

MEMORANDUM DECISION

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IN THE Court of Appeals of Indiana

Jessica Ann Marsh,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

July 31, 2024

Court of Appeals Case No.
23A-CR-2343

Appeal from the Tippecanoe Superior Court
The Honorable Randy Williams, Judge
Trial Court Cause No.
79D01-2111-F5-194

Memorandum Decision by Judge May
Judges Vaidik and Kenworthy concur.

May, Judge.

- [1] Jessica Ann Marsh appeals her two convictions of Level 5 felony kidnapping using a vehicle.¹ She presents three issues for our consideration which we restate as: (1) whether the State failed to sufficiently raise the theory of accomplice liability at trial and, thus, waived that argument on appeal; (2) whether there was sufficient evidence to prove each element of kidnapping for both counts; and (3) whether her sentence is inappropriate when considering the nature of her offenses and her character. We affirm.

Facts and Procedural History

- [2] Joshua Marsh (“Father”) and Ryan Stevens (“Mother”) have two children together, L.M.² and E.M.³ (collectively “Children”). Father completed paternity affidavits when each child was born but did not complete the portions to establish joint legal custody of Children. Thus, Mother retained sole legal custody of children.⁴ Mother and Children initially lived with Father in his father’s basement in Lafayette, Indiana, but Mother and Children moved out of paternal grandfather’s house after Father threatened to shoot Mother in her sleep.

¹ Ind. Code § 35-42-3-2(a).

² L.M. was born in December 2017.

³ E.M. was born September 2019.

⁴ Father filed a petition to modify custody of Children on March 10, 2022, after the events at issue herein. (State’s Ex. 38.)

[3] On November 1, 2021, Mother and Children went to a bus station in Lafayette, Indiana, because she planned to move to New York with Children. Mother and Children were driven to the bus stop by Carol Smith, an employee of the local women's shelter. After Father learned of Mother's relocation plans, Father spoke with Children's aunt, Marsh, who suggested Father take Children from Mother. Father's girlfriend at the time, Breanna Coble ("Girlfriend"), Father, and Marsh drove to the bus station together to wait for Mother and Children. Melissa Whitaker ("Grandma"), who is the mother of Father and Marsh, waited in her car in a different area of the bus station parking lot.

[4] Smith and Mother exited the van and began unloading luggage. Father, Girlfriend, and Marsh approached the van. Mother was holding E.M., and Smith picked up L.M. when Father and Marsh approached them. Father and Marsh said they wanted to say goodbye to the children, so Smith reluctantly handed L.M. to Marsh and Mother reluctantly handed E.M. to Father. Father then immediately turned away from Mother and instructed Marsh to "walk away." (Ex. 8 at 0:31.) Mother yelled "no" and tried to take Children back, but Father held out his free arm to block her and told her "don't touch my kids." (*Id.* at 0:32.) Mother grabbed the hood of Marsh's jacket and asked for L.M. back while Father tried to pull Mother away from Marsh. Father yelled for Grandma, who then pulled her car closer to Father and Marsh.

[5] Marsh broke away from Mother and carried L.M. to Grandma's car. Grandma exited her car to help Marsh because Mother caught up and was again trying to take L.M. from Marsh's arms. Father put E.M. in Grandma's car and then

went to help Marsh. Mother managed to get L.M. out of Marsh's arms and fell to the ground while holding L.M. Father forcibly tugged on L.M repeatedly and eventually ripped L.M. from Mother's arms. Mother "hit her head [on] the concrete two or three times before [L.M.] was let go of." (Tr. Vol. 2 at 103.) Father then "threw" L.M. in Grandma's car and told Grandma to drive away. (*Id.* at 97; Ex. 8 at 1:35.) Marsh, Father, and Girlfriend drove back to Marsh's apartment. Grandma took Children to Marsh's apartment, where Children remained until police arrived. Police arrested Grandma, Father, and Marsh that same day.

[6] The State charged Grandma, Father, and Marsh with Level 5 felony conspiracy to commit kidnapping using a vehicle⁵ and two counts of Level 5 felony kidnapping using a vehicle. The State also alleged Marsh was a habitual offender.⁶ Marsh waived her right to a trial by jury, and on June 20 and 21, 2023, the trial court held a bench trial and found Marsh guilty as charged. On August 8, 2023, Marsh admitted being a habitual offender.

