CIRCUIT COURT  
The Honorable G. David Laur, Judge  
Cause No. 57C01-0106-CF-65

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June 16, 2004

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

Bruce G. Heath was charged with two counts of criminal recklessness as Class C felonies,<sup>1</sup> and one count of criminal recklessness as a Class D felony.<sup>2</sup> He was convicted, after a jury trial, of criminal recklessness as a Class D felony.<sup>3</sup> The jury could not reach a result on the remaining two charges. The trial court sentenced Heath to two and one-half years imprisonment.

Heath raises two issues, which we restate as:

1. Whether the trial court's re-instruction of the jury on self-defense was fundamental error; and
2. Whether the trial court improperly weighed the aggravating and mitigating factors in determining Heath's sentence.

We affirm.

### FACTS AND PROCEDURAL HISTORY

Shawn Caudill encountered Eric Rupley and Joshua Deming while "cruising" (Tr. at 224) in Kendallville. Caudill looked at them because he did not know who they were, and they flipped him off. Deming and Rupley thought Caudill had given them a "look," (*id.* at 242), and confronted Caudill in a parking lot, yelling and cursing at him and challenging him to a fight. Caudill drove out of the parking lot, but Deming and Rupley found him again. At this later encounter, Deming slapped Caudill "upside the head" (*id.* at 244) and tried to attack Caudill's passenger, Rob Horn. Caudill again refused to fight Deming and Rupley.

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<sup>1</sup> Ind. Code § 35-42-2-2(c)(1).

<sup>2</sup> Ind. Code § 35-42-2-2(b)(1).

<sup>3</sup> Ind. Code § 35-42-2-2(b)(1).

In the meantime, Heath, along with his 13-year-old nephew, J.W., was also cruising the strip in Heath's Camaro. Heath saw Michael Amburgey at the Family Video, which was located on the strip, and stopped. Caudill also came to Family Video where he was again confronted by Rupley and Deming. Caudill finally agreed to fight Rupley and Deming and took his friend Chris Harden along to help. They agreed to meet on Airport Road. Rupley and Deming went to recruit additional friends to fight.

Heath and Amburgey were asked to leave the Family Video parking lot by management. Heath and J.W. proceeded to Airport Road in Heath's Camaro, followed by Rob Horn and A.J. Mobley in Mobley's Ford Escort and Amburgey in his truck. They encountered Caudill, who was going the other way, and he announced there was no longer going to be a fight. Amburgey turned around and followed Caudill back to town, while Heath and Mobley continued to Airport Road.

Heath and Mobley pulled into the parking lot of the Great Outdoors Landscaping Company off Airport Road. Three pickup trucks arrived simultaneously, one driven by Deming. At this point, chaos ensued. People began surrounding Heath and Mobley's vehicles, apparently kicking and hitting the cars and attempting to hit the people inside the cars. At one point, the passenger side mirror of Heath's car was broken.

At some point during this fracas, Heath pulled a gun and fired four shots in close succession. One bullet wounded Justin Knox in the leg. Another hit Deming in the face, shattering his jaw. The third bullet was found in a pile of pallets. The fourth bullet Heath fired passed through Austin Brown's truck door. There were three people in the bed of that truck, and one person on the floor of the cab.

The State charged Heath with one count of Class D felony criminal recklessness for firing the bullets that hit Brown's truck and landed near the pallets.<sup>4</sup> Heath claimed at trial that he was acting in defense of himself and J.W. when he fired the shots. The jury deliberated for approximately six hours, and then informed the court it could not agree on a verdict. Counsel did not agree on what should be done; the State wanted the jury to continue its deliberations, and Heath wanted the Court to declare the jury hung. The trial court decided to bring the jurors back into the courtroom to find out if the court and counsel could assist the jury in any way to come to a determination. The trial court did so, and the jury retired to the jury room. After more deliberation, the jury sent out two questions:

Question Number One: In regards to final instruction number eight, that's the self-defense instruction, the pattern instruction. It says, is the jury to determine if the quote and then quotation marks, "He reasonably believes it is necessary", close quotation marks. As if us the "Jury", in quotation marks or, quotation marks "he" the Defendant? I think they're, what they're, they're trying to say what's the word "he" mean. Does it mean the jury or he the Defendant?

