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IN THE COURT OF APPEALS OF INDIANA

DUWARD T. ROBY,
Appellant-Defendant,
vs.
STATE OF INDIANA,
Appellee-Plaintiff.

No. 10A01-0910-CR-492

APPEAL FROM THE CLARK SUPERIOR COURT
The Honorable Vicki L. Carmichael, Judge
Cause No. 10D01-0902-FB-47

October 25, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Duward Roby appeals his convictions after a jury trial of four counts of Class B felony robbery and of being an habitual offender.[1] He raises four issues: whether it was fundamental error to permit testimony by a State's witness in violation of a pretrial order *in limine*; whether his sentence was appropriate; whether he could properly be convicted of four robberies when he robbed only one bank but took money from four tellers; and whether a separate sentence should have been imposed for the habitual offender count. We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

Roby, wearing a mask and latex gloves and armed with a gun, entered a bank in Jeffersonville and demanded money from four different tellers. Soon afterward, a resident of a nearby subdivision saw a man carrying a gun and a bag run to a car parked on the street. The man took off a mask as he jumped into the back seat of the car. Police stopped that car and found Roby, the bank's money, a mask, a bag, latex gloves, and a gun.

The court granted Roby's motion *in limine* to prohibit the State's witnesses from testifying they were familiar with Roby from past law enforcement contacts. Roby was found guilty of all four counts of robbery, and he agreed to plead guilty to being an habitual offender. The court entered judgments of conviction on all four robbery counts and sentenced Roby to twenty years on each, with the four sentences to run concurrently. The

[1] Ind. Code § 35-42-5-1. Robbery is a Class B felony if it is committed while armed with a deadly weapon or results in bodily injury to any person other than the defendant. *Id*.

court ordered a thirty-year enhancement for the habitual offender count and ordered it to run consecutively to the robbery sentences.

DISCUSSION AND DECISION

1. Testimony of State's Witness

The trial court granted Roby's motion *in limine* and ordered the State's witnesses to "refrain from mentioning their familiarity with Mr. Roby." (App. at 208.) The motion indicated counsel's belief the State "may intentionally or unintentionally allow its law enforcement witnesses to testify to their familiarity with Mr. Roby based on prior encounters with law enforcement." *Id*. A police officer testified at trial he saw a head pop up in the back seat of the car where Roby was found. "And then he raised his head up a little bit longer and that's when I seen [sic] it was Tommy Roby in the back seat." (Tr. at 114.)

The officer's testimony did not violate the order *in limine* because it was not apparent the statement reflected the officer's "familiarity" with Roby "based on prior encounters with law enforcement." The jurors could have understood the Officer's statement as a reference to Roby as the person on trial at the time, and not to the officer's "familiarity" with Roby at the time the car was stopped.

Even if there was a violation, this allegation of error is waived because Roby did not object to the testimony at trial. A motion *in limine* is used as a protective order against prejudicial questions and statements being asked during trial. Such a ruling does not determine the ultimate admissibility of the evidence; that determination is made by the trial

court in the context of the trial. *Reid v. State*, 719 N.E.2d 451, 454 (Ind. Ct. App. 1999), *reh'g denied, cert. denied* 531 U.S. 995 (2000). Absent a contemporaneous objection at trial a ruling on a motion *in limine* does not preserve an issue for appeal. *Id.*

While a claim of error must be raised during trial in order to be available as an issue on appeal, we sometimes entertain such claims under the rubric of "fundamental error." *Clark v. State*, 915 N.E.2d 126, 131 (Ind. 2009), *reh'g denied*. Fundamental error is an error that makes a fair trial impossible or is a blatant violation of basic and elementary principles of due process presenting an undeniable and substantial potential for harm. *Id.*

As the statement, "I seen it was Tommy Roby in the backseat" did not necessarily indicate the officer knew Roby when the getaway car was stopped, or that any "familiarity" with Roby was "based on prior encounters with law enforcement," we cannot say the admission of the statement amounts to a "blatant violation of basic and elementary due process" making a fair trial impossible, which is the standard for fundamental error. *See Clark*, 915 N.E.2d at 133.

2. Appropriateness of Sentence

Sentencing is principally a discretionary function in which the trial court's judgment should receive considerable deference. *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). The Indiana General Assembly has substituted advisory sentences for presumptive sentences, providing a trial court may impose any sentence within the allowable range for a given crime without a requirement to identify specific aggravating or mitigating

circumstances. *Id*. The trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence. The reasons given, and the omission of reasons arguably supported by the record, are reviewable on appeal for abuse of discretion. But the relative weight or value assignable to reasons properly found or those that should have been found is not subject to review for abuse, and appellate review of the merits of a sentence may be sought on the grounds outlined in Ind. Appellate Rule 7(B), *i.e*., the sentence is "inappropriate in light of the nature of the offense and the character of the offender."[2] *Id*. at 1223.