[7] On September 7, 2023, at the sentencing hearing, the trial court vacated Marsh's conviction of Level 5 felony conspiracy to commit kidnapping. The trial court sentenced Marsh to five years for each count of Level 5 felony kidnapping, ordered those sentences served concurrently, and imposed two

⁵ Ind. Code § 35-42-3-2(a).

⁶ Ind. Code § 35-50-2-8.

years for the habitual offender enhancement. The trial court ordered five of the seven years served in the Indiana Department of Correction and two years suspended to supervised probation.

Discussion and Decision

[8] Marsh’s opening brief on appeal argued that the State failed to prove she committed kidnapping and that the trial court “inappropriately assigned the actions of her co-defendants to Marsh.” (Br. of Appellant at 17.) In response, the State argued it proved Marsh’s guilt under a theory of accomplice liability, which it was entitled to do without referencing accomplice liability in the charging information. (Br. of Appellee at 13-15.) In reply, Marsh argued the State waived accomplice liability by failing to raise it in the trial court. (Reply Br. at 5-6.) Thus, before addressing whether the evidence was sufficient to convict Marsh of two counts of kidnapping, we must determine whether the State could rely on accomplice liability or, instead, needed to prove Marsh committed all elements of the crimes as a principal. After addressing these two related issues, we will address Marsh’s argument that her sentence is inappropriate.

1. Accomplice Liability

[9] Marsh argues the State failed to sufficiently raise accomplice liability in the trial court, specifically noting that the State did not mention the theory in its opening

statement or written filings.⁷ Further, Marsh argues the State labeled Marsh as principal and failed to “explain how Marsh ‘knowingly or intentionally aided, induced, or caused another person to commit [kidnapping] regardless of whether that other person had been prosecuted, convicted or acquitted of that offense.’” (Reply Br. at 6) (quoting *Berry v. State*, 819 N.E.2d 443, 449-50 (Ind. Ct. App. 2004), *trans. denied*).

[10] The State argues the trial court and Marsh were put on notice of accomplice liability because it charged Marsh with conspiracy to commit kidnapping with two listed co-defendants: Father and Grandma. Conspiracy to commit a felony occurs when a person “agrees with another person to commit the felony.” Ind. Code § 35-41-5-2. Indiana law defines an accomplice as someone who “knowingly or intentionally aids, induces, or causes another person to commit an offense . . . , even if the other person (1) has not been prosecuted for the offense; (2) has not been convicted of the offense; or (3) has been acquitted of the offense.” Ind. Code § 35-41-2-4. We agree with the State that the statutory definitions of conspiracy and accomplice liability put the trial court and defense on notice that the State might rely on accomplice liability to convict Marsh of the two counts of kidnapping based on the plan she made and executed with Father and Grandma to separate Children from Mother.

⁷ Following the presentation of evidence, the trial court ordered the parties to file a “post hearing brief” with their arguments. (App. Vol. 2 at 36.) The State notes the brief it filed asserted Marsh could be convicted of kidnapping as an accomplice acting in conjunction with Father and Grandmother. (Br. of Appellee at 15) (citing App. Vol. 2 at 50-51).

[11] Moreover, it is a well-settled rule that a defendant may be convicted as an accessory despite only being charged as a principal. *Ozuna v. State*, 703 N.E.2d 1093, 1100 (Ind. Ct. App. 1998). “There is no separate crime of being an accessory to a crime or aiding and abetting its perpetration.” *Taylor v. State*, 495 N.E.2d 710, 713 (Ind. 1986). Accordingly, the State is not required to reference accomplice liability in the charging information, “regardless of whether the evidence showed that he or she acted alone or with an accomplice.” *Wise v. State*, 719 N.E.2d 1192, 1198-99 (Ind. 1999). Therefore, Marsh’s convictions can be based on her actions as an accomplice of Father and Grandmother. *See Taylor v. State*, 840 N.E.2d 324, 338 (Ind. 2006) (holding defendant could be convicted as an accomplice without the State mentioning accomplice liability before the close of trial because “caselaw provided sufficient notice to Taylor’s defense counsel that the State had the option to pursue accomplice liability”).

