

Aaron B. Fromer appeals his sentence for two counts of Class C felony robbery.¹

We affirm.

FACTS AND PROCEDURAL HISTORY

On March 20, 2007, Fromer was identified as the man who robbed a hotel and two gas stations located on U.S. 31 in Bartholomew County. Fromer was charged with Class B felony armed robbery, two counts of Class C felony robbery, and Class D felony criminal confinement.

Dr. George Parker and Dr. Ned Masbaum were appointed to evaluate Fromer's competency to stand trial and to determine whether he was sane at the time of the offenses. Both doctors' reports outlined a history of dyslexia; a brain injury resulting in seizures; treatment for depression and anxiety; and drug and alcohol abuse. However, the doctors concluded Fromer was able to understand the legal proceedings, could assist counsel in his defense, and was able to appreciate the wrongfulness of his conduct at the time of the offenses.

On June 26, 2008, Fromer pled guilty to two counts of Class C felony robbery and provided the following factual basis. Fromer went to a Speedway convenience store where Amber Harris was working. He grabbed Harris' arm, took her around the counter, and had her open a cash drawer. Fromer took the money in the drawer and then told Harris to open another drawer. Harris told him the drawer was locked, so he ripped it

¹ Ind. Code § 35-42-5-1.

out. He told a customer, “when you have a kid dying of cancer, that’s what you have to do.”² (Tr. at 19.) Fromer left in a black Jeep Cherokee.

Minutes later, Fromer stopped at Thornton’s Oil. He approached cashier David Altrum and said, “I’m going to rob your a**.” (*Id.* at 20.) Altrum thought Fromer was joking, but Fromer pushed him against the counter and slapped his face. “It wasn’t enough to cause a bruise, but it was enough to let Altrum . . . know that [Fromer] meant business.” (*Id.*) Fromer ordered Altrum to open the cash drawer. Fromer took the money and made the same comment about a child dying of cancer. Fromer told Altrum, “I’ll mess you right up,” and demanded cigarettes. (*Id.*) Altrum gave Fromer a package of cigarettes, and Fromer left.

Fromer was apprehended in a black Jeep Cherokee. Inside the vehicle, there was a cash drawer and money bearing Speedway’s stamp. Harris and Altrum identified Fromer as the robber. Fromer claimed he had no memory of the robberies, but he identified himself in the surveillance videos and stated he believed he committed the robberies as alleged.

A sentencing hearing was held on September 30, 2008. Dr. Parker and Dr. Masbaum testified, and their reports were included with the pre-sentence investigation report (“PSI”).

Dr. Parker indicated Fromer was dyslexic and had been in special education classes through eighth grade. In ninth grade, he transferred to vocational school and learned masonry. Fromer had a history of alcoholism. Fromer had suffered a traumatic

² At the guilty plea hearing, Fromer acknowledged that he did not have a child dying of cancer.

head injury, which caused him to have seizures. Dr. Parker testified that “head injuries can dis-inhibit folks and can make them more impulsive, more irritable.” (*Id.* at 76.) He opined that the injury could make it more difficult for Fromer to refrain from using alcohol; however, he would need more information about the location of Fromer’s injury and his behavior before and after the injury. Dr. Parker found Fromer’s judgment was “limited” and his intelligence was “in the range of borderline intellectual function.”³ (Appellant’s App. at 143.) Dr. Parker noted Fromer had past diagnoses of depression, bipolar, and anxiety disorders. However, he did not see signs of anxiety when he interviewed Fromer. Fromer was taking a mood-stabilizing drug and anti-depressants, but his medication for anxiety had been discontinued. Dr. Parker believed, with reasonable medical certainty, that Fromer has a mood disorder, but he did not feel he had a sufficiently clear history of Fromer’s symptoms to determine which one.

