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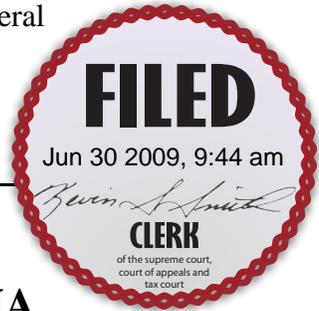
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**IN THE
COURT OF APPEALS OF INDIANA**

LAWAINE SMITH,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A02-0811-CR-990

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton Pratt, Judge
Cause No. 49G01-0805-MR-106856

June 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Lawaine Smith (a.k.a. Lawayne Smith, nicknamed “Head,”¹ hereinafter “Smith”) appeals his conviction and forty-year sentence for robbery, a class A felony.² We affirm.

Issues

Smith raises various issues,³ which we distill and restate as follows:

- I. Whether the trial court properly admitted into evidence co-conspirator statements;
- II. Whether the trial court properly admitted into evidence statements that Smith was present when another person used the murder weapon nine days later; and
- III. Whether Smith’s sentence is appropriate in light of the nature of the offense and his character.

Facts and Procedural History

The facts most favorable to the conviction reveal that on November 15, 2007, Arnold “Cubby” Fitzgerald asked his uncle, Melvin Fitzgerald, if he could use Melvin’s home at 3321 West 10th Street in Indianapolis, to host a dice game. Tr. at 102-03. The majority of the gamblers would be relatives, and Melvin would receive a portion of the money. *Id.* at

¹ Numerous persons involved in the relevant events have nicknames. Given that many of the persons have the same last name, for clarity’s sake, we shall use first names or nicknames at times.

² See Ind. Code § 35-42-5-1 (robbery); Ind. Code § 35-50-2-4 (class A felony advisory sentence is thirty years, with the range being from twenty to fifty years).

³ The trial court granted Smith permission to pursue a belated appeal. Smith contends that the lateness of his appeal was not his fault, that he was diligent, and that his appeal should not be dismissed as untimely. Appellant’s Br. at 25-27 (citing *Ricks v. State*, 898 N.E.2d 1277 (Ind. Ct. App. 2009)). The State neither disagrees nor seeks dismissal. As such, we need not address this non-issue.

104. Melvin agreed. At that time, Lantern “Homeboy” Smith, who is Smith’s father, was staying at Melvin’s place. *Id.* at 138. Cubby and Smith had grown up together.

That night, Melvin patted down the guests to make sure none of them brought any weapons into his home. The participants included Melvin, Cubby, Homeboy, Terrance Williams, “Manuel,” “Pippin,” “Sharon,” and “T-Brown.” *Id.* at 105-06. Although Melvin ran the game for a while, Homeboy pulled him away from the table and told him he wished to leave. Homeboy also made a couple phone calls. Later, someone knocked on the door. Homeboy went to answer the door, and a man wearing a gray jacket with fur on the hood broke into the home and began shooting. *Id.* at 114, 122-25. People fled to the basement and out windows. The intruder(s) took money. *Id.* at 126-27. Cubby tried to exit out the back door, but was fatally shot there. Meanwhile, a 9-1-1 caller observed a black Dodge Magnum leaving the crime scene and described a man wearing a long white shirt and jeans leaving the Magnum and running into a house. After the shooting, Homeboy was found wearing a long white shirt and jeans. *Id.* at 132.

The following day, Smith, Larry “Sherlock” Neil, Sam “Buddha” Fancher, James “Pooh” Compton, and Coy “Murder” Daniels were in a silver Chevrolet Trailblazer discussing the shooting. Specifically, they recounted that Smith’s father (Homeboy) answered the door, they began firing as potential victims attempted to flee, they took money from the floor, and someone was shot near the back door. Smith acknowledged that he knew the men in the house that was robbed. *Id.* at 289. Murder, Buddha, and Sherlock disputed who had fired his weapon first. *Id.* at 210-05.

