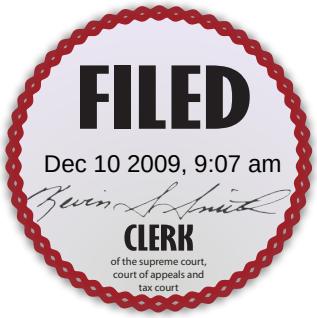

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IN THE COURT OF APPEALS OF INDIANA

JOHN C. FORADORI,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 84A01-0904-CR-166
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable David R. Bolk, Judge
Cause No. 84D03-0806-FC-1987

December 10, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

John C. Foradori appeals after a jury convicted him of burglary[1] as a Class C felony and auto theft[2] as a Class D felony. He raises three issues that we restate as:

I. Whether the trial court erred when it denied Foradori's *Batson* objection to the State's peremptory challenge of an African-American prospective juror;

II. Whether the evidence was sufficient to convict Foradori of burglary and auto theft; and

III. Whether Foradori's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

FACTS AND PROCEDURAL HISTORY

At about 5:30 a.m. on June 10, 2008, Janice Tighe and her husband noticed the silhouettes of two men with flashlights outside their residence. The two men approached Janice's 1991 blue Chevy Lumina van, got in it, and drove away. Janice immediately called 911.

Joan and Yogi's One Stop convenience store ("One Stop"), located along State Road 63, and not far from the Tighes' residence, was not yet open; therefore, the doors were locked, and the lights were off. Because of recent floods in the area, One Stop's owner and an employee, Nathan Anderson, were sleeping in the store in order to run a pump every couple of hours. At approximately 6:00 a.m., Anderson was awakened to rattling and commotion in the store. Anderson investigated and discovered a man, later determined to be

[1] *See* Ind. Code § 35-43-2-1.

[2] *See* Ind. Code § 35-43-4-2.5(b)(1).

Joseph Plunkett, at the cash register stealing money. Plunkett fled through the back door of the store, which had been pried open with a tool.

Anderson followed Plunkett outside. The blue 1991 Lumina van was parked behind the store, facing the highway with its door open and engine running. Anderson chased Plunkett, who was soon apprehended by National Guardsmen who were in the area assisting with the flood control efforts. As Anderson exited the store in pursuit of Plunkett, he saw a man standing by the highway, who immediately fled on foot when he saw Plunkett running from the store.

When the police arrived and arrested Plunkett, Anderson provided them with a physical description of the other man who had run from the scene: a white male with red hair, wearing khaki pants and a blue shirt. Deputy Jeffrey Bell of the Vigo County Sheriff's Department arrived at One Stop, ran the license plate on the van, and determined that the van had been stolen from Tighe earlier that morning. Authorities contacted Janice, who came and recovered her vehicle.

About this time, Vigo County Sheriff Jon Marvel was on his way to work when he saw a man, matching the description of the subject that had run from One Stop, walking along the highway in the rain. When Sheriff Marvel stopped and asked the man his name, he identified himself as Foradori. Sheriff Marvel read Foradori his rights, and Deputy Bell arrived at the scene to assist. Once inside Deputy Bell's vehicle, Foradori inquired about the charges he was facing, and Deputy Bell told him "burglary and theft." *Tr*. at 143. Foradori

stated, "I didn't know the vehicle was stolen, I just rode in it[,]" even though Deputy Bell had not mentioned that the theft charge related to a vehicle. *Id*.

The State charged Foradori with Class C felony burglary and Class D felony auto theft. The trial was held in February 2009, and during jury selection, the State used a peremptory challenge against Juror #1054, the only African-American juror that was on the panel at that time.[3] Foradori objected to the State's challenge of the juror, claiming it was in violation of *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), which determined that the exercise of race-based peremptory challenges is constitutionally impermissible. The trial court ultimately overruled Foradori's *Batson* objection, and the jury found Foradori guilty as charged.

