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IN THE
COURT OF APPEALS OF INDIANA

TRADELL MARZETTE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A04-1004-CR-346
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0905-FB-17

August 10, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Tradell Marzette appeals his convictions and sentences for conspiracy to commit robbery as a class B felony;[1] four counts of criminal confinement as class B felonies;[2] and attempted robbery as a class B felony.[3] Marzette raises several issues, which we revise and restate below. We raise one issue *sua sponte*.

I. Whether the trial court abused its discretion in granting the State's Application for Extension of Speedy Trial;

II. Whether the court erred in granting the State's motion to release Marzette on his own recognizance;

III. Whether the court erred in denying Marzette's motion to compel a witness to testify;

IV. Whether the court abused its discretion when it rejected Marzette's proposed alibi instruction;

V. Whether Marzette may be convicted of both conspiracy to commit robbery and attempted robbery under the circumstances;[4]

VI. Whether the evidence is sufficient to sustain Marzette's convictions;

VII. Whether the court abused its discretion in sentencing Marzette; and

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

We affirm and remand.

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[1] Ind. Code § 35-41-5-2 (2004); Ind. Code § 35-42-5-1 (2004).

[2] Ind. Code § 35-42-3-3 (Supp. 2006).

[3] Ind. Code § 35-41-5-1 (2004); Ind. Code § 35-42-5-1 (2004).

[4] We raise this issue *sua sponte*.

The relevant facts follow. In the spring of 2009, Charles Moritz, who was taking accounting courses towards an MBA at Purdue University, formulated plans to conduct robberies of persons who were drug dealers. Moritz delegated some responsibilities for performing the robberies to Dayna Alvarez and Sylvario Wilson. Moritz would use Google Earth to obtain aerial views of the residences so that the other participants could see the layout of the roads and escape routes. It was the responsibility of Alvarez and Wilson to plan the details as to escape routes and to find other persons to assist with the robberies. Moritz instructed the participants not to rob anyone of electronics but to take drugs and drug money only because most drug dealers would not report the robbery.

In April, Moritz visited Kyle Lehnen at Lehnen's upstairs apartment located at 1716 Vinton Street in Lafayette, Indiana, and purchased a quarter pound of marijuana. Moritz learned there was additional marijuana at the apartment. Moritz informed Alvarez, Wilson, and Randall Belmont, Wilson's cousin, about the amount of drugs at Lehnen's apartment, and a plan was formulated to attempt to take any and all money and drugs from Lehnen's apartment. Moritz used Google to observe an aerial view of the apartment building on Vinton Street and gave the address of Lehnen's apartment to Alvarez and the other men. At some point, a decision was made to carry out the robbery on the night of April 17, 2009. Marzette and Deon[5] joined Alvarez and Wilson to assist with the robbery.[6]

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[5] The record does not reveal Deon's last name.

[6] Belmont was initially planning to participate in the robbery, but backed out at some point and did not accompany the other four men to Vinton Street.

On April 17, 2009, Alvarez, Wilson, Deon, and Marzette went to 1714 Vinton Street, which was a downstairs apartment, and each of the men wore dark clothing, ski masks over their faces, and latex gloves. Each of the men was armed, and Marzette had a rifle or shotgun. Alvarez knocked on the door at 1714 Vinton Street, and Holly Nethercutt answered the door. When she did so, Alvarez rushed inside and Marzette, Deon, and Wilson followed him. The perpetrators were unaware that they had not entered Lehnen's apartment. Marzette, Deon, and Wilson attacked Nethercutt and her three guests, William Johnson, Michael Burnett, and Rusty Land. One of the perpetrators picked Nethercutt up by her throat, shoved her against a window, and said "bitch you say anything and I'm going to shoot you." Transcript at 36. The perpetrators struck the victims with their fists, pistol whipped Burnett and Land, which knocked Burnett unconscious, and then kicked and hogtied Johnson, Burnett, and Land with electrical extension cords. Nethercutt thought that the perpetrators would not leave any witnesses behind and that she and her friends would be shot.

The perpetrators kept asking "where's the weed at?" and "[w]ho's got the weed around here?" Id. at 38. The guests replied that they did not have any, and Nethercutt "told them that they had the wrong apartment" and that "they were looking for the upstairs apartment." Id. at 41. The perpetrators searched Nethercutt's apartment and took her identification and money.

Three of the perpetrators escorted Nethercutt upstairs to Lehnen's apartment while one of them stayed in Nethercutt's apartment and watched over Johnson, Burnett, and Land. Nethercutt knocked on the door to Lehnen's apartment, and Lehnen looked out through the window and observed Nethercutt, who was crying, and the three men, two of whom were holding guns aimed at the back of Nethercutt's head. Lehnen got his shotgun, went to the window, and shot one round at the ground.

After Lehnen fired his gun, "everybody scattered" and the four perpetrators ran to their vehicle and drove back to Moritz's house. Id. at 166. At Moritz's house, the men were upset because the robbery did not go according to plan and because they had gone to the wrong address. Marzette and Alvarez argued and yelled at each other.

Police were dispatched to Vinton Street in response to shots fired, arrived at the scene sometime around 1:15 a.m. on April 18, 2009, and discovered Nethercutt, as well as Johnson, Burnett, and Land, who were tied up with extension cords.

The police investigation into a string of robberies led to evidence linking the robberies to Wilson, Alvarez, Moritz, Belmont, and Marzette. Sometime after the robbery, Marzette spoke with Belmont. Marzette was upset because the police found gloves around the Vinton Street house and was unsure whether the discovered gloves were his gloves. Marzette also told Belmont that he "was going to say that he was with his uncle that night instead of committing that crime." Id. at 224.

