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ATTORNEY FOR APPELLANT:

RANDY M. FISHER
Deputy Public Defender
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General Of Indiana

RICHARD C. WEBSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

AARON L. GOLDSBY,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

No. 02A05-0701-CR-17

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No.02D04-0606-FC-147

December 27, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, Aaron Goldsby appeals his convictions and sentences for carrying a handgun without a license, a Class C felony; resisting law enforcement, a Class A misdemeanor; and public intoxication, a Class B misdemeanor. On appeal, Goldsby raises three issues, which we restate as 1) whether the trial properly admitted evidence over Goldsby's objections; 2) whether the trial court properly sentenced Goldsby; and 3) whether Goldsby's sentence is inappropriate in light of the nature of the offenses and his character. We affirm, concluding that although the trial court abused its discretion in admitting evidence, the errors were harmless; that the trial court properly sentenced Goldsby; and that Goldsby's sentence is not inappropriate.

Facts and Procedural History

In the early morning hours of June 18, 2006, Officer Scott Berning of the Fort Wayne Police Department was dispatched to investigate a report from a 911 caller. The caller reported that two black men wearing hooded sweatshirts and ski masks had knocked on her door. When Officer Berning approached the area, he observed two men matching the description the caller had given. Officer Berning approached the men and requested that they stop. One of the men, later identified as Eddie Wallace, complied with Officer Berning's request, but the other, later identified as Goldsby, continued walking. Officer Berning reiterated his request, but Goldsby did not comply. At that point, Officer Berning observed Goldsby place his hands in the pocket of his sweatshirt. Concerned that Goldsby might be

armed, Officer Berning drew his gun and ordered Goldsby to stop and place his hands above his head. Goldsby removed his right hand from his pocket, but continued walking.

While Officer Berning was ordering Goldsby to stop, Officer David Tinsley arrived on the scene and approached Goldsby. After initially walking away from Officer Tinsley, Goldsby stopped. Officer Tinsley grabbed Goldsby's right wrist, explained why he had stopped him, and told Goldsby he was going to conduct a pat-down search. Officer Tinsley observed that Goldsby "smelled very strongly of an alcoholic beverage" and "was unsteady on his feet." Transcript of Trial at 126. Before Officer Tinsley could conduct his search, Goldsby broke Officer Tinsley's grasp and ran past Officer Berning, who attempted to tackle Goldsby. As Officer Tinsley pursued, Goldsby again reached his hands into his sweatshirt pocket. Officer Tinsley caught up with Goldsby and pushed him against a parked vehicle. While the two struggled, Officer Tinsley heard a "metallic thunk" and "clatter" near his feet. Id. at 130. With Officer Berning's assistance, Officer Tinsley pinned Goldsby on the ground. Goldsby struggled, but relented when Officer Berning sprayed him several times with a chemical agent. Upon searching Goldsby, Officer Tinsley recovered a black ski mask. Officer Tinsley also recovered a handgun that was on the ground between the curb and the parked vehicle where he and Goldsby had struggled.

The State charged Goldsby with carrying a handgun without a license, a Class C felony;[1] resisting law enforcement, a Class A misdemeanor; and public intoxication, a Class B misdemeanor. At trial, Officers Berning and Tinsley testified to the events described

above. Officer Berning also testified over three hearsay objections from Goldsby regarding the reason for his dispatch. The trial court instructed the jury twice that it should consider this testimony as proof of what Officer Berning did in response to receiving the dispatch and not for "the truth of it." Tr. of Trial at 92, 95. The trial court also admitted the ski mask over Goldsby's objection. The jury returned guilty verdicts on all counts and also found that Goldsby had a prior conviction of carrying a handgun without a license.

Following the guilt phase of Goldsby's trial, the trial court conducted a sentencing hearing. At the sentencing hearing, Goldsby offered his youth as a mitigating factor and requested that the trial court sentence him to two years executed and two years suspended for all three convictions. After hearing arguments from counsel, the trial court made the following observations:

> I considered all the remarks of both counsel. Frankly, I did carefully consider [Goldsby's] young age and would note, in this particular case, I do not find it to be a mitigating circumstance. I have said in circumstances like this that I would almost consider it to be an aggravating circumstance, that a man of your age has been able to acquire the extraordinary criminal history that you have. If I am counting right, this is the fourth felony conviction at the young age of twenty years old. All of those were acquired after you were an adult it looks like, maybe not. But, what I'm looking at is, it says something about appears [sic] on back to a criminal orientation, but I don't see anything listed on the juvenile section here. Two carrying handguns. You have simply chosen to totally disregard. This isn't a piece of bad judgment. You've totally chosen to disregard society's rules about carrying guns and I just can't countenance that, as well as like I said, the lengthy record. Find that there are no aggravating circumstances – I mean, there are no mitigating circumstances, that there are aggravating circumstances in the form of [Goldsby's] criminal history, lengthy criminal history, generally and specifically, two priors for carrying handguns.

