

Juan Gonzalez appeals his conviction of three counts of Dealing in Cocaine,¹ all as class A felonies, and the sentences imposed thereon. Gonzalez presents the following restated issues for review:

1. Was the evidence sufficient to support the convictions?
2. Did the trial court err in finding aggravating circumstances?
3. Was the sentence inappropriate in view of the nature of the offenses and Gonzalez's character?

We affirm.

The facts favorable to the convictions are that Salvador Ceja had drug dealing charges pending in two separate counties. In an effort to ameliorate his sentence, Ceja contacted John Eads, a detective with the Indiana State Police and informed Eads that he wanted to work with law enforcement officials as a confidential informant. Eads advised Ceja that he could not promise anything with respect to those cases, but that he (Eads) would inform the prosecutor that Ceja was cooperating and would ask that this be considered at Ceja's sentencing. Ceja agreed to work in conjunction with the Indiana State Police Drug Task Force in making controlled buys from Gonzalez, whom Ceja knew as "Herbs". *Transcript* at 33. The first controlled buy occurred on June 28, 2007. Ceja called Gonzalez and arranged to make a drug purchase. Prior to the buy, Eads performed a pat-down search and attached a body wire to Ceja and gave him marked currency with which to make the buy. Ceja drove to Gonzalez's residence with Eads following in another vehicle. After Ceja entered Gonzalez's

¹ Ind. Code Ann. § 35-48-4-1 (West, Westlaw through 2009 1st Special Sess.).

home, Gonzalez retrieved a large bag of cocaine from a console on top of a television speaker. Gonzalez used a digital scale to weigh an eight-ball² of cocaine, which he then placed in a baggie and handed to Ceja in exchange for \$170.00. After completing the transaction, Ceja drove to a prearranged location and handed over the cocaine and remaining buy money to Eads.

Ceja arranged a second buy with Gonzalez, this one occurring on July 10, 2007. The same procedures were followed. During this transaction, also for an eight-ball of cocaine, Gonzalez offered to sell a nine-millimeter handgun. Ceja left but a short time later called Gonzalez and accepted his offer to buy the gun. That transaction was completed later the same day.

During the gun transaction, Gonzalez offered to sell Ceja a second gun. After leaving and rendezvousing with Eads, Ceja called Gonzalez and arranged to purchase the second gun as well as an additional quantity of cocaine. The third transaction occurred on August 7, 2007. Ceja purchased an eight-ball of cocaine. Gonzalez again offered to sell a handgun. Ceja deferred at that point, but returned later and purchased the weapon for \$300.00.

Laboratory tests revealed that the substance purchased on June 28, 2007 consisted of 2.19 grams of cocaine. The substance purchased on July 10, 2007 was determined to be 3.11 grams of cocaine. The substance purchased on August 7, 2007 was determined to be 3.22 grams of cocaine. All three transactions occurred at 2401 Ottawa Street in Lafayette, Indiana, which is situated within 1,000 feet of the Lynn Treece Boy's Club, Miami

² An eight-ball is approximately one-eighth of an ounce of cocaine.

Elementary School, or Kennedy Public Park.

On April 14, 2008, the State filed a six-count information against Gonzalez. For each of the aforementioned transactions, the State filed an information for possession of cocaine and dealing in cocaine, each as a class A felony. Jury trial commenced on January 21, 2009. Before the presentation of its case-in-chief, the State moved to amend the possession charge relating to the June 28 transaction, reducing it from a class A to a class B felony because of the weight of the cocaine involved.³ The trial court granted the motion. Following trial, the jury returned guilty verdicts on all counts. The trial court merged the possession convictions into the dealing convictions and entered judgment of conviction only with respect to the three dealing convictions – i.e., Count I relating to the June 28 transaction, Count III relating to the July 10 transaction, and Count V relating to the August 7 transaction. After finding that the aggravating circumstances outweighed the mitigating circumstances, the court sentenced Gonzalez to concurrent sentences of twenty-five years on Count I, thirty years on Count III, and thirty-five years on Count V, for a total executed sentence of thirty-five years.

1.