During the investigation, police visited and spoke with Marzette, and Marzette stated that he had been at Disney World during the month of April. Marzette went with

the officers to the police station, and the officers asked Marzette about the armed robbery. Marzette initially denied knowing Alvarez and Wilson but later admitted to knowing them. Marzette eventually stated that he could not have participated in the offenses because he worked at Subway on the day of the crimes from 8:00 p.m. to 3:00 a.m. and told the police that they should call his boss. Marzette also stated, "if I were there where's the gloves that I was wearing, where's the gun." Id. at 190. The officers were later able to determine that Marzette had not been working at the Subway restaurant at the time of the crimes. Marzette later stated that he was drinking with his uncle at the time of the crimes.

On May 13, 2009, the State charged Marzette and his co-defendants with various felony offenses, and filed an amended charge for Count I on July 15, 2009.[7] As amended, Marzette was charged with: Count I, conspiracy to commit robbery as a class B felony; Count II, criminal confinement of Nethercutt as a class B felony; Count III, criminal confinement of Land as a class B felony; Count IV, criminal confinement of Johnson as a class B felony; Count V, criminal confinement of Burnett as a class B felony; and Count VI, attempted robbery as a class B felony.

On June 1, 2009, Marzette filed a notice of alibi stating that he was "with his uncle and wife at his residence." Appellant's Appendix at 61. In response, the State filed a

[7] The State charged Marzette, Alvarez, Belmont, Cecil Johnson III, Moritz, and Wilson in the same charging information. Not all of Marzette's co-defendants were charged with the same counts.

motion for a more definite statement, and Marzette filed a response containing additional information regarding his alibi defense.

On June 16, 2009, Marzette moved for a speedy trial, and the court subsequently set trial for August 12, 2009. On June 22, 2009, the State filed a Motion for an Order Authorizing the Obtaining of Fingerprints, Blood, Hair and Saliva Samples from Defendant, and the court granted the motion. On July 23, 2009, the State filed an Application for Extension of Speedy Trial, submitting that it would not have the results of certain DNA tests prior to the scheduled trial date. On July 29, 2009, the court granted the State's Application, and on July 31, 2009, rescheduled the trial for October 14, 2009.

On October 8, 2009, Marzette and the State jointly moved to continue the trial, and on October 29, 2009, the court granted the motion and rescheduled the trial for January 20, 2010. Also on October 8, 2009, the State moved to release Marzette on his own recognizance, and the court granted the motion. The chronological case summary ("CCS") indicates that, by order on January 19, 2010, the court on motion by the State set aside the trial date of January 20, 2010, and reassigned the cause for trial for March 2, 2010.

Marzette's jury trial commenced on March 2, 2010. At trial, the State presented testimony from, among others, Johnson, Nethercutt, Burnett, Land, Lehnen, Moritz, Belmont, and Alvarez. Marzette presented his own testimony and the testimony of William Watkins, Marzette's uncle. Also, Marzette called Wilson, one of Marzette's co-defendants, as a witness. Marzette moved the court to grant use immunity to Wilson, and

the court denied the motion. After Marzette's counsel asked a question of Wilson, Wilson asserted his Fifth Amendment right to remain silent. Marzette's counsel moved to compel Wilson to answer his questions, and the court denied the motion. Also during trial, Marzette submitted a proposed alibi instruction, which the court declined to give.

The jury found Marzette guilty on each of the alleged counts. The court sentenced Marzette to nine years for each conviction with the sentences under Counts II and III to run consecutive to each other and to the sentence under Count I, and the sentences under Counts IV and V to run concurrent with the sentence under Count III, and the sentence under Count VI to run concurrent with the sentence under Count I. Thus, Marzette's aggregate sentence is twenty-seven years. The court also ordered fourteen years of the sentence suspended to probation.[8] Additional facts will be provided as necessary.

I.

The first issue is whether the court abused its discretion in granting the State's Application for Extension of Speedy Trial. In its Application, the State alleged that it obtained the court's order authorizing the obtaining of fingerprints, blood, hair and saliva on June 30, 2009 for Marzette and all orders for Marzette's co-defendants on July 1, 2009. The State cited to Ind. Criminal Rule 4(D) and argued that "evidence was found at the scene of the crime which may be either incriminating or exculpatory," that the evidence "needs to be tested for DNA and compared to standards of DNA from"

[8] The court also ordered that three years of the thirteen-year executed sentence be served through Tippecanoe County Community Corrections and that, of the fourteen years ordered to probation, Marzette be on supervised probation for two years and on unsupervised probation for twelve years.

Marzette, that "such evidence may prove essential to the State's case-in-chief," that "such DNA evidence may be 'case-altering' and necessary for identity purpose," and that "this testing has not yet occurred." Appellant's Appendix at 63. The State further submitted that it had received information from the Lafayette Police Department that "all DNA standards from [Marzette] and all co-defendants were collected on or by July 22, 2009 including the DNA standard for [Marzette]," that "all samples and evidence were packaged and ready to be shipped on July 23, 2009," and that the "Indiana State Police Lab does not accept deliveries on Fridays but [] that packaged samples, evidence, and/or standards would be delivered on Monday, July 27, 2009." Id. The State also submitted that it had contacted the Indiana State Lab and spoke with a DNA analyst who "said that the DNA testing and results would be had within 90 days if it was categorized as a 'rush' or 'priority testing' and if it was expedited but that it is likely impossible to have the DNA testing done by August 12, 2009." Id. at 64. The State argued that it was not seeking the extension "for the purpose of delay," that it "is no fault of the State that such evidence has not been had in time for the jury trial on August 12, 2009," and that "reasonable effort has been made by all parties involved to expedite the process of obtaining DNA and testing it against the evidence found at the scene." Id.