Dr. Masbaum also noted Fromer’s learning disorder, brain injury, and history of substance abuse. He reported that Fromer first used alcohol at age fifteen and then “proceeded to excessive alcohol use thereafter.” (*Id.* at 147.) Fromer also started using marijuana at age fifteen. Dr. Masbaum’s diagnostic impression included alcohol-induced persisting amnesic disorder, personality disorder, personality change due to alcohol and

³ Dr. Parker’s report does not define “borderline intellectual function.” Fromer directs us to an article on MentalHelp.net, which provides the following definition:

Borderline Intellectual Functioning diagnosis . . . can be made when IQ scores fall between 70 and 84. Such IQ scores describe uncommonly low intellectual ability, which is nevertheless not low enough to qualify for a diagnosis of mental retardation. . . . While such individuals function at a higher level than those classified as mentally retarded, their cognitive functioning is nevertheless limited, creating problems for everyday functioning, judgment, and academic or occupational achievement.

Tammi Reynolds & Mark Dombek, *Adaptive and Borderline Intellectual Functioning in Mental Retardation*, http://www.mentalhelp.net/poc/view_doc.php?type=doc&id=10323&cn=208 (last visited May 14, 2009).

substance abuse, and anti-social behavior. However, Dr. Masbaum believed Fromer's memory deficit was "too extreme," and he probably remembered more about the offenses than he was willing to admit. (Tr. at 41.) A personality disorder can "involve a lack of emotional closeness and perhaps using other people at times. And anti-social behavior means behavior that is against the law or against what is expected by a person in society." (*Id.* at 43.) These disorders "are not considered very treatable." (*Id.*) Medication can help his problems with seizures, depression, and anxiety. Fromer told Dr. Masbaum he was taking his medications at the time of the offenses. There is "not much treatment or medication" for the "primary brain changes" that Dr. Masbaum believed had already occurred. (*Id.* at 36.) Dr. Masbaum believed alcohol abuse was Fromer's "most prominent problem." (*Id.* at 40.)

Roger Fisher, a licensed clinical social worker at Indianapolis Psychiatric Associates, also testified at the sentencing hearing. During the time Fisher counseled Fromer, he saw no improvement, and he believed that was due to Fromer's brain injury.⁴ Fromer sometimes would not come in for counseling for months at a time. Fromer attended a counseling session the day of the robberies and he claimed his anxiety was getting worse, he could hardly leave home, and he did not feel comfortable making left turns when driving. Fisher noted Fromer would have had to make a left hand turn to reach Indianapolis Psychiatric Associates.

At the time of the sentencing hearing, Fromer was incarcerated in New Castle Correctional Facility. Fromer testified he was taking his medications daily, saw a

⁴ Fisher counseled Fromer prior to the crimes referenced herein.

psychologist twice a month, was taking anger management classes, and was on a waiting list for drug and alcohol counseling. He testified that in the past, he would stop treatment because he thought he was better, but he was learning to follow his doctors' advice. He acknowledged that he violated rules while in the Bartholomew County Jail. He claimed the conditions at the jail were very poor and he was not receiving his medications, and he has not been in trouble since he arrived at New Castle.

The State submitted three offense reports from the Bartholomew County Jail. The first report indicated that on April 20, 2007, an officer ordered Fromer to return to his cell because it was time to lock down. Fromer refused to go until he talked to the nurse about his medication. The officer informed Fromer that he would have to fill out a medical request. Fromer still refused to cooperate and said, "it will take all you [expletive] to get me downstairs." (State's Ex. 1 at 1.) Fromer was placed in handcuffs, but he refused to walk, and said, "I told you it would take all you [expletive] to get me downstairs." (*Id.*) The officer later talked to the nurse, who said Fromer was receiving all the medications that he was supposed to be getting. Fromer claimed he did not remember this incident.

The second offense report revealed that on October 18, 2007, an officer was handing out medication to inmates. Fromer complained to the officer that he needed fingernail clippers and medication for pain in his hands. The officer informed him that the requests had been made and she could do nothing further. Fromer said, "Sh** is going to get f***ed up if things don't get done and you let them know that." (State's Ex. 2 at 2.) The officer began to hand out medication to another inmate, and Fromer pushed the inmate aside. He then pushed the officer away from the medicine cart and said, "Best

that you move before you get hurt.” (*Id.*) He then flipped the cart over and kicked the cart. Another inmate’s medicine had to be thrown away because it spilled on the floor. The officer attempted to subdue him with OC spray, but he dodged, and most of the spray hit another inmate. The officer had to call for assistance. Fromer admitted at sentencing that this incident had occurred.

