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IN THE COURT OF APPEALS OF INDIANA

JASON M. ROUDEBUSH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 80A02-0701-CR-29
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPTON CIRCUIT COURT
The Honorable Thomas R. Lett, Judge
Cause No. 80C01-0402-MR-39

November 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Jason Roudebush appeals his convictions and sentence for felony murder[1] and conspiracy to commit robbery.[2] Roudebush raises ten issues, which we revise and restate as:

I. Whether the trial court erred by revoking Roudebush's recognizance status;

II. Whether the trial court abused its discretion by denying Roudebush's motion for change of venue;

III. Whether the trial court abused its discretion by overruling Roudebush's objections to the prosecutor's comments during voir dire;

IV. Whether the trial court abused its discretion by admitting an autopsy photograph and a videotape of the crime scene;

V. Whether the trial court abused its discretion by denying Roudebush's motion for a mistrial, which alleged that the jury had seen his restraints;

VI. Whether the trial court erred by rejecting Roudebush's proposed instructions regarding inferences and abandonment;

VII. Whether the prosecutor's comments during closing argument resulted in fundamental error;

VIII. Whether the evidence is sufficient to sustain Roudebush's convictions;

IX. Whether Roudebush's sentence violates the prohibition against double jeopardy;

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[1] Ind. Code § 35-42-1-1(2) (2004) (subsequently amended by Pub. L. No. 151-2006, § 16 (eff. July 1, 2006); Pub. L. No. 173-2006, § 51 (eff. July 1, 2006); Pub. L. No. 1-2007, § 230 (eff. Mar. 30, 2007)).

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

X. Whether the trial court abused its discretion in sentencing Roudebush; and

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

We affirm in part and vacate in part.[3]

The relevant facts follow. In late 2003, Morris Moody lived with Robert Ogden and Shawn Montgomery in a house in Tipton, Indiana. Ed Semsick and Lenora Swanson lived in a separate garage apartment on the property. Ethan Pennington was Moody's friend, and Moody would provide Pennington with cocaine when Pennington visited.

Pennington worked with Roudebush, and Roudebush was Shane Bramley's friend. Pennington told Roudebush that Moody kept cocaine and money in his truck. Pennington, Roudebush, and Bramley decided to rob Moody of his money and/or

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[3] Roudebush included a copy of the presentence investigation report on white paper in his brief. We remind Roudebush that Ind. Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Ind. Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Ind. Administrative Rule 9(G)(1)(b)(viii) states that "[a]ll pre-sentence reports pursuant to Ind. Code § 35-38-1-13" are "excluded from public access" and "confidential." The inclusion of the presentence investigation report printed on white paper in his appellant's appendix is inconsistent with Trial Rule 5(G), which states, in pertinent part:

> Every document filed in a case shall separately identify information excluded from public access pursuant to Admin. R. 9(G)(1) as follows:
>
> (1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked "Not for Public Access" or "Confidential."
>
> (2) When only a portion of a document contains information excluded from public access pursuant to Administrative Rule 9(G)(1), said information shall be omitted [or redacted] from the filed document and set forth on a separate accompanying document on light green paper conspicuously marked "Not For Public Access" or "Confidential" and clearly designating [or identifying] the caption and number of the case and the document and location within the document to which the redacted material pertains.

cocaine. At Thanksgiving in 2003, Pennington's sister heard Roudebush "nextelling" Pennington and heard Roudebush say that "he wanted to go take something from Morris." Transcript at 736. Roudebush and Pennington discussed that the item was "in the glove box of the truck." Id. at 745.

On the evening of December 26, 2003, Moody went to Indianapolis to get cocaine. Montgomery, Semsick, and some others were playing cards in the residence, and Ogden was sleeping. Swanson was watching television with two children in the living room. Between 11:00 p.m. and 11:30 p.m., Moody returned to the residence clutching the back of his head or neck and claiming that a couple of guys had hit him. Swanson, Semsick, Montgomery, and Ogden, who was awakened by the commotion, saw a tall man, later identified as Roudebush, standing just outside of the front door. Montgomery saw a shorter man, later identified as Bramley, across the road "digging through" Moody's truck. Id. at 761. Bramley then came across the street with something in his hand wrapped in what appeared to be a white towel. At about that time, Swanson's dog came out, and Roudebush told Bramley to shoot the dog. Bramley uncovered a gun in his hand, and Semsick told the others to call the police. Roudebush left, and Bramley followed after rifling through Moody's truck again.

After Roudebush and Bramley left, most of the people in the house either left or went to bed. Montgomery spent a few minutes cleaning the house up and then decided to go to Semsick and Swanson's garage apartment. As he headed toward the apartment, he looked out the laundry room window and saw a silhouette of a taller man. He turned

around, and someone "barged through the front door." Id. at 773. Montgomery locked himself in a nearby bathroom, and he heard two voices yelling, "Where's he at? Where's Morris at?" Id. Montgomery recognized one of the voices as that of Roudebush, the taller man who had been at the house earlier. Montgomery said that Moody was upstairs, and Roudebush told Montgomery that he would shoot him through the door if he did not keep quiet. Montgomery climbed out of the bathroom window and ran to his mother's nearby house.

A noise woke Ogden up again, and he came out of his bedroom. He saw Roudebush, who said, "Morris owes us money," and Roudebush then ran out the door. Id. at 564. Ogden started to go upstairs and saw a man, later identified as Bramley, with a gun pointed over the banister. Bramley told Ogden to "get the fuck back downstairs," and Ogden went to the garage apartment to look for Moody. Id. at 567. When he could not find Moody, Ogden returned to the house. In the meantime, Swanson had discovered Moody bleeding from a head wound on the second floor landing at the top of the stairs. Moody died as a result of a close contact gunshot wound to the head.

Neighbors saw a taller man and then a shorter man running through the neighborhood to an orange or red truck, which already contained another man. Police found Roudebush's fingerprints on Moody's truck. A gun belonging to Bramley was recovered from his neighbor. Moody's blood splatter and hair were found on Bramley's gun, and the State Police Laboratory determined that the bullet that killed Moody was fired from Bramley's gun. Roudebush gave a videotaped statement to the police and

admitted that he, Bramley, and Pennington agreed to steal Moody's cocaine and/or money. Roudebush admitted that he drove the three to Moody's residence, that he and Bramley went into Moody's house, and that Bramley shot Moody.

