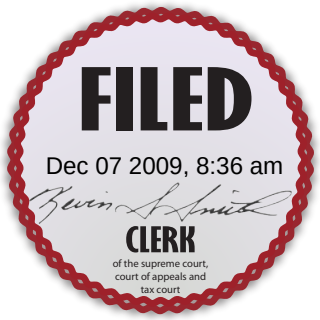

ATTORNEY FOR APPELLANT:

MICHAEL R. FISHER
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

NICOLE DONGIEUX WIGGINS
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

ROBERT STONE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0905-CR-257
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark A. Jones, Judge Pro Tempore
Cause No. 49G05-0712-MR-271954

December 7, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Robert Stone appeals his dual convictions for felony murder and resulting 110-year sentence for killing a father and his son during a robbery. He contends that the evidence identifying him as the shooter is insufficient and that his sentence is inappropriate in light of the nature of the offenses and his character. We conclude that the incredible dubiosity rule does not apply to this case because there was testimony from more than one witness, and their testimony was not inherently improbable. We also conclude that Stone has failed to persuade us that advisory sentences ordered consecutively for killing a father and his son one day after being released on bond for unrelated felony charges are inappropriate. We therefore affirm.

Facts and Procedural History

The facts most favorable to the verdicts reveal that on December 14, 2007, eighteen-year-old Michael Earl was with his friends David Eskew, Dustin Engelking, Zachary Taylor, and fifteen-year-old Warren Brown when the group started talking about guns. Michael said that his father, Anthony Earl, owned several guns, and Brown expressed an interest in seeing them. The five boys then went to the Indianapolis home of the Earls to view Anthony's gun collection. Anthony unlocked the closet where he kept his collection and showed the boys between twenty and thirty guns, including machine guns, pistols, and shotguns. Brown asked Anthony if he was interested in selling any of his guns, and Anthony said no. The boys left.

The following day, Brown received a phone call from his friend, fifteen-year-old Gary Ransom, who happened to be with eighteen-year-old Stone. Brown told Ransom

about the guns he had seen the night before at the Earls' home, and the three of them concocted a plan to steal the guns from the house later that same day. Stone, who was driving his car, and Ransom picked up Brown at his house. They stopped by Kevin Tucker's house to see if he was interested in joining the robbery, but he declined their invitation. So, the three of them, wearing masks and gloves, proceeded to the Earls' home. During the drive, Ransom observed a handgun in the glove compartment of Stone's car.

When the trio arrived at the Earls' home, Stone pulled his car in the driveway and grabbed the gun from the glove compartment. Ransom knocked on the door while Stone and Brown stood off to the side. When Michael answered the door, the three boys barged in and began yelling for the guns and demanding the keys to the gun closet. Also inside the house at the time were Michael's father, Anthony, and Michael's friend, Eskew. Anthony, who was unarmed, emerged from another room and charged Stone for his gun, attempting to tackle him for it. Anthony tried to "get the gun and push it upwards." Tr. p. 157. Stone shot Anthony twice, once in the back and once in the chest, and shot Michael once in the back. Eskew escaped to a back bedroom to avoid being shot. One of the boys then grabbed Eskew from the back bedroom and forced him to ask Michael, who was still moving a little, where the keys to the gun closet were so they could take the guns. Anthony was not moving at this time. Although Michael was saying that "he couldn't breathe," neither Stone nor Ransom or Brown for that matter did anything to help Michael. *Id.* at 489. Instead, Stone instructed Ransom and Brown to hurry up. *Id.* When the keys did not open the closet door, they shot through the door and then punched

it. Eventually, the closet door opened, and they took as many guns as they could. They then fled to Tucker's apartment. Brown later hid the guns in Haughville, an area on the west side of Indianapolis.

Eskew immediately called 911. Michael and his father Anthony were taken to the hospital, where they both died from the gunshot wounds they suffered.

