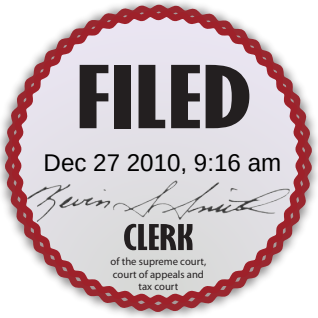

ATTORNEY FOR APPELLANT:

PHILIP R. SKODINSKI
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ARTURO RODRIGUEZ II
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

MARTEL JOHNSON,	)	
	)	
Appellant/Defendant,	)	
	)	
vs.	)	No. 71A03-1003-CR-169
	)	
STATE OF INDIANA,	)	
	)	
Appellee/Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable R.W. Chamblee, Jr., Judge
Cause No. 71D08-0903-MR-11

December 27, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Martel Johnson appeals from his Felony Murder[1] conviction. Specifically, Johnson contends that the trial court abused its discretion in admitting certain evidence at trial and that the evidence is insufficient to sustain his felony murder conviction. We affirm.

FACTS AND PROCEDURAL HISTORY

On March 14, 2009, Johnson, Aaron Johnson, and a man named Jermaine drove to Andrew Griffin's apartment complex armed with at least one handgun. Upon arriving at the apartment complex, the men visited with Johnson's cousin, who lived in an upstairs apartment. The men asked Johnson's cousin if he wanted "to make some money." Tr. p. 325. Johnson's cousin declined and told the men that he was tired and planned to take a nap. As they were leaving, the man named Jermaine told Johnson's cousin, "[W]ell, if you hear something just keep laying down [on your bed] then." Tr. p. 326. Moments later, Johnson's cousin heard three gunshots. Griffin was found dead in his apartment later that day with gunshot wounds to the back of the head.

On March 18, 2009, Johnson was charged with murder, Class B felony robbery, and felony murder. Johnson subsequently admitted that he had knocked on Griffin's door and entered Griffin's apartment after leaving his cousin's apartment on March 14, 2009, but claimed that he did not kill Griffin. Following a jury trial, Johnson was convicted of Class B felony robbery and felony murder. On February 26, 2010, the trial court imposed a fifty-five-

[1] Ind. Code § 35-42-1-1(2) (2008).

year sentence on Johnson's felony murder conviction.[2] This appeal follows.

DISCUSSION AND DECISION

I. Whether the Trial Court Abused its Discretion in Admitting Certain Evidence

Johnson contends that the trial court abused its discretion in admitting an audiotape of his ninety-minute interview with police officers in connection with Griffin's murder because the probative value of his statements is substantially outweighed by the danger of unfair prejudice.

> A trial court has broad discretion in ruling on the admissibility of evidence. Accordingly, we will reverse a trial court's ruling on the admissibility of evidence only when the trial court abused its discretion. An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court.

Washington v. State, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003) (citations omitted).

"All relevant evidence is admissible, except as otherwise provided by the United States or Indiana constitutions, by statute not in conflict with these rules, by these rules or by other rules applicable in the courts of this State." Ind. Evidence Rule 402. "Evidence which is not relevant is not admissible." Evid. R. 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid. R. 401. However, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of

[2] The trial court did not sentence Johnson on the robbery conviction because of double jeopardy concerns.

the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." Evid. R. 403. The evaluation of whether the probative value of a particular item of evidence is substantially outweighed by the danger of unfair prejudice is a discretionary task best performed by the trial court. *Bostick v. State*, 773 N.E.2d 266, 271 (Ind. 2002). "The trial court's ruling is presumptively correct, and a challenger bears the burden on appeal of persuading us that the trial court erred in its exercise of discretion." *Sears Roebuck and Co. v. Manuilou*, 742 N.E.2d 453, 457 (Ind. 2001) (citing *Anderson v. State*, 681 N.E.2d 703, 706 (Ind. 1997)).

