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IN THE
COURT OF APPEALS OF INDIANA

JEROME MCKINNEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0902-CR-172
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0710-FB-309

November 10, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Jerome McKinney appeals the sentences imposed, following a jury trial, for class D felony possession of cocaine; class B felony robbery resulting in bodily injury; class C felony criminal confinement; and class A felony burglary.

We affirm in part and remand with instructions.

ISSUES

1. Whether the trial court abused its discretion by admitting evidence allegedly obtained in violation of McKinney's Fourth Amendment rights.

2. Whether the trial court abused its sentencing discretion when it considered McKinney's criminal history and need for rehabilitative treatment as aggravating circumstances.

3. Whether McKinney's sentence is inappropriate pursuant to Indiana Appellate Rule 7(B).

FACTS

At the time of the underlying incident, Joyce Fischer and her husband operated a coin shop in their Anderson home. They also operated a free-standing antiques business and frequently stored the inventory for that business in their home. At approximately 11 p.m. on October 26, 2006, Fischer was alone when she heard her dog barking loudly. She walked through her kitchen and saw a man standing in the middle of the coin shop. He was a black male, wearing a dark brown jacket and pants, a dark hat, and black tennis shoes. On seeing Fischer, the man "grabbed [her] left arm" and held her firmly alongside himself as he gathered items to steal and "put[ ] them in his coat." (Tr. 167, 172).

During the course of the robbery, Fischer got a good look at the man's face and observed that he was missing a tooth on the right side of his mouth. In all, the man was in Fischer's home for approximately ten minutes, during which time he stole a bracelet, several rings, approximately two hundred coin holders,[1] and Fischer's purse, which contained approximately $300.00 in cash. Then, he fled, and Fischer called the police.

Within moments, several police officers converged on Fischer's neighborhood and established a surrounding perimeter. As the investigation unfolded, dispatch advised that Fischer's discarded purse had been found nearby and that a person of interest had been detained in the vicinity of the purse. Fischer accompanied police to the location and advised police that the detained individual was not the man who had robbed her.

Subsequently, dispatch advised that K-9 units had tracked the robber to the 1400 block of West 9th Street. Officer Tom Fedrick of the Anderson Police Department was in the vicinity and observed an Anderson Taxi cab turn into the area. He contacted dispatch to determine whether the cab was in the area to pick up a fare. Dispatch contacted Anderson Taxi and confirmed that a cabdriver had been called to the 1400 block of West Ninth Street and had just picked up an individual who matched the physical description of the robbery suspect. As Officer Fedrick traced the cabdriver's route, he observed an individual who matched the physical description of the robbery suspect walking near the intersection of 22nd and Madison.

[1] Fischer later testified that coin holders, also known as "two by twos," are cardboard sleeves with Mylar openings. Coins are inserted into the sleeves, which are then stapled shut in order to keep the coins stationary. (Tr. 172).

The subject -- later identified as McKinney -- saw Officer Fedrick, crossed the street, darted across a lawn, and attempted to disappear between two houses. Fedrick shined his spotlight on McKinney and asked him to stop several times before McKinney complied. In the meantime, Officer Matthew Kopp arrived to assist Officer Fedrick. Apparently, the cabdriver also arrived in the interim and identified McKinney as the man he had picked up at 1403 West Ninth Street.

The officers questioned McKinney about his whereabouts. McKinney claimed to be coming from an establishment called Ricker's, but gave varying accounts about his destination -- first, telling police that he was going to his girlfriend's home; then, later claiming to be going to visit his aunt. He also provided the purported addresses of his aunt and girlfriend. Twice, Fedrick asked McKinney whether he had been in the 1400 block of West Ninth Street. McKinney was initially unresponsive; however, when Fedrick told him that the Anderson Taxi cabdriver had identified him as the fare picked up from 1403 West Ninth Street, Mckinney admitted that he had been in the 1400 block of West Ninth Street.

