

David D. Williams (“Williams”) was convicted in Lake Superior Court of Class B felony burglary and determined to be an habitual offender. Williams appeals and argues that the trial court abused its discretion in excluding a defense investigator’s report and that the trial court abused its discretion in sentencing him to an aggregate term of thirty years. We affirm.

Facts and Procedural History

On the morning of December 17, 2008, Willie Wilson (“Wilson”) saw a man, later identified as Williams, wearing a white coat and a red hat and standing on the porch of Wilson’s neighbor’s house. Wilson saw Williams walk to the side of the neighbor’s home and then heard the sound of breaking glass. Wilson telephoned the police and walked closer to the house, where he saw Williams climbing through the broken window. Wilson stood on the street and waited for the police to arrive. As he did so, he saw Williams open the front door of the neighbor’s house preparing to exit. But when Williams saw Wilson, he went back inside the house.

Shortly thereafter, Officers Victor Mobley (“Officer Mobley”) and Foster Ward (“Officer Ward”) arrived on the scene. Wilson directed them to the home being burglarized. Officer Mobley went to the front door while Officer Ward went to the side of the house. When Officer Ward went to the side of the house, he saw a suitcase lying on the ground outside the broken window. He then saw Williams climb out the window and grab the suitcase. Williams, who was facing away from Officer Ward, did not see the police until they instructed him to drop the suitcase and get on the ground. Williams complied with the police, and Officer Ward handcuffed Williams.

In the meantime, a crowd of neighbors had begun to gather at the scene. As Officer Ward took Williams to his patrol car, Officer Ward told the crowd, “We got him now.” Tr. pp. 186-87. In response, Williams said, “You got me. This is nothing but a little petty-ass burglary.” Id. at 186.

Further investigation revealed that Williams had ransacked the burglarized home and taken two flat-screen televisions and a remote control, which were found in the suitcase. Other items were missing from the house and never recovered, including jewelry and a portable video game. As a result of this incident, the State charged Williams with Class B felony burglary and alleged that he was an habitual offender.

In 2009, Officer Mobley went on disability retirement from the police department because he was suffering from post-traumatic stress disorder (“PTSD”) as a result of combat service with the military. In June 2009, an investigator working for Williams’s defense counsel spoke with Officer Mobley. Officer Mobley was embarrassed to admit to the investigator, however, that he could not recall the burglary or arrest of Williams. The investigator showed Officer Mobley a copy of the police report regarding the burglary. After speaking with Officer Mobley, the defense investigator prepared a report detailing his interview with Officer Mobley.

At trial, Officer Mobley remembered the investigator speaking to him and showing him the police report regarding the burglary, but Officer Mobley had no recollection of telling the investigator that he was the arresting officer. Williams’s counsel asked Officer Mobley if he recalled telling the investigator that, on the day of the burglary, he spoke to a witness who told him that there was a burglar in the house who

was placing items in a suitcase outside the house. Officer Mobley responded, “That sounds familiar.” Tr. p. 246. Williams’s counsel then sought to call the defense investigator in order to introduce the investigator’s report into evidence under the “recorded recollection” exception to the hearsay rule. The trial court sustained the State’s objection to this, concluding that the report had never been shown to Officer Mobley during his testimony, that Officer Mobley never adopted the report as his own, and that the statements in the report were not accurate because of Officer Mobley’s testimony that he did not recall the burglary at the time he spoke to the investigator.

Williams’s counsel then made an offer to prove that established that, had the investigator been allowed to testify, he would have testified as to the following: that Officer Mobley did not initially recall the events of the burglary; that after he was shown a copy of the police report, Officer Mobley still could not recall who arrived first on the scene, but did recall that when he arrived, he was told by a witness that there was someone inside the house taking items out of the house and putting them into a suitcase; that Officer Mobley told the investigator that he arrested the burglar after the burglar came out of the house; and that the investigator reviewed the statements with Officer Mobley, who stated that they were correct.

The trial court found Williams guilty of Class B felony burglary, and Williams admitted to being an habitual offender. At sentencing, Williams claimed that he was a substance abuser and claimed to be remorseful. The trial court found Williams’s long criminal history to be an aggravating factor and sentenced him to eighteen years, and

imposed an habitual offender enhancement of twelve years, for an total sentence of thirty years. Williams now appeals.

