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**IN THE
COURT OF APPEALS OF INDIANA**

PHILLIP SPRATT,)

Appellant-Defendant,)

vs.)

No. 79A02-1006-CR-667

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0802-FA-10

June 7, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Phillip Spratt appeals his convictions and aggregate sentence of forty years for two counts of Class A felony dealing in cocaine and one count of Class B felony possession of cocaine. Because the same cocaine was used to support Spratt's dealing and possession convictions, we vacate Spratt's conviction for Class B felony possession of cocaine. We, however, find the evidence sufficient to support the dealing convictions. We also conclude that the trial court abused its discretion in relying on two aggravators. We exercise our authority to review and revise sentences and sentence Spratt to the advisory term of thirty years for each count of dealing in cocaine, to be served concurrently.

The State cross-appeals the trial court's exclusion of an exhibit offered to prove a predicate felony for Spratt's habitual offender status. Because there is no information on this exhibit, other than Spratt's name, linking it to Spratt, we affirm the trial court on this issue. We therefore reverse in part and affirm in part.

Facts and Procedural History

Confidential Informant 07-55 was facing felony drug and forgery charges. In order to work off these charges, she agreed to make some controlled purchases for the Tippecanoe County drug task force.

On the afternoon of January 23, 2008, CI 07-55 met with Detective William Patrick Dempster with the Lafayette Police Department in order to set up a controlled buy with a black male in his late twenties or early thirties known by the name "Black" or Sean. Tr. p. 79. She had known him for "a year or two at the most." *Id.* The CI called a

number in her phone. Black, later identified as Spratt, answered and said he would call her right back. Spratt then called the CI back from a different phone number. Detective Dempster recorded both phone conversations. The CI told Spratt that she wanted “to do 150.” State’s Ex. 16b. Spratt responded that she needed to come quickly because he “only got a little bit left” and then directed her to Ironwood Apartments in Lafayette. *Id.* The CI was searched for contraband, fitted with a body wire, and given \$150 in prerecorded buy money.

Detective Dempster drove the CI to Ironwood Apartments. Once parked outside the apartment buildings, the CI called Spratt and asked for his apartment number. Spratt exited the apartment and walked in view of the officers on the scene. Spratt was described as a black male wearing blue jeans, a white t-shirt, and with short to medium dread hair.

The CI followed Spratt into the apartment and exchanged \$50 for .17 grams of cocaine and paid \$50 on a past debt. State’s Ex. 22. The transaction was recorded on the CI’s body wire. State’s Ex. 17b. Shortly after leaving the apartment, Spratt called the CI and told her that he had more cocaine to sell. The CI returned to the apartment, went inside, and exchanged the remaining \$50 for .18 grams of cocaine. State’s Ex. 21. This transaction was also recorded on the CI’s body wire. State’s Ex. 19b. The CI identified Spratt in a photo array on January 25, 2008, two days after the controlled buys. Spratt was not arrested for a while so that Spratt’s arrest was not linked to this CI and so that Spratt’s arrest would not jeopardize the task force’s other targets.

The State charged Spratt with two counts of Class A felony dealing in cocaine, Ind. Code § 35-48-4-1(b)(3)(B) (within 1000 feet of family housing complex), and one count of Class B felony possession of cocaine, all for the January 23, 2008, offenses. The State later alleged that Spratt was a habitual offender. A jury trial was held during which the CI identified Spratt as the person she purchased the cocaine from. Spratt's defense at trial was that the CI identified the wrong "Black." The record shows that the CI knew another person by the name of "Black" whom she had also made controlled purchases from. Tr. p. 79-80. This person was later identified as Damien Rodgers. The CI testified in a trial against Rodgers in 2008, but Rodgers was acquitted. One of the officers who knew Rodgers and participated in this controlled buy, however, testified that Spratt was not Rodgers. *Id.* at 148-49.

The jury found Spratt guilty of the dealing and possession charges. Spratt then waived his right to a jury trial on the habitual offender charge. During the habitual offender phase of trial, the State offered into evidence State's Exhibit 26, which was a certified copy of court records from Circuit Court in Cook County, Illinois, for a "Phillip Spratt" for a 1996 felony conviction for possession of a controlled substance in Cause No. 96CR-16106. The State offered this exhibit to establish Spratt's second prior unrelated felony conviction. Spratt objected because Exhibit 26 did not contain a date of birth, fingerprint card, or anything else that specifically identified him. The trial court sustained Spratt's objection and found him not guilty of the habitual offender allegation.

