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# IN THE COURT OF APPEALS OF INDIANA

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| DAMIEAN M. MACK, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 45A05-0908-CR-489 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Diane Ross Boswell, Judge
Cause No. 45G03-0704-FB-34

**May 21, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

Damiean M. Mack appeals from his conviction of Dealing in Cocaine[1] a class B felony. Mack presents the following issues for our review:

1. Did the trial court abuse its discretion by admitting into evidence a video recording of the controlled drug buy under the "silent witness theory"?

2. Did the trial court abuse its discretion by admitting in evidence testimony and exhibits related to items found during the execution of a search warrant at the location of the controlled drug buy?

3. Did the trial court abuse its discretion by excluding proffered testimony from Mack's sister?

4. Is Mack's sentence inappropriate in light of the nature of the offense and the character of the offender?

5. Did the trial court deny Mack his due process rights at sentencing by refusing to allow Mack to cross-examine a police officer regarding his sentencing recommendation?

We affirm.

Gary Police Detective Travis Jolly, who worked in the narcotics/vice division of the Gary Police Department in 2007, had used a confidential informant (CI-726) for several years to conduct controlled drug buys. Detective Jolly received information that Lorenzo Blakely was selling drugs from a residence located at 4660 Carolina Street in Gary. In a controlled buy on March 28, 2007, CI-726 purchased narcotics from Blakely at the 4660 Carolina Street residence. On April 1, 2007, CI-726 went to the 4660 Carolina Street residence for a controlled buy that targeted Blakely, but during which CI-726 purchased crack cocaine from an individual he knew as "Davion". *Transcript* at 87. That transaction

[1] Ind. Code § 35-48-4-1(a) (West, Westlaw current through 2009 1st Special Sess.).

was audio and video recorded. CI-726 made a subsequent photo identification of Mack as the person known to him as "Davion" and from whom he had purchased the crack cocaine.

On April 3, 2007, CI-726 attempted to make another controlled buy at the 4660 Carolina Street residence but was not successful. Police officers, who had already obtained a search warrant for the residence, executed the warrant at that time. The officers found Blakely and Mack outside the front of the residence and found Mack's sister, Janiene Grisselle, inside the residence. The officers seized marijuana, crack cocaine, and drug dealing paraphernalia from the residence.

On April 5, 2007, the State charged Blakely and Mack with dealing in cocaine. CI-726 was killed, and because of this death, the State dismissed the charge against Blakely. CI-726's deposition in Mack's case was redacted and read to the jury during Mack's trial. A copy of the DVD recording of the April 1, 2007 drug transaction also was admitted, as were two photographs made from the recording.

Mack testified at trial and admitted he was present at the 4660 Carolina Street residence on April 1, 2007, and that he was depicted in the video recording, but denied selling crack cocaine to anyone while there. Mack stated that he had previously smoked marijuana at the residence and that he was aware that Blakely sold cocaine from that residence. Mack claimed that, although he was at the residence on April 3, 2007, he never went inside the house. Grisselle testified that she drove Mack to the 4660 Carolina Street residence on April 3, 2007, that she went inside and smoked marijuana while there, and was inside the residence when the search warrant was executed.

The jury found Mack guilty of dealing in cocaine. At his sentencing hearing, Mack's relatives and girlfriend testified about Mack's good character and that he had turned his life around. While all testified that they had known Mack for a long time, two witnesses admitted that they were unaware of Mack's marijuana usage. Mack also testified about his attempts to turn his life around. Ultimately, the trial court imposed a ten-year executed sentence. The trial court found no mitigators but found that Mack's prior conviction and the circumstances of the crime constituted aggravators. Mack now appeals.

1.

Mack claims that the trial court abused its discretion by admitting the video recording of the controlled buy under the "silent witness theory." CI-726 did not testify about the controlled buy as he was deceased by the time of trial. Mack contends that because CI-726 was unavailable to testify that the recording was a true and accurate representation of the things it was intended to depict, there was not a sufficient foundation for its admission.