The ensuing police investigation pieced together the following events. A man named “Picture Paul” Jordan rented a dark-colored Dodge Magnum from Enterprise Rent-A-Car from November 12 to 16, 2007, and a silver Trailblazer thereafter. *Id.* at 250-52. Picture Paul often rented vehicles for people, including Murder. The day of the shooting, Murder had contacted Pooh in search of guns to rob someone “out west.” *Id.* at 187-88. Murder, who was wearing a black jacket with a fur hood, was in the front passenger seat of a black Magnum when he met Pooh to obtain guns. *Id.* at 214. Smith was in the driver’s seat, and Buddha and Sherlock were in the back seat. *Id.* at 188-90. Each man had a gun on his lap. *Id.* at 201-03. A phone call between Smith and Homeboy confirmed that the participants of the dice game had no guns. *Id.* at 207-08. The plan was for Smith to be the driver, a less visible role, because people knew him on Melvin’s side of town. *Id.* at 208. Homeboy was to let Murder and the others into the house for the robbery. *Id.*

In addition, police learned that the same .40 caliber gun that was used to shoot Cubby was used on November 24, 2007 in a shooting on East 46th Street in Indianapolis. *Id.* at 212, 214, 351-52. That same day, Smith and Murder were observed together in a silver Trailblazer. *Id.* at 214.

On May 9, 2008, the State charged Smith with murder and class A felony robbery. In August 2008, the State filed an amended information, which defined robbery and redacted certain irrelevant information. A jury convicted Smith on the robbery count but was hung on the murder count. The court ordered a forty-year sentence on September 5, 2008. The State later dismissed the murder count.

Discussion and Decision

I. Admission of Co-Conspirator Statements

Smith asserts that statements by alleged co-conspirators should not have been admitted into evidence. He contends that the State failed to prove that a conspiracy existed, who the declarant was, that Smith and the declarant were co-conspirators, or that the statements were made during the course of and in furtherance of the conspiracy. He also questions how statements that were made after the murder/robbery could have furthered the conspiracy. He claims that certain hearsay was improperly admitted for the truth of the matter asserted and was extremely prejudicial.

Hearsay is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. Ind. Evidence Rule 801(c). Hearsay statements are generally inadmissible unless they fall within one of several exceptions found in Indiana Evidence Rules 802, 803, and 804. Trial court rulings on the admissibility of arguable hearsay statements are reviewed for abuse of discretion. *Stephenson v. State*, 742 N.E.2d 463, 473 (Ind. 2001).

Certain co-conspirator statements are not hearsay. *See* Ind. Evidence Rule 801(d)(2)(E); *Wright v. State*, 690 N.E.2d 1098, 1105 (Ind. 1997). In order to introduce evidence of a co-conspirator's statement, the State must lay an evidentiary foundation establishing (1) the existence of a conspiracy between the declarant and the party against whom the statement is offered, and (2) that the statement was made in the course and in furtherance of the conspiracy. *See Barber v. State*, 715 N.E.2d 848, 852 (Ind. 1999). Such

proof may be either direct or circumstantial and need not be strong. *See Robinson v. State*, 730 N.E.2d 185, 193 (Ind. Ct. App. 2000), *trans. denied*.

A conspiracy requires intent to commit a felony, an agreement with another person to commit the felony, and an overt act in furtherance of that agreement. *See Roush v. State*, 875 N.E.2d 801, 808 (Ind. Ct. App. 2007). A formal express agreement need not be proved. Rather, it is “sufficient if the minds of the parties meet understandingly to bring about an intelligent and deliberate agreement to commit the offense.” *Cockrell v. State*, 743 N.E.2d 799, 804 (Ind. Ct. App. 2001). A statement is in furtherance of a conspiracy when the statement is designed to promote or facilitate achievement of the goals of the ongoing conspiracy. *See Leslie v. State*, 670 N.E.2d 898, 901 (Ind. Ct. App. 1996), *trans. denied*.

