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IN THE COURT OF APPEALS OF INDIANA

JAMAAR BESS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0707-CR-594
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause Nos. 49G02-0608-MR-145267

January 28, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Jamaar Bess appeals the sentence he received after pleading guilty to Murder,[1] a felony, and Robbery,[2] a class C felony. Specifically, Bess argues that the fifty-five-year aggregate sentence cannot stand because the trial court improperly balanced the aggravating and mitigating circumstances and that several mitigating circumstances that were supported in the record were overlooked. Bess further claims that he is entitled to a reduced sentence because a sentence of fifty-five years is inappropriate in light of the nature of the offenses and his character. Finding no error, we affirm the judgment of the trial court.

FACTS

Eighteen-year-old Bess, Rodney Harris, and Herbert Johnson concocted a plan to rob an Indianapolis cab driver. On August 2, 2006, Bess directed someone to call and arrange for a cab to meet him in front of an abandoned residence on North Butler Avenue. When the cab arrived, Johnson opened the passenger door and pointed a gun at the driver, Clarence Hoosier. One of the men took thirty dollars and a cell phone from Hoosier, and Johnson pulled Hoosier from the vehicle. Johnson then shot Hoosier in the head, killing him.

As a result of the incident, Bess was charged with murder, felony murder, and robbery as a class A felony. Thereafter, on February 26, 2007, Bess agreed to plead guilty to murder and robbery as a class C felony pursuant to a plea agreement negotiated

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[1] Ind. Code § 35-42-2-1.

[2] I.C. § 35-42-5-1(2).

with the State. The plea agreement also provided that the State would dismiss the felony murder charge. Sentencing was left to the trial court's discretion except that the sentences for the two offenses were to run concurrently, and the aggregate sentence was not to exceed fifty-five years.

The trial court accepted the plea agreement, and at the sentencing hearing conducted on June 13, 2007, the trial court identified Bess's prior juvenile history and the nature and circumstances of the offenses as aggravating circumstances. Bess's age, expression of remorse, and his acceptance of responsibility for his actions were identified as mitigating factors. The trial court then determined that the aggravating and mitigating circumstances were evenly balanced and sentenced Bess to fifty-five years for murder and four years for robbery, to be served concurrently. Bess now appeals.

DISCUSSION AND DECISION

I. Weight of Factors and Overlooked Mitigating Circumstances

Bess claims that his sentence must be set aside because the trial court assigned improper weight to the mitigating and aggravating factors that were found. Moreover, Bess contends that the trial court overlooked the existence of several mitigating factors that were apparent from the record.

We initially observe that sentencing decisions are within the sound discretion of the trial court. Jones v. State, 790 N.E.2d 536, 539 (Ind. Ct. App. 2003). It is within the trial court's discretion to determine both the existence and weight of a significant mitigating circumstance. Creager v. State, 737 N.E.2d 771, 782 (Ind. Ct. App. 2000).

In addressing Bess's claims that the trial court erred in failing to assign appropriate weight to the mitigators and aggravators that it identified, we note that our Supreme Court has determined that a trial court "cannot be said to have abused its discretion in failing to 'properly weigh' such factors." Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). More specifically, "[t]he relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse." Id. Therefore, we decline to address Bess's claim that the trial court abused its discretion in giving too much weight to the aggravating circumstances and too little weight to the mitigating factors. See id.

Bess also contends that the trial court overlooked certain mitigating circumstances that were apparent from the record, including Bess's lesser degree of culpability in the offenses because he was not the shooter, Bess's "severely troubled background," and his potential for rehabilitation. Appellant's Br. p. 12-18. A defendant's allegation that the trial court failed to identify a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Anglemyer, 868 N.E.2d at 493. In other words, a trial court is not obligated to find a circumstance to be mitigating merely because it is advanced as such by the defendant. Spears v. State, 735 N.E.2d 1161, 1167 (Ind. 2000). However, when a trial court fails to find a mitigator that is clearly supported by the record, a reasonable belief arises that the trial court improperly overlooked this factor. Banks v. State, 841 N.E.2d 654, 658 (Ind. Ct. App. 2006), trans. denied.

