

Ricardo Rico appeals his conviction of two counts of Delivery of Methamphetamine, Three Grams or More,¹ both as class A felonies, as well as the sentences imposed thereon.

Rico presents the following restated issues for review:

1. Was the evidence sufficient to support the convictions?
2. Did the trial court abuse its discretion in evaluating Rico's criminal record as an aggravating circumstance?
3. Did the trial court err by not considering the State's role in the crime as a mitigating circumstance?
4. Was Rico's sentence inappropriate in light of his character and the nature of his offenses?

The facts favorable to the convictions are that on October 24, 2006, a confidential informant (C.I.) for the Elkhart Police Department met with officers of the Interdiction and Covert Enforcement Unit for Elkhart County (ICE) to plan a controlled buy of methamphetamines. ICE investigates narcotics activities in the county and uses cooperating, confidential sources to engage in controlled buys. ICE's standard protocol for conducting controlled buys begins with a meeting with the C.I. in a secret location where the C.I. and the C.I.'s car are searched. After ensuring that the C.I. has no drugs or money, ICE gives the C.I. money that has been photocopied in order to make the purchase. ICE also gives the C.I. a transmitting and recording device by which ICE officers may monitor the transaction. The C.I. then travels to the pre-arranged location for the buy, all the while under the visual and audio surveillance of ICE officers. After the buy is complete, ICE officers follow the C.I. to a predetermined location, where the C.I. and his vehicle are again searched for contraband

¹ Ind. Code Ann. § 35-48-4-1.1(a)(1)(C)&(b)(1) (West, Westlaw through 2010 2nd Regular

and money. Any contraband found is given to the police.

The foregoing procedures were followed on October 24 when the C.I. indicated to ICE officers that he might be able to get methamphetamine from an acquaintance. The C.I. was given \$300.00. The C.I. drove to a residence on Marion Street in Elkhart, Indiana, where he picked up a person later identified as Rico. At Rico's direction, the C.I. drove Rico to a grocery store parking lot. Once there, Rico exited the vehicle and walked to a nearby residence. Approximately one hour later, Rico exited that residence, returned to the C.I.'s vehicle and handed something to the C.I. Rico was driven back to his home. It was later determined that the substance Rico delivered to the C.I. contained 8.44 grams of methamphetamine.

Later on the same day, ICE officers conducted another controlled buy from Rico using the same C.I. This time, the C.I. was given \$500.00. The C.I. and Rico repeated the same procedure they had followed in the earlier buy, except this time police executed a prearranged traffic stop of the C.I.'s vehicle before Rico was dropped off in order to check Rico's identity. No arrest was made at that time. It was later determined that the substance Rico sold to the C.I. during the second buy was 12.90 grams of methamphetamine.

Rico was charged with two counts of dealing methamphetamine in excess of three grams, as set out above, and convicted as charged following a jury trial. The court sentenced Rico to forty-three years for each offense and ordered that the sentences be served concurrently. More facts will be provided where relevant.

1.

Sess.).

Rico contends the evidence was insufficient to support the convictions. He contends that the State did not present evidence with respect to either transaction establishing that adequate controls were observed. Specifically, he contends the evidence was insufficient to prove that adequate searches of the C.I.'s vehicle and person were conducted before both transactions.

When reviewing the sufficiency of the evidence needed to support a criminal conviction, we neither reweigh evidence nor judge witness credibility. *Henley v. State*, 881 N.E.2d 639, 652 (Ind. 2008). “We consider only the evidence supporting the judgment and any reasonable inferences that can be drawn from such evidence.” *Id.* We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt. *Id.*

Bailey v. State, 907 N.E.2d 1003, 1005 (Ind. 2009). We have indicated that a properly conducted controlled buy will permit an inference that the defendant had prior possession of a controlled substance. We have described a controlled buy as follows:

A controlled buy consists of searching the person who is to act as the buyer, removing all personal effects, giving him money with which to make the purchase, and then sending him into the residence in question. Upon his return he is again searched for contraband. Except for what actually transpires within the residence, the entire transaction takes place under the direct observation of the police. They ascertain that the buyer goes directly to the residence and returns directly, and they closely watch all entrances to the residence throughout the transaction.

Watson v. State, 839 N.E.2d 1291, 1293 (Ind. Ct. App. 2005) (quoting *Mills v. State*, 177 Ind. App. 432, 435, 379 N.E.2d 1023, 1026 (1978) (emphasis omitted)).

In the instant case, Sergeant Jeffrey Eaton of the Elkhart City Police Department testified that he observed the search of the C.I.'s person and vehicle prior to the first transaction. He participated in the surveillance of the first buy, testifying that he followed

Rico's vehicle and kept it in sight at all times before, during, and after the buy was made. He followed the C.I. to the original staging point and took from the C.I. the methamphetamine delivered by Rico. There was similar testimony concerning the second buy, both from Sergeant Eaton and the C.I., among others. Although, as Rico notes, there was no evidence that identified the name or names of the individual or individuals who conducted these searches, such is not required. There was evidence, including testimony from both the subject of the search and an officer who observed the searches, that searches were conducted, and that is sufficient. The same is true with respect to the evidence pertaining to the details of the searches themselves. The details or lack thereof merely go to the weight of the evidence. Rico's challenge to the search of his person is similar in nature, and fails for the same reason. The evidence was sufficient to support the convictions.

2.

