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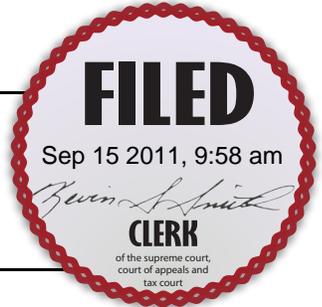
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**IN THE
COURT OF APPEALS OF INDIANA**



CORDARO CLARK,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 34A02-1012-CR-1410

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable William C. Menges, Jr., Judge
Cause No. 34D01-0912-FA-1127

September 15, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Cordaro Clark appeals his conviction and sentence for dealing in cocaine as a class B felony.¹

We affirm.

ISSUE

1. Whether sufficient evidence supports Clark's conviction.
2. Whether the trial court erred in sentencing Clark.

FACTS

Between September 16 and November 4, 2009, the Kokomo Police Department worked with confidential informant, Richard Green,² to conduct four controlled drug buys from Clark in front of Green's house on Brandon Street in Kokomo.

On November 4, Kokomo Police Detective Gary Taylor and Detective James Nielson met with Green at a nearby park to discuss and set up a controlled buy from Clark. Detective Taylor "thoroughly" searched Greene, and he did not have any money or drugs on him. (Tr. 225). Green phoned Clark and arranged to meet him at Green's house so he could buy some cocaine. Detective Clark recorded Green's telephone call to Clark. Detective Taylor then equipped Green with an audio and video recording device and gave him \$120 to buy cocaine from Clark. Detective Nielson drove Green to

¹ Ind. Code § 35-48-4-1(a)(1).

² Green's name is spelled as both "Green" and "Greene" in the record on appeal.

Brandon Street while Detective Taylor and other detectives conducted surveillance of the buy. Detective Taylor videotaped the buy from his surveillance point.

Green was standing outside his house when Clark pulled up in a red car driven by Shakiyla Woodard. Green walked up to Clark, who was sitting in the front passenger seat. Green gave Clark \$120 in cash, and Clark gave Green a purple rubber “doctor’s glove” that contained 2.68 grams of cocaine. (Tr. 81). Clark and Woodard drove away, and Green stayed outside his house until Detective Nielson returned to pick him up. Green gave the cocaine-filled glove to Detective Nielson, and the detective drove Green back to the park, where he turned Green and the cocaine over to Detective Taylor. Detective Taylor again searched Green and did not find any money or drugs on his person.

The State ultimately charged Clark with Counts I through IV, dealing in cocaine, all as class B felonies.³ A jury trial was held in October 2010. At trial, Woodard testified that she drove Clark to all four of the controlled buys and that she, not Clark, delivered cocaine to Green on two of the four controlled buys. She testified that on the occasions when she delivered the cocaine, it was packaged in a white baggie. She also testified that she did not deliver cocaine when she was driving the red car. The jury found Clark guilty of dealing in cocaine under Count IV but were unable to reach a verdict on Counts I through III. The State moved to dismiss Counts I through III, and the trial court granted the motion.

³ The State initially charged Counts I through IV as class A felonies but amended the charging informations prior to trial.

Prior to sentencing, Clark filed a pro se notice of appeal. During the sentencing hearing, the trial court commented on Clark's premature notice of appeal. The trial court indicated that it did not assign any aggravating or mitigating weight to the premature notice of appeal but stated that it provided "an interesting outlook on [Clark's] attitude" and seemed to indicate a lack of remorse on Clark's part. (Tr. 346). The trial court pointed out that this conviction was Clark's "third or fourth felony conviction in just over three years" and that he committed this crime while on bond in another case. (Tr. 347). The trial court did not find any mitigating circumstances and found Clark's criminal history to be an aggravating circumstance. The trial court sentenced Clark to twenty years.

DECISION

1. Sufficiency

Clark argues that the evidence was insufficient to support his conviction for dealing in cocaine.

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted).

To convict Clark of dealing in cocaine as charged, the State was required to prove beyond a reasonable doubt that Clark knowingly delivered cocaine. *See* Ind. Code § 35-48-4-1(a)(1); (App. 103). At trial, confidential informant Green testified that, on November 4, 2009, he gave Clark cash, and Clark gave him a rubber glove containing cocaine.