On appeal, Marzette appears to argue that the court erred in granting the State's Application for Extension of Speedy Trial filed on July 23, 2009,[9] asserting that Ind.

[9] Marzette does not present an argument related to the trial court's ruling on the October 8, 2009 or January 19, 2010 motions to continue trial.

Criminal Rule 4 "is in place to insure that an innocent person does not languish in jail while the [S]tate prepares a case it will never make." Appellant's Brief at 14.

The State argues that "[t]he trial court properly allowed the State to continue the cause in order to obtain what was rightly assumed to be critical physical evidence, which could well have linked Marzette, through physical evidence, to the crime." Appellee's Brief at 20. The State further argues that it "made clear, in its motion, that it was making efforts to obtain the physical evidence as expediently as possible" and that "[t]he speedy trial statute clearly permits such a continuance, and for just this reason, in just these circumstances." Id. The State also argues that "[i]n the end, [the evidence] linked Belmont and Moritz to the attempted robbery through fingerprint matches, and not their co-conspirator Marzette, but prior to obtaining it, the State could not have known this" and that "the link to Moritz and Belmont remained relevant to the State's case in the end anyway." Id.

Ind. Criminal Rule 4(B)(1) provides in relevant part that "[i]f any defendant held in jail . . . shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion . . . ." However, a defendant's right to a trial within seventy days of a speedy trial request is not absolute. Wiseman v. State, 600 N.E.2d 1375, 1376 (Ind. Ct. App. 1992), reh'g denied, trans. denied. Ind. Criminal Rule 4(D)[10] extends the time in which a defendant must be tried by an

[10] Ind. Criminal Rule 4(D) provides:

> If when application is made for discharge of a defendant under this rule, the court be satisfied that there is evidence for the state, which cannot then be had, that reasonable

additional ninety days if "the court is satisfied that there is evidence for the state, which cannot then be had, that reasonable effort has been made to procure the same and there is just ground to believe that such evidence can be had within ninety (90) days . . . ." Id.

A trial court may grant the State a continuance when it is satisfied that (1) there is evidence for the State that cannot then be had; (2) reasonable effort has been made by the State to procure the evidence; and (3) there is just ground to believe that such evidence can be had within ninety days. Chambers v. State, 848 N.E.2d 298, 303-304 (Ind. Ct. App. 2006) (citing Ind. Criminal Rule 4(D)), trans. denied. This court has previously stated that any exigent circumstances may warrant a reasonable delay beyond the limitations of Criminal Rule 4. Id. at 304 (citing Smith v. State, 802 N.E.2d 948, 951 (Ind. Ct. App. 2004)). "The reasonableness of such delay must be judged in the context of the particular case, and the decision of the trial judge will not be disturbed except for an abuse of discretion." Id. (quoting Smith, 802 N.E.2d at 951). Ind. Criminal Rule 4(B) "was designed to assure criminal defendants speedy trials, not to provide them with a technical means of avoiding trial." Smith, 802 N.E.2d at 951.

Here, Marzette's motion for speedy trial was filed on June 16, 2009, and the State filed its motion to obtain the physical samples from Marzette on June 22, 2009. In its July 23, 2009 Application for Extension of Speedy Trial, the State submitted that it had received information that evidence from Marzette and the co-defendants was collected

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effort has been made to procure the same and there is just ground to believe that such evidence can be had within ninety (90) days, the cause may be continued, and the prisoner remanded or admitted to bail; and if he be not brought to trial by the state within such additional ninety (90) days, he shall then be discharged.

"on or by July 22, 2009," that the evidence was ready to be shipped to the police lab, and that the package would be delivered to the lab on July 27, 2009. See Appellant's Appendix at 63. The State called the police lab and spoke with a DNA analyst who stated that it was "likely impossible to have the DNA testing done by August 12, 2009" but that if the testing was expedited "the DNA testing and results would be had within 90 days." See id. at 64. The State demonstrated that it had undertaken reasonable efforts to procure the results of the DNA tests following Marzette's motion for a speedy trial and for the scheduled August 12, 2009 trial.

Based upon the record, we cannot say that the court abused its discretion in granting the State's Application for Extension of Speedy Trial under Ind. Criminal Rule 4(D). See Kindred v. State, 524 N.E.2d 279, 290 (Ind. 1988) (holding the trial court did not err in denying the defendant's motion for discharge based on the alleged violation of the speedy trial rule where the State requested and received an extension under Ind. Criminal Rule 4(D) because one of its witnesses was unavailable); Fultz v. State, 849 N.E.2d 616, 621-622 (Ind. Ct. App. 2006) (finding that the trial court did not abuse its discretion in granting the State's request for an extension pursuant to Ind. Criminal Rule 4(D) in light of new evidence and the State's inability to procure a report from its expert on burned bodies in time for an early trial), trans. denied.

II.

