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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL KELLER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0610-CR-620
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton Pratt, Judge
Cause No. 49G01-0312-MR-208716

August 27, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Michael Keller ("Keller") appeals his convictions and sentences for murder and robbery as a Class C felony. Keller argues that the trial court abused its discretion by admitting a blood-stained T-shirt into evidence, that the evidence is insufficient to sustain his robbery conviction, and that the trial court abused its discretion by considering improper aggravators, failing to find his substance abuse as a mitigator, and enhancing his sentences when it ordered them to be served consecutively. Concluding that the admission of the T-shirt was harmless error, that the evidence is sufficient to support Keller's robbery conviction, and that the trial court properly sentenced Keller, we affirm the judgment of the trial court.

Facts and Procedural History

During the late evening of November 29, 2003, Keller, Doug Cook, Jr. ("Cook"), Brandon Fischer ("Fischer"), and Fischer's girlfriend, Ashley Wheat ("Wheat"), went to a Dollar Inn motel, where Cook was staying. After midnight on November 30, 2003, the four of them rode in Cook's Cadillac and dropped Wheat off at her mother's house. Keller, Cook, and Fischer then stole a safe, which contained at least $5000.00, from someone that Fischer knew and took it to Cook's mother's back yard.

In the evening of November 30, 2003, Keller was with Cook at Cook's mother's house eating dinner. After dinner, Keller and Cook sat in the living room and counted "a bunch of money." Tr. p. 169. Cook asked Keller if Keller "wanted to give [Fischer] one of [his] stacks [of] money[,]" and Keller said, "I'm not giving him shit." *Id.* Keller retrieved $1000.00 from the safe. Later, Keller and Cook left with Cook's mother's

friend, Cindy Sugars ("Sugars") so Sugars could rent a hotel room at the Clarion Hotel for Cook. As they were leaving Cook's mother's house, Fischer and Wheat drove up, and Fischer talked to Keller and Cook and then left. As Keller, Cook, and Sugars drove to the Clarion Hotel, Keller and Cook talked about the thousands of dollars that they "stole" from "a guy's house[,]" how Fischer "was the one who set it up[,]" and about "what Brandon [Fischer] wanted[.]" *Id.* at 171-72.

Later that evening, Cook went with his mother to a Meijer store, where he spent several hundred dollars on jewelry for his girlfriend. At some point, Keller told Fischer that he and Cook had opened the safe and that he retrieved $1000.00. Keller drove Cook's white Grand Prix and took Fischer to Ernest Dale's ("Dale") house. Fischer went to the door and told Dale, who was also known as EJ, that he wanted to buy a gun. Dale agreed to sell Fischer an unloaded nine-millimeter gun for $150.00. While Dale went to get the gun, Fischer went to the car and got money from Keller. Fischer then bought the nine-millimeter gun from Dale. Also that evening, Wheat saw Keller and Fischer at a gas station in the white Grand Prix, and Keller told Wheat that "there was going to be more money later on than there is now." *Id.* at 228. Wheat noticed that Keller was "acting fluckery," which means "strange [or] odd" or as if "something's not right[.]" *Id.* at 229.

Around midnight on December 1, 2003, Cook and his mother finished shopping at Meijer. Around 1:00 a.m., Cook called Wheat looking for Keller and Fischer. Between 1:00 a.m. and 2:00 a.m., Keller, who was wearing a white T-shirt and appeared to be "real nervous and sweaty," went to Cook's uncle's house looking for Cook. *Id.* at 160. Sometime after 2:00 a.m., Cook went to his mother's house to look for a gun clip, could

not find it, and then left the house. Around 2:30 or 2:45 a.m., Cook went to his uncle's house and asked his uncle to go to the hotel room with him. Cook's uncle said he did not want to go, and Cook left and went to the hotel room at the Clarion.