The third offense report indicated that on December 24, 2007, an officer thought he saw Fromer pass his medications to another inmate. Fromer would not show him the pills and insisted that he had already swallowed them. At the sentencing hearing, Fromer denied that he had given his pills to another inmate, claiming no one would want them because they could not be used to get high.

The PSI lists several of Fromer’s misdemeanor convictions: an unspecified alcohol offense in 1986, public intoxication in 1990 and 1993, resisting law enforcement in 1994, operating under the influence in 1994, public intoxication in 1999, and operating under the influence on two occasions in 2005. He also has a significant record of arrests: operating under the influence and driving while suspended in 1988, battery and public intoxication in 1994, battery and criminal mischief in 1999, and battery and public intoxication on another occasion in 1999.

In addition to this history of mostly alcohol-related offenses, Fromer was charged with several robberies and burglaries in three counties between September 2006 and March 2007. In Johnson County, Fromer pled guilty to Class C felony burglary, Class C felony robbery, and Class D felony resisting law enforcement. In Marion County, he was charged with two counts of Class C felony robbery, and he was convicted of at least one

count.⁵ During this timeframe, he was charged in Bartholomew County with the offenses at issue in this case.

The trial court imposed consecutive six-year sentences, all executed. The trial court noted Fromer's convictions, probation violations, and jail rule violations, and found his criminal history "a very aggravating circumstance." (Tr. at 85.) The trial court acknowledged the evidence of mental illness and brain injury, but did not give it mitigating weight because Fromer exacerbated his condition by consuming drugs and alcohol and by not complying with treatment. The trial court felt any mitigating weight attributable to his guilty plea was counterbalanced by the fact that two felony charges had been dropped.

DISCUSSION AND DECISION

Fromer challenges his sentence on several grounds: (1) the trial court erred by imposing a twelve-year sentence because his offenses were a single episode of criminal conduct; (2) the trial court abused its discretion in its recognition of aggravating and mitigating circumstances; (3) the trial court erred by not considering his eligibility for a diversion program; and (4) his sentence is inappropriate in light of his character and the nature of his offense.

⁵ At the time the PSI was completed, the Marion County charges were set for trial. In his brief, Fromer directs us to the Department of Correction website, which shows he is to serve four years for a Class C felony robbery conviction out of Marion County. Indiana Department of Correction, Offender Data for Aaron B. Fromer, www.in.gov/apps/indcorrection/ofs/ofs?offnum=184658&search2.x=42&search2.y=9 (last visited May 13, 2009).

1. Episode of Criminal Conduct

Fromer argues his offenses were a single episode of criminal conduct, and therefore, the trial court erred by imposing a twelve-year sentence. Ind. Code § 35-50-1-2(c) provides, in relevant part,

except for crimes of violence, the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under IC 35-50-2-8 [habitual offenders] and IC 35-50-2-10 [habitual substance offenders], to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.

Fromer's offenses are not crimes of violence in the meaning of Ind. Code § 35-50-1-2.⁶ If Fromer's two Class C felonies are deemed to arise out of a single episode of criminal conduct, he must be sentenced to a maximum of ten years, the advisory sentence for a Class B felony. Ind. Code § 35-50-2-5.

An episode of criminal conduct means "offenses or a connected series of offenses that are closely related in time, place, and circumstance." Ind. Code § 35-50-1-2(b); *Harris v. State*, 861 N.E.2d 1182, 1188 (Ind. 2007). The ability to recount each charge without referring to the other can provide guidance on the question of whether the conduct is an episode of criminal conduct, but it is not critical to resolving the question. *Reed v. State*, 856 N.E.2d 1189, 1200 (Ind. 2006).

