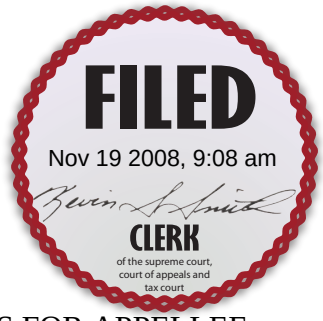

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IN THE
COURT OF APPEALS OF INDIANA

WAYNE REYNOLDS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0805-CR-400
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
The Honorable Jeffrey Marchal, Commissioner
Cause No. 49G06-0703-FB-43836

November 19, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, Wayne Reynolds appeals his convictions and sentence for two counts of robbery and two counts of criminal confinement, all Class B felonies. On appeal, Reynolds raises two issues, which we restate as 1) whether the trial court properly admitted pre-trial identification evidence and 2) whether Reynolds's sentence is inappropriate in light of the nature of the offenses and his character. Concluding the trial court did not improperly admit the pre-trial identification evidence and that Reynolds's sentence is not inappropriate, we affirm.

Facts and Procedural History

On the morning of March 14, 2007, Kathy Poole and Terese Potter were working at Kids Ink, a children's bookstore in Marion County. Around 11:30 that morning, Potter was talking on the telephone at the front of the bookstore when a black man in his "late forties, early fifties" entered and told Poole he was interested in buying a music book. Transcript at 29. The interest was a ruse; moments later a younger black man entered, pointed a handgun at Potter's head, and hung up the telephone. The older man escorted Poole to the front of the bookstore and told her to open one of the bookstore's two cash registers, while the younger man told Potter to do the same with the other register. Having taken money from one of the registers (the other one was empty), the robbers escorted Poole and Potter to the rear, employee-only area of the bookstore and asked if they had jewelry or other valuables. After taking forty dollars from Poole's purse, the robbers told Poole and Potter to lie on the floor and left. Potter called 911, police officers

responded several minutes later, and, several minutes after the response, Potter and Poole gave physical descriptions of the robbers to the officers.

Around the time the robbers were leaving the bookstore, Ellen Bower, an employee at a nearby jewelry store, was in the parking lot shared by both stores and saw two black men get into "a goldish, taupish, tanish van" and drive away. Id. at 104. Sensing something was amiss – her boss had received a call minutes earlier and told her he was going to check on the bookstore – Bower wrote down the van's license plate number and later gave it to Detective Rob Challis of the Indianapolis Metropolitan Police Department. A computer check of the license plate number revealed the van was registered to Reynolds's mother. After reviewing a headshot photograph of Reynolds and determining that his physical characteristics were consistent with the descriptions Poole and Potter had given, Detective Challis prepared two identical photographic arrays (one for Poole and one for Potter) that included Reynolds's photograph along with headshot photographs of five other men. Poole and Potter reviewed the photographic arrays around 4:00 that afternoon; both of them identified Reynolds's photograph as that of the older robber.[1]

On March 15, 2007, the State charged Reynolds with Count I, robbery, a Class B felony; Count II, criminal confinement, a Class B felony; Count III, robbery, a Class B felony; Count IV, criminal confinement, a Class B felony; and Count V, pointing a firearm at another person, a Class D felony.[2] On May 15, 2007, the State filed a motion

[1] Poole and Potter were unable to identify anyone from another photographic array Detective Challis had prepared in an attempt to identify the younger robber. The record does not indicate whether the younger robber was apprehended.

[2] Counts I, II, and V named Poole as the victim, and Counts III and IV named Potter as the victim.

for sentence enhancement based on Reynolds's alleged status as an habitual offender. On March 5, 2008, the trial court conducted a jury trial, which included testimony from Poole, Potter, Bower, and Detective Challis. At the close of the State's case-in-chief, the trial court granted Reynolds's motion for a directed verdict on Count V, pointing a firearm at another person.[3] The jury found Reynolds guilty of the four remaining charges, and the trial court entered judgments of conviction on all of them.