2. Sufficiency of Evidence

[12] When faced with challenges to the sufficiency of evidence, we apply a well settled standard of review that leaves determinations of the weight of the evidence and credibility of the witnesses to the fact-finder. *Teising v. State*, 226 N.E.3d 780, 783 (Ind. 2024). “We consider only the evidence most favorable to the trial court’s ruling and will affirm a defendant’s conviction unless ‘no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.’” *Id.* (quoting *Jenkins v. State*, 726 N.E.2d 268, 270 (Ind. 2000)).

[13] To convict Marsh of kidnapping, the State had to prove Marsh “knowingly or intentionally remove[d] another person, by fraud, enticement, force, or threat of force, from one place to another.” *See* Ind. Code § 35-42-3-2(a); (*see also* App. Vol. 2 at 19, 20). The offense is a Level 5 felony if the victim is removed using a vehicle, as charged in this case. *See* Ind. Code § 35-42-3-2(b)(1); (*see also* App. Vol. 2 at 19, 20). To determine whether the State needed to prove Marsh personally committed each of those elements as to each of Children, we must determine whether the evidence demonstrated she was an accomplice.

[14] “There is no bright line rule in determining accomplice liability; the particular facts and circumstances of each case determine whether a person was an accomplice.” *Jackson v. State*, 222 N.E.3d 321, 337 (Ind. Ct. App. 2023) (citing *Vitek v. State*, 750 N.E.2d 346, 353 (Ind. 2001), *reh’g denied*, *trans. denied*). The court considers “four factors to determine whether a defendant acted as an accomplice: (1) presence at the scene of the crime; (2) companionship with another engaged in criminal activity; (3) failure to oppose the crime; and (4) a defendant’s conduct before, during, and after the occurrence of the crime.” *Castillo v. State*, 974 N.E.2d 458, 466 (Ind. 2012) (citing *Vitek*, 750 N.E.2d at 352).

[15] The State presented ample evidence to demonstrate Marsh acted as an accomplice. She was involved in every step of the kidnapping – she initially suggested Father take Children, she helped separate Children from Mother, and she kept Children at her home until police arrived. Video evidence places Marsh at the scene of the crime, working with Grandma and Father to separate

Children from Mother over the protests of Mother and Smith. Marsh did nothing to oppose the crime. Accordingly, we hold the evidence was sufficient to support her liability as an accomplice. *See Snow v. State*, 137 N.E.3d 965, 971 (Ind. Ct. App. 2019) (the defendant was liable as an accomplice for each conviction because there was evidence of involvement in every step of the crime), *reh'g denied, trans. denied, cert. denied* 141 S. Ct. 631 (2020).

[16] Now that we have determined Marsh was an accomplice, the State need not prove Marsh personally committed every element of the crime so long as she was acting jointly with Father and Grandma. *See Eldridge v. State*, 406 N.E.2d 1264, 1266 (Ind. Ct. App. 1980) (“When two or more persons combine to commit a crime, each is criminally responsible for the acts of his confederate committed in furtherance of the common design.”). Thus, for example, Marsh’s arguments that she never had control of E.M. at the bus station, that she did not put either of Children in Grandma’s car, and that she did not drive Children away from the bus station become moot because Marsh is also responsible for the actions of Father and Grandma.

[17] Marsh argues the State failed to prove she knowingly or intentionally kidnapped Children because she did not go to the bus station with the intent of kidnapping them. “Because intent is a mental function and usually must be determined from a person’s conduct and resulting reasonable inferences, the element of intent may properly be inferred from circumstantial evidence.” *Beatty v. State*, 567 N.E.2d 1134, 1139 (Ind. 1991). Therefore, the circumstances of Marsh walking away from Mother despite her repeated pleas for the return of

Children show Marsh knew she was taking Children. Furthermore, Marsh suggested to Father that he take Children. Marsh asserts in her brief that this indicates “[Marsh] believed that [Father] had a legal basis to physical custody of the children.” (Br. of Appellant at 15.) Marsh is asking us to view the evidence in her favor, but we are not allowed to do that. *See Fernbach v. State*, 954 N.E.2d 1080, 1087 (Ind. Ct. App. 2011) (“it is not our role as an appellate court to second-guess the jury’s determination of what to believe and what to discredit”), *trans. denied*.