The trial court conducted a sentencing hearing, and after finding one aggravating factor—Foradori's criminal history—and no mitigating factors, the court sentenced Foradori to six years for the burglary conviction and two years for the auto theft conviction, to be served concurrently. Foradori now appeals.

DISCUSSION AND DECISION

I. *Batson* Objection

Foradori claims the trial court erred when it denied his *Batson* objection to the State's exercise of a peremptory challenge to Juror #1054, who was the only African-American on

[3] It is not clear whether Juror #1054 was the only African-American in the entire pool of prospective jurors that day. During the exchange between Foradori's counsel and the trial court regarding the *Batson* issue, Foradori's counsel said, "[H]e's the only African-American on the panel at this time. I haven't really looked at the entire jury pool that closely, but he may be the only, maybe one of few, that's in the entire jury pool." *Voir Dire Tr*. at 130.

the panel of prospective jurors at that time. When a party raises a *Batson* challenge—that is, a claim of racial discrimination in a peremptory strike—the trial court must undertake a three-step test. *Jeter v. State*, 888 N.E.2d 1257, 1263 (Ind. 2008), *cert. denied* (2008); *Highler v. State*, 854 N.E.2d 823, 826 (Ind. 2006). First, the trial court must determine whether the party making the *Batson* objection has made a prima facie showing that the challenger exercised a peremptory challenge on the basis of race. *Highler*, 854 N.E.2d at 826-27. To make a prima facie case of purposeful discrimination, the objecting party must show that the excused juror was a member of a cognizable racial group and present an inference that the juror was excluded because of his or her race. *Id*. at 827.

Second, the burden shifts to the party making the peremptory challenge to present a race-neutral explanation for striking the juror. *Id*. 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, 114 L. Ed. 2d 395 (1991) (plurality opinion)); *McCormick v. State*, 803 N.E.2d 1108, 1111 (Ind. 2004). The race-neutral explanation must be more than a mere denial of improper motive, but it is not required that the explanation be persuasive or even plausible. *Purkett v. Elem*, 514 U.S. 765, 767-68,115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995); *Highler*, 854 N.E.2d at 827; *Jones v. State*, 859 N.E.2d 1219, 1222 (Ind. Ct. App. 2007), *trans. denied*. If the reason is not inherently discriminatory, it passes the second step of the inquiry. *Highler*, 854 N.E.2d at 827.

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.[4] *Id*. 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); *Jones*, 859 N.E.2d at 1222. 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*, 888 N.E.2d at 1264 (best evidence of whether counsel's race-neutral explanation should be believed often will be demeanor of attorney who exercised peremptory challenge).

Here, during *voir dire*, the State used a peremptory challenge to strike an African-American person from the jury panel. 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. However, the removal of the only African-American juror that could have served does raise an inference that the juror was excluded on the basis of race. *McCormick*, 803 N.E.2d at 1111. Here, the State does not dispute that it removed the only African-American prospective juror on the panel; thus, Foradori presented a prima facie case of purposeful discrimination in the jury selection process.

[4] 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, 131 L. Ed. 2d 834 (1995)).

We now turn to the second step of the analysis to examine the State's explanation for exercising the peremptory challenge. After Foradori posed the *Batson* objection, the State explained:

> [T]hroughout questioning both by myself and through the defense questions [Juror #1054] seemed generally disinterested in the process, um, lack of eye contact. Failure actually to respond to the questions, I had to prompt a response to him, and I have real questions about whether or not he could be an active participant at trial as far as listening and weighing the evidence and applying it to the facts.

Voir Dire Tr. at 129-30. The trial court responded as follows:

> Okay. And I'm finding that the State has made a valid race-neutral reason um, for removing, for striking of [J] uror [#1054].
>
> . . . .
>
> [I]t's my impression that the State's characterization of [Juror #1054]'s answers is true. He seemed generally disinterested. He wouldn't, didn't really answer the State's questions at all. Um, now he did answer one of um, [defense attorney]'s questions but um, I'm gonna deny the *Batson* challenge.

