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IN THE
COURT OF APPEALS OF INDIANA

JOHN MARK HARRIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 85A04-1006-CR-390
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WABASH CIRCUIT COURT
The Honorable Robert R. McCallen III, Judge
Cause No. 85C01-0906-FB-65

April 12, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

John Mark Harris ("Harris") was convicted, after a jury trial, of receiving stolen property[1] as a Class D felony and conspiracy to commit burglary[2] as a Class B felony. He was also adjudicated an habitual offender[3] and was sentenced to three years for receiving stolen property and fifteen years for conspiracy to commit burglary, which was enhanced by fifteen years for his habitual offender adjudication, for a total of thirty years with two years suspended to probation. Harris appeals, raising the following restated issues:

I. Whether the State presented sufficient evidence to support his conviction for conspiracy to commit burglary;

II. Whether the trial court abused its discretion in the finding of aggravating and mitigating circumstances and in applying the habitual offender enhancement; and

III. Whether his sentence was inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

FACTS AND PROCEDURAL HISTORY

In March 2009, Harris was residing with Heather Huffman ("Huffman") and Nicole Bosworth ("Bosworth") in a house on Tenth Street in Marion, Indiana. On March 30, 2009, the group was having a party and drinking at the residence. They had recently found out that they were behind on the electric and gas bills, and they needed money to be able to pay them. In the past, Huffman had said that her grandparents, the Waggoners, had money, and on that night, she tried to call them to ask for money. She was unable to

[1] *See* Ind. Code § 35-43-4-2(b).

[2] *See* Ind. Code §§ 35-43-2-1; 35-41-5-2.

[3] *See* Ind. Code § 35-50-2-8.

reach her grandparents and found out through her father that they were out of town. Harris overheard Huffman's conversation and told her that they should go to her grandparents' house and take the money.

Later that night, sometime after midnight, Barry Magers ("Magers") received a phone call from Harris and Huffman asking him to give them a ride so Huffman could retrieve some of her belongings from her grandparents' house. Magers drove to the Waggoners' house in Wabash County, Indiana with Bosworth in the front passenger seat, and Huffman and Harris in the back seat. Magers, Bosworth, and Harris had never been to the Waggoners' house before, so Huffman gave Magers directions to the house. When they arrived, Magers dropped off Huffman and Harris in the driveway and drove away. Huffman asked Magers and Bosworth to drop them off and come back later.

Huffman and Harris walked up the driveway and into the garage attached to the Waggoners' house. A door to the garage had been kept unlocked for the neighbors to be able to enter to feed the cat, but the door leading into the house was locked. Inside the garage, there was a locked cabinet that Huffman knew contained coins and savings bonds. Huffman directed Harris to the cabinet that had the coins and bonds. Harris gave Huffman a screwdriver to "pop the lock off" of the cabinet. *Tr*. at 136. Huffman did not want to pry the lock open, so Harris took the screwdriver and "popped the lock himself." *Id*. Harris and Huffman took three metal ammunition boxes containing dollar coins, old coins, and savings bonds.

Harris called Magers and Bosworth to come back and pick up him and Huffman. Harris and Huffman got back into the car carrying something they did not have when

they got out of the car. Magers could hear Harris and Huffman attempting to pry open something metal in the backseat. They all drove back to their house in Marion, and once there, they counted the money from inside of the ammunition boxes and divided it between the four of them. The group cashed in the coins at a gas station and ripped up the savings bonds.

The police interviewed Harris regarding the burglary of the Waggoners' house. During the course of the audio recorded interview, Harris repeatedly denied entering the garage, but he did admit to helping remove one of the ammunition boxes when Huffman needed help. He also admitted that he helped dispose of the stolen property by cashing in the coins at the gas station. On June 1, 2009, the State charged Harris with burglary as a Class B felony and conspiracy to commit burglary as a Class B felony. The State later filed an information alleging Harris was an habitual offender. After a jury trial, Harris was found guilty of conspiracy to commit burglary as a Class B felony and residential entry as a Class D felony, as a lesser included offense of burglary. Harris waived his right to a jury trial on his habitual offender allegation and admitted to being an habitual offender. He was sentenced to three years for his residential entry conviction and fifteen years for his conspiracy to commit burglary conviction to run concurrently. The conspiracy to commit burglary sentence was enhanced by fifteen years for his habitual offender adjudication and two years were suspended from the total sentence and ordered to be served on probation. Harris therefore received an aggregate thirty-year sentence with two years suspended. He now appeals.