Johnson argues that the trial court abused its discretion in admitting the audiotape of his ninety-minute interrogation interview because the probative value of his statements was substantially outweighed by the danger of unfair prejudice from certain statements made by the investigating officer. Specifically, Johnson challenges the following five statements allegedly made by the investigating officer during the ninety-minute interview: (1) "You came back and told the girls you just committed a lick on the lake;" (2) "You told people up here in Milwaukee that you got rid of the gun;" (3) "Your DNA is all over the coat;" (4) "Your DNA is all over his body;" and (5) "Everybody else says this was supposed to be a lick." Appellant's Br. p. 6. Johnson argues that these statements by the investigating officer were false inadmissible hearsay and were "more prejudicial" to him "than the actual evidence presented by the State" and that his statements to the investigating officer had little probative

value because "he did not confess to committing any of the charged offenses."[3] Appellant's App. p. 7.

Upon playing the audiotape of the ninety minute interview, the trial court admonished the jury as follows:

> Ladies and gentlemen of the jury, on the interview tape you will hear statements, allegations and questions from the police officers. And while such statements, allegations and questions are legitimate during an interview you were instructed that only the statements and reactions from Martel Johnson are evidence. Anything said by the police officer is not in itself evidence.

Tr. p. 351. This admonishment specifically instructs the jury that only statements and reactions made by Martel Johnson are evidence, and that anything said by the investigating police officer is not evidence. Johnson, however, argues that this admonishment was "insufficient to overcome the prejudice created by the admission of the statements." Appellant's App. p. 6.

In *Strong v. State*, 538 N.E.2d 924, 928 (Ind. 1989), the Indiana Supreme Court considered whether the trial court abused its discretion in admitting an audiotape of a police interview with the defendant that included a statement by an investigating officer that police detectives found "physical evidence proof" in the defendant's home. The Court held that the trial court did not abuse its discretion in admitting an audiotape because the statements were not offered as proof of the facts asserted therein and the jury was adequately admonished that any statements made by the police officers were not to be considered as evidence. *Id.*

[3] On appeal, Johnson fails to provide any indication as to where in the ninety-minute audiotape the statements were allegedly made. In the future, we encourage counsel to provide reviewing courts with a time stamp of the approximate spot within the exhibit where the challenged statements can be found.

In *Bostick*, the Indiana Supreme Court considered whether the trial court abused its discretion in allowing the jury to hear the defendant's interrogation by police. 733 N.E.2d at 268-71. The interrogation in question contained repeated accusatory assertions by the interrogators that "there was absolutely no doubt that the defendant set the fire that killed her children," including the following:

> I want you to help me explain why this happened, why you did this. Not if you did it Amy. Why you did it, cause that's what's important.
>
> Amy, don't tell me you didn't do it. That's not a factor at this time, okay.
>
> Listen, Amy, everyone's gonna know that you did this and that's not a question, that is not a question we're here to discuss at this time. I can tell you absolutely without any, any reservation whatsoever that if you did it is not a question.
>
> You know you set that fire and you know exactly how you set that fire.
>
> Yeah, you do know you set it Amy. The only question is why you set it ....
>
> Don't give me I don't know Amy. You know as well as you know your name is Amy that you got up out of bed and set the fire. I want you to tell me how you did it.
>
> No, that's not the truth Amy. You know that you set that fire.
>
> We know the truth Amy and we know you did it.
>
> No, Amy, you set that fire. You know it and I know it.
>
> Oh I believe absolutely no doubt that you did it. That's not a question. The only question we have to explain to people is why.
>
> We know for a fact that Amy set the fire and I know what's going on in Amy's life.
>
> Okay, well we all know you did it ... Okay, well I think we all know it, and I think you know it too.

Id. at 269-70 (internal record citations omitted). In addition, at one point, the interrogator asserted that defendant "wanted to get rid of the kids" so she could "have her boyfriend." *Id*. at 270. Defendant argued on appeal that the danger of unfair prejudice from the interrogator's statements substantially outweighed the probative value of her statements. *Id*. at 269. However, the Indiana Supreme Court disagreed, and held that the repeated violations, in the context of the entire statement, did not create a substantial risk of unfair prejudice. *Id*. at 270. In reaching this conclusion, the Court relied largely upon the fact that the defendant maintained her innocence in the face of such accusations. *Id*.