I. Exclusion of the Investigator's Report

Williams first claims that the trial court erred in excluding the defense investigator's report. Decisions regarding the admission or exclusion of evidence rest within the sound discretion of the trial court, and we review the court's decision only for an abuse of that discretion. Rogers v. State, 897 N.E.2d 955, 959, 961 (Ind. Ct. App. 2008), trans. denied. The trial court abuses its discretion if its decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law. Id.

Williams claims that the investigator's report was admissible under Indiana Evidence Rule 803(5), which provides that certain out-of-court statements are not excluded by the hearsay rule even though the declarant is available as a witness.

Included among these statements are:

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

"The recorded recollection exception applies when a witness has insufficient memory of the event recorded, but the witness must be able to 'vouch for the accuracy of the prior [statement].'" Kubsch v. State, 866 N.E.2d 726, 734 (Ind. 2007) (quoting Gee v. State, 271 Ind. 28, 36, 389 N.E.2d 303, 309 (1979)); see also Williams v. State, 698 N.E.2d

848, 851 n.4 (Ind. Ct. App. 1998) (noting that there must be “some acknowledgment that the statement was accurate when it was made”).

Williams claims Officer Mobley had no recollection of the events of the burglary or arrest at the time he testified at trial. This much appears to be undisputed. Williams also claims that Officer Mobley adopted the investigator’s report when the matter was fresh in his memory. Specifically, he claims that Officer Mobley remembered being interviewed, agreed with “some” of the contents of the report, and did not repudiate any of the contents. Therefore, he argues that the report should have been admissible. We disagree.

Officer Mobley testified at trial that when he spoke to the investigator he was embarrassed to admit that he did not remember the events of the burglary. Thus, we cannot say that the report was “shown to have been made or adopted by the witness when the matter was fresh in the witness’s memory and to reflect that knowledge correctly.” Evid. R. 803(5). As such, we cannot say that the trial court abused its discretion in excluding the report. See Kubsch, 866 N.E.2d at 735 (where witness testified at trial that she had no memory of being interviewed four days after murder, videotape of interview was not admissible under Evidence Rule 803(5) because witness could not vouch for the accuracy of a recording).

Moreover, even if we were to conclude that the investigator’s report should have been admissible, any error in the exclusion of the report was harmless given the content of the report and the strength of the other evidence presented by the State. “Errors in the admission of evidence are to be disregarded as harmless unless they affect the

defendant's substantial rights." Rogers, 897 N.E.2d at 961 (citing Ind. Trial Rule 61; Ind. Evidence Rule 103(a)). An error will be deemed harmless if its probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties. Ind. Appellate Rule 66(A); Rogers, 897 N.E.2d at 961.

Williams claims that the investigator's report somehow implicated someone other than Williams in the burglary. We disagree. Williams's offer to prove established only that Officer Mobley told the investigator that, when he arrived at the scene, a witness told him that there was a man inside the burglarized home who was placing things inside a suitcase located outside the home, and when this man came out of the house, Mobley arrested him. This is consistent with Officer Ward's testimony, with one minor exception. According to the investigator's report, Officer Mobley stated that he was the arresting officer, whereas Officer Ward testified at trial that he handcuffed Williams. The police report too indicated that Officer Mobley was the arresting officer, but listed Officer Ward as the "booking officer." Tr. p. 196. At most this shows a minor inconsistency in Officer Ward's testimony regarding who arrested Williams. It is quite a stretch to say that this suggests that there was another participant in the burglary.

More importantly, the evidence at trial established that Wilson, who lived near the burglarized house, saw Williams at the front door of his neighbor's house and then go to the side of the house. After hearing breaking glass, Wilson saw Williams go into the house through a broken window. When Officer Ward arrived, he saw Williams come out of the window and attempt to leave with a suitcase that had items which had been taken from the house. The police found no one else inside the house. And when he was being

arrested, Williams told the police, “You got me. This is nothing but a little petty-ass burglary.” Tr. p. 186. In light of this strong evidence of Williams’s guilt, and considering the content of the excluded investigator’s report, we can only conclude that any error in the exclusion of the report was harmless.

II. Sentencing

Williams also claims that the trial court erred in imposing an aggregate sentence of thirty years. Specifically, he claims that the trial court abused its discretion by failing to consider certain mitigating factors.¹ If the trial court’s sentencing statement includes a finding of aggravating or mitigating circumstances, then it must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh’g, 875 N.E.2d 218. “[O]nce the trial court has entered a sentencing statement, which may or may not include the existence of aggravating and mitigating factors, it may then ‘impose any sentence that is . . . authorized by statute; and . . . permissible under the Constitution of the State of Indiana.’” Id. (citation omitted).