Keller took Fischer, who was unaware of where Cook was staying, to the hotel room at the Clarion to wait for Cook. Cook "kept playing" to Fischer like he and Keller had not opened the safe. Ex. Vol. p. 210. At some point, Cook, Keller, and Fischer left the hotel in Cook's Cadillac and drove to 16th Street. While they were in the car, Fischer shot Cook in the head, and Keller "pulled" Cook's body over the front seat and into the backseat of the Cadillac. *Id.*

Around 3:45 a.m., on December 1, 2003, the Wayne Township Fire Department was dispatched to a vehicle fire at 7375 Mariner Way in Indianapolis. When they arrived on the scene, the firefighters found a Cadillac, which was parked in an apartment complex parking lot, with the interior of the vehicle engulfed in flames. The firefighters also saw that the gas tank and the trunk of the car were open. Once the firefighters extinguished the fire, they found a body, which was later identified as Cook, in the backseat of the car. Cook was alive and still breathing when he burned, and he died of "smoke inhalation, thermal burns[,] and a gunshot wound to the head." Tr. p. 147. The fire was intentionally set, and the fire's origin was the interior passenger compartment. When the crime scene investigator arrived to process the scene, she discovered a white T-shirt with "possible blood stains" in the trunk of the car. *Id.* at 73.

Sometime that morning of December 1, 2003, Keller, who was driving Cook's white Grand Prix with Keller's uncle as a passenger, drove up to Tamabra Williams

("Williams"), who was out walking on Sharon Street, and asked Williams if she knew where he could "get some crack." *Id.* at 194. After Williams informed him that she knew where he could buy crack, she got in the car with Keller and saw him pull "a wad of money" out of a black leather coat that was in the middle of the car. *Id.* at 195. They then drove to a location in Indianapolis, where Keller gave Williams money to buy an "eightball" of crack cocaine. *Id.* at 199. Before driving back to the hotel room, Keller stopped in an alley, retrieved a gun from a shed behind a house, and gave it to his uncle once he got back into the car.

Once they arrived at Cook's Clarion hotel room, Keller's uncle put the gun into the drawer of the nightstand. Keller then "cook[ed] up some [cocaine] powder," and Keller, his uncle, and Williams smoked the crack cocaine. *Id.* at 204. While they were in the room, Fischer knocked on the window to talk to Keller, but Keller sent Fischer away. A little while later, Wheat called the hotel room looking for Fischer, and Keller told her that he was not there and that he went somewhere else.

Later that morning of December 1, 2003, Detective Scott Scheid ("Detective Scheid") of the Marion County Sheriff's Department went to Cook's mother's house as part of his investigation of the fire. Cook's mother told the detective that Cook had last been seen with Keller and someone named Brandon and that Sugars had rented a room for Cook at the Clarion Hotel. Detective Scheid, Sergeant Mark Gullion ("Sergeant Gullion"), and Sergeant Maloney went to the hotel room at the Clarion with a maintenance worker. When they first knocked on the door and announced their presence, Williams went to the bathroom and flushed some "crystal meth" down the toilet. *Id.* at

211. Keller looked out the window, told Williams not to answer the door, and then went to the bathroom and flushed the toilet. After Williams opened the door, the detectives found Keller, his uncle, and Williams in various states of undress. Before allowing them to dress, Sergeant Gullion checked their clothes for "safety" purposes. *Id.* at 242. When Sergeant Gullion searched Keller's coat that was on the bed, he found a nine-millimeter bullet, a "wad of cash," some methamphetamine, and some drug paraphernalia. *Id.* at 272. Sergeant Gullion took the bullet and left the remaining items in the coat. After Keller put on his pants, Detective Scheid noticed that Keller had blood on his pants, which was later tested and determined to be Cook's blood. The detectives obtained Sugars' consent to search the room and found, among other things, some drug paraphernalia, alcohol, some Meijer bags and Meijer receipts, and an unloaded forty-five caliber handgun, which was later identified as Cook's gun, in the drawer of the nightstand. The detectives also obtained a search warrant for Keller's clothing and seized methamphetamine and $1238.00 from Keller's coat.

That same day, the detectives arrested Keller and took him to the Sheriff's Department's headquarters, where the detectives conducted a videotaped interview with Keller. *See State v. Keller*, 845 N.E.2d 154, 158 (Ind. Ct. App. 2006). The following day, on December 2, 2003, Keller gave another videotaped statement to police. During this second interview, Keller admitted that he, Cook, and Fischer stole a safe from someone that Fischer knew and took it to Cook's mother's house. Keller stated that he thought the safe contained $5000.00. Keller also stated that he told Fischer that he and Cook had opened the safe and that he (Keller) took $1000.00. Keller stated that he and

Fischer got a gun from an individual named EJ, whose real name was Ernest Dale. Additionally, Keller stated that he took Fischer to the Clarion Hotel to wait for Cook and that when Cook showed up at the hotel, Cook did not did not "fess up" and tell Fischer that they had opened the safe. Ex. Vol. p. 210. Keller told the police that Fischer shot Cook and admitted that after Cook was shot, he pulled Cook's body into the backseat of the car. When the detectives asked Keller why he did not try to stop Fischer when they left the hotel when he knew that Cook was going to get killed, Keller responded that he thought that Cook was going to tell Fischer about opening the safe.

