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ATTORNEY FOR APPELLANT:

MICHAEL B. TROEMEL
Lafayette, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

RICHARD C. WEBSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DONALD ANDERSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A04-0901-CR-39
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0711-FA-43

May 20, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Donald Anderson (Anderson), appeals his sentence and conviction for conspiracy to commit dealing in cocaine, as a Class A felony, Ind. Code §§ 35-48-4-1, 35-41-5-2; and dealing in cocaine, as a Class A felony, I.C. § 35-48-4-1.

We affirm.

ISSUES

Anderson raises three issues, which we restate as:

(1) Whether the trial court committed reversible error by refusing to give an instruction to the jury tendered by Anderson that explained that his "mere presence" alone would not support a conviction for conspiracy;

(2) Whether there was sufficient evidence to support his conviction beyond a reasonable doubt; and

(3) Whether his sentence is inappropriate.

FACTS AND PROCEDURAL HISTORY

Anderson met and moved in with Chaniece Parsons (Parsons) in September of 2007. They lived together at 800 Brown Street, Apartment 7, in Lafayette, Indiana. Anderson and Parsons did not have much contact during the initial months they lived together as Anderson kept to himself. Parsons learned that Anderson was dealing crack cocaine from the apartment when a man came to the apartment asking for Anderson when Anderson was not home one morning. Parsons telephoned Anderson who instructed her to get a pill bottle from the top shelf of his closet, obtain a baggie containing crack cocaine, and give it to the man.

Afterward, Parsons wanted Anderson to leave her home, but she did not force him out because he helped watch her baby son.

On November 7, 2007, another man came to Parsons' apartment. Parsons asked who had sent the man to her apartment, and the man handed her his cell phone. On the other end of the cell phone was Anderson. Anderson instructed Parsons to give the man the rest of the crack cocaine in the pill bottle. The man gave Parsons $100 in return. On November 12, 2007, Anderson called Parsons and informed her "that some guy was coming over and that he was supposed to have [$200] and to give him four bags of cocaine." (Transcript p. 86). The man who had come by on November 7 came to the apartment and Parsons completed the exchange with the man as instructed by Anderson. After the transaction was completed, the man informed Parsons that he was a police officer and placed Parsons under arrest.

Police officers then obtained a search warrant for the apartment. While conducting their search pursuant to the warrant, they discovered a pill bottle which contained crack cocaine located inside of a gym bag. Additionally in the bag, the officers discovered a document from Cook County Court with the name "Donald Anderson" on it. At some point, Anderson showed up at the apartment. When he entered he was startled by the presence of the officers and tried to run from them, but was captured by other officers. At the time of his arrest, Anderson was carrying a cell phone that contained a call history entry corresponding with a phone call from the cell phone of the undercover officer. Additionally, Anderson was in possession of two twenty dollar bills that the undercover police officer had used to make the cocaine purchase on November 7.

On November 13, 2007, the State filed an Information charging Anderson with Count I, conspiracy to commit dealing in cocaine, as a Class A felony, I.C. §§ 35-48-4-1 and 35-41-5-2; Count II, dealing in cocaine, as a Class A felony, I.C. § 35-48-4-1; Count III, dealing in cocaine, as a Class A felony, I.C. § 35-48-4-1; Count IV, dealing in cocaine, as a Class A felony, I.C. 35-48-4-1; Count V, possession of cocaine, as a Class A felony, I.C. § 35-48-4-6(b); Count VI, possession of marijuana, as a Class A misdemeanor, I.C. § 35-48-4-11; and Count VII, maintaining a common nuisance, a Class D felony, I.C. § 35-48-4-13. On June 10 and 11, 2008, the trial court jury trial was held. After deliberations, the jury returned a verdict of guilty of all charges.

