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IN THE
COURT OF APPEALS OF INDIANA

DANIEL GROVES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0812-CR-587
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Roland W. Chamblee, Jr., Judge
Cause No. 71D08-0801-MR-2

May 21, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Daniel Groves appeals his conviction and sentence, after a jury trial, for murder.[1] We affirm.

ISSUES

1. Whether sufficient evidence supports Groves' conviction.
2. Whether the trial court erred in imposing a sixty-five year sentence.

FACTS

At the time of the underlying incident, Groves was a member of the "Chapin Street Posse," a street gang active in South Bend. (Tr. 354). The "Chapin Street Posse was on friendly terms with another street gang called "Daug Life." (Tr. 354). Spencer Johnson was a member of the "Lakesiders," a Chapin Street Posse rival gang. Groves and Johnson were bitter enemies. In 1993, during a fight between Johnson and Groves' brother, Delano, one of Johnson's fellow gang members intervened and killed Delano. Also, in 1994, Johnson killed Groves' friend, Christopher McFadden.[2]

On September 1, 1995, Groves was released to probation after being incarcerated for class D felony criminal recklessness. During Labor Day weekend, from September 3 - 4, 1995, Groves drank and smoked marijuana with friends. On the morning of September 4, 1995, Groves told his friends that he wanted to kill some Lakesiders;

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[1] Ind. Code § 35-42-1-1.

[2] Johnson was convicted of reckless homicide for McFadden's death.

specifically, Groves said that he had a "vengeance out" for Johnson and Donald Agnew and intended to kill one of them. (Tr. 344).

Just before noon, Johnson, Agnew, Jason Reeves, and Robert Winston were standing on the corner of Washington and Illinois Streets, when a small, white four-door Pontiac 6000 and another car rounded the corner. The occupants of the Pontiac opened fire on Johnson, Agnew, Reeves and Winston. During the flurry of gunshots, each man was shot at least once. Winston suffered a fatal gunshot wound to the head. Shell casings recovered from the crime scene revealed that the shooters used at least three different handguns and a shotgun. On September 5, 1995, a white Pontiac 6000 belonging to a Daug Life member was abandoned and set on fire.

The State charged Groves with various offenses stemming from the incident; however, on the first day of the jury trial, the State moved to dismiss the charges because Johnson refused to testify for the State unless he was immediately released from prison, where he was serving an eight-year sentence for killing McFadden.

On January 30, 2008, the State refiled charges against Groves, charging him with the following offenses: count I, murder;[3] count II, class B felony aggravated battery;[4] and counts III and IV, two counts of class C felony battery.[5] The trial court conducted Groves' jury trial from June 2 – 6, 2008. At the onset of the trial, Groves moved to dismiss counts II, III, and IV on the basis that the statute of limitations had expired; the

[3] I.C. § 35-42-1-1.

[4] I.C. § 39-42-2-1.5.

[5] I.C. § 35-42-2-1.

trial court granted the motion. The matter then proceeded to trial on the remaining count of murder; whereby, the jury found Groves guilty. On July 9, 2008, the trial court sentenced Groves to a sixty-five year term in the Department of Correction. Groves now appeals.

Additional facts will be provided as necessary.

DECISION

Groves argues that the evidence is not sufficient to support his conviction. He also argues that his sentence is inappropriate in light of the nature of the offense and his character.

1. Sufficiency of the Evidence

First, Groves argues that the evidence is insufficient to support his conviction because the testimony presented at trial was "contradictory and lack[ed] sufficient indicia of reliability upon which to base a conviction." Groves' Br. at 10. We disagree.

Our standard of review with regard to sufficiency matters is well settled:

> When reviewing a challenge to the sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. We look to the evidence and the reasonable inferences therefrom that support the verdict. The conviction will be affirmed if evidence of probative value exists from which the fact finder could find the defendant guilty beyond a reasonable doubt. We typically will not invade the province of the jury as the sole judge of the credibility of a witness. We will affirm unless 'no rational fact finder' could have found the defendant guilty beyond a reasonable doubt.

Williams v. State, 873 N.E.2d 144, 147 (Ind. Ct. App. 2007).

