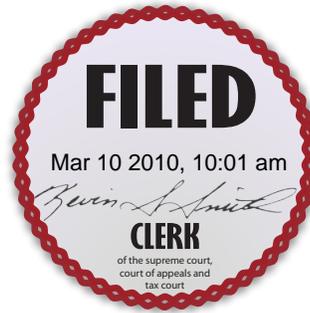


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

**MICHAEL R. FISHER**  
Indianapolis, Indiana

**GREGORY F. ZOELLER**  
Attorney General of Indiana  
Indianapolis, Indiana

**JOBY D. JERRELLS**  
Deputy Attorney General  
Indianapolis, Indiana

---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

JAMES TALLEY, )

Appellant-Defendant, )

vs. )

No. 49A02-0908-CR-726 )

STATE OF INDIANA, )

Appellee-Plaintiff. )

---

APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Sheila Carlisle, Judge  
Cause No. 49G03-0106-MR-123351

---

**MARCH 10, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARTEAU, Senior Judge**

## STATEMENT OF THE CASE

Appellant James Talley appeals from his conviction and sentence for murder. Indiana Code § 35-42-1-1. We affirm.

### ISSUES

Talley raises three issues for review, which we restate as:

- I. Whether the trial court abused its discretion by admitting certain evidence.
- II. Whether the evidence is sufficient to support Talley's conviction.
- III. Whether Talley's sentence is erroneous.

### FACTS

On February 14, 2001, family and friends of Mario Smith found his body in his car. Smith's car was parked behind a vacant residence in the 2900 block of North Park Street in Indianapolis. Smith's body was in the driver's seat, and he had been dead for several days. Smith had been shot multiple times by someone who had been sitting in the car's back seat.

Smith and Talley had argued over money several months before Smith was killed. A review of Smith's cell phone records revealed that on February 12, 2001, Talley called Smith at 6:09 p.m. At 6:28 p.m., Smith called Talley.

At 7:00 p.m., staff at Methodist Hospital in Indianapolis called the police to report that a person, who was subsequently identified as Talley, had come to the emergency room seeking treatment for a gunshot wound. A police officer came to Methodist Hospital and spoke with Talley, who had a gunshot wound to his left hand. The bullet had gone through Talley's hand, from the back of the hand to the palm. Talley told the

officer that he had been walking in the 3100 block of Broadway, which is near where Smith's body was later found, and that he was shot at around 6:35 or 6:45 p.m.

After Smith's body was discovered on February 14, 2001, the police found traces of blood in Smith's car. When the police learned that Talley had come to the hospital on February 12, 2001 with a gunshot wound, they obtained a limited arrest warrant to take a sample of Talley's blood. During the blood draw, Talley spoke to a detective and acknowledged having been in Smith's car in the past, but he could not explain why his blood could be in Smith's car. Testing subsequently indicated that some of the blood in Smith's car came from Talley. On June 4, 2001, the State charged Talley with murder, felony murder, and robbery. A warrant was issued for Talley's arrest, but Talley had fled the state and did not return for several years.

Police arrested Talley in Indianapolis on July 24, 2008, while serving an arrest warrant for Talley's brother, Ervin Crabtree. At the time of the arrest, Talley told the police he was Crabtree.

A jury found Talley guilty of murder and not guilty of felony murder and robbery. The trial court sentenced Talley to fifty-five (55) years.

## DISCUSSION AND DECISION

### I. ADMISSION OF EVIDENCE

Talley argues that the trial court erred by allowing a forensic pathologist to state as an expert opinion that Talley's hand could have been on Smith's shoulder during Smith's shooting.

Indiana Rule of Evidence 702 provides:

(a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

Decisions regarding the admissibility of expert testimony are within the broad discretion of the trial court. *Morgan v. State*, 755 N.E.2d 1070, 1077 (Ind. 2001). We will only reverse the trial court's judgment upon a showing of abuse of discretion. *Id.*

An expert must be qualified by knowledge, skill, experience, training or education.

