

STATEMENT OF THE CASE

Appellant-Defendant, Herbert Johnson (Johnson), appeals his sentence for murder, a felony, Ind. Code § 35-42-1-1, and robbery, as a Class B felony, I.C. § 35-42-5-1.

We affirm.

ISSUES

Johnson raises one issue for our review, which we restate as the following two issues:

- (1) Whether the trial court abused its discretion when sentencing him by relying upon the fact that he lied in wait as an aggravating factor; and
- (2) Whether his aggregate sentence of seventy-five years is inappropriate when the nature of his offenses and character are considered.

FACTS AND PROCEDURAL HISTORY

We previously described the facts and procedural history in Johnson's first direct appeal by stating as follows:

On the night of August 2, 2006, cab driver Clarence Hoosier was shot and killed in the course of a robbery. On August 17, 2006, the State filed charges against Johnson arising from that event. Specifically, the State charged Johnson with murder; felony murder; robbery, as a class A felony; conspiracy to commit robbery, as a class A felony; and criminal confinement, as a class B felony. Charges arising from the shooting and robbery of Hoosier were also filed against Jamaar Bess and Rodney Harris.

On June 6, 2007, a plea agreement between Johnson and the State was tendered to the trial court. Therein, Johnson agreed to plead guilty to murder and to robbery as a class B felony; the State agreed to dismiss the felony murder, conspiracy to commit robbery, and criminal confinement charges, *and* to not "pursue any possible robbery charges against" Johnson in four other pending investigations. The agreement provided that "all terms and conditions of sentencing . . . , including whether the sentences to be imposed are to be consecutive or concurrent," were "left to the discretion of the Court."

At the plea hearing, Johnson testified that he “knew” that he, Harris, and Bess were taking a loaded gun to use in their robbery of the cab driver. He further testified that the threesome “knowingly took, while armed with deadly [sic] weapon,” Hoosier’s money and cell phone from him, and that in the commission of the robbery, Hoosier suffered “serious bodily injury, specifically, a gunshot wound to the chest.” Johnson testified that it was “correct” that he was “guilty not only of the murder, but . . . guilty of the robbery as well.” The trial court accepted Johnson’s guilty plea and entered judgment of conviction.

On June 27, 2007, the trial court held the sentencing hearing. The State asserted at sentencing that Johnson’s lack of criminal history should be given little weight in light of his having been possibly linked to four other robberies. It further asserted that had the matter gone to trial, it believed the evidence would have shown that Johnson fired the fatal gunshot, as well as that it was his idea to commit the robbery and to target a cab driver as the victim. However, the State admitted that initially all of the defendants had given statements that minimized their involvement in the crime. Finally, the State asserted that Johnson’s lying-in-wait, or ambush, of the victim was an appropriate aggravating factor. Johnson urged the trial court “to review the criminal histories and juvenile histories of the co-Defendants” as to whether “their statements . . . that [Johnson] was the shooter” were credible. Johnson also asserted that the other alleged robberies could not be considered “as proper aggravators . . . because they haven’t been proven.” Johnson further urged the trial court to “compare” his character to “the character of the co-Defendants.”

The trial court found that Johnson’s “young age, . . . seventeen at the time that this crime was committed,” was mitigating. It further found “his lack of criminal history” was “mitigating,” but did not “give that . . . great weight” because of the “other uncharged robberies” that were noted as “part of the plea agreement.” The trial court found “the nature and circumstances of the crime,” specifically the “lying-in wait” for the cab driver, to be “a very aggravating circumstance.” Apparently the trial court took judicial notice of other proceedings not involving Johnson, as it further stated as follows:

I will also note that based on what I’ve heard and I find it incredible [sic] is that the other two co-Defendants have said that Mr. Johnson was the shooter and I believe based on the evidence this Court has heard over the course of the pendency of

this case, that that in fact was true and that's all just based on what I've heard here in court.

The trial court then found "lying-in wait" to be "a very aggravating circumstance," and concluded that "the aggravators outweigh[ed] the mitigators." It imposed the maximum sentence of sixty-five years for murder and ten years for robbery, as a class B felony – the sentences to be served consecutively, for a total of seventy-five years.