Fromer compares his case to *Henson v. State*, 881 N.E.2d 36 (Ind. Ct. App. 2008), *trans. denied* 891 N.E.2d 46 (Ind. 2008). Early one morning, Henson broke into two neighboring garages and stole items from the garages. Henson was convicted of two

⁶ Subsection (a) lists offenses that are considered crimes of violence for purposes of this statute. Class C felony robbery is not one of them.

counts of Class C felony burglary. We concluded that his conduct was an episode of criminal conduct, and therefore his sentence could not exceed ten years. In doing so, we compared Henson's case to *Reed* and *Harris*.

Reed was fleeing police in a vehicle. He stopped and fired a shot at the officers, then continued driving. A few seconds later, he slowed down and fired additional shots. Reed was convicted of two counts of attempted murder and carrying a handgun without a license. The offenses were held to be a single episode of criminal conduct. *Reed*, 856 N.E.2d at 1201.

Harris and a friend induced two girls to come into their apartment. Harris had sex with one of the girls, while his friend had sex with the other. About five minutes after they finished, Harris and his friend switched partners. Harris pled guilty to two counts of Class B felony sexual misconduct with a minor. Our Supreme Court also found these offenses to be a single episode of criminal conduct. *Harris*, 861 N.E.2d at 1189.

Henson appears to be the outer limit of what constitutes a single episode of criminal conduct. In other cases involving separate victims, the offenses have not fallen within the single episode rule unless they happened simultaneously or in the same location, as in *Harris* and *Reed*. See also *Ballard v. State*, 715 N.E.2d 1276 (Ind. Ct. App. 1999) (single episode where Ballard broke into apartment and battered two people inside); *Trei v. State*, 658 N.E.2d 131 (Ind. Ct. App. 1995) (single episode where Trei confined boy and girl in same location and forced girl to have sex with him). Although Fromer's robberies occurred a few minutes apart and were executed in a similar manner, they occurred in different, non-adjacent locations against different victims, and therefore,

his case is one step removed from *Henson*. The trial court correctly concluded that Fromer's offenses were not a single episode of criminal conduct. See *Smith v. State*, 770 N.E.2d 290 (Ind. 2002) (depositing six stolen checks at different banks within the course of three hours not a single episode); *Reynolds v. State*, 657 N.E.2d 438 (Ind. Ct. App. 1995) (burglary of three homes on one day not a single episode).

2. Aggravators and Mitigators

Sentencing decisions “rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion.” *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *reh'g granted on other grounds* 875 N.E.2d 218 (Ind. 2007). A trial court may abuse its discretion by finding aggravators that are not supported by the record or by not recognizing mitigators that are clearly supported and are advanced for consideration. *Id.* at 490-91. “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.” *Id.* at 493.

The trial court found Fromer's criminal history an aggravating factor:

[The PSI] shows seven misdemeanor convictions, three prior felony convictions Now you say you got time in Marion County as well. So if convicted on both of those, that would [be] four and five more felonies in addition to these two. So that would make them [the] sixth and seventh convictions. On the convictions you have, at least five times you were placed on probation and your probation was revoked That extensive criminal history is a very aggravating circumstance especially in light of the petitions to revoke probation which indicate that you have a real difficulty in complying with conditions of probation Now your history also included being violent and disrespectful I've not served any time in the Bartholomew County Jail. I know that it's way over crowded. I am sure that it is very difficult to deal with all of those circumstances. But I sentence a lot of people from the jail and not very many of them have jail

rule violations. And even if you have them if they were directed to the inmates alone, that might be more understandable. But some of your violations are directed toward staff and that is a problem. That is consistent with your disruptive behavior when you are out of jail My concern in this is the violence that you exhibit. The anger, the disruption You're disagreeable. You're violent. You're angry. And those things may very well be able to be managed with medication, but I think it's too early to tell.

(Tr. at 85-87, 89.)

Fromer argues the trial court erred by characterizing his criminal record as evidencing violent and disrespectful tendencies. He acknowledges his long history of alcohol-related offenses but notes all the battery charges against him were dismissed. He argues the trial court may have been misled by the PSI's and the prosecutor's characterization of his criminal record.⁷ He notes that he used minimal force in the Bartholomew County robberies.