*Prewitt v. State*, 819 N.E.2d 393, 410 (Ind. Ct. App. 2004), *transfer denied*.

Additionally, an expert must have sufficient skill in his particular area of expertise before an opinion may be rendered in that area. *Id.*

In this case, the State called forensic pathologist Dr. John Pless to testify at trial. Dr. Pless has over forty (40) years of experience and has testified as an expert witness over 1,000 times. Dr. Pless served for twenty (20) years as professor of pathology at the IU School of Medicine and directed the Division of Forensic Pathology at the Indiana University Medical Center. Furthermore, Dr. Pless attended Smith's autopsy.

Dr. Pless testified that Smith's right shoulder had a "shored" entrance wound, which meant that something was pressed up against Smith's skin when the bullet passed through the skin, resulting in a large abrasion. Dr. Pless also stated that he had an opinion about the presence of Talley's left hand near the shored entrance wound on Smith's right shoulder. Dr. Pless, who had examined photographs of Talley's gunshot wound, elaborated that Smith's shored wound was "consistent with a hand pressing

against [Smith's shoulder] as the missile passed through the hand and then into the back of the neck of Mario Smith." Tr. p. 477.

Talley contends that the State did not demonstrate that Dr. Pless' testimony as to the possible presence of Talley's hand on Smith's shoulder during the shooting was supported by reliable scientific principles. We disagree. Doctors often testify about the injuries depicted in photographs even though they were not present when the pictures were taken and did not personally examine the injuries depicted. *Malinski v. State*, 794 N.E.2d 1071, 1085 (Ind. 2003). Dr. Pless' conclusion was based on his analysis of the nature and locations of Smith's and Talley's wounds. Knowledge of the placement and nature of wounds falls within Dr. Pless' area of expertise, and his testimony was undoubtedly an aid to the jury. Thus, the trial court did not abuse its discretion in allowing Dr. Pless to testify about the possible placement of Talley's hand on Smith's shoulder when Smith was shot. *See Morgan*, 755 N.E.2d at 1078-1079 (determining that the trial court did not err by allowing a pathologist to testify about the relative locations of a shooter and the victim during a shooting).

## II. SUFFICIENCY OF THE EVIDENCE

Talley contends that there is insufficient evidence to sustain the murder conviction.

Our standard of review for sufficiency of the evidence is well settled. We neither reweigh the evidence nor judge the credibility of witnesses. *Whitlow v. State*, 901 N.E.2d 659, 660 (Ind. Ct. App. 2007). Rather, we consider the evidence most favorable to the

verdict and draw all reasonable inferences that support the ruling below. *Id.* at 660-661. We affirm the conviction if there is probative evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. *Id.* at 661. Circumstantial evidence is sufficient for a conviction if inferences may reasonably be drawn that allowed the jury to find the defendant guilty beyond a reasonable doubt. *Pelley v. State*, 901 N.E.2d 494, 500 (Ind. 2009), *reh'g denied*. It is not necessary that the evidence “overcome every reasonable hypothesis of innocence.” *Drane v. State*, 867 N.E.2d 144, 147 (Ind. 2007) (*quoting Moore v. State*, 652 N.E.2d 53, 55 (Ind. 1995), *reh'g denied*).

In order to obtain a conviction for murder, the State had to prove beyond a reasonable doubt that Talley (1) knowingly or intentionally (2) killed (3) Mario Smith. *See* Indiana Code § 35-42-1-1.