The next issue is whether the court erred in granting the State's October 8, 2009 motion to release Marzette on his own recognizance. Marzette argues that the State

"moved to release [him] on his own recognizance in order to frustrate the application for speedy trial" and that the State "acted in bad faith by manipulating the court and [him] while he was sitting in jail." Appellant's Brief at 14. Marzette further argues, without citation to authority or the record, that "[t]he process here is not harmless error," that the State "was able to cross examine the defendant's alibi witness, William Watkins," that "[b]eing in jail, Marzette had no chance to talk to Watkins . . . until his release in October 2009," that "[e]arly preparation in an alibi case is crucial," and that "[n]o innocent citizen has reason to reconstruct what he did sixty days ago." Id. Marzette argues that his "manipulation at the hands of the [S]tate impeded his ability to prepare for trial, and certainly violated the spirit of CR4 and its intent," and that "[t]his violation, suggests your appellant, warrants a reversal with no retrial." Id. at 14-15. Marzette also argues that "[t]he decision to o.r. the defendant, after he has already served a substantial amount of jail time should be the defendant's, not the [S]tate's" and that he "should be allowed to decide that his jail credit time be utilized to force an early trial." Id. at 15.

The State argues that the court properly granted its motion and that "it is unclear to the State exactly how or why the decision to release Marzette on his own recognizance either (1) undermines the State's reason for seeking the continuance, or undermines the court's logic in granting it, or (2) how it constitutes error, let alone an error for which some remedy exists." Appellee's Brief at 21. The State argues that "[i]t is unclear how or why the State ever would have needed to manipulate either the court or the defendant when moving for a continuance, given that statutorily the State is permitted to seek a

continuance, in response to a speedy trial motion . . . ." Id. The State further argues that it "believes that the prosecutor's motives for the motion were actually quite contrary to those motives asserted by Marzette," that "one purpose underlying a defendant's right to request a speedy trial under Rule 4(B) is 'to prevent a defendant from being detained in jail *for more than* 70 days after requesting an early trial . . . ,'" and that "by moving to release Marzette, the State was ensuring compliance with one of the intentions underlying the rule allowing for speedy trial requests." Id. at 22 (citing Upshaw v. State, 934 N.E.2d 178, 182 (Ind. Ct. App. 2010), trans. denied). The State also argues that "Marzette's remedy for being released from custody pending his trial is to be released altogether – that he should 'walk' because he was allowed, in the interim, to 'walk,'" that "Marzette can not show that the State's motion to release him was intended to frustrate or manipulate the court's decision-making process," and that the court's decision to grant the State's motion "does not warrant a reversal." Id. at 23-24.

In Upshaw, this court noted that the trial court had released the defendant on his own recognizance prior to the expiration of the seventy-day period under Ind. Criminal Rule 4(B). 934 N.E.2d at 182. We also noted that "the purpose of Rule 4(B) is to prevent a defendant from being detained in jail for more than 70 days after requesting an early trial" and held that "[b]ecause [the defendant] was released from jail before the seventy-day period had expired, the objective of the Rule was satisfied." Id. (citations omitted). See also Bartley v. State, 800 N.E.2d 193, 195 (Ind. Ct. App. 2003) (holding that the objective of Ind. Criminal Rule 4(B) was satisfied where the defendant was

released on his own recognizance prior to expiration of the seventy-day period). As in Upshaw and Bartley, we find that the objective of Ind. Criminal Rule 4 was satisfied in this case. Marzette was released from jail prior to the expiration of the applicable period of time required by Ind. Criminal Rule 4(B) as extended by Ind. Criminal Rule 4(D). Based upon the record, we cannot say that the court erred in granting the State's motion to release Marzette on his own recognizance. See Upshaw, 934 N.E.2d at 182; Bartley, 800 N.E.2d at 195.

III.

The next issue is whether the trial court erred in denying Marzette's motion to compel a witness to testify. At trial, Marzette's counsel called Wilson, one of Marzette's co-defendants, as a witness. Prior to Wilson taking the stand, Wilson's defense counsel told the court that Wilson had previously pled guilty, had subsequently filed a motion to withdraw his plea which was denied, and was appealing the denial of the motion to withdraw, which "puts [Wilson] in the position where [he has] to assert his fifth amendment rights . . . ." Transcript at 259. The court noted that it did not have a record that Wilson had received use immunity. Marzette's defense counsel then moved "the court to grant use immunity to [Wilson]." Id. at 261. The State objected, and the court denied the motion. Marzette's counsel then asked the court what its ruling would be "on compelling [Wilson] to testify," and the court stated that Wilson was "entitled to assert his [F]ifth [A]mendment rights if there is no use immunity." Id. at 262. Marzette then asked the court to show his objection to the court's "non order [] to compel [Wilson] to

testify." Id. After Wilson took the stand and was asked a question by Marzette's counsel, Wilson asserted his Fifth Amendment right against self-incrimination and asked the court that he not be required to testify. Marzette's counsel moved to compel Wilson to answer his questions, and the court denied the motion. Wilson was then excused.

Marzette argues on appeal that the court erred in failing to grant use immunity or to compel the testimony of Wilson. Specifically, Marzette argues that Article 1, Section 13 of the Indiana Constitution "was violated when the court failed to compel Wilson's testimony."[11] Appellant's Brief at 11. Marzette cites to Fancher v. State, 918 N.E.2d 16 (Ind. Ct. App. 2009), and argues that his case is different from Fancher because "Fancher was deemed to have waived his equal protection claim under the Indiana Constitution;" because "unlike Fancher" he "did call Wilson as a witness, and did attempt to compel him to testify that he had made a previous statement that ostensibly could exonerate the defendant;" and because "Fancher made no claim of violation of Section 12, the right to compulsory process."[12] Id. at 12. Marzette further cites to Bubb v. State, 434 N.E.2d 120 (Ind. Ct. App. 1982), and argues that the State may not use its power to interfere with

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[11] Ind. Const. Art. 1, Section 13(a) provides:

> In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury, in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor.