On August 8, 2008, the trial court held a sentencing hearing. The trial court merged the convictions for Counts II and III merged with Count I. Additionally, the trial court merged the convictions for Counts V, VI, and VII into his conviction for Count IV.[1] The trial court found Anderson's criminal history to be an aggravating factor. On September 24, 2003, Anderson had been convicted of aggravated hijacking with a firearm as a felony in Cook County, Illinois, and was sentenced to eight years in prison for that crime. Additionally, Anderson was on parole at the time of his offenses. At the hearing, the State presented testimony from Tippecanoe County Sheriff's Deputy Andrew Swartz (Deputy Swartz) who was a member of the Drug Task Force. Deputy Swartz testified that Anderson was involved in transporting drugs from Chicago to Lafayette and was a "mid-level dealer."

[1] It seems odd to us that a conviction for possession of marijuana would be merged into a conviction for dealing in cocaine. However, neither party has challenged this merger on appeal, and, therefore, we will not address the propriety of this action.

(Tr. p. 256). Relying on this testimony and the evidence presented at trial, the trial court found that Anderson "was deeply involved in the sale of cocaine in the community." (Appellant's App. pp. 220-21). Based on these considerations, the trial court found that the aggravating factors outweighed the mitigating factors and sentenced Anderson to a term of forty years on Count I, conspiracy to commit dealing in cocaine as a Class A felony, and forty years on Count IV, dealing in cocaine as a Class A felony. The trial court ordered these sentences to be served concurrently in the Department of Correction.

Anderson now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Jury Instruction*

Anderson argues that the trial court committed reversible error by not giving the jury an instruction which he tendered to the court. Specifically, the trial court refused to give an instruction proposed by Anderson at the close of evidence which stated:

> Mere presence at the scene of a crime or mere association with co-conspirators will not by themselves support a conspiracy. Presence or a single act will support a conspiracy only if the circumstances permit an inference that the presence or act was intended to advance the ends of the conspiracy.

The State contends that Anderson has waived this issue on appeal by not submitting the jury instructions that were given as a part of the record.

Instructing the jury falls with the discretion of the trial court. *Perez v. State*, 872 N.E.2d 208, 210 (Ind. Ct. App. 2007), *trans. denied*. When reviewing the propriety of the trial court's refusal to give a jury instruction, we consider: (1) whether the instruction was

supported by evidence on the record; (2) whether the instruction correctly states the law; and (3) whether other instructions given to the jury adequately cover the substance of the denied instruction. *Washington v. State*, 840 N.E.2d 873, 888 (Ind. Ct. App. 2006), *trans. denied*.

Indiana Appellate Rule 50(B)(1)(c) provides that the Appendix should contain: "Any instruction not included in appellant's brief under Rule 46(A)(8)(e), or the Transcript of the instruction, when error is predicated on the giving or refusing of any instruction." On appeal, Anderson has provided us with a copy of the instruction which he claims was erroneously excluded. However, he has not provided us with any of the instructions that were given to the jury. Therefore, we are unable to review whether the instructions given adequately covered the substance of the instruction which the trial court refused. Nevertheless, we will not find that he has waived this claim for our review because "[a]ny party's failure to include any item in an Appendix shall not waive any issue or argument." App. R. 49(B).

However, we need not delay our review of this appeal by requiring Anderson to supplement the record because we conclude that Anderson's argument fails for another reason. The evidence in the record shows that Anderson provided the cocaine for the sales, instructed Parsons on how to conduct the sales, communicated with the buyers to facilitate the sales, and received money from the sales. Anderson presented no evidence which could be used to refute any of these facts. As such, the evidence was not that Anderson was merely present at the scene of the crime or merely associated with those involved in the crime. Therefore, the trial court did not abuse its discretion by refusing to give the instruction tendered by Anderson.

II. *Sufficiency of the Evidence*

Anderson argues that the evidence presented by the State was insufficient to sustain his convictions beyond a reasonable doubt.

> In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. We will consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. A conviction may be based upon circumstantial evidence alone. Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense.

Perez, 872 N.E.2d at 212-13.