- [18] Marsh further asserts she was voluntarily handed L.M., relinquished L.M. to Mother, and never threatened Children or prevented Children from leaving with Mother. While Smith may have voluntarily handed L.M. to Marsh, Mother testified that Children were handed over so Marsh and Father could say goodbye, not leave the premises. The video of the incident, which was recorded by Girlfriend, shows Marsh prevented Mother from leaving with Children by walking away with L.M. and Marsh did not relinquish L.M. freely. After Grandma pulled up her vehicle, Marsh walked with L.M. to the backdoor of the vehicle but was prevented from placing L.M. inside because a struggle ensued between Marsh and Mother. Mother actively tried to take L.M. from Marsh’s arms by wrapping both arms around L.M.’s waist while repeatedly yelling at Marsh to give her back her child. Grandma wedged herself in the middle of the altercation to push Mother away from L.M. and Marsh, causing Mother to fall to the concrete while holding L.M. in her arms as Marsh’s grip on L.M. was released. Father then grabbed L.M. and yanked L.M. from

Mother's arms. Mother testified to the injuries she sustained as a result of chasing after Marsh and Father, falling to the ground, and trying to keep L.M. from being ripped from her arms. There is sufficient evidence to prove Children were taken by force.⁸ See *Owens v. State*, 375 N.E.2d 203, 205 (Ind. 1978) (holding evidence of force sufficient where Owens pulled adult victim toward car and then pushed her into car).

[19] All of Marsh's arguments for why the evidence was insufficient fail. Accordingly, we affirm her convictions. See *Madden v. State*, 162 N.E.3d 549, 557-58 (Ind. Ct. App. 2021) (evidence was sufficient to convict Madden of kidnapping as an accomplice even though Madden was not present for every aspect of the crime)

3. Inappropriateness of Sentence

[20] Marsh argues her sentence is inappropriate considering the nature of the offense and her character, stating her sentence is "a measure of vindictive justice and not reformation."⁹ (Br. of Appellant at 18.) Pursuant to Indiana Appellate

⁸ Marsh also argues she did not threaten Children. As the State needed to demonstrate Children were removed "by fraud, enticement, force, **or** threat of force," Ind. Code § 35-42-3-2(a) (emphasis added), and we have found the evidence supported finding she, along with Father and Grandma, used force, we need not address whether the evidence also supported finding she used threat of force. See *Parker v. State*, 358 N.E.2d 110, 113 (Ind. 1976) ("The crime of kidnapping can be committed in any of three ways: by 'forcibly carrying off,' by 'fraudulently carrying off or decoying,' or by 'imprisonment with the intent to carry off.'") (discussing prior version of statute that provided alternate means of removing person from original location).

⁹ Marsh argues, in part, that her sentence is excessive because she was an accomplice. However, individuals convicted of felonies in Indiana are considered to have been convicted on the weight of their own actions even if the court or jury uses the accomplice liability statute to determine guilt. *Johnson v. State*, 687 N.E.2d 345, 349-50 (Ind. 1997). The standard for reviewing the sentence imposed on an accomplice is thus the same

Rule 7(B), we may 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.” Our determination “turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case.” *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). “In conducting our review, we do not look to see whether the defendant’s sentence is appropriate or if another sentence might be more appropriate; rather, the test is whether the sentence is ‘inappropriate.’” *Barker v. State*, 994 N.E.2d 306, 315 (Ind. Ct. App. 2013), *reh’g denied, trans. denied*.

[21] “When considering the nature of the offense, we first look to the advisory sentence for the crime.” *McHenry v. State*, 152 N.E.3d 41, 46 (Ind. Ct. App. 2020). When a sentence deviates from the advisory sentence, “we consider whether there is anything more or less egregious about the offense as committed by the defendant that distinguishes it from the typical offense accounted for by our legislature when it set the advisory sentence.” *Madden v. State*, 162 N.E.3d 549, 564 (Ind. Ct. App. 2021). The sentencing range for a Level 5 felony is one to six years, with an advisory sentence of three years. Ind. Code § 35-30-2-6(b). Marsh pled guilty to the habitual offender enhancement, which at the time of Marsh’s crime resulted in an enhancement between two and six years. *See Ind.*

as it is for principals. *Id.* (addressing the “manifestly unreasonable” standard for review of sentences then in effect).

Code § 35-50-2-8(i)(2) (2017) (enhancement modified to three to six years by P.L. 37-2023, Sec.2, eff. July 1, 2023). Marsh was sentenced to seven years – five for kidnapping, enhanced by two for being a habitual offender – with two years suspended to probation. Thus, she received an elevated, but not the maximum possible, sentence.