Id. at 130-31.

On appeal, Foradori claims that the record does not support the State's explanation about the juror's responses and his lack of interest and that, therefore, "the prosecutor failed to provide a race neutral justification to support the strike." *Appellant's Br*. at 5-6. We disagree. "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Purkett*, 514 U.S. at 767-68; *Jeter*, 888 N.E.2d at 1264. In the present case, the State explained that Juror #1054 was inattentive and disinterested in the proceedings based on his responses to questions posed by

both the State and Foradori during jury selection, and this reason constitutes a race-neutral explanation for striking the juror. We now turn to the third step of the analysis.

Foradori argues that the trial court failed to properly analyze the challenge when it determined the State had given a race-neutral reason for striking Juror #1054; however, we are not persuaded. "'In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed.'" *Jeter*, 888 N.E.2d at 1264-65 (quoting *Hernandez*, 500 U.S. at 365). Thus, a trial court's conclusion that the striking party's reasons were not pretextual is essentially a finding of fact that turns substantially on credibility, and therefore the decision is accorded great deference. *Highler*, 854 N.E.2d at 828. Here, the trial court excused the jury and heard the *Batson* motion and arguments of counsel. After receiving this information, the court rendered its decision that it accepted the State's reason as being race-neutral. The trial court is in the best position to weigh the reasons, and Foradori has failed to show that the trial court erred in overruling Foradori's *Batson* objection to the State's peremptory strike of Juror #1054.

II. Sufficiency of the Evidence

Foradori next asserts that the evidence was not sufficient to support his convictions for burglary and auto theft. When reviewing claims of insufficiency of the evidence, we neither reweigh the evidence nor judge the credibility of the witnesses. *Baltimore v. State*, 878 N.E.2d 253, 258 (Ind. Ct. App. 2007), *trans. denied* (2008). Rather, we examine only the probative evidence and the reasonable inferences therefrom that support the verdict. *Id.* We

will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *Id*. It is the function of the trier of fact to determine the weight of the evidence and the credibility of the witnesses, and it is free to believe or disbelieve witnesses as it sees fit. *Klaff v. State*, 884 N.E.2d 272, 274 (Ind. Ct. App. 2008) (citing *McClendon v. State*, 681 N.E.2d 486, 488 (Ind. Ct. App. 1996)).

A. Burglary Conviction

Based on the evidence, the State pursued a conviction of Foradori for Class C felony burglary under an accomplice liability theory, which required the State to prove that Foradori knowingly or intentionally aided, induced, or caused Plunkett to commit burglary.[5] *See* Ind. Code § 35-41-2-4. Burglary as a Class C felony is defined as "break[ing] and enter[ing] the building or structure of another person, with the intent to commit a felony in it." Ind. Code § 35-43-2-1. Indiana law provides that there is no distinction between the responsibility of a principal and that of an accomplice. *Wise v. State*, 719 N.E.2d 1192, 1198 (Ind. 1999). It is not necessary for a conviction that the accomplice participates in each and every element of the crime. *Id*.

Foradori's sufficiency challenge is based on the lack of direct evidence of his involvement in the burglary of One Stop. However, "'a conviction for burglary may be sustained by circumstantial evidence alone.'" *Klaff*, 884 N.E.2d at 275 (quoting *Cash v. State*, 557 N.E.2d 1023, 1025 (Ind. 1990)). Even though one's mere presence at the crime

[5] In December 2008, Plunkett executed a guilty plea agreement under which he pleaded guilty to, among other things, burglary and auto theft, both as Class C felonies. *State's Ex.* 4 at 8-12.

scene with the opportunity to commit a crime is not a sufficient basis on which to support a conviction, one's presence at the scene in connection with other circumstances tending to show one's participation may raise a reasonable inference of guilt. *Klaff*, 884 N.E.2d at 275. "Where circumstantial evidence is used to establish guilt, the question for the reviewing court is whether reasonable minds could reach the inferences drawn by the jury; if so, there is sufficient evidence." *Id*. at 274-75. It is not necessary to determine whether the circumstantial evidence is adequate to overcome every reasonable hypothesis of innocence, but rather whether inferences may be reasonably drawn from that evidence which supports the verdict beyond a reasonable doubt. *Id*. at 275.

