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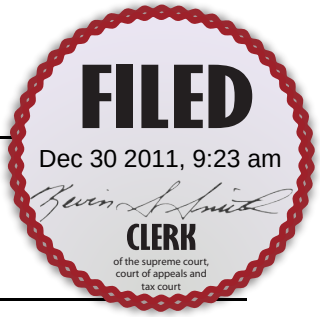

IN THE COURT OF APPEALS OF INDIANA

EDWARD MERCER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A04-1012-CR-800
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0907-FB-28

December 30, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Edward Mercer appeals his conviction of and sentence for two counts of Class B felony robbery while armed with a deadly weapon.[1] He argues the evidence was insufficient to support his conviction, his convictions subject him to double jeopardy, and his sentence is inappropriate. We affirm.

FACTS AND PROCEDURAL HISTORY

On July 1, 2009, Jarrod Rodriguez asked his father, Eugene Hall, to drive him and Mercer to Lafayette, Indiana in exchange for $100.00 and gas money. The purpose of the trip was to buy "some brand new 24 inch davins ss3 with 255/30 tires,"[2] (State's Ex. 15) (errors in original), from Cortney Robinson and Kyle Bostic.

Rodriguez, Hall, and Mercer arrived in Hall's van. Robinson and Bostic were in a Chevrolet Tahoe. Rodriguez and Mercer exited the van and met with Robinson and Bostic. After determining the rims would fit the van's wheels, the parties agreed on a price of $3,100.00. The five men, including Hall, loaded the rims into the van. Hall then returned to his driver's seat.

Rodriguez handed the money to Robinson, who gave half of the money to Bostic. While Robinson and Bostic were counting their money, Mercer came up behind Bostic and put a gun to his neck and said, "Give me the MF'n money." (Tr. at 264.) Rodriguez also pulled a gun, pointed it at Robinson's face, and demanded money. Robinson gave Rodriguez

[1] Ind. Code § 35-42-5-1.
[2] "[D]avins ss3" were referenced in the State's charging information as "Davin Dub spinners/floaters, rims, tires." (App. at 12.)

the money in his possession. Bostic attempted to flee, and the money he was holding flew into the air.

Rodriguez and Mercer returned to the van, and Bostic began to fire shots at it. Mercer returned fire from the rear passenger door, and Rodriguez returned fire from the front passenger door. Hall headed toward Interstate 65. An employee of a nearby Subway, Wade Claiborne, saw the gunfire and followed Hall's van while calling 911. Claiborne told the police someone threw a gun out of the passenger side window of the van while it was driving down the highway. Police later retrieved a gun from the area Claiborne identified.

When police pulled over Hall's van, Rodriguez and Mercer told police they were the victims of a crime. The police found $117.00 on Rodriguez, and $2,035.00 on Mercer. Meanwhile, police stopped Bostic and Robinson in the parking lot where the incident occurred. After confirming their story regarding the sale of the rims, police released Bostic and Robinson.

On July 16, 2009, the State charged Rodriguez, Mercer, and Hall with two counts of Class B felony robbery while armed with a deadly weapon, one count of Class B felony conspiracy to commit robbery,[3] and one count of Class D felony theft.[4] Mercer was also charged with two counts of Class C felony intimidation by drawing or using a deadly weapon.[5] In July 2010, Hall agreed to plead guilty to Class D felony assisting a criminal[6] in

[3] Ind. Code §§ 35-42-5-1 (robbery) and 35-41-5-2 (conspiracy).
[4] Ind. Code § 35-43-4-2.
[5] Ind. Code § 35-45-2-1(b)(2).
[6] Ind. Code § 35-44-3-2.

exchange for his testimony at the trial of Rodriguez and Mercer.

After a joint bench trial, Mercer was found guilty of two counts of Class B felony robbery while armed with a deadly weapon, two counts of Class C felony intimidation by drawing or using a deadly weapon, and one count of Class D felony theft. The trial court determined the intimidation and theft findings merged into the robberies, and it entered two convictions of Class B felony robbery while armed with a deadly weapon. The trial court sentenced Mercer to twenty years for each count of robbery, to be served concurrently.