[12] Ind. Const. Art. 1, Section 12 provides: "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay."

the defense's presentation of its case, that "the prosecutor's decision was clearly made with the deliberate intention of disturbing the judicial fact finding process," and that "[t]he remedy for the trial court should have been to compel the testimony, or immunize the testimony, or dismiss the cause." Id. at 12-13. Marzette also argues that he and the State "are of exactly the same class" for purposes of Indiana equal protection analysis, that "truth is the goal, and the [S]tate should not have the upper hand," and that "[t]o limit the immunity statute to the prosecutor's toolbox only . . . is a violation of Sections 13 and 23" of the Indiana Constitution.[13] Id. at 13.

The State argues that the prosecution, and not the trial court, may grant use immunity to a witness and that Marzette waived any equal protection, due process, or other arguments under the Indiana Constitution. The State argues that the case of Bubb pre-dates Fancher, that Bubb exclusively addressed federal issues and is thus inapplicable, and that under Bubb "a defendant must show that the testimony would have somehow been exculpatory." Appellee's Brief at 18. The State also argues that "the court should not have compelled the testimony, and could not have compelled it," without violating Wilson's Fifth Amendment assertion and "without putting constitutional rights behind considerations of trial strategy." Id. at 19.

We initially observe that, at trial, Marzette did not object or raise any argument based upon the Indiana Constitution when the trial court ruled that it would not compel

[13] Ind. Const. Art. 1, Section 23 provides: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."

Wilson to testify. As a general rule, the failure to object at trial results in a waiver of the issue on appeal. Fancher, 918 N.E.2d at 20 (citing Benson v. State, 762 N.E.2d 748, 755 (Ind. 2002)). To the extent Marzette cites to or attempts to make an argument based upon the Indiana Constitution, the argument is waived. See Fancher, 918 N.E.2d at 20; see also Washington v. State, 808 N.E.2d 617, 625 (Ind. 2004) (noting that "a trial court cannot be found to have erred as to an issue or argument that it never had an opportunity to consider").

Waiver notwithstanding, in Fancher this court noted that "[i]t is within a prosecutor's scope of authority to make promises and offers of immunity, leniency, money or other benefit to a State's witness to induce cooperation." Fancher, 918 N.E.2d at 20 n.1 (citing Sigler v. State, 700 N.E.2d 809, 811-812 (Ind. Ct. App. 1998) (citing Schmanski v. State, 466 N.E.2d 14, 15 (Ind. 1984)), reh'g denied, trans. denied). We also noted: "[T]hese practices place a burden upon the prosecution because they tend to impair the credibility of witnesses or to show interest, bias or motives as a witness" and that "[a] prosecutor must disclose to the jury any agreement made with the State's witness, such as promises, grants of immunity, or rewards offered in return for testimony." Id. (citing Lott v. State, 690 N.E.2d 204, 211 (Ind. 1997)). Marzette does not argue that the prosecutor failed to disclose to the jury any plea agreements which the State's witnesses may have entered into. In addition, we note that Wilson was not called as a witness by the State, but instead was called as a witness for the defense.

Further, in Fancher, the defendant raised an argument under the Equal Protection Clause of the U.S. Constitution and argued that his fundamental right to present a defense was implicated. Fancher, 918 N.E.2d at 20-21. In evaluating the defendant's claim, the court referred to the Indiana Supreme Court's opinion in Walters v. State, 271 Ind. 598, 394 N.E.2d 154 (1979). In Walters, the defendant was charged with murder and two other men were charged with being accessories after the fact. 271 Ind. at 601-602, 394 N.E.2d at 157. One of the men was granted immunity and testified for the State, while the other man was called as a defense witness and asserted his Fifth Amendment right against self-incrimination. Id., 394 N.E.2d at 157. Although the defendant requested that the court grant the defense witness immunity, the trial court refused. Id., 394 N.E.2d at 157. The Court concluded that the granting of immunity to a State's witness did not violate the defendant's equal protection rights. Id. at 603, 394 N.E.2d at 158; see Fancher, 918 N.E.2d at 21.

The court in Fancher also cited to the Indiana Supreme Court's opinion in Arnold v. State, in which the defendant argued that "he was denied due process in that the state could grant immunity to witnesses but he could not." 460 N.E.2d 494, 497 (Ind. 1984). Relying on Walters, the Court held that the defendant's due process argument was the same as the equal protection argument in Walters, which the Court had denied. Id.; see Fancher, 918 N.E.2d at 21.

In Bubb v. State, which cites to Walters but pre-dates the Arnold and Fancher opinions, Bubb argued that a defendant should be able to compel immunity for its

witnesses under either Fourteenth Amendment due process or Sixth Amendment fair trial grounds. 434 N.E.2d 120, 124 (Ind. Ct. App. 1982). The court noted that "[t]he [F]ourteenth [A]mendment does not require prosecutors to give an immunity bath to defense witnesses" and that "[a]lthough the defendant has no due process right to compel immunization of defense witnesses, the State may not use that power to interfere with the defense's presentation of its case or to prevent its witnesses from testifying." Id. at 124 (citations and internal quotation marks omitted). The court then stated that "[t]he [S]ixth [A]mendment compulsory process clause does empower the defendant to compel witnesses to appear in court and divulge non-privileged testimony, but . . . does not go so far as to supplant incriminatory privilege with a grant of immunity," that "[a]n analysis of the right to a fair trial would yield the same result" and that "[t]he State must only refrain from interference with the defense's presentation of its case." Id. (citations and internal quotation marks omitted). The court held that "[f]or Bubb to prevail at a new trial he would have to show the State had prevented [the witness] from testifying or intimidated him into withholding evidence he would otherwise have given." Id. The court found no error in the State's refusal to immunize the witness. Id. at 124-125.

