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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL D. SLATON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A05-1012-CR-766
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Diane Ross Boswell, Judge
Cause No. 45G03-1003-FB-16

August 25, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Michael D. Slaton and two other individuals robbed a Check-Into-Cash store in Hammond. Following a jury trial, Slaton was convicted of two counts of robbery as class B felonies and two counts of criminal confinement as class B felonies. On appeal, Slaton challenges the trial court's discretionary decision to replace one of the members of the jury panel, prior to deliberations, with an alternate juror. Slaton also asserts that the trial court abused its discretion when it refused his oral request to instruct the jury regarding class C felony robbery. Finally, Slaton contends that the trial court abused its discretion when it sentenced him to an aggregate sentence of twelve years for his four class B felony convictions. Finding no abuse of discretion, and concluding that any error in sentencing was harmless, we affirm the convictions and sentence.

Facts and Procedural History

On March 13, 2010, at approximately 10:20 a.m., Slaton and two other individuals entered a Check-Into-Cash store in Hammond. One of the other individuals, a male, pointed a gun as he approached the female store manager and employee who were present at the store. Another of the individuals, a female, also pointed a gun at the women. Slaton stood at the front of the store with a "do-rag" mask over his face. Tr. at 111. The manager and employee could not tell whether Slaton was armed as well. Slaton's male accomplice ordered the manager and employee to empty the cash registers. After taking the cash and shoving it into what appeared to be a laptop computer bag that he was carrying over his shoulder, the male accomplice ordered the manager to the back room to unlock the safe. The

manager entered the code on the safe but informed the male that the safe was equipped with a fifteen-minute delay. Slaton placed duct tape around the legs and arms, and over the mouth, of the employee. Slaton then used duct tape and an extension cord to tie up the store manager. Frustrated that the safe had not yet opened, the three robbers demanded each of the women's purses. The robbers took two purses, emptied them, and stole various items including credit cards and cell phones. Then, the robbers fled from the store, deciding not to wait for the safe to open.

Assistant Chief John Doughty of the Hammond Police Department was responding to a panic button call received from the Check-Into-Cash when he entered the parking lot in his police cruiser and observed three individuals walking toward a black Mazda. Chief Doughty entered the store and was informed by the store manager that the three individuals who had just left the store had robbed the store. Two police squad cars stopped the Mazda after it pulled out of the parking lot. Hammond Police Officer Adam Clark performed a pat-down search of Slaton after Slaton was removed from the back seat of the Mazda. The pat-down search of Slaton revealed credit cards and an identification card that belonged to one of the store employees. Officer Clark later discovered a cell phone and set of keys in the squad car where Slaton had been sitting. A subsequent search of the black Mazda revealed a laptop computer bag containing cash and two handguns.

On March 15, 2010, the State charged Slaton with two counts of class B felony robbery and two counts of class B felony criminal confinement. A jury trial was held on October 18 through 20, 2010, following which the jury found Slaton guilty as charged. The

trial court held a hearing and sentenced Slaton on November 18, 2010. In its written sentencing statement, the trial court found no aggravating or mitigating circumstances. Appellant's App. at 62. The trial court sentenced Slaton to a reduced term of six years on each of his four class B felony counts. The court ordered that the six-year sentence for count I, robbery, and the six-year sentence for count III, criminal confinement, each count committed against the same victim, to be served concurrently. The court ordered that the six-year sentence for count II, robbery, and the six-year sentence for count IV, criminal confinement, each committed against the second victim, also be served concurrently. However, the court ordered that the sentence for the crimes against the first victim run consecutively to the sentence for the crimes against the second victim, for an aggregate sentence of twelve years. This appeal ensued.

Discussion and Decision

I. Removal of Juror

During trial, the trial court, as well as other individuals in the courtroom, observed ongoing outward flirtation between Juror Number 1 and Slaton. Prior to jury deliberations, the trial court removed Juror Number 1 and replaced her with Alternate Juror Number 1. Slaton argues that the trial court abused its discretion when it did so. We disagree.

Indiana Trial Rule 47(B) provides, in pertinent part, "Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury returns its verdict, become or are found to be unable or disqualified to perform their duties." Trial courts have significant leeway under Trial Rule 47(B) in determining whether to replace a juror with an

alternate, and we will reverse only for an abuse of discretion. *Riggs v. State*, 809 N.E.2d 322, 327 (Ind. 2004). "We defer substantially to trial judges on this point because they see jurors firsthand and are in a much better position to assess a juror's ability to serve without bias or intimidation and decide the case according to law." *Jervis v. State*, 679 N.E.2d 875, 881-82 (Ind. 1997). Moreover, a defendant is entitled as a matter of right only to an impartial jury, not a jury of his precise choosing where the issue is merely replacing a regular juror with an alternate. *Jeter v. State*, 888 N.E.2d 1257, 1265 (Ind. 2008), *cert. denied*. "Indeed, alternate jurors are presumed to be fair and equally qualified to the task." *Jervis*, 679 N.E.2d at 882.

