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IN THE
COURT OF APPEALS OF INDIANA

MARIA CABRERA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 09A02-1010-CR-1084
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CASS SUPERIOR COURT
The Honorable Richard A. Maughmer, Judge
Cause No. 09D02-0810-FA-14

May 31, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Maria Cabrera appeals after a jury trial from her conviction and sentence for class A felony Dealing in Cocaine.[1] Cabrera raises the following restated issues for our review:

1. Did the trial court err by finding that Cabrera's co-defendant was not required to testify on her behalf after asserting his Fifth Amendment privilege not to incriminate himself?

2. Was the evidence sufficient to sustain Cabrera's conviction?

3. Did the State's compensation to the confidential informant for completion of the drug transaction and for missing two days of work to attend depositions violate due process principles?

4. Did the trial court err by failing to find aggravating or mitigating circumstances and is Cabrera's advisory sentence inappropriate in light of the nature of the offense and the character of the offender?

We affirm in part, reverse in part, and remand with instructions.

On October 22, 2008, paid confidential informant, Orland Garcia, contacted Cass County Drug Task Force Detective James Klepinger about conducting a controlled drug buy from Javier Serrato in Logansport, Indiana. Garcia had served as a paid confidential informant for the drug task force numerous times. Detective Klepinger met Garcia at his residence out of town, searched him, fitted him with an audio interceptor device, and gave him $1000 in buy money to purchase one ounce of cocaine.

Detective Klepinger took Garcia to within one and one-half blocks from Serrato's residence where he dropped him off and watched as Garcia approached Serrato's front door. Serrato and his live-in girlfriend of six years, Cabrera, answered the door. The three spoke in

[1] Ind. Code § 35-48-4-1(b) (West, Westlaw current through 2011 Pub. Laws approved & effective through 4/6/2011).

Spanish as Garcia told Serrato that he needed an ounce and handed Serrato the buy money. Serrato kept $100, returned $100 to Garcia, and then handed the remaining $800 to Cabrera, who immediately left the residence and drove away in a van that had been parked in front of the residence. Detective Klepinger followed Cabrera as she drove three or four blocks to a different residence where she exited the van, went inside for a couple of minutes, and then returned to the van. Cabrera returned to Serrato's residence and went inside.

Cabrera handed Serrato a plastic bag with 25.08 grams of cocaine from her jacket. Serrato then handed the plastic bag to Garcia. Cabrera said that she thought she had been followed by police. Garcia left and met with Detective Klepinger who searched him. Garcia gave the officer the cocaine and remaining $100. Garcia was paid $100 for the drug transaction.

The State charged both Serrato and Cabrera with class A felony dealing in cocaine. Prior to trial, Garcia missed two days of work at his regular employment in order to attend depositions in this case and was compensated $100 per day. At Cabrera's jury trial, she called Serrato as a witness on her behalf. Serrato had objected prior to trial on Fifth Amendment grounds to his subpoena to testify. At Cabrera's trial, Serrato was represented by stand-in counsel. Through an interpreter, Serrato asserted his Fifth Amendment privilege against self-incrimination and refused to answer questions. Out of the presence of the jury, Serrato then indicated that he would testify. The trial court allowed Serrato's stand-in counsel to confer with him about the implications of his testimony at Cabrera's trial, as Serrato's counsel had not met with him to discuss the subject. After this private meeting,

Serrato indicated that he was asserting his Fifth Amendment privilege not to incriminate himself.

Cabrera argued that Serrato was being prevented from testifying, but Serrato's stand-in counsel explained that Serrato now understood the implications of his testimony at Cabrera's trial. The trial court then released Serrato from his subpoena after Serrato confirmed that he would not testify. The jury found Cabrera guilty as charged. The trial court found no aggravating and mitigating circumstances and sentenced Cabrera to the advisory sentence for a class A felony, thirty years. Cabrera now appeals.

1.

Cabrera contends that the trial court erred by finding that Serrato, Cabrera's co-defendant, was not required to testify on Cabrera's behalf after he asserted his Fifth Amendment privilege against self-incrimination. A trial court has broad discretion in its rulings on the admissibility of evidence. *Jennings v. State*, 723 N.E.2d 970 (Ind. Ct. App. 2000). Upon review, we will disturb a trial court's ruling on the admissibility of evidence only for an abuse of discretion. *Id*.