The State charged Roudebush with felony murder and conspiracy to commit robbery as a class A felony. The felony murder charging information provided:

> [O]n or about the 27th day of December, 2003, in the County of Tipton, State of Indiana, one Jason M. Roudebush did kill Morris W. Moody by means of a bullet fired from a handgun into the head of Morris W. Moody while Jason M. Roudebush was attempting to commit the felony of robbery, to-wit: Jason M Roudebush knowingly or intentionally attempted to take property to-wit: money and/or cocaine, from Morris W. Moody, by the use or threatened use of force on Morris W. Moody or by putting Morris W. Moody in fear, to-wit: a handgun was displayed and fired at Morris W. Moody during an attempt to take Morris W. Moody's property and that the firing of the gun caused a gunshot wound to Morris W. Moody's head, resulting in Morris W. Moody's death.

Appellant's Appendix at 18. The conspiracy to commit robbery charging information provided:

> [O]n or about the 27th day of December, 2003, in the County of Tipton, State of Indiana, one, Jason M. Roudebush did that and there, with intent to commit a felony, to-wit: robbery, to-wit: Jason M. Roudebush did knowingly or intentionally attempt to take property, to-wit: money and/or cocaine, from Morris W. Moody, by using or threatening the use of force on Morris W. Moody, or by putting Morris W. Moody in fear to-wit: a handgun was displayed and fired at Morris W. Moody, resulting in serious bodily injury to Morris W. Moody, to-wit: a gunshot wound to the head which caused Morris W. Moody's death, and further did agree with Michael S. Bramley and Ethan D. Pennington, to commit the felony of robbery and did agree to drive to 410 South Independence Street, Tipton, Indiana, and there rob Morris W. Moody, and that Jason M. Roudebush did in fact drive to Tipton, Indiana, with Michael S. Bramley and Ethan D. Pennington, where Michael S. Bramley and Jason M. Roudebush entered the home of Morris W. Moody and Jason M. Roudebush did knowingly or intentionally attempt to take property from Morris W. Moody, to-wit:

> money and/or cocaine, which attempted taking was accomplished by using force or the imminent threat of force on Morris W. Moody, to-wit: a handgun was displayed and fired at Morris W. Moody, the firing of the gun resulting in serious bodily injury to Morris W. Moody, to-wit: a gunshot wound to the head which caused Morris W. Moody's death.

Id. at 19.

On August 17, 2004, Roudebush was released on his own recognizance pursuant to Ind. Criminal Rule 4(A). However, Roudebush was arrested in Hamilton County, Indiana, on November 6, 2004, for operating a vehicle while intoxicated and operating a vehicle with a BAC of 0.08 or more, and the State filed a motion to revoke his recognizance status. The trial court granted the State's motion, revoked Roudebush's recognizance status, and later held a hearing after Roudebush filed a motion to reestablish his recognizance release. Roudebush later filed a motion to reconsider and pointed out that the new offenses were class C misdemeanors, but the trial court denied the motion to reconsider. Finally, Roudebush filed a renewed motion for release, which the trial court also denied.

In December 2005, Roudebush filed a motion for change of venue due to pretrial publicity in Tipton County. The trial court found that the newspaper articles "contain[ed] no inflammatory material, misstatements, or distortions of the evidence which would require a change of venue" and that Roudebush did not meet "his burden of showing that there exists a community bias or prejudice sufficient to show that he cannot obtain a fair trial." Id. at 220. As a result, the trial court denied Roudebush's motion for change of venue. At the start of Roudebush's jury trial, he filed a supplement to his motion for

change of venue and a request for reconsideration. After voir dire, the trial court noted that "in sitting here the last day and a half listening to the responses of the jurors, I have not heard really what I expected to hear from them concerning their, their having seen or read any media accounts of what is going on. In fact, it was much lower than what I'd expected to hear." Transcript at 355. Consequently, the trial court denied Roudebush's request for reconsideration.

During voir dire at Roudebush's jury trial, the prosecutor made comments regarding accomplice liability and felony murder and gave a hypothetical example. Roudebush objected to the prosecutor's statements based, in part, upon "indoctrination" of the jury. Id. at 164. The trial court sustained Roudebush's objection as to the use of hypotheticals, but overruled the objection in all other respects. The prosecutor also made statements and asked questions regarding the effect on a witness's credibility if the witness had taken drugs or consumed alcohol. Roudebush objected to these statements and questions, but his objections were overruled.

During the jury trial, the State sought to admit State's Exhibit 12, part 3, which is an autopsy photograph. Roudebush objected, arguing that the photograph was unnecessary, gruesome, and would inflame the jury's prejudices. The trial court admitted State's Exhibit 12, part 3 over Roudebush's objections. The State also sought to admit State's Exhibit 44, which is a videotape of the crime scene and includes video footage of Moody's body. Roudebush objected that the videotape was cumulative and unduly prejudicial, but the trial court overruled the objection.

During the jury trial, as Roudebush was returning to the courtroom after lunch, the jury saw an officer escorting Roudebush into the courtroom and the officer was carrying restraints. Roudebush filed a motion for a mistrial, which the trial court denied because the jury did not see Roudebush in restraints.

Roudebush tendered a proposed instruction regarding inferences and two proposed instructions regarding abandonment, which the trial court declined to give. During closing arguments, the prosecutor referred to Roudebush as the "angel of death" and the "Grim Reaper." Transcript at 1271, 1279. Roudebush did not object to either of these statements.

The jury found Roudebush guilty as charged. The trial court entered judgment of conviction as to both felony murder and conspiracy to commit robbery as a class A felony. The trial court found Roudebush's criminal history as an aggravating factor and found no mitigating factors. The trial court then sentenced Roudebush to fifty-five years in the Indiana Department of Correction for the felony murder conviction.

I.

