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IN THE
COURT OF APPEALS OF INDIANA

OCTAVIUS ALEXANDER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A05-0902-CR-77
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Don Daniel, Judge
Cause No. 79C01-0801-FA-7

October 9, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Octavius D. Alexander ("Alexander") appeals the sentence imposed following his plea of guilty to class B felony armed robbery.

We affirm.

ISSUE

Whether the trial court abused its sentencing discretion.

FACTS

On June 6, 2006, Darryl Richardson and Michael Alexander ("Michael") telephoned an individual known as "Scrappy" and ordered a quantity of crack cocaine. Soon thereafter, Scrappy sent Alexander to sell and deliver the cocaine to Michael's Lafayette residence. Alexander left after the transaction. When Richardson and Michael smoked the cocaine, they suspected that they had been sold a bad batch and called Scrappy to request higher quality cocaine. Soon thereafter, Alexander returned to the residence, ostensibly to deliver more cocaine; he was accompanied by Akhnaton Chioke and Anthony Lofton.

When Michael opened his safe to retrieve money to pay Alexander, Lofton suddenly grabbed his wallet. In an attempt to help Michael, Richardson then grabbed Lofton. In the ensuing struggle, one of the assailants dropped his hat, and Michael's money was strewn all over the garage. Richardson punched Lofton several times and then turned to assist Michael who was fending off Chioke and Alexander. Lofton then picked up a hammer and struck Richardson with it several times on his head; he also

struck Michael with the hammer. Alexander then stole drugs from Michael's safe and money from the garage before fleeing the scene with Lofton and Chioke.

Police were dispatched to the scene and arrived to find Richardson "bleeding from the top and back of his head" and Michael "bleeding profusely from several wounds to the head." (App. 20). Richardson and Michael were transported to the local hospital where emergency room physicians used staples to close their wounds. After they were released from the hospital, Richardson and Michael picked Lofton and Chioke's images from photographic arrays shown to them by police. Subsequently, police interrogated Lofton, and he identified Alexander as the third assailant in the garage. Forensic tests conducted on the hat dropped at the scene revealed that it belonged to Alexander and conclusively linked him to the crime.

Lofton and Chioke were charged and subsequently convicted as follows: Lofton pleaded guilty to class C felony battery resulting in serious bodily injury and received a four-year sentence to be served concurrently with an unrelated twenty-seven-year sentence for dealing in cocaine; and Chioke pleaded guilty to class B felony armed robbery and received an eleven-year sentence, with six years executed.

On October 28, 2006, Alexander committed several unrelated offenses[1] for which he has since been continuously incarcerated. On January 17, 2008, the State charged him with several offenses stemming from the robbery and attack on Michael and Richardson.

[1] On November 1, 2006, he was convicted and sentenced to a seven-year term in the Department of Correction for class D felony operating a vehicle with a controlled substance in the body causing serious bodily injury; class D felony resisting law enforcement; class A misdemeanor possession of marijuana; class A misdemeanor criminal recklessness; class D felony leaving the scene of an accident resulting in bodily injury; and class A misdemeanor leaving the scene of an accident resulting in bodily injury.

Alexander was charged with one count of class A felony armed robbery resulting in serious bodily injury; one count of class B felony robbery while armed; two counts of class C felony battery with a deadly weapon; two counts of class C felony battery resulting in serious bodily injury; and one count of class D felony theft. On November 7, 2008, Alexander pleaded guilty pursuant to an open plea[2] to one count of class B felony robbery while armed. In return, the State agreed to dismiss the remaining charges. The trial court took the plea agreement under advisement pending the preparation of a pre-sentence investigation report ("PSI").

On November 25, 2008, probation officer Dustin Bowles amended the PSI used in Alexander's prior sentencing hearing for use in the instant offense. He retained the court documents, victims' statements, sentencing order and abstract of judgment pertaining to the prior case, and also, included an eighteen-year sentence recommendation and updated Alexander's criminal history, incarceration status, and prison activities. Bowles then filed the amended PSI with the trial court. Alexander did not object.

