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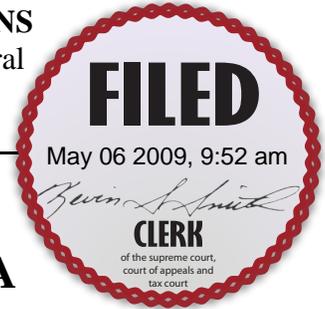
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**IN THE
COURT OF APPEALS OF INDIANA**

JAMES A. DOBBS,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 69A05-0810-CR-586

APPEAL FROM THE RIPLEY CIRCUIT COURT
The Honorable Carl Taul, Judge
Cause No. 69C01-0712-FA-004

May 6, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

James A. Dobbs (“Dobbs”) appeals his conviction after a jury trial from dealing in cocaine¹ as a Class A felony and conspiracy to deal cocaine² as a Class A felony. Dobbs presents the following restated issues for our review:

- I. Whether the trial court committed reversible error by allowing into evidence cocaine used to support Dobbs’s conspiracy to deal cocaine conviction;
- II. Whether Dobbs’s convictions for dealing in cocaine and conspiracy to deal cocaine violate double jeopardy principles; and
- III. Whether the trial court erred when sentencing Dobbs.

We affirm.

FACTS AND PROCEDURAL HISTORY

On July 16, 2007, Indiana State Police Detective Grant Martin was working undercover in a drug investigation involving Dobbs. Detective Martin spoke with Dobbs at approximately 10:50 a.m. that day about purchasing some cocaine and met with Dobbs at the parking lot of a McDonald’s restaurant in Versailles, Indiana where he arranged to purchase a quarter ounce of cocaine from Dobbs for \$400 plus \$40.00 for gas. Detective Martin met Dobbs later that same day at the same parking lot and Dobbs gave Detective Martin two bags of cocaine, which together weighed 5.39 grams.

On July 18, 2007, Detective Martin spoke with Dobbs who told Detective Martin that he could obtain from his source half an ounce of cocaine for \$650.00. On July 19, 2007,

¹See Ind. Code § 35-48-4-1(b).

² See Ind. Code § 35-48-4-1(b); Ind. Code § 35-41-5-2.

Detective Martin met with Dobbs in the McDonald's restaurant parking lot and arranged to purchase the cocaine and provide some extra money for gas. Later that same day, Dobbs met Detective Martin and gave him a bag of cocaine, which weighed 11.27 grams.

On December 10, 2007, the State filed the present charges against Dobbs. Dobbs's jury trial was held on July 29 and 30, 2008, at the conclusion of which, the jury found Dobbs guilty as charged. On August 27, 2008, the trial court sentenced Dobbs to forty years, with five years suspended, on each Class A felony conviction to be served concurrently. This sentence was ordered to be served concurrently with his sentence in another matter. Dobbs now appeals.

DISCUSSION AND DECISION

I. Admission Of Evidence

Dobbs alleges that the trial court committed fundamental error by admitting evidence of the delivery of cocaine on July 19, 2007 when the charged offense occurring on that date was conspiracy to deal cocaine. Dobbs argues that the evidence was irrelevant and inadmissible under Indiana Evidence Rule 404(b).

A trial court has broad discretion in ruling on the admissibility of evidence. *Scott v. State*, 855 N.E.2d 1068, 1071 (Ind. Ct. App. 2006). "Because we are considering the issue after a completed trial, we review the admission of evidence for an abuse of discretion." *Taylor v. State*, 891 N.E.2d 155, 158 (Ind. Ct. App. 2008), *trans. denied, cert. denied* (2009). We will consider the conflicting evidence most favorable to the trial court's ruling and any uncontested evidence favorable to the defendant. *Id.* An abuse of discretion occurs when the

trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or it misinterprets the law. *Id.*

Dobbs acknowledges that he did not object to the admission of the evidence on Rule 404(b) grounds at trial. "Generally, the failure to object, and thereby properly preserve an issue for appeal, results in waiver." *Marsh v. State*, 818 N.E.2d 143, 145 (Ind. Ct. App. 2004). However, he argues here that the evidence unfairly prejudiced him, depriving him of a fair trial such that the admission of the evidence constituted fundamental error.

The mere fact that error occurred and that it was prejudicial will not satisfy the fundamental error rule. *Absher v. State*, 866 N.E.2d 350, 355 (Ind. Ct. App. 2007). Similarly, in order to invoke this doctrine, it is not enough to urge that a constitutional right is implicated. *Id.* To qualify as fundamental error, "an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible" and must "constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process." *Id.* (citing *Benson v. State*, 762 N.E.2d 748, 755 (Ind. 2002) (internal quotations and citations omitted)).

