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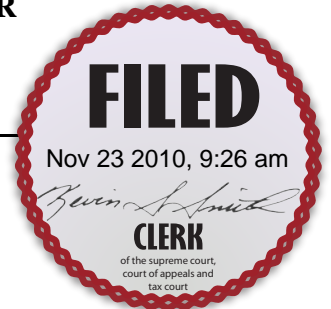
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**IN THE  
COURT OF APPEALS OF INDIANA**

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ERIK E. NEAL, JR., )  
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Appellant-Defendant, )  
 )  
vs. )  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

No. 71A03-1003-CR-214

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APPEAL FROM THE ST. JOSEPH SUPERIOR COURT  
The Honorable John M. Marnocha, Judge  
Cause No. 71D02-0810-MR-17

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**November 23, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## **Case Summary**

Erik Neal, Jr., appeals his conviction and sentence for felony murder. We affirm.

### **Issues**

The issues before us are:

- I. whether there is sufficient evidence to support Neal's conviction; and
- II. whether his fifty-year sentence is inappropriate.

### **Facts**

The evidence most favorable to the conviction is that on October 18, 2008, Patrick Henderson suggested to Davontay Lewis that they go to the home of a drug dealer named "Yao" to rob him of drugs and money. Tr. p. 394. At first, only Henderson and Lewis discussed this plan. Later, however, Neal, Joe Williams, and Ricky Griffin joined the group, and they discussed the various roles each would carry out during the robbery. It was agreed that Griffin and Lewis would search the house for drugs and money while Henderson and Williams detained anyone inside; Neal's job was to be the driver.

At approximately 4:30 a.m. on October 19, 2008, Neal drove Henderson, Lewis, Williams, and Griffin to 115 East Woodside Street in South Bend in a car borrowed from Lewis's mother. Henderson gave Neal directions to the house. Yao's former girlfriend, Janel Jenkins, resided at the house, along with her two children, her sister Benita Pfeifer, Pfeifer's child, and Pfeifer's friend, Alisha Gregory. Several other children under the age

of thirteen were at the house that night for a sleepover. Yao apparently no longer lived there. Also, Jenkins's current boyfriend, James Martin, was at the house.

Upon arriving at the residence, Neal stayed in the car while Henderson, Lewis, Williams, and Griffin went to the house. Griffin knocked on the door and rang the doorbell, and Gregory answered it. Griffin asked for Yao, and Gregory told Griffin he was not there. She then shut and locked the door, ran upstairs to where Pfeifer and the children were, and started looking for her cell phone to call police. Griffin attempted to break through the front door but could not. Henderson, however, was able to kick in a side door, and he, Lewis, Griffin, and Williams entered the house.

Henderson, Lewis, and Griffin went upstairs and found Gregory, Pfeifer, and the children gathered together in a bedroom. Griffin and Henderson held the group at gunpoint, demanding to know where Yao and his drugs and money were; Pfeifer and Gregory said that Yao did not live there anymore and that there were no drugs or money to be found there. Henderson and Lewis searched the room for drugs and money but found nothing.

Lewis then went downstairs and noticed light coming from a room, which was a bedroom where Jenkins and Martin were staying. Lewis told Henderson that there were people downstairs. Henderson then came downstairs and began kicking in the closed bedroom door, eventually causing it to shatter. Martin at first ran into an adjoining bathroom, and at some point Williams came into the bedroom, armed with a gun. Martin came out of the bathroom and managed to knock the gun out of Williams's hand, but

Henderson then shot Martin, and Williams also recovered his gun and shot Martin. Martin died at the scene. Henderson, Lewis, Griffin, and Williams then ran out of the house, and Neal was waiting for them in the car. Lewis was carrying with him a TV he had taken from the house. Neal then drove away.

On October 20, 2008, Neal was again driving Lewis's mother's car when he was pulled over by a South Bend police officer. Williams and Lewis were passengers in the car, and Lewis fled when Neal stopped the car. Lewis was carrying Williams's gun, but he had refused Williams's request that he take Henderson's gun as well. Neal shoved the gun under the front passenger seat. After police discovered that there were no licensed drivers in the car, they impounded it. Police discovered the gun during an inventory search of the car.

Neal called Lewis's mother and told her about being pulled over and Lewis fleeing. A few hours later, Neal and Williams went to Lewis's mother's house. Williams told Lewis's mother about the burglary and robbery and Neal's role in the crimes as the driver of the getaway car. Neal stood silently while Williams told the story and did not object to anything he said. Lewis's mother subsequently reported what she had been told to the police.