Also on December 2, 2003, Keller called Wheat and told her to "[t]ell [Fischer] not to worry" and that he had "everything under control." Tr. p. 234. Fischer was arrested that same day, and upon his arrest, he had $1600.00 on him, which was unusual for Fischer because "he usually doesn't have money." *Id.* at 312.

The State charged Keller with Count I, murder;[1] Count II, felony murder;[2] Counts III and IV, arson as a Class A felony;[3] Count V, carrying a handgun without a license as a Class C felony;[4] Count VI, theft as a Class D felony;[5] Count VII, possession of methamphetamine as a Class C felony;[6] and Count VIII, robbery as a Class A felony for

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[1] Ind. Code § 35-42-1-1.

[2] *Id.*

[3] Ind. Code § 35-43-1-1.

[4] Ind. Code § 35-47-2-1.

[5] Ind. Code § 35-43-4-2. The theft charge related to the unauthorized control of the safe and its contents.

[6] Ind. Code § 35-48-4-6.

taking currency from Cook.[7] Prior to trial, Keller filed a motion to suppress the evidence from the search of the hotel room and a motion to suppress the two statements he made to police on December 1 and December 2. *See Keller*, 845 N.E.2d at 159. After holding a hearing, the trial court granted Keller's motion to suppress his first statement to police but denied his request to suppress the second statement and the evidence from the search of the hotel room. *Id.* Following an interlocutory appeal filed by the State, we affirmed the trial court's rulings on the suppression motions. *See id.* at 166-69.

A jury trial was held in August 2006.[8] During the trial, the crime scene investigator who collected evidence from the burned vehicle where Cook's body was found testified that a white T-shirt "with possible blood stains" was recovered from the vehicle's trunk area. Tr. p. 73. The State then moved to admit the blood-stained T-shirt, as State's Exhibit 106, into evidence. Keller objected based on "relevance grounds" and argued that there was "nothing to link the blood on th[e] shirt to anything involved" because no DNA testing had been done on the shirt. *Id.* at 74. The State admitted that there had been no DNA analysis regarding whose blood was on the shirt, but it argued that it believed that Keller used the shirt to clean up the blood in the car after Cook was shot and asserted that it would show the relevancy of the shirt later during trial because the coroner would testify that Cook bled a lot after being shot. The trial court overruled

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[7] Ind. Code § 35-42-5-1.

[8] Prior to the commencement of trial, the State moved to dismiss the theft charge against Keller, and the trial court granted the motion. Apparently, the carrying a handgun without a license charge was also dismissed some time prior to trial because when the trial court gave the preliminary instructions and advised the jury of the charges against Keller, the court did not refer to the carrying a handgun without a license charge.

Keller's objection and admitted the T-shirt into evidence. As part of its presentation of evidence, the State played Keller's December 2nd videotaped statement to police for the jury.[9] The State's theory was that Keller was an accomplice with Fischer in committing the crimes, and the trial court gave an accomplice liability instruction. The jury found Keller guilty of murder, felony murder, both counts of arson, possession of methamphetamine, and robbery.

During Keller's September 2006 sentencing hearing, the trial court did not enter judgments of conviction on felony murder and Count IV arson and reduced the Count III arson conviction from a Class A felony to a Class B felony and the robbery conviction from a Class A felony to a Class C felony due to double jeopardy concerns. The trial court found the following aggravating circumstances: (1) Keller's criminal history, including his delinquent activity and adult criminal activity; (2) the fact that Keller was serving an executed sentence on home detention when he committed the offenses and had cut off his ankle monitoring bracelet prior to committing the crimes; (3) Keller's commission of a new offense—prisoner in possession of a dangerous device, i.e., a shank—while he was in jail on the current offenses; and (4) Keller was in a position of trust with Cook because they were friends. The trial court found no mitigating circumstances, and in so finding, specifically rejected Keller's suggestion that his

[9] The State played a redacted version of the videotaped statement, which was admitted into evidence as State's Exhibit 101, and also admitted into evidence a transcript of the redacted video as State's Exhibit 102. The State also provided the trial court with the original, unredacted videotape and corresponding transcript as State's Exhibits 103 and 108, respectively. The original videotape and transcript were "admitted for the record purposes only" and "the Jury [did not] see those." Tr. p. 324.