Clark does not directly challenge that Green's testimony supports the elements of the crime; instead, he merely argues that the evidence was "tenuous" because it came from confidential informant Green, who Clark contends "failed to tell the truth" and "was an admitted drug user." Clark's Br. at 6.

Clark's argument, however, is without merit. "Even the uncorroborated testimony of an informant-buyer is sufficient to sustain a conviction." *Simmons v. State*, 585 N.E.2d 1341, 1343 (Ind. Ct. App. 1992). Moreover, Clark's argument amounts to nothing more than a request for this court to reweigh the evidence and judge witness credibility, which we will not do. Additionally, despite Clark's assertion to the contrary, Green's testimony was corroborated by Detective Taylor's testimony regarding the details of the controlled buy, the video and photographs depicting the buy, and Woodard's testimony that she saw Green give money to Clark and that she never delivered cocaine to Green when she drove the red car. Green's testimony that Clark delivered cocaine to him in exchange for money was evidence of probative value sufficient to support Clark's conviction for dealing in cocaine. Accordingly, we affirm Clark's conviction. *See, e.g., Yarbrough v. State*, 703 N.E.2d 1101, 1102 (Ind. Ct. App.

1998) (holding informant's testimony that defendant delivered cocaine to him was sufficient to support defendant's conviction).

2. Sentencing

Lastly, Clark argues that the trial court erred in sentencing him. The State contends that Clark has waived any sentencing argument because he failed to include a copy of his presentence investigation report ("PSI") in his appellate appendix. *See Nasser v. State*, 727 N.E.2d 1105, 1110 (Ind. Ct. App. 2000) (explaining that defendant has burden to establish prejudicial error was committed and finding defendant's failure to include PSI in record resulted in waiver), *trans. denied*. The State, however, acknowledges that, pursuant to Appellate Rule 49(B), this failure to include the PSI does not necessarily result in waiver. *See* Ind. Appellate Rule 49(B) ("Any party's failure to include any item in an Appendix shall not waive any issue or argument."); *see also Eiler v. State*, 938 N.E.2d 1235, 1237 n.2 (Ind. Ct. App. 2010) (noting that defendant's failure to include PSI "hampers our ability to . . . review the trial court's sentencing decision" but not finding waiver), *reh'g denied*; *Nasser*, 727 N.E.2d at 1110 (reviewing defendant's sentencing error notwithstanding waiver for failure to include PSI in record). We agree that the lack of PSI "hampers" our appellate review but find that the sentencing transcript is sufficient to allow us to adequately review Clark's sentencing claims. Accordingly, we will address his sentencing claims.

Clark contends that: (a) the trial court failed to consider mitigators; and (b) his sentence is inappropriate.⁴

a. *Mitigators*

Clark argues that the trial court should have considered the following as mitigators: his history of drug abuse and request for treatment; and hardship on his dependents.

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). One way in which a court may abuse its discretion is by entering a sentencing statement that omits mitigating circumstances that are clearly supported by the record and advanced for consideration. *Id.* at 490–91. However, a trial court is not obligated to accept a defendant's claim as to what constitutes a mitigating circumstance. *Rascoe v. State*, 736 N.E.2d 246, 249 (Ind. 2000). A claim that the trial court failed to find a mitigating circumstance requires the