\* \* \* \* \*

And then questions [sic] number two: Does the Jury have the responsibility to define when a person is justified in using deadly force?

(*Id.* at 928-29.)

The State suggested case law presents an objective standard: "[a] reasonable person's standard, not a subjective standard of the Defendant." (*Id.* at 929.) Heath's

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<sup>4</sup> The State also charged Heath with two counts of Class C felony criminal recklessness for the two shots fired that hit Knox and Deming. The jury could not reach a verdict on those counts, and they are not at issue in this appeal.

counsel agreed, adding "I guess it just depends if you define the reasonable person as yourself or not." (*Id.* at 931.)

The trial court and the attorneys worked on the answers to the jurors' two questions. The trial court also gave counsel the opportunity to present argument to the jury with respect to their positions on the answers to the jury's questions. All of this was done without objection from the State or Heath.

The agreed answers to the questions were:

In answer to your question number one: The law requires a Jury to judge the reasonableness of the danger and the exten[t] of force to be used from an objective standpoint rather than from the Defendant's standpoint. One of the factors necessary to justify using deadly force is the bonafide [sic] of [sic] fear of death or serious bodily injury. But whether or not there was such a state of mind must be found objectively in the light of the surrounding circumstances. And the standard for determining that issue is the reasonableness of such belief under the circumstances. . . . And in answer to question two, the Jury shall apply the law as instructed to the facts the jury has determined from the testimony and evidence presented.

(*Id.* at 937.)

After the jurors returned to deliberate, they sent out another note that said, "We cannot reach a decision on evidence presented." (*Id.* at 942.) The jurors indicated they were close on one count, and the trial court sent them back to deliberate again without objection from counsel. The jury returned a verdict of guilty on Count III, criminal recklessness as a Class D felony, but was unable to reach a verdict on Counts I and II, the two Class C felonies.

During the sentencing hearing, the trial court considered the nature and circumstances of the crime as an aggravating circumstance: the court noted there were a

number of unarmed observers, and Heath's actions were intentional. Another aggravating circumstance was that the crime was committed in the presence of a thirteen year old. The trial court found Heath's act was the "most serious . . . D Felony Criminal Recklessness that one could imagine." (*Id.* at 985.)

The trial court found Heath's lack of a criminal history was a mitigating factor. However, it found the aggravating factors outweighed the mitigating factor, and sentenced Heath to two and one-half years. In addition, it ordered restitution of \$469.26 for the damage to Brown's truck.

## DISCUSSION AND DECISION

### 1. Response to Jury Questions

Heath argues the instruction given to the jury in response to its first question deprived him of the statutory right to defend himself and relieved the State of having to prove he unjustifiably disregarded the risk of his conduct. Jury instruction generally lies within the sole discretion of the trial court, and we reverse only for an abuse of that discretion. *Driver v. State*, 760 N.E.2d 611, 612 (Ind. 2002).

However, Heath did not object to the instruction at trial,<sup>5</sup> which results in waiver of any alleged error on appeal. *See Williams v. State*, 771 N.E.2d 70, 72 (Ind. 2002). To avoid waiver, he now contends the instruction was fundamental error. Fundamental errors are those that are "a substantial, blatant violation of due process [and are] so

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<sup>5</sup> In fact, before the trial court gave the instruction to the jury, Heath's counsel agreed the instruction was a correct statement of the law. His agreement is akin to "inviting error," which results in error we will not review on appeal. *See Booher v. State*, 773 N.E.2d 814, 822 (Ind. 2002) (where defendant requested trial court take certain action, that action may not be asserted as error on appeal). Nevertheless, we review the instruction for fundamental error.

prejudicial to the rights of a defendant as to make a fair trial impossible.” *Hopkins v. State*, 759 N.E.2d 633, 638 (Ind. 2001).

We believe this instruction was a proper statement of law and does not rise to the level of fundamental error. Ind. Code § 35-41-3-2(a) states “[a] person is justified in using reasonable force against another person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force.” Reasonableness has been defined as “an objective test inquiring what a reasonable man situated in similar circumstances would do.” *Davis v. State*, 265 Ind. 476, 481, 355 N.E.2d 836, 839 (1976).