Even if Marzette had not waived his arguments under the Indiana Constitution, the arguments would not have merit. Marzette has failed to demonstrate that his rights under Article 1, Sections 13 or 23 of the Indiana Constitution were violated by the trial court's denial of his request to compel Wilson to testify where Wilson had not been granted immunity by the State and asserted his Fifth Amendment right against self-incrimination.

IV.

The next issue is whether the trial court abused its discretion when it rejected Marzette's proposed alibi instruction. "The purpose of an instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict." Overstreet v. State, 783 N.E.2d 1140, 1163 (Ind. 2003), cert. denied, 540 U.S. 1150, 124 S. Ct. 1145 (2004). Instruction of the jury is generally within the discretion of the trial court and is reviewed only for an abuse of that discretion. Id. at 1163-1164. A trial court erroneously refuses to give a tendered instruction, or part of a tendered instruction, if: (1) the instruction correctly sets out the law; (2) evidence supports the giving of the instruction; and (3) the substance of the tendered instruction is not covered by the other instructions given. Id. at 1164.

At trial, Marzette tendered an instruction regarding alibi evidence which provided as follows:

> The defendant has asserted the defense of alibi. Evidence has been presented that at the time of the commission of the crime charged in the information the defendant was at a different place so remote or distant that he could not have committed the crime.
>
> The State has the burden of disproving this defense beyond a reasonable doubt.

Appellant's Appendix at 74. The court refused the instruction.

Marzette argues that the trial court abused its discretion by rejecting his proposed alibi instruction because the instruction was supported by testimony at trial and the

instruction was not covered by any other instruction. The State argues that the evidence "supported the conclusion that Marzette's alibi was untrue, entirely made up" and that any error in rejecting the instruction was harmless. Appellee's Brief at 13.

We observe that Marzette and William Watkins, Marzette's uncle, testified at trial that Marzette had been drinking with Watkins at Watkins's house beginning sometime between about 8:00 p.m. and 10:00 p.m. on Friday, April 17, 2009 until between 1:00 a.m. and 2:00 a.m. the next morning. We also note that Lafayette Police Detective Michael Humphrey testified that during the police investigation he had spoken with Watkins on September 25, 2009, at which time Watkins stated that he was with Marzette until about half an hour after 10:00 p.m. to 11:00 p.m. on April 17, 2009. Evidence was presented that the offenses occurred sometime between 12:00 a.m. and 2:00 a.m. on the morning of April 18, 2009. Belmont testified that, sometime after the offenses in April 2009, Marzette told him that "he was going to say that he was with his uncle that night instead of committing the crime." Transcript at 224. According to the testimony of West Lafayette Police Detective Jonathan Eager, when he and another officer visited Marzette's residence, Marzette indicated that he was in Disney World during the month of April, and then later at the police station Marzette indicated that he had worked from 8:00 p.m. until 3:00 a.m., during the time the crimes were committed.

Even if we assume that the trial court abused its discretion by rejecting Marzette's proposed instruction, we conclude that any error was harmless. A defendant must demonstrate that his substantial rights have been prejudiced in order to obtain a reversal

for the trial court's failure to instruct the jury. Cliver v. State, 666 N.E.2d 59, 67 (Ind. 1996), reh'g denied; Ind. Trial Rule 61. The jury was instructed that the State was required to prove each element of the charged crimes beyond a reasonable doubt, that a person charged with a crime is presumed to be innocent, that a defendant must not be convicted on suspicion or speculation, and that the jury had the duty to determine the value to give the exhibits and testimony. See Appellant's Appendix at 580-593. If the jury had believed the testimony of Marzette and Watkins, it could have returned a verdict in Marzette's favor based upon the instructions that were given. The trial court's failure to instruct the jury with Marzette's proposed alibi instruction did not prejudice his substantial rights. See Merrill v. State, 716 N.E.2d 902, 906 (Ind. 1999) (holding that the defendant's trial counsel was not ineffective for failing to tender an alibi instruction because the instruction was unlikely to change the outcome of the trial where the "jury heard his alibi defense and if it had believed him, could have returned a verdict in his favor" and the "jury also heard Merrill's alibi witness deny being in the restroom with him").

V.

The next issue, which we raise *sua sponte*, is whether Marzette's convictions for both conspiracy to commit robbery and attempted robbery violate Ind. Code § 35-41-5-3(a). Although not cited by the parties, Ind. Code § 35-41-5-3(a) provides: "A person may not be convicted of both a conspiracy and an attempt with respect to the same underlying crime." Counts I and VI of the State's information charged Marzette with

both the conspiracy to rob Lehnen and the attempted robbery of Lehnen and those in his apartment.

Although it is proper for the State to charge and prosecute both an attempt and a conspiracy with respect to the same underlying crime, see State v. Hancock, 530 N.E.2d 106, 108 (Ind. Ct. App. 1988), reh'g denied, trans. denied, the statute prohibits convictions on both charges. Williams v. State, 690 N.E.2d 162, 171 (Ind. 1997) (citing Ind. Code § 35-41-5-3(a); Haymaker v. State, 528 N.E.2d 83, 87 (Ind. 1988), abrogated on other grounds by Fajardo v. State, 859 N.E.2d 1201 (Ind. 2007), superseded in part by statute on other grounds.