A sentencing hearing was then held. The trial court identified the following mitigators: (1) Spratt has two minor children that are dependent on him; (2) he has

support of family and friends; and (3) his “demeanor and respect for the Court at all times.” Appellant’s App. p. 10. The court identified the following aggravators: (1) Spratt’s criminal history (one misdemeanor, two felonies, eleven cases “stricken off leave from Illinois,” and “seven other cases that have been dismissed and one withheld judgment,” Sent. Tr. p. 38); (2) his use of aliases; (3) he has not taken responsibility for his actions and has expressed no remorse for them; and (4) he is not dependent on drugs and is not a substantial user but rather is a dealer. Finding that the aggravators outweighed the mitigators, the trial court sentenced Spratt to forty years for each Class A felony and fifteen years for the Class B felony and ordered them to be served concurrently, for an aggregate sentence of forty years. Spratt now appeals his convictions and sentence, and the State cross-appeals the trial court’s exclusion of State’s Exhibit 26 during the habitual offender phase of trial.

Discussion and Decision

I. Spratt’s Appeal

Spratt raises several issues on appeal. First, he contends that his possession of cocaine conviction must be vacated because it was based on the same cocaine as his dealing in cocaine conviction. Second, he contends that the evidence is insufficient to support his convictions because the CI’s testimony is incredibly dubious. Finally, he contends that the trial court abused its discretion in sentencing him by relying on improper aggravators and that his sentence is inappropriate.

A. Lesser Included Offense

Spratt first contends that his possession of cocaine conviction must be vacated because it based on the same cocaine as his dealing in cocaine conviction. The State concedes that Spratt “may not be convicted and sentenced for both dealing in cocaine and possession of cocaine where the same cocaine is used for each offense.” Appellee’s Br. p. 6. “Possession of a narcotic drug is an inherently included lesser offense of dealing that drug, and a defendant generally may not be convicted and sentenced separately for both dealing and possession of the same drug.” *Quick v. State*, 660 N.E.2d 598, 601 (Ind. Ct. App. 1996), *reh’g denied*; *see also* Ind. Code § 35-38-1-6. Because the same cocaine was used to support both of Spratt’s dealing and possession convictions, we vacate Spratt’s conviction for Class B felony possession of cocaine.

B. Incredible Dubiosity Rule

Spratt next contends that the evidence is insufficient to support his convictions for Class A felony dealing in cocaine because the CI’s testimony is incredibly dubious.

In reviewing a sufficiency of the evidence claim, an appellate court does not reweigh the evidence or assess the credibility of witnesses. *Treadway v. State*, 924 N.E.2d 621, 639 (Ind. 2010). Rather, the court looks 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. *Id.*

Under the “incredible dubiosity” rule, a reviewing court will impinge on the factfinder’s responsibility to judge the credibility of the witness only when it has

confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of “incredible dubiousity.” *Copeland v. State*, 802 N.E.2d 969, 971 (Ind. Ct. App. 2004). When a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant’s conviction may be reversed. *Id.* Application of this rule is rare. The standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it. *Id.*

Spratt appears to challenge the CI’s testimony on two grounds. First, he challenges her testimony on the ground that she “was clearly under pressure to extricate herself from serious criminal problems” and she already had a cocaine conviction from 2005. Appellant’s Br. p. 10. However, the jury was made aware of this information and had the opportunity to evaluate her credibility. This does not make the CI’s testimony incredibly dubious.

Spratt then appears to argue that the CI’s testimony is incredibly dubious because she testified at trial that her memory of the controlled buys (which occurred over two years earlier) was “very blurry,” Tr. p. 124, she could not remember at her deposition a few days before trial how Spratt was dressed on January 23, 2008, yet she could remember at trial. The CI’s testimony does not fall within the limited exception of the incredible dubiousity rule. Her trial testimony was not contradictory, equivocal, or the result of coercion. Rather, the CI was forthcoming with what information she did not recall, and this information was presented to the jury for evaluation.

Moreover, circumstantial evidence exists to support the CI's testimony. Each of the controlled buys was arranged by telephone, and these conversations were recorded. Detective Dempster searched the CI both before and after the buys. The CI was fitted with a body wire to record the actual buys, and she was given prerecorded buy money to make the purchases. The CI then made two separate purchases from Spratt and returned the cocaine to Detective Dempster. The cocaine was subsequently tested by the State Police and had a combined net weight of .35 grams. Two days later, the CI identified Spratt from a photo array. The body wire, telephone calls, and cocaine provide circumstantial evidence which corroborated the CI's testimony that she purchased cocaine from Spratt.