We note that the State has cited to the original videotape—State's Exhibit 103—in its Facts and Argument sections of its brief. *See* Appellee's Br. p. 2, 7. Because Exhibit 103 was not admitted into evidence and shown to the jury, any reference to the exhibit is improper.

substance abuse should be considered as a mitigator. The trial court then sentenced Keller to sixty-five years for his murder conviction, twenty years on his Class B felony arson conviction, eight years for his Class C felony possession of methamphetamine conviction, and eight years for his Class C felony robbery conviction. The trial court ordered the sentences for murder and robbery be served consecutively and the remaining sentences be served concurrently, thereby resulting in an aggregate sentence of seventy-three years. When ordering consecutive sentencing on the murder and robbery convictions, the trial court stated that the "very gruesome nature" of the crime, Keller's criminal history, and the fact that he was on home detention and had cut his home detention bracelet were aggravating circumstances that warranted the imposition of consecutive terms. *Id.* at 440. Keller now appeals.[10]

Discussion and Decision

Keller argues that the trial court abused its discretion by admitting the blood-stained T-shirt into evidence, that the evidence is insufficient to sustain his robbery conviction, and that the trial court abused its discretion by considering improper aggravators, failing to find his substance abuse as a mitigator, and enhancing his sentences when it ordered them to be served consecutively.

[10] Fischer was tried separately, and a jury found Fischer guilty of murder, felony murder, carrying a handgun without a license as a Class A misdemeanor, robbery as a Class A felony, and two counts of arson as Class A felonies. *See Fischer v. State*, No. 49A05-0503-CR-144, slip op. at 3 (Ind. Ct. App. Dec. 19, 2005). The trial court entered judgments of conviction for murder, robbery as a Class B felony, one count of arson as a Class B felony, and carrying a handgun without a license as a Class A misdemeanor and sentenced Fischer to sixty-six years. *See id.* Fischer appealed his sentence, and this Court affirmed his sentence in a memorandum opinion issued on December 19, 2005. *See id.* at 6.

I. Admission of Evidence

Keller first argues that the trial court abused its discretion by admitting State's Exhibit 106—the blood-stained T-shirt found in the trunk of the burned car—into evidence. Generally, the admission or exclusion of evidence is a determination entrusted to the discretion of the trial court. *Carpenter v. State*, 786 N.E.2d 696, 702 (Ind. 2003). We will reverse a trial court's decision only for an abuse of discretion, that is, when the trial court's decision is clearly erroneous and against the logic and effect of the facts and circumstances before the court. *Id*. at 702-03.

Keller argues that the trial court abused its discretion by admitting the blood-stained T-shirt into evidence because there was "no nexus" between him and the T-shirt; specifically, he argues that there was no evidence that the blood belonged to the victim.[11] Appellant's Br. p. 8. Keller asserts that the admission of the T-shirt merely "bolster[ed] the gruesome nature of the crime" and was used "to horrify the jury as to the amount of blood potentially involved." *Id.* The State argues that any error in the admission of the T-shirt was harmless because Keller's conviction for murder was supported by substantial evidence, including the evidence that blood found on Keller's own clothing matched the victim's blood. We agree with the State.

A claim that evidence was improperly admitted at trial will only prevail on appeal upon a showing that the error had an adverse effect on a substantial right of a party. *Smith v. State*, 839 N.E.2d 780, 784 (Ind. Ct. App. 2005). When there is substantial independent evidence of guilt such that it is unlikely that the erroneously admitted

[11] Keller does not specifically state that the admission of the T-shirt was erroneous in relation to his murder conviction. However, given his argument regarding the "blood" and the "gruesome nature" of "the crime," *see* Appellant's Br. p. 8, we infer that his argument relates to his murder conviction.

evidence played a role in the conviction or where the offending evidence is merely cumulative of other properly admitted evidence, the substantial rights of the party have not been affected, and we deem the error harmless. *Id.*