On October 24, 2008, the State charged Neal with one count of felony murder and one count of Class A felony burglary. Both Griffin and Lewis pled guilty to Class A felony burglary. Griffin received a forty-year sentence. Lewis received a twenty-year sentence and agreed to testify against Neal at trial. At the time of Neal's sentencing,

Henderson was in plea negotiations with the State and Williams was awaiting extradition from Michigan. After a jury trial conducted on April 20-23, 2009, Neal was found guilty as charged. The trial court entered judgment only on the felony murder conviction and sentenced Neal to fifty years. After receiving permission to pursue a belated appeal, Neal now appeals.

## **Analysis**

### ***I. Sufficiency of the Evidence***

We first address Neal's challenge to the sufficiency of the evidence. When we review the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). "It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction." Id. When confronted with conflicting evidence, we must consider it in a light most favorable to the conviction. Id. We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. Id.

Our legislature has criminalized as murder the killing of another human being while committing certain enumerated offenses, including burglary. See Ind. Code § 35-42-1-1(2). In establishing guilt under this statute for felony murder, the State does not have to prove intent to kill, only the intent to commit the underlying felony. Exum v.

State, 812 N.E.2d 204, 207 (Ind. Ct. App. 2004) (citing Vance v. State, 620 N.E.2d 687, 690 (Ind. 1993)), trans. denied.

Additionally, although the language of the information indicates that Neal was charged as a principal in the commission of the burglary and Martin's shooting, it is well-settled that one may be charged as a principal yet convicted as an accomplice. Taylor v. State, 840 N.E.2d 324, 338 (Ind. 2006). "In Indiana, the responsibility of a principal and an accomplice is the same." Id. Factors to be considered in determining whether a defendant 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). Although a defendant's presence during the commission of the crime or his or her failure to oppose the crime are, by themselves, insufficient to establish accomplice liability, the trier of fact may consider them along with the factors above to determine participation. Id. Furthermore, accomplice liability applies to the contemplated offense and all acts that are a probable and natural consequence of the concerted action and may encompass felony murder. See id. at 1202-03. That an accomplice was not physically present when a killing occurs does not absolve that person of felony murder, unless he or she demonstrated voluntary renunciation of the contemplated crime before it occurred. See Mauricio v. State, 476 N.E.2d 88, 92 (Ind. 1985).

Neal argues there is insufficient evidence that he knew the members of the group he drove to Jenkins's residence intended to burglarize it. We conclude otherwise. At least, there is sufficient evidence Neal was fully aware that a burglary was going to and did take place. For purposes of the felony murder statute, he did not have to anticipate or intend that a killing would occur.

Although Neal was not present when Henderson and Lewis first discussed the possibility of robbing Yao, he was at a later meeting where Griffin, Williams, Henderson, and Lewis all were present and each member's role in the planned robbery was outlined. According to Lewis, Neal agreed to be the getaway driver. He did in fact drive the group to the residence at Henderson's direction, waited while the other four members of the group forced their way into the residence, and had the car ready to leave the scene as soon as they left, with Lewis bringing a TV he had stolen to the car. This goes well beyond Neal merely being present at the scene of the crime and instead establishes his knowing, active participation in the burglary. Neal also made no attempt to minimize or deny his participation in the burglary when Williams was describing it to Lewis's mother. This evidence is sufficient to support Neal's conviction for felony murder under an accomplice liability theory.

## ***II. Sentence***

Next, Neal contends that his fifty-year sentence is inappropriate pursuant to Indiana Appellate Rule 7(B) in light of his character and the nature of the offense. See Angelemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). Although Rule 7(B) does not

require us to be “extremely” deferential to a trial court’s sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. “Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate.” Id.

The principal role of Rule 7(B) review “should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived ‘correct’ result in each case.” Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008). We “should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count.” Id. Whether a sentence is inappropriate turns on the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case. Id. at 1224.

The sentencing range for felony murder is no different than it is for murder: a range of forty-five to sixty-five years, with the advisory sentence being fifty-five years. I.C. § 35-50-2-3(a). Thus, Neal received a sentence five years below the advisory and five years above the minimum he could have received. Nonetheless, Neal contends that his sentence is excessive in light of his relatively minimal role in the burglary and killing, in comparison to the other four members of the group. He notes that he received a



sentence exceeding those of Griffin and Lewis, who arguably were more culpable parties and received terms of forty and twenty years respectively.

In Cardwell, our supreme court examined a case in which two defendants, Cardwell and Gentry, were charged with various crimes related to a child who was injured while in their care. Eventually, after a jury trial, Cardwell was convicted of two counts of Class B felony neglect of a dependent and was sentenced to consecutive seventeen-year terms, thus totaling thirty-four years. Gentry, by contrast, was convicted by a jury of only one count of Class D felony neglect of a dependent and received a sentence of eighteen months.