Spratt, under the guise of the incredible dubiousity rule, is simply inviting this Court to reweigh the evidence and judge the credibility of the witnesses, which is something we may not do. The evidence is sufficient to support Spratt's two convictions for Class A felony dealing in cocaine.

C. Sentence

Spratt makes two sentencing arguments. He first contends that the trial court abused its discretion in sentencing him by relying on improper aggravators. But in the event that we find no abuse of discretion, he contends that his sentence is inappropriate.

1. Abuse of Discretion

Spratt first contends that the trial court abused its discretion by relying on improper aggravating factors in imposing concurrent forty-year sentences. Sentencing decisions rest within the sound discretion of the trial court. *Anglemyer v. State*, 868

N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). So long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Id.* An abuse of discretion will be found where 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.*

A trial court may abuse its discretion in a number of ways, including: (1) failing to enter a sentencing statement at all; (2) entering a sentencing statement that includes aggravating and mitigating factors that are unsupported by the record; (3) entering a sentencing statement that omits reasons that are clearly supported by the record; or (4) entering a sentencing statement that includes reasons that are improper as a matter of law. *Id.* at 490-91. If a trial court abuses its discretion for any of these reasons, “remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.” *Id.* at 491.

Spratt argues that the trial court abused its discretion in identifying as an aggravator that he has not taken responsibility for his actions and has expressed no remorse for them. The State argued at the sentencing hearing,

He said that he’s never been in possession of drugs or drug money and I think that based on his criminal history and his arrest that’s just not the case. I feel like he’s not—still not taking responsibility. He took this case to trial after a long time of it being on the court calendar, going through more than one attorney. He had an opportunity to resolve it in another fashion but did not. He’s continued not to take responsibility by saying he’s never been in possession of anything that he was charged with.

Sent Tr. p. 34. Spratt argued:

I think that his demeanor and respect to the Court when he . . . would always come to his Court hearing, his pre-trial conferences, he made an effort to dress up, he was very respectful to the Court, he was respectful to the Court throughout the trial. He's accepted the jury's verdict while he may disagree there was no outburst and he accepted it like a gentleman and we appreciate the Court giving us a continuance but his family was there throughout the trial supporting him also.

Id. at 30. The trial court ultimately found as an aggravator that Spratt “has not taken responsibility for his actions and has expressed no remorse for them” but did not elaborate any further. Appellant’s App. p. 10; *see also* Sent. Tr. p. 38-39.

There is no general prohibition against using lack of remorse as an aggravator. *See Fredrick v. State*, 755 N.E.2d 1078, 1084 (Ind. 2001); *Owens v. State*, 544 N.E.2d 1375, 1378 (Ind. 1989). This is so even though a defendant insists upon his innocence. *Bacher v. State*, 722 N.E.2d 799, 802 n.6 (Ind. 2000). Here, Spratt’s defense at trial was that the CI identified the wrong “Black” at trial; he did not dispute that two controlled buys occurred. But there is no evidence in the record showing Spratt’s lack of remorse, and the trial court did not identify any either. In fact, the trial court found mitigating Spratt’s “demeanor and respect for the Court at all times.” Thus, we find that the trial court abused its discretion in identifying this aggravator without providing support from the record.

Spratt next argues that the trial court abused its discretion in identifying as an aggravator that he is a drug dealer but is neither a substantial user nor dependent on drugs. The State does not specifically defend this argument in its brief.

As Spratt argues, it is inappropriate to use an element of an offense as an aggravator. *See Hape v. State*, 903 N.E.2d 977, 1002 (Ind. Ct. App. 2009) (“[A] trial

court may not use a factor constituting a material element of an offense as an aggravating circumstance.”), *trans. denied*. Because Spratt was convicted of two counts of dealing in cocaine, the trial court abused its discretion in identifying as an aggravator that Spratt was not dependent on drugs but rather dealt them.

Finally, Spratt argues that the trial court abused its discretion in identifying his use of aliases as an aggravator. At sentencing, the State pointed out that Spratt has “had five different aliases, one of which is Wayne Wilson who I believe, according to jail records, was listed as a cousin who visited him. Four date of births.” Sent. Tr. p. 31. The PSI shows that Spratt has been arrested in the past under at least two different names. PSI p. 4. In addition, the record shows that Spratt used the name “Black” or even Sean in this case. The trial court did not abuse its discretion in identifying this aggravator.