Pooh testified that on the day of the robbery and shooting, he was called to the Magnum “by Murder and them” to “get some guns.” Tr. at 184-85. The defense objected. The court overruled, noting that Evidence Rule 801(d)(2) would allow the statements. *Id.* at 186. Presumably, the court believed that the prerequisites for the admission of co-conspirator statements had been satisfied. Indeed, prior to that ruling, the following testimony had been heard without objection. Homeboy, Smith’s dad, knew that a dice gambling game would be occurring on the night in question. *Id.* at 104-05, 138-39. Several times that night, Homeboy indicated that he wanted to leave Melvin’s house.⁴ *Id.* at 112. Homeboy was on his phone two or three times that night before he ultimately opened the door for Murder. *Id.* at 112-14.

⁴ Incidentally, the court admonished the jury that this was admitted to show what happened next, i.e., that Homeboy attempted to pull Melvin away from the game. Admonishments are presumed to correct any error in the admission of evidence. *See Banks v. State*, 761 N.E.2d 403, 405 (Ind. 2002). In any event, regardless of what Homeboy may have wanted to do, he did not leave before the intruders’ arrival.

Homeboy resembled the person seen near the Magnum, which left the scene of the robbery/murder; the Magnum's occupants were described as "four black males." *Id.* at 62, 132, 147. Police connected Smith, Pooh, Murder, Buddha, and Sherlock to the investigation. *Id.* at 142-46. In sum, relationships were established among Smith, Murder, the victim, Homeboy (Smith's father), etc., and the getaway vehicle. While hardly ironclad evidence of the existence of a conspiracy to commit robbery, the combination of such facts meets the necessary threshold for admissibility purposes. The second requirement, that the statement be made in the course/furtherance of the conspiracy, is certainly met by the request to meet at the Magnum regarding acquiring guns, which would be quite useful in a robbery. Accordingly, we cannot say the court abused its discretion by admitting those co-conspirator statements.

Thereafter, additional evidence was introduced that Smith, Murder, Buddha and Sherlock were the occupants of the Magnum at the scene of the crime. The State also introduced evidence that Murder spoke of robbing someone on the west side, that money was taken from Melvin's home that night, that the Magnum's occupants all had guns, that Smith was to be the getaway driver to prevent him from being recognized by the victims who were friends in his neighborhood, and that Curtis "Petey" Williams had been observed in the vicinity of the Magnum. *Id.* at 187-93, 126-27, 201-08. Therefore, when Petey was subsequently asked if the Magnum's occupants were "waiting for somebody to show up,"²⁵ the court was within its discretion in overruling Smith's objection. *Id.* at 278. By that point

in the trial, evidence of a conspiracy among Smith, Murder, Buddha, and Sherlock had already been presented to the jury. Thus, no reversible error has been shown.

For the first time on appeal, Smith attempts to challenge the following testimony by

Pooh:

Q. Now when you went up to the Magnum, what part of the vehicle did you walk up to?

A. On the passenger side.

Q. Front seat or back seat?

A. Front.

Q. So who would have been the person closest to you?

A. Murder.

Q. And what was the nature of the conversation? What was the conversation when you walked up to that Magnum?

A. To let 'em get some guns or to go with 'em. To let 'em get some guns and they give me some money when they get back or to go with 'em.

Q. So [M]urder still wanted you to go along on this lick or robbery?

A. Yes, ma'am.

Q. And part one of it was for you to give them guns?

A. Yes, ma'am.

Q. Now explain to the jury that you didn't have any guns at that point to give them; is that right?

A. Yes, ma'am.

Id. at 195.

