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IN THE
COURT OF APPEALS OF INDIANA

SEAN W. CLOVER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 03A04-1010-CR-675
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Chris D. Monroe, Judge
Cause No. 03D01-1002-FA-263

AUGUST 26, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Senior Judge

Following a jury trial, Sean W. Clover was convicted of two counts of dealing in cocaine as Class A felonies. Ind. Code §35-48-4-1 (2006). The charges and convictions were based upon two separate undercover drug buys on August 21, 2008 and September 5, 2008 occurring in Columbus, Indiana. Clover was sentenced to concurrent terms of forty years each for the two convictions.

Three issues are presented for our review:

I. Whether the trial court erred in admitting State's Exhibit 28 as a substitute for State's Exhibit 12, an inaudible recording of the September 5 occurrence.

II. Whether the trial court erred by denying Clover's motion for a mistrial based on alleged prosecutorial misconduct.

III. Whether Clover's sentence is inappropriate.

I. ADMISSION OF EVIDENCE

Clover challenges the admission into evidence of State's Exhibit 28, which is purported to be an authentic copy of an audio recording made of the September 5 undercover transaction. The admissibility of evidence is within the sound discretion of the trial court, and we will not disturb the decision of the trial court absent a showing of abuse of that discretion. Gibson v. State, 733 N.E.2d 945, 951 (Ind. Ct. App. 2000). 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. Id.

At trial, Indiana State Police Detective Martin, the undercover officer involved in

the drug buys, testified that he made the original audio recording of the September 5 drug buy with his digital recorder as the transaction was occurring. Using a computer, he then downloaded the recording onto a compact disc that was introduced at trial as State's Exhibit 12. When Exhibit 12 was played for the jury, it was found to be unintelligible. The State then requested admission of Exhibit 28 as a substitute for Exhibit 12. Exhibit 28 is a compact disc that was represented to contain an additional copy of Detective Martin's audio recording of the September 5 transaction. It was explained that Exhibit 28 was produced by downloading the recording from the server of the Columbus Police Department by an officer other than Detective Martin. Detective Martin had previously mistakenly testified that the recording was not saved on the computer's hard drive because he was unaware that the Columbus Police Department downloaded and maintained these items on their server. However, Officer Rhode testified that once Detective Martin was done downloading the contents from his digital recorder to a disc, he then downloaded the contents of the digital recorder to the computer's hard drive and that Detective Martin did not know about this process because it is all internal within the Columbus Police Department.

Clover's argument regarding the allegedly improper admission of Exhibit 28 is based upon the lack of a proper foundation and insufficient chain of custody. However, we need not decide that matter. The information contained on the compact disc marked as Exhibit 28 is alleged to be the recording of the September 5 drug buy, the details of which Detective Martin testified to at trial. Detective Martin's testimony consisted of a

detailed recitation of how he contacted Clover, where and when they met, their drive to a trailer park where the drug transaction occurred with a third person, the amount of money Detective Martin gave Clover, and the amount of cocaine he received from Clover. Therefore, even if we were to determine that the trial court erred by admitting Exhibit 28, the error would be harmless because the evidence was cumulative. Purvis v. State, 829 N.E.2d 572, 585 (Ind. Ct. App. 2005) (stating that improper admission of evidence is harmless error when erroneously admitted evidence is merely cumulative of other evidence), trans. denied.

II. DENIAL OF MISTRIAL

Next, Clover alleges that the trial court erred by denying his motion for mistrial based upon two instances of alleged prosecutorial misconduct. A mistrial is an extreme remedy warranted only when no other curative measure will rectify the situation. Donnegan v. State, 809 N.E.2d 966, 972 (Ind. Ct. App. 2004), trans. denied. The grant of a mistrial is a determination within the trial court's discretion, and we will reverse its decision only for an abuse of that discretion. Id. We give great deference to the trial court's decision, as it is in the best position to gauge the circumstances and the probable impact on the jury. Id. To prevail on appeal from the denial of a motion for mistrial, the defendant must establish that the questioned information or event was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected. Williams v. State, 755 N.E.2d 1128, 1132 (Ind. Ct. App. 2001), trans. denied. The gravity of the peril is determined by considering the misconduct's probable

persuasive effect on the jury's decision. Id.

Further, appellate review of a claim of prosecutorial misconduct is a two-step process. First, we consider whether the prosecutor engaged in misconduct. Hand v. State, 863 N.E.2d 386, 393 (Ind. Ct. App. 2007). If so, we then consider whether the misconduct placed the defendant in a position of grave peril to which he should not have been subjected. Id. at 394. The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury's verdict rather than the degree of impropriety of the conduct. Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006).