The first issue is whether the trial court erred by revoking Roudebush's recognizance status. On August 17, 2004, Roudebush was released on his own recognizance pursuant to Ind. Criminal Rule 4(A), which provides:

> No defendant shall be detained in jail on a charge, without a trial, for a period in aggregate embracing more than six (6) months from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge (whichever is later); except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of

> the court calendar; provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall make such statement in a motion for continuance not later than ten (10) days prior to the date set for trial, or if such motion is filed less than ten (10) days prior to trial, the prosecuting attorney shall show additionally that the delay in filing the motion was not the fault of the prosecutor. Provided further, that a trial court may take note of congestion or an emergency without the necessity of a motion, and upon so finding may order a continuance. Any continuance granted due to a congested calendar or emergency shall be reduced to an order, which order shall also set the case for trial within a reasonable time. Any defendant so detained shall be released on his own recognizance at the conclusion of the six-month period aforesaid and may be held to answer a criminal charge against him within the limitations provided for in subsection (C) of this rule.

However, Roudebush was arrested in Hamilton County, Indiana, on November 6, 2004, for operating a vehicle while intoxicated and operating a vehicle with a BAC of 0.08 or more, and the State filed a motion to revoke his recognizance status. The trial court granted the State's motion, revoked Roudebush's recognizance status, and later held a hearing after Roudebush filed a motion to reestablish his recognizance release. Roudebush later filed a motion to reconsider and pointed out that the new offenses were class C misdemeanors, but the trial court denied the motion to reconsider. Finally, Roudebush filed a renewed motion for release, which the trial court also denied.

The revocation of a release on personal recognizance is governed by Ind. Code § 35-33-8-5(d), which provides:

> The court may revoke bail or an order for release on personal recognizance upon clear and convincing proof by the state that:
> (1) while admitted to bail the defendant:
> (A) or the defendant's agent threatened or intimidated a victim, prospective witnesses, or jurors concerning the pending criminal proceeding or any other matter;

(B) or the defendant's agent attempted to conceal or destroy evidence relating to the pending criminal proceeding;
(C) violated any condition of the defendant's current release order;
(D) failed to appear before the court as ordered at any critical stage of the proceedings; or
(E) committed a felony or a Class A misdemeanor that demonstrates instability and a disdain for the court's authority to bring the defendant to trial;

(2) the factors described in IC 35-40-6-6(1)(A) and IC 35-40-6-6(1)(B) exist or that the defendant otherwise poses a risk to the physical safety of another person or the community; or

(3) a combination of the factors described in subdivisions (1) and (2) exists.

According to Roudebush, the trial court erred because none of the above statutory requirements to revoke his recognizance status were met.

The State does not argue that the trial court properly revoked Roudebush's recognizance status. Rather, the State argues that Roudebush's claim is moot because no remedy is available. The State contends that Roudebush should have filed a writ of habeas corpus or an interlocutory appeal to obtain relief from the trial court's error.

We begin by noting that "[a] violation of the six-month deadline in Criminal Rule 4(A) requires that an incarcerated defendant be released from jail, but does not result in complete discharge from criminal liability." Joyner v. State, 678 N.E.2d 386, 392 (Ind. 1997), reh'g denied. Generally, a trial court's failure to release a defendant on bond or on his own recognizance is reviewed through the filing of a petition for writ of habeas corpus, petition for writ of mandamus, or an interlocutory appeal. See, e.g., State ex rel. Bramley v. Tipton Circuit Court, 835 N.E.2d 479, 480-482 (Ind. 2005) (granting the defendant's petition for writ of mandamus after the trial court denied his motion for

recognizance release pursuant to Ind. Criminal Rule 4(A)); Vacendak v. State, 261 Ind. 317, 322, 302 N.E.2d 779, 782 (1973) (addressing the defendant's petition for writ of habeas corpus and remanding with instructions to hold a hearing on the State's petition for increase of bond); Tinsley v. State, 496 N.E.2d 1306, 1306 (Ind. Ct. App. 1986) (addressing an interlocutory appeal of bond conditions). Roudebush did not file any of these petitions or attempt in any way to appeal the trial court's revocation of his recognizance status. Rather, Roudebush waited until his direct appeal following his conviction to raise the issue.

In Ross v. State, 274 Ind. 588, 592-593, 413 N.E.2d 252, 255-256 (Ind. 1980), the defendant raised this same issue on direct appeal. The Indiana Supreme Court held:

> It is clear that this ruling was in error and that the defendant was entitled to be released on his own recognizance after the six-month period had expired. However, he was not entitled to discharge. The State was authorized to bring him to trial and this error does not require reversal.

274 Ind. at 593, 413 N.E.2d at 256.

Even if the trial court erred here, Roudebush does not demonstrate how he has been harmed or identify what remedy he seeks. As the State points out, Roudebush is not entitled to discharge, there is no bond to be returned to him, and he has already received credit time for the time he spent in jail prior to trial. We conclude that, as in Ross, reversal is not required here. See, e.g., id.

II.

The next issue is whether the trial court abused its discretion by denying Roudebush's motion for change of venue. In December 2005, Roudebush filed a motion

for change of venue due to pretrial publicity in Tipton County. The trial court found that the newspaper articles "contain[ed] no inflammatory material, misstatements, or distortions of the evidence which would require a change of venue" and that Roudebush did not meet "his burden of showing that there exists a community bias or prejudice sufficient to show that he cannot obtain a fair trial." Appellant's Appendix at 220. As a result, the trial court denied Roudebush's motion for change of venue. At the start of Roudebush's jury trial, he filed a supplement to his motion for change of venue and a request for reconsideration. After voir dire, the trial court noted that "in sitting here the last day and a half listening to the responses of the jurors, I have not heard really what I expected to hear from them concerning their, their having seen or read any media accounts of what is going on. In fact, it was much lower than what I'd expected to hear." Transcript at 355. Consequently, the trial court denied Roudebush's request for reconsideration.

We review a trial court's denial of a motion for change of venue for an abuse of discretion. Ward v. State, 810 N.E.2d 1042, 1049 (Ind. 2004), reh'g denied, cert. denied, 546 U.S. 926, 126 S. Ct. 395 (2005). Ind. Code § 35-36-6-1(a) provides that "[i]n any criminal action, the defendant may request a change of venue from the county by filing a verified motion for change of venue alleging that bias or prejudice against the defendant exists in that county."