Here, when the State charged Keller with Cook's murder, it alleged that Keller and Fischer shot Cook and then set fire to a vehicle containing Cook. The State presented evidence that Keller and Fischer were in a car with Cook when Fischer shot Cook in the right side of the head and that, due to this gunshot wound, Cook would have had "copious blood coming from [his] mouth and nose." Tr. p. 137. The State also introduced evidence to show that Keller had Cook's blood on his clothing. Additionally, the State presented evidence that Keller and Fischer pulled Cook's body into the back seat of the Cadillac and that the car was driven to another location where it was set on fire with Cook in it. The State's evidence also indicates that Cook "was in fact alive and still breathing when he burned[,]" *id.* at 134, and that Cook died of "smoke inhalation, thermal burns and a gunshot wound to the head," *id.* at 147. Keller challenges neither the admission of any of this evidence nor the sufficiency of the evidence used to support his murder conviction. Because there is substantial independent evidence of guilt such that it is unlikely that the admission of the T-shirt played a role in Keller's conviction for murder, we conclude that any error in the admission of State's Exhibit 106 was harmless.

II. Sufficiency of the Evidence

Keller next argues that the evidence is insufficient to sustain his conviction for the robbery of Cook.[12] In reviewing a claim of insufficient evidence, we neither reweigh the

[12] Keller does not challenge the sufficiency of the evidence relating to any of his other convictions.

evidence nor assess the credibility of the witnesses. *Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002). Instead, we look to the evidence most favorable to the verdict and reasonable inferences drawn therefrom. *Id.* We will affirm the conviction if there is probative evidence from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.*

To convict a defendant of robbery, the State is required to prove that the defendant knowingly or intentionally took property from another by using or threatening the use of force on any person or by putting any person in fear. *See* Ind. Code § 35-42-5-1. The State's theory was that Keller was an accomplice with Fischer in committing the robbery of currency from Cook, and the trial court gave an accomplice liability instruction. The statute pertaining to liability for aiding in a crime, Indiana Code § 35-41-2-4, provides, in pertinent part, that "[a] person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense . . . ."

It is not necessary for the accomplice to commit every element of the crime in order to be convicted of it. *Hodge v. State*, 688 N.E.2d 1246, 1248 (Ind. 1997). The particular facts and circumstances of each case must be considered in determining whether a person participated in the commission of an offense as an accomplice. *Brown v. State*, 770 N.E.2d 275, 278 (Ind. 2002). In determining whether a person aided another in the commission of a crime, we consider the following four factors: (1) presence at the scene of the crime; (2) companionship with another engaged in criminal activity; (3) failure to oppose the crime; and (4) a defendant's conduct before, during, and after the occurrence of the crime. *Garland v. State*, 788 N.E.2d 425, 431 (Ind. 2003). While a

defendant's mere presence at the crime scene, or lack of opposition to a crime, standing alone, is insufficient to establish accomplice liability, they may be considered along with the other factors to determine participation. *Hodge*, 688 N.E.2d at 1248.

Keller argues that the evidence is insufficient to support his robbery conviction because the robbery allegation is "speculative[,]" because there is no evidence that Keller took property from Cook, and because "no large sums of money were recovered with any nexus between Doug [Cook] and Michael [Keller]." Appellant's Br. p. 9. The State argues that the evidence was sufficient to show that Keller helped to perpetrate the robbery of Cook. Again, we agree with the State.

At trial, the State presented evidence that Keller, Cook, and Fischer stole a safe, which contained at least $5000.00, from someone that Fischer knew and took it to Cook's mother's back yard. The State's evidence further shows that the following day, Keller and Cook opened the safe and took some money from it when Fischer was not present. The State also presented evidence from Keller's December 2, 2003, statement to police, wherein Keller admitted that he and Fischer bought a gun from Dale, that he told Fischer that he got $1000.00 from the safe when he and Cook opened the safe, that he drove Fischer to the hotel room at the Clarion to wait for Cook, that Cook did not admit to Fischer that they had opened the safe, that Fischer shot Cook, and that they pulled Cook's body into the backseat of the car. Additionally, Wheat, who saw Keller and Fischer at a gas station on the evening that Cook was killed, testified that Keller told her that "there was going to be more money later on than there is now," Tr. p. 228, and that Keller was "acting fluckery" or "odd," *id.* at 229. Cook's uncle, Tom Tomlinson, testified that

Keller came to his house looking for Cook on the day of Cook's death and that Keller appeared to be "real nervous and sweaty." *Id.* at 160. Williams testified that when Keller picked her up off the street to help him buy crack, she saw Keller pull "a wad of money" out of a black leather coat that was in the middle of the car and that he gave her money to buy an eightball of crack cocaine. *Id.* at 195. The State also presented testimony from Sugars that Cook had "two black leather coats he wore at different times." *Id.* at 178. Additionally, Williams testified that when the police knocked on the door of the hotel room, Keller looked out the window and told Williams not to answer the door. When police arrested Keller, they found methamphetamine and $1238.00 in Keller's coat. The State also presented evidence that upon Fischer's arrest, he had $1600.00 on him, which was unusual for Fischer because "he usually doesn't have money." *Id.* at 312.

