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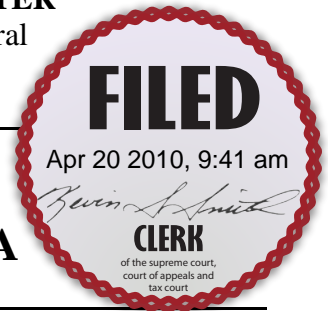
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**IN THE
COURT OF APPEALS OF INDIANA**



MAURICE MCCLUNG, JR.,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 27A02-0910-CR-1012

APPEAL FROM THE GRANT CIRCUIT COURT
The Honorable Mark E. Spitzer, Judge
Cause No. 27C01-0808-FA-155

April 20, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Maurice McClung, Jr. (“McClung”) was convicted of attempted murder¹ as a Class A felony and armed robbery² as a Class A felony after a jury trial, and was subsequently found guilty in a bench trial of unlawful possession of a firearm by a serious violent felon,³ a Class B felony. He was sentenced to fifty years for the attempted murder conviction and fifty years for the armed robbery conviction, with these sentences to be served concurrently, and twenty years for the unlawful possession of a firearm by a serious violent felon conviction, to be served consecutively to the other sentences, for an aggregate sentence of seventy years. McClung appeals, raising the following restated issues:

- I. Whether the trial court abused its discretion when it admitted evidence of McClung’s prior marijuana dealing;
- II. Whether the trial court abused its discretion when it allowed the State to refer during its final argument to photographs not admitted into evidence; and
- III. Whether McClung’s seventy-year aggregate sentence was inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

FACTS AND PROCEDURAL HISTORY

On August 14, 2008, Darrell Hollins (“Hollins”) was in Marion, Indiana with his friend, Matthew Dragoo (“Dragoo”), to buy Lortabs from Tina Jones (“Tina”) for pain he experienced from a previous automobile accident. Tina showed Hollins some marijuana

¹ See Ind. Code §§ 35-42-1-1, 35-41-5-1.

² See Ind. Code § 35-42-5-1.

³ See Ind. Code § 35-47-4-5.

she had and told Hollins that her son, Ralph Jones (“Ralph”), could arrange for Hollins to buy some. Because Hollins had lost his job ten months earlier, he was dealing marijuana to make ends meet until he could find legitimate employment. Hollins told Tina to give Ralph his contact information and left. Tina called Ralph with Hollins’s contact information, and Ralph made contact with Hollins. After several calls between the two, Hollins arranged to buy two pounds of marijuana from Ralph for \$2,200. Ralph suggested that they meet at the Greentree Apartments in Marion. At around 5:00 p.m., Hollins and Dragoo drove to the Greentree Apartments. Ralph had told them where to find him in the complex and that he would be driving a black Grand Am.

After arriving at the apartment complex, Hollins saw Ralph’s black Grand Am backed into a parking spot and pulled in beside it. Hollins exited his car, and Dragoo remained in the car. Ralph was waiting for Hollins with another man, Joey Bolden (“Bolden”). The two approached Hollins and introduced themselves. Hollins then followed Ralph into the “far foyer on the right” side of the apartment building. *Tr.* at 104. Hollins entered the foyer behind Ralph with Bolden following them. As he walked in, Hollins saw McClung standing beside the stairs with Allen Horton (“Horton”). Hollins did not expect to meet anyone other than Ralph at the Greentree Apartments.

Hollins had not previously met Ralph or Bolden, but he had met McClung and Horton prior to that date. Hollins’s cousin was a tattoo artist, and Hollins had previously seen the work his cousin had done on McClung, which included a panther and a grim reaper sitting on a throne. Hollins had met McClung about seven years earlier, when

Hollins was sixteen years old. He had met Horton a year before encountering him in the foyer, when they lived in the same apartment complex.