In *Washington v. State*, 808 N.E.2d 617 (Ind. 2004), the Indiana Supreme Court again considered whether the trial court abused its discretion in allowing the jury to hear the defendant's interrogation by police. The interrogation in question included the following statements:

> We'll prove to you her blood's all over your clothes and I'll prove to you that you were there when she died.
>
> You got your supposedly your [sic] best friend in the world's blood on your clothes.
>
> ****
>
> We've got physical evidence from her blood on your clothes.
>
> Her blood on your clothes Jeff.
>
> Those are your clothes, that's her blood on your clothes.
>
> ****
>
> Your sisters, your grandma and your mother, they've all been talking to us all

> night scared to death, what happened to Jeff. What's he going to do to himself. You know they all think you did it.

Id. at 622. Upon allowing the jury to hear defendant's interrogation, the trial court instructed the jury that the statements made by the interrogating officers during the course of the interview were not evidence and, as such, were not to be considered as evidence of the defendant's guilt or innocence. *Id*. at 624. The Indiana Supreme Court found that the interrogators' statements were buried within and scattered throughout the twenty page transcript of the interview, and as a result, "fail[ed] to see how a jury could have been persuaded by these comments." *Id*.

Here, like in *Strong*, *Bostick*, and *Washington*, the limited investigative function of the investigating officer's statements was explained to the jury at the time the recording was played, the jury was specifically instructed that only statements made by Johnson could be considered evidence, and Johnson fails to point to any incriminating statements that he made in response to any of the alleged incendiary statements. Furthermore, like in *Bostick* and *Washington*, the investigating officer's allegedly prejudicial statements were spread throughout the ninety-minute interview, and therefore must be considered within the context of the entire interview. Like the Indiana Supreme Court in *Bostick* and *Washington*, here, we fail to see how the five statements, when considered in the context of the entire ninety-minute interview, persuaded the jury or created a risk of unfair prejudice. Again, Johnson bears the burden on appeal of persuading us that the trial court erred in its exercise of discretion. *See Manuilou*, 742 N.E.2d at 457; *Anderson*, 681 N.E.2d at 706.

Furthermore, Johnson's statements were particularly probative. His statements demonstrated that he was at Griffin's apartment at the time of the murder, thus linking Johnson to the murder scene at the time of Griffin's murder. Additionally, when considered along with other evidence presented at trial, Johnson's admission created a reasonable inference that Griffin was killed by either Johnson, Aaron, or Jermaine during the commission of a robbery. This other evidence demonstrated that Griffin was a known drug dealer who had previously sold Johnson pills and that Johnson was in possession of pills and money shortly after Griffin's murder that he did not have before. Because Johnson failed to demonstrate either that he was substantially prejudiced by the investigating officer's statements or the admonishment given by the trial court was insufficient to protect against any potential prejudice, and in light of the substantial probative value of Johnson's statements connecting Johnson to the scene of the crime, we conclude that Johnson failed to prove that the trial court abused its discretion in this regard.

II. Whether the Evidence was Sufficient to Sustain Johnson's Felony Murder Conviction

Johnson next contends that the evidence presented at trial is insufficient to sustain his felony murder conviction.

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. 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. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary

> that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (citations, emphasis, and quotations omitted).

