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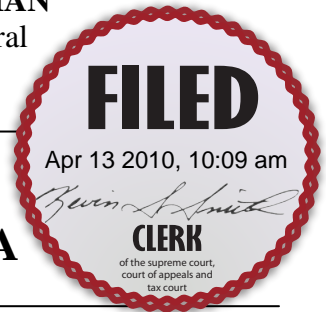
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**IN THE
COURT OF APPEALS OF INDIANA**

ANTONIO WALKER,)
)
Appellant-Defendant,)

vs.)

No. 49A02-0905-CR-432

STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Paula Loossa, Senior Judge
Cause No. 49G02-0812-FA-289807

April 13, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Antonio Walker appeals his convictions and sentences for one count of robbery as a class B felony;¹ six counts of attempted robbery, one as a class A felony and five as class B felonies;² unlawful possession of a firearm by a serious violent felon as a class B felony;³ criminal recklessness as a class C felony;⁴ carrying a handgun without a license as a class A misdemeanor;⁵ and his adjudication as an habitual offender.⁶ Walker raises several issues, which we revise and restate as:

- I. Whether the trial court properly denied Walker's Batson challenge;
- II. Whether the trial court abused its discretion in denying Walker's motion for mistrial;
- III. Whether the evidence is sufficient to sustain Walker's convictions for attempted robbery as class B felonies and his conviction for unlawful possession of a firearm by a serious violent felon; and
- IV. Whether the trial court abused its discretion in sentencing Walker.

We affirm in part, reverse in part, and remand with instructions.

The relevant facts follow. During the evening of December 18, 2008, a number of people were at Big Engine Entertainment, an Indianapolis recording studio owned by Gregory Arnold, Jr. ("Arnold Jr."), for a recording session. The building's occupants included a number of Arnold Jr.'s relatives, friends, employees, and children. Arnold Jr.

¹ Ind. Code § 35-42-5-1 (2004).

² Ind. Code § 35-42-5-1; Ind. Code § 35-41-5-1 (2004).

³ Ind. Code § 35-47-4-5 (Supp. 2006).

⁴ Ind. Code § 35-42-2-2 (Supp. 2006).

⁵ Ind. Code § 35-47-2-1 (Supp. 2007).

⁶ Ind. Code § 35-50-2-8 (Supp. 2005).

had known Walker “all [his] life,” and many of the occupants were acquainted with Walker. Transcript at 468. A recording was being made in the studio, and the occupants of the building were located in different rooms of the building.

Arnold Jr.’s sister Shontez Simmons was outside smoking a cigarette when Walker and his brother Antwane Walker (“Antwane”) arrived at the studio. Walker and Antwane greeted Simmons, entered the studio building for “not even a minute,” and then exited the building. Id. at 108. A few minutes later, Walker and Antwane returned to the building accompanied by Curtis Stokes, Johnnie Stokes, Terry Lynem, and Marcus.⁷ Johnnie Stokes carried a black trash bag to his side. The six men entered the studio building.

Walker and Antwane entered an office where Arnold Jr., Fred Winfield, Shantell Williams, and Andrew Steele were located. Walker greeted Arnold Jr. and shook his hand, and then asked to speak with Andrew Steele in the hallway. Andrew Steele exited the room with Walker and Antwane, at which point Walker pulled out a semi-automatic handgun, placed it “forcefully” against Andrew Steele’s face, and said: “Get down. You know what this is.” Id. at 479-480. Arnold Jr. jumped out of his chair to try to close the door to the office, but Antwane was still in the doorway which initially prevented Arnold Jr. from closing the door.

Johnnie Stokes, who was in the hallway or main office area outside the office where Arnold Jr., Fred Winfield, and Shantell Williams were located, repeated Walker’s

⁷ The perpetrator named Marcus was never fully identified.

command by saying “[g]et down, you know what this is,” and pulled an assault rifle out of the black trash bag he was carrying and fired a shot. Id. at 480. After Johnnie Stokes fired a shot, Arnold Jr. “forcefully closed the door” to the office and “wedged [himself] on the door.” Id. at 482.

Earnest Phillips (“Earnest”)⁸ was located in a recording booth which was connected to the office where Arnold Jr., Fred Winfield, and Shantell Williams were located at the time Walker and Johnnie Stokes made the commands to “get down” elsewhere in the studio. Earnest observed Walker and Antwane enter the office, shake Arnold Jr.’s hand, speak with the individuals in the room, and then leave the room. A few seconds after that, Earnest heard gunshots and picked up a phone and “busted out the window and jumped out the window.” Id. at 600.

In another area of the studio, Terry Lynem and Marcus grabbed Edriese Phillips (“Edriese”), who was an employee of Big Engine Entertainment, and demanded money at gunpoint. Lynem pointed a revolver at Edriese’s stomach and said “[c]ome on with that shit out of your pockets.” Id. at 402. Edriese did not remove anything from his pockets, and Lynem struck him with the revolver, breaking the glasses that Edriese was wearing. Marcus then pushed Edriese against a wall and took \$200 from his pocket. Arnold Jr. took out his handgun, opened the office door slightly, fired at Walker, and then closed the door again.