Earlier in the day, Ralph, McClung, Bolden, Horton, and Cletus Luster had devised a plan to rob Hollins. They took mulch from Tina and placed it inside some plastic grocery bags. They planned to rob Hollins when he arrived to purchase the marijuana at the Greentree Apartments. When Hollins walked into the foyer, he saw a duffle bag that contained two knotted Wal-Mart plastic bags on the staircase. Hollins walked over to the duffle bag and saw that the plastic bags contained mulch. He immediately knew he was going to be robbed. As Hollins looked to his right, he saw McClung give Ralph a “look” and then saw a gun in McClung’s hand. *Id.* at 109. Without saying a word, McClung began shooting Hollins from approximately two feet away. McClung shot Hollins once in the leg, twice in the stomach, once above the heart, and once in the left arm. Hollins fell back and tried to kick the door open behind him, while Ralph and Horton tried to grab him and drag him back inside. As Hollins attempted to turn and run away, McClung followed and shot him two more times. McClung shot Hollins in the lower back, and Hollins grabbed his money and threw it at McClung. Hollins fell to the ground, and McClung approached him and shot him in the upper left shoulder.

Hollins lost consciousness, and as he awoke, he saw Ralph, McClung, and Bolden picking his money up off of the ground. Hollins then jumped up and grabbed his arm because it felt as if it was “barely attached.” *Id.* at 111. He tried to get to his car, but fell again. Dragoo helped Hollins into the car as McClung, Ralph, Bolden, and Horton fled.

Dragoo picked up the remaining money at Hollins's request. The next thing that Hollins remembered was speaking to the paramedic and telling her that he was shot "everywhere." *Id.* at 115.

The paramedic was the last thing that Hollins remembered seeing. As a result of the extreme blood loss from his gunshot wounds, Hollins had a stroke, which disabled his optic nerve and rendered him blind. Hollins suffered seven total gunshot wounds. Because of these wounds, his intestines and bowels had to be rerouted and his gall bladder removed. He breathed through a tracheotomy tube and had a feeding tube for six months. One of the bones in Hollins's left arm was shattered, and he had to undergo surgery to regain use of the arm. Hollins was hospitalized for four months after being shot and had continuous health problems as a result of his injuries.

Marion Police Officer Jeff Wells ("Officer Wells") responded to a dispatch of the shooting and stopped Ralph and Bolden in the black Grand Am. When they were stopped, both men had wadded-up money in their possession. McClung's forty-five caliber handgun, shirt, and hat were found in a trash barrel a short distance from the Greentree Apartments. Three bullets were left in the gun. Three bullet casings located at the crime scene matched the gun found. The magazine of the gun would hold ten rounds. Police officers located Horton the next day, and McClung eventually turned himself in to the police.

The State charged McClung with attempted murder as a Class A felony, armed robbery as a Class A felony, and unlawful possession of a firearm by a serious violent felon as a Class B felony. Prior to trial, the State filed its "Notice of Intent to Use Rule

404(b) Evidence” as it sought to admit evidence that Hollins had purchased marijuana from McClung in the past in order to establish how Hollins knew McClung and was able to identify him. *Appellant’s App.* at 14. After a hearing, the trial court allowed the State to use the evidence and held that, since the victim himself intended to admit that he was a marijuana dealer and all of the parties involved were “in essence marijuana dealers,” the State could permissibly establish the victim’s familiarity with McClung through a past marijuana transaction. *Tr.* at 12. The trial court stated that it would give a limiting instruction to the jury at the time the evidence came in to indicate that the jury was not to consider the evidence to show McClung was “acting in conformity therewith,” but only in determining the issue of identity and Hollins’s familiarity with McClung. *Id.*

Hollins testified at trial, and on cross-examination, he was asked if he remembered ever smoking marijuana with McClung at the home of Hollins’s cousin, which Hollins did not remember. *Id.* at 137. Hollins was then asked if he remembered the questions and answers from his deposition where he mentioned that he had previously bought marijuana for personal use from McClung. *Id.* at 138. Hollins replied that he did not remember that part of the deposition. *Id.* On redirect, Hollins explained that he remembered purchasing marijuana in the past from McClung at McClung’s grandmother’s home. *Id.* at 139.

