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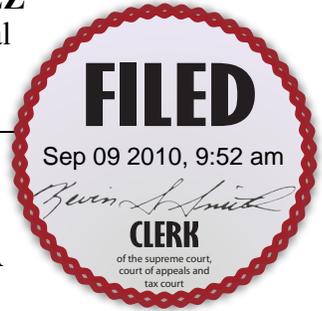
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**IN THE
COURT OF APPEALS OF INDIANA**

RICARDO TELFER,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 20A05-1001-CR-106

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0808-FB-59

September 9, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Ricardo Telfer (“Telfer”) was convicted in Elkhart Circuit Court of Class B felony dealing in cocaine. The trial court sentenced Telfer to a term of sixteen years in the Department of Correction. Telfer appeals and raises four issues, which we restate as:

- I. Whether the prosecutor engaged in misconduct by eliciting testimony from a defense witness that Telfer was incarcerated at the time of trial;
- II. Whether the State presented sufficient evidence to sustain Telfer’s conviction;
- III. Whether the trial court abused its sentencing discretion by considering improper aggravating factors; and
- IV. Whether Telfer’s sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

Facts and Procedural History

The facts most favorable to the judgment reveal that a cooperating source (“CS”) told the Elkhart police that she could buy crack cocaine from a man she knew as “Rico” at a house located at 326 Aspenwald Street in Elkhart. When Detective James Anderson (“Detective Anderson”) of the Elkhart Police Department showed the CS a photograph of Telfer, she identified him as the man she knew as Rico.

As a result of this information, Detective Anderson worked with the CS to conduct a controlled buy at the Aspenwald Street residence on October 4, 2006. Prior to the controlled buy, Detective Anderson searched the CS for contraband, wired her with an audio transmitter and recording device, and gave her forty dollars with which to purchase the drugs. Detective Anderson then drove the CS to the Aspenwald Street residence, where he remained in the vehicle while the CS approached the house and asked for Rico.

Telfer then walked out from between two houses toward the CS, and the two entered the Aspenwald Street residence together.

Once inside, the CS handed Telfer the money and asked for forty dollars worth of crack cocaine. Telfer only had twenty dollars worth of crack cocaine, so he sold her that amount. Telfer then gave the rest of the money to Alvester Waters (“Waters”), another man who was present in the house, and Waters sold the CS another twenty dollars worth of crack cocaine. The CS then emerged from the house and gave the drugs to Detective Anderson.

On June 28, 2007, the State charged Telfer with Class B felony dealing in cocaine. Prior to Telfer’s trial, Waters was convicted for his cocaine sale to the CS in the same incident. Telfer’s two-day trial commenced on November 30, 2009, and the jury found Telfer guilty as charged. On December 31, 2009, the trial court sentenced Telfer to sixteen years in the Department of Correction. Telfer now appeals. Additional facts will be provided as necessary.

I. Prosecutorial Misconduct

Telfer initially argues that the State committed prosecutorial misconduct when it elicited testimony from Waters that Telfer was incarcerated at the time of trial. At trial, Waters testified for the defense that he had never met Telfer and that Telfer was not present at the Aspenwald Street residence on October 4, 2006. Previously convicted for his role in the same buy, Waters was already serving his sentence at the time of Telfer’s trial. During cross-examination, the prosecutor asked Waters where he resided, and Waters responded that he was currently housed in the Elkhart jail. The prosecutor then

asked Waters where Telfer was residing, and Waters replied, “I guess the Elkhart jail too.” Tr. p. 217. When the prosecutor continued to question Waters as to Telfer’s precise location in the jail, defense counsel objected on the grounds that where the defendant resided was “an inappropriate subject to have in front of the jury.” Tr. p. 218. The prosecutor agreed not to pursue the line of questioning further, and Telfer’s counsel declined the trial court’s offer to admonish the jury not to consider the testimony.

To preserve a claim of prosecutorial misconduct, the defendant must object and request an admonishment. Nunley v. State, 916 N.E.2d 712, 721 (Ind. Ct. App. 2009), trans. denied. If the party is not satisfied with the admonishment, the proper procedure is to move for a mistrial. Id. Failure to request an admonishment or move for a mistrial results in waiver of the issue on appeal. Id.

Here, the trial court repeatedly offered to admonish the jury. Apparently deciding it was better strategy not to draw further attention to the testimony, Telfer declined. This issue is therefore waived.

II. Sufficiency of the Evidence

Telfer also argues that the State presented insufficient evidence to prove that he sold crack cocaine to the CS. In reviewing a challenge to the sufficiency of the evidence, we neither reweigh the evidence nor judge the credibility of witnesses. Atteberry v. State, 911 N.E.2d 601, 609 (Ind. Ct. App. 2009). Instead, we consider only the evidence supporting the conviction and the reasonable inferences to be drawn therefrom. Id. If there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged

beyond a reasonable doubt, then the verdict will not be disturbed. Baumgartner v. State, 891 N.E.2d 1131, 1137 (Ind. Ct. App. 2008).