Dobbs argues that the evidence of his delivery of the cocaine to Detective Martin should have been excluded under Evidence Rule 404(b), which provides as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

The "court must determine that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the person's propensity to commit the charged act," and "balance

the probative value of the evidence against its prejudicial effect pursuant to Rule 403.” *Roop v. State*, 730 N.E.2d 1267, 1270 (Ind. 2000). “[I]f the evidence bears on some issue other than criminal propensity and clears the balancing hurdle of Rule 403, it is admissible.” *Id.*

Dobbs argues that the evidence that he delivered the cocaine to Detective Martin on July 19, 2007, was irrelevant to the charged offense for that date, conspiracy to deal cocaine. Dobbs notes that the State brought in a lab analyst to testify that the drugs were cocaine, and commented on the completion of the July 19, 2007 deal during closing argument. Dobbs contends that the State was only required to show that Dobbs accepted money for the purpose of the drug deal, not that the deal was later completed.

Furthermore, Dobbs argues that the admission of the evidence was prejudicial to him because the evidence “painted Dobbs as a habitual drug dealer thereby evoking the forbidden inference—that Dobbs was a career criminal whose actions were in conformity with his character.” *Appellant’s Br.* at 8. Dobbs claims that by admitting the cocaine later delivered on July 19, 2007, the State was allowed to have “a powerful visual aid to encourage the jury to convict.” *Id.*

Assuming *arguendo* that the cocaine was erroneously admitted, the admission of the evidence did not constitute fundamental error. Detective Martin testified that Dobbs conspired to sell cocaine, and the admission of that cocaine was cumulative of Detective Martin’s testimony. The admission of cumulative evidence is generally harmless. *See Muncy v. State*, 834 N.E.2d 215, 217 (Ind. Ct. App. 2005). “Admission of evidence is harmless and is not grounds for reversal where the evidence is merely cumulative of other

evidence.” *Oldham v. State*, 779 N.E.2d 1162, 1174 (Ind. Ct. App. 2002). The trial court did not err.

II. Double Jeopardy

Next, Dobbs claims that his convictions for dealing in cocaine and conspiracy to deal cocaine violate double jeopardy principles because the continuous crime doctrine applies to his activities on July 16 and July 19, 2007.

The continuing crime doctrine essentially provides that actions that are sufficient in themselves to constitute separate criminal offenses may be so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction [W]e note that the continuous crime doctrine does not seek to reconcile the double jeopardy implications of two distinct chargeable crimes; rather, the doctrine defines those instances where a defendant’s conduct amounts only to a single chargeable crime. In doing so, the continuous crime doctrine prevents the State from charging a defendant twice for the same continuous offense.

Riehle v. State, 823 N.E.2d 287, 296 (Ind. Ct. App. 2005) (internal citations omitted).

Here, there is a singleness of purpose in that Detective Martin and Dobbs were engaged in an ongoing drug selling arrangement. However, the two offenses at issue here were not so compressed in time, place, or continuity of action as to constitute a continuous offense. While Dobbs notes that our Supreme Court has disfavored consecutive sentencing of an offender for multiple drug buys to the same State agent over a short period of time, the trial court imposed concurrent sentences here. *See Gregory v. State*, 644 N.E.2d 543, 546 (Ind. 1994) (reversed consecutive sentences for drug sales to same informant in short period of time). The singleness of purpose was addressed when the trial court ordered concurrent sentences for the two Class A felony convictions.

III. Sentencing

Dobbs argues that the trial court abused its discretion when sentencing him by failing to take into consideration factors supported by the record for a more lenient sentence. Dobbs also argues that his sentence is inappropriate in light of the nature of the offense and the character of the offender.

Trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (2007). The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Id.* If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id.* Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Id.* An abuse of discretion occurs if the decision 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.*

One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. *Id.* Other examples include entering a sentencing statement that explains reasons for imposing a sentence, including a finding of aggravating and mitigating factors if any, but the record does not support the reasons, 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. *Id.* at 490-91. Because the trial court no longer has any obligation to “weigh” aggravating and mitigating factors against each other when imposing a sentence, a trial court cannot now be said to have abused its discretion in failing to “properly weigh” such factors. *Id.* at 491. Once the trial court has entered a sentencing statement, which may or may not include the existence of aggravating and mitigating factors, it may then “impose any sentence that is . . . authorized by statute; and . . . permissible under the Constitution of the State of Indiana.” Ind. Code § 35-38-1-7.1(d).