On January 9, 2009, the trial court conducted a sentencing hearing. It found, as mitigating circumstances, Alexander's acceptance of responsibility by entering into a plea agreement; support from his family and pastor; and the classes and training that he had completed during his incarceration. The trial court also identified the following aggravating circumstances: (1) Alexander's "really significant" criminal history (tr. 34); (2) his history of alcohol and drug abuse; (3) that the instant charge stemmed from his

[2] A plea agreement where the issue of sentencing is left to the trial court's discretion is often referred to as an "open plea." *Collins v. State*, 817 N.E.2d 230, 231 (Ind. 2004).

involvement in an illegal enterprise; and (4) his score of thirty-two on the Level of Service Inventory-Revised test ("LSI-R"). It then imposed a sixteen-year sentence in the Department of Correction. Alexander now appeals.

DECISION

Alexander argues that the trial court abused its sentencing discretion. Specifically, he argues that the trial court relied upon an improper aggravating circumstance; improperly accepted the amended PSI; and that his sentence is inappropriate pursuant to Indiana Appellate Rule 7(B).

We initially note that sentencing determinations are within the sound discretion of the trial court, and we will only reverse for an abuse of that discretion. *Field v. State*, 843 N.E.2d 1008, 1010 (Ind. Ct. App. 2006), *trans. denied.* 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.*

1. Improper Aggravating Circumstance

First, Alexander argues that the trial court erred in finding that his ("LSI-R")[3] test score was an aggravating circumstance because the test duplicated his criminal history and demonstrated substance abuse – factors already analyzed by the trial court. The State

[3] 'The LSI-R is a standardized actuarial instrument that contains 54 items and produces a summary risk score that can be categorized into five risk levels.... Higher risk levels reflect an increase in the propensity to commit future criminal acts.' Christopher T. Lowenkamp & Kristin Bechtel, The Predictive Validity of the LSI-R on a Sample of Offenders Drawn from the Records of the Iowa Department of Corrections Data Management System, 71 Fed. Probation 25, 25-26 (Dec. 2007). While this actuarial instrument may be a helpful consideration for a probation department in determining rehabilitative services for an offender, its use by a trial court to assess a defendant's propensities is contrary to the essential function of the trial court in sentencing.
Rhodes v. State, 896 N.E.2d 1193, 1194 (Ind. Ct. App. 2008).

concedes that Alexander's LSI-R score[4] was an improper aggravating circumstance, but asserts that his enhanced sentence should be affirmed because the court relied upon other valid aggravating factors in imposing sentence.

When a trial court abuses its discretion in finding an aggravating circumstance, as the trial court has here, we will nonetheless affirm the sentence if we can say with confidence that the trial court would have imposed the same sentence even if it had not considered the improper aggravator. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). Here the trial court identified three other aggravating circumstances that Alexander does not challenge.

The trial court properly relied on the aggravating circumstances of Alexander's criminal history, his pattern of drug and alcohol abuse, and his involvement in a criminal enterprise, when it imposed an enhanced sentence. Specifically, the trial court noted,

> I note one prior misdemeanor conviction, three prior felony convictions, three other cases that have been dismissed. There have been six petitions to revoke probation found true although the court notes that three of those are in essence duplicates, there [sic] are the result of the same act and on one occasion the defendant failed to appear, and a warrant was issue [sic]. Since the commission of this crime there has been an additional felony and an additional misdemeanor conviction. At age twenty-three Mr. Alexander that is really frightening that you've got that kind of a history.

(Tr. 34).