The Indiana Supreme Court has held that "[a]t the heart of the decision on a motion for change of venue is the right to an impartial jury." Ward, 810 N.E.2d at 1048

(quoting Lindsey v. State, 485 N.E.2d 102, 106 (Ind. 1985), reh'g denied). "This right derives from the Sixth Amendment to the United States Constitution, as applied to the States by the Fourteenth Amendment, as well as Article One, Section Thirteen of the Indiana Constitution." Id. "A fair trial in a fair tribunal is a basic requirement of due process." Id. (quoting In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625 (1955)).

A trial court does not abuse its discretion by denying a motion to change venue "where voir dire reveals that the seated panel was able to set aside preconceived notions of guilt and render a verdict based solely on the evidence." Id. at 1049 (citing Elsten v. State, 698 N.E.2d 292, 294 (Ind. 1998)). The defendant must demonstrate the existence of two distinct elements: (1) prejudicial pretrial publicity and (2) the inability of jurors to render an impartial verdict. Id. "Prejudicial pretrial publicity is that which contains inflammatory material which would not be admissible at the defendant's trial or contains misstatements or distortions of the evidence given at trial." Id. (quoting Burdine v. State, 515 N.E.2d 1085, 1092 (Ind. 1987), reh'g denied).

Roudebush argues that the jury was exposed to pretrial publicity concerning Bramley's trial and sentencing and Bramley and Pennington's statements. However, Roudebush fails to demonstrate that the jurors were unable to render an impartial verdict or that the jurors were unable to set aside preconceived notions of guilt and render a verdict based solely upon the evidence. As the State noted, Roudebush does not point to any comments by the jurors or prospective jurors indicating that they were prejudiced against Roudebush and could not decide the case fairly based upon the evidence.

Consequently, we conclude that the trial court did not abuse its discretion by denying Roudebush's motion for change of venue. See, e.g., Wentz v. State, 766 N.E.2d 351, 357-358 (Ind. 2002) (holding that the defendant failed to demonstrate that the jurors were unable to disregard preconceived notions and render a verdict based on the evidence), reh'g denied; cf. Ward, 810 N.E.2d at 1047-1050 (holding that the trial court abused its discretion by denying the defendant's motion for change of venue where sixty-five percent of prospective jurors indicated that they had formed a belief concerning the defendant's guilt or innocence and a "pattern of deep and bitter hostility shown to be present throughout the community was clearly reflected in the juror questionnaires").

III.

The next issue is whether the trial court abused its discretion by overruling Roudebush's objections to the prosecutor's comments during voir dire. During voir dire, the prosecutor stated:

> Judge Lett read the charges that have been filed against the defendant and I'm not going to read those to you again but there are some, some issues involved in these charges that I want to discuss with you to see if you understand them, and if the Court were to instruct you under the law that certain legal principles apply in this case, could you follow the law. The defendant's charged with felony murder and in the State of Indiana felony murder, it doesn't necessarily mean that the defendant killed anyone. As a matter of fact, we're not going to present any evidence, we haven't alleged that he killed someone. What we've alleged is that that the defendant committed or attempted to commit a felony and during the involvement in trying to commit the felony someone was killed. Do you understand that? It'd be like, it'd be like I agree with Detective Frawley to go over here and rob a bank and we reach an agreement. Detective Frawley – I decide I'm going to be the wheel man or the getaway driver. I take Detective Frawley over to the bank, we've agreed that we're going to rob the bank, I've got a role, I've got a part on this team. His role on this team is to go in and take

> the money and use force to take the money. He's in there and he kills someone. I'm sitting out in the car. I agreed with him that we would do this. I agreed to rob the bank. Someone's dead. Now the law in Indiana is that, under accomplice liability theory is that I'm just as culpable and responsible for the death as he is. That's the law. If I aid, induce, or cause an offense I'm just as responsible as the guy that did it, the guy that pulled the trigger, the guy that held up the bank. Now some people might think that that's harsh, that it's – some people might not think it's fair. It's the law. You're going to be instructed that that's the law and you would be required to follow that instruction if you were chosen as a jury or a juror. There's a number of things that the courts in Indiana look at to determine whether or not a defendant who's been charged with, whether it's felony murder or being an accomplice, what is looked at to determine whether or not someone is guilty as an accomplice, and Indiana case law has held that . . . .

Transcript at 162-164. Roudebush then objected to the prosecutor's statements based, in part, upon "indoctrination" of the jury. Id. at 164. The trial court sustained Roudebush's objection as to the use of hypotheticals, but overruled the objection in all other respects. The prosecutor also made statements and asked questions regarding the effect on a witness's credibility if the witness had taken drugs or consumed alcohol. Roudebush objected to these statements and questions, but his objections were overruled.

On appeal, Roudebush argues that the trial court abused its discretion by overruling his objections to the prosecutor's comments. The State argues, and we agree, that Roudebush waived this issue. Although Roudebush objected to the prosecutor's comments, he did not request further curative measures. In Robinson v. State, the Indiana Supreme Court held that certain voir dire questions were improper and highly prejudicial. 260 Ind. 517, 522, 297 N.E.2d 409, 412 (1973). However, the court held that the defendant had waived any error because he "should have moved for a mistrial at

the conclusion of the state's case in chief, because it was within the context of the evidence presented that the propriety of the interrogation and the probability of harm therefrom had to be made." Id.; see also Didio v. State, 471 N.E.2d 1117, 1122 (Ind. 1984) (holding that a defendant waived his argument regarding the prosecutor's voir dire questioning where, although he objected, the defendant "did not ask for further curative action either by admonishing the prospective jurors or by granting a mistrial and a discharge of those prospective jurors present"); but see Bardonner v. State, 587 N.E.2d 1353, 1357 n.4 (Ind. Ct. App. 1992) (noting that the proper motion in such a case is a motion to strike or discharge the jury panel or challenge the array), trans. denied. Because Roudebush failed to ask for further curative actions, he has waived this argument.