Gonzalez contends the evidence was not sufficient to support the convictions. Specifically, he contends that Ceja's testimony, which was the linchpin of the evidence against him, was inherently unbelievable by application of the incredible dubiousity rule.

Our standard of review for challenges to the sufficiency of evidence is well

settled.

When considering a challenge to the sufficiency of evidence to support a conviction, we respect the fact-finder's exclusive province to weigh conflicting evidence and therefore neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the verdict, and “must affirm ‘if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.’” *Id.* at 126 (quoting *Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

Gleaves v. State, 859 N.E.2d 766, 769 (Ind. Ct. App. 2007). The uncorroborated testimony of one witness may be sufficient by itself to sustain a conviction on appeal. *Gleaves v. State*, 859 N.E.2d 766. In this case, Gonzalez seeks a ruling that, by application of the principal of incredible dubiousity, Ceja's testimony is not worthy of belief. For testimony to be so inherently incredible that it is to be disregarded on this basis, “the witness must present testimony that is inherently contradictory, wholly equivocal or the result of coercion, and there must also be a complete lack of circumstantial evidence of the defendant's guilt.” *Clay v. State*, 755 N.E.2d 187, 189 (Ind. 2001).

Gonzalez contends that because of the pending serious drug charges against him in other cases, Ceja was highly motivated to help the State obtain a conviction of Gonzalez – so motivated that he might not only lie about Gonzalez's involvement, but might also “plant” evidence of Gonzalez's guilt.⁴ This motivation was aptly pointed out to the jury. It was the jury's task to determine the extent to which Ceja's credibility was thereby undermined, if at

³ The dealing charge relating to this transaction, however, remained a class A felony because it occurred within 1000 feet of a school.

⁴ Gonzalez contends: “[Ceja] could have easily concealed cocaine in his pants or underwear, and thereafter claim that the cocaine was sold to him by Gonzalez.” *Appellant's Brief* at 8.

all. We will not invade the jury's province in this regard. Moreover, we note that Ceja's testimony was not uncorroborated. The audio recordings of the conversations between Ceja and Gonzalez during the transactions were entered into evidence, and generally corroborated Ceja's testimony. In addition, Ceja was searched before each transaction and it was determined that he was not then in possession of cocaine, but following his meetings with Gonzalez he possessed cocaine. We reiterate that the incredible dubiousity rule does not apply if there is evidence that corroborates the testimony in question. The evidence was sufficient to support the convictions.

2.

Gonzalez contends the trial court erred in finding aggravating circumstances.

When imposing a sentence for a felony offense, trial courts are required to enter a sentencing statement. This statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. If the court finds aggravating or mitigating circumstances, it "must identify all *significant* mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." *Anglemyer v. State*, 868 N.E.2d at 490 (emphasis supplied). An abuse of discretion in identifying or failing to identify aggravators and mitigators occurs if it is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Id.* (quoting *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006)). Also, an abuse of discretion occurs if the record does not support the

reasons given for imposing sentence, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. *Anglemyer v. State*, 868 N.E.2d 482.

The trial court found the following aggravating circumstances: “The Court finds as aggravating factors that the seriousness of the crime and the defendant’s repeated sale of drugs and weapons, the defendant has a history of criminal or delinquent behavior, the defendant lacks remorse, and the defendant has gang associations.” *Appellant’s Appendix* at 34. Gonzalez contends the trial court erred in finding as aggravating that he lacked remorse and had gang associations.

With respect to the former, Gonzalez contends the trial court “grasp[ed] this factor out of thin air” because it has no factual support in the record. *Appellant’s Brief* at 14. The State concedes that because Gonzalez did not testify at trial and did not speak at sentencing, “there is little in the record to support” this aggravator. *Appellee’s Brief* at 12. We agree.

With respect to the latter, Gonzalez contends there is nothing in the record to support it. The State points out that there is evidence that Gonzalez associated with a cousin in the commission of a crime and that the cousin was a gang member. The State concedes, however, that this is not a “strong aggravator” and contends that, in any event, “there is no evidence that the trial court gave them much weight.” *Id.* at 12.

