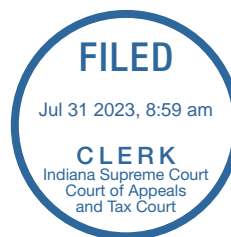


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



ATTORNEY FOR APPELLANT

Christopher Kunz
Marion County Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana
Nicole D. Wiggins
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Fernando Juan Bornstein,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

July 31, 2023

Court of Appeals Case No.
22A-CR-3017

Appeal from the Marion Superior
Court

The Honorable Angela Dow
Davis, Judge

Trial Court Cause No.
49D27-1912-MR-48588

Memorandum Decision by Judge Weissmann
Judges Riley and Bradford concur.

Weissmann, Judge.

- [1] A jury convicted Fernando Bornstein of felony murder for the death of Meliton Angel Salazar, who died following a robbery committed by Bornstein and three accomplices. On appeal, Bornstein first attacks his conviction by alleging that the State presented insufficient evidence. He then challenges his sentence, arguing that the trial court abused its discretion by relying on improper aggravating factors. Finding no error, we affirm.

Facts

- [2] Bornstein's friend, Jacqueline Lizarraga, went on a date with Salazar in October 2019. Afterward, Bornstein persuaded Lizarraga, her friend Andy Rosales, and her boyfriend Jesus Oviedo to rob Salazar under the guise of a second date. According to Bornstein's plan, Lizarraga would lure Salazar to the White River Parkway bridge in Indianapolis. Once there, Bornstein and Oviedo would attack Salazar and disarm him. Rosales would then steal Salazar's belongings and keys to his car.
- [3] Setting Bornstein's plan in motion, Lizarraga contacted Salazar and arranged for him to walk with her along the White River Parkway. Salazar met Lizarraga at the parkway, and the two began to walk. As Salazar and Lizarraga walked under the bridge, Bornstein and Oviedo jumped out of the shadows and attacked Salazar. While Bornstein and Salazar were tussling for the gun in Salazar's pants, Oviedo came from behind them and hit Salazar in the head with a hammer around a dozen times. At the same time, the gun went off

shooting Salazar in the leg. The group then grabbed Salazar's belongings and ran off, leaving Salazar under the bridge.

[4] A few hours later, Salazar was discovered under the bridge still breathing. The responding police officer described Salazar as in a "very, very mutilated bloody condition" and with a weak pulse. Tr. Vol. III, p. 118. Salazar died from his injuries the next day. During the ensuing police investigation, Detective David Miller determined that Lizarraga was Salazar's last known contact. Detective Miller therefore interviewed Lizarraga that night.

[5] At first, Lizarraga lied to Detective Miller about the murder because she had been warned by Oviedo and Bornstein not to say anything. But a few months later, Lizarraga came clean. She informed the detective about the events surrounding Salazar's death and the State charged Bornstein with felony murder. Bornstein was found guilty of felony murder by a jury.

[6] At Bornstein's sentencing hearing, the trial court found multiple aggravating and mitigating circumstances. As aggravating circumstances, Bornstein had a lengthy arrest history, he was on probation at the time of the robbery, and the harm and injury suffered by the victim left him "unrecognizable." Tr. Vol. IV, p. 228. The court also noted that Bornstein did not help Salazar and laughed and joked about his death on Snapchat in the immediate aftermath. The mitigating circumstances included Bornstein's troubled childhood, undiagnosed and untreated mental health issues, newfound remorse for his actions, and youth. Finding the mitigating and aggravating circumstances were equally

balanced, the trial court imposed the advisory sentence of 55 years imprisonment.

Discussion and Decision

I. Sufficiency of the Evidence

- [7] In reviewing a claim for insufficient evidence, an appellate court only considers the evidence favorable to the judgment and any reasonable inferences drawn from it. *Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009). We do not reweigh evidence or judge the credibility of witnesses. *Id.* And we will affirm the conviction “unless no reasonable factfinder could determine that each element of the crime was proved beyond a reasonable doubt.” *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007).
- [8] Bornstein was convicted of felony murder. A felony murder conviction requires proof beyond a reasonable doubt that the defendant acted knowingly or intentionally to kill a person while committing or attempting to commit a felony: in this case, a robbery. Ind. Code § 35-42-1-1. While Bornstein did not directly kill Salazar, a defendant can be found criminally responsible for the death of another during the commission of a qualifying felony. *Dalton v. State*, 56 N.E.3d 644, 648 (Ind. Ct. App. 2016). This happens when the defendant reasonably should have “foreseen that the commission of or attempt to commit the contemplated felony would likely create a situation which would expose another to the danger of death.” *Id.* (quoting *Palmer v. State*, 704 N.E.2d 124, 126 (Ind. 1999)); see also *Sage v. State*, 114 N.E.3d 923, 930 (Ind. Ct. App. 2018)

(“On review, we must determine whether the defendant’s conduct caused or contributed to the victim’s death or set in motion a series of events that could have reasonably been expected and did result in death.”).