Q. Was there any conversation about how the robbery – back to the Magnum – how the robbery was going to go down?

A. Homeboy was going to let everybody in when they knocked.

Q. Was there any talk when they were talking about doing the robbery what [Smith's] job was going to be?

A. Just to be the driver, ma'am.

Q. Why would he be the driver?

A. Where the people in the house wouldn't notice it was him, because it's his neighborhood. It's his friends.

Id. at 208. Smith complains that it is unclear from the record who made the above

⁵ The answer was that they were waiting for Pooh. Tr. at 279.

statements, thus “there could be no showing a conspiracy existed between Smith and whoever said them.” Appellant’s Br. at 14. In addition, he asserts that the State did not show that the statements were made in the course of and in furtherance of the conspiracy.

Having failed to object to the above testimony at trial, Smith has waived this particular argument on appeal. *See Mitchell v. State*, 690 N.E.2d 1200, 1205 (Ind. Ct. App. 1998), trans. denied. To avoid waiver, Smith contends that the admission of the evidence constituted fundamental error. The fundamental error doctrine is extremely narrow. *Rowe v. State*, 867 N.E.2d 262, 266 (Ind. Ct. App. 2007). “To qualify as fundamental error, an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible.” *Id.* The error must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process. *Id.*

In light of the evidence admitted prior to the now-questioned testimony, Smith cannot demonstrate that the admission of the excerpted portions *supra* was so prejudicial to his rights as to make a fair trial impossible. Again, even before Pooh’s testimony, the jury had heard evidence of a conspiracy to commit robbery. While it may not have been conclusive, it was sufficient to support the admission of the other testimony. *See Siglar v. State*, 541 N.E.2d 944, 949 (Ind. 1989) (noting that “much latitude” must be allowed a court in “marshalling the facts and circumstances which bear upon the issue, and it must be left very largely to the discretion of the court trying the cause to determine whether or not there has been introduced evidence sufficient to establish *prima facie* the existence of a conspiracy” to

justify the admission of the acts and declarations of one confederate against another). Also, acquiring guns and determining that the only person who might be recognized should remain in the getaway vehicle clearly fall within furthering the conspiracy to commit robbery. Without a doubt, the now-challenged evidence is prejudicial to Smith, however, it is not unfairly so. Smith has not demonstrated fundamental error in this regard.

We briefly touch upon the admissibility of post-incident statements. Again, Smith did not object to statements made after the robbery/shooting and thus must show fundamental error at this stage. We agree with the State that the relevant statements do not constitute hearsay because they were not admitted for the truth of the matter asserted. For instance, Pooh's testimony that the day after the robbery/murder, the foursome argued about who had shot first was not admitted to prove who actually shot first. Tr. at 204-05, 209-10. Instead, it was admitted to bolster the theory that Smith, Murder, Sherlock, and Buddha worked together to commit the robbery. Not qualifying as hearsay, said statements were admissible.

II. Evidence of Subsequent Incident Involving Same Gun

Next, Smith claims that the court erred in admitting evidence of a subsequent shooting involving Murder, Smith, and the gun used to shoot Cubby. Curtis Williams and Pooh provided testimony regarding a November 24, 2007 shooting in the 900 block of East 46th Street in Indianapolis. Smith maintains that such evidence was irrelevant, did not fit within Indiana Evidence Rule 404(b), and was highly prejudicial.

Indiana Evidence Rule 404(b) provides in relevant part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Evidence Rule 404(b) was designed to assure that the State, relying upon evidence of uncharged misconduct, does not punish a person for his character. *Lee v. State*, 689 N.E.2d 435, 439 (Ind. 1997). The effect of Rule 404(b) is that evidence is excluded only when it is introduced to prove the “forbidden inference” of demonstrating the defendant’s propensity to commit the charged crime. *Herrera v. State*, 710 N.E.2d 931, 935 (Ind. Ct. App. 1999).