The language Heath challenges was borrowed from an instruction we have previously approved. See *Misztal v. State*, 598 N.E.2d 1119, 1123 (Ind. Ct. App. 1992), *trans. denied*. The instruction in *Misztal* provided:

One of the factors necessary to justify killing in self defense is the bona fide fear of death or serious bodily injury. But, whether or not there was such a state of mind must be found objectively in light of the surrounding circumstances, and the standard for determining that issue is the reasonableness of such belief under the circumstances.

*Id.* at 1123 n.6. *Misztal* complained the instruction erroneously required the jury to use an objective standpoint, rather than the defendant’s standpoint. We held the instruction was not erroneous because our “supreme court’s test contains an objective reasonableness standard with regard to the defender’s fear of death or great bodily harm.” *Id.* at 1123.

In *Miller v. State*, 720 N.E.2d 696, 701 (Ind. 1999), our supreme court found an instruction matching the one in *Misztal* “correctly and more aptly covered the substance of the law” than an alternate instruction offered by the defendant. Accordingly,

following *Misztal* and *Miller*, we hold the court's instruction was not fundamentally erroneous.

## 2. Sentencing

Heath received a two and one-half year sentence.<sup>6</sup> He argues the trial court considered improper aggravating circumstances, and given his character and the nature of the offense, "the presumptive sentence is not even appropriate and appellate intervention is warranted." (Br. of Appellant at 11.)

A trial court has broad discretion to determine the sentence imposed on a defendant. *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 and to determine whether sentences should be served consecutively or concurrently. *Id.* We will not modify the sentence imposed by the trial court unless a clear abuse of discretion has occurred. *Id.* An abuse of discretion has occurred if the trial court's decision is against the logic and effect of the facts and circumstances before the court. *Krumm v. State*, 793 N.E.2d 1170, 1186 (Ind. Ct. App. 2003).

When the trial court deviates from the presumptive sentence, it is required to: (1) identify all significant aggravating and mitigating circumstances; (2) state why each circumstance is aggravating or mitigating; and (3) explain its evaluation and balancing of

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<sup>6</sup> The presumptive sentence for a Class D felony is one and one-half years. The maximum sentence is three years.

the aggravating and mitigating circumstances to arrive at the sentence imposed. *Henderson*, 769 N.E.2d at 179.

The nature and circumstances of a crime is a valid aggravating circumstance. *Wethington v. State*, 560 N.E.2d 496, 509-10 (Ind. 1990). Heath fired his gun toward a group of unarmed people, causing property damage to a truck that contained four individuals. We cannot say the trial court erred in considering this an aggravating circumstance.

In addition, Ind. Code § 35-38-1-7.1(a)(5) requires a trial court to consider whether the crime was committed “in the presence or within hearing of a person who is less than eighteen years of age who was not the victim of the offense.” To properly find this an aggravating circumstance, however, “the defendant’s actions must have had an impact on . . . other persons of a destructive nature that is not normally associated with the commission of the offense in question and this impact must be foreseeable to the defendant.” *Smith v. State*, 770 N.E.2d 818, 821-22 (Ind. 2002) (internal citation and quotation marks omitted.) Heath’s nephew, thirteen at the time of this event, saw Heath fire a gun four times toward a group of unarmed people. The result of Heath’s actions should have been foreseeable to him. The trial court did not err in finding this aggravating circumstance.

Even if Heath is correct this was not the “most serious . . . D Felony Criminal Recklessness that one could imagine” (Tr. at 985), the other two aggravating factors are valid. Even one aggravating circumstance can support an enhanced sentence. *Buzzard v. State*, 712 N.E.2d 547, 554 (Ind. Ct. App. 1999), *trans. denied* 726 N.E.2d 301 (Ind.

1999). We cannot say the trial court abused its discretion by sentencing Heath to two and one-half years.