Here, Serrato declined to testify citing his Fifth Amendment privilege against self-incrimination as the basis of his objection. Ind. Code Ann. § 35-37-3-1(West, Westlaw current through 2011 Pub. Laws approved & effective through 4/6/2011) provides that if a witness at a trial after an information has been filed refuses to answer any question, the trial court shall remove the jury and immediately conduct a hearing on the witness's refusal, and the trial court shall decide after the hearing if the witness is required to answer the question. Although the Due Process Clause of the Fourteenth Amendment and the Compulsory Process

or Confrontation Clauses of the Sixth Amendment guarantee criminal defendants a "meaningful opportunity to present a defense," *Joyner v. State*, 736 N.E.2d 232, 242-43 (Ind. 2000), "the power to compel testimony is not absolute." *Duso v. State*, 866 N.E.2d 321, 325 (Ind. Ct. App. 2007).

A trial court will determine whether an answer to a question proposed to a witness will incriminate the witness. *Duso v. State*, 866 N.E.2d 321. A trial court is bound by the statement of the witness as to its effect unless it clearly appears from examination of the witness and the circumstances before the trial court that the witness is mistaken in his conclusion that the answer will incriminate him, or that the witness's refusal to testify is purely contumacious. *Id*. The witness is excused from answering if the answer would tend to furnish one link in the chain of evidence necessary to convict him of a criminal charge. *Id*. A witness is not obligated to explain how the answer might incriminate him as this would defeat the object of the constitutional provision. *Id*.

Here, Serrato was charged with class A felony dealing in cocaine involving the same transaction that led to the charges against Cabrera. Prior to trial, Serrato objected to the subpoena to testify in Cabrera's trial and indicated in front of the jury that he was asserting his Fifth Amendment privilege against self-incrimination. The trial court excused the jury and Serrato indicated his willingness to testify. His stand-in counsel then asked to privately consult with Serrato, as his attorney had not previously met with him, and explained the implications of his testimony. After the consultation, Serrato indicated that he now understood the implications of testifying and reasserted his Fifth Amendment rights. After Cabrera's counsel argued that Serrato was being prevented from testifying, Serrato's stand-in

counsel then explained why Serrato was not willing to testify. The trial court then excused Serrato. Our review of the record leads us to conclude that the trial court correctly followed its statutory mandate and reached the conclusion that Serrato's testimony would likely incriminate him. We find no error here.

2.

Cabrera claims that the evidence is insufficient to support her conviction. Cabrera was convicted of delivering three or more grams of cocaine. I.C. § 35-48-4-1(b)(1). In reviewing a claim of insufficiency of the evidence, we do not reweigh the evidence or assess the credibility of the witnesses. *Soward v. State*, 716 N.E.2d 423 (Ind. 1999). Rather, we look to the evidence and reasonable inferences drawn therefrom that support the verdict, and will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *Kelly v. State*, 719 N.E.2d 391 (Ind. 1999).

Cabrera argues that her conviction was the result of entrapment. In Indiana, the entrapment defense is provided for by statute. Ind. Code Ann. § 35-41-3-9 (West, Westlaw current through 2011 Pub. Laws approved & effective through 4/6/2011). The entrapment defense is raised once the evidence indicates that the police were involved in criminal activity. *Shelton v. State*, 679 N.E.2d 499 (Ind. Ct. App. 1997). Furthermore, it is the defendant's responsibility to place the affirmative defense of entrapment in issue before the State is required to provide rebuttal evidence that the defendant was predisposed to commit the crime. *Jackson v. State*, 441 N.E.2d 29 (Ind. Ct. App. 1982). The defendant must make entrapment an issue. *Townsend v. State*, 418 N.E.2d 554 (Ind. Ct. App. 1981). Where the

issue is never raised in any manner at trial, the issue is waived on appeal. *Patterson v. State*, 329 N.E.2d 630 (Ind. Ct. App. 1975).

Here, Cabrera did not argue that the drug transaction occurred because she was entrapped, but rather that the drug transaction never took place at all. Because the affirmative defense was not raised at trial, the burden to show Cabrera's predisposition to commit the crime never shifted to the State. We find that the State's evidence passes appellate review on this component of the sufficiency challenge.

Cabrera also attacks the sufficiency of the State's evidence of dealing in cocaine. Yet, Cabrera casts her argument in terms of the sufficiency of the evidence of her possession of the cocaine. In fact, Cabrera was charged with dealing in cocaine by delivering it, not possessing it. I.C. § 35-48-1-11(West, Westlaw current through 2011 Pub. Laws approved & effective through 4/6/2011) defines delivery as an actual or constructive transfer from one person to another of a controlled substance, whether or not there is an agency relationship, or the organizing or supervising of the transfer of the controlled substance to another person.

Here, the evidence shows that Garcia gave the buy money to Serrato who then gave $800 of the buy money to Cabrera. Cabrera immediately left the house and drove three to four blocks to a residence where she went inside for a couple of minutes prior to exiting and returning to the van. When Cabrera returned to her home, she handed Serrato a plastic bag containing 25.08 grams of cocaine from her jacket. Serrato then handed the cocaine to Garcia.

