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IN THE
COURT OF APPEALS OF INDIANA

BRANDON LEE JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-1006-CR-367
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0912-MR-9

April 28, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Brandon Lee Johnson appeals his convictions of murder[1] and attempted murder.[2] He presents three issues, which we restate as:

1. Whether the trial court committed a reversible error when it admitted certain photographs;
2. Whether there was sufficient evidence to convict Johnson; and
3. Whether Johnson's sentence was appropriate in light of his character and the nature of the offenses.

We affirm.

FACTS AND PROCEDURAL HISTORY

On December 16, 2009, Johnson's brother, Leroy, hosted a night of card playing. After Johnson arrived, he brandished what was described as a "little assault rifle," (Tr. at 49), and told everyone "don't move" and "don't do nothin'." (*Id*. at 50.) Johnson then ordered Leroy and Clifton Davis into the kitchen, but they did not obey. When Davis saw Johnson fire a shot, he fled into the bathroom and put his foot on the door. Most other guests fled the apartment through the front door. More shots were fired, and some bullets entered the bathroom and struck Davis. When the shooting stopped, Davis exited the bathroom, saw Leroy's dead body, and called the police.

A jury found Johnson guilty of murder and attempted murder. The court sentenced him to 60 years for murder and 45 years for attempted murder, to be served consecutively.

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[1] Ind. Code § 35-41-1-1.
[2] Ind. Code §§ 35-41-1-1 (murder), 35-42-5-1 (attempt).

DISCUSSION AND DECISION

1. Photographs

Johnson contends the trial court abused its discretion in admitting autopsy photographs. Photographic evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." Ind. Evid. R. 403. Admission of photographic evidence is within the sound discretion of the trial court. *Helsley v. State*, 809 N.E.2d 292, 296 (Ind. 2004). Even "[g]ruesome and gory photographs with strong probative value are admissible where they help interpret the facts of the case for the jury." *Corbett v. State*, 764 N.E.2d 622, 627 (Ind. 2002).

The trial court admitted several autopsy photographs of Leroy's injuries, including the fatal gunshot wound to his head. The State argues the photographs were of specific injuries Leroy suffered as a result of the gunshot wounds Johnson inflicted, they gave the jury a visual representation of the coroner's findings including cause of death, and they helped the jury interpret relevant facts. We agree.

Evaluating an exhibit's probative value is a discretionary task best performed by the trial court. *Helsley*, 809 N.E.2d at 296. The trial court noted that it had seen "far worse" autopsy photos. (Tr. at 169.) The photos were not extremely gruesome, and they were probative of the issues to be decided by the jury. We therefore are not persuaded the trial court abused its discretion in admitting the photographs. *See Corbett*, 764 N.E.2d at 627 (no prejudicial error in admitting autopsy photographs showing the victim's body with the head

wounds cleaned and some hair shaved away).

2. Sufficiency of the Evidence

Johnson next contends the evidence was insufficient to support his murder conviction.

> The standard for reviewing sufficiency of the evidence claims is well settled. We do not reweigh the evidence or assess the credibility of the witnesses. Rather, we look to the evidence and reasonable inferences drawn therefrom that support the verdict and will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt.

Stewart v. State, 768 N.E.2d 433, 435 (Ind. 2002). "[I]t is for the trier of fact to reject a defendant's version of what happened, to determine all inferences arising from the evidence, and to decide which witnesses to believe." *Holeton v. State*, 853 N.E.2d 539, 541 (Ind. Ct. App. 2006). It is also not necessary that the evidence "overcome every reasonable hypothesis of innocence." *Moore v. State*, 652 N.E.2d 53, 55 (Ind. 1995).

Johnson contends the incredible dubiosity rule is implicated because there was conflicting testimony. "Under the incredible dubiosity rule, a court will impinge upon the jury's responsibility to judge the credibility of witnesses only when confronted with inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity." *Murray v. State*, 761 N.E.2d 406, 408 (Ind. 2002). As we apply this standard, we must consider whether the testimony "runs counter to human experience, and no reasonable person could believe it." *Stout v. State*, 612 N.E.2d 1076, 1080-81 (Ind. Ct. App. 1993), *trans denied*. But this rule does not apply to conflicts among witnesses. *See Tillman v. State*, 642 N.E.2d 221, 223 (Ind. 1994) (holding the rule is limited to cases where a sole

witness presents contradictory testimony). Thus, this argument fails.

Johnson notes Davis did not see Johnson shoot him or Leroy and another witness testified Davis ran into the bathroom before any shots were fired. Johnson argues there is no credible direct evidence identifying the person responsible for shooting Davis and Leroy. However, Johnson was the only guest identified as having a weapon that night and some witnesses saw Johnson shoot his weapon. After considering all the evidence most favorable to the verdict and drawing all reasonable inferences therefrom, we hold the jury reasonably could have concluded that Johnson killed Leroy and injured Davis.[3]

3. Indiana Appellate Rule 7(B)

Johnson also contends his aggregate 105-year sentence is inappropriate. 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 the 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 for determining the appropriateness of a sentence. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), modified on reh'g., 875 N.E.2d 218 (Ind. 2007). The advisory sentence for

[3] Johnson also argues there was inconsistent testimony regarding the timing of the events that evening. Even if that testimony were "conflicting evidence," a trier of fact is still entitled to reject a defendant's version of the events. *McClendon*, 671 N.E.2d at 488. We decline to rejudge the credibility of the witnesses.

murder is fifty-five years, Ind. Code § 35-50-2-3(a), and the advisory sentence for attempted murder, a Class A felony, is thirty years. Ind. Code § 35-50-2-4.

Johnson argues the maximum sentence should be reserved for the worst offenses and offenders. We agree; however, Johnson was not given the maximum sentence. Instead, Johnson was sentenced to 60 of a possible 65 years for murder and 45 of a possible 50 years for attempted murder. Because the court ordered them served consecutively, he received 105 of a possible 115 years.

Where, as here, the court deviates from the advisory sentence, one factor we consider for determining appropriateness is whether there is anything more or less egregious about the offense committed by the defendant 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*. Johnson killed his own brother and injured another person in the presence of a child. That there were multiple victims is a valid aggravator, *French v. State*, 839 N.E.2d 196, 197 (Ind. Ct. App. 2005), as is the fact the defendant committed a crime of violence in the presence or within hearing of a child under the age of eighteen. *Abrajan v. State,* 917 N.E.2d 709, 712 (Ind. Ct. App. 2009) (citing Ind. Code § 35-38-1-7.1(a)(4)(B)(i)). In light of these facts, we cannot say Johnson's sentence is inappropriate for his crime.

When considering the character of the offender, one relevant fact is the defendant'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*. Johnson is only twenty-two years old but already has had numerous experiences with our criminal justice system. As a juvenile, Johnson was placed on administrative probation in 2001 for conversion, given operational probation in 2003 for disorderly conduct, and placed on probation for possession of marijuana in 2003. As an adult, Johnson was convicted in 2007 of operating a vehicle with a suspended license, battery, and felony possession of cocaine, and he was convicted of invasion of privacy in both 2008 and 2009. He clearly has failed to benefit from prior rehabilitative efforts, and this reflects poorly on his character.

Because nothing about Johnson's character or offense suggest his sentence is inappropriate, we affirm the sentence imposed by the trial court.

CONCLUSION

Johnson has not demonstrated the trial court commited reversible error by admitting the autopsy photographs. There was sufficient evidence to convict Johnson as the shooter and his sentence is appropriate in light of the nature of the offenses and his character. Thus, the judgment of the trial court is affirmed.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.