⁸ The charging information and jury instructions in the record identify Earnest as “Ernest Michael Phillips.” See Appellant’s Appendix at 31, 135. At trial, Earnest testified that his name was “Earnest Michael Simmons.” See Transcript at 593. We will refer to the alleged victim as Earnest or Earnest Phillips in this opinion.

The six men—Walker, Antwane, Terry Lynem, Curtis Stokes, Johnnie Stokes, and Marcus—exited the building and Antwane was observed running backwards, firing a semi-automatic handgun back toward the inside of the building. After the shooting stopped, Collin Moore, another employee of Big Engine Entertainment, was discovered on the floor of the hallway having suffered a gunshot wound to his lower abdomen.

On December 22, 2008, the State charged Walker and his co-defendants⁹ with a number of felony counts, including robbery, attempted robbery, unlawful possession of a firearm by serious violent felon, battery, and criminal recklessness. Walker was charged with: Count I, attempted robbery of Collin Moore as a class A felony; Count II, robbery of Edriese Phillips as a class B felony; Count III, attempted robbery of Arnold Jr. as a class B felony; Count IV, attempted robbery of Shontez Simmons as a class B felony; Count V, attempted robbery of Earnest Phillips as a class B felony; Count VI, attempted robbery of Michael Cameron as a class B felony; Count VII, attempted robbery of Andrew Steele as a class B felony; Count VIII, attempted robbery of Fred Winfield as a class B felony; Count IX, attempted robbery of Willie Brownlee as a class B felony; Count X, attempted robbery of Shantell Williams as a class B felony; Count XII, unlawful possession of a firearm by a serious violent felon as a class B felony; Count XIV, criminal recklessness as a class C felony; and Count XVIII, carrying a handgun without a license as a class A misdemeanor, elevated to a class C felony for a prior

⁹ The State charged Antonio Walker, Antwane Walker, Curtis Stokes, Johnnie Stokes, and Terry Lynem in one information. Some of the counts in the State's information related to Walker's co-defendants and not to Walker.

offense. On February 19, 2009, the State moved to amend a portion of the language in its information related to the attempted robbery counts, which the court granted. On March 2, 2009, the State alleged that Walker was an habitual offender.

Trial commenced on March 9, 2009. During *voir dire*, the State exercised its peremptory challenges to strike two African American jurors. Walker objected to the State's peremptory strikes and argued that the State is required to state a race-neutral basis for its challenges. After the State argued that its reasons for challenging the prospective jurors were race-neutral, the trial court overruled Walker's objection. During the trial, jurors were made aware that Walker and his co-defendants were incarcerated pending trial when a deputy sheriff inadvertently left paperwork in the jury room which disclosed the cellblock locations of Walker and his co-defendants. Walker moved for a mistrial, and after interviewing each of the jurors the trial court denied his motion.

Following the presentation of the State's evidence, Walker moved for a directed verdict on Counts I through X and Count XIV. The trial court granted Walker's motion with respect to Count IV, attempted robbery of Shontez Simmons as a class B felony; Count VI, attempted robbery of Michael Cameron as a class B felony; and Count IX, attempted robbery of Willie Brownlee as a class B felony. On March 13, 2009, the jury found Walker guilty of each of the remaining counts.¹⁰ The trial court found Walker to

¹⁰ The chronological case summary, the completed verdict forms found in the appellant's appendix, and the portion of the trial transcript setting forth the jury's verdicts do not include a verdict for Count XII, unlawful possession of a firearm by a serious violent felon as a class B felony. Also, the final jury instructions did not include an instruction related to Count XII. However, the abstract of judgment states that the jury found Walker guilty on Count XII and Walker concedes in his appellant's brief that he was convicted on Count XII.

be an habitual offender and sentenced him to an aggregate term of 105 years.¹¹
Additional facts will be provided as necessary.

I.

The first issue is whether the trial court properly denied Walker's Batson challenge. "The exercise of racially discriminatory peremptory challenges is constitutionally impermissible." McCormick v. State, 803 N.E.2d 1108, 1110 (Ind. 2004). Peremptory challenges based on race violate the juror's Fourteenth Amendment right to equal protection of the law and require a retrial. Highler v. State, 854 N.E.2d 823, 826 (Ind. 2006). A defendant's claim of racial discrimination in a peremptory strike "triggers a three-step inquiry." Id. (citing Bradley v. State, 649 N.E.2d 100, 105 (Ind. 1995) (citing Batson v. Kentucky, 476 U.S. 79, 96-98, 106 S. Ct. 1712 (1986)), reh'g denied).

First, the defendant must make a prima facie showing that the prosecutor exercised peremptory strikes based on race. Hardister v. State, 849 N.E.2d 563, 576 (Ind. 2006) (citing Batson, 476 U.S. at 96-98, 106 S. Ct. 1712). "A prima facie showing requires the defendant to show that peremptory challenges were used to remove members of a

Also, with respect to Count XVIII, Walker was convicted for carrying a handgun without a license as a class A misdemeanor.

