

Robert L. Herrin appeals his conviction and sentence for class D felony Home Improvement Fraud.¹ He presents the following restated issues for review:

1. Did the trial court abuse its discretion by instructing the jury on accomplice liability?
2. Is Herrin's three-year sentence inappropriate in light of the nature of the offense and his character?

We affirm.

On the morning of October 12, 2007, Robert Herrin along with his son, Robert Herrin, Jr., and brother-in-law, Johnny Broadway, went to eighty-six-year-old Doris Champe's home in Ripley County, Indiana. The men were uninvited and did not know Champe, who was hard of hearing and dependent on her son. One of the men informed Champe that her house needed work and that he had observed squirrels crawling into the house through the roof. The man talked incessantly to her about the condition of her house, as if it were about to fall apart. Champe ultimately gave the man permission to fix her roof. The men were at Champe's home for about three hours. In that time, she saw at least two of them get onto her roof. The same man that she had previously spoken with eventually approached Champe for payment. Due to her arthritis Champe was only able to sign her name on the check, so the man completed the rest of the check. He made the check payable to "Robert Herrin" for \$5200.00. The man gave her a receipt² and then he and his two companions left in Herrin's

¹ Ind. Code Ann. § 35-43-6-12(a)(4) (West, PREMISE through 2008 2nd Regular Sess.); I.C. § 35-43-6-13(b)(2)(A) (West, PREMISE through 2008 2nd Regular Sess.).

² The receipt indicated that Champe had paid a flat rate of \$5200.00 for "stopping [sic] all leaks in roof coating vents [and] pipes". *State's Exhibits from Jury Trial* at State's Exhibit 6. While the receipt stated that all work was guaranteed for twenty years, there was no identifying information contained on the receipt for Champe to be able to contact Herrin or the other men.

truck.

At approximately 1:30 p.m., Herrin presented the check at Champe's local bank branch for payment. Employees of the bank were suspicious of the check and secretly contacted Champe, who asked them not to pay the check. The police were then contacted by the bank while Herrin waited.

Indiana State Police Detective Stan Tressler arrived at the bank shortly thereafter and noticed a truck parked in a lot across from the bank's parking lot. He spoke with the two occupants of Herrin's truck. The person in the driver's seat identified himself as Johnny Broadway and the person in the passenger's seat identified himself as Robert Herrin, Jr. (referred to as Jr.). After back-up arrived, Detective Tressler went into the bank, where he made contact with Herrin. Before being transported to the police post, Herrin asked to speak with his son. Herrin told Jr. to cooperate with the police and tell them what happened. Herrin asked the officers not to arrest his son, who was not involved and had only come "along for the ride." *Transcript* at 356. Jr. was not arrested because, among other reasons, he had a debilitating injury to his right foot and left leg that left him seemingly unable to work on Champe's roof. Broadway was arrested on an outstanding warrant, though he was never ultimately charged in this case.

While in custody, Herrin told Detective Tressler that he had spent about an hour and a half "doing some sealing on [Champe's] roof, her chimney and her vents and that they resealed some old shingles down." *Id.* at 312. Herrin admitted that they had lied to her about seeing squirrels enter her home through the roof. He also acknowledged that he was the one

who filled out the check that was signed by Champe.

Herrin consented to the search of his pickup truck. In the cab of the truck, officers discovered a duplicate of the receipt given to Champe and a two-day-old receipt from 84 Lumber for items (including one gallon of cure and seal, two quarts of concrete crack filler, and three cans of black spray paint) totaling \$59.99. Officers also found, among other things, a tool box in the bed of the truck.

An investigation of Champe's roof revealed that minor work had been done. Specifically, officers observed a small area that looked like it had been sealed with rubber cement and painted black. Upon his arrest, Herrin was found to have black residue on his hands and shoes.

The State charged Herrin with home improvement fraud as a class D felony. Herrin's jury trial commenced on August 14, 2008 and concluded the following day with the jury finding him guilty as charged. At the sentencing hearing on September 18, the trial court sentenced Herrin to the maximum term of three years in prison. Herrin now appeals his conviction and sentence.

1.

Herrin initially argues that the trial court abused its discretion when it instructed the jury on accomplice liability over his objection. He claims there was no evidence to support giving the instruction because the State had not alleged or built its case on the concept that he aided or induced the offense.

The manner of instructing a jury lies largely within the sound discretion of the trial court, and we review the trial court's decision only for an abuse of

that discretion. In reviewing a challenge to a jury instruction, we consider: (1) whether the instruction is a correct statement of the law; (2) whether there was evidence in the record to support giving the instruction; and (3) whether the substance of the instruction is covered by other instructions given by the court.

Boney v. State, 880 N.E.2d 279, 293 (Ind. Ct. App. 2008) (citations omitted), *trans. denied*.

Here, Herrin claims only that there was no evidence in the record to support giving the instruction.