DISCUSSION AND DECISION

I. Sufficient Evidence

Our standard of review for sufficiency claims is well-settled. When we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. *Parahams v. State*, 908 N.E.2d 689, 691 (Ind. Ct. App. 2009) (citing *Jones v. State*, 783 N.E.2d 1132, 1139 (Ind. 2003)). We look only to the probative evidence supporting the judgment and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. *Id*. If there is substantial evidence of probative value to support the conviction, it will not be set aside. *Id*. It is the function of the trier of fact to resolve conflicts of testimony and to determine the weight of the evidence and the credibility of the witnesses. *Yowler v. State*, 894 N.E.2d 1000, 1002 (Ind. Ct. App. 2008).

Harris argues that there was insufficient evidence presented to support his conviction for conspiracy to commit burglary. He specifically contends that there was insufficient evidence to prove that Harris, Bosworth, and Magers shared Huffman's intent to burglarize her grandparents' house or agreed with Huffman to commit burglary prior to Huffman entering the garage. He claims that the evidence merely showed that Harris, Bosworth, and Magers were in the presence of Huffman at the time she decided to burglarize her grandparents' house.

In order to convict Harris of conspiracy to commit burglary, the State was required to prove that, with the intent to commit burglary, Harris agreed with another person, to

commit burglary and that either Harris or the other person with whom he agreed performed an overt act in furtherance of the agreement. Ind. Code § 35-41-5-2. When establishing the existence of a conspiracy, the State is not required to prove the existence of a formal express agreement. *Dickenson v. State*, 835 N.E.2d 542, 552 (Ind. Ct. App. 2005), *trans. denied*. Rather, an agreement can be inferred from circumstantial evidence, which may include the overt acts of one of the parties in furtherance of the criminal act. *Id*. Relationship and association with the alleged co-conspirator, standing alone, is insufficient to establish a conspiracy. *Stokes v. State*, 801 N.E.2d 1263, 1273 (Ind. Ct. App. 2004), *trans. denied*.

The evidence presented at trial showed that Harris and Huffman discussed needing money to pay the utility bills for their house. Harris then overheard Huffman when she learned that her grandparents were out of town, and as Huffman had previously mentioned that her grandparents had money, Harris suggested to Huffman that they go over to their house to take money. Harris contacted Magers to pick them up and was persistent in getting Huffman and Bosworth to go along with the plan. Harris then rode in Magers's car to the Waggoners' house, exited the car with Huffman leaving Magers and Bosworth to drive around, walked up the driveway, and entered the unlocked door of the attached garage. Additionally, Harris assisted in disposing of the stolen property by going to the gas station to cash in the coins. We conclude that sufficient evidence was presented for a reasonable jury to infer that Harris, with the intent to commit burglary, had agreed with Huffman to commit burglary.

While mere association "with others who engage in a criminal act does not, in and of itself, suffice to uphold a conviction of conspiracy to commit a felony," the evidence in the present case showed more than Harris's mere association with Huffman. *Bailey v. State*, 717 N.E.2d 1, 3 (Ind. 1999). Harris participated in a discussion with Huffman about needing money for utility bills and told Huffman they should go to her grandparents' house to get money. He also called Magers to obtain a ride to the Waggoners' house, and when they arrived at the house, he exited the car with Huffman and entered the garage. We conclude that sufficient evidence was presented to support Harris's conviction for conspiracy to commit burglary. His arguments to the contrary are merely requests to reweigh the evidence, which we cannot do. *Parahams*, 908 N.E.2d at 691.

II. Abuse of Discretion in Sentencing

Trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Id.* If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id.* Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Id.* An abuse of discretion occurs if the

decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Id*.