Subsequently, the officers attempted to verify McKinney's claims about visiting his girlfriend and aunt; however, the occupants of the residences that McKinney had identified each denied knowing who he was. Fedrick then advised dispatch that he and Kopp had detained a person of interest at 22nd and Madison. Police brought Fischer to the location, and after observing him from a nearby location, she positively identified McKinney as the man who had robbed her.

McKinney was arrested after Fischer identified him as the robber. As Kopp searched him, he felt a hard object in McKinney's left front pocket. Kopp could not identify the object, which was approximately the size of half a credit card, and could not eliminate it as a potential weapon. He pulled the object from McKinney's pocket, and a clear baggie containing a white powdery substance that had the appearance of cocaine fell to the ground at the same time. Kopp then found rings bearing Fischer's inventory and price tags, a bracelet, coin holders, coins, and cash on McKinney's person. Police also recovered several of Fischer's possessions found strewn between her home and the 1400 block of West 9th Street, where McKinney was picked up by the taxicab.

On October 29, 2007, the State charged McKinney with the following offenses: Count I, class D felony possession of cocaine; Count II, class B felony robbery resulting in bodily injury; and Count III, class C felony criminal confinement. On October 15th and December 8th, the parties appeared for pre-trial dispositional hearings, and McKinney rejected the State's plea offers. On December 10, 2008, the State amended the charging information to add Count IV, burglary as a class A felony. That same day, the trial court heard argument on McKinney's motion to suppress evidence obtained pursuant to the search, which motion the court subsequently denied. The trial court conducted McKinney's jury trial on December 11 – 12, 2008. The jury found McKinney guilty on all counts.

On January 5, 2009, the trial court conducted a sentencing hearing. The trial court issued its sentencing order, wherein it found, as aggravating circumstances, McKinney's

prior criminal history and his "need [for] correctional rehabilitative treatment that can best be provided by his commitment to a penal facility"; the court found no mitigating circumstances. (App. 18). The trial court imposed the following sentences, to be served concurrently: Count I, possession of cocaine, three years; Count II, robbery, fifteen years; Count III, criminal confinement, six years; and Count IV, burglary, fifty years; thus, the trial court imposed an aggregate sentence of fifty years, "all of which shall be executed." (App. 18). McKinney now appeals.

DECISION

1. Motion to Suppress

McKinney argues that the trial court erred in denying his motion to suppress evidence obtained pursuant to the police search. Because he appeals following a completed trial, "the issue is appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial." *Miller v. State*, 846 N.E.2d 1077, 1080 (Ind. Ct. App. 2006). Our standard of review of rulings on the admissibility of evidence is essentially the same whether the challenge is made by a pre-trial motion to suppress or by trial objection. *Id*. We do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling. *Id*. However, we must also consider the uncontested evidence favorable to the defendant. *Id*. An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Wilson v. State*, 765 N.E.2d 1265, 1272 (Ind. 2002).

The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures by the government. *State v. Atkins*, 834 N.E.2d 1028, 1032 (Ind. Ct. App. 2005). When a search is conducted without a warrant, the State has the burden of proving that an exception to the warrant requirement existed at the time of the search. *Coleman v. State*, 847 N.E.2d 259, 262 (Ind. Ct. App. 2006), *trans. denied.* One such exception to the requirement for a warrant is a search incident to arrest, which provides that a police officer may conduct a search of the arrestee's person and the area within his control. *VanPelt v. State*, 760 N.E.2d 218, 222 (Ind. Ct. App. 2001).

In order for a search incident to an arrest to be valid, the arrest itself must be lawful. *Id.* In other words, probable cause must be present to support the arrest. *Id.* Further, the critical issue is not when the arrest occurs, but whether there was probable cause to arrest at the time of the search. *Id.* at 223. "Probable cause to arrest 'exists when, at the time of the arrest, the arresting officer has knowledge of facts and circumstances which would warrant a person of reasonable caution to believe that the suspect had committed a criminal act.'" *Scarborough v. State*, 770 N.E.2d 923, 926 (Ind. Ct. App. 2002) (quoting *Ortiz v. State*, 716 N.E.2d 345, 348 (Ind. 1999)).