Pre-trial, the State argued that the evidence of the subsequent shooting was relevant to prove identity. Taking the issue under advisement, the court waited to rule until trial when it could watch the issues and evidence unfold. When an objection on this matter arose at trial, the court made the following ruling:

The Court will allow the State to offer the following evidence that on November 24, 2007, in the 900 block of East 46th Street, [Smith] and [Murder] were together, that a .40 caliber handgun was discharged by [Murder], that [Smith] was with [Murder] at the time the gun was discharged ... that ballistic evidence shows that the same .40 caliber casings or handgun was fired and that the .40 caliber casings recovered from the November 24th, 2007 shooting and the November 15th, 2007 crime scene shooting [came] from one and the same handgun. So you may not testify that someone was actually shot or that there was a drug robbery or an alleged drug robbery. All right. And for the record, the Court has done the [Indiana Evidence Rule 403] balancing test, and the Court finds that the evidence is relevant and probative and that the probative value of that evidence outweighs its prejudicial impact, especially as the Court has limited the prejudice a great deal.

Tr. at 166-70. In conjunction, the court instructed the jury that evidence of the subsequent incident involving the same gun was admitted for the limited purpose of proving identity, rather than to show that Smith had a propensity for any particular type of bad behavior. *See id.* at 213.

Had we performed the 403 balancing test or applied 404(b), we may have arrived at a different conclusion than that of the trial court. However, given the limiting instruction and the considerable other evidence that supported the robbery conviction, we are convinced that any error in the admission of this evidence was harmless. *See Stewart v. State*, 754 N.E.2d 492, 496 (Ind. 2001) (noting that errors in the admission of evidence are to be disregarded as harmless unless they affect the defendant's substantial rights); *see also Ware v. State*, 816 N.E.2d 1167, 1176 (Ind. Ct. App. 2004) (“When a limiting instruction is given that certain evidence may be considered for only a particular purpose, the law will presume that the jury will follow the trial court’s admonitions.”).

III. Sentencing

Smith asserts that the nature of his offense calls for a lesser sentence because he did not enter the house during the robbery, but merely stayed in the car. He claims he “could not have conclusively known that someone was to be killed.” Appellant’s Brief at 24-25. As for his character, Smith highlights the supplies he provides to his young son. Smith also notes his own “rough childhood” and substance abuse. *Id.* at 25. He downplays his criminal history by attempting to distinguish his current crime from his priors and by focusing on the times that he successfully completed court orders.

Indiana trial courts are required to enter sentencing statements whenever imposing a 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. 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.* So long as the sentence is within the statutory range, it is subject to review only for abuse of discretion. *Id.* A trial court abuses its discretion when its 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.* Under the advisory sentencing scheme, trial courts no longer have any obligation to weigh aggravating and mitigating factors against each other when imposing a sentence; therefore, the weight the trial court gives to such factors is not subject to appellate review. *Id.* at 491.

Here, the court provided a thoughtful, lengthy explanation of its reasoning before sentencing Smith:

Sir, the Court – the jury having found you guilty as charged of count III, Robbery, a Class A Felony, the Court will find as aggravating the fact that you do have a history of delinquent and adult criminal activity, that being in 1993, when you were ten years old, you had a true finding for burglary and theft which would have been a C and a D Felony. In 1994 you have a true finding for criminal conversion. In 1994, in April of '94, you have a true finding for theft, which would have been a D Felony, had you been an adult. In December of '94 you have a true finding for fleeing law enforcement. In September of 1995 you have true findings for possession of cocaine – you were 12 years old