One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. *Id*. Other examples include entering a sentencing statement that explains reasons for imposing a sentence, including a finding of aggravating and mitigating factors if any, but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. *Id.* at 490-91. Because the trial court no longer has any obligation to "weigh" aggravating and mitigating factors against each other when imposing a sentence, a trial court cannot now be said to have abused its discretion in failing to "properly weigh" such factors. *Id*. at 491. Once the trial court has entered a sentencing statement, which may or may not include the existence of aggravating and mitigating factors, it may then "impose any sentence that is . . . authorized by statute; and . . . permissible under the Constitution of the State of Indiana." Ind. Code § 35-38-1-7.1(d).

Harris argues that the trial court abused its discretion when it sentenced him. He first contends that the trial court abused its discretion in failing to find several of his proposed mitigating circumstances, which he claims were supported by the record. He also alleges that the trial court improperly found that a reduced sentence would depreciate the seriousness of the crime as an aggravating circumstance. Lastly, Harris argues that the trial court abused its discretion when it applied his habitual offender enhancement to his conviction for conspiracy to commit burglary.

It is well settled that a trial court is not required to find mitigating circumstances, nor is it obligated to accept as mitigating each of the circumstances proffered by the defendant. *Ousley v. State*, 807 N.E.2d 758, 761 (Ind. Ct. App. 2004). Accordingly, the finding of a mitigating circumstance is within the trial court's discretion. *Id*. A court does not err in failing to find mitigation when the presence of a mitigating circumstance is highly disputable in nature, weight, or significance. *Id*. at 761-62. However, when the trial court fails to find a significant mitigator that is clearly supported by the record, there is a reasonable belief that the mitigator was overlooked. *Id*. at 762.

Here, the trial court found Harris's guilty plea to the habitual offender enhancement and the fact that the crime was a result of circumstances unlikely to recur as mitigating factors. Harris presented the following factors at sentencing, which he contends the trial court failed to find as mitigating: the crime neither caused or threatened to cause serious harm to the victims; the crime was the result of circumstances unlikely to recur; the act occurred under strong provocation; he planned to continue his education; he intended to pay restitution; and a long period of incarceration would cause undue hardship to Harris's dependents. *Tr*. at 245-46. Contrary to Harris's argument, the trial court did find the fact that the crime was the result of circumstances unlikely to recur as a mitigating factor, and it rejected the rest of the other proposed factors. *Id*. at 254. The determination of mitigating circumstances is within the trial court's discretion, and we conclude that the trial court did not abuse its discretion by accepting some of Harris's proposed mitigating circumstances and rejecting others.

The trial court found Harris's criminal history, the fact that Harris's prior offenses were similar to the current offense and that his prior convictions had not deterred him from committing further criminal offenses, and that imposition of a reduced sentence would depreciate the seriousness of the present crime as aggravating factors. Harris argues, and the State concedes, that the trial court improperly considered as an aggravating factor that a reduced sentence would depreciate the seriousness of the crime. Assuming, without deciding that the trial court abused its discretion when it found this as an aggravating factor, we conclude that the trial court still properly sentenced Harris. "Even one valid aggravating circumstance is sufficient to support an enhancement of a sentence." *Sargent v. State*, 875 N.E.2d 762, 769 (Ind. Ct. App. 2007). Harris does not challenge the other aggravating circumstances found by the trial court. Therefore, the trial court did not abuse its discretion in its consideration of the remaining aggravating factors.

In sentencing Harris, the trial court also enhanced Harris's fifteen-year sentence for conspiracy to commit burglary by fifteen years based upon his habitual offender adjudication. Harris contends that this was an abuse of discretion because of his guilty plea to the enhancement and because the enhancement was based on the only two prior felony convictions in his criminal history. He asserts the trial court should have applied the enhancement to his sentence for residential entry.