¹¹ Specifically, Walker received thirty years for Count I, attempted robbery as a class A felony; twenty years for Count II, robbery as a class B felony, to run consecutively to Count I; ten years for Counts III, V, VII, VIII, and X, attempted robberies as class B felonies, to run concurrent to Count I; twenty years for Count XII, unlawful possession of a firearm by a serious violent felon as a class B felony, to run consecutive to Count I; five years for Count XIV, criminal recklessness as a class C felony, to run consecutive to Count I; one year for Count XVIII, carrying a handgun without a license as a class A misdemeanor, to run concurrent to Count I; and thirty years for being an habitual offender, to run consecutive to Count I.

cognizable racial group from the jury pool and that the facts and circumstances raise an inference that the removal was because of race.” Id. “The removal of some African American jurors by the use of peremptory challenges does not, by itself, raise an inference of racial discrimination.” Highler, 854 N.E.2d at 827 (citing McCormick, 803 N.E.2d at 1111). “However, the removal of ‘the only . . . African American juror that could have served on the petit jury’ does ‘raise an inference that the juror was excluded on the basis of race.’” Id. (quoting McCormick, 803 N.E.2d at 1111).

Second, once the defendant presents a prima facie case of racial discrimination in the use of a peremptory challenge, “the burden shifts to the State to present a race-neutral explanation for striking the juror.” Highler, 854 N.E.2d at 827 (citing Batson, 476 U.S. at 97-98, 106 S. Ct. 1712). “A race-neutral explanation means ‘an explanation based on something other than the race of the juror.’” Id. (quoting Hernandez v. New York, 500 U.S. 352, 360, 111 S. Ct. 1859, 1866 (1991) (plurality), reh’g denied). Although the prosecutor must present a comprehensible reason and offer more than a mere denial of improper motive, “the second step of this process does not demand an explanation that is persuasive, or even plausible.” Id. (quoting Purkett v. Elem, 514 U.S. 765, 767-768, 115 S. Ct. 1769, 1771 (1995) (per curiam)). If the reason is not inherently discriminatory, it passes the second step. Id. “[T]he issue is the facial validity of the prosecutor’s explanation. Unless a discriminatory intent is inherent in the prosecutor’s explanation, the reason will be deemed race neutral.” Highler, 854 N.E.2d at 827. “[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of

the reasons' proffered." Id. (quoting Miller-El v. Dretke, 545 U.S. 231, 252, 125 S. Ct. 2317, 2332 (2005)). See also Dickens v. State, 754 N.E.2d 1, 7 (Ind. 2001) ("Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.") (citations omitted).

Third, the trial court must evaluate the persuasiveness of the justification offered by the party making the peremptory challenge, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the peremptory challenge.¹² See Highler, 854 N.E.2d at 828. A trial court's decision as to whether a peremptory challenge was discriminatory is given great deference on appeal and will be set aside only if found to be clearly erroneous. Forrest v. State, 757 N.E.2d 1003, 1004 (Ind. 2001). Trial court judges are much better situated than are appellate judges to weigh the credibility of the proffered explanation for striking the prospective juror. See Jeter v. State, 888 N.E.2d 1257, 1264 (Ind. 2008), cert. denied, 129 S. Ct. 645 (2008); see also Ashabraner v. Bowers, 753 N.E.2d 662, 671 (Ind. 2001) ("Batson requires the judge to determine whether a race-neutral reason offered for a challenge is honest, and district judges are much better situated than appellate judges to evaluate the honesty of the lawyers who practice in district court.") (quoting United States v. Roberts, 163 F.3d 998, 1000 (7th Cir. 1998)). "In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory

¹² While the burden of production shifts in step two of the analysis to the party exercising the peremptory challenge, the overall burden to prove discriminatory use of peremptory challenges remains on the party who objected to the challenge. Ashabraner v. Bowers, 753 N.E.2d 662, 672 n.2 (Ind. 2001) (citing Purkett, 514 U.S. 765, 768, 115 S. Ct. 1769 (1995)).

challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge.” *Id.* at 1264-1265 (quoting *Hernandez*, 500 U.S. at 359, 111 S. Ct. 1859 (citations omitted)). “As with the state of mind of a juror, evaluation of the [proponent’s] state of mind based on demeanor and credibility lies peculiarly within a trial judge’s province.” *Id.* (internal quotation marks omitted). A *Batson* claim is one purely of fact, and its resolution will turn largely on an assessment of credibility of both the witnesses and the prosecutor. *Nicks v. State*, 598 N.E.2d 520, 523 (Ind. 1992) (citation omitted).

In this case, during *voir dire*, the State exercised its peremptory challenges to strike two prospective African American jurors—Juror 1 and Juror 12. Walker objected to the State’s peremptory challenges on the basis that “the State should be required to state a race-neutral basis for their challenges, or those jurors should be seated.” Transcript at 40, 1306. The State noted that two other African American jurors on the panel had been struck for cause and that additional African American jurors remained in the jury pool.

Even assuming Walker presented a *prima facie* case of racial discrimination, we conclude that the State presented race-neutral explanations for challenging Jurors 1 and 12. During *voir dire*, the following exchange occurred between the trial court, the prosecutor, and Juror 12:

The Court: Okay. Does anybody have to have fingerprints or DNA before they can convict? [Juror 12].

Prospective Juror: Yes.

[Prosecutor]: Do you think without fingerprints, you would[n't] be able to convict somebody?

Prospective Juror: That's correct.

[Prosecutor]: What about if there was a lot of evidence or something, or if there's other evidence, do you think you have to have some kind of forensic evidence?