In *Underwood v. State*, 644 N.E.2d 108, 110 (Ind. 1994), a man entered a store and robbed three victims. After the robber fled, one of the victims reported the crime to police and provided a physical description of the robber. The police picked up the robber's trail and soon encountered the defendant, who matched the physical description provided by the victim. Upon seeing the police, the defendant initially fled, but

eventually stopped. He was arrested and searched and was found in possession of the victims' possessions. On direct appeal, the defendant argued that the stop and search had violated his Fourth Amendment rights and that the evidence obtained pursuant to the search should have been suppressed. Our supreme court disagreed, finding that the police had probable cause to stop, search and arrest the defendant because they "had received an ample description of [the suspect] and the general location in which he might be found," and because the suspect had attempted to evade officers upon being found. *Id*.

Here, after Fischer called the police to report the robbery and provided a physical description of the robber, Officer Fedrick learned that a taxicab had been called to the vicinity of Fischer's home and had picked up an individual who matched the physical description of the robbery suspect. As Fedrick retraced the cabdriver's route, he observed McKinney, who matched the physical description of the robbery suspect, walking in the vicinity of Fischer's home near the intersection of 22nd and Madison. When McKinney saw Fedrick, he attempted to elude him, but eventually stopped. Officer Kopp arrived to assist. The cabdriver also arrived and identified McKinney as the man he had recently picked up. When Kopp and Fedrick questioned McKinney, he lied about his whereabouts. In the meantime, Fischer was brought to the scene and, after observing McKinney from a squad car, she positively identified him as the man who had robbed her.

We conclude that based upon the totality of the facts and circumstances, Kopp's search of McKinney's person was a lawful search incident to a lawful arrest. The instant

facts are even more damaging than those in *Underwood*. Here, McKinney was identified as having been picked up by a cabdriver in the vicinity of Fischer's home; he matched the physical description of the robber; he lied to police about his whereabouts; and he was positively identified as the robber by the victim before he was arrested and searched. The trial court did not abuse its discretion in admitting the evidence obtained pursuant to the search.

2. Sentencing

a. Improperly Weighed Aggravating Circumstance

McKinney argues that his criminal history does not support a maximum sentence because his prior felony convictions -- for class D felony theft-receiving stolen property (1997) and class B felony burglary (1998) -- are over ten years old and were of a non-violent[2] nature. We disagree.

First, inasmuch as McKinney is arguing that the trial court assigned too much weight to his criminal history, this claim is no longer available on appeal. In *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g,* 875 N.E.2d 218 (Ind. 2007), our supreme court held that trial courts no longer have any obligation to weigh aggravating and mitigating circumstances against each other when imposing a sentence; thus, a trial court cannot now be said to have abused its discretion in failing to properly weigh such circumstances.

[2] We note that pursuant to Indiana Code section 35-50-1-2(a)(12), robbery is a crime of violence for which a trial court may impose a consecutive sentence.

Next, McKinney's extensive criminal history was clearly a significant aggravating factor under the circumstances. Our supreme court has held that the significance of a criminal history "varies based on the gravity, nature and number of prior offenses as they relate to the current offense." *Wooley v. State,* 716 N.E.2d 919, 929 n.4 (Ind. 1999). The Court explained further,

> 'a criminal history comprised of a prior conviction for operating a vehicle while intoxicated may rise to the level of a significant aggravator at a sentencing hearing for a subsequent alcohol-related offense. However, this criminal history does not command the same significance at a sentencing hearing for murder.' A different example might help illustrate the same point. *A conviction for theft six years in the past would probably not, standing by itself, warrant maxing out a defendant's sentence for class B burglary. But, a former conviction for burglary might make the maximum sentence for a later theft appropriate*.