The admission or exclusion of evidence is entrusted to the discretion of the trial court. *Shepherd v. State*, 902 N.E.2d 360 (Ind. Ct. App. 2009). We will reverse a trial court's decision only for an abuse of discretion. *Id*. A trial court abuses its discretion when its decision is clearly against the logic and effect of the facts and circumstances before the court. *Johnson v. State*, 831 N.E.2d 163 (Ind. Ct. App. 2005). In reviewing the decision, we consider the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor. *Id*.

The State correctly observes that Mack has waived this issue because he failed to object to the admission of the DVD of the controlled buy at trial. The failure to make a

contemporaneous objection waives the alleged error for purposes of appeal. *Turner v. State*, 878 N.E.2d 286 (Ind. Ct. App. 2007). Waiver notwithstanding, the admission of the evidence was not an abuse of discretion.

"Photographs introduced in conjunction with testimony, are admitted not as direct evidence of the scene depicted, but to assist the jury in visualizing the testimony of a witness." *Shepherd v. State*, 690 N.E.2d 318, 324 (Ind. Ct. App. 1997). "Demonstrative evidence is evidence offered for the purpose of illustration and clarification." *Id*. In *Bergner v. State*, 397 N.E.2d 1012 (Ind. Ct. App. 1979), we adopted the silent witness theory. "Under the 'silent witness' theory, videoptapes and photographic evidence may be admitted as substantive evidence, rather than merely as demonstrative evidence." *Edwards v. State*, 762 N.E.2d 128, 136 (Ind. Ct. App. 2002). The foundational requirements for videotape or photographic evidence admitted as substantive evidence are a strong showing of authenticity and competency including proof that no alteration has occurred in any way. *Edwards v. State*, 762 N.E.2d 128. This higher standard is applied in situations such as the one here, where no one can testify as to the accuracy and authenticity because the photograph must speak for itself and because such a silent witness cannot be cross-examined. *Id.*

Detective Garza, an electronics technician for the Gary Police Department narcotics/vice unit, testified at trial that he was responsible for placing the video recording device on CI-726 prior to the April 1, 2007 controlled buy. He stated that the device was in substantially the same condition when it was returned to him after the buy had been completed. The confidential informant who is outfitted with the device cannot turn the device off or on, but if that were to happen it would be detected in the digital data retrieved

from the device. The particular device used here is manufactured for law enforcement and military personnel and any attempt to tamper with the device would result in a corruption of the data recorded.

Detective Garza also testified that after Detective Jolly returned the device to him, he downloaded the electronic data from the device to his computer and onto a blank DVD. State's Exhibit 6 is a copy of the DVD that was directly downloaded from the device. The original DVD is kept in the narcotics/vice unit's secured storage cabinet. Only Detective Garza and Detective Jelks have keys to that storage cabinet. Detective Garza testified that the device, which had previously malfunctioned due to the insertion of an insufficiently charged battery, did not malfunction on April 1, 2007.

We find that the trial court did not abuse its discretion in admitting this evidence as there was sufficient foundational evidence of authenticity and competency. Furthermore, State's Exhibit 6 was cumulative of CI-726's deposition testimony, during which he identified a photograph of Mack as the person who sold crack cocaine to him on April 1, 2007. Any error in the admission of the recording of the controlled buy, which was cumulative of CI-726's deposition testimony, would be harmless at most. *Williams v. State*, 891 N.E.2d 621 (Ind. Ct. App. 2008).

2.

Mack also challenges the trial court's decision to admit evidence of drugs and drug paraphernalia found during the execution of the search warrant. Mack claims that the evidence was irrelevant to the charges against him as he did not own the residence that was the subject of the search and was not accused of conspiring to deal in cocaine.