At the conclusion of the trial, the jury found McClung guilty of attempted murder as a Class A felony and armed robbery as a Class A felony. In a subsequent proceeding, the trial court found McClung guilty of unlawful possession of a firearm by a serious violent felon, a Class B felony, after he admitted he had the prior convictions listed in the

charging information. *Id.* at 476. At the sentencing hearing, the trial court found the following aggravating circumstances: (1) McClung’s criminal history, including convictions and adjudications for violence against persons; (2) the harm and injury to the victim “were significant and will be long-lasting and life-altering, and were substantially greater than that required for commission of the crime”; and (3) McClung was on probation at the time of the crime. *Appellant’s App.* at 23; *Tr.* at 498-99. It also found McClung’s age and the fact that imprisonment may result in hardship to his dependants to be mitigating circumstances. *Appellant’s App.* at 23; *Tr.* at 499. Finding that the aggravating factors outweighed the mitigating factors, the trial court sentenced McClung to fifty years for Count I, Class A felony attempted murder, fifty years for Count II, Class A felony armed robbery, and twenty years for Count III, Class B felony unlawful possession of a firearm by a serious violent felon. The trial court ordered the sentences for Counts I and II to be served concurrently to each other and consecutively to Count III for an aggregate sentence of seventy years executed. McClung now appeals.

DISCUSSION AND DECISION

I. Admission of 404(b) Evidence

A trial court has broad discretion in ruling on the admissibility of evidence. *Scott v. State*, 855 N.E.2d 1068, 1071 (Ind. Ct. App. 2006). “Because we are considering the issue after a completed trial, we review the admission of evidence for an abuse of discretion.” *Taylor v. State*, 891 N.E.2d 155, 158 (Ind. Ct. App. 2008), *trans. denied, cert. denied* (2009). We will consider the conflicting evidence most favorable to the trial court’s ruling and any 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 the court or it misinterprets the law. *Id.*

McClung argues that the trial court abused its discretion when it allowed evidence to be admitted at trial of an occasion, prior to the instant crime, where Hollins purchased marijuana from McClung. The State had sought to admit such evidence in order to establish how Hollins knew McClung and was able to identify him. McClung contends this evidence was improperly allowed to be admitted under the identity exception of Indiana Evidence Rule 404(b) because that exception is primarily used for signature crimes with a common *modus operandi*, which was not an issue in the present case.

Here, although prior to the trial, the State had stated its intention to introduce evidence of a prior marijuana transaction between Hollins and McClung in order to establish how Hollins was able to identify McClung, it did not do so at trial. During the direct testimony of Hollins, the State instead had him explain that he knew McClung because Hollins's cousin had done two tattoos for McClung a few years before, and Hollins had met him at that time. *Tr.* at 106-07. The State did not have Hollins testify about the prior marijuana transaction on direct examination. Rather, on cross-examination, McClung initiated the subject when he questioned Hollins about his deposition testimony. *Id.* at 138. “A party may not invite error, then later argue that the error supports reversal, because error invited by the complaining party is not reversible error.” *Gamble v. State*, 831 N.E.2d 178, 184 (Ind. Ct. App. 2005) (quoting *Kingery v. State*, 659 N.E.2d 490, 494 (Ind. 1995)). Because invited errors are not subject to appellate review, this issue is waived. *See id.*

II. Reference to Photographs

As previously stated, a trial court has broad discretion in ruling on the admissibility of evidence, and we review the admission of evidence for an abuse of that discretion. *Scott*, 855 N.E.2d at 1071; *Taylor*, 891 N.E.2d at 158. An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or it misinterprets the law. *Taylor*, 891 N.E.2d at 158.

McClung argues that the trial court abused its discretion when it allowed the State, during its final argument, to refer to photographs that had not been admitted into evidence, finding the photographs to be demonstrative. He contends that nothing in the record indicated that the State had previously provided these photographs to him or provided any information regarding them prior to the trial, and therefore the accuracy of the photographs could not be determined. He further claims that his substantial rights were affected because, without knowing the specific nature of the photographs, there is no way to know the effect they had on the jury.