Prospective Juror: (Indiscernible,) actions of the person themselves or the one committing the crime, or attempting to do something.

Transcript at 1219-1220. Immediately following the exchange above with Juror 12, the following exchange occurred between the prosecutor and Juror 1:¹³

[Prosecutor]: Okay. Who else feels that way? Okay. She raised her hand first. What do you think about that?

Prospective Juror: . . . I think there should be some kind of fingerprints and . . . other stuff on there.

[Prosecutor]: Okay.

Prospective Juror: Or some kind of DNA.

[Prosecutor]: What if there isn't any fingerprints or DNA? Is there any other evidence that could convince you beyond a reasonable doubt that somebody's guilty?

Prospective Juror: It will be hard.

¹³ We note that the transcript of the jury selection process does not identify the prospective jurors by juror number or by name. In his appellant's brief, Walker cites to this exchange in the transcript as the testimony of prospective Juror 1. In its appellee's brief, the State does not contest the accuracy of Walker's attribution of the testimony to Juror 1.

Id. at 1220-1221. Later during *voir dire*, Juror 1 testified that he did not think that a family member who had been previously convicted of a crime had been “treated fairly by the police.” Id. at 1239.

The State argued that its reasons for striking Juror 1 and Juror 12 were race-neutral. Specifically, the State argued that Juror 1 “said that she need[ed] more evidence than just . . . testimony to convict and the State’s concerned with that, given that . . . our evidence testimony.” Id. at 1308. The State also argued that “from the very beginning [Juror 12] was indicating that he said he actually could not convict without DNA or fingerprint evidence.” Id.

Walker argues on appeal that “[t]he State’s reasons for removal of the prospective jurors was pretextual.” Appellant’s Brief at 29. The State argues that its reasons for striking Juror 1 and Juror 12 were race-neutral. The evidence presented by the State in this case was comprised primarily of the testimony of eyewitnesses, including employees of Big Engine Entertainment and family members of Arnold Jr. who were at the studio building at the time of the offenses. During the jury selection process, a number of the State’s questions for the prospective jurors related to whether those jurors felt that they would be able to convict a person based upon testimony alone.

Based upon our review of the exchanges above and the questions posed by the State to the prospective jurors during *voir dire*, we cannot say that “discriminatory intent is inherent in the prosecutor’s explanation” as to its reasons for challenging Jurors 1 and 12 or that the trial court, who viewed the challenged jurors, was clearly erroneous in

accepting the State's explanations. See Kent v. State, 675 N.E.2d 332, 340 (Ind. 1996) (concluding that the State provided race-neutral explanations for challenging the potential jurors and concluding that the trial court's finding as to discriminatory intent in accepting the State's explanations was not clearly erroneous); Lee v. State, 689 N.E.2d 435, 440-441 (Ind. 1997) (holding that the State provided race-neutral reasons to challenge a prospective juror and that the reasons were not merely pretextual), reh'g denied; Highler, 854 N.E.2d at 826-828 (holding that the trial court's conclusion was not clearly erroneous where the trial court concluded that the prosecutor's reasons for striking a prospective juror were not pretextual). The trial court did not err in overruling Walker's Batson objection.

II.

The next issue is whether the trial court abused its discretion in denying Walker's motion for a mistrial. Whether to grant or deny a motion for a mistrial is a decision left to the sound discretion of the trial court. Alvies v. State, 795 N.E.2d 493, 506 (Ind. Ct. App. 2003), trans. denied. We will reverse the trial court's ruling only upon an abuse of that discretion. Id. We afford the trial court such deference on appeal because the trial court is in the best position to evaluate the relevant circumstances of an event and its impact on the jury. Id. To prevail on appeal from the denial of a motion for a mistrial, the appellant must demonstrate the statement or conduct in question was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected. Id. We determine the gravity of the peril based upon the probable

persuasive effect of the misconduct on the jury's decision rather than upon the degree of impropriety of the conduct. Id. A mistrial is an extreme sanction warranted only when no other cure can be expected to rectify the situation. Id.

Here, as previously mentioned, Walker moved for a mistrial after learning that several of the jurors had been exposed to paperwork disclosing the fact that Walker and his co-defendants were incarcerated pending trial. Specifically, a deputy sheriff inadvertently left some paperwork in the jury room which disclosed the cellblock locations of Walker and his co-defendants, and some of the jurors saw and discussed the paperwork. One of the jurors informed court staff that the jurors knew that Walker and his co-defendants were in the custody of law enforcement. Upon discovering that the jurors had been exposed to the fact that Walker and his co-defendants were incarcerated pending trial, the trial court questioned each juror to determine what the jurors had learned and whether the information would prejudice Walker or his co-defendants.¹⁴ After interrogating each juror, the trial court was convinced that the jurors would remain impartial in their deliberations and that the jurors' impartiality was not affected by the fact that they had learned that Walker and his co-defendants were incarcerated pending trial. The trial court stated that "any reasonable citizen in this city would walk into a courtroom and hear the nature of these charges and I think they would automatically

¹⁴ Walker also objected to the trial court's proposal to question the jurors on the basis that it would "make a bad situation even worse." Transcript at 168. On appeal, Walker does not appear to argue that the trial court erred in deciding to question the jurors.

conclude by the nature of the charges that the defendants may be incarcerated.” Transcript at 251. The trial court denied the motion for a mistrial.