On appeal, our supreme court held that, although it was not required to compare Cardwell's sentence to Gentry's, it concluded that the disparity in their sentences was "stark," particularly in light of its determination that Cardwell's culpability was substantially the same or even less than Gentry's. Cardwell, 895 N.E.2d at 1226. In light of this disparity, and other factors noted by the court, it revised Cardwell's sentence to an aggregate term of seventeen years. Id.

We observe that, in Cardwell, Cardwell's original sentence was nearly twenty-three times greater than Gentry's, and the revised sentence still was approximately eleven times greater. Here, by contrast, Neal's sentence is ten years more than Griffin's, and two and a half times as long as Lewis's. This disparity is not nearly as "stark" as was the case in Cardwell. Much of that disparity is attributable to the inescapable fact that Griffin and Lewis pled guilty to Class A felony burglary, with a sentencing range of twenty to

fifty years, and Neal chose to stand trial for and was convicted of felony murder, with a sentencing range of forty-five to sixty-five years. See I.C. §§ 35-50-2-3(a) & 35-50-2-4. Neal, of course, should not be penalized for exercising his constitutional right to trial, but the fact remains that he was convicted of a more serious offense than either Griffin or Lewis.

With respect to an independent review of Neal's character, the presentence report reveals that he had a juvenile delinquency adjudication for burglary just a few months before committing the present offense.<sup>1</sup> The presentence report also reveals that Neal admitted to other illegal conduct, most notably the frequent use of marijuana, including on the date of the offense. Neal's character is not impeccable.

Regarding the nature of the offense, we will assume for the sake of argument that Neal might have been the least culpable of any of the five members of the group, at least with respect to Martin's death. Still, as we have recounted, the evidence demonstrates that Neal willingly agreed to assist in a middle-of-the-night home invasion to rob a drug dealer of drugs and money. Moreover, there were a number of young children in the house at the time of the offense and they were directly involved in the burglary. An innocent person with no apparent connection to Yao ended up dead. Although Neal might not have been aware of the presence of children or that Martin would be shot, a defendant does not necessarily need to know the circumstances of a crime to warrant an increased sentence because of those circumstances. See McCann v. State, 749 N.E.2d

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<sup>1</sup> Neal was seventeen when he committed the present offense.

1116, 1120 (Ind. 2001) (holding attempted rape victim's pregnancy was a proper aggravating circumstance, even though defendant was unaware of pregnancy). We conclude that Neal's sentence is not inappropriate in light of his character and the nature of the offense.

### **Conclusion**

There is sufficient evidence to support Neal's conviction, and his sentence is not inappropriate. We affirm.

Affirmed.

CRONE, J., concurs.

FRIEDLANDER, J., concurs in part, and dissents in part with separate opinion.

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**IN THE  
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ERIK E. NEAL, JR.	)	
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Appellant-Defendant,	)	
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vs.	)	No. 71A03-1003-CR-214
	)	
STATE OF INDIANA	)	
	)	
Appellee-Plaintiff.	)	
	)	

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**FRIEDLANDER, Judge, concurs in part, dissents in part with separate opinion.**

I concur with the Majority in all respects but one – the appropriateness of his sentence. The Majority ably and correctly disposes of the argument that Neal deserves a lesser sentence in light of the sentences received by two of his confederates for their involvement in this incident. If the disparity in those sentences, and in particular the difference between Lewis’s and Neal’s, is the error that we should strive to correct here, then we are defeated before we start. The *minimum* sentence that can be imposed for the offense of which Neal was convicted is forty-five years which is still 225% greater than the sentence Lewis received. As the Majority has observed, however, the two were convicted of entirely different offenses, which carried markedly different sentencing ranges, especially with respect to the minimum sentence permitted. Thus, I agree with

the Majority that Neal's argument for a reduced sentence based upon a comparison with the sentences imposed upon Griffin and, especially, Lewis must fail. This is not to say, however, that the fifty-year sentence is appropriate.

Neal was charged with felony murder based upon Ind. Code Ann. § 35-41-2-4 (West, Westlaw through 2010 2nd Regular Sess.), Indiana's accomplice liability statute. Under this provision, Neal could be found guilty of felony murder whether he acted as the principal shooter or merely an accomplice. *See Taylor v. State*, 840 N.E.2d 324 (Ind. 2006). When considering the nature of the offense with an eye to the appropriateness of his sentence, however, we must examine with specificity his actions in the commission of that offense.

Neal agreed with the others to participate in robbing a local drug dealer. Neal was the driver. As the designated driver, he stayed in the car while the others carried out the robbery. Of course, events unfolded inside the victim's residence in such a way that what was intended to be a robbery became a murder. Neal was not an active participant in the events that occurred in the residence. Although Neal is as culpable for the murder as if he were inside the residence when it was committed, I believe his actual participation in the episode warrants only the minimum sentence allowable for the crime of murder. Therefore, I would reduce his sentence to forty-five years.