Here, Marzette was convicted and then sentenced for both a conspiracy and an attempt of the same underlying crime, the unsuccessful effort to rob Lehnen. The trial court should have merged the two offenses. See id. (citing Lawrence v. State, 665 N.E.2d 589, 590 n.1 (Ind. Ct. App. 1996) (observing that the trial court merged convictions of attempted murder and conspiracy to commit murder), trans. denied). To convict and sentence on both charges was fundamental error. Accordingly, we remand with instructions to vacate the conviction and sentence for attempted robbery under Count VI. See Williams, 690 N.E.2d at 171 (holding *sua sponte* that the defendant's convictions for both an attempt and a conspiracy of the same underlying crime resulted in fundamental error because it was a conviction prohibited by statute in effect when the defendant was charged and vacating the attempt conviction); Haymaker, 528 N.E.2d at 87 (remanding with instructions to vacate the defendant's conviction and sentence for

attempted robbery pursuant to Ind. Code § 35-41-5-3(a) where the defendant was convicted and sentenced for both an attempt to commit robbery and a conspiracy to commit the same robbery); Borton v. State, 759 N.E.2d 641, 647 (Ind. Ct. App. 2001) (reversing the defendant's conviction for attempted robbery where he was convicted of both attempted robbery and conspiracy to commit robbery with respect to the same underlying crime in contravention of Ind. Code § 35-41-5-3(a)), trans. denied.

VI.

The next issue is whether the evidence was sufficient to sustain Marzette's convictions. When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jordan v. State, 656 N.E.2d 816, 817 (Ind. 1995), reh'g denied. Rather, we look to the evidence and the reasonable inferences therefrom that support the verdict. Id. We will affirm the conviction if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. Id.

Marzette argues that there was insufficient evidence to convict him.[14] Specifically, Marzette argues that "it was stipulated that no DNA, no fingerprint, no foot prints, or no physical evidence of any type was introduced that even remotely connected [him] to the robbery." Appellant's Brief at 15. Marzette further argues that none of the victims could identify the robbers and that "[t]he testimony of the co-defendants,

[14] In Part V above, we remand with instructions to vacate Marzette's attempted robbery conviction. We need not address Marzette's arguments regarding the sufficiency of the evidence to the extent they relate to his conviction for attempted robbery.

immunized, and with plea bargains was the cornerstone of the conviction." Id. Marzette also argues that the "incredible dubiosity rule applies here, in that three immunized, deal making co-defendants made the [S]tate's case, while the [S]tate prevented one co-defendant from testifying (Wilson)." Id. at 16. The State argues that merely circumstantial evidence may support Marzette's convictions, that the victims could not identify Marzette because he was wearing a mask during the robbery, and that the incredible dubiosity rule does not apply because there was no inherent contradiction in any one witness's testimony.

A. Identification

To the extent that Marzette argues that the evidence was insufficient to show he was one of the persons who committed the crimes, we note that elements of offenses and identity may be established entirely by circumstantial evidence and the logical inferences drawn therefrom. Bustamante v. State, 557 N.E.2d 1313, 1317 (Ind. 1990). Inconsistencies in identification testimony impact only the weight of that testimony, because it is the jury's task to weigh the evidence and determine the credibility of the witnesses. Gleaves v. State, 859 N.E.2d 766, 770 (Ind. Ct. App. 2007) (citing Badelle v. State, 754 N.E.2d 510 (Ind. Ct. App. 2001), trans. denied). As with other sufficiency matters, we will not weigh the evidence or resolve questions of credibility when determining whether the identification evidence is sufficient to sustain a conviction. Id. Rather, we examine the evidence and the reasonable inferences therefrom that support the verdict. Id.

Here, while the victims in Nethercutt's apartment were unable to observe Marzette's face, the evidence shows that Marzette and the other co-defendants were wearing masks at the time they committed the crimes. In addition, Marzette's co-defendants identified Marzette as a participant in the crimes. We also reiterate that identity may be established entirely by circumstantial evidence, see Bustamante, 557 N.E.2d at 1317, and the fact that the State may have not presented DNA or fingerprint evidence does not require reversal.

Further, if there is an existing agreement between the State and one of its witnesses, a prosecutor has a duty to reveal it. Whatley v. State, 908 N.E.2d 276, 283 (Ind. Ct. App. 2009) (citing Rubalcada v. State, 731 N.E.2d 1015, 1024 (Ind. 2000) ("A prosecutor must disclose to the jury any agreement made with the State's witness, such as promises, grants of immunity, or reward offered in return for testimony.")), trans. denied. The purpose of this rule is to assist the jury in assessing the witness's credibility. Id. (citing McCorker v. State, 797 N.E.2d 257, 266 (Ind. 2003)). On the other hand, the State is not required to disclose a witness's hope of leniency. Id. Here, Marzette does not argue or point to the record to show that the State failed to disclose to the jury that the co-defendants who testified for the State had received plea agreements under which they received some degree of leniency in exchange for their testimony against Marzette. The jury heard testimony from Moritz, Belmont, and Alvarez, and each of those witnesses were questioned before the jury regarding the terms of their agreements with the State. The jury was able to assess the credibility of the co-defendants in light of the plea

agreements or leniency they would receive in exchange for their testimony against Marzette. Marzette's arguments regarding why Moritz, Belmont, and Alvarez should not be believed amount to an invitation that we reweigh the evidence, which we cannot do. See Jordan, 656 N.E.2d at 817.

