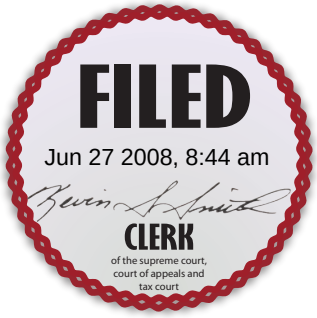

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IN THE
COURT OF APPEALS OF INDIANA

ANISSA TYLER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0711-CR-989
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0604-MR-178

June 27, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Anissa Tyler appeals her convictions for Aiding, Inducing, or Causing Robbery,[1] a class A felony, and Murder,[2] a felony, arguing that the trial court committed fundamental error by permitting the State to amend the charging information after the statutory deadline had passed. Tyler also argues that the trial court abused its discretion in sentencing her by declining to find certain mitigators and that the sentences are inappropriate in light of the nature of the offenses and her character. Finding no reversible error, we affirm.

FACTS

In early to mid-April 2006, Tyler acted as the lookout for Jeff Miller as Miller attempted to rob Charles Robinette in his apartment in Anderson. While inside, Miller savagely beat Robinette, an elderly man, to death.

On April 19, 2006, the State charged Tyler with murder and class A felony aiding, inducing, or causing robbery. The charging information alleged that the crimes had occurred on or about April 11, 2006. On June 12, 2006, Tyler filed a notice of alibi stating that Tyler had been at another residence in Madison County between April 10 and April 12, 2006.

On February 2, 2007, the State filed an amended charging information, which alleged that the crimes occurred on April 9 or April 10, 2006. Initially, Tyler objected to

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[1] Ind. Code § 35-41-2-4, § 35-42-5-1.

[2] I.C. § 35-42-1-1.

the amended information, but Tyler's attorney withdrew the objection at a hearing. Tyler's jury trial began on April 24, 2007. During the trial, Tyler's attorney reiterated that the objection to the amended information had been withdrawn. Tr. p. 1191-93. On May 1, 2007, the jury found Tyler guilty as charged.

At the July 23, 2007, sentencing hearing, the trial court found Tyler's criminal history, the fact that she had recently violated probation, and the fact that she was at a high risk to reoffend to be aggravating factors. It found hardship to her two minor children to be a mitigator but afforded it little weight because Tyler had not had custody of her children for some time. The trial court sentenced Tyler to concurrent executed sentences of sixty years for murder and forty-five years for aiding in robbery. Tyler now appeals.

DISCUSSION AND DECISION

I. Amended Information

First, Tyler argues that it was fundamental error for the trial court to permit the State to amend the charging information months after the statutory cutoff date had passed. At the March 26, 2007, hearing on the objection to the amended information, Tyler's attorney stated that "I've talked to my client. We do have an alibi for that date. So, we're not substantially prejudice[d] as we would have been and I originally thought we would be. So ah, you can go ahead and deny my motion." Tr. p. 37. Without hearing further argument, the trial court replied, "he's saying I can deny his motion, which I'll do." Id. At Tyler's jury trial, her attorney explicitly affirmed—twice—that the objection to the amended information had been withdrawn. Id. at 1191-93.

The State acknowledges that the amended information was "clearly late." Appellee's Br. p. 5. It argues, however, that Tyler has waived any argument on this topic because she invited the error. A party may not invite error at the trial level and then argue on appeal that the error supports reversal. Dumas v. State, 803 N.E.2d 1113, 1121 (Ind. 2004). Invited error is neither reversible error, id., nor fundamental error, Kingery v. State, 659 N.E.2d 490, 494 (Ind. 1995). Finally, invited error is not available for appellate review. Turner v. State, 878 N.E.2d 286, 293-94 (Ind. Ct. App. 2007), trans. denied.

Here, although Tyler originally objected to the amended information, she explicitly withdrew her objection at the hearing thereon. Relying on that withdrawal, the trial court summarily denied the objection without hearing further argument or conducting further analysis on the substance of the issues. Therefore, Tyler invited the error and may not now complain about it on appeal.

II. Sentencing

A. Mitigators

Tyler next argues that the trial court abused its discretion by declining to find two mitigating circumstances. In Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on rehearing, 875 N.E.2d 218 (2007), our Supreme Court held that trial courts are required to enter sentencing statements whenever imposing a sentence for a felony offense. The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. 868 N.E.2d at 490. If the recitation includes the finding of aggravating or mitigating circumstances, then the statement must identify

all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. Id. We review sentencing decisions for an abuse of discretion. Id. A trial court may abuse its discretion by, among other things, entering a sentencing statement that omits reasons clearly supported by the record. Id. at 490-91.