Anderson contends that Parsons' testimony was "equivocal" because Parsons conceded that she had sent money to Anderson via Western Union and she was facing substantial prison time herself, but had yet to be sentenced. (Appellant's Br. p. 12). We disagree. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 769 (2002) defines the word "equivocal," in part, by stating: "having two or more significations: capable of more than one interpretation: of doubtful meaning . . . ." Parsons testified that a man came to her door wanting to buy cocaine from Anderson. She called Anderson. Anderson instructed her to go to his room, get cocaine out of a pill bottle that he had, and give it to the man in exchange for money. She gave most of the money she received to Anderson. She testified that similar exchanges happened at least two more times. This is not equivocal testimony.

We acknowledge that Anderson may be trying to argue that Parsons' credibility is questionable considering the evidence of the Western Union money transfer and her

impending sentencing. However, this evidence was submitted to the jury, and the jury determined the credibility of Parsons. We cannot reweigh this evidence or judge the credibility of Parsons upon appellate review. *See Perez*, 872 N.E.2d at 212-13.

Anderson also argues that the undercover police officer's testimony that he recognized Anderson's voice during the cell phone calls was "sketchy at best." (Appellant's Br. p. 12). However, the police officer's testimony was as follows:

Attorney for the State:	Had you met Donald Anderson before?
Police Officer:	Yes.
Attorney for the State:	Had you met him before just, uh, just introduced?
Police Officer:	No, I spoke to him on, at length on a couple of occasions.
Attorney for the State:	Okay. So you knew what he looked like.
Police Officer:	Yes.
Attorney for the State:	You knew, did you know his voice?
Police Officer:	Yes.

(Tr. pp. 106-07). This is clear testimony that the undercover police officer knew Anderson's voice when he spoke with him over the phone. Moreover, the phone that Anderson was carrying when he was arrested contained an entry in the call history representing a phone call with the undercover police officer. Altogether, we conclude that the evidence presented by the State is sufficient to sustain his convictions for conspiracy to commit dealing in cocaine and dealing in cocaine.

III. *Appropriateness of Anderson's Sentence*

Finally, Anderson argues that his sentence is inappropriate when the nature of his offenses and character are considered. Regardless of whether the trial court has sentenced the defendant within its discretion, we also have the authority to independently review the appropriateness of a sentence authorized by statute through Appellate Rule 7(B). *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008). That rule permits us to 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. *Anglemeyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. Where a defendant asks us to exercise our appropriateness review, the burden is on the defendant to persuade us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). "Ultimately the length of the aggregate sentence and how it is to be served are the issues that matter." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). Whether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and a myriad of other considerations that come to light in a given case. *Id*.

Anderson argues that his crimes were elevated to Class A felonies because they were committed within 1,000 feet of two schools and a housing complex; "[h]owever, the offenses had nothing to do with any children or that class of persons that the statutory enhancement seeks to protect." (Appellant's Br. p. 10). Anderson's contention ignores that there was a baby residing in the apartment from which he was selling cocaine. Moreover, in his actions

with the undercover police officer, Anderson sent what he believed to be a drug user or dealer, which he obviously did not know well, to his apartment when he was not even there. By doing such, Anderson endangered the safety and well being of the child.

Further, Anderson argues that his "sentence may be appropriate for a crime of violence or at least a crime where there is a victim." (Appellant's Br. p. 10). Essentially, Anderson is arguing that our legislature has made the punishment for his crimes too harsh. Regardless, we do not conclude that Anderson's sentence is inappropriate when the evidence clearly demonstrated that he was frequently dealing cocaine from an apartment where a baby resided, which was also located close to two different schools. His actions speak both for his character and the nature of his offenses.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion when it refused to give the jury instruction on conspiracy which Anderson tendered, that the evidence was sufficient to sustain Anderson's convictions, and that his sentence is not inappropriate when the nature of his offenses and character are considered.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.