Heath also asks we review his sentence in light of his character and the nature of the offense. A sentence authorized by statute will not be revised unless it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B); *Kien v. State*, 782 N.E.2d 398, 416 (Ind. Ct. App. 2003), *reh'g denied, trans. denied* 792 N.E.2d 47 (Ind. 2003). When considering the appropriateness of the sentence for the crime committed, the sentencing court should focus initially on the presumptive sentence. *Id.* It may then consider deviation from the presumptive sentence based on a balancing of the factors that must be considered pursuant to Ind. Code § 35-38-1-7.1(a)<sup>7</sup> together with any discretionary aggravating and mitigating factors found to exist. *Id.*

The record reflects Heath had no criminal history and, despite this one instance of extremely poor judgment, he was apparently a good worker and family person. However,

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<sup>7</sup> That section provides:

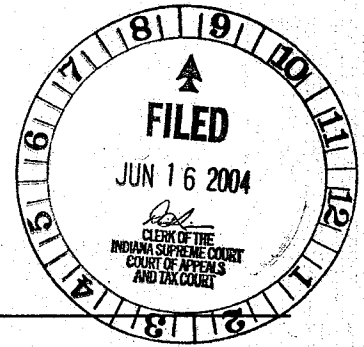
- (a) In determining what sentence to impose for a crime, the court shall consider:
  - (1) the risk that the person will commit another crime;
  - (2) the nature and circumstances of the crime committed;
  - (3) the person's:
    - (A) prior criminal record;
    - (B) character; and
    - (C) condition;
  - (4) whether the victim of the crime was less than twelve (12) years of age or at least sixty-five (65) years of age;
  - (5) whether the person committed the offense in the presence or within hearing of a person who is less than eighteen (18) years of age who was not the victim of the offense;
  - (6) whether the person violated a protective order issued against the person under IC 31-15, IC 31-16, or IC 34-26-5 (or IC 31-1-11.5, IC 34-26-2, or IC 34-4-5.1 before their repeal); and
  - (7) any oral or written statement made by a victim of the crime.

we cannot disregard the extreme nature of the offense. Heath chose to protect himself not by driving away from the scene of the fracas, but by shooting a gun. When he chose to pull a gun and shoot toward unarmed bystanders, injuring two people and damaging one truck, he made a critical decision that does not reflect favorably on his character. We cannot say that a two and one-half year sentence for this act is inappropriate.

Affirmed.

VAIDIK, J., concurs.

SULLIVAN, J., concurs in part and dissents in part with separate opinion.



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**IN THE  
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---

BRUCE G. HEATH, )

Appellant-Defendant, )

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STATE OF INDIANA, )

Appellee. )

No. 57A04-0307-CR-371

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**SULLIVAN, Judge, concurring in part and dissenting in part**

I concur in the holding that the self-defense instruction given was a correct statement of the law and was appropriately given.

I respectfully dissent, however, from affirmance of the enhanced sentence. More particularly, I disagree with the majority's conclusion finding that "Heath chose to protect himself not by driving away from the scene of the fracas, but by shooting a gun." Slip op. at 11. Drawing from that conclusion, the majority emphasizes the "extreme nature of the offense."

I acknowledge that Heath fired the gun three or four times at or in the direction of unarmed persons. However, the circumstances under which the shots were fired are not, in light of my consideration of the evidence, the circumstances perceived by the majority.

The evidence, in my view, reflects that Heath and his thirteen-year-old nephew inside Heath's car were being subjected to physical attack by numerous persons. Those persons were attacking the vehicle itself, but more threateningly, were punching Heath and the boy and attempting to drag Heath from the car. Heath pulled the firearm and attempted to maneuver the car to escape but got no response from the attackers. He then fired the shots. One shot struck Knox, the person who had been attacking the nephew. Another shot struck the person who was attacking Heath. Heath was able to make his escape through a grassy tractor path rather than through the exit from the parking lot.<sup>8</sup>

These facts do not lead me to conclude, as stated by the trial court, that the offense was "the most serious . . . D Felony Criminal Recklessness that one could imagine" (Tr. at 985), nor as held by the majority an offense of an "extreme nature." Slip op. at 11.

I would reverse and remand for imposition of the presumptive one and one-half year sentence.

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<sup>8</sup> To be sure, Heath, in possessing a firearm, knowingly and voluntarily placed himself at the scene of what he expected to be an all-out donnybrook involving many people bent upon physical harm to the opposing forces. Nevertheless, that circumstance does not change the subsequent circumstances under which Heath and his nephew were being singled out for attack.