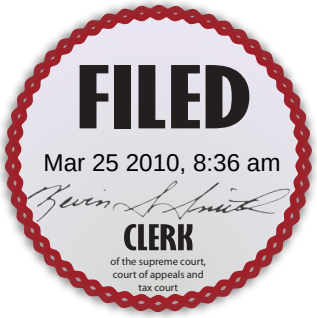

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IN THE
COURT OF APPEALS OF INDIANA

HOSEY WHITMORE,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 71A03-0911-CR-507
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward-Miller, Judge
Cause No. 71D01-0807-MR-11

March 25, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, Hosey Whitmore appeals his conviction and sentence for felony murder. For our review, Whitmore raises two issues, which we expand and restate as: 1) whether sufficient evidence supports Whitmore's conviction for felony murder; 2) whether the trial court properly sentenced Whitmore; and 3) whether Whitmore's sentence is inappropriate in light of the nature of his offense and his character. We conclude sufficient evidence supports the conviction and the trial court properly sentenced Whitmore. However, we also conclude the executed portion of Whitmore's sentence is inappropriate and remand with instructions to suspend five years of his sentence to probation.

Facts and Procedural History

On the night of July 9, 2008, Whitmore, along with his friends, Andrew Harvey and Shannon Dockery, was gambling at an illegal gambling house run by Johnny Duke. After losing some money gambling, Whitmore left, and he and his friends went to the home of another friend, Jeffrey Winston. While there, Whitmore suggested they all return to Duke's and rob him. Early the next morning, the four men left in Whitmore's car, heading to Duke's, but the car ran out of gas on the way and the men had to continue on foot. Winston and Harvey were armed with a .38 caliber and a .45 caliber handgun respectively.

Whitmore and Dockery arrived at Duke's house first, entered, and began playing dice with Duke. Winston and Harvey arrived a short time later. Harvey then drew his gun and pointed it at Duke. Whitmore and Dockery walked out of the house as Duke

attempted to wrestle Harvey's gun away from him. At some point during the scuffle, or shortly thereafter, Winston shot Duke twice, once in the head and once in the stomach. Harvey and Winston then stole money from Duke and another person in the house and fled. Duke died several days later from his injuries.

While fleeing the house, Winston discarded his gun in some bushes. Later that day, Whitmore returned to retrieve the gun and hid it in a wall inside his home. At some point after the shooting, Whitmore flagged down a police officer and reported Duke had been shot, referring to Duke as his friend. Whitmore was questioned by police on three separate occasions. Initially, Whitmore lied to police about his involvement in the crime and provided false identities for his co-conspirators.

On July 16, 2008, the State charged Whitmore and the other three men with felony murder and robbery, a Class A felony. Winston and Harvey both pled guilty to robbery, and the State dismissed the felony murder charges in exchange for their testimony against Whitmore and Dockery. A jury trial was held from July 27 to 31, 2009, after which the jury found Whitmore guilty of felony murder and robbery. The trial court held a sentencing hearing on September 3, 2009, at which it vacated Whitmore's robbery conviction as a lesser included offense to felony murder and sentenced Whitmore to serve fifty-five years with the Department of Correction. Whitmore now appeals.

Discussion and Decision[1]

I. Sufficiency of the Evidence

A. Standard of Review

In reviewing sufficiency of the evidence claims:

> [we] must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. [T]he evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (citations and quotations omitted) (emphasis in original).

B. Felony Murder

In order to convict an individual of felony murder, the State must prove beyond a reasonable doubt the individual killed another person while committing a robbery or other dangerous crime. See Ind. Code § 35-42-1-1(2). It is undisputed that Winston shot Duke during the commission of a robbery, and Duke later died from his injuries; therefore, a felony murder occurred. It is also undisputed that Whitmore did not shoot Duke and was not armed. However, under the accomplice liability statute, a person who "knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense." Ind. Code § 35-41-2-4.

[1] We heard oral arguments on February 11, 2010 in the courtroom of the Indiana Supreme Court. We thank both counsel for their excellent advocacy.

> Factors considered by the fact-finder to determine whether a defendant aided another in the commission of a crime include: (1) presence at the scene of the crime; (2) companionship with another engaged in a crime; (3) failure to oppose the commission of the crime; and (4) the course of conduct before, during, and after the occurrence of the crime. While the defendant's presence during the commission of the crime or his failure to oppose the crime are, by themselves, insufficient to establish accomplice liability, the trier of fact may consider them along with the factors above to determine participation. Furthermore, accomplice liability applies to the contemplated offense and all acts that are a probable and natural consequence of the concerted action. An accomplice may be held accountable for a murder performed by another during the person's departure from the crime scene.

Wieland v. State, 736 N.E.2d 1198, 1202-03 (Ind. 2000) (citations omitted).