Eskew was able to identify Brown as one of the robbers. Eskew recognized Brown because he had been with him the night before. Brown confessed to the police that the robbery was his idea, implicated Ransom as one of his co-conspirators, and identified Stone as the shooter. Ransom confessed as well and also identified Stone as the third participant and shooter. Tucker also identified Stone as one of the robbers.

Based on this information, the State charged Stone with two counts of murder, two counts of felony murder, and one count of Class A felony robbery. At trial Brown and Ransom identified Stone as the shooter, and Tucker testified that Stone was with Brown and Ransom both before and after the robbery. Stone testified in his own defense. Specifically, he testified that he did not know Ransom, Brown, or Tucker and that he did not know anything "about those events, those horrible events which took place on that weekend, December 15th." *Id.* at 1089-90.

A jury convicted Stone of the two counts of felony murder and robbery. It did not reach a verdict on the murder counts. The trial court "set aside" the robbery conviction due to double jeopardy concerns. Appellant's App. p. 28. The trial court identified as aggravators Stone's juvenile and adult criminal history, including a probation violation; that this offense involved a handgun, and one of Stone's previous convictions was for

carrying a handgun without a license; that the day before the murders, Stone bonded out of jail on felony charges of forgery and attempted theft; and the nature and circumstances of the offenses. The court identified as mitigators that Stone was eighteen years old when he committed the offenses, he has three young children (three-year-old twins and a one-year-old) upon whom lengthy incarceration would be a hardship, as well as the hardship upon the mother of Stone's one-year-old child and Stone's mother. The trial court sentenced Stone to fifty-five years on each count of felony murder and ordered the sentences to be served consecutively, for an aggregate term of 110 years. Stone now appeals.

Discussion and Decision

Stone raises two issues on appeal. First, he contends that the evidence identifying him as the shooter is insufficient to support his convictions, invoking the incredible dubiosity rule. Second, he contends that his 110-year sentence is inappropriate in light of the nature of the offenses and his character.

I. Incredible Dubiosity Rule

Stone contends that the evidence is insufficient to support his felony murder convictions because the evidence identifying him as the shooter "was based solely on the testimony of accomplices who received enormous benefit from courts. The only eyewitness who was not involved in the crime [Eskew] failed to identify Mr. Stone and, in fact, initially identified another man as the shooter." Appellant's Br. p. 6. Because "[t]he testimony of those who each participated in the offense is so unworthy of belief," Stone asks us to invoke the incredible dubiosity rule and reverse his convictions. *Id.*

When reviewing the sufficiency of the evidence, appellate courts must only consider 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. *Id.* To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it "most favorably to the trial court's ruling." *Id.* Appellate courts affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Id.* at 146-47 (quotation omitted). It is therefore not necessary that the evidence "overcome every reasonable hypothesis of innocence." *Id.* at 147 (quotation omitted). "[T]he evidence is sufficient if an inference may reasonably be drawn from it to support the verdict." *Id.* (quotation omitted).

The incredible dubiosity rule provides that a court may "impinge on the jury's responsibility to judge the credibility of witnesses only when confronted with inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity." *Murray v. State*, 761 N.E.2d 406, 408 (Ind. 2002). The application of this rule is limited to where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the defendant's guilt. *James v. State*, 755 N.E.2d 226, 231 (Ind. Ct. App. 2001), *trans. denied*. "[A]pplication of this rule is rare and . . . the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no person

could believe it." *Stephenson v. State*, 742 N.E.2d 463, 497 (Ind. 2001) (citation omitted).