Here, the trial judge justified the decision to replace Juror Number 1 as follows:

> It has come to the Court's attention through reporting and observation that Juror Number 1 has – has been making significant eye contact and I'm just going to say flirting with the defendant. I don't know any other way to say it, and it's been reported that the defendant is kind of flirting back with Juror Number 1. It's been noted by others in the courtroom, those at the State's table, my bailiffs, and myself. It's also been noted that when I have made eye contact with her, she got terribly embarrassed and dropped her head and tried to look away.
>
> I think this conduct is inappropriate. It's an indication of a compromise in her impartiality at this point and leads to a presumption of bias. And in order to preserve the integrity of this verdict, this process, and the verdict, I'm going to remove her and replace her with Alternate Number 1.

Tr. at 202-03. Outside the presence of the rest of the jury, and at defense counsel's request, the trial court questioned Juror Number 1. The trial court informed Juror Number 1 that the court, and other individuals in the courtroom, had noticed flirting between her and the defendant. Juror Number 1 responded, "Oh. No." *Id*. at 207. In response to further questioning, Juror Number 1 denied knowing the defendant and stated that she had never

seen him prior to the trial. The trial judge noted her concern about Juror Number 1's ability to remain impartial and indicated to Juror Number 1 that the court intended to replace her with an alternate. Juror Number 1 responded, "Okay." *Id.* at 208.

Slaton has not shown that the trial court's decision to replace Juror Number 1 with an alternate constituted an abuse of discretion. A juror's bias may be actual or implied. *Joyner v. State*, 736 N.E.2d 232, 238 (Ind. 2000). The trial court here, as well as other individuals in the courtroom, observed firsthand what appeared to be actual bias and partiality on the part of Juror Number 1 in favor of Slaton. When questioning Juror Number 1 regarding the outward flirtation with Slaton, the court was able to observe Juror Number 1's demeanor. Based upon this observation, and in its significant discretion, the trial court determined that Juror Number 1 was unable to serve without bias. Under the circumstances, we cannot say that the trial court abused its discretion when it replaced Juror Number 1 with an alternate.[1]

II. Jury Instruction

Slaton next contends that the trial court abused its discretion when it denied his oral request to instruct the jury on the inherently lesser-included offense of class C felony robbery. Slaton has waived this argument because he did not also tender a written jury

[1] Slaton contends that the trial court's removal of Juror Number 1 prejudiced him by altering the racial makeup of the jury. However, this claim is unsubstantiated by the record. Slaton, an African-American, suggests that Juror Number 1 may have been the only African-American on the jury and that removing her prejudiced him. However, defense counsel objected to Juror Number 1's removal arguing that she was "the only African-American on the panel in [Slaton's] age range" but would be replaced by a Caucasian female substantially older than Slaton. Tr. at 204. Slaton points to nothing in the record to indicate that Juror Number 1 was, in fact, the only African-American on the panel, only that she was the only African-American in his age range. Moreover, Slaton does not suggest that the alternate juror was otherwise unqualified to serve. As we have noted, while Slaton was entitled to an impartial jury, he was not entitled to the precise jury of his choosing, and he was clearly not entitled to have a juror remain who had demonstrated outward partiality.

instruction to the trial court. An oral request for a jury instruction is not enough and failure to tender the jury instruction in writing waives the claim on appeal. *Ketcham v. State*, 780 N.E.2d 1171, 1177 (Ind. Ct. App. 2003), *trans. denied*.

Waiver notwithstanding, Slaton's claim fails on the merits. A requested instruction for an inherently lesser-included offense should be given only if, based upon the evidence presented, there existed a serious evidentiary dispute about the element or elements distinguishing the greater from the lesser offense such that the jury could conclude that the lesser offense was committed but not the greater. *McKinney v. State*, 873 N.E.2d 630, 644 (Ind. Ct. App. 2007), *trans. denied*. Class C felony robbery is inherently included in the class B felony robbery charged here, as the elements of each offense are identical with the exception of the "while armed with a deadly weapon" requirement of the greater class B offense. Ind. Code § 35-42-5-1. It is undisputed in this case that two handguns were used to commit the robberies. Whether Slaton was the individual who was armed, or whether his accomplices were the ones armed, is of no moment. It is well established that a person who aids another in committing a crime is just as guilty as the actual perpetrator. *Vandivier v. State*, 822 N.E.2d 1047, 1054 (Ind. Ct. App. 2005), *trans. denied*. To be convicted as an accomplice, it is not necessary for a defendant to have participated in every element of the crime. *Bruno v. State*, 774 N.E.2d 880, 882 (Ind. 2002). As noted by the trial court when denying the oral request for the instruction, "Either he aided in this robbery where guns were used or he didn't." Tr. at 258. Accordingly, the evidence did not support the giving of an instruction on class C felony robbery, and the trial court properly refused Slaton's request.