now, possession of cocaine which would have been a D Felony had you been an adult, and operating a vehicle and never received a license. Again, you were 12 years old. In 1996 you have a true finding for resisting law enforcement. In 1997 you have true findings for pointing a firearm – you were 14, pointing a firearm, criminal recklessness, carrying a handgun without a license, fleeing law enforcement, D – which would have been a D felony, the crim recklessness and pointing the firearm, had you been an adult. You have a February 2000 conviction for carrying a handgun without a license. In March of 2000 you have another conviction for carrying a handgun without a license. In 1999 you have a conviction for resisting law enforcement. In July of 2000 you have a conviction for possession – a felony conviction, C Felony, possession of cocaine and possession of marijuana. In July of 2000 you were convicted of a battery, misdemeanor battery. In December of 2006, driving while license suspended. In August of 2007 you were convicted of a D Felony, resisting law enforcement. In August 7th, 2008 you were convicted of escape. The Court will find as aggravating that the fact that you were on parole at the time that you committed this robbery. The Court will find as aggravating the fact that you were also serving an executed sentence through Community Corrections at the time that you committed this --- this robbery. The Court will consider as mitigating the fact that you did have a very disadvantaged childhood and that you must apparently have some form of mental health issues. You had – you started doing burglaries at age ten. You – it says in your PSI that you began consuming alcohol when you were 12, a half ounce of marijuana since you were 14, addiction to cocaine – Codeine since you were 21, and addiction to cocaine where you would consume between 4 and 5 ounces daily so this – your brain has got to be damaged from all of the substances that you’ve been abusing so the Court will consider that as a mitigator. The Court does find that the aggravating circumstances outweigh the mitigating and the Court’s going to sentence you to 40 years executed in the Department of Corrections.

Tr. at 527-30.

Indiana Appellate Rule 7(B) allows a court on review to revise a sentence if the sentence is inappropriate in light of the nature of the offense and the character of the offender. Although Rule 7(B) does not require us to be extremely deferential to a trial court’s sentencing decision, we still give due consideration to that decision. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007) (recognizing the unique perspective a trial

court brings to its sentencing decisions); *see also Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008) (“sentencing is principally a discretionary function in which the trial court’s judgment should receive considerable deference”). The defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate. *Krempetz v. State*, 872 N.E.2d 605, 616 (Ind. 2007).

Regarding the nature of the offense, the advisory sentence is the starting point our legislature has selected as an appropriate sentence for the crime committed. *Anglemyer*, 868 N.E.2d at 494. As a class A felony, robbery carries an advisory sentence of thirty years, with a fixed term of between twenty and fifty years. Ind. Code § 35-50-2-4. The court sentenced Smith to forty years in prison. Smith’s offense consisted of helping to plan and execute an armed robbery during a gathering at the home of a family friend. For his part, Smith drove the getaway car, confirmed with his own father that the robbery victims would be unarmed, and coordinated the robbers’ entry into the home. Moreover, although Smith may not have conclusively known that someone would be killed during the robbery, it could hardly have been a stretch to envision such a scenario given that each member of his group had a gun with him.

Moving next to the question of character, we often look at criminal history. Our supreme court has emphasized that “the extent, if any, that a sentence should be enhanced [based upon prior convictions] turns on the weight of an individual’s criminal history.” *Duncan v. State*, 857 N.E.2d 955, 959 (Ind. 2006). “This weight is measured by the number of prior convictions and their gravity, by 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." *Bryant v. State*, 841 N.E.2d 1154, 1156 (Ind. 2006).

Smith's criminal history consumes nine pages of his presentence investigation report. As detailed by the trial judge, the offenses are myriad and serious, and reflect very poorly on his character. While Smith may have had some positive moments, they are overshadowed by his voluminous illegal actions. Neither substance abuse nor a difficult childhood justifies the plethora of offenses committed by Smith. *See Coleman v. State*, 741 N.E.2d 697, 700 (Ind. 2000) ("[T]his court has consistently held that evidence of a difficult childhood warrants little, if any, mitigating weight."); *Iddings v. State*, 772 N.E.2d 1006, 1018 (Ind. Ct. App. 2002) (indicating that a history of substance abuse may actually constitute an aggravating factor), *trans. denied*. Considering the nature of his offense and his character, Smith has failed to persuade us that his sentence, which is ten years less than a maximum sentence, is inappropriate. *Cf. Patterson v. State*, 846 N.E.2d 723, 725 (Ind. Ct. App. 2006) (affirming fifty-year sentence for robbery resulting in serious bodily injury, a class A felony).

Affirmed.

BRADFORD, J., and BROWN, J., concur.