In *Cline v. State*, 860 N.E.2d 647 (Ind. Ct. App. 2007), we held that the evidence was sufficient to support a conviction of dealing by delivering where the defendant handed the

controlled substance to another person prior to a traffic stop. Cabrera's intent to possess the controlled substance was not an element of the charged offense. Cabrera told Garcia and Serrato that she believed that she had been followed by law enforcement. It is for the trier of fact to determine witness credibility. We see no reason to disturb the jury's verdict here, as the evidence of delivery is sufficient, and we conclude that Cabrera's conviction is supported by sufficient evidence in all regards.

3.

Cabrera argues that the State's compensation arrangement with the confidential informant violates due process. In particular, Cabrera contends that the doctrine of outrageous government conduct is an absolute bar to the government invoking judicial process to obtain a conviction. Cabrera cites to *United State v. Valona*, 834 F.2d 1334 (7th Cir. 1987) in support of her argument. The court there held that the issue of outrageous conduct is a legal question, and the pre-targeting of a suspect combined with the contingent payment of a confidential informant raises some serious due process concerns. *Id.*

Here, the drug task force used Garcia, a well-known paid confidential informant, for the drug transaction involving Serrato and Cabrera. Garcia was paid a flat fee of $100 for the drug transaction and $200 for missing two days of his regular work for attendance at depositions. Cabrera did not file a motion to dismiss the information based on constitutional grounds prior to trial, and has waived any due process constitutional challenge. Waiver aside, her argument nonetheless fails.

The Due Process Clause of both the federal and state constitutions prohibit state action that deprives a person of life, liberty, or property without the process or course of law that is

due, that is, a fair proceeding. *Indiana High Sch. Athletic Assoc. v. Carlberg*, 694 N.E.2d 222 (Ind. 1997). As for federal claims, outrageous government conduct occurs when law enforcement obtains a conviction for conduct beyond the defendant's predisposition by using methods that fail to comport with due process guarantees. *United State v. Cizkowski*, 492 F.3d 1264 (11th Cir. 2007). Due process grants leeway to law enforcement agencies in their investigation of crime, and assuming no independent constitutional right has been violated, governmental conduct must be truly outrageous before a defendant's conviction will be prevented by due process. *United States v. Kaminski*, 703 F.2d 1004 (7th Cir. 1983). Here, Garcia was paid a flat fee for his participation in the drug transaction and was compensated for each day of regular work missed to attend depositions in this case. The payment was made before trial and there was no evidence that Garcia gained any other monetary benefit. Furthermore, the jury was made aware of Garcia's compensation in the present case. The outrageous conduct doctrine is inapplicable here.

As for a state constitutional claim of outrageous government conduct, we decline to adopt a rule that contingent fee agreements with confidential informants are unconstitutional under the Indiana Constitution, as this is not the case for such a holding. Again we note that Garcia was paid a flat fee as a confidential informant. We find no violation of Cabrera's stated due course of law protections. The jury was fully apprised of the State's compensation of Garcia and Cabrera was allowed to cross-examine Garcia about this point. We find no reversible error here.

4.

Cabrera asserts that the trial court abused its discretion in sentencing her by failing to

acknowledge mitigating factors and by poorly articulating its sentencing statement. Cabrera additionally argues that her sentence is inappropriate in light of her character and the nature of her offense. The trial court sentenced Cabrera to a thirty-year advisory sentence for her class A felony conviction.

Sentencing decisions rest within the sound discretion of the trial court. *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. When imposing a sentence for a felony, the trial court must enter a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing the sentence. *Id*. A trial court abuses its discretion if its reasons and circumstances for imposing the sentence are 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. *Hollin v. State*, 877 N.E.2d 462 (Ind. 2007).

Cabrera argues that the trial court abused its discretion by failing to find her remorse as a mitigating factor in sentencing. The determination of mitigating circumstances is within the discretion of the trial court. *Rogers v. State*, 878 N.E.2d 269 (Ind. Ct. App. 2007). The trial court is not obligated to accept the defendant's argument as to what constitutes a mitigating factor, and a trial court is not required to give the same weight to proffered mitigating factors as does a defendant. *Id*. A trial court does not err in failing to find a mitigating factor where that claim is highly disputable in nature, weight, or significance. *Id*. An allegation that a trial court abused its discretion by failing to identify or find a mitigating factor requires the defendant on appeal to establish that the mitigating evidence is significant and clearly supported by the record. *Id*.