On April 3, 2008, Reynolds having waived a jury trial for the sentence enhancement phase, the trial court found that Reynolds was an habitual offender. On the same day, the trial court heard evidence on sentencing, finding no mitigating circumstances and the following aggravating circumstances: 1) Reynolds's crimes involved multiple victims; 2) Reynolds's "significant" criminal history, id. at 265; and 3) Reynolds's "significantly high" likelihood of reoffending, id. at 267. Based on these findings, the trial court sentenced Reynolds to terms of twenty years on Count I, enhanced by twenty-five years based on the habitual offender finding; twenty years on Count II; twenty years on Count III; and twenty years on Count IV. The trial court ordered that Reynolds serve the terms of Counts I and II concurrent with each other and the terms of Counts III and IV concurrent with each other, but consecutive to Count I, resulting in an aggregate sentence of sixty-five years executed. Reynolds now appeals.

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[3] The trial court granted Reynolds's motion because the State alleged in its charging information that the firearm was pointed at Poole, but the only evidence it presented at trial on this point was that the firearm was pointed at Potter.

Discussion and Decision

I. Witnesses' Identifications

Reynolds argues the trial court improperly admitted pre-trial identification evidence, specifically testimony from Poole and Potter regarding their identifications of Reynolds from the six-man photographic array that Detective Challis had prepared.[4] This court reviews the trial court's decision to admit evidence for an abuse of discretion. Pickens v. State, 764 N.E.2d 295, 297 (Ind. Ct. App. 2002), trans. denied. Abuse of discretion occurs when the trial court's ruling is clearly against the logic and effect of the facts and circumstances before it. Id. We also note that Reynolds concedes he did not object to the admission of the identification evidence at trial. See Appellant's Brief at 6. Reynolds's concession thus requires him to show fundamental error to receive a new trial. Cowan v. State, 783 N.E.2d 1270, 1277 (Ind. Ct. App. 2003). Fundamental error is error that is "so prejudicial to the rights of the defendant as to make a fair trial impossible." Id.

The Due Process Clause of the Fourteenth Amendment protects a criminal defendant against pre-trial identification evidence where the procedures employed to obtain such evidence are "impermissibly suggestive." Swigeart v. State, 749 N.E.2d 540, 544 (Ind. 2001). Such procedures are impermissibly suggestive if they "give rise to a

[4] Reynolds frames this argument in the context of a challenge to the sufficiency to the evidence, which is curious because he does not appear to challenge the propriety of the trial court's admission of the witnesses' in-court identifications of Reynolds as the older robber. Even assuming the trial court improperly admitted the pre-trial identification evidence, Reynolds's failure to contest the in-court identifications appears to undermine his sufficiency challenge. See Toney v. State, 715 N.E.2d 367, 369 (Ind. 1999) ("[T]he uncorroborated testimony of one witness may be sufficient by itself to sustain a conviction on appeal."); Henson v. State, 467 N.E.2d 750, 753 (Ind. 1984) ("[E]ven if we would assume for the sake of argument that the pretrial identification was impermissible, the in-court identification is still proper if the court can find that such testimony is supported by bases independent from the pretrial procedure."). However, because we conclude below that the trial court properly admitted the pre-trial identification evidence, we will assume Reynolds also challenges the in-court identifications, but note that our discussion below applies equally to both types of evidence.

very substantial likelihood of irreparable misidentification." Coleman v. State, 558 N.E.2d 1059, 1064 (Ind. 1990) (citing Neil v. Biggers, 409 U.S. 188, 197 (1972)), cert. denied, 501 U.S. 1259 (1991). However, even if the procedures are impermissibly suggestive, the pre-trial identification may be admitted if, under the totality of the circumstances, the pre-trial identification was otherwise reliable. See Biggers, 409 U.S. at 199.

Our review of the pre-trial identification procedures do not convince us they were impermissibly suggestive. We note initially Detective Challis testified that when Poole and Potter reviewed the photographic arrays, they did so separately, and he merely asked if they recognized anyone. Asking an open-ended question is recommended because it avoids "implicitly suggest[ing] to the witness that 'this is the man,'" Gregory-Bey v. Hanks, 332 F.3d 1036, 1045 (7th Cir. 2003) (quoting Foster v. California, 394 U.S. 440, 442-43 (1969)), or at least that "the man" is among those pictured. Turning to the photographic arrays themselves, Reynolds argues they were impermissibly suggestive because the two most prominent features identified by Poole and Potter – lightly complected skin and gray facial hair – are not featured in any of the photographs except Reynolds's. Even assuming these were the two most prominent features identified by the witnesses (according to the police report and the witnesses' testimony at trial, both mentioned gray facial hair, but only Potter mentioned skin complexion, and she stated it was "medium," state's exhibit 19 at 4), we are not convinced they are unique to Reynolds's photograph. At least two of the other photographs feature men with graying facial hair, and although Reynolds's skin complexion is arguably the lightest, it is