First, Tyler seems to contend that the trial court should have considered a nonspecific mental illness as a mitigator. Specifically, she argues, without citation to the record or other evidence, that "her undiagnosed longstanding learning disability, and emotionally troubled past, combined with her history of substance addiction" constituted an "addiction illness [that] led to her inability to control her behavior and involvement in the crime." Appellant's Br. p. 24. Tyler contends that this combination "creates a condition that is comparable to a longstanding mental illness." Id. She offers no evidence that she, in fact, suffered from a mental illness. Furthermore, there is no evidence that she was unable to control her behavior, that there were limitations on her ability to function, or that there was a nexus between the alleged illness and the crimes. See Lopez v. State, 869 N.E.2d 1254, 1259 (Ind. Ct. App. 2007) (holding four factors must be considered in determining whether a defendant's mental illness is a valid mitigator: (1) the extent of the defendant's inability to control her behavior; (2) overall limitations on functioning; (3) the duration of the mental illness; and (4) the extent of any nexus between the mental illness and the commission of the crime). Thus, we cannot find that the trial court abused its discretion by failing to find this as a mitigating circumstance.

Next, Tyler asserts that the trial court should have found her limited participation in the crime—she acted solely as a lookout—as a mitigator. Evidence that the defendant played a lesser role in the crime may constitute a mitigating circumstance. Sensback v. State, 720 N.E.2d 1160, 1164 (Ind. 1999). In Roney v. State, the defendant made a similar argument. 872 N.E.2d 192, 205 (Ind. Ct. App. 2007), trans. denied. A panel of this court agreed because "Roney and the State agree, and the record indicates, that Roney was not actively involved in either initiating the trip to [the victim's] apartment or in formulating the plan that led to [the victim's] death." Id. (citing Widener v. State, 659 N.E.2d 529, 534 (Ind. 1995) (holding that defendant's lesser role was a significant mitigator where the planning of the crimes was initiated and formulated by the defendant's cohorts)). Thus, the Roney court found that the trial court had abused its discretion by overlooking this mitigator.

Here, similarly, the record indicates—and the State does not dispute—that Tyler was neither involved in formulating the plan that led to Robinette's death or in initiating the trip to his apartment. Apart from acting as the lookout, Tyler's participation was entirely passive. Under these circumstances and based on Roney and Widener, we find that the trial court abused its discretion by overlooking this mitigating circumstance. Our inquiry does not end here, however, inasmuch as we may either remand the case to the trial court for a new sentencing determination or exercise our authority to review the sentence pursuant to Indiana Appellate Rule 7(B). Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007). In this case, we will proceed under the latter option.

B. Appropriateness

Indiana Appellate Rule 7(B) provides that this court has the constitutional authority to review 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 offenses and the character of the offender. In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). 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).

In determining whether a sentence is appropriate, the advisory sentence is "the starting point the Legislature has selected as an appropriate sentence for the crime committed." Id. at 1081. The advisory sentence for murder is fifty-five years, with a minimum of forty-five and a maximum of sixty-five years. Ind. Code § 35-50-2-3. The advisory sentence for a class A felony is thirty years, with a minimum of twenty and a maximum of fifty years. I.C. § 35-50-2-4. Here, the trial court imposed a sentence of sixty years for murder and forty-five years for class A felony aiding robbery, to be served concurrently.

As for the nature of the offenses, Tyler acted as a lookout while Miller robbed and savagely beat Robinette, an elderly man, to death. There is no evidence that Tyler actively participated in the planning of these crimes or that she knew that Miller might kill Robinette while inside the apartment. On the other hand, Tyler was uncooperative when questioned by the police and attempted to conceal her involvement in the crimes. Although these may not be the worst offenses, we note that the trial court did not impose

the maximum sentence on Tyler, reflecting, perhaps, its acknowledgement of Tyler's passive role in the robbery and murder.

As for Tyler's character, her prior criminal history includes a conviction for class D felony possession of cocaine and misdemeanor public intoxication. Additionally, Tyler has violated probation on multiple occasions and has had multiple positive drug screens. Tyler has a serious substance abuse problem and, although she has received help and counseling for her addictions, she continues to choose to abuse drugs and alcohol. Tyler has certainly faced challenges in her life, but it is entirely possible to cope with life's difficulties without resorting to drugs and crime. Tyler has been afforded lenient treatment in the past by the judicial system but took advantage of the leniency by violating probation on multiple occasions. Evidence was presented establishing that Tyler is at a high risk to reoffend. Under these circumstances, we cannot say that the aggregate sixty-year sentence imposed by the trial court was inappropriate.

The judgment of the trial court is affirmed.

RILEY, J., and ROBB, J., concur.