"Upon a determination that a person is a habitual offender, the length of the sentence enhancement imposed based upon such a finding is left to the trial court's sound

discretion." *Montgomery v. State*, 878 N.E.2d 262, 267 (Ind. Ct. App. 2007). The range of a habitual offender enhancement is established by statute:

> The court shall sentence a person found to be a habitual offender to an additional fixed term that is not less than the advisory sentence for the underlying offense nor more than three (3) times the advisory sentence for the underlying offense. However, the additional sentence may not exceed thirty (30) years.

Ind. Code § 35-50-2-8(h). A trial court has the discretion to impose a sentence anywhere within the range set by statute. *Montgomery*, 878 N.E.2d at 268.

Although Harris pleaded guilty to the habitual offender allegation, there is no authority requiring the trial court to set forth aggravating and mitigating factors to explain the particular habitual offender enhancement determined by the trial court. *Id.* (citing *Merritt v. State*, 663 N.E.2d 1215, 1217 (Ind. Ct. App. 1996), *trans. denied*). If the enhancement had been applied to the residential entry conviction, it could have been between one-and-a-half years and four-and-a-half years; if applied to the conspiracy to commit burglary conviction, the enhancement could have been between ten years and thirty years. The trial court here enhanced Harris's sentence for conspiracy to commit burglary by an additional fifteen years, which was within the permissible range under statute. The trial court was not required to give the enhancement that resulted in the lesser penalty. *Burrus v. State*, 763 N.E.2d 469, 472 (Ind. Ct. App. 2002), *trans. denied*. "[W]here a defendant is convicted of multiple felonies at the same time and the defendant is an habitual offender, the trial court may attach the habitual offender finding to any of the relevant felonies even if attachment results in a harsher penalty." *Id.* We therefore

conclude that the trial court did not abuse its discretion in its determination of which felony to enhance.

III. Inappropriate Sentence

"This court has authority to revise a sentence '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.'" *Spitler v. State*, 908 N.E.2d 694, 696 (Ind. Ct. App. 2009) (quoting Ind. Appellate Rule 7(B)), *trans. denied*. "Although Indiana Appellate Rule 7(B) does not require us to be 'extremely' deferential to a trial court's sentencing decision, we still must give due consideration to that decision." *Patterson v. State*, 909 N.E.2d 1058, 1062-63 (Ind. Ct. App. 2009) (quoting *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007)). We understand and recognize the unique perspective a trial court brings to its sentencing decisions. *Id*. at 1063. The defendant bears the burden of persuading this court that his sentence is inappropriate. *Id*.

Harris argues that his sentence was inappropriate in light of the nature of the offense and his character. As to the nature of the offense, he specifically contends that the crime only occurred because Huffman knew about the coins and the Waggoners were out of town, and because the crime occurred when the victims were out of town, there was no threat of physical harm. As to his character, he claims that, although he had a criminal history, it only consisted of the minimal number of prior felonies for the habitual offender enhancement, and he also expressed his desire to complete his college education and see his son graduate from high school. Harris therefore alleges that a more

appropriate sentence would be to apply the habitual offender enhancement to his residential entry conviction or to impose an enhanced sentence of no more than ten years.

As to the nature of the offense, Harris, together with Huffman, needed money to pay their utility bills and devised a plan to drive to the Waggoners' house to take money since Huffman learned her grandparents were out of town. The Waggoners had previously allowed Huffman to stay with them, during which time she learned about the coins and savings bonds her grandfather kept in the garage cabinet. Harris and Huffman abused the trust of Huffman's grandparents by entering into this plan. Harris arranged for Magers to drive them to the house, and after they were dropped off, Harris and Huffman proceeded to enter the garage, pried open a locked cabinet, and took three ammunition boxes, which contained dollar coins, old coins, and savings bonds totaling $1,934.00. Harris, Huffman, Bosworth, and Magers all divided up the money and took it to a gas station to cash it in.

As to Harris's character, he had a criminal history that included a juvenile record, consisting of an adjudication for criminal mischief and two adjudications for receiving stolen property. His adult criminal history included misdemeanor convictions for criminal mischief and disorderly conduct, one felony conviction for residential entry, and two felony convictions for burglary. Additionally, he had a probation violation. We conclude that Harris's sentence was not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

CRONE, J., and BRADFORD, J., concur.