Johnson v. State, No. 49A02-0707-CR-634, slip op. at 2-4 (Ind. Ct. App. Feb. 22, 2008) (citations omitted). On appeal, we concluded that the trial court had inappropriately referred to what it had learned from the two "co-Defendants" (Bess and Harris) in other proceedings when sentencing Johnson and remanded to the trial court for re-sentencing.

Upon remand, the trial court conducted another sentencing hearing at which it incorporated all testimony presented at Johnson's previous sentencing hearing. Additionally, the State called Detective Jeffrey Patterson (Detective Patterson) of the Indianapolis Metropolitan Police Department. Detective Patterson testified that he had separately interviewed Bess and Harris during his investigation of the robbery and murder of Hoosier. Bess stated that the robbery was Johnson's idea because he needed money and that Johnson was the one who shot Hoosier. Harris confirmed Bess' account that the idea of the robbery was Johnson's and that Johnson shot Hoosier. Harris also stated that Johnson struck Hoosier in the head with the gun and drug him out of his cab by his neck prior to shooting him.

At the close of evidence the trial court made a sentencing statement on the record by stating:

In sentencing [Johnson] the [c]ourt's going to find as mitigating his young age. Court is also going to find as mitigating the fact that he has a minimal criminal history and [c]ourt is going to find as mitigating the fact that he accepted his

responsibility for his own actions, I'm going to give that little weight because I believe that he got the benefit of his plea agreement to the extent that the State could have filed four additional robbery charges and they did not in this case. I find as aggravating the nature and the circumstances of the crime committed, it's based on the totality of the circumstances. This evidence by the testimony here today of Det[ective] Patterson and his interviews of Jamaar Bess and Rodney Harris that [Johnson] was the shooter and that [Johnson] was the planner, the instigator and the shooter. And [c]ourt also as stated originally based on the evidence it has heard here through Det[ective] Patterson that certainly three of these individuals were lying-in-wait and did in fact ambush Mr. Hoosier and [c]ourt also believes that what it did hear from Det[ective] Patterson, agrees with the State that the statements given by those two individuals were in fact corroborated by physical evidence in this case and for all of those reasons the [c]ourt finds that the nature and the circumstances in this case are aggravating.

(Transcript pp. 58-59). Based on these considerations, the trial court sentenced Johnson to the same sentence it had imposed prior to Johnson's first direct appeal: sixty-five years for murder and ten years for robbery to be served consecutively in the Department of Correction.

Johnson now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Standard of Review

Johnson challenges his sentence on appeal. As long as a sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Anglemeyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the trial court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.* One way in which a trial court may abuse its sentencing discretion is by applying aggravating factors that are improper as a matter of law. *Id.* at 490-491. Another

example includes entering a sentencing statement that explains the reasons for imposing a sentence, including aggravating and mitigating factors, which are not supported by the record. *Id.*

Regardless of whether the trial court has sentenced the defendant within its discretion, we also have the authority to independently review the appropriateness of a sentence authorized by statute through Appellate Rule 7(B). *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008). That rule permits us to revise a sentence 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. *Anglemyer*, 868 N.E.2d at 491. Where a defendant asks us to exercise our appropriateness review, the burden is on the defendant to persuade us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). “Ultimately the length of the aggregate sentence and how it is to be served are the issues that matter.” *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). Whether we regard a sentence as appropriate 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 a myriad of other considerations that come to light in a given case. *Id.*

II. Abuse of Discretion

Johnson argues that the trial court abused its discretion when sentencing him. Specifically, Johnson argues:

In non-capital cases, lying in wait is merely a part of the totality of the circumstances of the crime which the trial judge may consider as an aggravator. It was, therefore, improper for the trial judge in Johnson’s case to

find the “lying in wait” and the totality of the circumstances to be separate aggravators.

(Appellant’s Br. p. 6) (emphasis in original). However, the trial court stated that the “nature and circumstances of the crime” were aggravating, “based on the totality of the circumstances.” (Tr. pp. 58-59). The trial court found that included in the totality of the circumstances was the fact that Johnson lay in wait when committing his crime, not that each was a separate aggravating factor. Thus, the trial court found that the nature and circumstances of the crime were aggravating based in part on the fact that Johnson was “lying in wait.”