consistent with, rather than a substantial departure from, the complexions in the other photographs. See State's Exhibits 15 and 16. Coupling these slight differences with attributes that are common among the photographs – all are of black men with short-cropped hair and goatees, except one who has a full beard, see id. – and it becomes clear that the arrays, though possibly suggestive, are not impermissibly suggestive. More to the point, our supreme court has stated that "a photographic array is sufficient if the defendant 'does not stand out so strikingly in his characteristics that he virtually is alone with respect to identifying features.'" Harris v. State, 716 N.E.2d 406, 410 (Ind. 1999) (quoting Pierce v. State, 267 Ind. 240, 246, 369 N.E.2d 617, 620 (1977)). Because Reynolds's photograph is far from a standout, it follows that use of the photographic arrays as a pre-trial identification procedure was not impermissibly suggestive.

Even if we concluded the procedures were impermissibly suggestive, we would conclude that under the totality of the circumstances, the witnesses' identifications were nevertheless reliable. Determining whether an identification is reliable despite impermissibly suggestive procedures requires examination of five factors: 1) the opportunity of the witness to view the criminal at the time of the crime; 2) the witness's degree of attention; 3) the accuracy of the witness's prior description of the criminal; 4) the level of certainty demonstrated by the witness at the confrontation; and 5) the length of time between the crime and the confrontation. See Biggers, 409 U.S. at 199-200. Even assuming the second factor favors unreliability (our review of the record does not disclose much evidence on this point), the remaining factors indicate the witnesses' identifications were reliable. Regarding the first factor, Poole spoke with the older

robber before and during the robbery, and Potter responded affirmatively when asked if the older robber was "[n]o more than a couple of feet from [her]" when he entered the bookstore. Tr. at 28. Regarding the third factor, the witnesses' descriptions of the older robber were not only accurate, they were consistent with each other's, and we reiterate they were interviewed separately.[5] According to a police report that was introduced into evidence, Poole described the older robber as in his late forties or early fifties, an inch or two shorter than six feet tall, and approximately 180 pounds with "gray stubble on his face," while Potter described him as forty to fifty years old, an inch or two shorter than six feet tall, 150 to 165 pounds, "medium complected, short cropped hair . . . and [] a goatee." State's Exhibit 19 at 4. Potter also testified that the older robber's facial hair was "graying." Tr. at 29. Regarding the fourth factor, Poole testified she "was afraid to say [she] was one hundred percent sure" she had correctly identified Reynolds's photograph as that of the older robber, but nevertheless testified she was "very sure." Id. at 71. Similarly, Potter answered affirmatively when asked if she was "totally confident" that she had correctly identified Reynolds's photograph as that of the older robber. Id. at 44. Regarding the fifth factor, we doubt the investigating officers could have responded more quickly – the robbery occurred around 11:30 a.m., Detective Challis interviewed Poole and Potter no more than a half-hour later, and the witnesses reviewed the photographic arrays around 4:00 that afternoon. Examination of the Biggers factors

[5] Poole and Potter were apparently well-informed of the dangers of group identifications because they insisted on remaining separated to avoid commingling their descriptions of the robbers. Indeed, the bookstore owner testified that "[Poole] and [Potter] were so concerned that they not contaminate each other's stories that they wouldn't even tell me together what happened." Tr. at 113.

convinces us that even if the pre-trial identification procedures had been impermissibly suggestive, the witnesses' identifications were nevertheless reliable.

The pre-trial identification procedures were not impermissibly suggestive, and even if they were, the witnesses' identifications were nevertheless reliable. Thus, it follows that the trial court did not abuse its discretion when it admitted into evidence the witnesses' testimony regarding their pre-trial identifications of Reynolds as the older robber.[6]

II. Appropriateness of Sentence

This court has authority to revise a sentence "if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We may "revise sentences when certain broad conditions are satisfied," Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005), and we recognize that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed," Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). In determining whether a sentence is inappropriate, we examine both the nature of the offense and the character of the offender. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When making this examination, we may look to any factors appearing in the record, Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied, starting with

[6] We also note that Reynolds briefly argues that even if the trial court properly admitted this evidence, it is not sufficient to sustain his convictions because it "is not supported by circumstantial evidence . . . ." Appellant's Br. at 7. This court has observed that circumstantial evidence may be required in conjunction with eyewitness testimony where the testimony is that of a single eyewitness and the eyewitness is equivocal as to identification. See Scott v. State, 871 N.E.2d 341, 343-46 (Ind. Ct. App. 2007), trans. denied. The foregoing discussion demonstrates that is hardly the case here (there were two eyewitnesses, and neither was equivocal about identifying Reynolds as the older robber), and even if it was, Reynolds overlooks that the presence of his mother's van in the parking lot of the bookstore shortly after the robbery is circumstantial evidence that he was one of the robbers.

