Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

FILED
Apr 20 2011, 9:05 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

NEIL L. WEISMAN
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana
Indianapolis, Indiana

RICHARD C. WEBSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

LATRICE L. KING,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A05-1007-CR-560
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Roland W. Chamblee, Jr., Judge
Cause No. 71D08-0901-MR-00007

APRIL 20, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Senior Judge

Defendant-Appellant LaTrice L. King[1] appeals her conviction of criminal confinement, a Class B felony, Indiana Code section 35-42-3-3 (2006), and the sentence the trial court imposed on that conviction. We affirm her conviction and sentence.

In early February, 2008, King told her friend Mario Ellis that she wanted to purchase a pound of marijuana. Ellis called his friend, Marcus Rice, who arranged for Rice's sister to sell King a pound of marijuana for $800.00. In the afternoon of February 4, 2008, Ellis, King, Rice, and Ellis' cousin Doug Johnson drove to Rice's sister's apartment in South Bend, where King planned to buy the marijuana. Rice's sister drove up, verified that King had the money, and invited King and Rice to come into her apartment.

Ellis and Johnson remained in Ellis' car. A few minutes later, Ellis and Johnson saw several other men approach the apartment building. After an additional five to ten minutes elapsed, Ellis and Johnson saw King come out of the apartment building while struggling with a man. Ellis and Johnson ran to King's assistance and fought with her assailant and another individual. Rice came outside, and King, Rice, Ellis and Johnson got into Ellis' car and drove away. King was angry with Rice and accused him of setting her up to be robbed.

At King's request, Ellis dropped King off at a liquor store, and Ellis, Johnson and Rice went to Ellis' apartment. Later, King arrived with her sister and her sister's boyfriend. King told Rice to call his sister, but Rice's sister did not answer Rice's call.

[1] In her brief, King does not capitalize the letter "T" in her first name. However, when she was asked to spell her name at trial, she indicated that the "T" should be capitalized. We will spell her name in accordance with her testimony.

During this time, King spoke with an unidentified individual on her mobile phone, and she gave the person directions to Ellis' residence.

King, Rice, Ellis and Johnson went outside when a car pulled up. Brandon Phillips, Wallace Wilson, and Michael Anderson got out of the car. One of them asked King if Ellis and Johnson were responsible for the attack, and King identified Rice as the one who had set her up. Phillips pulled out a gun and ordered Rice to get in the car's trunk. After Rice was in the trunk, Phillips, Wilson, Anderson, King and two unidentified people got in the car, and Wilson drove away.

Following Anderson's directions, Wilson drove out into the country for five to ten minutes. Wilson stopped along the road at a spot Anderson selected. Everyone except Wilson got out of Wilson's car and walked back to the rear of the car. Anderson opened the trunk, and Rice either got out or was removed from the trunk and apparently "went straight to his knees." Tr. 2, p. 23.[2] Phillips shot Rice four times, killing him. Everyone got back into Wilson's car, and Wilson drove off, leaving Rice's body in the snow on the side of the road.

The State charged King with murder and criminal confinement. The trial did not take place until January, 2010, because King was incarcerated on a federal handgun conviction. The jury found King guilty of criminal confinement but was unable to return a verdict on the murder charge. The State dismissed the murder charge, and the trial court sentenced King to serve fourteen years for the criminal confinement conviction.

[2] The volumes of the trial transcript are not consecutively paginated, in violation of Indiana Appellate Rule 28(A)(2). We refer to the transcript of the proceedings held on January 19 and 20, 2010, as "Tr. 1," the transcript of proceedings held on January 21, 2010, as "Tr. 2," and the transcript of the June 21, 2010 sentencing hearing as "Tr. 3."

Subsequently, King received permission from the trial court to pursue this belated direct appeal.

King raises three issues, which we restate as:

I. Whether the evidence is sufficient to support King's conviction.

II. Whether the trial court abused its discretion in the course of sentencing King.

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

I. SUFFICIENCY OF THE EVIDENCE

In reviewing a sufficiency of the evidence claim, we do not reweigh the evidence or assess the credibility of the witnesses. Treadway v. State, 924 N.E.2d 621, 639 (Ind. 2010). 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. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). Rather, we look to the evidence and reasonable inferences drawn therefrom that support the verdict, and 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. Treadway, 924 N.E.2d at 639.

In order to convict King of criminal confinement as a Class B felony pursuant to the charging information, the State was obligated to prove that King (1) confined (2) Rice (3) without his consent (4) resulting in serious bodily injury to Rice in the form of gunshot wounds. Ind. Code § 35-42-3-3 (2006). Furthermore, the State charged King with criminal confinement under the accomplice liability statute, Indiana Code section 35-41-2-4 (1977). In determining whether a person aided another in the commission of a

crime, our Supreme Court has considered 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).