DISCUSSION AND DECISION

1. Sufficiency of the Evidence

When reviewing sufficiency of evidence to support a conviction, we consider only the probative evidence and reasonable inferences supporting the trial court's decision. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the fact-finder's role, and not ours, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. *Id.* To preserve this structure, when confronted with conflicting evidence, we consider it most favorably to the trial court's ruling. *Id.* We affirm a conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id.* It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence; rather, the evidence is sufficient if an inference reasonably may be drawn from it to support the trial court's decision. *Id.* at 147.

Class B felony robbery while armed with a deadly weapon occurs when a person, while armed with a deadly weapon, "knowingly or intentionally takes property from another

person or from the presence of another person: (1) by using or threatening the use of force on any person; or (2) by putting any person in fear[.]" Ind. Code § 35-42-5-1. As charged herein, the State was required to prove Mercer took either cash or rims, the two items stolen during the crime.

Mercer argues he did not take cash from Bostic and thus he cannot be convicted of robbing Bostic. However, the State's charging information alleges Mercer took "Davin Dub spinners/floaters, rims, tires, and/or United States currency" from Bostic. (App. at 12.) The State presented evidence of the following: Mercer pointed a gun at Bostic, while Rodriguez pointed a gun at Robinson; both demanded money; Bostic dropped his money as he fled the scene, but Robinson gave his money to Rodriguez; Mercer, Hall, and Rodriguez drove away with Bostic's rims and more than two-thirds of the purchase money; and Mercer was found in possession of cash that could have been stolen from Robinson.

The State presented sufficient evidence Mercer robbed Bostic by pointing a gun at Bostic and driving from the scene with his rims. Mercer was an accomplice to the robbery of Robinson because he was present at the scene, was friends with Rodriguez, participated in the robbery by drawing a gun on Bostic, and was found in possession of money presumably stolen from Robinson. This evidence supports Mercer's robbery conviction either as a principal in the taking of Bostic's rims and money or as an accomplice to Rodriguez's robbery of Robinson.[7] *See*, *e.g.*, *Stokes v. State*, 908 N.E.2d 295, 303 (Ind. Ct. App. 2009)

[7] Mercer also argues the evidence was insufficient to demonstrate he was an accomplice to Rodriguez's crimes based on the test announced by our Indiana Supreme Court's test in *Edgecomb v. State*, 673 N.E.2d 1185, 1193 (Ind. 1996), *reh'g denied*. The four factors considered to determine whether a person was an accomplice

(holding there is no distinction between the responsibility of the principal and an accomplice, and a defendant may be convicted on either theory of liability), *trans. denied*.

2. Double Jeopardy

Article 1, Section 14 of the Indiana Constitution provides, in relevant part, "No person shall be put in jeopardy twice for the same offense." Our Indiana Supreme Court has held:

> Two or more offenses are the 'same offense' in violation of Article 1, Section 14 of the Indiana Constitution if, with respect to *either* the statutory elements of the challenged crimes *or* the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.

Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999) (emphasis in original).

Mercer argues his two robbery convictions subjected him to double jeopardy based on the "actual evidence" test. Under this test,

> the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. To show that two challenged offenses constitute the "same offense" in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.

Id. at 53. The actual evidence test is satisfied only if the evidence establishing all of the

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to a crime include: (1) presence at the crime; (2) companionship with other actors engaged in the crime; (3) failure to oppose the commission of the crime; and (4) the course of conduct before, during, and after the crime. *Id.* Mercer was present at the scene of the crime and did not oppose its commission. He and Rodriguez were friends and fled the scene together with Bostic's rims and money. During the commission of the crime, Rodriguez pointed a gun and demanded money from Robinson, and Mercer pointed a gun and demanded money from Bostic. Rodriguez was successful in obtaining money from Robinson. Finally, Mercer and Rodriguez attempted to avoid responsibility by claiming to be victims of the crime instead of the perpetrators. These facts support an inference Mercer was an accomplice to the robbery of Robinson. *See, e.g*., *Stokes v. State*, 908 N.E.2d 295, 303 (Ind. Ct. App. 2009) (Stokes guilty of attempted armed robbery because his accomplice stole a gun from a store), *trans. denied*.

elements of one offense also establishes all of the elements of a second offense. *Spivey v. State*, 761 N.E.2d 831, 833 (Ind. 2002). Mercer argues the State used Rodriguez's taking of money from Robinson to support both robbery convictions. We disagree.