B. Incredible Dubiosity

To the extent Marzette asserts that the incredible dubiosity rule requires reversal of his convictions, we note that the rule applies only in very narrow circumstances. See Love v. State, 761 N.E.2d 806, 810 (Ind. 2002). The rule is expressed as follows:

> If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it.

Fajardo, 859 N.E.2d at 1208 (quoting Love, 761 N.E.2d at 810).

Marzette fails to show that the testimony of co-defendants Moritz, Belmont, or Alvarez was inherently contradictory. To the extent the co-defendants' testimony conflicted with Marzette's testimony or Marzette argues that the co-defendants' testimony was less believable, we note that this is an issue of witness credibility. The function of weighing witness credibility lies with the trier of fact, not this court. Whited v. State, 645 N.E.2d 1138, 1141 (Ind. Ct. App. 1995). We cannot reweigh the evidence and judge the credibility of the witnesses. See Jordan, 656 N.E.2d at 817. Further, we cannot say that the testimony of the co-defendants regarding the events of the night of

April 17, 2010 and early morning of April 18, 2010, including the testimony that Marzette was one of the men who planned to go to the apartment on Vinton Street to rob Lehman and attacked and confined Nethercutt, Johnson, Burnett, and Land, was so inherently improbable that no reasonable person could believe it. Marzette does not show how the testimony against him was somehow internally inconsistent and has not shown the co-defendants' testimony to be incredibly dubious.

Based upon our review of the evidence as set forth in the record and above, we conclude that sufficient evidence exists from which the jury could find Marzette guilty beyond a reasonable doubt of conspiracy to commit robbery and four counts of criminal confinement.

VII.

The next issue is whether the trial court abused its discretion in sentencing Marzette. We review the sentence for an abuse of discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). A trial court abuses its discretion if it: (1) fails "to enter a sentencing statement at all;" (2) enters "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;" (3) enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration;" or (4) considers reasons that "are improper as a matter of law." Id. at 490-491. However, the relative weight or value

assignable to reasons properly found, or those which should have been found, is not subject to review for abuse of discretion. Id. at 491.

Marzette argues that "it is within the trial court's discretion to determine the existence and weight of a mitigator" and that "[t]his court recently reversed a sentence for the trial court's failure to consider the defendant's lack of criminal record . . . ." Appellant's Brief at 19. To the extent Marzette argues that the trial court improperly considered his criminal history as an aggravating circumstance rather than a mitigating circumstance, we note that the argument is, in essence, a request for this court to reweigh that factor, which we may not do. See Anglemyer, 868 N.E.2d at 490-491.

VIII.

The next issue is whether Marzette's sentence is inappropriate in light of the nature of the offense and the character of the offender. Indiana Appellate Rule 7(B) provides that this court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Marzette argues that he was twenty-four years old when he was sentenced, that he is the father of two children and has a good work record, that he was gainfully employed after his release on his own recognizance, and that there was "ample testimony of his good character at the sentencing hearing by his wife . . . his mother, his uncle and his

pastor." Appellant's Brief at 21. Marzette further argues that "[p]erhaps most important, [he] had no adult criminal convictions, only two diverted counts of fraud" and that "[t]he counts of fraud have no relation whatsoever to a charge of armed robbery." Id. Marzette also argues there was "nothing particularly egregious about the crime." Id.

The State argues that Marzette's crimes victimized multiple persons, that Johnson, Burnett, and Land had been struck or beaten, and that the victims had been held at gunpoint. The State also argues that Marzette had four juvenile adjudications which include four counts of battery, that his adult history includes a diversion agreement resulting from two counts charging fraud and two counts charging theft, and that Marzette's past wrongs regardless of procedural outcome may be used as evidence of Marzette's character.

Our review of the nature of the offenses reveals that Marzette, armed with a rifle or shotgun and together with three of the co-defendants, went to the Vinton Street apartments to rob Lehnen. Marzette and the other co-defendants entered the apartment of Nethercutt, struck her guests in the head with their hands and weapons, and hogtied them with electrical extension cords. The perpetrators "beat the crap out of" the victims. See Transcript at 38. At least Burnett and Land were pistol whipped, resulting in Burnett being knocked unconscious. Nethercutt, who feared for her life, was compelled to knock on Lehnen's door while held at gunpoint.

Our review of the character of the offender reveals that Marzette's criminal history includes juvenile adjudications for four counts of battery and one count of disorderly

conduct. As an adult Marzette was charged with two counts of fraud and two counts of theft and entered a diversion agreement with respect to those charges. Marzette has a history of illegal alcohol and drug use. He has made efforts to complete his education and to be employed.

While Marzette's criminal history may not be extensive, our review of the nature of the offense and the character of the offender does not lead us to conclude that Marzette's aggregate sentence of twenty-seven years with fourteen years suspended to probation is inappropriate. See Robbins v. State, 839 N.E.2d 1196, 1200-1201 (Ind. Ct. App. 2005) (holding that the defendant's sentence of twenty years for class B felonies was not inappropriate in light of the nature of the offense and the character of the offender despite the defendant's lack of criminal history).

For the foregoing reasons, we remand with instructions to vacate Marzette's conviction and sentence under Count VI for attempted robbery, and we affirm Marzette's convictions and sentences for conspiracy to commit robbery and criminal confinement under Counts I through V.[15]

Affirmed and remanded with instructions.

FRIEDLANDER, J., concurs.

BAILEY, J., concurs in result as to issue VI.B. and concurs as to all other issues.

[15] Marzette's aggregate sentence is not affected by our instruction on remand to vacate his conviction and sentence under Count VI for attempted robbery.