Based upon our review of the record, we conclude that Walker has not established that the fact that the jury was exposed to documents showing that he and his co-defendants were incarcerated pending trial was so prejudicial and inflammatory that he was placed in a position of grave peril. We note that no juror expressed concern about his or her ability to remain impartial and that several of the jurors expressed that they had already assumed that Walker and his co-defendants were in custody because of the presence of multiple law enforcement officers in the courtroom. We also note that the jury was instructed that the filing of a charge or the arrest of Walker and his co-defendants cannot be considered as evidence of guilt, that the jury’s verdict was to be based solely on the evidence admitted, and that the jury was to disregard any information derived from other sources. The trial court did not abuse its discretion in denying Walker’s motion for a mistrial. See Stokes v. State, 919 N.E.2d 1240, 1244 (2009) (holding that the trial court did not abuse its discretion when it denied the motion for a mistrial by Curtis Stokes, one of Walker’s co-defendants, on the basis of the jury’s exposure to evidence that he was incarcerated pending trial), trans. pending: see also Sherwood v. State, 784 N.E.2d 946, 951-952 (Ind. Ct. App. 2003), trans. denied (affirming the trial court’s denial of defendant’s motion for mistrial and noting that the defendant did not demonstrate actual harm where jurors averred that their decision would not be affected by their viewing of the defendant in jail clothing).

III.

The next issue is whether the evidence was sufficient to sustain Walker's convictions for attempted robbery of Collin Moore, Arnold Jr., Earnest Phillips, Andrew Steele, Fred Winfield, and Shantell Williams and his conviction for unlawful possession of a firearm by a serious violent felon.¹⁵

When reviewing the claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

A. Convictions for Attempted Robbery

With respect to his convictions for attempted robbery, Walker argues that the evidence was insufficient to support his convictions for the attempted robberies of Arnold Jr., Earnest, Steele, Fred Winfield, and Shantell Williams because those individuals "were not in the room where any violent activity occurred." Appellant's Brief at 16. Walker argues that the trial court granted judgment on the evidence with respect to the counts of attempted robbery of Simmons, Cameron, and Brownlee, "whose positions in the building and circumstances were identical to those of alleged victims Arnold [Jr.], Steele, Winfield, and Williams" Id. at 19. Walker also argues that there was no

¹⁵ Walker does not challenge the sufficiency of the evidence with respect to any of his other convictions.

evidence to indicate that he, either personally or as an accomplice, attempted to take anything of value from Collin Moore, Arnold Jr., Earnest, Andrew Steele, Fred Winfield, or Shantell Williams. We agree with Walker in part and disagree with him in part.

The offense of robbery is governed by Ind. Code § 35-42-5-1, which provides that “[a] person who knowingly or intentionally takes property from another person or from the presence of another person . . . by using or threatening the use of force on any person . . . or . . . by putting any person in fear . . . commits robbery, a Class C felony.” “However, the offense 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 a defendant, and a Class A felony if it results in serious bodily injury to any person other than a defendant.” Ind. Code § 35-42-5-1. An attempt is defined by Ind. Code § 35-41-5-1, which states in part that “[a] person attempts to commit a crime when, acting with the culpability required for commission of the crime, he engages in conduct that constitutes a substantial step toward commission of the crime. An attempt to commit a crime is a felony or misdemeanor of the same class as the crime attempted.” A “substantial step” toward the commission of a crime, for purposes of the crime of attempt, is any overt act beyond mere preparation and in furtherance of intent to commit an offense. Hughes v. State, 600 N.E.2d 130, 131 (Ind. Ct. App. 1992). Whether a defendant has taken a substantial step toward the commission of the crime, so as to be guilty of attempt to commit that crime, is a question of fact to be decided by the trier of fact based on the particular circumstances of the case. Id. Thus, to convict Walker of attempted robbery as a class B felony, the State needed to prove that

Walker: (1) knowingly or intentionally; (2) took a substantial step; (3) toward taking property from the person or presence of Arnold Jr., Earnest, Andrew Steele, Fred Winfield, and Shantell Williams; (4) while armed with a deadly weapon; (5) by using or threatening the use of force on or by putting Arnold Jr., Earnest, Andrew Steele, Fred Winfield, and Shantell Williams, respectively, in fear. See Ind. Code §§ 35-42-5-1; 35-41-5-1. To convict Walker of attempted robbery as a class A felony, the State needed to prove that Walker: (1) knowingly or intentionally; (2) took a substantial step; (3) toward taking property from the person or presence of Collin Moore; (4) while armed with a deadly weapon; (5) by using or threatening the use of force on Collin Moore or by putting Collin Moore in fear; and (6) which resulted in serious bodily injury to Collin Moore. See Ind. Code §§ 35-42-5-1; 35-41-5-1.

We initially note that in Indiana there is no distinction between the responsibility of a principal and an accomplice. Wise v. State, 719 N.E.2d 1192, 1198 (Ind. 1999). A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense, even if the other person has not been prosecuted for the offense. Ind. Code § 35-41-2-4. The factors that are generally considered to determine whether one person has 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. Wieland v. State, 736 N.E.2d 1198, 1202 (Ind. 2000).