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[1] The offense was charged as a Class C felony because the State alleged Goldsby had a prior conviction of carrying a handgun without a license. See Ind. Code §§ 35-47-2-1 and -23(c).

Transcript of Sentencing Hearing at 7-8. Based on these observations, the trial court sentenced Goldsby to eight years for carrying a handgun without a license, one year for resisting law enforcement, and one hundred eighty days for public intoxication. The trial court ordered the sentences to run concurrently, resulting in a total executed sentence of eight years. Goldsby now appeals.

Discussion and Decision

I. Admission of Evidence

Goldsby argues the trial court improperly admitted into evidence Officer Berning's testimony regarding the reason for his dispatch and the ski mask that Officer Tinsley recovered from Goldsby. We review the trial court's decision to admit or exclude evidence for an abuse of discretion. Pickens v. State, 764 N.E.2d 295, 297 (Ind. Ct. App. 2002), trans. denied. An abuse of discretion occurs when the trial court's ruling is clearly against the logic and effect of the facts and circumstances before the court. Id.

A. Officer Berning's Testimony

The trial court allowed Officer Berning to testify over Goldsby's hearsay objections to a statement he received from police dispatch that a 911 caller reported two men standing on her porch wearing hooded sweatshirts and ski masks. Goldsby argues Officer Berning's testimony is inadmissible hearsay, while the State counters that Officer Berning's testimony is not hearsay because it was not offered to prove the truth of the matter asserted and, even if it was inadmissible hearsay, its admission was harmless.

Our supreme court has outlined the process courts should take "where proof of out-of-

court statements received by police officers engaged in investigative work are challenged as hearsay." Craig v. State, 630 N.E.2d 207, 210-11 (Ind. 1994). "Courts must first consider whether the fact to be proved under the State's suggested purpose for the statement is relevant to some issue in the case and whether any danger of prejudice outweighs its probative value." Bonner v. State, 650 N.E.2d 1139, 1141 (Ind. 1995) (citing Craig, 630 N.E.2d at 211).

The State offered Officer Berning's testimony "to show why the police were in the area and why [Goldsby] and Wallace were stopped by the police." Appellee's Brief at 7. However, neither an explanation of why Officer Berning was in the area nor the propriety of Officer Berning's stopping Goldsby was an issue at trial. Thus, Officer Berning's testimony is either irrelevant, see Ind. Evidence Rule 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."), or, because it suggests Goldsby was engaged in uncharged criminal activity, its probative value was substantially outweighed by the danger of unfair prejudice, see Ind. Evidence Rule 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."). Either way, the trial court abused its discretion in allowing Officer Berning to testify regarding the reason for his dispatch.

B. Ski Mask

The trial court's admission of the ski mask suffers from the same deficiencies as Officer Berning's testimony. The State offered the ski mask "to establish [Goldsby's]

identity as one of the men reported in the police dispatch and sought by the police officers." Appellee's Br. at 8. Again, we fail to see how admitting the ski mask was relevant to an issue at trial. Stated differently, the fact that Goldsby had a ski mask when he was arrested does not make it more probable that Goldsby carried a handgun without a license, resisted law enforcement, or was intoxicated in a public place. Even assuming the ski mask was relevant, its probative value was substantially outweighed by the danger of unfair prejudice because it suggested Goldsby was engaged in uncharged criminal activity. Thus, it follows that the trial court abused its discretion when it admitted the ski mask into evidence.

C. Harmless Error

Although the trial court abused its discretion in admitting this evidence, in order to receive a new trial, Goldsby still must demonstrate that these errors prejudiced his substantial rights. See Martin v. State, 622 N.E.2d 185, 188 (Ind. 1993). Regarding Officer Berning's testimony, the trial court admonished the jury twice that it should not consider the testimony for "the truth of it," but as proof of what Officer Berning did in response to receiving the dispatch. Tr. of Trial at 92, 95. "A proper admonishment to the jury is presumed to cure any alleged error, unless the contrary is shown." Hackney v. State, 649 N.E.2d 690, 694 (Ind. Ct. App. 1995), trans. denied. Goldsby has not explained how the trial court's admonishments failed to cure the error.