We find these arguments without merit. The PSI supports the finding Fromer has seven misdemeanor convictions, would have seven felony convictions if convicted of both of the robbery charges from Marion County, and has violated probation at least five

⁷ The prosecutor asked Dr. Masbaum whether he could form an opinion as to whether Fromer was a threat to society:

Q . . . If a person has a history of criminal conduct going back to [1986], involving arrests and convictions for driving while intoxicated, public intoxication, resisting law enforcement, batteries, and robberies. How does that fact fit in your ability to predict whether a person [with] diagnoses of personality disorder and anti-social disorder is a threat to the community?

A Well first of all I was never presented with this complete history to review. And I was just given history mainly from [Fromer], which centered mainly around alcohol related charges. And of course a history of past violence is the most important thing as far as predicting future violence and things of that nature. But again, I was led to believe that his arrests and his behavior was mainly alcohol related from the information I was provided with.

(Tr. at 44-45.)

The "Evaluation/Summary" section of the PSI states, "The defendant has a lengthy criminal history over the last 22 years consisting of numerous alcohol related offenses and batteries." (Appellant's App. at 128.)

times. Therefore, it appears the trial court was aware the battery charges were dismissed. In context, the court's comments about violence and disrespect appear to be directed toward Fromer's behavior in the Bartholomew County Jail rather than his battery arrests. Fromer admitted one of the incidents, in which he pushed an officer and flipped over a medicine cart. Fromer's conduct during these incidents can properly be characterized as violent, threatening, and disrespectful. Fromer alleged he was not receiving his medications while in jail, and that contributed to his behavior; however, the trial court was not required to credit that testimony. We note that two of the incidents occurred while officers were attempting to distribute medication to Fromer, and the jail nurse reported that Fromer was receiving all the medications he was supposed to take.

Fromer's extensive record of convictions, his probation violations, and his jail rule violations adequately support the trial court's finding that his criminal history is a "very aggravating circumstance." (*Id.* at 85.) Fromer emphasizes the fact that his felony convictions are recent and occurred over a short period of time, but he does not explain how this undermines the trial court's findings. It appears to be directed at the weight the trial court assigned to his criminal record, but we do not review the weighing of aggravators and mitigators. *Anglemyer*, 868 N.E.2d at 491.

Next, Fromer argues the trial court should have recognized his mental illness and limited intelligence as mitigating circumstances. The trial court found:

Now you do have . . . there is some evidence I should say of mental illness, substance abuse, and brain injury. Now while those might be mitigating circumstances, the problem is that you will not comply with treatment. . . . And alcohol . . . gets in the way of your treatment in addition to getting in the way of your behavior I believe Dr. Masbaum said you've created

some of your own problems by using the substances. . . . So it is true that you have these things, but you still by all the doctors have the ability to choose whether to consume substances or comply with treatment. . . . The only possible mitigator is your mental illness which is not clear from the testimony of the psychiatrist. There is some question about that, but that is offset by the fact that you create more of your own problems by continuing to . . . consume substances.

(Tr. at 85-86, 88.)

Fromer notes the trial court seemed to equivocate on the issue of whether he had a mental illness. Although Dr. Parker could not identify a specific mental illness, it appears both doctors were reasonably certain that Fromer had a mental illness of some sort. Nevertheless, the record supports the trial court's conclusion that any mitigating weight attributable to mental illness was counterbalanced by Fromer's substance abuse and failure to comply with treatment. Dr. Masbaum testified that

one of the best treatments for him of course is abstinence from alcohol, and that's been his main problem in adult life as far as I can tell. . . . [H]e's created problems for himself with his drug and alcohol abuse. They have caused him severe problems. And that's the most prominent problem that he has from a clinical standpoint.

(*Id.* at 36, 39-40.) Dr. Masbaum believed Fromer could have obtained effective treatment if he would have "take[n] the step to do so. It's in his hands." (*Id.* at 45.) Fisher testified Fromer did not go to appointments regularly, and Fromer admitted that he would discontinue treatment on his own accord. The record supports the trial court's conclusion that Fromer had contributed to his own problems.

