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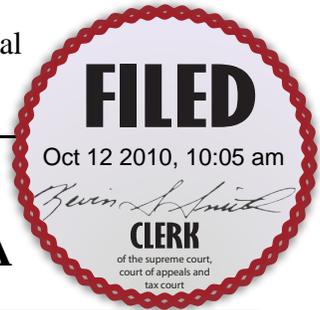
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**IN THE
COURT OF APPEALS OF INDIANA**

LUTHER J. GANT,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 02A03-1004-CR-208

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-0908-FB-146

October 12, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Luther J. Gant appeals his conviction for Robbery,¹ a class B felony, arguing that the trial court erroneously admitted certain evidence. Gant also challenges the fifteen-year sentence imposed by the trial court, contending that the trial court abused its discretion by neglecting to find certain mitigators and that the sentence is inappropriate in light of the nature of the offense and his character. Finding no error, we affirm.

FACTS

On August 29, 2008, Leilani Edwards, the manager of a Dollar General store in Fort Wayne, was driving into the parking lot of the Liberty Diner across the street from the Dollar General. Edwards noticed a car parked in the corner of the diner parking lot, facing the Dollar General. Edwards noticed the man sitting in the passenger seat of the parked car. The car was farther away from the diner than the other parked cars, which Edwards thought was odd, so she chose a seat in the diner from which she could watch the parked car. After about ten or fifteen minutes, she saw the vehicle drive away. Edwards later identified Gant as the man she had seen sitting in the passenger seat of the parked car.

The next day, on August 30, 2008, at 7:30 a.m., Laurie Tiller, an employee of the Dollar General, began unlocking the store's front door. She saw a man running along the side of the store with a gun. The man cornered Tiller, took the key to the store, and entered. He placed a gun against Tiller's back and ordered her to unlock the safe; she

¹ Ind. Code § 35-42-5-1.

complied. Edwards ordered her to turn the alarm off and remove money from the safe. She removed approximately \$1,000 and gave it to Edwards. The man directed her to enter the back room of the store, where another man was waiting. The other man placed Tiller's arms behind her back and secured her hands with "zip ties." Tr. p. 92. After the two men left the store, Tiller slipped out of the zip ties and drove to the gas station across the street to call the police.

A few weeks later, Fort Wayne Police Detective Scott Straub showed Tiller a photo array and she identified Gant as the man who had held the gun against her back. Although the lower portion of his face had been covered by a bandana during the robbery, she was able to identify him by his eyes.

Almost two months after the robbery, on October 26, 2008, Fort Wayne Police Officer Craig Dennis initiated a traffic stop of a vehicle in which Gant was a passenger. During a pat-down search of Gant, Officer Dennis found zip ties, which were in the "form of handcuff forms," and a dark-colored glove in Gant's pocket. Id. at 147, 150. Gant was arrested and later questioned by Detective Straub. After waiving his rights, Gant told Straub that he had been involved in the robbery of the Dollar General, admitting that "that day, Dollar General, I did it." Id. at 164, 186-88.

On August 12, 2009, the State charged Gant with class B felony robbery. On February 1, 2010, Gant filed a motion in limine seeking to bar the admission of all evidence obtained during the October 26, 2008, traffic search, arguing that the evidence is irrelevant and prejudicial. The trial court denied the motion.

Gant's jury trial took place on February 2, 2010, and although Gant renewed his objection to the evidence at the start of the trial, when the State actually offered the zip ties and glove into evidence, Gant stated "No objection, Your Honor," *id.* at 150, 151, and the trial court admitted the evidence. At the close of the trial, the jury found Gant guilty as charged.

At Gant's March 9, 2010, sentencing hearing, the trial court found Gant's criminal history to be an aggravating factor and found no mitigating circumstances. The trial court imposed a fifteen-year sentence, and Gant now appeals.

DISCUSSION AND DECISION

I. Admission of Evidence

Gant first argues that the trial court erred by admitting the zip ties and glove that were found during the traffic stop into evidence. A trial court has broad discretion in ruling on the admissibility of evidence, and we will reverse only for an abuse of that discretion. Gado v. State, 882 N.E.2d 827, 831 (Ind. Ct. App. 2008), trans. denied.