[22] Marsh asserts her sentence is inappropriate because Smith voluntarily handed L.M. to Marsh; she eventually relinquished L.M. to Mother; Marsh did not put Children in Grandma’s vehicle without car seats; and Marsh did not drive Children away from the scene. As established above, L.M. was handed to Marsh so she could say goodbye, not take L.M. from the premises. Additionally, Marsh did not voluntarily relinquish L.M. – Marsh lost her grip on L.M. after a struggle with Mother, which ended with Mother falling to the ground with L.M. still in her arms. Marsh may not have personally placed Children in Grandma’s vehicle, but Marsh was instrumental in separating Mother from L.M., walking L.M. toward Grandma’s car, and actively resisting Mother’s attempts to regain possession of L.M. Furthermore, while Marsh did not drive Children away from the scene, Children were taken to Marsh’s apartment and remained there until police arrived and asked for Children. Marsh is not entitled to leniency simply because her cooperation with Father and Grandmother to effectuate the kidnapping meant that she did not perform every act necessary to accomplish their plan to take Children from Mother.

[23] Moreover, the impact of Marsh’s offense on the Children and Mother is significant. Following the event, L.M. experienced nightmares, cried for

Mother at night, and frequently said “mommy saved me daddy stole me.” (App. Vol. 2 at 84.) E.M. “has become very fearful of people even family members.” (*Id.*) Mother’s “mental health was acutely impacted by . . . the subsequent kidnapping of her children” and she was diagnosed and sought treatment for acute post-traumatic stress disorder. (*Id.* at 82.) Thus, we cannot say Marsh’s sentence is inappropriate given the nature of the offense.

[24] Nor do we find Marsh’s sentence inappropriate for her character. “When considering the character of the offender, one relevant fact is the defendant’s criminal history.” *Johnson v. State*, 986 N.E.2d 852, 857 (Ind. Ct. App. 2013). The trial court found several aggravating factors including Marsh’s “Criminal History; Substance abuse history; on bond and a new case filed in Benton County; violated bond by failing drug screen; 3 modifications filed as a juvenile all found true; 16 petitions to revoke filed with 9 found true; 4 petitions to execute filed and found true[.]” (App. Vol. 2 at 92.) An offender’s continued criminal behavior after judicial intervention reveals a disregard for the law that reflects poorly on his character. *Kayser v. State*, 131 N.E.3d 717, 724 (Ind. Ct. App. 2019).

[25] In her brief, Marsh argues she “has taken objective steps to demonstrate an appropriate character” by maintaining employment and attending college courses. (Br. of Appellant at 22.) We also note the trial found mitigators in Marsh’s “admission to the Habitual Offender Enhancement; has support; and has health issues.” (App. Vol. 2 at 92.) We have previously explained that “many people are gainfully employed; therefore, a defendant’s employment is

not necessarily a mitigating factor.” *Holmes v. State*, 86 N.E.3d 394, 399 (Ind. Ct. App. 2017), *trans. denied*. While we appreciate Marsh’s admission of being a habitual offender, personal circumstances, attendance at college courses, and employment, none of those factors, even in combination, lead us to be so “overcome by compelling evidence portraying in a positive light . . . the defendant’s character (such as substantial virtuous traits or persistent examples of good character)” that we would shorten Marsh’s sentence for these crimes. *Oberhansley v. State*, 208 N.E.3d 1261, 1271 (Ind. 2023) (quoting *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015)). *See also Hale v. State*, 128 N.E.3d 456, 466 (Ind. Ct. App. 2019) (declining to find sentence inappropriate in light of criminal history despite Hale’s employment and college attendance), *trans. denied*. Marsh’s seven-year sentence is not inappropriate for kidnapping her brother’s two children.

Conclusion

[26] Indiana law permitted Marsh to be convicted under the theory of accomplice liability, and Marsh’s suggestion to take Children, her active participation in their taking, and her holding the Children at her apartment following the kidnappings are sufficient to make her responsible as an accomplice for the kidnapping of Children. The evidence was sufficient to support her convictions, and we cannot say her sentence is inappropriate in light of the nature of her offenses or her character. Accordingly, we affirm.

[27] Affirmed.

Vaidik, J., and Kenworthy, J., concur.

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