3. Diversion Program

Fromer's PSI states:

The defendant was screened for the Forensic Diver[sion] Program. The defendant was found to not be eligible to participate in the forensic diversion program due to having been convicted of crimes evidencing a propensity or history of violence and the current offense being suspendible.

(Appellant's App. at 124.) Fromer argues he meets the statutory criteria for a diversion program, and the trial court erred by not reevaluating his eligibility.

Any error was invited by Fromer. *See Booher v. State*, 773 N.E.2d 814, 822 (Ind. 2002) ("A party may not invite error, then later argue that the error supports reversal, because error invited by the complaining party is not reversible error."). At the beginning of the sentencing hearing, the trial court asked if Fromer wanted to make any changes or additions to the PSI, but Fromer did not bring the alleged inaccuracy to the trial court's attention. Nor did Fromer ask for placement in a diversion program.

Nevertheless, Fromer has not established he meets the requirements of Ind. Code § 11-12-3.7-12(a), which provides:

(a) A person is eligible to participate in a post-conviction forensic diversion program only if the person meets the following criteria:

- (1) The person has a mental illness, an addictive disorder, or both a mental illness and an addictive disorder.
- (2) The person has been convicted of an offense that is:
 - (A) not a violent offense; and
 - (B) not a drug dealing offense.
- (3) The person does not have a conviction for a violent offense in the previous ten (10) years.
- (4) The court has determined that the person is an appropriate candidate to participate in a post-conviction forensic diversion program.
- (5) The person has been accepted into a post-conviction forensic diversion program.

Fromer addresses only whether he has any convictions of violent offenses. He has not shown he has been accepted into a diversion program. In addition, given the trial court's sentencing statement and the fact that it imposed aggravated, consecutive sentences with no time suspended, we are doubtful the trial court would find Fromer an appropriate candidate for a diversion program.⁸ We need not remand for resentencing if we are confident the trial court would have imposed the same sentence despite the asserted error. *See Pitts v. State*, 904 N.E.2d 313, 320 (Ind. Ct. App. 2009) (if trial court abuses discretion in sentencing, we remand if we cannot say with confidence the trial court would have imposed the same sentence).

4. Appropriateness of Sentence

Although a trial court may have acted within its lawful discretion, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review of sentences. *Anglemyer*, 868 N.E.2d at 491. This authority is implemented through Ind. Appellate Rule 7(B), which provides the "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." The defendant bears the burden of persuading us the sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

Fromer argues his offenses were not particularly egregious for Class C felony robberies and compares the sentence imposed by the Bartholomew Circuit Court with the

⁸ We note Fisher testified Fromer was in a diversion program when he was receiving counseling from Indianapolis Psychiatric Associates.

sentences he received in Marion and Johnson Counties. He was charged in Marion County with two counts of Class C felony robbery, and he asserts he was sentenced on one count for the advisory sentence of four years. He directs us to his “Offender Data” on the Department of Correction website. The website does not reflect whether Fromer will also serve time on probation for this conviction and does not indicate the disposition of the other charge out of Marion County. In Johnson County, he was sentenced to four years executed and two years probation for each of his Class C felony convictions, to be served consecutively. That he received some time on probation for his Johnson County offenses does not persuade us his Bartholomew County sentence is inappropriate, especially as the facts of his other recent offenses are not before us.

Fromer has a long record of criminal behavior that has escalated in severity. He has violated terms of probation and jail rules on several occasions. He was out on bond when he committed these offenses. There was some evidence that his limited intelligence and mental illness made it more difficult for him to conform his behavior to the law. However, there was also evidence that he compounded his problems by abusing alcohol and not complying with treatment. Fromer has struggled to comply with probation, but was doing well while incarcerated at New Castle Correctional Facility; he was taking his medications, seeing a psychologist regularly, taking anger management classes, and was on a waiting list for substance abuse counseling. Fromer’s sentence is not inappropriate.

Affirmed.

BAKER, C.J., and BARNES, J., concur.