To establish that Telfer committed Class B felony dealing in cocaine, the State was required to prove that Telfer knowingly or intentionally delivered cocaine to the CS. Ind. Code § 35-48-4-1 (2004). At trial, the CS identified Telfer as one of the two men from whom she bought crack cocaine on October 4, 2006. Telfer claims that the CS's testimony is insufficient to support his conviction because it was uncorroborated and contradicted by Waters's testimony that Telfer was not present at the Aspenwald Street residence when the CS purchased the drugs.

Telfer's argument is simply an invitation to reweigh the evidence and judge the credibility of witnesses, which we will not do. The jury was free to disbelieve Waters's testimony and to accept the CS's testimony as truthful. The State presented sufficient evidence to support Telfer's conviction for Class B felony dealing in cocaine.

III. Sentencing

A. Aggravating Circumstances

In the first part of his challenge to his sentence, Telfer argues that the trial court abused its discretion by relying on improper aggravating factors in imposing Telfer's sixteen-year sentence. Sentencing decisions rest within the sound discretion of the trial court. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007). So long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. Id. "An abuse of discretion occurs if the decision is 'clearly against the logic and effect of the facts and circumstances before the court or the reasonable, probable, and actual

deductions to be drawn therefrom.” Id. at 491 (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)).

A trial court may abuse its sentencing discretion in a number of ways, including: (1) failing to enter a sentencing statement at all; (2) entering a sentencing statement that includes aggravating and mitigating factors that are unsupported by the record; (3) entering a sentencing statement that omits reasons that are clearly supported by the record; or (4) entering a sentencing statement that includes reasons that are improper as a matter of law. Id. at 490-491. If the trial court abuses its discretion in one of these or another way, remand for resentencing is the appropriate remedy “if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.” Id. at 491.

Here, the trial court noted the following as mitigating factors: (1) that Telfer was twenty-eight years old; and (2) all statements of Telfer and his counsel. The trial court found the following six aggravating circumstances: (1) Telfer’s prior felony conviction; (2) that Telfer’s crime subjected him, as a lawful permanent resident, to the possibility of deportation; (3) Telfer’s use of marijuana, in combination with his prior conviction involving controlled substances; (4) that previous sanctions had proven ineffective in rehabilitating Telfer; (5) Telfer’s poor work history; and (6) that Telfer appeared to be blaming others for his present situation. The trial court then stated “on balance I think an aggravated sentence is in order, and the main reason is that there are now two felonies that did involve controlled substances.” Tr. p. 300.

Telfer argues that the trial court abused its discretion because its consideration of his immigration status was improper as a matter of law and because its conclusion that Telfer was blaming others for his present situation is unsupported by the record. However, even assuming that these considerations were improper, the remaining four aggravators were properly found by the trial court. Moreover, the trial court specifically stated that the main reason for imposing the sentence was Telfer's prior felony conviction. In light of these facts, we can say with confidence that the trial court would have imposed the same sentence even if it had not considered the factors to which Telfer objects. Accordingly, remand for resentencing is unwarranted. Anglemyer, 868 N.E.2d at 491; see also McDonald v. State, 868 N.E.2d 1111, 1114 (Ind. 2007); Alvies v. State, 905 N.E.2d 57, 64 (Ind. Ct. App. 2009).

B. Inappropriate Sentence

Finally, Telfer argues that his sixteen-year sentence is inappropriate in light of the nature of the offense and the character of the offender. Although a trial court may have acted within its lawful discretion in imposing a sentence, Article 7, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of a sentence imposed by the trial court. Alvies, 905 N.E.2d at 64 (citing Anglemyer, 868 N.E.2d at 491). This appellate authority is implemented through Indiana Appellate Rule 7(B), which provides that a court “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Anglemyer, 868 N.E.2d at 491. However, “we must and should exercise deference to a

trial court's sentencing decision, both because Rule 7(B) requires us to give 'due consideration' to that decision and because we understand and recognize the unique perspective a trial court brings to its sentencing decisions." 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. Reid v. State, 876 N.E.2d 1114, 1116 (Ind. 2007).

Telfer committed Class B felony dealing in cocaine, for which the sentence range is six to twenty years, with an advisory sentence of ten years. Ind. Code § 35-50-2-5 (2004). The trial court sentenced Telfer to sixteen years executed in the Department of Correction.

As to the nature of his offense, the General Assembly has classified Telfer's offense as a Class B felony, and has established the applicable sentencing range. In our consideration of Telfer's character, we note that Telfer has a previous felony conviction for possession of a firearm by an unlawful user of a controlled substance, a crime that involves both controlled substances and potential violence. Under these facts and circumstances, and giving proper deference to the trial court's sentencing discretion, we cannot conclude that Telfer's sixteen-year sentence is inappropriate.

Conclusion

Telfer's prosecutorial misconduct claim is waived. The State presented sufficient evidence to support Telfer's conviction for Class B felony dealing in cocaine. Even assuming the trial court abused its discretion by considering improper aggravating circumstances, remand for resentencing is unwarranted because the trial court would have imposed the same sentence without considering the allegedly improper aggravators.

Telfer's sixteen-year sentence is not inappropriate in light of the nature of the offense and character of the offender.

Affirmed.

BAKER, C.J., and NAJAM, J., concur.