Rico was charged with the instant offenses on April 13, 2007 and sentenced following his convictions on August 26, 2010. Between those two dates, Rico was charged, convicted, and sentenced for attempted murder and aggravated battery. The trial court considered those convictions as part of Rico's criminal history, which the court determined to be an aggravating circumstance. Rico contends the court erred in considering as part of his criminal history offenses that were committed after he committed the instant offenses. He also contends the trial court erred in evaluating his criminal record as an aggravating circumstance.

With respect to Rico's first contention, our court has held that criminal activity that takes place after the crime for which the instant sentence is being imposed is a proper

consideration in sentencing. *See Haddock v. State*, 800 N.E.2d 242 (Ind. Ct. App. 2003); *see also Sauerheber v. State*, 698 N.E.2d 796, 806 (Ind. 1998) (“[c]riminal activity that occurs subsequent to the offense for which one is being sentenced is a proper sentencing consideration”). Therefore, the trial court did not err in considering as part of his criminal history the offenses Rico committed after the instant offenses.

Rico’s second contention is that the trial court erred in finding that his criminal history is an aggravating circumstance. This argument is premised largely upon Rico’s first argument, i.e., that the court erred in including the attempted murder and battery convictions as part of his criminal history for purposes of sentencing in this case. Having rejected the premise, we also reject the conclusion based upon it. The trial court noted that Rico, who is twenty-four years old, has two misdemeanor driving offenses, a misdemeanor handgun offense, and the aforementioned two felony convictions. The court noted that Rico’s pattern of criminal behavior is escalating in terms of the seriousness of the offenses he has committed. The trial court did not err in considering Rico’s criminal history as an aggravating circumstance. To the extent his argument in this regard includes a claim that the trial court erred in weighing this aggravating circumstance, we reject it. “The relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse.” *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218.

3.

Rico contends the trial court erred by not considering the State’s role in his offenses as a mitigating circumstance. Determining mitigating circumstances is within the discretion of

the trial court. *Corbett v. State*, 764 N.E.2d 622 (Ind. 2002). A trial court does not err in failing to find mitigation when a mitigation claim is “highly disputable in nature, weight, or significance.” *Smith v. State*, 670 N.E.2d 7 (Ind. 1996). We further observe that the trial court is not obligated to accept the defendant’s arguments as to what constitutes a mitigating factor. *Corbett v. State*, 764 N.E.2d 622. Nor is the trial court required to give the same weight to proffered mitigating factors as the defendant does. *Id.* Additionally, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. *Id.* The failure to find mitigating circumstances that are clearly supported by the record, however, may imply that they were overlooked and not properly considered. *Id.* An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Id.*

Rico’s counsel argued at sentencing that the fact that a cooperating source was used to facilitate the buys should be given mitigating weight. The trial court indicated that it would “consider all arguments made by counsel for the defendant to be mitigating circumstances[.]” *Transcript* at 501. Thus, the court did consider the fact that a cooperating source was involved as a mitigator, but ultimately did not find this of significant weight. This court has held that the fact that a cooperating source was used is not automatically entitled to significant mitigating weight. *See, e.g., Moyer v. State*, 796 N.E.2d 309 (Ind. Ct. App. 2003).

In the instant case, it is apparent that the C.I. knew that he could procure drugs from Rico, and Rico readily complied with the C.I.’s requests and acquired a large amount of methamphetamine in a short amount of time. On these facts, the trial court did not abuse its discretion in failing to find that significant mitigating weight should be accorded to the fact

that a cooperating source was used to facilitate the buys. *See also Anglemeyer v. State*, 868 N.E.2d 482 (we will not review the relative weight or value assigned to aggravating and mitigating circumstances).

4.

Rico contends his sentence was inappropriate in light of his character and the nature of his offenses. Article 7, section 4 of the Indiana Constitution grants our Supreme Court the power to review and revise criminal sentences. Pursuant to Ind. Appellate Rule 7, the Supreme Court authorized this court to perform the same task. *Cardwell v. State*, 895 N.E.2d 1219 (Ind. 2008). Per App. R. 7(B), we may revise a sentence “if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” *Wilkes v. State*, 917 N.E.2d 675, 693 (Ind. 2009), *cert. denied*, 131 S.Ct. 414 (2010). “[S]entencing is principally a discretionary function in which the trial court’s judgment should receive considerable deference.” *Cardwell v. State*, 895 N.E.2d at 1223. Rico bears the burden on appeal of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006).

We begin by examining the nature of Rico’s offenses. Rico’s first offense resulted in the delivery of 8.44 grams of methamphetamine to the C.I., an amount well in excess of the amount necessary to sustain a class A felony conviction for dealing methamphetamine. Later that same day, Rico committed his second offense, this time delivering an amount more than four times the amount required to sustain a class A felony conviction. Therefore, Rico demonstrated the willingness and ability to procure large amounts of methamphetamine in a short amount of time.

Turning now to Rico's character, Rico was only twenty-four years of age when he was convicted of the instant offenses. Although his criminal history is not the most extensive this court has encountered, it did consist of two misdemeanor and three felony offenses. Moreover, and perhaps most disturbingly, we note the offenses of which he was convicted escalated in severity, progressing from misdemeanor driving offenses to the instant dealing methamphetamine offenses to attempted murder and aggravated battery. We note also that Rico admitted that he has consistently used illegal drugs since he was eighteen years old and that he is an illegal alien who has used multiple aliases in an effort to skirt our immigration laws.

We find that Rico's character and the nature of his offenses are aggravating in light of his character and the nature of his offenses. Therefore, Rico has failed to persuade us that the concurrent, forty-three year sentences imposed by the trial court are inappropriate.

Judgment affirmed.

MAY, J., and MATHIAS, J., concur.