Regarding the trial court's admission of the ski mask, Goldsby overlooks that substantial independent evidence supports his guilt. See Bonner, 650 N.E.2d at 1141 ("The improper admission of evidence is harmless error when the conviction is supported by

substantial independent evidence of guilt sufficient to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction."). Officer Tinsley testified Goldsby initially refused to stop, and then ran when Officer Tinsley began a pat-down search. Officer Tinsley also testified he heard a "metallic thunk" and "clatter" at his feet when he pushed Goldsby against a parked vehicle, tr. of trial at 130; had Officer Berning subdue Goldsby by spraying him with a chemical agent; smelled alcohol on Goldsby's breath and noticed he "was unsteady on his feet," id. at 126; and later found a handgun near where he pushed Goldsby against the parked vehicle. Officer Berning corroborated this testimony. Because this testimony constitutes substantial independent evidence of Goldsby's guilt, and because the trial court admonished the jury regarding Officer Berning's testimony, it follows that the trial court's errors were harmless.

II. Propriety of Sentence

Goldsby argues the trial court abused its discretion when it sentenced him because it improperly found that his youth was an aggravating factor and failed to find that his youth and employment were mitigating factors.[2] We note initially Goldsby's argument that the trial court improperly found his youth was an aggravating factor misconstrues the record. At the sentencing hearing, the trial court stated it "would almost consider [Goldsby's age] to be an

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[2] Goldsby also argues in the portion of his brief addressing these issues that the trial court abused its discretion in weighing the aggravating and mitigating factors. Because Goldsby was sentenced under the advisory sentencing scheme, we are precluded from reviewing whether there was an abuse of discretion in this regard. See Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007) (concluding that the weight a trial court gives to aggravating and mitigating factors is not subject to appellate review for an abuse of discretion because, under the advisory sentence scheme, "the trial court no longer has any obligation to 'weigh' aggravating and mitigating factors against each other . . . [and therefore] can not now be said to have abused its discretion in failing to 'properly weigh' such factors"), clarified on reh'g, 875 N.E.2d 218.

aggravating circumstance," tr. of sentencing hearing at 7 (emphasis added), but then concluded "there are aggravating circumstances in the form of Defendant's criminal history, lengthy criminal history, generally and specifically, two priors for carrying handguns," id. at 8. Goldsby cannot predicate error on an aggravating factor the trial court did not find.

Turning to Goldsby's next argument, the trial court's failure to find Goldsby's youth and employment as mitigating factors, we note initially that Goldsby never presented his employment as a mitigating factor. At the sentencing hearing, Goldsby's counsel stated Goldsby wanted the presentence investigation report ("PSI") corrected to reflect that Goldsby was employed and also stated, "and we believe there are several – there's at least one mitigating factor, Judge. [Goldsby] isn't that old and we believe that his age should be considered a mitigating factor." Id. at 5. Thus, Goldsby's failure to offer his employment as a mitigating factor constitutes waiver. See Spears v. State, 735 N.E.2d 1161, 1167 (Ind. 2000) ("If the defendant does not advance a factor to be mitigating at sentencing, this Court will presume that the factor is not significant and the defendant is precluded from advancing it as a mitigating circumstance for the first time on appeal."); see also Anglemyer v. State, 875 N.E.2d 218, 220 (Ind. 2007) (opinion on rehearing) (explaining that the rule in Spears does not apply to guilty pleas).

Goldsby did preserve his argument that the trial court abused its discretion in refusing to find his youth was a mitigating factor. To prove such an abuse, however, Goldsby must establish that the mitigating evidence was significant and clearly supported by the record. McCann v. State, 749 N.E.2d 1116, 1121 (Ind. 2001). Moreover, our supreme court has

stated that youth is not a per se mitigating factor because "[f]ocusing on chronological age, while often a shorthand for measuring culpability, is frequently not the end of the inquiry for people in their teens and early twenties. There are both relatively old offenders who seem clueless and relatively young ones who appear hardened and purposeful" Monegan v. State, 756 N.E.2d 499, 504 (Ind. 2001) (citation omitted). Goldsby falls under the latter category, as he has three prior felony convictions despite his youth. In light of this criminal history, Goldsby has not explained how his youth constitutes significant mitigating evidence. Thus, it follows that the trial court was within its discretion in refusing to find Goldsby's youth as a mitigating factor.