III. Sentencing

Finally, we address Slaton's contention that the trial court abused its discretion when it sentenced him. The statutory sentencing range for a class B felony is between six and twenty years, with the advisory sentence being ten years. Ind. Code § 35-50-2-5. Although Slaton received the statutory minimum six-year sentence for each of his class B felonies, the trial court ordered the sentences regarding the crimes against each victim to run consecutively for an aggregate sentence of twelve years. In its written sentencing statement, the trial court found no aggravating or mitigating circumstances. Slaton asserts that the trial court abused its discretion when it imposed consecutive sentences in the absence of aggravating circumstances and also when it failed to specifically find mitigating circumstances despite evidence in the record to support them.

Sentencing decisions are within the sound discretion of the trial court and are reviewed only for an abuse of that discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). When a trial court increases or decreases a basic sentence, suspends a sentence, or imposes consecutive terms of imprisonment, the record should disclose what factors were considered by the trial judge to be mitigating or aggravating circumstances. *Wagner v. State*, 474 N.E.2d 476, 496 (Ind. 1985). Choosing whether sentences will run concurrently or consecutively is among the trial court's many options when determining the length of a sentence. *Davidson v. State*, 926 N.E.2d 1023, 1025 (Ind. 2010). In order to impose consecutive sentences, the trial court must find at least one aggravating circumstance. *Rhoiney v. State*, 940 N.E.2d 841, 846 (Ind.

Ct. App. 2010), *trans. denied* (2011). Our appellate review "should focus on the forest – the aggregate sentence – rather than the trees – consecutive or concurrent number of counts, or length of the sentence on any individual count." *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008).

Trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. *Anglemyer*, 868 N.E.2d at 490. The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Id.* The purpose of this rule is to guard against arbitrary sentencing and to provide an adequate basis for appellate review. *Id.* When we find that an irregularity has occurred in a trial court's sentencing determination, we may follow one of three courses of action. *Cotto v. State*, 829 N.E.2d 520, 525 (Ind. 2005). We may: (1) "remand to the trial court for a clarification or new sentencing determination," (2) "affirm the sentence if the error is harmless," or (3) "reweigh the proper aggravating and mitigating circumstances independently at the appellate level." *Id*. We choose the second option here.

Although the trial court's written sentencing statement provides that the trial court found no aggravating or mitigating circumstances, the sentence imposed and the record before us clearly reflect that the trial court found the existence of both. In sentencing Slaton to the minimum statutory term on each of the felony counts, it appears that the trial court considered evidence of Slaton's general good character and lack of criminal history in mitigation. Indeed, the transcript of the sentencing hearing reveals that the trial court specifically recognized Slaton's good character despite his poor decision to jump on "the

bandwagon" and commit the current crimes. Tr. at 498-99. The court went on to acknowledge that, despite this mitigating evidence, it was constrained to impose at least the statutory minimum of six years on each class B felony count. *Id*.

Slaton concedes that he received the minimum sentence on each felony count but complains that the trial court still imposed consecutive sentences without first finding the existence of any aggravating circumstances. Regarding consecutive sentences, it is abundantly clear from our review of the record that the trial court considered the fact that two victims were involved in this case as an aggravating circumstance which justified the imposition of consecutive sentences. Whether the counts involve one or multiple victims is highly relevant to the decision to impose consecutive sentences. *Cardwell*, 895 N.E.2d at 1225. Indeed, "[w]hile the better practice may be to explicitly label the presence of multiple victims as an aggravating circumstance for the purposes of consecutive sentencing," we are convinced that the trial court here actually found multiple victims to be an aggravator and that it based the imposition of consecutive sentences on that aggravator. *Townsend v. State*, 860 N.E.2d 1268, 1273 (Ind. Ct. App. 2007), *trans. denied*.

Obviously, the trial court's written sentencing statement indicating the presence of no aggravating or mitigating circumstances is erroneous and is not a proper reflection of the record. Nevertheless, we conclude that any error in the written sentencing statement is harmless. When the trial court abuses its discretion in sentencing, remand is necessary only if we cannot say with confidence that the trial court would have imposed the same sentence "had it properly considered reasons that enjoy support in the record." *Anglemyer*, 868 N.E.2d

at 491. Based upon the record before us, we are confident that the aggregate twelve-year sentence would have been imposed by the trial court even had its written sentencing statement properly included the aggravating and mitigating circumstances supported by the evidence. Remand to the trial court is unnecessary.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.