- [9] Bornstein claims that Salazar’s death resulted from Oviedo’s rogue, unforeseeable acts of hitting Salazar over a dozen times on the head with a hammer. But the record disproves this argument. It is uncontroverted that Bornstein instigated a plan whereby four people agreed to rob and violently attack one man. Indeed, Bornstein specifically instructed Oviedo to hit the victim with the hammer. Tr. Vol. III, pp. 170-71. A reasonable person can foresee that violence will erupt from a robbery where the assailants bring a weapon, and the plan relies on forcibly disarming the victim of his firearm. *See Vance v. State*, 620 N.E.2d 687, 690 (Ind. 1993) (finding sufficient evidence to support felony murder conviction where defendant participated in the robbery and held the victim still so that an accomplice could stab him with a knife). Although it was Oviedo that brought the hammer and repeatedly struck Salazar with it, Bornstein planned the robbery and charged Oviedo with helping him attack Salazar while Bornstein took his gun. *See Lichti v. State*, 827 N.E.2d 82, 93 (Ind. Ct. App. 2005), *aff’d mem.* 835 N.E.2d 478 (Ind. 2005) (holding that death resulting from kidnapping “an elderly man with heart problems” and binding his limbs with duct tape was reasonably foreseeable).
- [10] Because Bornstein’s role in the robbery contributed to Salazar’s reasonably foreseeable death, sufficient evidence supports his conviction.

II. Sentencing

- [11] Bornstein also argues that the trial court erred in sentencing him by relying on improper aggravators. This claim is reviewed for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). In the sentencing context, an abuse of discretion occurs when a trial court enters a sentencing statement that includes aggravating and mitigating factors unsupported by the record or is incorrect as a matter of law. *Id.* The relative weight or value that the sentencing court assigns to valid aggravating or mitigating circumstances is not subject to review for abuse of discretion. *Id.* at 491. Here, Bornstein received the advisory sentence of 55 years imprisonment. Ind. Code § 35-50-2-3.
- [12] Bornstein argues that the trial court erred by finding the nature of the offense as an aggravating factor. A trial court “may not use a material element of the offense as an aggravating circumstance.” *Plummer v. State*, 851 N.E.2d 387, 391 (Ind. Ct. App. 2006). But “the nature and circumstance of the crime can be an aggravator where the trial court discusses facts that go beyond the statutory requirements for the crime.” *Gleason v. State*, 965 N.E.2d 702, 711 (Ind. Ct. App. 2012). The bottom line is that the court must consider and find specific facts separate from those that constitute a material element of the crime.
- [13] Many facts exist in the record demonstrating the extent to which Bornstein’s crime went beyond the statutory elements. For instance, the State presented evidence of Bornstein’s leading role in planning the attack. The record also reflects that Bornstein felt no remorse for his actions—illustrated with a video

posted to social media showing Bornstein “laughing” and “joking” about the robbery while displaying Salazar’s gun as a trophy in the immediate aftermath. Tr. Vol. IV, p. 228. As these facts go beyond the statutory requirements for felony murder, *see* Ind. Code § 35-42-1-1, they comprise valid aggravating circumstances.

[14] But Bornstein also argues that the trial court improperly found Salazar’s injuries to be an aggravating circumstance. The harm, injury, loss, or damage suffered by the victim is a statutory aggravating circumstance that the court can consider when determining what sentence to impose for a crime where the injury was (A) significant; and (B) greater than the elements necessary to prove the commission of the offense. Ind. Code § 35-38-1-7.1(a)(1).

[15] When patrol officers discovered Salazar’s body, they described it as “very, very bloody and mutilated.” Tr. Vol. III, p. 118. The court properly assigned aggravating weight to Salazar’s injuries because they were so severe to render him essentially “unrecognizable.” Tr. Vol. IV, p. 228. The injuries were plainly both “significant” and “greater than the elements necessary to prove” the crime and were thus a valid aggravating circumstance. Ind. Code § 35-38-1-7.1(a)(1). The State introduced testimony from a criminal pathologist who stated that Salazar’s death was caused by blunt force to the head and found about 16 lacerations consistent with blunt force trauma from a tool like a hammer. Tr. Vol. IV, pp. 20-23. We have no trouble determining that over a dozen blows to the head with a hammer goes beyond the elements necessary to prove felony

murder. Accordingly, the trial court did not abuse its sentencing discretion in assigning aggravating and mitigating factors to Bornstein's sentence.

[16] In sum, as the evidence supports Bornstein's conviction and we find no abuse of the trial court's sentencing discretion, we affirm.

Riley, J., and Bradford, J., concur.