"the trial court's recognition or nonrecognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed here was inappropriate," Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). However, "inappropriateness review should not be limited . . . to a simple rundown of the aggravating and mitigating circumstances found by the trial court." McMahon v. State, 856 N.E.2d 743, 750 (Ind. Ct. App. 2006). We also recognize that it is the defendant's burden to "persuade the appellate court that his or her sentence has met this inappropriateness standard of review." Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

The trial court sentenced Reynolds to the statutory maximum term of twenty years for each of his four Class B felony offenses, see Ind. Code § 35-50-2-5, but did not order that he serve all of the terms consecutively. We also note that Reynolds's habitual offender enhancement of twenty-five years is five years less than the statutory maximum. See id. (stating that the advisory sentence for a Class B felony is ten years); Ind. Code § 35-50-2-8(h) ("The court shall sentence a person found to be a habitual offender to an additional fixed term that is not less than the advisory sentence for the underlying offense nor more than three (3) times the advisory sentence for the underlying offense. However, the additional sentence may not exceed thirty (30) years."). Reynolds's aggregate sentence of sixty-five years is therefore thirty-five years less than the statutory maximum sentence of one hundred years.[7]

[7] We calculate the statutory maximum sentence of one hundred years as follows: twenty years for each of the robberies, fifteen years for each of the criminal confinements, and thirty years for the habitual offender enhancement. Because criminal confinement is not a "crime of violence" within the meaning of Indiana Code section 35-50-1-2(a), those sentences would require reduction to fifteen years for the trial court to order consecutive sentences on all four offenses. See Ind. Code § 35-50-1-2(a) to (c).

Turning first to the nature of the offenses, we agree with the State that Reynolds's offenses are more egregious than a typical robbery and criminal confinement because, to use the State's words, the offenses "took place in a children's bookstore where small children frequent." Appellee's Brief at 10. Indeed, Potter testified that approximately one hour before the robbery occurred, the bookstore was concluding a "story hour" for several children and their parents. Tr. at 26. That these customers were not also victims of Reynolds's crimes is either the result of good fortune or of Reynolds and his accomplice surveilling the bookstore before launching their robbery. Either way, Reynolds's offenses are more egregious than is typical.

Regarding the character of the offender, we agree with the trial court that Reynolds has a "significant" criminal history. Id. at 265. Putting to the side the two felony convictions supporting Reynolds's habitual offender sentence enhancement, the presentence investigation report indicates that Reynolds has been convicted of nine felonies in the past twenty years: two for robbery, both Class B felonies; two for criminal confinement, both Class B felonies; four for theft, all Class D felonies; and one for auto theft, a Class D felony. The presentence report also states that Reynolds's probation has been revoked each of the four times he has been placed on probation. For forty-five year old Reynolds, the record thus indicates that for most of his adult life, he has either been incarcerated, serving a suspended sentence, or committing crimes. Although the sheer number of convictions and probation revocations is sufficient to sustain Reynolds's sentence, we also note that Reynolds's previous robbery and criminal confinement convictions were similar to the current offenses, as all of them were committed with a

firearm and an accomplice, and involved small businesses. See Prickett v. State, 856 N.E.2d 1203, 1209 (Ind. 2006) (explaining that the significance of a defendant's criminal history varies based on the gravity, nature, and number of prior offenses as related to the current offenses).

The burden was on Reynolds to demonstrate that his sentence was inappropriate based on the nature of the offenses and his character. After due consideration of the trial court's decision and of the record, we conclude that Reynolds has not carried this burden. Thus, it follows that Reynolds's sentence is not inappropriate.

Conclusion

The trial court did not improperly admit evidence relating to pre-trial identification of Reynolds, and Reynolds's sentence is not inappropriate in light of the nature of the offenses and his character.

Affirmed.

NAJAM, J., and MAY, J., concur.