⁴ Clark also makes various vague arguments that are either irrelevant or waived. For example, he refers to the seriousness of the crime and need for rehabilitative treatment and appears to suggest that these were improper aggravators. The trial court, however, did not find these as aggravators. He also seems to contend that the trial court improperly considered his premature notice of appeal when sentencing him; yet, at the same time, he acknowledges that the trial court did not consider it to be an aggravating or mitigating factor. Finally, Clark appears to suggest that the trial court erred by considering his criminal history to be an aggravating circumstance due to the fact that the trial court “did not state which convictions it considered to be aggravators and made a generalized comment about the defendant's criminal history.” Clark's Br. at 9-10. During sentencing, Clark's counsel conceded that Clark's criminal history was an aggravating circumstance. (*See* Tr. 345). Clark, however, cannot invite the trial court to use his criminal history as an aggravator and then challenge that use of that aggravator on appeal. *See Kingery v. State*, 659 N.E.2d 490, 494 (Ind. 1995) (“Invited errors are not subject to appellate review.”), *reh'g denied*; *see also Mitchell v. State*, 730 N.E.2d 197, 201 (Ind. Ct. App. 2000) (holding that defendant had waived appellate review of sentencing claim because of invited error), *trans. denied*. Indeed, Clark's vague argument on appeal amounts to nothing more than a challenge to the weight that the trial court assigned to the criminal history aggravator, which he cannot do. *See Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007).

defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Anglemyer*, 868 N.E.2d at 493.

Clark first contends that the trial court should have considered his drug addiction history and request for treatment to be a mitigating circumstance. Clark, however, failed to cite to any legal authority supporting his contention. Indeed, to the contrary, a defendant's substance abuse could be considered as a valid aggravating factor. *See Iddings v. State*, 772 N.E.2d 1006, 1018 (Ind. Ct. App. 2002) (explaining that "a history of substance abuse is sometimes found by trial courts to be an aggravator, not a mitigator"), *trans. denied*. Aside from the fact that Clark told the trial court at sentencing that he was an "addict", (tr. 344), he has failed to meet his burden of showing that this mitigator was significant and clearly supported by the record. Accordingly, we conclude the trial court did not abuse its discretion by not finding his substance abuse to be a mitigating circumstance.

Clark also argues that the trial court should have found a mitigator in the fact that he has two dependents. There is no requirement that a trial court find a defendant's incarceration would result in undue hardship to his dependents. *Roney v. State*, 872 N.E.2d 192, 204 (Ind. Ct. App. 2007), *trans. denied*. As our supreme court has observed, "[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." *Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999). To support use of this hardship on a dependent mitigator, there generally should be some evidence that the hardship to be suffered by a dependent is more severe than that suffered by any

child whose parent is incarcerated. *See Roney*, 872 N.E.2d at 205. At the sentencing hearing, Clark merely stated that he was the father of two children, but he did not indicate that he supported them in any manner. Because Clark has failed to show that this proffered mitigator was significant, the trial court did not abuse its discretion by declining to find it as a mitigating circumstance. *See, e.g., Anglin v. State*, 787 N.E.2d 1012, 1018 (Ind. Ct. App. 2003) (finding no abuse of discretion where evidence established that defendant's daughter was ill and that he was concerned and wished to spend time with her, but nothing indicated her degree of reliance upon him), *trans. denied*.

b. *Inappropriate*

Clark contends that his twenty-year sentence is inappropriate and argues that he should have received a fifteen-year sentence with five years suspended. 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). The defendant has the burden of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

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. The sentencing range for a class B felony is between six and twenty years, with advisory sentence being ten years. I.C. § 35-50-2-5. The trial court sentenced Clark to the maximum term of twenty years for his class B felony dealing in cocaine conviction.

Regarding Clark's offense, the record reveals that Clark sold 2.68 grams of cocaine to a confidential informant as part of a series of multiple controlled buys. He sold the cocaine from a car in a neighborhood.

As to Clark's character, he is twenty-two years old and has a criminal history consisting of multiple felony convictions. The trial court commented that this was Clark's "third or fourth conviction in just over three years[.]" (Tr. 347). Clark admitted during the sentencing hearing that he was "an addict" and that when "looking at it in black and white it looks real bad." (Tr. 344). Despite his failure to include the PSI, the record from the sentencing hearing reveals that Clark was on bond from another charge⁵ when he committed this offense and that he has a previous conviction for dealing in cocaine. His criminal history indicates a disregard for the law.

In light of the nature of the offense and Clark's character, we cannot say that a twenty-year sentence for his class B felony dealing in cocaine conviction is inappropriate.

Affirmed.

FRIEDLANDER, J., and VAIDIK, J., concur.

⁵ From the record, it appears that he was out on bond on another dealing charge.