Here, the evidence shows that Walker entered the studio building along with five other men, including Terry Lynem and Marcus. Walker put a gun to Andrew Steele's face and said, "Get down. You know what this is." Transcript at 480. Thus, we conclude that the evidence is sufficient to support Walker's conviction for the attempted robbery of Andrew Steele. See, e.g., Stokes, 919 N.E.2d at 1245-1246 (concluding that the evidence was sufficient to support Curtis Stokes's conviction as an accomplice for the attempted robbery of Andrew Steele).

We next turn to the evidence in support of Walker's convictions for the attempted robbery of Arnold Jr., Fred Winfield, Shantell Williams, and Earnest. After Walker moved for a directed verdict, the State appeared to argue that the command by Walker and Johnnie Stokes to "Get down. You know what this is" in the hallway of the studio building showed the intent of Walker and his co-defendants to rob Arnold Jr. and all of the persons in the office with him. The trial court, apparently persuaded by the State's argument, denied Walker's motions for directed verdict with respect to the attempted robberies of Arnold Jr., Fred Winfield, Shantell Williams, and Earnest.

However, the evidence reveals that Arnold Jr., Fred Winfield, Shantell Williams, and Andrew Steele were located in an office in the studio building when Walker and Antwane entered the office. After Walker greeted Arnold Jr. by saying "[w]hat's up cuz?" and shook Arnold Jr.'s hand, Walker said "[l]et me talk to you outside." Transcript at 474, 477. Arnold Jr. initially thought that Walker's comment was directed at him, and stood up to exit the room. However, Walker then "told [Arnold Jr. that] he wasn't talking

to [him], [Walker] was talking to Steele.” Id. at 477. Arnold Jr. then sat back down, and Steele stood up and walked out of the office. Once Steele was in the hallway, Walker pulled out a semi-automatic handgun, placed it forcefully against Steele’s face and said: “Get down. You know what this is.” Id. at 479-480. Johnnie Stokes, located in the hallway or main office area outside the office, also said “Get down. You know what this is.” Id. at 480. Johnnie Stokes pulled an assault rifle out of the black trash bag he was carrying and fired a shot, and Arnold Jr. was able to close the door to the office. In another area of the studio building, Lynem and Marcus robbed Edriese at gunpoint.

Based upon these facts, we cannot say that that evidence supports a reasonable inference that Walker or any of the other co-defendants had the specific intent to rob Arnold Jr., Winfield, or Williams, who remained inside the office, and a door separated them from the hallway where Walker attempted to rob Steele. The commands by Walker and Johnnie Stokes to “Get down. You know what this is,” are without more too ambiguous to support a reasonable inference that Walker and his co-defendants intended to rob each of the alleged victims. See Stokes, 919 N.E.2d at 1246-1248 (reversing Curtis Stokes’s convictions for the attempted robbery of Arnold Jr., Winfield, and Williams, observing that “the evidence shows that the perpetrators singled out certain individuals to rob,” and holding that the commands “Get down. You know what this is,” by Walker and Johnnie Stokes were, “without more, too ambiguous to support a reasonable inference that [Curtis] Stokes and his co-defendants intended to rob each of

the alleged attempted robbery victims”). Therefore, we reverse Walker’s convictions for the attempted robbery of Arnold Jr., Winfield, and Williams as class B felonies.

The evidence also reveals that Earnest was located in a recording booth connected to the office where Arnold Jr., Fred Winfield, and Shantell Williams were located at the time Walker and Johnnie Stokes made the commands to “get down” elsewhere in the studio building. After hearing gunshots, Earnest “busted out the window” to exit the building. We conclude that the evidence does not support a reasonable inference that Walker and his co-defendants attempted to rob Earnest. Accordingly, we reverse Walker’s conviction for Count V, the attempted robbery of Earnest as a class B felony. See Stokes, 919 N.E.2d at 1246 (reversing Curtis Stokes’s conviction for the attempted robbery of Earnest and observing that Earnest “was in a sound-proof recording booth at the time the commands to ‘get down’ were made elsewhere in the studio building”).

Finally, to the extent that Walker argues that the evidence does not support his conviction for the attempted robbery of Collin Moore, we note that the evidence shows that Moore was in the hallway area of the recording studio when he was ordered to “get on the ground” by “individuals who he was unable to identify” and “suffered a gunshot wound to his lower left leg.”¹⁶ Transcript at 850. The fact that Moore was directly ordered to “get down” supports a reasonable inference that Walker and his co-defendants intended to rob him. We conclude that the evidence is sufficient to prove that Walker was an accomplice to the attempted robbery of Moore. We affirm Walker’s conviction

¹⁶ Moore did not testify at trial, but a stipulation was read in substitution for his testimony.

for attempted robbery of Moore as a class A felony. See Stokes, 919 N.E.2d at 1248 (holding that the evidence was sufficient to support Stokes’s conviction for the attempted robbery of Moore because Moore “was singled out and directly ordered to ‘get down’”).¹⁷

B. Conviction for Unlawful Possession of a Firearm by a Serious Violent Felon

With respect to his conviction for unlawful possession of a firearm by a serious violent felon as a class B felony, Walker argues that “there was no testimony that Walker was arrested with a firearm in his possession,” that “[o]nly three of the State’s witnesses testified to seeing a firearm in Antonio Walker’s vicinity,” and that Arnold Jr.’s child who testified that she observed “Tonio” with a gun did not testify that “Tonio was the same person as Antonio Walker” and that “her knowledge of firearms was derived from playing the video game Grand Theft Auto.” Appellant’s Brief at 23-25 (internal quotation marks omitted). Walker also argues that “the prior offense was not established” because “[t]he State conceded that Antonio Walker’s fingerprints did not match the arrest card for the prior offense alleged in Count 12.” Id. at 24.