A single aggravating circumstance may support the imposition of an enhanced sentence. *McNew v. State*, 822 N.E.2d 1078, 1082 (Ind. Ct. App. 2005). Further, "a

[4] We have previously held that "use of a standardized scoring model, such as the LSI-R, undercuts the trial court's responsibility to craft an appropriate, individualized sentence." *Id.* at 1195. Further, "[r]elying upon a sum of numbers purportedly derived from objective data cannot serve as a substitute for an independent and thoughtful evaluation of the evidence presented for consideration." *Id.* "It is an abuse of discretion to rely on scoring models to determine a sentence." *Id.*

criminal history suffices by itself to support an enhanced sentence." *Deane v. State,* 759 N.E.2d 201, 205 (Ind. 2001). Our supreme court has previously held that "[e]ven when a trial court improperly applies an aggravator, a sentence enhancement may be upheld if other valid aggravators exist." *Walter v. State,* 727 N.E.2d 443, 447 (Ind. 2000). *See Hildebrandt v. State,* 770 N.E.2d 355, 359 (Ind. Ct. App. 2002) (upholding defendant's enhanced sentences, despite trial court's improper reliance upon victim impact of crime, where the trial court properly relied on other aggravating factors including defendant's criminal history). Thus, notwithstanding the trial court's improper reliance upon the LSI-R score, Alexander's enhanced sentence can be justified on the basis of his criminal history alone. The trial court's comments at sentencing make clear that the overriding factor in its sentencing decision was Alexander's extensive criminal history. Therefore, we can say with confidence that the trial court would have imposed the same sentence even if it had not considered the LSI-R score.

2. PSI

Next, Alexander argues that the trial court erred in accepting and relying upon the amended PSI tendered by the State.

> There is only one purpose for filing a presentence investigation report, viz., to provide information to the court for use at individualized sentencing. The sentencing court evaluates that information to determine the existence of aggravating and mitigating factors. Thus, it goes without saying that the information contained in the report must be accurate. * * * [W]e observe that because of its importance in sentencing, the relevant inquiry regarding pre-sentence reports usually concerns their accuracy. To that end, we are generally concerned only with insuring that the defendant had an opportunity to examine the report and challenge any inaccuracies contained therein, pursuant to I.C. § 35-38-1-12(b).

Dillard v. State, 827 N.E.2d 570, 576 (Ind. Ct. App. 2005), *trans. denied.* We have consistently held that "having been afforded the opportunity to review the report, if the defendant fails to register an objection to the information contained therein, any such objection is waived for appellate review." *Id.* at 577.

At the sentencing hearing, Alexander failed to object to the PSI as prepared by the probation officer. At the beginning of the sentencing hearing, the trial court asked him whether he had been given an opportunity to review the PSI; he responded, "Yes." (Sent. Tr. 16). The trial court then asked whether he had any proposed "additions or corrections"; he responded, "No." (Sent. Tr. 17). Subsequently, the trial court noted, "The record will show that the defendant does not dispute the accuracy of the contents of the pre-sentence investigation"; again, Alexander remained silent. (Sent. Tr. 17). This issue is waived.

Waiver notwithstanding, we proceed to the merits of Alexander's claim that he suffered prejudice from the trial court's consideration of the PSI as amended by the probation department. Alexander challenges the inclusion of victims' statements, the charging information and other court documents pertaining to an unrelated crime that occurred subsequent to the underlying crime herein. Without citation to authority on this point, Alexander speculates that having such access to the details of his prior conviction might have tempted the trial court to "[over-] compensate and enter a harsher sentence for th[e] [instant] offense based not upon [his] criminal and societal history and the instant offense, but instead upon [over-] compensation for the perceived lesser sentence that was ordered [for the prior offense]. Alexander's Br. at 9. We are not persuaded.

> The probation officer who prepares the presentence investigation report is given *wide discretion to include any matters he or she deems relevant to a determination of a sentence*. The presentence report should include the defendant's criminal history. * * * It [i]s not error to include *the whole history* of [defendant]'s encounters with the criminal justice system. What parts of that history a sentencing judge might properly find as aggravating or mitigating circumstances is a different question.

Allen v. State, 720 N.E.2d 707, 714 (Ind. 1999) (internal citations omitted) (emphasis added).