We must limit our review to the correctness of the finding that gang association was an aggravating factor, as “the weight the trial court gives to any aggravating circumstances is not subject to appellate review. *Ramon v. State*, 888 N.E.2d 244, 255 (Ind. Ct. App. 2008)

(citing *Anglemeyer v. State*, 868 N.E.2d 482). The record indicates that Gonzalez did indeed associate with a cousin who was a known gang member. We can find no evidence that Gonzalez himself was a gang member, and the State did not attempt to show that the instant offenses were gang-related. Thus, we conclude there is no evidence to support this aggravator.

When, as here, at least one aggravating circumstances found by the trial court is invalid, we must decide whether the remaining circumstance or circumstances are sufficient to support the sentence imposed. *Cotto v. State*, 829 N.E.2d 520 (Ind. 2005). When we find an irregularity in a trial court's sentencing determination, we have at least three courses of action. We may: 1) "remand to the trial court for a clarification or new sentencing determination", 2) "affirm the sentence if the error is harmless", or 3) "reweigh the proper aggravating and mitigating circumstances independently at the appellate level." *Id.* at 525. Mindful that the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B), *Anglemeyer v. State*, 868 N.E.2d 482, and that Gonzalez challenges the sentences as inappropriate, we proceed to the third issue presented by Gonzalez, i.e., the appropriateness of his sentence.

3.

Gonzalez contends his sentence is inappropriate in view of the nature of the offenses and his character.

We have the constitutional authority to revise a sentence if, after considering the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the

offense and character of the offender. Ind. Appellate Rule 7(B); *Corbin v. State*, 840 N.E.2d 424 (Ind. Ct. App. 2006). “We recognize, however, the special expertise of the trial courts in making sentencing decisions; thus, we exercise with great restraint our responsibility to review and revise sentences.” *Scott v. State*, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006), *trans. denied*. Gonzalez bears the burden on appeal of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006).

The nature of Gonzalez’s offenses does not support his argument that “the presumptive sentence, or less, would be appropriate.”⁵ *Appellant’s Brief* at 17. Gonzalez was contacted three times over a period of almost six weeks by Ceja, who was seeking to purchase cocaine. It is apparent that on each occasion, Gonzalez had sufficient cocaine on hand to make the sale. During the latter two transactions, Gonzalez made unsolicited offers to sell handguns to Ceja. Gonzalez actually sold Ceja two handguns, one each after the second and third drug transactions. We find these offenses to be somewhat aggravating.

Turning now to Gonzalez’s character, in addition to what the offenses of which he was convicted reveal of his character, we note that Gonzalez had not been employed since 2005. Therefore, it appears that he supported himself by selling drugs and weapons. We note that he has fathered three children, all still young, but apparently is not paying child support for any of them. His criminal and juvenile history included a 1997 true finding that he committed acts that would constitute the offense of battery if committed by an adult. In

⁵ We note that in 2005, the General Assembly eliminated fixed presumptive terms in favor of “advisory” sentences for each offense. Now, a court may impose any sentence within the statutory range set for the crime, “regardless of the presence or absence of aggravating circumstances or mitigating circumstances.” Ind. Code Ann. § 35-38-1-7.1(d) (West, Westlaw through 2009 1st Special Sess.).

2005, he was convicted of operating a vehicle without ever having received a license, a class C misdemeanor. In January 2007, he was convicted of disorderly conduct as a class B misdemeanor and sentenced to ten days in jail, plus probation. On September 5, 2007, while on probation, Gonzalez was charged with furnishing alcohol to a minor as a class C misdemeanor. On September 26, 2007, a petition was filed to revoke his probation. The “furnishing” charge and petition to revoke were still pending at the time this appeal was filed. Although this is certainly not an extensive criminal history, the charge of furnishing alcohol to a minor is especially troubling in light of the instant offenses. We note in mitigation that Gonzalez completed his G.E.D. while awaiting trial on these charges.

We find that Gonzalez’s character and the nature of the offenses he committed are somewhat aggravating. We further find that the trial court did not abuse its discretion in imposing the sentences it did, and that a thirty-five-year executed sentence is not inappropriate.

Judgment affirmed.

KIRSCH, J., and ROBB, J., concur.