In order to convict Groves of Winston's murder, the State was required to show that he knowingly and intentionally killed Winston. The State presented ample evidence

in the form of eyewitness testimony to support Groves' murder conviction. First, Ralph Jones, who was among the men drinking and smoking marijuana at Groves' house before the shootings, testified that he saw "a lot of guns" in Groves' house. (Tr. 358). Jones testified that Groves said he "had a vengeance out for the guys that had something to do with his brother [Delano] being shot, specifically, Spencer [Johnson] and Agnew," and "wanted to kill one of them." (Tr. 344, 345). Jones also testified that he had seen Groves with Keith Jennings ("Swift"), a "Daug Life" gang member, who owned a white Pontiac 6000. Jones testified further that after the shootings, Groves referred to the "vengeance," laughed, and "said he did it." (Tr. 348). Jones testified that he interpreted Groves' statement to mean that Groves "thought he killed one of the guys he was aiming to kill." (Tr. 348).

Next, Sir Brown testified that he witnessed the shooting and saw a white four-door sedan pull up to the corner where Johnson, Agnew, Reeves, and Winston were standing; then, the occupants of the sedan opened fire on the men. Brown testified that he got a good look at the front passenger because when the car turned the corner, the "front passenger put his whole butt, put his whole top half out the window," placed his elbows on the roof of the car, aimed his gun, and shot repeatedly at the men on the corner. (Tr. 516). Brown testified that in 2005 or 2006, Groves walked into his place of employment. Brown testified that he immediately recognized Groves as the front passenger from the 1995 drive-by shooting. Brown testified that Groves became a regular patron of the business. Apparently, Groves learned of Brown's identity because he spoke with Brown and threatened him not to cooperate with law enforcement saying, "I ain't never [sic]

done nothing to you, stay out of my business or something will happen to you." (Tr. 512).

Shooting victim Spencer Johnson testified that he and Groves were sworn enemies because he killed Groves' friend, Christopher McFadden, and was present when Groves' brother, Delano, was killed. He testified that after Delano's death, Groves had threatened to kill him. He testified that after McFadden's death, Groves made a second threat to kill him. He testified that on the day of the drive-by shooting, a small white four door sedan pulled up to the corner where he stood with Winston, Agnew, and Reeves and the occupants of the car opened fire. Johnson testified that Groves "came out of the window" and fired a semi-automatic handgun in the men's direction, striking Winston in the back of the head, and striking him in the chest, arm, and leg, and wounding Agnew and Reeves. (Tr. 552).

Shooting victim Donald Agnew testified that he "was looking at [Groves'] eyes when [Groves] was looking at [him]." (Tr. 621). He testified that Groves then fired a semi-automatic handgun at the men on the corner. He testified that from his hospital bed, he not only named Groves as one of the shooters, but he also picked Groves' picture from a photo array.

Next, bystander Dennis Campbell testified that moments before the shooting, he was approaching the intersection of Illinois and Washington streets and saw Winston, Agnew, Reeves, and Johnson standing on the corner. He testified that a white car approached the intersection, and he recognized it as a "Daug Life" car. Campbell

testified that he heard handgun and shotgun fire and saw Groves shooting at the men on the corner.

Daug Life member Deangelo Chick testified that in 2006, he and Groves were incarcerated in the same Westville prison dormitory. He testified that during a conversation with Groves, Groves said "he had tried to take [Johnson]'s head off before" during a drive by shooting. (Tr. 674). Chick testified,

> [F]irst I asked him was it recently since Spencer had been out of prison or when was it because I wasn't aware of the situation. And he said it was from back in the day. And he said they went over there on a drive by, seen [sic] Spencer outside with a few of his buddies, Spencer seen [sic] him, he ran, the rest of them ran when [Spencer] ran. They got to shooting. And Spencer got hit, laid down like he was dead, [Groves] stopped shooting in that direction, shot in another direction. Second guy got hit. He explained that's when he . . . got his OBK which is Daug Life terminology for off brand killer[6] which I was part of Daug Life so . . . I knew what he was talking about which means he killed him.

(Tr. 674-75). Chick testified further that Groves was friends with Daug Life member Swift, who owned a white Pontiac 6000.

Brent Allen Harrington testified that in 2008, he was incarcerated in the same cell block as Groves. He testified that he asked Groves whether the State had a strong case against him, and that Groves responded, "[N]ot if [Spencer Johnson] didn't tell." (Tr. 687). He testified that Groves explained that prior charges had been dismissed because Johnson would not cooperate with the State. He also testified that Groves was "worried that Spencer was going to try to cooperate" and expressed fear that "Spencer was going to be able to link him to" Winston's murder. (Tr. 688, 689).

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[6] Chick testified that rival gang members are "considered off brand" or "outside of the circle," therefore, killing a rival gang member is "called off brand OBK which is off brand kill." (Tr. 675).