Id. (internal citations omitted) (emphasis added). Here, the PSI indicates that McKinney has been convicted of at least[3] seven prior criminal offenses, six of which were convictions for crimes against property, including class D felony theft-receiving stolen property (1997) and class B felony burglary (1998). Based upon the foregoing, we conclude that the trial court did not abuse its discretion in finding McKinney's criminal history to be a significant aggravating circumstance that warranted the maximum sentence.

b. Improper Aggravating Circumstance

Next, McKinney argues that the trial court improperly relied on the aggravating factor -- that he was in need of correctional rehabilitative treatment best provided by

[3] The PSI lists three additional felonies for crimes against property; however, no disposition is available for these matters.

commitment to a penal facility -- to enhance his sentence. Specifically, he argues that the trial court's determination was "'derivative of [his] criminal history' and cannot serve as a separate aggravating circumstance." McKinney's Br. at 9-10.

At sentencing, the trial court made the following sentencing statement:

> The aggravation is a suspended prior. The legal history is noted in the document [PSI] herein and the testimony and argument. No mitigation. Count One (1), Possession of Cocaine a D Felony, Three (3) years. Count Two (II) Robbery Resulting in Bodily Injury a B Felony, Fifteen (15) years concurrent with Count One (I). * * * Count Three (III) Criminal Confinement, Six (6) years concurrent with Counts One (I) and Two (II) and Count Four (IV) Burglary a Class A Felony, sentenced to the Department of Corrections [sic] for Fifty (50) years ah, concurrent with Counts One (I), Two (II), and Three (III). All executed at the Department of Corrections [sic].

(Tr. 508). In its sentencing order, the trial court stated,

> The Court having entered Judgment of Conviction against the defendant following the jury's verdicts of guilty [on all counts], considers the pre-sentence investigation report, the arguments and evidence of counsel, and now finds the following aggravating circumstances to exist: *Defendant's prior criminal history; defendant is in need of correctional rehabilitative treatment that can best be provided by his commitment to a penal facility*. Court finds no mitigating circumstances to exist. Therefore, the Court finds sufficient aggravating circumstances to enhance the sentences herein.

(App. 18) (emphasis added).

We agree that the trial court improperly found McKinney's need for rehabilitative treatment in a penal institution to be an aggravating circumstance. A defendant's criminal history cannot be restated or described as multiple aggravators. *Williams v. State*, 838 N.E.2d 1019, 1021 (Ind. 2001). A defendant's need for rehabilitation is

derivative of his prior criminal history, "the single fact of which cannot be restated as separate aggravating circumstances"; rather, such observations "are more properly characterized as 'legitimate observations' about the weight to be given to facts." *Id.*

However, because only one valid aggravating circumstance is necessary to support an enhanced sentence, *Johnson v. State*, 725 N.E.2d 864, 868 (Ind. 2000), and given McKinney's troubling criminal history, including a prior conviction for a class B burglary, we cannot say that the trial court's consideration of his need for correctional treatment best provided in a penal institution constituted reversible error.[4]

c. Inappropriateness of Sentence

Lastly, McKinney argues that his fifty-year aggregate sentence is inappropriate in light of the nature of the offenses and his character. Appellate courts have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, the court concludes the sentence 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*, 868 N.E.2d at 494.

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

[4] He also argues that the trial court failed to explain why McKinney needs treatment provided in a penal facility; however, we do not reach this claim having already concluded that the aggravating circumstance was improper.

committed." *Childress*, 848 N.E.2d 1073, 1081 (Ind. 2006)). The advisory sentence for a class A felony is thirty years. I.C. § 35-50-2-4. McKinney received the maximum fifty-year sentence.

The nature of the offenses is as follows: McKinney, who has previously been convicted of at least six crimes against other people's property -- including a previous class B felony burglary conviction -- broke into Fischer's in-home coin shop at night. When confronted, he grabbed her arm and held her in a painful vise grip alongside himself as he continued rifling through her possessions. After stealing jewelry, coins, coin paraphernalia, and Fischer's purse, McKinney fled the scene. Later, when police apprehended him, he attempted to evade arrest by giving them false information. He also possessed and smoked cocaine and marijuana on the night of the underlying incident and attempts to blame his criminal conduct entirely upon his consumption of these illicit substances.