Gant concedes that the evidence is relevant, appellant's br. p. 10, but argues that its probative value is outweighed by its prejudicial effect. Thus, Gant argues the evidence should not have been admitted pursuant to Evidence Rule 403, which provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice"

Initially, we note that Gant did not object to the admission of this evidence at the time it was actually admitted. Consequently, he has waived this argument. Ind. Evid. R. 103(a) (requiring a timely objection).

Waiver notwithstanding, we note that even if we were to assume solely for argument's sake that it was erroneous to admit these items into evidence, any error would have been harmless. Edwards identified Gant as the man she had observed behaving strangely in a vehicle the day before the robbery. Tiller identified Gant as the man who held a gun to her back and forced her to remove \$1,000 from the store safe. Finally, Gant confessed to Officer Straub that he had, in fact, committed the robbery. In light of this overwhelming evidence of Gant's guilt, any error with respect to the admission of the zip ties and glove was harmless. Therefore, we decline to reverse on this basis.

II. Sentence

Gant next argues that the trial court erred in sentencing him. We review sentencing decisions for an abuse of discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on rehearing, 875 N.E.2d 218 (2007). A trial court may abuse its discretion by entering a sentencing statement that includes reasons for imposing a sentence not supported by the record, omits reasons clearly supported by the record, or includes reasons that are improper as a matter of law. Id. at 490-91.

Gant contends that the trial court abused its discretion by refusing to credit two of his proffered mitigators—hardship to his dependents and his history of substance abuse. As for hardship to his dependents, the trial court found “little or no evidence that any hardship on his family would be excessive beyond that ordinarily endured by the family of a convicted felon,” sent. tr. p. 8-9, and Gant makes no argument to that effect on appeal. See Dowdell v. State, 720 N.E.2d 1146, 1154 (Ind. 1999) (holding that “[m]any persons convicted of serious crimes have one or more children and, absent special

circumstances, trial courts are not required to find that imprisonment will result in an undue hardship”). Therefore, we find no error on that basis.

As for Gant’s nearly lifelong history of substance abuse, the trial court reasoned that Gant has had decades of opportunity to seek drug treatment and has failed to do so; thus, it declined to find this to be a mitigating circumstance. See Hape v. State, 903 N.E.2d 977, 1002 (Ind. Ct. App. 2009) (observing that although a history of substance abuse may be a mitigating circumstance, “when a defendant is aware of a substance abuse problem but has not taken appropriate steps to treat it, the trial court does not abuse its discretion by rejecting” it as a mitigator), trans. denied. We do not find that the trial court abused its discretion in that regard.

Finally, Gant contends that the fifteen-year sentence imposed by the trial court is inappropriate in light of the nature of the offense and his character pursuant to Indiana Appellate Rule 7(B). In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Gant was convicted of a class B felony, meaning that he faced a sentence of six to twenty years, with an advisory sentence of ten years. Ind. Code § 35-50-2-5. The trial court imposed a sentence of fifteen years, which is five more than the advisory but five less than the maximum possible term.

As for the nature of Gant’s offense, he cornered a store employee as she was opening the store for the day, put a gun to her back, ordered her to open the safe and give

him the money inside, restrained her in the back of the store with zip ties around her hands, and then fled the scene.

As for Gant's character, we note that he has a lengthy criminal history that dates back to 1989. He has amassed eight misdemeanor convictions and six felony convictions, including four counts of armed robbery in Illinois. After he committed the instant offense but before he was charged herein, he committed false informing, criminal conversion, driving while suspended, and resisting law enforcement. It is evident from this criminal history that Gant has been afforded multiple opportunities to rehabilitate himself and conform to the rule of law. He has refused to do so for decades. Under these circumstances, we do not find the fifteen-year sentence imposed by the trial court to be inappropriate.

The judgment of the trial court is affirmed.

NAJAM, J., and MATHIAS, J., concur.