Waiver notwithstanding, the trial court has broad discretionary power in regulating the form and substance of voir dire examination. Hopkins v. State, 429 N.E.2d 631, 634 (Ind. 1981). "The decision of the trial court will be reversed only if there is a showing of a manifest abuse of discretion and a denial of a fair trial." Logan v. State, 729 N.E.2d 125, 133 (Ind. 2000). "This will usually require a showing by the defendant that he was in some way prejudiced by the voir dire." Id.

"The function of voir dire examination is not to educate jurors, but to ascertain whether jurors can render a fair and impartial verdict in accordance with the law and the evidence." Coy v. State, 720 N.E.2d 370, 372 (Ind. 1999). "It is not the function of voir dire examination to 'inform' the jurors of anything." Hopkins, 429 N.E.2d at 634

(quoting Blackburn v. State, 390 N.E.2d 653, 656 (Ind. 1979)). The Indiana Supreme Court has indicated that it disapproves of "using voir dire to implant in jurors' minds ideas about the substantive facts of the case being tried." Id. On the other hand, the court approves of "using voir dire to inquire into jurors' biases or tendencies to believe or disbelieve certain things about the nature of the crime itself or about the particular line of defense." Id.

A prosecutor's attempt to indoctrinate the jury during voir dire may require reversal if his or her questions amount to misconduct, and if that misconduct subjects the defendant to grave peril. Coy, 720 N.E.2d at 372. The gravity of the peril is "determined by the probable persuasive effect on the jury's decision, not by the degree of impropriety of the conduct." Id. at 372-373.

Roudebush argues that the prosecutor improperly used voir dire to "'inform' jurors concerning specific principles of culpability, to wit: accomplice liability, as well as issues involving drinking and drugs." Appellant's Brief at 18. Our review of the prosecutor's comments and questions reveals that he was attempting to question the prospective jurors regarding their view on accomplice liability and a witness's use of drugs and alcohol, not indoctrinate the jury. See, e.g., Hopkins, 429 N.E.2d at 635 ("We see nothing wrong in inquiring into jurors' minds about their biases in regard to the credibility of witnesses with an eye toward removing prospective jurors predisposed to disbelieve those with certain characteristics, such as plea bargainers."). Moreover, Roudebush has failed to demonstrate how he suffered grave peril as a result of the

prosecutor's comments. Consequently, the trial court did not abuse its discretion by overruling Roudebush's objections to the prosecutor's comments. See, e.g., id.

IV.

The next issue is whether the trial court abused its discretion by admitting an autopsy photograph and a videotape of the crime scene. We review the trial court's ruling on the admission of evidence for an abuse of discretion. Noojin v. State, 730 N.E.2d 672, 676 (Ind. 2000). We reverse only where the decision is clearly against the logic and effect of the facts and circumstances. Joyner, 678 N.E.2d at 390.

Roudebush first argues that the trial court abused its discretion by admitting State's Exhibit 12, part 3, which is an autopsy photograph. The photograph depicts the entrance wound and skull fractures to Moody's skull after the scalp had been retracted. At trial, Roudebush objected to the admission of the photograph, arguing that the photograph was unnecessary, gruesome, and would inflame the jury's prejudices. The trial court admitted State's Exhibit 12, part 3 over Roudebush's objections. Roudebush also argues that the trial court abused its discretion by admitting State's Exhibit 44, which is a videotape of the crime scene and includes video footage of Moody's body. At trial, Roudebush objected that the videotape was cumulative and unduly prejudicial, but the trial court overruled the objection.

On appeal, Roudebush seems to argue that the photograph and videotape were gruesome and cumulative. The Indiana Supreme Court has addressed the admission of such photographs in numerous cases.

> Relevant evidence, including photographs, may be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice. "Even gory and revolting photographs may be admissible as long as they are relevant to some material issue or show scenes that a witness could describe orally." Photographs, even those gruesome in nature, are admissible if they act as interpretative aids for the jury and have strong probative value.

Wilson v. State, 765 N.E.2d 1265, 1272 (Ind. 2002) (internal citations omitted). In Wilson, the court held that while the photographs were "unpleasant," they "were relevant to material issues and to the testimony of the pathologist." Id. Thus, the court "decline[d] to find abuse of discretion by the trial court in admitting them over the defendant's objections." Id. at 1272-1273.

Similarly, here, the photograph demonstrated the gunshot entrance wound to Moody's skull and the videotape demonstrated the location of Moody's body. Both of the exhibits were interpretative aids for the jury and had strong probative value. While the contents of the exhibits are gruesome, we cannot say that the prejudicial effect of the exhibits substantially outweigh their probative value. The trial court did not abuse its discretion by admitting the exhibits. See, e.g., Coy, 720 N.E.2d at 375-376 (holding that the trial court did not abuse its discretion by admitting an autopsy photograph depicting a dowel rod going through the victim's head).

V.

The next issue is whether the trial court abused its discretion by denying Roudebush's motion for a mistrial, which alleged that the jury had seen his restraints. During the jury trial, as Roudebush was returning to the courtroom after a lunch break,

the jury saw an officer escorting Roudebush into the courtroom and the officer was carrying restraints. Roudebush filed a motion for a mistrial, which the trial court denied because the jury did not see Roudebush in restraints. After the jury issued its verdict, the parties asked the jurors individually whether they had seen Roudebush in restraints, and each of the jurors indicated that they had not seen him in restraints.

The granting of a mistrial lies within the sound discretion of the trial court, and we reverse only when an abuse of discretion is clearly shown. Davis v. State, 770 N.E.2d 319, 325 (Ind. 2002), reh'g denied. The general rule precludes presenting a defendant to the jury in handcuffs or shackles, but a court may need to do so in certain exceptional circumstances when restraint is necessary to prevent the escape of the prisoner, to protect those in the courtroom, or to maintain order. Id. Moreover, it is not an abuse of discretion for a trial court to deny a motion for mistrial because a juror has seen a defendant in handcuffs unless the defendant demonstrates actual harm. Id.

Here, at most, the jurors saw an officer with restraints in his hand. The Indiana Supreme Court has noted that "[p]otential jurors would reasonably expect that anyone in police custody would be restrained, regardless of the precise nature of the charge against the accused." Davis, 770 N.E.2d at 326. As the jurors did not see Roudebush in restraints, we conclude that the trial court did not abuse its discretion by denying Roudebush's motion for a mistrial. See, e.g., id. (holding that the trial court did not abuse its discretion by denying the defendant's motion for a mistrial where a juror momentarily saw him in handcuffs and the defendant did not demonstrate actual harm).