The State presented evidence Rodriguez took money from Robinson after Rodriguez pointed a gun at Robinson. The State also presented evidence Mercer pointed a gun at Bostic, demanded money, but did not receive the money because Bostic threw the money in the air as he fled. Mercer argues he did not rob Bostic because he did not receive the money he demanded. Thus, he claims, both of his robbery convictions were based on the money Rodriguez took. However, the State's charging information indicated Mercer and Rodriguez took "Davin Dub spinners/floaters, rims, tires, and/or United States currency" from both Bostic and/or Robinson. (App. at 12-14.) During its rebuttal to Mercer and Rodriguez's motion for a directed verdict, the State again argued Mercer and Rodriguez took "rims and money." (Tr. at 577.) Therefore, one robbery conviction could have been based on the theft of Robinson's money, and the other on the theft of Bostic's rims. Mercer was not subject to double jeopardy because each individual count of robbery was supported by separate evidence.

3. Sentence

We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. *Williams v. State*, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008) (citing Ind. Appellate Rule 7(B)). We consider not only the aggravators and mitigators found by the trial court, but also any other factors appearing in the record. *Roney v. State*, 872

N.E.2d 192, 206 (Ind. Ct. App. 2007), *trans. denied.* The appellant bears the burden of demonstrating his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

When considering the nature of the offense, the advisory sentence is the starting point to determine the appropriateness of a sentence. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), *clarified on reh'g* 878 N.E.2d 218 (Ind. 2007). The advisory sentence for a Class B felony is ten years, with a range of six to twenty years. Ind. Code § 35-50-2-5. One factor we consider when reviewing a deviation from the advisory sentence is whether there is anything more or less egregious about the offense that makes it different from the "typical" offense accounted for by the legislature when it set the advisory sentence. *Rich v. State*, 890 N.E.2d 44, 54 (Ind. Ct. App. 2008), *trans. denied*.

Mercer does not contest the serious nature of his crime. Instead he argues the trial court inappropriately sentenced him to a more severe sentence than Rodriguez. In its sentencing statement, the court said:

> [Mercer] has a greater role in the crime than [Rodriguez]. The evidence before the Court was that the goal of the operation was to get spinners for [Mercer]'s car. That it was [Mercer] who made the decision to go forward with the robbery, that [Hall and Rodriguez] were waiting for his call on that, and that he was right in the middle of all of the activities and there were two guns fired[.]

(Tr. at 738.) Our Indiana Supreme Court explained a defendant "must be judged by the facts of his own case, not the facts accompanying his accomplices' cases." *Williams v. State*, 430 N.E.2d 759, 765 (Ind. 1982), *reh'g denied.* Thus, we cannot find Mercer's sentence inappropriate based on the sentence received by Rodriguez.

When considering the character of the offender, one relevant fact is the offender's criminal history. *Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007). The significance of criminal history in assessing a defendant's character varies based on the gravity, nature, and number of prior offenses in relation to the current offense. *Id*. Mercer's history includes one prior felony conviction of robbery and three misdemeanor convictions. Of the three times he has been on probation, he violated probation once. Mercer had two other felony charges pending at the time of his sentencing for the instant offenses, and one active warrant for his arrest. While we do not consider a history of arrest to be evidence of criminal history, "a record of arrest, particularly a lengthy one, may reveal that a defendant has not been deterred even after having been subject to the police authority of the State." *Cotto v. State*, 829 N.E.2d 520, 526 (Ind. 2005). Based on Mercer's criminal history, pending charges, and warrants, in addition to the nature of his involvement in these crimes, we cannot say his aggregate sentence of twenty years is inappropriate.

CONCLUSION

The State presented sufficient evidence Mercer robbed Bostic by pointing a gun at Bostic and driving from the scene with his rims. Mercer was an accomplice to the robbery of Robinson because he was present at the scene, was friends with Rodriguez, participated in the robbery by drawing a gun on Bostic, and was found in possession of money presumably stolen from Robinson. Mercer's two robbery convictions do not subject him to double jeopardy because the robbery of Bostic was supported by evidence that Mercer stole his rims, while the robbery of Robinson was supported by evidence that Rodriguez stole his money.

Finally, Mercer's sentence was not inappropriate based on the nature of the crime and Mercer's character. For all these reasons, we affirm.

Affirmed.

NAJAM, J., and RILEY, J., concur.