Detective David Dosmann, a former South Bend police officer, testified that on September 6, 1995, he was assigned to investigate a car fire that had occurred on September 5, 1995. The burned vehicle was a white, four-door Pontiac 6000 registered to Keith Jennings, Sr. He testified that his investigation revealed that "[t]he vehicle was abandoned [in an alley]. The key was in the ignition. The vehicle was later reported stolen and had not been reported stolen at the time of the fire." (Tr. 454). He determined that the fire was "a deliberate act of arson[,] set on fire by human hands." (Tr. 454). Earlier in the testimony, Jones had testified that before the shooting, he had seen Groves with "Daug Life" gang member Keith Jennings ("Swift"), and that Jennings' white Pontiac 6000 was parked nearby.

Despite the overwhelming evidence, Groves maintains that the evidence is insufficient to support his conviction because some witnesses gave equivocal and conflicting testimony. Our standard of review precludes us from reweighing the evidence presented at trial or reassessing witness credibility; we decline Groves' invitation that we do so. *See Williams,* 873 N.E.2d at 147. Moreover, it is well established that inconsistencies in the witnesses' testimony are matters for the factfinder to evaluate, and it is the role of the factfinder, not the reviewing court, to determine what testimony to believe. *Mendoza v. State,* 869 N.E.2d 546, 554 (Ind. Ct. App. 2007). Here, the jury weighed the conflicting testimony as well as the credibility of the witnesses and found Groves guilty.

Based upon the evidence, including the testimony of multiple witnesses who identified Groves as the shooter, we find that the State presented sufficient evidence from

which the jury could conclude that Groves knowingly killed Winston. The State's evidence showed that Groves: (1) had the specific intent to kill Johnson, Agnew, and Lakesiders in general;[7] (2) had access to handguns as well as a white Pontiac 6000; (3) was identified as one of the shooters by two of the victims and also by bystanders; and (4) admitted his involvement in the drive-by shooting to several witnesses, and even boasted about "earning" his "off-brand killer designation" for killing Winston. We conclude that the State's evidence was sufficient to support Groves' conviction for murder.

1. Enhanced Sentence

Next, Groves asserts that the trial court erred in imposing a sixty-five year enhanced sentence. Because this crime was committed before the advisory sentencing scheme took effect on April 25, 2005, the presumptive sentencing scheme applies to this case. *See Gutermuth v. State*, 868 N.E.2d 427, 431 n.4 (Ind. 2007); *see also Padgett v. State*, 875 N.E.2d 310, 316 (Ind. Ct. App. 2007) (reviewing defendant's sentencing under the presumptive sentencing scheme where defendant committed his crime before effective date of new sentencing scheme, but was sentenced after that date).

Sentencing decisions, including whether to enhance a sentence, are within the trial court's discretion and will be reversed only for an abuse of discretion. *Edmonds v. State*, 840 N.E.2d 456, 461 (Ind. Ct. App. 2006). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances

[7] *See Blanche v. State*, 690 N.E.2d 709, 712 (Ind. 1998) (doctrine of transferred intent provides that defendant's intent to kill one person is transferred when defendant mistakenly or inadvertently kills third person; he may be found guilty of murder of person killed, even though he intended to kill another).

before the court. *Henderson v. State*, 848 N.E.2d 341, 344 (Ind. Ct. App. 2006). It is within the trial court's discretion to decide both the existence and weight of aggravating and mitigating circumstances. *Ross v. State*, 835 N.E.2d 1090, 1093 (Ind. Ct. App. 2005). However, modification of a presumptive sentence based upon aggravating or mitigating circumstances requires the trial court to identify all significant mitigating and aggravating circumstances, state the specific reason why each circumstance is determined to be mitigating or aggravating, and articulate its evaluation and balancing of the circumstances. *White v. State*, 847 N.E.2d 1043, 1045 (Ind. Ct. App. 2006).

First, Groves contends that it was error for the trial court to enhance his sentence based solely upon his prior conviction for class D felony criminal recklessness. He directs our attention to the trial court's Judgment of Conviction and its oral Sentencing Order, wherein the trial court identifies Groves' 1995 criminal recklessness conviction as the sole aggravating circumstance. In *McElroy v. State*, 865 N.E.2d 584, 589 (Ind. 2007), our supreme court held that reviewing courts shall consider both the trial court's written and oral sentencing statements in determining whether it has abused its discretion in imposing sentence. Here, the record reveals that at the sentencing hearing, the trial court identified, in addition to Groves' criminal history and the danger he posed to the community, two additional aggravating circumstances -- namely the nature of the offense and the fact that Groves was on probation when he committed the instant offense. Thus, we consider the three aggravating circumstances that the trial court identified in its oral and written sentencing remarks. Groves, herein, raises no challenge to the trial court's

finding that the nature of the offense was an aggravating circumstance; thus, we address the remaining aggravating circumstances identified by the court.