VI.

The next issue is whether the trial court erred by rejecting Roudebush's proposed instructions regarding inferences and abandonment. First, we note that Ind. Appellate Rule 46(A)(8)(e) provides: "When error is predicated on the giving or refusing of any instruction, the instruction shall be set out verbatim in the argument section of the brief with the verbatim objections, if any, made thereto." Roudebush did not set out the instructions verbatim in the argument section of his appellant's brief. Ordinarily, an appellant waives the issue by failing to comply with this appellate rule. See, e.g., Collins v. State, 509 N.E.2d 827, 831 (Ind. 1987) (holding under the prior appellate rule that the defendant waived the issue by failure to comply with Appellate Rule 8.3(A)(7), which required a verbatim copy of the refused instruction and the verbatim objections thereto, if any, in the argument section of the brief).

Waiver notwithstanding, we review a trial court's refusal to give a tendered instruction for an abuse of discretion. Springer v. State, 798 N.E.2d 431, 433 (Ind. 2003), reh'g denied. "We consider (1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions that are given." Id.

A. Instruction Regarding Inferences.

Roudebush tendered the following instruction regarding inferences:

> During the trial you have heard the attorneys use the term "inference," and in their arguments they have asked you to infer, on the

> basis of your reason, experience and common sense, from one or more established facts, the existence of some other fact.
>
> An inference is not a suspicion or a guess. It is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact which you know exists.
>
> There are times when different inferences may be drawn from facts, whether proved by direct or circumstantial evidence. The State asks you to draw one set of inferences, while the attorneys for the accused ask you to draw another. It is for you, and you alone, to decide what inferences you will draw.
>
> The process of drawing inferences from facts in evidence is not a matter of guesswork or speculation. An inference is a deduction or conclusion which you, the jury, are permitted to draw – but not required to draw – from the facts which have been established by either direct or circumstantial evidence. In drawing inferences, you should exercise your common sense.
>
> So, while you are considering the evidence presented to you, you are permitted to draw, from the facts which you find to be proven, such reasonable inferences as would be justified in light of your experience.
>
> Here again, let me remind you that, whether based upon direct or circumstantial evidence, or upon the logical, reasonable inferences drawn from such evidence, you must be satisfied of the guilt of the accused beyond a reasonable doubt before you may convict.

Appellant's Appendix at 359.

Roudebush argues that this instruction was supported by the evidence, correctly stated the law, and was not covered by other instructions. However, the State points out that final instruction number 11 instructed the jury that "[k]nowledge or intent may be inferred from facts and circumstances presented in each case. Intent may be inferred from surrounding circumstances and when circumstances reasonably permit inference of intent."[4] Id. at 383. Further, final instruction number 15 instructed the jury regarding

[4] The State also argues that Roudebush waived this argument because he did not object to the denial of his proposed instruction no. 3. However, the Indiana Supreme Court has held that "[a]n objection to a rejection of a properly tendered instruction is not required." Brown v. State, 703 N.E.2d

reasonable doubt, the burden of proof, and noted that "[a] Defendant must not be convicted on suspicion or speculation." Id. at 387. We conclude that the proposed instruction was covered by other instructions, and the trial court did not abuse its discretion by refusing Roudebush's proposed instruction. See, e.g., Alvies v. State, 795 N.E.2d 493, 505-506 (Ind. Ct. App. 2003) (holding that the defendant's tendered instruction, which focused on impeachment of a witness as a result of a witness's reputation in the community, was covered by the other instructions regarding witness credibility), trans. denied.

B. Instructions Regarding Abandonment.

> Roudebush tendered the following two instructions regarding abandonment:
>
> When two or more persons combine to commit a crime, each is criminally responsible for the acts of his confederates committed in the furtherance of the common design. The act of each is the act of all. However, one who had aided and encouraged the commission of a crime may nevertheless withdraw all his aid and encouragement before its completion, and thus not be criminally liable for the completed crime. The State bears the burden of disproving abandonment beyond a reasonable doubt.

Appellant's Appendix at 364.

> One who has aided and encouraged a crime's commission may nevertheless, before its completion, withdraw all his aid and encouragement and escape criminal liability for the completed crime. The State has the burden of disproving abandonment beyond a reasonable doubt.

Id. at 365.

1010, 1019 (Ind. 1998) (citing Carroll v. Statesman Ins. Co., 509 N.E.2d 825, 827 (Ind. 1987), reh'g denied; see also Ollis v. Knecht, 751 N.E.2d 825, 832 n.1 (Ind. Ct. App. 2001) ("[T]o preserve error for appeal arising out of a tendered instruction, a party is not required to object to the refusal to give its own properly tendered instruction."), reh'g denied, trans. denied.

The defense of abandonment is governed by Ind. Code § 35-41-3-10, which provides: "With respect to a charge under IC 35-41-2-4 [aiding, inducing, or causing an offense], IC 35-41-5-1 [attempt], or IC 35-41-5-2 [conspiracy], it is a defense that the person who engaged in the prohibited conduct voluntarily abandoned his effort to commit the underlying crime and voluntarily prevented its commission." Roudebush argues that these abandonment instructions were supported by the evidence as presented through his statement to the police, which was admitted as State's Exhibit 48. However, Roudebush's statement indicates that he was "done with it" and left the residence only after he saw Bramley and Moody fighting. Defendant's Exhibit B at 40; State's Exhibit 48. "To be considered voluntary, the decision to abandon must originate with the defendant, not as a result of extrinsic factors that increase the probability of detection." Estep v. State, 716 N.E.2d 986, 987 (Ind. Ct. App. 1999).

We conclude that because Roudebush's abandonment was made in response to an extrinsic factor and was not a product purely of his own volition, the evidence did not support the giving of these instructions. The trial court did not err by refusing to give the proposed abandonment instructions. See, e.g., Patterson v. State, 729 N.E.2d 1035, 1041 (Ind. Ct. App. 2000) (holding that the trial court did not err in refusing to give an abandonment instruction where the evidence indicated that the defendant's abandonment was made in "response to an extrinsic factor, namely, the probability of detection, and was not a product purely of his own volition").