The evidence supporting the conviction demonstrates that Whitmore first suggested robbing Duke, pointing out that only two people were in the gambling house. Whitmore intended to drive the group to Duke's to commit the robbery, although his car ran out of gas on the way and the group had to continue on foot. While there is no evidence Whitmore actively took part in the robbery or shooting, there is also no evidence he did anything to oppose the robbery or shooting. Afterward, Whitmore fled the scene with the other three men, and although he initially split off from them, they all reunited at Winston's house later that day. Finally, Whitmore went back to the place where Winston had thrown the murder weapon, found the weapon, and disposed of it inside one of the walls in his house. All of these actions demonstrate that Whitmore knowingly aided Winston and Harvey in the commission of the robbery.

Whitmore argues, however, the evidence is based solely on the testimony of Winston, the confessed shooter, and Harvey, the only other person who used a weapon during the robbery, and their testimony is inherently unreliable. Specifically, Whitmore

points out the two witnesses provided conflicting testimony about whether Whitmore or Winston provided the murder weapon. Initially, we point out Whitmore's argument amounts to a request that we reweigh the evidence or judge witness credibility, which we will not do. See Drane, 867 N.E.2d at 146. In addition, the source of the guns is not dispositive of Whitmore's knowing participation in the robbery. Whether he provided one of the guns or not, Whitmore knew Harvey and Winston were armed when the four men set off to rob Duke. [2]

Whitmore asserts his case is similar to that of Garland v. State, 719 N.E.2d 1236 (Ind. 1999). In Garland, Lloyd, the lover of Garland's mother, informed Garland of his intent to kill Garland's father and asked for Garland's help. Garland repeatedly told Lloyd he wanted nothing to do with killing his father, but he did not warn his father of Lloyd's intentions. On the night of the murder, Garland was home with his mother and father when Lloyd came over. Garland's mother initially went out to speak to Lloyd, and after a few minutes, Garland went out to check on them. Lloyd told Garland to stay outside if he did not want to have anything to do with the murder. While Garland stood outside, Lloyd walked in and shot and killed Garland's father. Afterward, Garland initially lied about his knowledge of the murder before finally confessing five months

[2] Whitmore also argues we should discount Winston's testimony that Whitmore gave him the murder weapon based on the incredible dubiosity rule. See White v. State, 706 N.E.2d 1078, 1079 (Ind. 1999) ("When a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed.") (citation omitted). Aside from our discussion above regarding the non-material nature of evidence of the source of the gun, Whitmore's reliance on the incredible dubiosity rule is misplaced. "Application of this rule is limited to cases … where a sole witness presents inherently contradictory testimony which is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the appellant's guilt." Id. at 1079-80 (quoting Tillman v. State, 642 N.E.2d 221, 223 (Ind. 1994) (emphasis added)). Whitmore's conviction was based upon the testimony of both Winston and Harvey as well as circumstantial evidence linking him to the robbery. The jury was made aware of the plea agreements entered into by Winston and Harvey and had the opportunity to determine the credibility of those witnesses in light of their incentives and expectations of favorable treatment. We will not reassess those credibility determinations. See id. at 1080. Therefore, there is no basis for applying the incredible dubiosity rule here.

later. Our supreme court determined the evidence of Garland's conduct prior to, during, and after the murder was insufficient to prove he knowingly or intentionally aided, induced, or caused Lloyd to commit the murder. Id. at 1242. However, our supreme court did find the evidence sufficient to support a conviction for assisting a criminal. Id.

The evidence against Whitmore is considerably more than that in Garland. Unlike in Garland, the evidence here indicates the robbery was Whitmore's idea. In addition, Whitmore attempted to drive the group to Duke's to commit the robbery. After the robbery and shooting, Whitmore recovered and hid the murder weapon. This evidence is sufficient to support a finding that Whitmore knowingly and intentionally aided and induced the robbery. As a result, the evidence is sufficient to support Whitmore's conviction for felony murder.

II. Whitmore's Sentence

A. Standard of Review

We engage in a multi-step process when evaluating a sentence. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (2007). First, the trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Id. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. Third, the weight given to those reasons, i.e. to particular aggravating or mitigating circumstances, is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id.

B. Propriety of Sentence

A trial court may impose "any sentence that is: (1) authorized by statute … regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d). However, a trial court abuses its discretion when it: 1) fails to issue any sentencing statement; 2) enters a sentencing statement that explains reasons for imposing a sentence, but the record does not support the reasons; 3) enters a sentencing statement that omits reasons clearly supported by the record and advanced for consideration; or 4) considers reasons that are improper as a matter of law. Anglemyer, 868 N.E.2d at 490-91.

Initially, we point out that Whitmore's abuse of discretion argument is barely coherent. Whitmore first argues the trial court "placed little or no weight on the significant mitigating factors" that Whitmore did not have a gun and did not commit the murder. Similarly, Whitmore seems to argue the trial court gave too much weight to his prior criminal history as an aggravating circumstance. As stated above, the weight given by the trial court to particular aggravating or mitigating circumstances is not subject to appellate review. Id. at 491. Therefore, we hold the trial court did not abuse its discretion when it sentenced Whitmore.