King argues that the evidence is insufficient to support her conviction because she did not participate in Rice's confinement but was merely present when Rice was forced to get in the trunk of the car. We disagree. After King was attacked, she accused Rice of setting her up "to get robbed." Tr. 1, p. 361. Later, at Ellis' residence, King was overheard giving someone directions to Ellis' residence. When Phillips and others arrived, King identified Rice as "the one that about tried to set me up to get robbed." Id. at 374. She did not object when Phillips and his companions ordered Rice into the trunk of the car. After Rice got into the trunk, King got into the same car and left Ellis' residence. When they arrived at the scene of the shooting, King got out of the car and was standing with the others when Phillips shot Rice. On the way back into town, King congratulated Phillips, calling him "my boy" and stating that Phillips "got my back." Tr. 2, p. 25. Several hours later, when discussing Rice's abduction, King told Ellis, "if anything happens, just, you know, be cool or whatever, if you say anything funny, let me know." Tr. 1, p. 379. Several days after the shooting, King warned Johnson "not to say anything." Tr. 1, p. 438.

Based upon King's animosity towards Rice, her presence and failure to object during the kidnapping and shooting, her congratulating the shooter, and her instructions to witnesses to remain silent about the matter, there was ample evidence to hold her liable

as an accomplice for the criminal confinement of Rice. See Ransom v. State, 850 N.E.2d 491, 498 (Ind. Ct. App. 2006) (determining that the evidence was sufficient to uphold a conviction for criminal confinement where the defendant was present during the confinement and did not object, accompanied the person who confined the victim, and later called the victim to ask if she was pressing charges).[3]

King further argues that the evidence supporting her conviction is insufficient because Rice did not suffer serious bodily injury as a result of being confined. We disagree. Confinement exists when there is a substantial interference with liberty without consent. Hopkins v. State, 747 N.E.2d 598, 606 (Ind. Ct. App. 2001), trans. denied. In this case, after King identified Rice, Phillips forced Rice into a trunk at gunpoint. Next, they drove out to the countryside, where Phillips shot Rice immediately after he got out from or was removed from the trunk, as the others watched. All reasonable inferences drawn from the evidence indicate that King and others were still substantially interfering with Rice's liberty at the time Phillips shot Rice, and Rice was not free to go simply because he was no longer confined in the trunk. Thus, the evidence is sufficient to determine that Rice was shot as a result of his confinement. See Carter v. State, 766 N.E.2d 377, 380 (Ind. 2002) (finding the evidence sufficient to sustain a conviction for confinement as a Class B felony where the perpetrators surrounded the victim and beat him before taking the victim to an apartment, where they shot him).

[3] The confinement conviction was affirmed by all three members of the Court of Appeals panel although there were serious double jeopardy problems perceived by two members of the panel with respect to a separate battery conviction. See Ransom, 850 N.E.2d at 503 (Sullivan, J., concurring in part and dissenting in part) (discussing the panel members' differing conclusions on the double jeopardy issue).

King cites Long v. State, 743 N.E.2d 253 (Ind. 2001), to support her claim, but that case is factually distinguishable. In Long, the evidence demonstrated that the victim suffered fractured bones, but there was no evidence that the fractures occurred during or resulted from the confinement. Id. at 259. Consequently, our Supreme Court determined that the evidence was insufficient to convict Long of criminal confinement as a Class B felony. Id. By contrast, in this case there is sufficient evidence that Rice was shot multiple times as he was confined by King and her confederates. Therefore, Long is not controlling.[4] We conclude that there is sufficient evidence to sustain King's conviction.

II. MITIGATING AND AGGRAVATING FACTORS

Sentencing decisions rest within the sound discretion of the trial court and, if the sentence is within the statutory range, are reviewed on appeal for an abuse of discretion. See Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). 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. (quotation omitted). Our Supreme Court has explained:

> One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. 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.

[4] King also cites to Redman v. State, 743 N.E.2d 263 (Ind. 2001) and Russell v. State, 743 N.E.2d 269 (Ind. 2001). Those appeals were filed by Long's co-defendants and presented the same challenge as in Long's case to the sufficiency of the evidence supporting their criminal confinement convictions. Consequently, Redman and Russell, like Long, are factually distinguishable from King's case.