VII.

The next issue is whether the prosecutor's comments during closing argument resulted in fundamental error. During closing arguments, the prosecutor referred to Roudebush as "the angel of death" and "the Grim Reaper." Transcript at 1271, 1279. Roudebush did not object to either of these statements. Recognizing that he did not object, Roudebush argues that the prosecutor's comments amounted to fundamental error.

In reviewing a properly preserved claim of prosecutorial misconduct, we determine: (1) whether the prosecutor engaged in misconduct, and if so, (2) whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she would not have been subjected. Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006). Whether a prosecutor's argument constitutes misconduct is measured by reference to case law and the Rules of Professional Conduct. Id. The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct. Id.

Where, as here, a claim of prosecutorial misconduct has not been properly preserved, our standard for review is different from that of a properly preserved claim. Id. More specifically, the defendant must establish not only the grounds for the misconduct but also the additional grounds for fundamental error. Id. Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue. Id. 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." Id.

The Indiana Supreme Court has found no prosecutorial misconduct in a variety of cases involving name-calling during closing arguments where the prosecutor was commenting on the evidence. See, e.g., Miller v. State, 623 N.E.2d 403, 408 (Ind. 1993) (finding no error where the prosecutor called the defendant a "mean s.o.b." because he was merely commenting on the evidence), reh'g denied; Wrinkles v. State, 749 N.E.2d 1179, 1197 (Ind. 2001) (holding that the prosecutor's reference to the defendant as a "psychopath" and "sociopathic" was a fair characterization of the evidence given testimony that the defendant had been diagnosed with at least five mental illnesses), cert. denied, 535 U.S. 1019, 122 S. Ct. 1610 (2002); Cooper, 854 N.E.2d at 837 (holding that a prosecutor's comments that the defendant was "a back shooter and a woman beater" were fair commentary on the facts introduced at trial).

However, this case appears to be more comparable to Ellison v. State, 717 N.E.2d 211, 214 (Ind. Ct. App. 1999), trans. denied, where the prosecutor repeatedly called the defendant a "murderer." In Ellison, we held: "Certainly, the prosecutor's comments in this case fall into the 'gray area' between fair comment and personal expressions of belief. Prosecutors who enter this area do so at their own peril, risking both mistrial and appellate reversal solely as a result of their advocacy." 717 N.E.2d at 214. The prosecutor's references to Roudebush as the "angel of death" and "Grim Reaper" "at least approached if not crossed the line of improper commentary." Cooper, 854 N.E.2d at 837.

Even assuming misconduct in this case, Roudebush has not demonstrated that the harm or potential harm done by the prosecutor's comments was substantial. Police found

Roudebush's fingerprints on Moody's truck. A gun belonging to Bramley was recovered from his neighbor. Moody's blood splatter and hair were found on Bramley's gun, and the State Police Laboratory determined that the bullet that killed Moody was fired from Bramley's gun. Roudebush gave a videotaped statement to the police and admitted that he, Bramley, and Pennington agreed to steal Moody's cocaine and/or money. Roudebush admitted that he drove the three to Moody's residence, that he and Bramley went into Moody's house, and that Bramley shot Moody. Given the evidence presented against Roudebush, it is extremely unlikely that the prosecutor's comments contributed to his convictions. See, e.g., Cooper, 854 N.E.2d at 838 ("It strains credulity to believe that the jury found Cooper guilty of murder for any reason other than the evidence introduced at trial. Any harm done by the prosecutor's remark was de minimis, not substantial. And the resulting error if any did not result in denying Cooper fundamental due process.").

VIII.

The next issue is whether the evidence is sufficient to sustain Roudebush'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.

The offense of felony murder is governed by Ind. Code § 35-42-1-1, which provides: "A person who: . . . (2) kills another human being while committing or attempting to commit . . . robbery . . . commits murder, a felony." Roudebush argues that the charging information alleged that he killed Moody while attempting to commit robbery but the evidence demonstrated that Bramley killed Moody. Roudebush's argument is unavailing as the Indiana Supreme Court has held that "[a]ll participants in a robbery or attempted robbery which results in killing by one robber are deemed equally guilty of murder, regardless of which participant actually killed the victim." Williams v. State, 706 N.E.2d 149, 157 (Ind. 1999), reh'g denied, cert. denied, 529 U.S. 1113, 120 S. Ct. 1970 (2000). Moreover, it is unnecessary that the defendant actually be charged as an accomplice. Hampton v. State, 719 N.E.2d 803, 807 (Ind. 1999). The Indiana statute governing accomplice liability does not establish it as a separate crime, but merely as a separate basis of liability for the crime charged. Id.; see Ind. Code § 35-41-2-4. Where the facts in the case raise a reasonable inference that the crime was carried out with an accomplice, it is appropriate for the judge to give such an instruction. Hampton, 719 N.E.2d at 807. Roudebush admitted that he, Bramley, and Pennington agreed to steal Moody's cocaine and/or money. Roudebush also admitted that he drove the three to Moody's residence, that he and Bramley went into Moody's house, and that Bramley shot Moody. Regardless of the fact that Roudebush did not shoot Moody, we conclude that the State presented evidence of probative value from which the jury could have found Roudebush guilty of felony murder.

The offense of conspiracy to commit robbery, a class A felony, is governed by Ind. Code § 35-41-5-2. To convict Roudebush of conspiracy to rob Moody, the State was required to prove that: (1) with the intent to commit robbery, (2) Roudebush agreed with another person to commit robbery, and (3) an overt act in furtherance of the agreement was performed. Fry v. State, 748 N.E.2d 369, 374 (Ind. 2001). Our review of the evidence reveals that Roudebush admitted that he, Bramley, and Pennington agreed to steal Moody's cocaine and/or money. Roudebush admitted that he drove the three to Moody's residence, that he and Bramley went into Moody's house, and that Bramley shot Moody. This evidence and the evidence discussed above demonstrates that the State presented evidence of probative value from which the jury could have found Roudebush guilty of conspiracy to commit robbery, a class A felony. See, e.g., Fry, 748 N.E.2d at 374 (holding that the evidence was sufficient to sustain the defendant's conviction for conspiracy to commit robbery).