In this case, Smith and Talley had argued over money several months prior to Smith's shooting. Smith spoke with Talley by cell phone at 6:09 p.m. and 6:28 p.m. on Monday, February 12, 2001. Shortly thereafter, Talley came to the hospital with a gunshot wound in his left hand. Talley told a police officer at the hospital that he had been walking in the 3100 block of Broadway, which is near where Smith's body was later found, and he was shot at around 6:35 or 6:45 p.m. Talley, when interviewed by the police, could not provide a reason why his blood would be in Smith's car. Subsequent testing revealed that Talley's blood was present in Smith's car. Finally, the gunshot wound to Talley's hand, when compared with a gunshot wound to Smith's shoulder,

indicated that Talley could have been holding Smith by the shoulder as he shot Smith. This evidence is sufficient to sustain Talley's murder conviction.

### III. SENTENCING

Talley argues that the trial court erred in finding and weighing aggravating and mitigating circumstances. Talley also argues that his sentence is unreasonable in light of the nature of the offense and the character of the offender.

We note that Smith's murder occurred in 2001, prior to the April 25, 2005 revision to the sentencing statutes. Therefore, we review Talley's sentence pursuant to the pre-April 25, 2005 presumptive sentencing framework. *See Robertson v. State*, 871 N.E.2d 280, 286 (Ind. 2007).

Sentencing decisions rest within the discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Smallwood v. State*, 773 N.E.2d 259, 263 (Ind. 2002). The trial court must include within the record a statement of the court's reasons for selecting the sentence it imposes if the court finds aggravating or mitigating circumstances. *Harris v. State*, 659 N.E.2d 522, 527 (Ind. 1995). The trial court's statement of reasons should include the following elements: (1) identification of all significant mitigating and aggravating circumstances; (2) the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) an articulation that the court evaluated and balanced the mitigating circumstances against the aggravating circumstances to determine if the mitigating circumstances offset the aggravating circumstances. *Id.* at 527-528.

In this case, Talley argues that the trial court erred by finding as an aggravating circumstance that Smith apparently thought he could trust Talley, and that Talley ambushed Smith. The manner in which a crime is committed, including whether a defendant lay in wait for a victim, may serve as an aggravating circumstance. *See Taylor v. State*, 695 N.E.2d 117, 120 (Ind. 1998).

Here, the trial court concluded, “the person that was in that vehicle with Mario Smith was obviously someone that Mario thought he could trust to let them in and so close to him.” Tr. p. 641. The evidence shows that Talley and Smith spoke by telephone, and then the two met. Talley, while sitting in the back seat of Smith’s car, shot Smith repeatedly from behind. Thus, the evidence supports the trial court’s determination that Talley ambushed Smith, and the trial court did not err in citing this factual circumstance as an aggravating factor. *See Taylor*, 695 N.E.2d at 120 (determining that the trial court sufficiently explained its reliance on the defendant’s lying in wait for the victim as an aggravating circumstance).

Talley also argues that the trial court erred by citing as aggravating factors Talley’s deception of the police and flight from the state after committing the murder. Here, with respect to aggravating circumstances, the trial court stated:

It’s also the circumstances of you lying to the police and concocting the story about your injuries that you received from this, as well as your fleeing the state. And to suggest that you had the plan all along to turn yourself in to the police, one has to question that, when you knew it was all coming down when the police officers were there, and you chose to, once again, elude the police and lie and give them your brother’s name.

Tr. p. 642. The trial court considered Talley's continued deception and flight under the particular circumstances of the case to rebut Talley's claim that he was going to surrender to the police. The trial court's determination was not an abuse of discretion. *See Anglin v. State*, 787 N.E.2d 1012, 1019 (Ind. Ct. App. 2003), *transfer denied* (concluding that the trial court did not abuse its discretion by citing the appellant's continued flight as an aggravating factor).