Id. at 490-491.[5]

King argues that the trial court abused its discretion during sentencing because the trial court overlooked mitigators that are clearly supported by the record, specifically her lack of a significant criminal history and her remorse. The trial court is not obligated to accept the defendant's assertions as to what constitutes a mitigating circumstance. Shields v. State, 699 N.E.2d 636, 639 (Ind. 1998).

Regarding King's criminal history, the record reflects that she has no juvenile criminal history and no adult convictions prior to criminally confining Rice. However, after her encounter with Rice, King was charged in federal court for crimes related to her sale of a firearm. King was convicted of one of the federal charges and sentenced to two years in prison prior to sentencing in this case. The trial court noted King's federal conviction during the sentencing hearing and in the Judgment of Conviction and Sentencing Order. Thus, the trial court did not overlook King's criminal record, but rather appropriately determined that it was an aggravating factor. See Atwood v. State, 905 N.E.2d 479, 488 (Ind. Ct. App. 2009), trans. denied (noting that even "a limited criminal history can be considered an aggravating factor"). Furthermore, the trial court noted during the sentencing hearing that King committed criminal confinement after attempting to purchase marijuana. Uncharged criminal conduct is relevant to the nature of a defendant's criminal history. See Krempetz v. State, 872 N.E.2d 605, 614 (Ind. 2007) (concluding that the trial court properly took into account the defendant's admitted,

[5] King argues that the trial court rendered an insufficient sentencing statement to justify the enhanced sentence.

uncharged drug use while considering the defendant's criminal history). We find no abuse of discretion.

As to King's remorse, substantial deference must be given to a trial court's evaluation of remorse. Corralez v. State, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004). The trial court, which has the ability to directly observe the defendant and listen to the tenor of his or her voice, is in the best position to determine whether the remorse is genuine. Id. In this case, King expressed sadness for Rice's death and sympathy for Rice's family, but she did not accept responsibility for participating in the criminal confinement of Rice. Instead, she apologized only for attempting to purchase a "small amount of marijuana." Tr. 3, p. 9. Thus, King's statement of remorse was equivocal, and the trial court did not abuse its discretion by declining to find remorse as a mitigating factor. See Price v. State, 765 N.E.2d 1245, 1253 (Ind. 2002) (affirming the trial court's refusal to find remorse to be a mitigating factor where the defendant's statement was short of a full acceptance of responsibility).

Next, King argues that the trial court improperly cited Rice's death as an aggravating factor. Specifically, King notes that the jury did not return a verdict on her murder charge, and she contends that it was inappropriate to aggravate her sentence for criminal confinement by referring to Rice's death. Generally, "the nature and circumstances" of a crime is a proper aggravating factor. McCann v. State, 749 N.E.2d 1116, 1120 (Ind. 2001). So long as the trial court takes into consideration facts not needed to prove the elements of the offense, the nature and the circumstances of the

crime can appropriately be considered as aggravating circumstances. Hall v. State, 870 N.E.2d 449, 464 (Ind. Ct. App. 2007), trans. denied.

In this case, in the Judgment of Conviction and Sentencing Order, the trial court determined that King's "central role in the abduction and execution style murder of the victim justifies a sentence above the advisory sentence." Appellant's App. p. 6. At the sentencing hearing, the trial court stated, "the circumstances of this particular criminal confinement, in my opinion, warrant a sentence above the advisory." Tr. 3, p. 9. The trial court explained, "but for your involvement, there would be no other crime." Id. The trial court further stated:

> [Y]ou didn't call Mr. Phillips over there to have a discussion with Mr. Rice. You called Mr. Phillips over there to do something. And as a result of what did you did [sic], whether you were present or not, whether the jury thought that that wasn't proved or not, a man died over weed at your instance [sic].

Id. at p. 10. Thus, the trial court explained that an enhanced sentence for King's criminal confinement was appropriate because the crime she did commit, criminal confinement, was caused by her drug deal gone awry and resulted in a death. The trial court's explanation is appropriate because, in finding King guilty of criminal confinement resulting in serious bodily injury, the jury found King responsible as an accessory for the multiple gunshot wounds that ultimately killed Rice. We conclude that the trial court sufficiently explained the nature and circumstances of the crime and was not disregarding the jury's failure to reach a verdict on the murder charge. Thus, the trial court properly cited this factor as an aggravating circumstance. See Johnson v. State, 837 N.E.2d 209, 217 (Ind. Ct. App. 2005), trans. denied (affirming sentences for criminal confinement and

other convictions where the trial court cited the nature and circumstances of the crimes and identified the specific circumstances at the sentencing hearing).