IX.

The next issue is whether Roudebush's sentence violates the prohibition against double jeopardy. Article I, Section 14 of the Indiana Constitution provides in part that: "No person shall be put in jeopardy twice for the same offense." The Indiana Supreme Court held in Richardson v. State that:

> two or more offenses are the "same offense" in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. Both of these considerations, the statutory elements test and the actual evidence test, are

> components of the double jeopardy "same offense" analysis under the Indiana Constitution.

717 N.E.2d 32, 49-50 (Ind. 1999) (footnote omitted). Roudebush argues that his convictions and sentences for both felony murder and conspiracy to commit robbery violate the prohibition against double jeopardy.

First, we note that, although the trial court entered judgment of conviction on both guilty verdicts, the trial court only sentenced Roudebush for felony murder. The trial court did not enter a sentence for the conspiracy to commit robbery conviction. Thus, the trial court's sentence did not violate the prohibition against double jeopardy.

As for the judgments of conviction, the State concedes that the entry of judgments of conviction for both verdicts violates the Richardson actual evidence test. Appellee's Brief at 36-37 (citing Laux v. State, 821 N.E.2d 816, 819 (Ind. 2005)). Consequently, we vacate the judgment of conviction for conspiracy to commit robbery, and we leave standing the felony murder conviction. See, e.g., Jenkins v. State, 726 N.E.2d 268, 271 (Ind. 2000) (vacating a robbery conviction based upon double jeopardy but leaving the felony murder conviction in place).

X.

The next issue is whether the trial court abused its discretion in sentencing Roudebush. 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). An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." Pierce v. State, 705 N.E.2d 173, 175 (Ind.

1998). Roudebush's offenses were committed prior to the April 25, 2005, sentencing statute amendments. Thus, we apply the pre-April 25, 2005, sentencing statutes. Under those statutes, in order for a trial court to impose an enhanced sentence, it was required to: (1) identify the significant aggravating factors and mitigating factors; (2) relate the specific facts and reasons that the court found to those aggravators and mitigators; and (3) demonstrate that the court has balanced the aggravators with the mitigators. Veal v. State, 784 N.E.2d 490, 494 (Ind. 2003).

The trial court here found Roudebush's criminal history as an aggravating factor and found no mitigating factors. The trial court then sentenced Roudebush to fifty-five years in the Indiana Department of Correction for the felony murder conviction, which was the presumptive sentence for felony murder. Roudebush argues that the trial court abused its discretion by considering his criminal history as an aggravating factor because his misdemeanor and felony convictions are "illustrative of substance abuse and property taking, not violence." Appellant's Brief at 33.

The Indiana Supreme Court has held that "[t]he significance of a criminal history 'varies based on the gravity, nature and number of prior offenses as they relate to the current offense.'" Morgan v. State, 829 N.E.2d 12, 15 (Ind. 2005) (quoting Wooley v. State, 716 N.E.2d 919, 929 n.4 (Ind. 1999), reh'g denied). As examples, the court has stated that "a criminal history comprised of a prior conviction for operating a vehicle while intoxicated may rise to the level of a significant aggravator at a sentencing hearing for a subsequent alcohol-related offense. However, this criminal history does not

command the same significance at a sentencing hearing for murder." Id. Further, "[a] conviction for theft six years in the past would probably not, standing by itself, warrant maxing out a defendant's sentence for class B burglary. But, a former conviction for burglary might make the maximum sentence for a later theft appropriate." Id. at 15-16.

Here, Roudebush has a 1993 juvenile adjudication for minor in consumption of alcohol and adult convictions for theft as a class D felony in 1995, criminal trespass as a class A misdemeanor in 1995, attempted theft as a class D felony in 1995, theft as a class D felony in 1995, two counts of possession of marijuana as class A misdemeanors in 1995, forgery as a class C felony in 1995, possession of marijuana as a class D felony in 1996, and operating a vehicle while intoxicated as a class C misdemeanor in 2005. Roudebush has also violated his probation numerous times.

The State points out that the underlying felony here was attempted robbery and that the murder occurred while Roudebush and his accomplices were attempting to steal Moody's money and/or cocaine. The instant offense is a continuation and escalation of Roudebush's previous property crimes. Based on Roudebush's numerous previous property crimes and their relationship to the attempted robbery underlying the instant felony murder conviction, we conclude that the trial court did not abuse its discretion by using Roudebush's criminal history as an aggravating factor. See, e.g., Corbett v. State, 764 N.E.2d 622, 631-632 (Ind. 2002) (holding that the trial court did not abuse its discretion by using the defendant's criminal history, which consisted of convictions for burglary and theft, as an aggravating factor in his sentence for murder and robbery).

XI.

The final issue is whether the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "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). Roudebush asks that we impose the minimum sentence of forty-five years.

Our review of the nature of the offense reveals Roudebush, Bramley, and Pennington conspired to take Moody's money and/or cocaine. Roudebush drove the trio to Moody's house, he and Bramley attacked Moody and chased Moody into the house, he ordered Bramley to shoot Swanson's dog, he drove them back to Moody's house later in the evening, and he entered the house with Bramley. Although Roudebush did not shoot Moody, he was an active participant in the attempted robbery that resulted in Moody's death. Our review of the character of the offender reveals that Roudebush has numerous convictions for property crimes and substance abuse offenses. He violated his probation numerous times, resulting in a revocation of his suspended sentences. He was released from the Indiana Department of Correction in February 2000.

Given the facts of the offense and Roudebush's criminal history, we cannot say that the fifty-five-year presumptive sentence is inappropriate. See, e.g., Fuller v. State,

852 N.E.2d 22, 26 (Ind. Ct. App. 2006) (holding that the fifty-five-year advisory sentence for murder was not inappropriate), trans. denied.

For the foregoing reasons, we affirm Roudebush's conviction and sentence for felony murder and vacate his judgment of conviction for conspiracy to commit robbery, a class A felony.

Affirmed in part, vacated in part.

FRIEDLANDER, J. and RILEY, J. concur