Keller's argument that the robbery charge against him was speculative amounts to nothing more than a request to reweigh the evidence, which we cannot do. Considering the four factors in determining accomplice liability and the evidence that the State presented against Keller, we conclude there was probative evidence from which the jury could have found Keller guilty beyond a reasonable doubt of robbery. Therefore, we affirm Keller's robbery conviction.

III. Sentencing

Keller argues that the trial court abused its discretion by: considering the violation of a position of trust and the gruesome nature of the crime as aggravators; failing to

consider his substance abuse as a mitigator; and ordering his sentences for murder and robbery to be served consecutively.[13]

In general, sentencing lies within the discretion of the trial court. *Henderson v. State*, 769 N.E.2d 172, 179 (Ind. 2002). As such, we review sentencing decisions only for an abuse of discretion, "including a trial court's decision to increase or decrease the presumptive sentence because of aggravating or mitigating circumstances and to run the sentences concurrently or consecutively." *Id*. In order for a trial court to impose an enhanced or consecutive sentence, it must: (1) identify the significant aggravating factors and mitigating factors; (2) state the specific facts and reasons that the court found those aggravators and mitigators; and (3) demonstrate that the court has balanced the aggravators with the mitigators. *Veal v. State*, 784 N.E.2d 490, 494 (Ind. 2003).

A. Consecutive Sentences

We first consider Keller's argument that the trial court abused its discretion by imposing consecutive maximum sentences on his murder and robbery convictions. Specifically, Keller points to Indiana Code § 35-50-2-1.3(c)(1)—which provides, in pertinent part, "In imposing consecutive sentences in accordance with IC 35-50-1-2 . . . a court is required to use the appropriate advisory sentence in imposing a consecutive sentence or an additional fixed term"—and argues that this statutory provision required the trial court, in ordering consecutive sentences, to impose the advisory sentence of fifty-five years for the murder conviction and the advisory sentence of four years for the Class C felony robbery conviction.

[13] Keller makes no argument regarding the appropriateness of his sentence under Indiana Appellate Rule 7(B).

Initially, we note that even though Keller was sentenced after April 25, 2005—the effective date of Indiana's current "advisory" sentencing scheme—he committed his offenses in December 2003 and was therefore entitled to be sentenced under the former "presumptive" sentencing scheme. *See Gutermuth v. State*, 868 N.E.2d 427, 431 n.4 (Ind. 2007) (explaining that "the long-standing rule" is that "the sentencing statute in effect at the time a crime is committed governs the sentence for that crime"). Nonetheless, Keller asserts that Indiana Code § 35-50-2-1.3(c)(1), which did not exist under the presumptive sentencing scheme and was introduced as part of the advisory sentencing scheme, is ameliorative and therefore should apply to him. *See Richards v. State*, 681 N.E.2d 208, 213 (Ind. 1997) ("The doctrine of amelioration provides that 'a defendant who is sentenced after the effective date of a statute providing for more lenient sentencing is entitled to be sentenced pursuant to that statute rather than the sentencing statute in effect at the time of the commission or conviction of the crime.'"). He is incorrect.

In support of his argument, Keller relies upon *Robertson v. State*, 860 N.E.2d 621, 625 (Ind. Ct. App. 2007), *trans. granted*, where a panel of this Court held that Indiana Code § 35-50-2-1.3(c)(1) prohibits a trial court from "deviat[ing] from the advisory sentence for any sentence running consecutively." But after Keller filed his brief, our Supreme Court granted transfer in *Robertson*, thereby vacating this Court's opinion, and on August 8, 2007, reversed our decision, holding instead that "under the sentencing laws from April 25, 2005, a court imposing a sentence to run consecutively to another sentence is not limited to the advisory sentence. Rather, the court may impose any sentence within

the applicable range." *Robertson v. State*, --- N.E.2d ---, 2007 WL 2258260 (Ind. 2007). In light of our Supreme Court's holding in *Robertson*, the trial court did not err in imposing consecutive maximum sentences on Keller's murder and robbery convictions.