In determining the appropriateness of a sentence, we may consider any factors appearing in the record. *Clara v. State*, 899 N.E.2d 733, 736 (Ind. Ct. App. 2009). The "character of the offender" portion of the sentence review involves consideration of the aggravating and mitigating circumstances[3] and of general considerations. *Id.* The defendant

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[2] As for the nature of Roby's offense, Roby and the State agree the offense "is not necessarily any more egregious than other bank robberies." (Br. of the Appellee at 15.) We will therefore address only whether the sentence is inappropriate in light of Roby's character.

[3] We accordingly address Roby's independent arguments concerning the aggravating and mitigating circumstances in our review of appropriateness based on Roby's character. We agree with Roby that certain aggravators the court found were improper, for example that the victims suffered emotional trauma, and we disregard those aggravators in our appropriateness review.

Roby also argues the court should have found his guilty plea a mitigating circumstance. That a defendant pleads guilty does not automatically amount to a significant mitigating factor. *Lindsey v. State*, 877 N.E.2d 190, 198 (Ind. Ct. App. 2007), *trans. denied*. Where the State reaps a substantial benefit from a guilty plea, the defendant deserves to have a substantial benefit returned in terms of the guilty plea being given significant mitigating weight. *Id*. But where the evidence against him is such that the decision to plead guilty is a pragmatic one, the fact that he pleads guilty does not rise to the level of significant mitigation. *Id*. For example, Lindsey pleaded guilty to the habitual substance offender allegation only after the State sought to present certified documents clearly establishing his status. The State thus did not reap a substantial benefit as Lindsey's decision to plead guilty did not save the State time or money, and was a pragmatic decision. *Id*. We held the trial court did not abuse its discretion in declining to consider Lindsey's guilty plea a significant

bears the burden of persuading us that his or her sentence is inappropriate. *Richardson v. State*, 906 N.E.2d 241, 246-47 (Ind. Ct. App. 2009).

We cannot find the sentence inappropriate. Roby acknowledged at sentencing that he has eleven prior felony convictions dating back to 1981. Many involved taking other people's property by means of theft or forgery. He has a number of arrests that were not reduced to convictions, but which could properly be considered. *See, e.g.*, *Monegan v. State*, 756 N.E.2d 499, 503 (Ind. 2001) ("Rather than as evidence of prior criminal history, the trial court properly deemed Monegan's four prior apprehensions as evidence that his antisocial behavior was not deterred by numerous encounters with the law."). We must agree with the State's characterization of Roby as a "career criminal who has spent most of his life taking other's property and abusing drugs and alcohol. He has now escalated the nature of his criminal offenses to that of armed bank robbery." (Br. of the Appellee at 16.) Roby's fifty-year sentence was not inappropriate.

3. The Single Larceny Rule

The State concedes on appeal that Roby should have been convicted of only one robbery. *See Williams v. State*, 271 Ind. 656, 669, 395 N.E.2d 239, 248-49 (1979) ("We hold that an individual who robs a business establishment, taking that business's money from four employees, can be convicted of only one count of armed robbery."). This is referred to as the

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mitigating factor. *Id*. Roby's decision to plead guilty to the habitual offender allegation was similarly a pragmatic decision the court was not obliged to consider as a mitigator.

"Single Larceny Rule": "The prevailing rule is that when several articles of property are taken at the same time, from the same place, belonging to the same person or to several persons there is but a single "larceny", *i.e.* a single offense." *Raines v. State*, 514 N.E.2d 298, 300 (Ind. 1987).

That rule "has long been entrenched in Indiana law." *Id*. (citing *Furnace v. State*, 153 Ind. 93, 95, 54 N.E. 441, 444 (1899)). We are therefore concerned that the prosecutor, in apparent disregard of this over-one-hundred-year-old rule, proceeded to charge Roby with four larcenies and to vigorously argue to the jury he should be convicted of all four independent counts. We direct the trial court on remand to vacate three of the robbery convictions and the sentences therefor.

4. The Habitual Offender Count

The State and Roby also agree the trial court should not have imposed a separate sentence for the habitual offender count. That is because an habitual offender finding does not amount to a separate crime nor does it result in a separate sentence; it is a sentence enhancement imposed on conviction of a subsequent felony. *Barnett v. State*, 834 N.E.2d 169, 173 (Ind. Ct. App. 2005). We direct the trial court on remand to revise Roby's sentence so the habitual offender finding enhances the sentence for the remaining robbery conviction.

We accordingly affirm in part, reverse in part, and remand.

ROBB, J., and VAIDIK, J., concur.