C. Inappropriateness of Sentence

Whitmore received the advisory sentence of fifty-five years for felony murder. See Ind. Code § 35-50-2-3(a). Pursuant to Indiana Appellate Rule 7(B), we may revise a sentence 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."

When making this decision, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 196 (Ind. Ct. App. 2007), trans. denied; cf. McMahon v. State, 856 N.E.2d 743, 750 (Ind. Ct. App. 2006) ("[I]nappropriateness review should not be limited … to a simple rundown of the aggravating and mitigating circumstances found by the trial court."). However, the defendant bears the burden to "persuade the appellate court that his … sentence has met this inappropriateness standard of review." Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

1. Nature of the Offense

Whitmore initiated, helped plan, facilitated, and participated in a robbery that went bad and ended in a murder. Winston and Harvey went into Duke's armed with firearms. Whitmore provided one of the guns[3] and later retrieved and disposed of the murder weapon. Although Winston claims he shot in Duke's general direction from across the room, Harvey's testimony and the evidence of Duke's wounds paint a different picture. Harvey testified that Winston pointed his gun at Duke from close range, causing Duke to give up his struggle and say, "all right, man all right. Y'all can have [the money]." Transcript at 509. Harvey took the money from Duke and started to leave, when Winston shot Duke. The circumstances of the shooting and the victim's lingering death make this crime more heinous than an average felony murder.

We acknowledge that Whitmore did not shoot Duke or carry a gun that night. In addition, the evidence indicates Whitmore had fled the scene prior to the shooting. Nonetheless, Whitmore is culpable for the actions of his co-conspirators. Ind. Code § 35-

[3] The evidence most favorable to the conviction demonstrates Whitmore provided the murder weapon to Winston. However, this evidence is based solely on Winston's testimony, which was contradicted by Harvey, who testified Winston provided the guns.

41-2-4. In addition, the robbery was initially Whitmore's idea, he attempted to drive the group to Duke's, and he disposed of the murder weapon. In light of the nature of the offense we cannot say Whitmore's sentence is inappropriate.

2. Character of the Offender[4]

Whitmore has an extensive criminal history. In the eight years prior to the robbery, Whitmore has seven misdemeanor convictions: resisting arrest; fleeing arrest; unlawful possession of a firearm; criminal trespass; false informing; and driving without a license twice, and one felony, residential burglary. Moreover, Whitmore was charged with seven additional misdemeanors and one additional felony, although those charges were eventually dismissed. On one occasion, Whitmore had his probation revoked due to being charged with a subsequent felony. Clearly Whitmore has demonstrated an inability and unwillingness to avoid criminal activity. Further, Whitmore initially lied to police about his involvement in the crime and provided false identifications of the other people involved. Considering this, we cannot say Whitmore's sentence is inappropriate in light of his character.

That being said, we cannot ignore the fact that Whitmore played a lesser role in the violence that led to Duke's murder yet received an executed sentence that is five years greater than the maximum possible sentence that could be imposed upon Winston,

[4] The pre-sentence investigation report is included as part of the Appendix on white paper. Indiana Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Ind. Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Indiana Administrative Rule 9(G)(1)(b)(viii) states that "[a]ll pre-sentence reports pursuant to Ind. Code § 35-38-1-13" are "excluded from public access" and "confidential." Whitmore's inclusion of the pre-sentence investigation report within the appendix is inconsistent with Trial Rule 5(G), which states, in pertinent part, that "[w]hole documents that are excluded from public access . . . shall be tendered on light green paper or have a light green coversheet attached to the document, marked 'Not for Public Access' or 'Confidential.'"

who committed the murder, but pled guilty only to robbery.[5] See Ind. Code § 35-50-2-4 (maximum sentence for a Class A felony conviction is fifty years). While this fact does not minimize the grievous nature of the crime or the seriousness of Whitmore's criminal history, it does lead us to believe the executed portion of Whitmore's sentence is inappropriate. Therefore, we remand this case to the trial court with instructions to suspend five years of Whitmore's fifty-five year sentence to probation.

Conclusion

Sufficient evidence supports Whitmore's conviction for felony murder, and the trial court did not abuse its discretion when it sentenced Whitmore. However, we find the executed portion of Whitmore's sentence is inappropriate. Therefore, we affirm Whitmore's conviction and remand this case to the trial court with instructions to suspend five years of Whitmore's fifty-five year sentence to probation.

Affirmed in part and remanded with instructions.

DARDEN, J., and BAILEY, J., concur.

[5] In addition, Whitmore's sentence is fifteen years greater than Harvey's, who initiated the robbery, pointed his gun at Duke, and took the money.