As regards his character, McKinney's extensive criminal history does not reflect positively thereon. His criminal history consists of several convictions for crimes against property, including at least one prior conviction for a class B felony burglary. Despite repeated contacts with the criminal justice system and several lenient, probationary sentences, McKinney continues to reoffend. The record also reveals that he refuses to accept responsibility for his crimes, "short of offering the fact that he was consuming marijuana and cocaine at the time of the offense, and his acknowledgment that

consumption of these substances contributed to his actions." (PSI 10).[5] Based upon our review of the evidence, we see nothing in his character or in the nature of these offenses that would suggest that McKinney's sentence is inappropriate.

3. Double Jeopardy

Lastly, we raise *sua sponte* the question of whether McKinney's convictions of class B felony robbery resulting in bodily injury and class A felony burglary run afoul of Indiana's double jeopardy clause and its prohibition against multiple punishments for the same offense.

> In *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999), [our Supreme] Court developed a two-part test for determining whether two convictions are permissible under Indiana's double jeopardy clause. A double jeopardy violation occurs when 'the State ... proceed[s] against a person twice for the same criminal transgression.' Under *Richardson*, "two or more offenses are the 'same offense' ... if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense." When we look to the actual evidence presented at trial, we will reverse one of the convictions if there is 'a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.'

Johnson v. State, 749 N.E.2d 1103, 1108 (Ind. 2001) (quoting *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999) (internal citations omitted)). "Application of the actual evidence

[5] In his remarks to the trial court at sentencing, McKinney alluded to a twenty-five year long battle with drug dependency; however, the prosecutor refuted his claim by noting that in McKinney's prior PSI reports from 1992 and 1998, respectively, he described infrequent marijuana consumption and denied using cocaine or other narcotics.

test requires the court to 'identify the essential elements of each of the challenged crimes and to evaluate the evidence from the [fact-finder's] perspective.'" *Lee v. State*, 892 N.E.2d 1231, 1234 (Ind. 2008) (quoting *Spivey v. State*, 761 N.E.2d 831, 832 (Ind. 2002)). In determining the facts used by the fact-finder to establish the elements of each offense, it is appropriate to consider the charging information, jury instructions, and arguments of counsel. *Id.*; *see Spivey*, 761 N.E.2d at 832.

Here, McKinney was convicted in Count II and IV of Class B felony robbery resulting in bodily injury and class A felony burglary, which also resulted in bodily injury, respectively. On the robbery charge (Count II), the State was required to establish that McKinney (1) knowingly or intentionally (2) took property from Fischer (3) by use of force or by placing her in fear (4) resulting in bodily injury to Fischer. For the burglary conviction (Count IV), the State was required to prove that McKinney (1) knowing or intentionally (2) broke and entered Fischer's dwelling (3) with the intent to commit a felony therein, (4) resulting in bodily injury.

As to Count II (robbery), the State's charging information alleged that McKinney took currency, coin holders, coins, rings, and a purse from Fischer's presence by force and/or by putting Fischer in fear, and that the act resulted in physical pain and discomfort (bodily injury) to Fischer. At trial, the State's evidence revealed that an unarmed McKinney broke and entered Fischer's in-home coin shop and was in the midst of stealing her possessions when she interrupted him; he paused momentarily, grabbed Fischer's arm, and held her alongside him while continuing to steal her property.

The record does not contain the charging information for Count IV; however, in urging the jury to convict McKinney of burglary, the State presented evidence and argued that McKinney broke into and entered Fischer's in-home coin shop, with the intention of committing theft inside, and that Fischer suffered injury to her arm when McKinney grabbed and held her while continuing to steal her property.

Pursuant to the actual evidence test, we discern no real distinction between the facts alleged to establish the "bodily injury" element of Count II (robbery) and the evidence of "bodily injury" used to elevate the burglary offense (Count IV) to a class A felony. We find that a reasonable possibility exists that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense. *Richardson*, 717 N.E.2d at 53. Accordingly, we remand to the trial court with instruction to vacate McKinney's robbery conviction; in all other respects, his convictions and sentences shall remain unchanged.

Affirmed in part and remanded in part.

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