Demonstrative evidence is evidence offered for purposes of illustration and clarification. *Wise v. State*, 719 N.E.2d 1192, 1196 (Ind. 1999). "To be admissible, the evidence need only be sufficiently explanatory or illustrative of relevant testimony to be of potential help to the trier of fact." *Myers v. State*, 887 N.E.2d 170, 184 (Ind. Ct. App. 2008). "The admissibility of demonstrative evidence, like all evidence, is also subject to the balancing of probative value against the danger of unfair prejudice." *Id.*

During its final argument, the State made reference to photographs that had not been admitted into evidence during the trial for any purpose, demonstrative or otherwise.

Tr. at 438. McClung objected to the State's use of the photographs because they had not been previously introduced into evidence. *Id.* at 438-39. The trial court overruled this objection and gave a limiting instruction, which stated:

. . . arguments by counsel are not evidence. Demonstrative props that they use as well are not evidence and so you are not to . . . consider them as evidence. You're to make your determination based upon the testimony and evidence that you hear. Arguments and props that are used, you can accept or reject them as you see fit.

Id. at 439.

Assuming that it was error for the trial court to allow the State during its final argument to refer to the photographs that had not been admitted into evidence, we conclude that McClung is not entitled to relief. McClung did not provide this court with the photographs as they do not appear in the appellate record and did not give any explanation as to why they were not included. McClung, as the appellant, "has the responsibility to present a sufficient record that supports his claim in order for an intelligent review of the issues." *Miller v. State*, 753 N.E.2d 1284, 1287 (Ind. 2001). Our Supreme Court has held that "without submitting a complete record of the issues for which an appellant claims error, the appellant waives the right to appellate review." *Id.* Therefore, as the photographs in question were not included in the record on appeal, we are unable to evaluate McClung's claim, and it has been waived.

III. Inappropriate 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.'" *Spitler v. State*, 908 N.E.2d 694,

696 (Ind. Ct. App. 2009) (quoting Ind. Appellate Rule 7(B), *trans. denied*). “Although Indiana Appellate Rule 7(B) does not require us to be ‘extremely’ deferential to a trial court’s sentencing decision, we still must give due consideration to that decision.” *Patterson v. State*, 909 N.E.2d 1058, 1062-63 (Ind. Ct. App. 2009) (quoting *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007)). We understand and recognize the unique perspective a trial court brings to its sentencing decisions. *Id.* at 1063. The defendant bears the burden of persuading this court that his sentence is inappropriate. *Id.*

McClung argues that his seventy-year aggregate sentence should be revised pursuant to Indiana Appellate Rule 7(B).⁴ He contends that [t]he mitigators in relationship to the aggravators in this case do not warrant consecutive sentences.” *Appellant’s Br.* at 10. He further claims that the maximum sentences for Counts I and II were not warranted.⁵

As to the nature of the offense, McClung shot Hollins seven times and took money from him after setting up a fake drug transaction with Hollins. As a result of this shooting, Hollins was rendered blind and suffered several other serious injuries, some of the effect of which he will suffer long-term. As to his character, McClung had a history of criminal behavior that included convictions for crimes of violence against persons and

⁴ Specifically, McClung argues that his sentence is “manifestly unreasonable” under Indiana Appellate Rule 7(B). Prior versions of Appellate Rule 7(B) permitted us to revise a sentence only if the sentence was manifestly unreasonable, whereas the current version of the rule, effective January 1, 2003, allows us to revise a sentence we find “inappropriate” in light of the nature of the offense and the character of the offender.

⁵ To the extent that McClung is arguing that the trial court abused its discretion in the weight given to the aggravating and mitigating circumstances, this is no longer a proper consideration for our review. “The relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse.” *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218 (Ind. 2007).

was on probation at the time he committed the present offense. We, therefore, conclude that McClung's sentence was not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

FRIEDLANDER, J., and ROBB, J., concur.