In order to prove that Johnson committed the offense of felony murder, the State was required to prove that Griffin was murdered during the commission of or the attempted commission of a robbery. Ind. Code § 35-42-1-1(2). The Indiana Supreme Court has held "that the statutory language 'kills another human being while committing' does not restrict the felony murder provision only to instances in which the [defendant] is the killer, but may also apply equally when, in committing any of the designated felonies, the [defendant] contributes to the death of any person." *Exum v. State*, 812 N.E.2d 204, 207 (Ind. Ct. App. 2004) (quoting Ind. Code § 35-42-1-1(2)). In establishing guilt under the statute for felony murder, the State does not have to prove intent to kill, but only the intent to commit the underlying felony. *Id*. (citing *Vance v. State*, 620 N.E.2d 687, 690 (Ind. 1993)). Therefore, in order to establish guilt under Indiana Code section 35-42-1-1(2), the State was required to prove either that Johnson knowingly or intentionally aided, induced, or caused another person to commit a robbery, Ind. Code § 35-41-2-4 (2008), or that he knowingly or intentionally took property from Griffin with the use of a deadly weapon or that the robbery resulted in bodily injury to any person other than himself. Ind. Code § 35-42-5-1 (2008).

At trial, the State presented circumstantial evidence to prove that at the very least, Johnson aided Aaron and Jermaine in robbing Griffin. Circumstantial evidence by its nature

is a web of facts in which no single strand may be dispositive. *Kriner v. State*, 699 N.E.2d 659, 664 (Ind. 1998). In a prosecution based on circumstantial proof, the evidence in the aggregate may point to guilt where individual elements of the State's case might not. *Id.* The Indiana Supreme Court has held that a conviction may be supported by circumstantial evidence alone. *Gambill v. State*, 675 N.E.2d 668, 674 (Ind. 1996). Where, as here, the sufficiency of circumstantial evidence is in question, the evidence need not be adequate to overcome every reasonable hypothesis of innocence. *Cardin v. State*, 540 N.E.2d 51, 58 (Ind. Ct. App. 1989), *trans. denied*. Circumstantial evidence is sufficient to sustain a conviction if an inference may reasonably be drawn from the evidence which supports the verdict. *Id.*

The evidence presented at trial demonstrates that immediately preceding Griffin's murder, Johnson, Aaron, and Jermaine visited Johnson's cousin in an upstairs apartment in the same building in which Griffin's apartment was located. Johnson, Aaron, and Jermaine asked Johnson's cousin whether he wanted to "make some money," but Johnson's cousin declined. Tr. p. 326. As Johnson, Aaron, and Jermaine were leaving Johnson's cousin's apartment, Jermaine told Johnson's cousin, "[W]ell, if you hear something just keep laying down [on your bed] then." Tr. p. 326. Moments later, Johnson's cousin heard three gunshots. Subsequently, Johnson told investigating officers that after he, Aaron, and Jermaine left his cousin's apartment, he knocked on Griffin's door because he knew Griffin. Johnson stated that either Aaron or Jermaine shot Griffin in the back of the head when he turned around to let the three of them in. In addition, the State presented testimony that

Johnson knew Griffin to be a drug dealer, had bought pills and other drugs from him on prior occasions, and that on the day following Griffin's murder, Johnson and Aaron were in possession of pills resembling the pills that Johnson had previously purchased from Griffin and money that they had not had the day before.

Upon review, we conclude that Johnson's, Aaron's, and Jermaine's comments to Johnson's cousin support the inference that they intended to rob Griffin. We also conclude that the evidence supports the inference that Johnson, at the very least, aided in, if not committed, the robbery by knocking on Griffin's door, and that Johnson and Aaron took pills and money that belonged to Griffin from his possession at the time of, or immediately following, his murder. The evidence demonstrates that at least one of the individuals involved used a deadly weapon in connection to the robbery and that the robbery resulted in Griffin's death. Johnson's challenge to the sufficiency of the evidence on appeal amounts to an invitation for this court to reweigh the evidence, which we will not do. *See McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005) (providing that upon a challenge to the sufficiency of the evidence, a reviewing court does not reweigh the evidence). Accordingly, we further conclude that the evidence is sufficient to sustain Johnson's felony murder conviction. *See* Ind. Code § 35-42-1-1(2); *Exum*, 812 N.E.2d at 207.

The judgment of the trial court is affirmed.

KIRSCH, J., and CRONE, J., concur.