We find that the trial court did not abuse its discretion in refusing to find Cabrera's expression of remorse to be a significant mitigating circumstance. On appeal, a trial court's determination of a defendant's remorse is similar to its determination of credibility. *Pickens v. State*, 767 N.E.2d 530 (Ind. 2002). Without some evidence of an impermissible consideration by the sentencing court, we accept its determination of credibility. *Id*. Here, it appears from Cabrera's written statement to the trial court that her expressions of remorse were more in the nature of begging for leniency than a genuine expression of remorsefulness for her actions. In her expression of remorse, Cabrera indicated a desire to remove herself from controlled substances and those who deal in controlled substances. Her relationship with Serrato, a drug dealer, was still on-going at the time of Cabrera's sentencing. We do not find that the trial court abused its discretion by failing to find a significant mitigating circumstance.

Further, the trial court considered Cabrera's criminal history and did not find it as a mitigating circumstance. A defendant's lack of criminal history is generally recognized as a significant mitigating factor. *Carter v. State*, 711 N.E.2d 835 (Ind. 1999). In this case, Cabrera was in violation of a pre-trial diversion program for theft in Florida for which a warrant had been issued, and thus does not lack a criminal history. Cabrera also admitted to occasional usage of marijuana and was in possession of three grams of cocaine when she was arrested for the instant offense. The trial court did not abuse its discretion by failing to find her lack of criminal history as a mitigating circumstance. We conclude that the trial court did not abuse its discretion by failing to identify these proffered mitigating factors in sentencing.

Cabrera also challenges the adequacy of the trial court's sentencing statement. "One

way in which a trial court may abuse its discretion is failing to enter a sentencing statement. . . ." *Anglemyer v. State*, 868 N.E.2d at 490. Here, in sentencing Cabrera to the thirty-year advisory sentence for a class A felony conviction, the trial court stated as follows:

> Okay, Maria, I've reviewed the PSI and having heard the evidence presented at trial in this cause of action I now sentence you to the advisory sentence for a class A felony which is thirty years. The court not finding any mitigating or aggravating circumstance and believes that an advisory sentence according to the law is where the case should start and finish. There is nothing to add or subtract from what it is other than what you are convicted for. So thirty years is the sentence.

Appellant's Appendix at 30-31. Although brief, the trial court's expression of its finding that there were no significant aggravating or mitigating circumstances and the appropriateness of the advisory sentence is quite clear and adequate. We find no reversible error here.

Cabrera also challenges her thirty-year advisory sentence as inappropriate in light of the nature of the offense and her character. We have the constitutional authority to revise a sentence, if after careful consideration of the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and the character of the offender. *See* Ind. Appellate Rule 7(B); *Anglemyer v. State*, 868 N.E.2d 482. Even if the trial court follows proper procedure in arriving at its sentence, we retain the power to revise the sentence we find inappropriate. *Hope v. State*, 834 N. E.2d 713 (Ind. Ct. App. 2005). Although we are not required under App. R. 7(B) to be "extremely" deferential to a trial court's sentencing determination, we do recognize the unique perspective a trial court brings to that determination. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). Here on appeal, Cabrera bears the burden of persuading us that her sentence is inappropriate in light of the nature of her offense and her character. *Rutherford v. State*, 866 N.E.2d 867.

In looking at the nature of the offense, we find that the advisory sentence appears to be an appropriate place to begin. Cabrera received the $800 in buy money and drove to a location where she retrieved 25.08 grams of cocaine and returned to her residence with that cocaine. She then handed it over to Serrato. The amount of cocaine, 25.08 grams, was well beyond that required for a class A felony conviction, i.e., three grams. The PSI in this case reflects that this was not an isolated drug transaction involving Cabrera and Serrato. When Cabrera was arrested for the instant offense, she was in possession of more than three grams of cocaine. Further, there is nothing in the record to indicate that the nature of this offense warranted a reduced sentence. An advisory sentence for dealing in cocaine is appropriate where the defendant is the middleman. *Bonilla v. State*, 907 N.E.2d 586 (Ind. Ct. App. 2009).

As for the character of the offender, Cabrera was in violation of a pre-trial diversion program for theft in Florida for which a warrant had been issued. She admittedly uses marijuana and was in possession of more than three grams of cocaine when she was arrested for the instant offense. On the other hand, Cabrera attended school through the tenth grade, quitting school in order to care for her siblings. She had been employed at Tyson Foods from December of 2007 until the time of her arrest. Cabrera did request assistance in becoming drug free. Although Cabrera's continued association and relationship with Serrato, a drug-dealer, is troubling because it was ongoing as of the time of sentencing, we find that a more appropriate sentence in this case would be the sentence recommended by Cabrera's probation officer, i.e., twenty years with ten years suspended to probation. Therefore, we remand this matter to the trial court for the issuance of an order reflecting this revised sentence.

Judgment affirmed in part, reversed in part, and remanded with instructions for a new sentencing order.

BAILEY, J., and BROWN, J., concur.