As long as the sentence is within the prescribed statutory range, it is subject to review only for an abuse of discretion. Id. at 490. A trial court abuses its sentencing discretion if it: (1) fails to enter a sentencing statement at all, (2) enters a sentencing

¹ Williams briefly mentions Appellate Rule 7(B) but fails to develop any argument that his sentence is inappropriate in light of the nature of the offense and the character of the offender. Even if he did, Williams’s significant criminal history would justify his sentence. Williams has been convicted for eight felonies in seven different cases and four misdemeanors. His prior convictions include robbery, burglary, theft, criminal trespass, resisting law enforcement, and possession of burglary tools. He has also failed to appear in other cases and was on probation at the time he committed the instant offense, and was charged with another burglary shortly after being arrested in the present case.

statement that explains reasons for imposing a sentence, but the record does not support the reasons, (3) enters a sentencing statement that omits reasons that are clearly supported by the record and advanced for consideration, or (4) considers reasons that are improper as a matter of law. Id. at 490-91. Under the current advisory sentencing scheme, trial courts no longer have any obligation to weigh aggravating and mitigating factors against each other when imposing a sentence. Id. at 491. Thus, the relative weight or value assignable to reasons properly found, or to those which should have been found, is not subject to review for abuse of discretion. Id.

Here, Williams claims that the trial court erred in failing to consider his drug problem as a mitigating circumstance. As noted by the State, Williams offered no evidence of his drug problem other than his own testimony, which the trial court was not required to credit. See Heyen v. State, 936 N.E.2d 294, 304-05 (Ind. Ct. App. 2010) (trial court is not obligated to credit facts proffered as mitigating by the defendant) (citing Abel v. State, 773 N.E.2d 276, 280 (Ind. 2002)). Even if Williams did have a substance abuse problem, the trial court was not required to consider this as a mitigating circumstance. Williams claims that his drug abuse problem explains his “history of economically motivated offenses.” Appellant’s Br. at 11. But Williams claimed to have only recently sought treatment for his alleged drug problem. Under these circumstances, the trial court was not required to consider Williams’s alleged drug problem as mitigating. Cf. Bryant v. State, 802 N.E.2d 486, 501 (Ind. Ct. App. 2004) (concluding that trial court did not err in determining that defendant’s substance abuse problem was an aggravating factor

where defendant was aware of his drug and alcohol problems but had not sought treatment).

Williams also claims that he clearly expressed remorse and that the trial court erred in failing to consider this as a mitigating circumstance. Although an expression of remorse may be considered as a mitigating circumstance, our review on appeal of the trial court's determination of a defendant's remorse is akin to all credibility judgments. Hape v. State, 903 N.E.2d 977, 1002 (Ind. Ct. App. 2009), trans. denied. The trial court possesses the ability to directly observe the defendant and is therefore in the best position to determine whether the defendant is genuinely remorseful. Mead v. State, 875 N.E.2d 304, 309-10 (Ind. Ct. App. 2007). Without evidence of some impermissible consideration by the trial court, we will accept its determination as to remorse. Stout v. State, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005).

Here, Williams briefly apologized to the occupant of the home he burglarized, but he shirked responsibility by denying that he committed the burglary, and making accusations of abuse against the police.² Under these circumstances, we cannot say that Williams's expression of remorse was clearly supported by the record, and the trial court did not err in declining to consider remorse as a mitigating factor. See Stout, 834 N.E.2d at 711 (holding that trial court did not err in failing to recognize defendant's claim of remorse as mitigating where defendant did apologize but also blamed his conduct on drug

² A defendant has the right to maintain his innocence at sentencing, and a good faith maintenance of innocence cannot be used as an aggravating factor. Kien v. State, 782 N.E.2d 398, 412 (Ind. Ct. App. 2003). But there is no requirement that an expression of innocence be credited.

problem). Williams has not shown that the trial court abused its discretion in failing to find Williams's claimed drug problem and remorse as mitigating factors.

Conclusion

The trial court did not err in excluding the defense investigator's report, and any error in the exclusion of the report would have been harmless given the weight of the evidence against Williams. The trial court did not abuse its discretion in refusing to consider William's proffered mitigating circumstances.

Affirmed.

FRIEDLANDER, J., and MAY, J., concur.