In determining whether a person aided another in the commission of a crime, we consider the following factors: (1) presence at the scene of the crime; (2) companionship with another at the scene of the crime; (3) failure to oppose commission of the crime; and (4) course of conduct before, during, and after the occurrence of the crime. *Vandiver v. State*, 822 N.E.2d 1047, 1054 (Ind. Ct. App. 2005), *trans. denied*. Here, Foradori admitted to police that he was with Plunkett at One Stop. *Tr*. at 135. One Stop employee Anderson testified that, as he chased Plunkett out of the building, he observed that the blue van was parked behind One Stop, with the engine still running and facing State Road 63. Upon exiting the One Stop building, Anderson also observed Foradori standing on or next to State Road 63, in front of the store, and then watched Foradori flee when Foradori saw that Plunkett was being chased. Indiana recognizes that flight can constitute evidence of consciousness of guilt. *Dill v. State*, 741 N.E.2d 1230, 1232 (Ind. 2001). After Foradori's

arrest, he asked police "where Joe P. was," suggesting his companionship with Plunkett. *Tr.* at 143.

Considering Foradori's presence at the scene of the crime, his companionship with Plunkett, and his course of conduct before, during, and after the burglary, we find that the evidence raised a reasonable inference of guilt and was sufficient to support his conviction for burglary.

B. Auto Theft

Like his burglary conviction, Foradori's Class D felony auto theft conviction was premised on an accomplice liability theory, which required the State to prove that Foradori knowingly or intentionally aided, induced, or caused Plunkett to commit auto theft. *See* Ind. Code § 35-41-2-4. To convict one of auto theft, the State must establish beyond a reasonable doubt that the defendant knowingly or intentionally exerted unauthorized control over another's vehicle with the intent to deprive that person of the vehicle's value or use. Ind. Code § 35-43-4-2.5. As with Foradori's burglary conviction, the evidence presented to prove the auto theft charge consisted primarily, if not entirely, of circumstantial evidence. A theft conviction may be sustained by circumstantial evidence. *J.B. v. State*, 748 N.E.2d 914, 916 (Ind. Ct. App. 2001). Unexplained possession of recently stolen property is sufficient to infer actual theft. *Brown v. State*, 827 N.E.2d 149, 153 (Ind. Ct. App. 2005).

On the morning in question, Janice and her husband witnessed two men enter her blue Lumina van, which was parked on her property, and drive away at about 5:30 a.m. Less than an hour later, her van was found parked outside One Stop, which was being burglarized and

robbed. Specifically, Plunkett was observed inside One Stop at the cash register, and Foradori was observed standing outside at the road in front of the store. Foradori fled the scene, but his description was reported to police radio dispatch, and Sheriff Marvel picked up Foradori a short time later as Foradori was walking along the highway in the rain. Deputy Bell arrived to assist Sheriff Marvel and took Foradori into custody and transported him to jail. Along the way, Foradori asked Deputy Bell what offenses he was being charged with, and Deputy Bell advised Foradori, "burglary and theft." *Tr*. at 143. Foradori replied, "I didn't know the vehicle was stolen, I just rode in it." *Id*. By this statement, Foradori revealed his knowledge that the van was stolen, even though no one had yet told him that the theft charge related in any way to a vehicle.

Meanwhile, during Plunkett's arrest, he told officers that he did not steal the van, and was only a passenger in it. This supports the inference that Foradori was the driver of the stolen blue van. The jury was free to believe that Foradori was either the driver or a passenger in the stolen van. In addition, Foradori's flight from the scene upon realizing that Anderson was in pursuit of Plunkett is further evidence that Foradori exerted unauthorized control over the vehicle. *See Maxey v. State*, 730 N.E.2d 158, 162 (Ind. 2000) (evidence of flight is relevant as circumstantial evidence of consciousness of guilt). We conclude that the evidence was sufficient to convict Foradori of auto theft.