The first claim of prosecutorial misconduct is that Exhibit 28 was not disclosed or provided to defense counsel until trial. However, it appears from the materials on appeal, and Clover does not assert otherwise, that prior to trial the defense was aware of and had been provided with the opportunity to listen to one of the compact discs containing the recording of the September 5 drug buy, as well as review a copy of the transcript of the recording.

Moreover, it appears from the transcript that one of the compact discs that were made available to the defense was eventually marked at trial as Exhibit 28. See Tr. pp. 412-13. Therefore, merely because Clover was not informed by the State until trial that there were in existence additional copies of the recording of the drug buy does not amount to prosecutorial misconduct. This is true notwithstanding the manner in which the recording was copied to the additional compact discs. We agree with the trial court's conclusion that although the State was guilty of being "sloppy," there was no "bad faith

by the State." Tr. p. 454. We are unable to conclude that any arguable failings on the part of the prosecution with respect to discovery amount to prosecutorial misconduct.

The second asserted instance of misconduct on the part of the State involves an alleged violation of a court order by Detective Martin. At the conclusion of part of his testimony, Detective Martin was instructed not to discuss his testimony with anyone, including the prosecutor. The trial court further explained to Detective Martin that he was not to talk to anyone involved in the case, except the witness coordinator from the prosecutor's office. On the morning of the third day of trial, an administrative assistant from the prosecutor's office approached Detective Martin and asked him for discs that he had in his file. Detective Martin gave the discs to the assistant. Although not pleased with the contact, the trial court determined there was no evidence that Detective Martin violated the court's order because the court had told Detective Martin he could have contact with an assistant at the prosecutor's office, and defense counsel agreed with the trial court. We again note the State's subpar performance in this case; nevertheless, we cannot say that it rises to the level of prosecutorial misconduct and reversible error. Thus, the trial court did not abuse its discretion in denying the motion for mistrial based upon these circumstances.

III. INAPPROPRIATENESS OF SENTENCES

Clover asserts that his sentences are inappropriate. The trial court imposed concurrent sentences of forty years for each of the two Class A felonies. Clover requests that each of the concurrent sentences be reduced to a term of twenty years.

We may revise a sentence authorized by statute if, after due consideration of the trial court's decision, we determine that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). A defendant bears the burden of persuading the appellate court that his or her sentence has met the inappropriateness standard of review. Anglemyer v. State, 868 N.E.2d 482, 494 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007).

To assess the appropriateness of the sentence, we look first to the statutory range established for the class of the offense. Here the offenses are both Class A felonies, for which the advisory sentence is thirty years, with a minimum sentence of twenty and a maximum sentence of fifty. Ind. Code § 35-50-2-4 (2005).

As to the nature of the offenses, Clover merely claims that he did not initiate either undercover buy or dictate the amounts purchased, and, although such does not relieve him of responsibility for either offense, it does distinguish his behavior "from other possible, perhaps more culpable, scenarios." Appellant's Br. p. 12. We decline Clover's invitation to find this as a basis to hold the sentences inappropriate.

With respect to his character, Clover focuses upon several factors. He first claims that he has expressed remorse in that he stated that he was "very sorry" for what he has done. Appellant's App. p. 57. Such expression falls short of a full acceptance of responsibility. See Price v. State, 765 N.E.2d 1245, 1253 (Ind. 2002) (noting that defendant's statement that he was "very sorry about what happened" was well short of a full acceptance of responsibility).

Clover next points to the fact that at the time of his arrest and incarceration he was employed. However, Clover admitted that his employment history was spotty at best, in part because of his "extra-curricular activities." Appellant's App. p. 62. This comment is presumably a reference to his long-standing abuse of alcohol and drugs. In any event, his short-term employment at the time of these offenses does not warrant revision of his sentence under Indiana Appellate Rule 7(B).

Clover also notes his pursuit of his GED ("General Education Development") diploma during his incarceration. While commendable, this factor does not cause his sentence to be inappropriate.

Finally, Clover points to the fact that he cooperated and participated in the pre-sentence evaluation and thoroughly and appropriately answered the interviewer's questions. While this is certainly more favorable than would be a failure to cooperate, it nevertheless does not cause us to hold the sentences unduly harsh.

Standing alone, Clover's prior criminal history justifies the ten year enhancement of his sentences. He had felony and misdemeanor convictions in four states: Michigan, Georgia, Ohio and Indiana. In addition, he was on probation from the state of Georgia at the time of these offenses, which is a "substantial consideration" in our assessment of his character. See Rich v. State, 890 N.E.2d 44, 54 (Ind. Ct. App. 2008), trans. denied. In short, Clover has not demonstrated that his concurrent forty-year sentences are inappropriate given the nature of the offenses and the character of the offender.

The judgment and sentences are affirmed.

ROBB, C.J., and MATHIAS, J., concur.