Next, Talley contends that the trial court erred by failing to find that certain circumstances were mitigating factors. Although a court must consider all evidence of mitigating factors presented by a defendant, a finding of mitigating circumstances is within the trial court's discretion. *Harris*, 659 N.E.2d at 528. A trial court is not obligated to explain why it has not chosen to find mitigating circumstances. *Id.* Thus, a trial court is only required to articulate in the sentencing statement those proffered mitigating circumstances, if any, that it determines are significant. *Id.*

Talley contends that he had suffered a severe head injury several years prior to the murder, and that the injury is a mitigating circumstance. In this case, the trial court, in considering Talley's head injury, found that the injury:

didn't prevent Mario Smith's death. It didn't prevent your planning after the death, or your fleeing after that murder, or your making up a story about your hand injury, or your leaving the state, living in another state, or your being gone from these charges for seven years. It didn't prevent you from able – being able to form the plans to live that type of life or to commit the murder that you have been found guilty of. So by the same token, it should not be allowed to be used by you as a reason to mitigate your sentence for this crime.

Tr. pp. 639-640. Thus, the trial court considered the evidence and stated reasons why Talley's head injury was not, in the trial court's view, a mitigating factor. The trial court did not abuse its discretion. *See Wooley v. State*, 716 N.E.2d 919, 931 (Ind. Ct. App. 1999), *reh'g denied* (determining that the trial court did not err by rejecting the appellant's seizure condition as a mitigating circumstance).

In addition, Talley argues that the trial court erred by failing to find as a mitigating factor that Talley's incarceration would impose a hardship on his daughter. Talley states that the trial court cited "no evidence in the record on which to find that the loss of her father to incarceration would not result in any less hardship to Mr. Talley's daughter than it would to any other child in that circumstance." Appellant's Br. p. 18. Talley misstates the relevant standard. Many persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship. *Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999) (quotation omitted). Thus, Talley bore the burden of proving that his incarceration, in these particular circumstances, would impose undue hardship on his daughter. At sentencing, the trial court noted that Talley does not pay court-ordered support to his daughter. Talley failed to identify any specific undue hardship that his incarceration would impose on his daughter. Thus, the trial court did not abuse its discretion in determining that hardship to Talley's daughter was not a mitigating circumstance. *See Dowdell*, 725 N.E.2d at 1154 (determining that the record did not support a determination that incarceration would be an undue hardship on the appellant's dependents).

Finally, Talley contends that his sentence is inappropriate. We have the authority to revise a sentence if, after due consideration of the trial court's decision, we determine that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Indiana Appellate Rule 7(B). Our review under Appellate Rule 7(B) is very deferential to the trial court. *Ketcham v. State*, 780 N.E.2d 1171, 1182 (Ind. Ct. App. 2003), *transfer denied*.

The trial court sentenced Talley to fifty-five (55) years, which was the presumptive sentence for murder. Starting with the nature of the offense, Talley ambushed Smith in Smith's own car, shooting him repeatedly from behind. Talley contends that Smith was a drug dealer and that drug-dealing "played a significant role in this crime." Appellant's Br. p. 20. However, Talley fails to explain why the role that drugs may have played in this crime merits reducing the sentence to less than the presumptive amount.

Turning to the character of the offender, Talley had multiple true findings as a juvenile, including assisting a criminal, which would be a class C felony if committed by an adult, and two counts of operating a vehicle while never having received a license, which would be class C misdemeanors if committed by an adult. Talley's adult criminal history is minimal, but, as the trial court pointed out at sentencing, after Talley murdered Smith in February 2001, Talley had an incentive to avoid criminal entanglements because he was wanted for murder. After Talley committed the murder, he avoided arrest for seven years. Finally, after the police caught Talley during a warrant sweep, he attempted to continue his deceptions by pretending to be his brother. These factors present a poor

picture of Talley's character. Therefore, Talley's sentence is appropriate in light of the nature of the offense and the character of the offender.

### CONCLUSION

We conclude that the trial court did not abuse its discretion by permitting Dr. Pless to state an opinion as to the possible placement of Talley's hand on Smith's shoulder. In addition, the evidence is sufficient to sustain Talley's conviction. Finally, the trial court did not abuse its discretion in the course of sentencing Talley, and Talley's sentence is not inappropriate.

Affirmed.

ROBB, J., and CRONE, J., concur.