¹⁷ Walker also appears to argue that the single larceny rule applies in this case. The single larceny rule provides that when several articles of property are taken at the same time, from the same place, belonging to the same person, there is a single larceny. Dellenbach v. State, 508 N.E.2d 1309, 1314 (Ind. Ct. App. 1987). Indeed, “the ‘single larceny’ doctrine . . . appl[ies] only where the property of one business is taken, even though it is taken from several employees or persons. This doctrine does not apply to the situation here where a robber has taken the individual property of separate individuals.” Ferguson v. State, 273 Ind. 468, 475, 405 N.E.2d 902, 906 (Ind. 1980). Here, Walker and his co-defendants completed the robbery of Edriese Phillips and attempted to rob other persons. We also note that the parties have not directed us to evidence that Walker or his co-defendants robbed or attempted to rob Big Engine Entertainment. Therefore, the single larceny rule is inapplicable in this case. See Stokes, 919 N.E.2d at 1246-1247 (noting that Stokes and his co-defendants completed the robbery of one victim and attempted to rob other victims and that the evidence did not show that the co-defendants stole or attempted to steal any property belonging to the recording studio, and thus that the single larceny rule did not apply).

In order to prove unlawful possession of a firearm by a serious violent felon as a class B felony, the State was required to prove that Walker was a serious violent felon and knowingly or intentionally possessed a firearm. See Ind. Code § 35-47-4-5. Here, Arnold Jr. testified that he observed Walker in possession of a semi-automatic handgun. In addition, one of Arnold Jr.'s children testified that she observed Walker with a "silver long gun." Transcript at 289. In addition, the State presented evidence connecting Walker to the prior offense, including that the prior offense was committed by a male matching Walker's name, birth date, and race. Walker's argument is an invitation for this court to judge the credibility of the witnesses and reweigh the evidence, which we will not do. See Jones, 783 N.E.2d at 1139. The evidence is sufficient to support Walker's conviction for unlawful possession of a firearm by a serious violent felon as a class B felony.

IV.

The next issue is whether the trial court abused its discretion in sentencing Walker. Walker argues that "a fact which comprises a material element of a crime may not also constitute an aggravating circumstance to support an enhanced sentence." Appellant's Brief at 29. Specifically, Walker argues that "[a]mongst the aggravators the trial court found was that the offense was committed with guns." Id. Walker also argues that "the trial court found an aggravator in [that] Antonio Walker permitted a relative to go with him," and the "State argued the case was based upon accomplice liability," and that "[t]his would seem to involve an element of criminal liability itself being used as an

aggravator, not permissible.” Id. at 30. Walker further argues that the evidence was sparse that Walker possessed a firearm and that there was no evidence that he was the leader of the events on December 18, 2008.¹⁸

We note that Walker’s offenses were committed after the April 25, 2005 revisions of the sentencing scheme.¹⁹ In clarifying these revisions, the Indiana Supreme Court has held that “the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence.” Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh’g, 875 N.E.2d 218 (Ind. 2007). We review the sentence for an abuse of discretion. Id. An abuse of discretion occurs if “the decision is clearly against the logic and effect of the facts and circumstances before the court.” Id. A trial court abuses its discretion if it: (1) fails “to enter a sentencing statement at all;” (2) enters “a sentencing statement that explains reasons for imposing a sentence—including a

¹⁸ Walker also claims that “Walker’s sentence was constitutionally excessive” and that “[t]he Eighth Amendment to the United States Constitution and Article 1, § 16, of the Indiana Constitution prohibit cruel and unusual punishment.” Appellant’s Brief at 29. Walker does not cite to authority or develop arguments with respect to his constitutional claims. Therefore, these arguments are waived. See Tracy v. State, 837 N.E.2d 524, 531 n.10 (Ind. Ct. App. 2005) (holding that the defendant’s argument that his sentence violated Article 1, Section 16 of the Indiana Constitution was waived for failure to present a cognizable argument), clarified on reh’g by 840 N.E.2d 360 (Ind. Ct. App. 2006), trans. denied; Teer v. State, 738 N.E.2d 283, 290 n.5 (Ind. Ct. App. 2000) (holding that the defendant waived any Eighth Amendment claim because he failed to present a cogent argument on federal constitutional grounds), trans. denied.

Walker also states that “[g]iven the nature of Antonio Walker and the circumstances of the offense, the sentence meted out by the trial court was excessive.” Appellant’s Brief at 30. However, Walker does not cite to Ind. Appellate Rule 7(B) or develop an argument that his sentence is inappropriate in light of the nature of the offense or the character of the offender. Therefore, this argument is waived. See Ford v. State, 718 N.E.2d 1104, 1107 n.1 (Ind. 1999); Johnson v. State, 837 N.E.2d 209, 217 (Ind. Ct. App. 2005), trans. denied.

