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IN THE
COURT OF APPEALS OF INDIANA

JERRY PERRY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1012-CR-1363
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant W. Hawkins, Judge
Cause No. 49G05-0901-FB-9180

August 31, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Jerry Perry appeals his convictions and sentence for burglary, as a Class B felony; two counts of robbery, each as a Class C felony; conspiracy to commit robbery, as a Class C felony; and two counts of criminal confinement, each as a Class D felony, following a bench trial. Perry raises the following two issues for our review:

1. Whether the trial court committed fundamental error when it allowed one of Perry's co-conspirators to testify to statements made to him by Perry; and

2. Whether his sentence is inappropriate in light of the nature of the offenses and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

On January 10, 2009, Perry called his friend John Williams and asked him if he wanted to make some money. Perry told Williams of a home that had a flat-screen television, a PlayStation 3, and an Xbox 360 that they could steal. Williams agreed and invited his brother, Robert Williams, and another friend, Langston Hughes, into the agreement. Perry's plan was to have his fourteen year-old cousin, M.K. go to the home in question because M.K. was friends with two children who lived there, B.W. and M.W. M.K. was then to call Perry when M.K. left the residence.

Later that evening, M.K. went to the home in question, where he stayed for several hours. Around 11:30 p.m., M.K. left the residence and called Perry. Within minutes, Perry, driving a Cavalier, lead Hughes and the Williams brothers, who were in a blue Caprice, to the residence. Hughes and the Williams brothers then entered the residence while Perry waited down the street. John Williams threw a blanket over M.W. on the

floor, and Robert Williams slammed B.W. to the floor, tossing a hoodie over him. The children were told to stay quiet. The intruders took televisions, the PlayStation 3, the Xbox 360, DVD players, a computer, a gold necklace, and video games.

Once the men left, B.W. called 911 and described the blue Caprice as well as the men's clothing. Within minutes, an Indianapolis Metropolitan Police Officer pulled over a blue Caprice less than a mile from the residence. Perry, who was driving his car behind the Caprice at the time of the traffic stop, pulled his car over and fled the scene. The children were brought to the scene and identified the Williams brothers. John Williams then gave a statement to the police implicating Perry. Hughes and the Williams brothers later pleaded guilty to the State's ensuing charges against them.

Perry, however, proceeded to a bench trial. At his trial, John Williams testified that Perry had first contacted him about the proposed burglary. Williams also testified to Perry's relationship with M.K. and Perry's use of M.K. to set up the burglary. And Williams testified that he, his brother, and Hughes had followed Perry to the residence shortly before the burglary. Perry did not object to Williams' testimony.

The court found Perry guilty as charged, but entered one of the State's confinement charges as a Class D felony rather than a Class C felony. The court then sentenced Perry to an aggregate term of twenty-one years, noting that "[b]ut for him we wouldn't have this." Transcript at 140. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Fundamental Error

Perry first contends that the trial court committed fundamental error when it allowed Williams to testify to Perry's alleged statements without first requiring the State to provide independent proof of the alleged conspiracy. Because Perry did not object to Williams' testimony during trial, to succeed on appeal Perry must show that Williams' testimony is fundamental error. "Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue. It is error that makes 'a fair trial impossible or constitute[s] clearly blatant violations of basic and elementary principles of due process . . . present[ing] an undeniable and substantial potential for harm.' " Hand v. State, 863 N.E.2d 386, 393-94 (Ind. Ct. App. 2007) (quoting Benson v. State, 762 N.E.2d 748, 756 (Ind. 2002)) (alterations and omission original).

Perry's appellate contentions are premised on his theory that the trial court allowed Williams' testimony under Indiana Evidence Rule 801(d)(2)(E). According to that rule, a statement is not hearsay if "[t]he statement is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." Ind. Evidence Rule 801(d)(2)(E). But Perry's theory is inaccurate. The statements at issue were Perry's statements, and Perry is the party against whom the statements were offered. Thus, the statements were not "by a co-conspirator of a party." Rule 801(d)(2)(E) might have applied to statements Williams made and offered against Perry, but it does not apply to Perry's statements against himself.

Rather, Williams' recollection of Perry's statements were admissible under Rule 801(d)(2)(A), because the statements were offered against a party and were "the party's own statement[s]." Thus, the statements were not hearsay, and the rule that State had to present independent evidence to first show the existence of a conspiracy is not applicable. Accordingly, Perry cannot show that the trial court committed fundamental error in permitting Williams' testimony.

Issue Two: Sentencing

Perry also contends that his twenty-one year aggregate sentence is inappropriate. Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution "authorize[] independent appellate review and revision of a sentence imposed by the trial court." Roush v. State, 875 N.E.2d 801, 812 (Ind. Ct. App. 2007) (alteration original). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. Revision of a sentence under Appellate Rule 7(B) requires the appellant to demonstrate that his sentence is inappropriate in light of the nature of his offense and his character. See Ind. Appellate Rule 7(B); Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). However, "a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." Roush, 875 N.E.2d at 812 (alteration original).

Moreover, "sentencing is principally a discretionary function in which the trial court's judgment should receive considerable deference." Cardwell v. State, 895 N.E.2d 1219, 1222 (Ind. 2008). Indiana's flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented. See id. at 1224. The principal role of appellate review is to attempt to "leaven the outliers." Id. at 1225. Whether we regard a sentence as inappropriate at the end of the day turns on "our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other facts that come to light in a given case." Id. at 1224.

We first address Perry's suggestion that his sentence is disproportionate to the sentences received by his co-conspirators. Robert Williams received a twelve-year sentence. Hughes received an eight-year sentence. And John Williams received a six-year sentence. But each of Perry's co-conspirators pleaded guilty. Perry, on the other hand, obliged the State to see him through trial. He is, therefore, not entitled to the benefits received by his confederates. And for the reasons stated below, Perry's sentence is not inappropriate as to his offenses and character.

Perry's sentence is not inappropriate in light of the nature of the offenses. Much of Perry's argument on this question focuses on the behavior of his colleagues and their respective sentences, but, again, we will not consider that argument. Instead, we note that Perry used his fourteen-year-old cousin to set up a burglary of the home of his cousin's friends. In doing so, Perry likely knew that children would be present at the time of the burglary. And in the course of the burglary, the two young children were subjected to abuse.

And Perry's sentence is not inappropriate in light of his character. Again, he deliberately used a fourteen-year-old relative to aid in the commission of multiple felonies. Indeed, as the trial court stated, Perry was the mastermind of the burglary. We also note that, while on bail for the instant offenses, Perry was arrested and convicted of another crime. And although Perry is nineteen years old, he has had several prior adjudications, which reflects poorly on his character. We cannot say his sentence is inappropriate.

Affirmed.

RILEY, J., and MAY, J., concur.