III. Appropriateness of Sentence

This court has authority to revise a sentence "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." Ind. Appellate Rule 7(B). We may "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). In determining whether a sentence is inappropriate, we examine both the nature of the offense and the character of the offender. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When making this examination, we may look to any factors appearing in the record, Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied, and recognize that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed," Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). Moreover, "a defendant must persuade the appellate court that his

sentence has met this inappropriateness standard of review." Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

The trial court sentenced Goldsby to eight years, which is the statutory maximum sentence for a Class C felony. See Ind. Code § 35-50-2-6(a) ("A person who commits a Class C felony shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years."). Generally, maximum sentences should be reserved for the worst offenses and offenders. Bacher v. State, 686 N.E.2d 791, 802 (Ind. 1997). At the same time, however, reading this observation narrowly "would reserve the maximum punishment for only the single most heinous offense." Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), trans. denied. Instead, a reviewing court "should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character." Id.

Regarding the nature of the offenses, Goldsby argues his offenses "can not be considered the worst offense[s] of possessing a handgun without a license, resisting arrest, or public intoxication." Appellant's Brief at 18. The State counters that the nature of Goldsby's offenses reveal that Goldsby was "calculating and deliberate" and that he "evidences an extreme disregard for the lives of others, and a deep-seated disrespect for the law." Appellee's Br. at 11. Our review of the record[3] does not reveal that the nature of Goldsby's offenses was more egregious than is typical for offenses of carrying a handgun

without a license, resisting law enforcement, and public intoxication. The report from the 911 caller suggests Goldsby may have been planning to commit more serious crimes around the time of his arrest, in which case the nature of Goldsby's offenses would have been more egregious than usual, but the record is too tenuous on this point to attribute such a plan to Goldsby. Although we do not condone Goldsby's offenses, the record does not indicate their nature was anything but typical.

Goldsby's character, however, is a different story. In this respect, Goldsby argues that "[a]lthough [he] has three (3) previous convictions, he should not be viewed by the court as the worst offender." Appellant's Br. at 18. We note initially that Goldsby was employed at the time he commit the offenses, which comments favorably on his character. Cf. Scheckel v. State, 620 N.E.2d 681, 686 (Ind. 1993) (indicating that a defendant's employment history may constitute a mitigating factor). However, the positive nature of Goldsby's employment is diminished because of his extensive criminal history. This criminal history comments very negatively on Goldsby's character because two of his three previous convictions are for carrying a handgun without a license. See Prickett v. State, 856 N.E.2d 1203, 1209 (Ind. 2006) (explaining that the significance of a defendant's prior criminal history in determining whether to impose a sentence enhancement will vary "based on the gravity, nature and number of prior offenses as they relate to the current offense") (quoting Ruiz v. State, 818 N.E.2d 927, 929 (Ind. 2004)). Moreover, Goldsby committed these three offenses within slightly over two and one-half years, which means that with regard to carrying a handgun

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[3] The record did not include the PSI, which would have been helpful in determining whether

without a license, Goldsby is among the worst offenders. In this respect, the prosecutor's observation that "Goldsby obviously doesn't get it when it comes to handguns," tr. of sentencing hearing at 6, and the trial court's observation that Goldsby chose to "totally disregard society's rules about carrying guns," id. at 8, are apt.

Goldsby bore the burden of demonstrating that his sentence was inappropriate. Although there is nothing in the record indicating that the nature of the offenses are more egregious than is typical, the fact that twenty-year-old Goldsby accumulated three felony convictions of carrying a handgun without a license, and four felony convictions overall, despite having reached the age of majority only two and one-half years previously convinces us he has not carried his burden. Thus, we conclude Goldsby's sentence is not inappropriate based on the nature of the offenses and his character.

Conclusion

Although the trial court abused its discretion in admitting evidence, the errors were harmless. Moreover, the trial court properly sentenced Goldsby and Goldsby's sentence is not inappropriate in light of the nature of the offenses and his character.

Affirmed.

VAIDIK, J., concurs.

ROBERTSON, Sr. J., concurs in result.

Goldsby's sentence is inappropriate.