The State correctly observes that Mack objected on relevancy grounds only to State's Exhibits 7, 11, 12, and 13, items that were retrieved from the 4660 Carolina Street residence during the execution of the search warrant.[2] Exhibit 7 was a box of baggies, Exhibit 11 was a pipe in a baggie, Exhibit 12 was a jar in a baggie, and Exhibit 13 was a scale in a baggie.

"Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." *Sanders v. State*, 724 N.E.2d 1127, 1131 (Ind. Ct. App. 2000). The trial court has the discretion to admit even marginally relevant evidence. *Sanders v. State*, 724 N.E.2d 1127. Only where the probative value of the evidence is substantially outweighed by the danger of unfair prejudice will that evidence be excluded. *Id*. The trial court has wide latitude in weighing the probative value of the evidence against the possible prejudice of its admission. *Id*. We review the trial court's decision for an abuse of discretion. *Id*.

The State presented evidence that no one actually lived in the 4660 Carolina Street residence. Instead, Blakely used the house for trafficking in drugs. Blakely and Mack were

[2] The State contends that Mack objected to the relevancy of State's Exhibit number 9. Our review of the record reveals that Mack made no objection to the admission of that exhibit.

found outside of the house on the date the search warrant was executed, and Mack's sister was located inside the house. The challenged evidence tended to show that Mack was working with Blakely in selling crack cocaine from the house and that Mack intended to sell crack cocaine to CI-726 on April 1, 2007. Further, this evidence was admitted after the jury saw the video recording of the controlled buy. The trial court did not abuse its discretion in admitting the evidence.

3.

The trial court did not allow Mack's sister to testify about alleged threats made to her by police officers when they found her inside the residence at the time of the execution of the search warrant. Mack claims, without citation to authority beyond merely referring to the standard of review, that the trial court abused its discretion. Failure to cite to the transcript and failure to provide citation to pertinent authority in support of the argument constitutes a waiver of the issue on appeal. *Smith v. State*, 822 N.E.2d 193 (Ind. Ct. App. 2005); Ind. Appellate Rule 46(A)(8).

Waiver notwithstanding, Mack's argument fails on appeal. Mack made an offer of proof that his sister, Grisselle, would have testified that Detective Jelks told her that he would charge her with possession of a bag of drugs if she did not cease complaining that her handcuffs were too tight. Further, she would have testified that other police officers threatened to cause her to lose her job if she did not cooperate. The trial court disallowed her testimony.

First, the evidence constituted hearsay. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the

truth of the matter asserted. Ind. Evidence Rule 801(c). Hearsay is not admissible except as provided by law or by the rules of evidence. Evid. R. 802. Mack has failed to cite us to any exception to the hearsay rule which would have permitted the admission of the statements.

Second, the evidence was not relevant to the charges against Mack. Mack appears to argue that his sister's testimony was admissible to show her possession of the illegal substances found in the residence. Mack's argument seems to be that he could not have possessed the illegal substances if his sister did; thus, the evidence should not have been used in Mack's trial for dealing in cocaine. Possession of contraband by the defendant need not be exclusive and it can be possessed jointly. *Iddings v. State*, 772 N.E.2d 1006 (Ind. Ct. App. 2002). The trial court did not abuse its discretion.

4.

Mack argues that his sentence is inappropriate in light of the nature of the offense and the character of the offender. Mack argues that the trial court failed to find mitigating circumstances supported by the record. Mack received the ten-year advisory sentence for a conviction of a class B felony.[3]

Appellate courts may revise a sentence after careful review of the trial court's decision if they conclude that the sentence is inappropriate based on the nature of the offense and the character of the offender. App. R. 7(B). Even if the trial court followed the appropriate procedure in arriving at its sentence, the appellate court still maintains a constitutional power to revise a sentence it finds inappropriate. *Hope v. State*, 834 N.E.2d 713 (Ind. Ct. App. 2005).

Trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (2007). The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Id*. If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id*. Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal 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*. One way in which a trial court can abuse its discretion is by entering a sentencing statement that omits reasons for imposing a sentence that are clearly supported by the record and advanced for consideration. *Id*.

Although Mack makes reference to the fact that he was thirty-four years old at the time of trial and that his one prior felony was not drug-related, he fails to cite any authority in support of that argument. The failure to make a cogent argument or cite to relevant authority results in waiver of the issue. *Sharp v. State*, 835 N.E.2d 1079 (Ind. Ct. App. 2005); App. R. 46(8)(a).

Nevertheless, we find that the trial court did not abuse its discretion by failing to find Mack's age as a mitigating factor. We have held that a trial court's failure to assign mitigating weight to a twenty-year-old defendant's age at the time of the crime was not error.

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[3] Ind. Code § 35-50-2-5 (West, Westlaw current through 2009 1st Special Sess.).

*See Ketcham v. State*, 780 N.E.2d 1171 (Ind. Ct. App. 2003). Further, the argument that Mack's one prior felony conviction was not drug-related is more properly considered an argument against finding his criminal history an aggravating factor. The trial court did not abuse its discretion for failing to find these mitigating circumstances. A trial court is free to disregard mitigating factors it did not find to be significant. *Carter v. State*, 711 N.E.2d 835 (Ind. 1999).

Regarding the nature of the offense, Mack sold crack cocaine that was readily available at the 4660 Carolina Street residence to the confidential informant who came to the door. Mack was aware that there was crack cocaine at the residence and completed the transaction on April 1, 2007 as he was familiar with and a part of Blakely's drug trafficking operation. Regarding the character of the offender, Mack did have one prior felony conviction, which the trial court found to be an aggravating circumstance. Mack admitted at trial that he smoked marijuana and associated with Blakely and others who sold and used crack cocaine. We do not find that the imposition of the advisory ten-year sentence for Mack's class-B felony conviction to be inappropriate in light of the nature of the offense and the character of this offender.

5.

Mack argues that the trial court violated his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution when the trial court refused to permit him to cross-examine Detective Jelks at Mack's sentencing hearing. Federal constitutional arguments are reviewed de novo. *Davies v. State*, 730 N.E.2d 726 (Ind. Ct. App. 2000).

Sentencing hearings are not criminal proceedings, consequently, the Sixth Amendment right of cross-examination is not implicated. *Debro v. State*, 821 N.E.2d 367 (Ind. 2005). The sole purpose of a sentencing hearing is to determine only the appropriate punishment for the conviction, not to determine the defendant's guilt. *Id*. Mack's constitutional rights were not violated when the trial court did not allow him to cross-examine Detective Jelks.

Our review of the record reveals that the trial court did swear-in Detective Jelks during the sentencing hearing but did so out of habit because Detective Jelks often appeared as a witness before the court. Detective Jelks, however, was making a victim-impact statement concerning drug trafficking in Gary, Indiana. We previously have stated as follows:

> The purpose of the victim impact statement is to guarantee that the interests of the victim of a crime are fully and effectively represented at the sentencing hearing. Additionally, the statement allows for a degree of catharsis by the victim or the victim's representative, permitting him or her to express their recommendation as to a sentence, the impact a crime had, and their feelings toward the defendant, all in a judicial setting. As such, we would not want to require victims or victim representatives to have to make their statement under oath with the ever-present threat of a perjury charge limiting their ability to speak freely; nor would it be wise, in our view, to subject a victim or victim's

> representative to defense cross-examination regarding comments made in a victim impact statement as a general rule.

*Cloum v. State*, 779 N.E.2d 84, 93 (Ind. Ct. App. 2002) (internal citations omitted). The trial court properly did not allow Mack to cross-examine Detective Jelks, who was making a victim-impact statement at Mack's sentencing.

Judgment affirmed.

KIRSCH, J., and ROBB, J., concur.