In a related argument, Johnson contends that the aggravator “lying in wait” should not have been applied because the trial court did not specifically find that he had lied in wait with the intent to kill or inflict bodily injury, citing to *Krempez v. State*, 872 N.E.2d 605, 611 (Ind. 2007). However, *Krempez* was a case that involved a sentence of life imprisonment without parole. Indiana Code section 35-50-2-9 provides that the State may seek either a death sentence or sentence of life imprisonment without parole for murder by alleging at least one of several specific aggravating circumstances, including that “the defendant committed the murder by lying in wait.”

Here, however, the State did not seek a death sentence or sentence of life imprisonment without parole. As we explained above, the trial court considered the fact that Johnson had lied in wait to commit his crimes as a part of the nature and circumstances of his crime which deserved treatment as an aggravating factor. Outside of instances where the

State has sought a death sentence or life imprisonment without parole, we conclude that that the trial court may properly consider the fact that the defendant was “lying in wait” to be a part of the nature and circumstances of the crime which deserve treatment as aggravating factor without finding the intent to kill or injure while “lying in wait.” *See Roney v. State*, 872 N.E.2d 192, 204 n.6 (Ind. Ct. App. 2007), *trans. denied* (noting by footnote to its conclusion that lying in wait was a valid aggravator that “[w]hether Roney’s actions prior to the encounter . . . were sufficient to constitute lying in wait for purposes of the death penalty statute is immaterial.”). Altogether, we conclude that the trial court did not abuse its discretion when determining that the nature and circumstances of the crime were aggravating factors.

III. *Appropriateness of Johnson’s Sentence*

Additionally, Johnson argues that his sentence is inappropriate when the nature of his offenses and character are considered. As for the nature of the offenses, Johnson contends that the State failed to prove that any of the men planned on killing the cab driver prior to the robbery. Additionally, Johnson states, “[d]uring the robbery, one of the men, for some unknown reason, shot the cab driver. Under the law, Johnson is responsible for that death *even though he did not pull the trigger.*” (Appellant’s Br. p. 7) (emphasis added). To the contrary, the trial court found that Johnson did pull the trigger. At the first sentencing hearing, Johnson claimed that he had not fired the shot that killed Hoosier, but at the second sentencing hearing the trial court was presented with evidence, which it found to be credible, that Johnson was the shooter. We are not in a position to contradict the trial court’s findings

based on our review of a cold record. *See, e.g., Coleman v. State*, 741 N.E.2d 697, 701 (Ind. 2000), *reh'g denied, cert. denied*, 534 U.S. 1057 (2001) (“We cannot effectively evaluate the credibility of this evidence from a cold record.”). Further, the trial court found that Johnson was the instigator of the crime. In that crime, a cab driver was summoned to a place where Johnson and two others ambushed him, drug him out of his cab, choked him, and then Johnson murdered him. Johnson has not persuaded us that his sentence is inappropriate based upon the nature of his offenses.

As for Johnson’s character, Johnson contends that his lack of criminal history and young age require a revision of his sentence. We have not been presented with the written plea agreement in the record of this appeal, but we know from Johnson’s prior appeal and a statement by the trial court that he exchanged his plea of guilty for the State’s promise that it would not bring charges against him in four other robbery investigations. We find this noteworthy in that the threat of those charges was substantial enough to motivate Johnson to plead guilty. As such, Johnson’s claim that his sentence is inappropriate due to his lack of criminal history is unpersuasive.

As for Johnson’s youth, our supreme court has explained:

Age is neither a statutory nor a per se mitigating factor. There are cunning children and there are naïve adults. In other words, focusing on chronological age, while often a shorthand for measuring culpability, is frequently not the end of the inquiry for people in their teens and early twenties. There are both relatively old offenders who seem clueless and relatively young ones who appear hardened and purposeful.

Monegan v. State, 756 N.E.2d 499, 504 (Ind. 2001) (citations and internal quotations omitted). The facts found by the trial court persuade us that Johnson would fall in the category of a relatively young offender who is hardened and purposeful due to the heinous nature of his crime and the fact that he negotiated with the State to prevent the filing of charges for four other robberies. Altogether we are not persuaded that Johnson's sentence is inappropriate considering his character.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion when sentencing Johnson and that his sentence is not inappropriate when the nature of his offenses and his character are considered.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.