A. Abuse of Discretion in Sentencing

Dobbs was convicted of Class A felony dealing in cocaine and Class A felony conspiracy to deal cocaine. The sentencing range for a Class A felony is a fixed term of between twenty years and fifty years, with the advisory sentence of thirty years. Ind. Code § 35-50-2-4. The trial court found that: (1) Dobbs’s seven arrests were indicative of a bad character and thus an aggravating factor; (2) Dobbs’s three prior misdemeanor convictions were an aggravating factor, but not worth substantial weight; (3) Dobbs was without genuine remorse; and (4) while Dobbs was not mentally ill, he did have a personality disorder. Based on these findings, the trial court sentenced Dobbs to forty years in the Department of Correction, with five years suspended to probation.

Dobbs argues that the trial court abused its discretion when sentencing him by failing to take into consideration reasons supported by the record for a more lenient sentence. More specifically, Dobbs argues that the trial court failed to take into account Dobbs’s long history of drug addiction, the evidence of which he claims is clearly supported by the record. Dobbs

advanced the argument that his drug addiction should be entitled to consideration as a mitigating factor.

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. *Anglemyer*, 868 N.E.2d at 493. If the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist. *Id.* (quoting *Fugate v. State*, 608 N.E.2d 1370, 1374 (Ind. 1993)). Moreover, the trial court is not obligated to weigh or credit facts proffered as mitigating by the defendant in the way that the defendant suggests they should be weighed or credited. *Abel v. State*, 773 N.E.2d 276, 280 (Ind. 2002). Furthermore, “[t]he approach employed by Indiana appellate courts in reviewing sentences in non-capital cases is to examine both the written and oral sentencing statements to discern the findings of the trial court.” *McElroy v. State*, 865 N.E.2d 584, 589 (Ind. 2007) (citing *Corbett v. State*, 764 N.E.2d 622, 631 (Ind. 2002)).

In the present case, the trial court’s oral sentencing statement included the following observation:

Mr. Dobbs has significantly, or was significantly less than honest in the interview. This indicates arrogant dishonesty or successful history of deceit or nearly delusional belief in his own innocense [sic] of all previous wrongdoing. That pretty much sums up the Court’s impression Mr. Dobb’s [sic] attitude throughout this proceeding as well as in others um, which then calls into question the sincerity of his remorse and the honesty of his letter. The letter says, I can’t remember ever losing total control around two and a half (2 ½) years ago someone gave me cocaine before that I never did know hard drugs I wasn’t perfect but I was functional. The convictions for battery and intimidation occurred in 2000 and 2003 before the two and a half (2 ½) years

he claims he was taking cocaine, crack cocaine. . . . Throughout this proceeding, until conviction and time for sentencing, Mr. Dobbs has shown no remorse, no willingness to admit that he has any kind of a problem. . . . After, I will recommend that he receive drug treatment. . . .

Tr. at 635-36. We find that the trial court took into consideration Dobbs's long-term drug problem, but found that it was not significant or clearly supported by the record as a mitigating factor. Dobbs's repeated substance abuse instead illustrated a pattern of violation of the law and failure to voluntarily seek treatment. Indeed, a trial court may find drug addiction to be an aggravating circumstance. *Iddings v. State*, 772 N.E.2d 1006, 1018 (Ind. Ct. App. 2002). The trial court did not abuse its discretion by failing to identify Dobbs's substance abuse as a mitigating circumstance.

B. Inappropriate Sentence

Lastly, Dobbs argues that the sentence is inappropriate in light of the nature of the offense and the character of the offender. He argues that he is not the worst offender and that he should have received a more lenient sentence. Indiana Appellate Rule 7(B) provides that the court 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. Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

Here, assuming without deciding that the nature of Dobbs's crimes were not remarkable, Dobbs's character, as shown by his criminal history, renders his slightly enhanced sentence appropriate. Even a limited criminal history can be considered an

aggravating factor. *See Pagan v. State*, 809 N.E.2d 915, 928 (Ind. Ct. App. 2004) (single juvenile adjudication and single adult conviction warranted some aggravation). Dobbs's first arrest was in 1994 for battery, but that charge was dismissed. Dobbs was convicted of intimidation in 2000 and convicted of battery in 2001. Dobbs was charged with neglect of a dependent in 2002, which was resolved through a pre-trial diversion program. In 2006, Dobbs was charged with criminal recklessness, which was dismissed the same day he was convicted of criminal mischief. Dobbs was convicted of domestic battery in 2006 as well. We find that Dobbs's slightly enhanced sentence is not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

RILEY, J., and MATHIAS, J., concur.