The incredible dubiosity rule does not apply to this case because there is testimony from more than one witness, and their testimony is not inherently improbable. In fact, Stone fails to argue or show that the testimony of a single witness is inherently contradictory. Brown and Ransom identified Stone as the shooter—both shortly after the murders and at trial. Brown and Ransom admitted their roles in the robbery and gave similar accounts of what transpired. In addition, Tucker, who was not charged in connection with these offenses, testified at trial that Stone was with Brown and Ransom both before and after the robbery. Stone's argument, then, is that their testimony conflicts with that of Eskew. Eskew, who, miraculously, was not shot, identified Brown as one of the robbers but was never able to identify the shooter. It is true that Brown and Ransom received considerable leniency in exchange for their testimony at Stone's trial. However, this leniency, of which the jury was aware, came after their initial identifications of Stone. Instead, this is an issue of witness credibility. The function of weighing witness credibility lies with the trier of fact, not this court. *Whatley v. State*, 908 N.E.2d 276, 283 (Ind. Ct. App. 2009), *trans. denied*. Stone merely asks that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do. *See Drane*, 867 N.E.2d at 146. Therefore, we conclude that the incredible dubiosity rule does not apply. *See Whatley*, 908 N.E.2d at 283. Given Brown's, Ransom's, and Tucker's testimony which corroborates many details of the robbery and Brown's and Ransom's

testimony which identifies Stone as the shooter, we affirm Stone's felony murder convictions.

II. Inappropriate Sentence

Stone contends that his 110-year sentence for two counts of felony murder is inappropriate in light of the nature of the offenses and his character. In reviewing the imposition of a trial court's decision, Article 7, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a court "may revise a sentence authorized by statute 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." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007)). The burden is on the defendant to persuade us that his or her sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

Stone was convicted of two counts of felony murder. Ind. Code § 35-42-1-1(2). A person who commits murder shall be imprisoned for a fixed term between forty-five and sixty-five years, with the advisory sentence being fifty-five years. Ind. Code § 35-50-2-3. The trial court sentenced Stone to advisory terms of fifty-five years for each conviction and then ordered the sentences to be served consecutively.

As for the nature of the offenses, Stone argues that the murders of Michael and his father Anthony were not intentional, as evidenced by the jury's guilty verdict on the felony murder chargers but lack of a unanimous decision on the murder charges. He

highlights that the shots were fired after Anthony tried to tackle him for the gun. Stone also argues that the "entire crime was the brainchild of Warren Brown, who acknowledged to the police it was all his idea." Appellant's Br. p. 14. And according to this "plan," no one was supposed to be at the Earls' home when they stole the guns. Even though Stone may not have intended to kill anyone, this does not negate the fact that Stone, wearing at least gloves to conceal his identity, stormed into another family's home, after knowing they were home and armed with a loaded handgun, and shot and killed a father and his son. As the trial court aptly stated:

> Moreover, the crimes in this case included a home invasion in which the two victims were father and son. They were in their own home at the time and the evidence shows that the father was trying to protect his son and the other young man present when Mr. Stone decided to kill him. Given defendant's history and his conduct in committing these offenses, court further finds that the likelihood of defendant committing another offense in the future is great. The fact he left both of these men to die in their own home while he decided to complete the robbery is an aggravating factor. The devastating impact on the family. You've made a devastating impact not only on the Earls, but on your own family. The fact that you're not going to see your children as they grow up was your choice.

Tr. p. 1280-81.

As for Stone's character, the PSI shows that, as a juvenile, he has true findings for misdemeanor battery and misdemeanor operating a vehicle having never received a license. As an adult, Stone has a 2006 misdemeanor conviction for carrying a handgun without a license. And the day before the murders, Stone was released on bond for felony charges of forgery and attempted theft. The timing of these felony murders is clearly demonstrative of Stone's quickly escalating criminal propensity.

As for Stone's argument that his sentence is inappropriately disproportionate to the sentences Brown and Ransom received, we simply respond that Stone is the one who carried the handgun and shot Michael and his father Anthony. In addition, Brown and Ransom admitted their involvement in the robberies, while Stone refused to accept responsibility for his actions, instead testifying that he played no part in these crimes.

Stone has failed to persuade us that his 110-year sentence for two felony murders is inappropriate considering that, as a young adult, he had already evidenced a propensity for crime and senselessly took the lives of a father and his son.

Affirmed.

BAILEY, J., and BRADFORD, J., concur.