King cites to Gambill v. State, 436 N.E.2d 301 (Ind. 1982), to support her claim that the trial court erred by citing to Rice's death as an aggravating circumstance, but that case is distinguishable. In Gambill, the jury convicted Gambill of voluntary manslaughter instead of murder. During sentencing, the court cited several statutory aggravating factors without elaboration and criticized the jury's verdict, asserting that a murder conviction would have been justified under the evidence. Id. at 304. Our Supreme Court determined that the trial court erred by failing to explain how the statutory aggravating factors applied to the case. Id. More importantly, the Court noted that it appeared that the trial court disagreed with the jury's verdict and invaded the province of the jury by giving Gambill the maximum sentence for voluntary manslaughter to "compensate for what he believed to be an erroneous verdict." Id. at 305.

By contrast, in the current case the trial court did not disparage the jury's inability to return a verdict on the charge of murder. Furthermore, the trial court did not impose the maximum sentence on King for the criminal confinement conviction. Instead, the trial court simply noted that King's commission of criminal confinement led to Rice's death, regardless of the jury's verdict on the murder charge. Thus, the trial court appropriately cited King's death as a nature and circumstance of the crime, and Gambill is not controlling. We find no abuse of discretion.

III. APPROPRIATENESS OF SENTENCE

King's final sentencing challenge is governed by Indiana Appellate Rule 7(B), which provides, in relevant part, "[t]he 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." We may look to any factors appearing in the record to review the sentence imposed. Schumann v. State, 900 N.E.2d 495, 497 (Ind. Ct. App. 2009). It is the defendant's burden to demonstrate that his or her sentence is inappropriate. Major v. State, 873 N.E.2d 1120, 1130 (Ind. Ct. App. 2007), trans. denied.

The "nature of the offense" portion of the standard articulated in Appellate Rule 7(B) speaks to the statutory advisory sentence for the class of crimes to which the offense belongs. Id. Our Supreme Court has noted that the advisory sentence is the "starting point" the Legislature has selected as an appropriate sentence for the crime committed. Anglemyer, 868 N.E.2d at 494. However, this Court has held that although the advisory sentence may be the appropriate sentence, it is not a "mandatory starting point." Richardson v. State, 906 N.E.2d 241, 245 (Ind. Ct. App. 2009). For our purposes of review under Appellate Rule 7(B), we first look to the advisory sentence to guide us in determining whether the sentence imposed is appropriate given the nature of the offense and the character of the offender.

At the time King committed her crime, the advisory sentence for a Class B felony was ten years, with a minimum of six years and a maximum of twenty years. Ind. Code § 35-50-2-5 (2005). King received a sentence of fourteen years.

Our review of the nature of the offense shows that based on King's suspicion that Rice may have set her up to be robbed, King arranged for associates to force Rice into the trunk of a car. Subsequently, King and her associates drove out to a rural area, where Rice was brutally shot to death in her presence, and his remains were discarded in the snow on the side of the road.[6] King had ample opportunity to change her mind and ask her companions to let Rice go or to refrain from killing Rice, but she persisted in her criminal conduct. The circumstances of this crime reflect a callous and vengeful attitude and support a sentence above the advisory.

The character of the offender portion of the standard refers to the general sentencing considerations and the relevant aggravating and mitigating circumstances. Major, 873 N.E.2d at 1131. In this case, King, who is twenty-eight years old, has only one other criminal conviction. However, the other conviction is for a federal firearms charge, and King committed the federal crime after committing the instant offense. In addition, the events that led to Rice's confinement and fatal shooting began when King attempted to purchase a pound of marijuana. Furthermore, King admitted to using marijuana on a daily basis starting when she was 13 and continuing for several years. Thus, she has not lived a law-abiding life. Furthermore, King's expressions of gratitude to Phillips after he shot Rice and her threat to Johnson that he should remain silent after the shooting also reflect poorly on her character. These facts support a sentence above the advisory.

[6] As earlier noted, the fact that the jury did not convict King of murder does not militate against her conviction for criminal confinement resulting in serious bodily injury. See the extensive discussion of allegedly inconsistent verdicts in Beattie v. State, 924 N.E.2d 643, 648-49 (Ind. 2010).

King again notes that she expressed remorse at sentencing. However, the only behavior for which King apologized was her attempt to purchase marijuana. King is constitutionally entitled to continue to assert her innocence, but in light of the jury's verdict, her lack of acceptance of responsibility for Rice's confinement is not entitled to mitigating weight and does not render her sentence inappropriate. We conclude that King has failed to demonstrate that her sentence is inappropriate in light of the nature of the offense and the character of the offender.

CONCLUSION

For the reasons stated above, we affirm the judgment of the trial court.

Affirmed.

BARNES, J., and BRADFORD, J., concur.