Alexander's claim as to the alleged over-breadth of the PSI must fail. First, we generally presume that trial courts know and follow the applicable law, and will not be swayed by extraneous information. *See Thurman v. State*, 793 N.E.2d 318, 321 (Ind. Ct. App. 2003). Moreover, pre-sentence investigation reports contain a comprehensive account of the defendant's criminal history, the exhaustiveness of which is left to the preparer's discretion. Apparently, probation officer Bowles deemed the specifics and close timing of Alexander's prior conviction to be relevant to the determination of sentence in the instant case. Further, given ample opportunity to object to the contents of the PSI as prepared by the probation department, Alexander declined to do so. Based upon the foregoing, we cannot conclude that the trial court's consideration of the amended PSI caused Alexander to suffer undue prejudice that rendered the proceeding fundamentally unfair. We find no abuse of discretion.

3. Appellate Rule 7(B)

Finally, Alexander asserts that his sentence is inappropriate in light of the nature of his offense and his character. We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). It is

the defendant's burden to "'persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.'" *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007) (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)), *clarified on reh'g,* 875 N.E.2d 218 (Ind. 2007).

In determining whether a sentence is inappropriate, the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Childress*, 848 N.E.2d at 1081. Here, after being charged with a class A felony, Alexander pleaded guilty to a class B felony. The range of possible sentences for a Class B felony is between a minimum of six years and a maximum of twenty years with an advisory sentence of ten years. I.C. § 35-50-2-5. The trial court imposed a sixteen-year sentence.

As regards the nature of the offense, it appears from the PSI that after a drug transaction had gone wrong, Alexander returned to Michael's residence with Lofton and Chioke. Lofton grabbed Michael's wallet and a fight ensued. During the altercation, in which Alexander was a willing and active participant, Lofton struck Michael and Richardson with a hammer, causing serious bodily injury to both, and Alexander stole illicit drugs and money from Michael's safe. We do not find that the information in the record regarding the nature of the offense renders Alexander's sentence inappropriate.

Nor are we persuaded that Alexander's sentence is inappropriate in light of his character. His "really significant" and "frightening" criminal history does not, by any means, reflect favorably upon his character. (Tr. 34). The trial court noted, and we

agree, that Alexander has a rather extensive criminal history for one so young.[5] By his own admission, his contacts with the criminal justice system began at fifteen years of age when he was adjudicated a delinquent child for possession of a stolen vehicle. As an adult, he has had three true findings for violations of probation and has been convicted of several misdemeanors, including class B misdemeanor reckless driving; class A misdemeanor possession of marijuana; and class A misdemeanor criminal recklessness.

His criminal record also includes felony convictions for possession of a controlled substance; manufacturing/dealing cocaine; possession/use of a firearm; operating a vehicle with a controlled substance in the body causing serious injury; resisting law enforcement; and leaving the scene of an accident resulting in bodily injury. According to the PSI, the latter vehicle-related felonies stemmed from an incident during which Alexander took part in a brawl outside a nightclub; attempted to escape the melee by driving through a crowd of people, one of whom he dragged underneath his vehicle; and then led police on a thirty-one mile chase. Further, not only have various prior attempts at rehabilitation failed, but Alexander, by his own admission, also suffers from "alcohol and drug addictions" for which he has never voluntarily attempted to undergo treatment. (App. 86).

In light of the foregoing, we do not find that the sentence imposed by the trial court is inappropriate.[6]

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[5] At the time of sentencing, Alexander was twenty-three years of age.

[6] Inasmuch as Alexander complains that his accomplices received lesser sentences, we observe that according to the PSI, not only did Lofton and Chioke plead guilty, but also, Lofton was instrumental in helping the police to identify Alexander as the third assailant in the garage. These factors are

Affirmed.

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

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appropriately considered as mitigating circumstances and may have contributed to Lofton and Chioke's shorter sentences.