As for Bess's claims that the trial court should have identified the fact that he was not the shooter as a significant mitigating factor, we note that a defendant's role in a crime may be mitigating. Sensback v. State, 720 N.E.2d 1160, 1164 (Ind. 1999). However, an accomplice to an offense is not automatically entitled to a lesser sentence. Herron v. State, 808 N.E.2d 172, 179 (Ind. Ct. App. 2004).

In this case, the trial court noted that even though Bess was not the actual shooter, the evidence showed that he supplied the gun to Johnson. Tr. p. 50. Moreover, Bess actively and significantly participated in setting up the robbery that led to Hoosier's murder. Id. In light of these circumstances, we cannot say that the trial court should have identified Bess's alleged lesser culpability as a mitigating factor merely because he was not the actual shooter.

Bess also claims that the trial court erred when it did not identify his "severely disadvantaged background" as a mitigating circumstance. Appellant's Br. p. 14. However, we note that Bess's counsel did not argue at the sentencing hearing that Bess's background and troubled childhood was a mitigating circumstance. Additionally, Bess did not attempt to establish any nexus between his background and the crimes he committed. See Evans v. State, 855 N.E.2d 378, 387-88 (Ind. Ct. App. 2006) (recognizing that a defendant's mental illness is afforded mitigating weight when there is a nexus between the mental illness and the offense), trans. denied. Thus, the claim is waived. See Simms v. State, 791 N.E.2d 225, 233 (Ind. Ct. App. 2003) (observing that if the defendant fails to advance a mitigating circumstance at sentencing, this court will

presume that the circumstance is not significant and the defendant is precluded from advancing it as a mitigating circumstance for the first time on appeal).

Finally, Bess argues that his sentence should be reduced because the trial court should have identified his "potential for rehabilitation" as a mitigating factor. Appellant's Br. p. 17-18. Notwithstanding this contention, we again point out that the trial court has discretion in evaluating mitigating factors and must only include those it deems significant. Anglemyer, 868 N.E.2d at 493. Here, the record shows that Bess had a number of prior juvenile adjudications for battery, resisting law enforcement, fleeing law enforcement, and theft, which would have been crimes had Bess committed the offenses as an adult. Tr. p. 48-50. Moreover, the evidence established that Bess was an active participant in Hoosier's murder, in that it was established that Bess's gun was used in the commission of the murder and Bess assisted the others in luring Hoosier to the abandoned residence before robbing him. In light of these circumstances, we cannot say that the trial court abused its discretion when it did not identify Bess's potential for rehabilitation as a significant mitigating factor.

II. Appropriate Sentence

Bess argues that his sentence is inappropriate in light of the nature of the offenses and his character. Pursuant to Indiana Appellate Rule 7(B), our court has the constitutional authority to 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." We defer to the trial court during appropriateness review, Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007), and we refrain from

merely substituting our judgment for that of the trial court. Foster v. State, 795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). With regard to the nature of the offense, the advisory sentence is the starting point in our consideration of an appropriate sentence for the crime committed. Id. at 1081. Pursuant to Indiana Code section 35-50-2-3, the advisory sentence for murder is fifty-five years, and the advisory sentence for robbery as a class C felony is four years. I.C. § 35-50-2-6.

As discussed above, Bess was an active participant in the murder and robbery of Hoosier. Indeed, the trial court pointed out that Bess and the two other men lured Hoosier to the vacant residence and robbed him of thirty dollars and a cell phone at gunpoint. Tr. p. 50. Johnson then shot and killed Hoosier with the gun that Bess had purportedly supplied. Id. Under these circumstances, the nature of Bess's crime supports the sentence that the trial court imposed. In other words, we do not find the nature of the offenses to render Bess's sentence inappropriate.

As for Bess's character, the record demonstrates that he has a number of juvenile adjudications, which include battery and resisting a police officer, offenses that would have been criminal had they been committed by an adult. PSI p. 3-5. Obviously, Bess has not been deterred from criminal conduct. Even more compelling, the severity of Bess's criminal activity has escalated despite his previous contacts with the criminal justice system. As a result, we do not find the fifty-five-year aggregate sentence to be inappropriate in light of the nature of the offenses and Bess's character.

The judgment of the trial court is affirmed.

DARDEN, J., and BRADFORD, J., concur.