B. Aggravators

We next address Keller's argument that the trial court abused its discretion by considering certain aggravators. Keller first argues that the trial court improperly considered the gruesome nature of the crime as an aggravator when enhancing his sentences and argues that the trial court cannot aggravate a sentence based upon the elements of the crime. We cannot agree with Keller.

The trial court referred to the "very gruesome nature" of the crime as one of three aggravators supporting the imposition of consecutive sentences, not when enhancing Keller's sentences. Tr. p. 440. Thus, Keller's argument that the trial court relied on an improper aggravator when enhancing his sentence is without merit. Furthermore, even if the trial court had relied upon the gruesome nature of the crime to enhance Keller's sentences, the gruesome nature was not an element of any of his offenses, and the trial court's consideration of the "gruesome" nature and circumstances of the crime was a proper aggravating circumstance. *See, e.g.*, *Loveless v. State*, 642 N.E.2d 974, 978 (Ind. 1994) (holding that the trial court's consideration of the "gruesome nature" of the crime—which involved the victim being confined, beaten, stabbed, and set on fire while still alive—was not improper); *Tackett v. State*, 642 N.E.2d 978, 980 (Ind. 1994) (holding that the "gruesome nature" of the crimes was properly considered as an aggravating circumstance), *reh'g denied*.

Keller also argues that trial court improperly considered the violation of a position of trust with Cook as an aggravator because "Indiana caselaw does not support the finding of this type of relationship as a[n] aggravating circumstance amongst competent adults." Appellant's Br. p. 11. The State contends that even if this position of trust with a friend aggravator was improper, the three remaining aggravators found by the trial court are sufficient to aggravate Keller's sentence. We agree with the State.

Here, in addition to the position of trust aggravator, the trial court found three other aggravating circumstances—specifically, (1) Keller's criminal history;[14] (2) the fact that Keller was serving an executed sentence on home detention when he committed the offenses and had cut off his ankle monitoring bracelet prior to committing the crimes; and (3) Keller's commission of a new offense of prisoner in possession of a dangerous device while he was in jail on the current offenses—and Keller does not challenge any of these aggravators.

C. Mitigator

Finally, we address Keller's argument that the trial court abused its discretion by failing to consider his substance abuse as a mitigating circumstance. Determining mitigating circumstances is within the discretion of the trial court. *Corbett v. State*, 764 N.E.2d 622, 630 (Ind. 2002). The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. *Id.* Further, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. *Id.* at 630-

[14] Keller had juvenile adjudications for burglary and criminal conversion and the following adult convictions: a Class D felony theft conviction from May 2001; convictions for Class D felony theft and Class A misdemeanor criminal conversion from August 2002; convictions for Class D felony theft and Class D felony resisting law enforcement also from August 2002; and two Class D felony theft convictions from November 2003.

631. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Id.* at 631.

Keller contends that the trial court abused its discretion because it "refused to acknowledge" Keller's history of substance abuse. Appellant's Br. p. 12. A history of substance abuse is sometimes found by trial courts to be an aggravator, not a mitigator. *See Iddings v. State*, 772 N.E.2d 1006, 1018 (Ind. Ct. App. 2002), *trans. denied*. Furthermore, "[a] trial court is not required to consider as mitigating circumstances allegations of appellant's substance abuse or mental illness." *James v. State*, 643 N.E.2d 321, 323 (Ind. 1994). The presentence investigation report ("PSI") reveals that Keller, who was twenty-four years old at the time of sentencing, has a long history of substance abuse. Specifically, the PSI indicates that Keller first used marijuana at age ten, first drank alcohol at age twelve, first used cocaine at age fifteen, and first used methamphetamine at age eighteen and that he admitted that he used these substances on a daily basis. The PSI also indicates that, from age fifteen to seventeen, Keller smoked embalming fluid three times a week. Despite Keller's extensive history of substance abuse, he has never voluntarily sought drug treatment and has continued to use illicit substances. Thus, we cannot say Keller has shown that the mitigating evidence is both significant and clearly supported by the record. Accordingly, the trial court did not abuse its discretion by not finding Keller's substance abuse to be a mitigating factor.

Affirmed.

ROBB, J., concurs.

SULLIVAN, Sr. J., concurs as to Part I & III, and concurs in result as to Part II.