¹⁹ Indiana’s sentencing scheme was amended effective April 25, 2005 to incorporate advisory sentences rather than presumptive sentences. See Ind. Code § 35-50-2-7 (Supp. 2005).

finding of aggravating and mitigating factors if any—but the record does not support the reasons;” (3) enters a sentencing statement that “omits reasons that are clearly supported by the record and advanced for consideration;” or (4) considers reasons that “are improper as a matter of law.” Id. at 490-491. If the trial court has abused its discretion, we will remand for resentencing “if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.” Id. at 491. However, under the new statutory scheme, the relative weight or value assignable to reasons properly found, or those that should have been found, is not subject to review for abuse of discretion. Id.

At sentencing, the trial court found no mitigating circumstances and found the following aggravating circumstances: that “one of the victims, Collin Moore, was paralyzed,” that “there were children . . . present during the robbery,” that the “four adults permitted a 17, 18 year old to accompany them on this crime spree,” and prior criminal history. Transcript at 1116. The court found the fact that Walker, as “the leader,” went into the studio with a gun to be an additional aggravator, and that “with the children present, the Court believes that he has no reverence for life.” Id. at 1127.

We initially observe that, under the current advisory sentencing scheme, a material element of a crime may also form an aggravating circumstance to support an enhanced sentence under certain circumstances. See Pedraza v. State, 887 N.E.2d 77, 80 (Ind. 2008) (“Another rule established early on in this field provides that a material element of a crime may not also form an aggravating circumstance to support an enhanced sentence.

For the same reasons we stated above, based on the 2005 statutory changes, this is no longer an inappropriate double enhancement.”) (Citation omitted). Thus, to the extent that Walker argues that the trial court enhanced his sentence based in part upon a material element of one of the crimes for which he was convicted, we note that a material element may form the basis for an aggravating circumstance to support an enhanced sentence.²⁰

Moreover, in deciding to impose enhanced sentences, the trial court found Walker’s criminal history, the fact that Moore was paralyzed, and the fact that children were present during the robbery to be aggravating circumstances in support of an enhanced sentence. A single aggravating circumstance is adequate to justify a sentence enhancement. See Guillen v. State, 829 N.E.2d 142, 149 (Ind. Ct. App. 2005), trans. denied; Kirby v. State, 774 N.E.2d 523, 539 (Ind. Ct. App. 2002), reh’g denied, trans. denied. Based upon our review of the aggravating circumstances identified by the trial court, we cannot conclude that the trial court abused its discretion in sentencing Walker.

For the foregoing reasons, we reverse Walker’s convictions for the attempted robberies of Gregory Arnold Jr., Earnest Phillips, Fred Winfield, and Shantell Williams as class B felonies and remand and instruct the trial court to vacate the entry of judgment

²⁰ Here, we note that Walker was convicted as an accomplice for the attempted robbery of Moore and the robbery of Edriese based upon the actions of Lynem, Marcus, and Johnnie Stokes, not his younger brother Antwane Walker. Further, the fact that Walker forcefully placed a semi-automatic handgun against Steele’s face includes conduct which was more severe than the mere possession of the firearm as a serious violent felon.

on these four convictions.²¹ We affirm Walker's convictions and sentences on all remaining counts.

Affirmed in part, reversed in part, and remanded with instructions.

MATHIAS, J., concurs.

BARNES, J., concurs with separate opinion.

²¹ Because Walker's sentences on these four counts were concurrent with his sentences on the other counts, the vacation of these convictions will not affect his aggregate sentence.

**IN THE
COURT OF APPEALS OF INDIANA**

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| ANTONIO WALKER, |) | |
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| Appellant-Defendant, |) | |
| |) | |
| vs. |) | No. 49A02-0905-CR-432 |
| |) | |
| STATE OF INDIANA, |) | |
| |) | |
| Appellee-Plaintiff. |) | |

BARNES, Judge, concurring

Although I fully concur in the majority opinion, I feel it is necessary to explain my vote in this case as contrasted with the opinion I authored with respect to one of Walker’s co-defendants, Terry Lynem. See Lynem v. State, No. 49A04-0905-CR-274 (Ind. Ct. App. Dec. 17, 2009), trans. denied. Here, we have vacated four of Walker’s Class B felony robbery convictions on the basis that there is insufficient evidence Walker intended to rob the victims named in those counts. Similarly, in Stokes v. State, 919 N.E.2d 1240, 1248 (Ind. Ct. App. 2010), we vacated the same four robbery counts as to Walker’s and Lynem’s co-defendant Curtis Stokes.

We did not vacate these robbery convictions in Lynem. I hasten to note, however, that Lynem's sole attack on the sufficiency of the evidence in his appeal was that there was insufficient evidence he was guilty of any of the charges, claiming the testimony of victim Edriese Phillips was incredibly dubious and not corroborated by any other evidence. See Lynem, slip op. at 11. Lynem did not make the argument that Stokes and Walker made, i.e. that there was insufficient evidence to support four of the robbery convictions because of a lack of evidence of intent to rob those particular victims. Given the state of the record and the particular arguments made by Walker in this appeal, I vote to concur in the majority opinion.