III. Sentencing

The trial court sentenced Foradori to six years for his Class C felony burglary conviction and imposed a concurrent two-year sentence for his Class D felony auto theft

conviction. Foradori contends that this six-year executed sentence is unreasonably excessive and asks us to revise it.

Even where a trial court has not abused its discretion in imposing a sentence, the Indiana Constitution authorizes us to conduct independent appellate review and sentence revision. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g* 875 N.E.2d 218 (Ind. 2007). Indiana Appellate Rule 7(B) provides: The 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. The burden rests with the defendant to persuade us that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

"Regarding the nature of the offense, the [advisory] sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Id*. at 1081; *Weiss v. State*, 848 N.E.2d 1070, 1072 (Ind. 2006). The statutory range for a Class C felony is between two and eight years, with the advisory sentence being four years. Ind. Code § 35-50-2-6. The statutory range for a Class D felony is between six months and three years, with the advisory sentence being one and one-half years. Ind. Code § 35-50-2-6.

Upon examination of the nature of the present offense, we acknowledge that this was a burglary in which no one was injured, and there was minimal property damage.[6] However, we note that Foradori committed the offenses during a "one hundred year flood event," a

[6] Janice testified that "[t]hey busted my ignition," and that some items were missing from that van when she retrieved it, such as her camera and her MP3 player. *Tr*. at 38.

time of tragedy or vulnerability for some residents and when some were reaching out to assist one another.[7] *Tr*. at 11. In light of those existing conditions, Foradori's actions of stealing a vehicle and robbing a flooded store were notably opportunistic.

Assuming without deciding that the nature of Foradori's offense was not remarkable, Foradori's character alone supports the six-year executed sentence. The trial court characterized Foradori's criminal history as "awful," observing that Foradori had four juvenile adjudications of delinquency, three prior adult felony convictions, and ten misdemeanor convictions. *Id*. at 16. Foradori's character does not reflect an individual who has respect for the law. He has previously failed to comply with the requirements of the probation department, such that his probation has been revoked on five occasions. The trial court found that Foradori's criminal history constituted an aggravating factor, and it found that no mitigating factors existed.[8]

Foradori has not carried his burden of persuading this court that his sentence met the inappropriateness standard of review. *See Anglemyer*, 868 N.E.2d at 494 (declaring that

[7] One Stop owner Ted Pohlman was keeping the store open longer hours to assist those residents affected by the flood, and he slept at the store in order to operate the pumps every couple of hours. *Tr*. at 46. Janice was awake in the morning hours talking with her husband about how they were going to handle the prospect of repairing their air conditioning that "went out," when she witnessed her van being stolen out of her driveway. *Id*. at 34.

[8] In his argument, Foradori appears to claim that the trial court failed to consider as a mitigator that he has a history of drug abuse and its effects on him. *See Appellant's Br*. at 15-16. However, Foradori testified at the sentencing hearing and such matters were not raised or mentioned in his testimony, nor did his counsel mention drug abuse in her argument, other than stating he had "a rocky start in life." *Tr*. at 13. Accordingly, the issue of whether drug abuse should have been considered as a mitigating factor has been waived. *See Spears v. State*, 735 N.E.2d 1161, 1167 (Ind. 2000) (where defendant does not advance factor to be mitigating at sentencing, reviewing court will presume factor is not significant and defendant may not advance it for first time on appeal).

defendant must persuade appellate court that his sentence has met inappropriateness standard of review). Foradori's six-year executed sentence, consisting of a six-year sentence for the Class C felony conviction and a concurrent two-year sentence for the Class D felony conviction, is not inappropriate in light of the nature of the offenses and the character of this offender.

Affirmed.

NAJAM, J., and BARNES, J., concur.