We are thus left with only two aggravators—Spratt’s criminal history and his use of aliases—and three mitigators—Spratt has two minor children that are dependent on him, he has the support of family and friends, and “his demeanor and respect for the Court at all times.” Because we address whether Spratt’s sentence is inappropriate under Indiana Appellate Rule 7(B), we need not determine whether the trial court would have imposed the same sentence had it considered only the proper aggravators.

2. Inappropriateness

Article 7, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Appellate Rule 7(B), which provides that a court “may revise a sentence authorized by statute 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.” *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer*, 868 N.E.2d at 491).

The advisory sentence for a Class A felony is thirty years. Ind. Code § 35-50-2-4. The maximum term is fifty years and the minimum is twenty. *Id.*

As for the nature of the offenses, Spratt, thirty-three years old at the time of sentencing, sold a small amount of cocaine, specifically .35 grams, in back-to-back transactions to a confidential informant. The sale would have been made in one transaction but Spratt did not have enough cocaine the first time around. And the sale was a Class A felony only because it was within 1000 feet of a family housing complex. There is nothing particularly heinous or dangerous about the offenses.

As for Spratt’s character, we acknowledge he has numerous arrests. The PSI shows that he has three felony convictions from Illinois: (1) 1996 felony possession of a controlled substance (this is the same conviction that the trial court excluded during the habitual offender phase of trial); (2) 1999 felony possession of a firearm; and (3) 1999 felony manufacture/delivery of cocaine. The 1999 convictions are from the same cause number. Spratt also has a 1995 misdemeanor conviction from Illinois for disorderly conduct. Notably, the most recent convictions are more than a decade old.

On the other hand, Spratt has redeeming aspects to his character. As the trial court alluded, Spratt, a high school graduate with one semester of college under his belt, does not appear to have any substance abuse issues. He has two children who are dependent on him. He has the support of his family. He showed respect to the court throughout the pendency of his case and apparently has a positive demeanor. Before his incarceration,

Spratt reported working for five continuous years at a job in Plainfield, Illinois. Based on the nature of the offenses and these positive traits, we use our review-and-revise authority to sentence Spratt to the advisory term of thirty years on each count of dealing in cocaine, to be served concurrently.

II. State's Cross-Appeal

In its cross-appeal, the State contends that the trial court abused its discretion in excluding State's Exhibit 26 during the habitual offender phase of trial. State's Exhibit 26 is a certified copy of court records from Circuit Court in Cook County, Illinois, for a "Phillip Spratt" for a 1996 felony conviction for possession of a controlled substance in Cause No. 96CR-16106. The State offered this exhibit to establish Spratt's second prior unrelated felony conviction in order to prove that he was a habitual offender. *See* Ind. Code § 35-50-2-8. Spratt objected because Exhibit 26 did not contain a date of birth, fingerprint card, or anything else that specifically identified him. The trial court sustained Spratt's objection and found him not guilty of the habitual offender allegation.

Spratt responds that the State is not entitled to cross-appeal an adverse evidentiary ruling. Assuming that the State has this right, we note that State's Exhibit 26 lists only Spratt's name as "Phillip Spratt," an Illinois cause number of 96CR-16106, and "I.R. # 1101973." There is no date of birth, no fingerprint card, no photograph, and no other identifying information. In short, there is nothing linking the Illinois "Phillip Spratt" to the Spratt in this case. In addition, there was no testimony to this effect either. Therefore, we conclude that the trial court did not abuse its discretion in excluding State's Exhibit 26. *Cf. French v. State*, 778 N.E.2d 816, 822 (Ind. 2002) (a defendant's

date of birth and picture are sufficient to establish his identity for habitual offender purposes); *Toney v. State*, 715 N.E.2d 367, 369 (Ind. 1999) (documentation listing defendant's name, gender, race, and birthdate were sufficient to prove defendant was the same person who committed a previous felony); *Parks v. State*, 921 N.E.2d 826, 834 (Ind. Ct. App. 2010) (evidence was sufficient to prove that defendant was the same person identified in the documents that the State admitted into evidence to prove habitual offender status because the documents included date of birth and social security number), *trans. denied*.

Reversed in part, affirmed in part.

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