Groves acknowledges the well established standard that a single aggravating factor may support an enhanced sentence. *See Noojin v. State*, 730 N.E.2d 672, 678 (Ind. 2000). However, he cites to *Bryant v. State*, 841 N.E.2d 1154, 1156 (Ind. 2006), for the proposition that

> the extent, if any, that a sentence should be enhanced turns on the weight of an individual's criminal history. The weight given to one[']s criminal history is measured by the number of prior convictions, their gravity, their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability.

Id.; Groves' Br. at 11. We agree; however, we find the holding applies to Groves' detriment.

The trial court was warranted in according Groves' criminal history significant weight. In all, Groves has four felony and six misdemeanor convictions, including two convictions for carrying a handgun without a license. These convictions should be accorded significant gravity, given the indiscriminate manner in which Groves used a handgun in the instant case.

More significantly, just two years before he murdered Winston, Groves was convicted of class D felony criminal recklessness and sentenced to a two-year term of incarceration. The offense of criminal recklessness involves a reckless, knowing, or intentional act that creates a substantial risk of bodily injury to another person. I.C. § 35-42-2-2. As the trial court noted at the sentencing hearing, <u>class D felony</u> criminal

recklessness "involves, by necessity, the use of a firearm or . . . serious bodily injury to another person." (Sentencing. Tr. 399). The State asserts, and we agree, that the instant offense "evinces a similar recklessness and disregard for the bodily safety of others" as inherent in Groves' prior criminal recklessness offense. State's Br. at 12. Under the instant facts, Groves' behavior posed a substantial risk of bodily injury or possible death to innocent bystanders when he rapidly fired numerous rounds at Winston, Johnson, Reeves, and Agnew, as they stood on the corner of a bustling neighborhood street.

Groves makes much of the fact that his felony probation for criminal reckless was "some thirteen (13) years prior to this sentencing" and that his three other felony convictions occurred subsequent to the instant offense, which occurred "over a time period of thirteen (13) years spanning from 1995 to 2008." Groves' Br. at 12. However, he cites to no legal authority that would compel us to find that his convictions should not be considered significant for purposes of imposing sentence.

Guided by our supreme court's holding in *Bryant*, we conclude that given the number of Groves' prior criminal convictions, including a prior conviction for criminal recklessness; the gravity of his convictions; their proximity to Winston's murder; and, his pattern of reckless behavior and disregard for human life, we find no error by the trial court in enhancing his sentence. Thus, we find no abuse of discretion.[8]

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[8] We decline to address Groves' argument that the trial court improperly enhanced his sentence based upon his remarks during the sentencing hearing. He cites to no legal authority for the proposition that doing so would constitute error. Moreover, as the State notes, even if the trial court had relied on an improper aggravating circumstance in imposing its sentence, the reviewing court may still affirm the sentence if it "can say with confidence that the same sentence is appropriate without it." *Day v. State*, 560 N.E.2d 641, 643 (Ind. 1990). Such is the case here given Groves' criminal history, the nature of his

Affirmed.[9]

BAILEY, J., and ROBB, J., concur.

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offense, and the fact that he was on probation for class D felony criminal recklessness when he committed the drive-by shooting that resulted in Winston's death.

[9] We also decline to address Groves' claim of prosecutorial misconduct because Groves has waived the issue for appeal. Groves argues that the prosecutor asked Spencer Johnson an improper question and elicited a response from which it is probable that the jury concluded that he killed Winston. He argues that this amounted to prosecutorial misconduct that placed him in great peril. However, because Groves did not object to the prosecutor's question or Johnson's response, and further did not request an admonishment or move for a mistrial, we deem this issue waived. *See Reynolds v. State*, 797 N.E.2d 864, 868-69 (Ind. Ct. App. 2003) ("Failure to object to prosecutorial misconduct and to request an admonishment or move for a mistrial, waives a defendant's appellate right, unless the defendant can demonstrate that the misconduct amounted to fundamental error."). As Groves does not assert that the alleged misconduct amounted to fundamental error, we do not reach the merits of his claim.