The State proceeded to trial on the theory that Herrin defrauded Champe by personally telling her that he had seen squirrels entering her house, “repairing” the roof in a matter of hours with materials costing less than \$100, and writing a check to himself on her account for \$5200.00, which he then attempted to cash. This was consistent with the police investigation, particularly Herrin’s statements to Detective Tressler. At trial, however, Herrin’s counsel elicited testimony indicating that some of these acts may have been committed by Jr. or Broadway.³ As a result, the State tendered a final jury instruction on accomplice liability, which the trial court gave to the jury.

Our Supreme Court has made clear that there is no distinction between the criminal responsibility of a principal and that of an accomplice. *McQueen v. State*, 711 N.E.2d 503 (Ind. 1999).

³ By the time of trial, Champe’s condition had noticeably deteriorated and her testimony was confusing and at least somewhat inconsistent with her prior statements to police made immediately after the events in question. For example, she had told police that Jr., whom she referred to as the “younger man”, stayed on the ground and spoke with her while the other two were on the roof. At trial, she indicated that she never spoke with Jr. and that he worked on the roof. Moreover, she indicated that the “middle man” (i.e., Broadway) was the only one that spoke with her, including about the payment. She also initially indicated that the middle man got on the roof, but later said that he never got on the roof. At trial, Champe further testified that she never spoke with the “older man” (i.e., Herrin).

Thus, one may be charged as a principal yet convicted as an accomplice. Accordingly, this Court has repeatedly held that where one is charged as a principal it is not error to instruct on the crime of aiding in the commission of the crime when there is evidence to support such an instruction. In such an instance, the instruction on accessory liability does not represent an additional charge or a new theory of the case.

Id. at 506 (citations omitted).

Herrin's conduct – indeed, his theory of the case – created at least an inference that if he did not defraud Champe himself, he aided Jr. and/or Broadway in doing so. *See Hubbard v. State*, 742 N.E.2d 919 (Ind. 2001). Specifically, Herrin drove approximately fifty miles in his truck to a stranger's home with two other men. The evidence further establishes, at a minimum, that he was present over the next few hours while the eighty-six-year-old victim was coerced into accepting the work and paying \$5200.00 for it with a check completed by one of the men in Herrin's name. Moreover, it is undisputed that after leaving Champe's home, Herrin took the check to the bank to cash it. The evidence is clearly sufficient to support the instruction on accomplice liability. *See Wisheart v. State*, 693 N.E.2d 23, 51 (Ind. 1998) (finding sufficient evidence to support instruction on accomplice liability where defendant "elicited testimony that it was a possibility that other people may have been involved in the crime").

2.

Herrin claims that the maximum sentence of three years⁴ is inappropriate in light of the nature of the offense and his character. With respect to the nature of the offense, Herrin

argues that the non-violent crime did not result in any pecuniary loss to Champe because the check was never cashed. Turning to his character, Herrin acknowledges his extensive criminal history but notes he has never before served a lengthy jail sentence or been sent to prison. In sum, he claims that “the advisory sentence would appropriately allow potential for reformation and serve the ends of justice.” *Appellant’s Brief* at 15.

We have the constitutional authority to revise a sentence if, after consideration of the trial court’s decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. *See* Indiana Appellate Rule 7(B); *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218. Although we are not required under App. R. 7(B) to be “extremely” deferential to a trial court’s sentencing decision, we recognize the unique perspective a trial court brings to such determinations. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). On appeal, Herrin bears the burden of persuading us that his sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867.

The maximum sentence was not inappropriate in the instant case. In fact, we observe that Herrin actually asked the trial court to give him the maximum sentence but requested that it be served on electronic home detention. Thus, we fail to see how Herrin can now argue that a three-year sentence is inappropriate and that the trial court should have imposed the advisory sentence.

⁴ Ind. Code Ann. § 35-50-2-7(a) (West, PREMISE through 2008 2nd Regular Sess.) provides that a person who commits a class D felony “shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 1/2) years.”

Aside from the particularly advanced age of Herrin's victim, we do not find the circumstances of his crime to be especially egregious in the context of class D felony home improvement fraud cases. Therefore, we agree with Herrin that the nature of the offense does not support a maximum sentence.

Herrin's character, however, clearly supports the maximum sentence imposed in the instant case. Defense counsel even acknowledged at the sentencing hearing that his client's criminal history "alone would aggravate a sentence to max a sentence out." *Transcript* at 520. To be sure, Herrin's lengthy criminal history, spanning at least four states, reveals a consistent pattern of preying on elderly women through home improvement scams similar to the one at hand. Herrin appears to be correct that he has never served a lengthy jail term,⁵ despite a number of convictions. As a result of leniency by the courts of our sister states, Herrin has been able to continue his criminal enterprises, seemingly undeterred by probation or pending charges. We agree with the trial court that the only way to keep Herrin from committing criminal offenses appears to be imprisonment and, here, the maximum sentence is warranted.

Judgment affirmed.

NAJAM, J., and VAIDIK, J., concur.

⁵ At the time of this offense, Herrin was serving ten-year periods of probation in both Georgia and Tennessee for similar offenses.