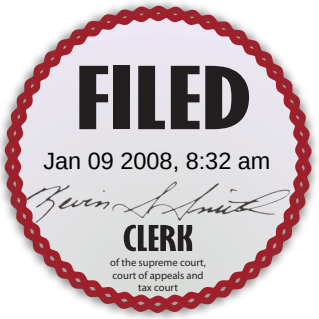

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IN THE
COURT OF APPEALS OF INDIANA

MANUEL G. AYON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 32A01-0610-CR-441
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable Robert W. Freese, Judge
Cause No. 32D01-0408-FB-00017

January 9, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Manuel G. Ayon appeals his convictions for Burglary,[1] a class A felony, and Robbery,[2] a class C felony. Ayon raises the following arguments: (1) the trial court should have set aside the guilty verdict based upon the State's failure to provide Ayon with information about one of the State's witnesses before the witness was deposed; (2) the trial court erroneously admitted evidence of Ayon's other alleged criminal acts; (3) the trial court erroneously admitted evidence of the victims' identification of Ayon in a photo array; and (4) there is insufficient evidence supporting the convictions. Ayon also challenges the seventy-year aggregate sentence imposed by the trial court following the two convictions and a finding that Ayon is a habitual offender. Finding no error, we affirm the judgment of the trial court.

FACTS

On August 1, 2004, Willard Carpenter and Teresa Stansberry were asleep on the sofa in Carpenter's Plainfield home. At approximately 4:00 a.m., Carpenter was awakened by a man hitting Stansberry on the head with a baseball bat. The front door of the residence had been kicked in. Stansberry sustained a blow to the head and she fell to the floor. Carpenter defended himself against two assailants, sustaining seven or eight blows to his back, head, and arms. He "got a real good look" at one assailant, later identified as Ayon. Tr. p. 113. At some point during the altercation, Ayon forced Stansberry into another room and told her to "[s]tay in there you f*cking bitch." Id. at

[1] Ind. Code § 35-43-2-1.

[2] Ind. Code § 35-42-5-1.

114, 176-77. Ultimately, one assailant ran out the front door and the other ran out the back door. Carpenter chased one of the men for awhile and then went to his mother's house, where he called 911. The police arrived at Carpenter's residence and released Stansberry from the room in which she was still confined. The front door sustained considerable damage, Carpenter's coffee table was broken, and Stansberry's purse was missing.

Shelly Mundy was intimately involved with Ayon and was also a friend of Carpenter. On August 5, 2004, Carpenter had cashed a check so that he could pay his employees in cash. He arrived at an Indianapolis address provided by Mundy to pick her up for a funeral they were planning to attend together. As Carpenter waited for Mundy, Ayon leaped into Carpenter's vehicle, held a gun to his head, and yelled, "[g]ive me the f*cking money!" Id. at 122. Carpenter handed Ayon his wallet, which contained $7. Ayon then whistled, at which time the second assailant from the home invasion ran out of the building, approached the driver's side of the vehicle, and held a gun to Carpenter's head. Ayon pushed Carpenter's head into his stomach, which was decorated with chains, scratching his face on the chains. The other man then grabbed the payroll money and both men fled, at which time Carpenter called the police.

Heather Ellis was a friend of Mundy and Carpenter. She also happens to be the daughter of Hendricks County Sheriff's Sergeant Ray Ellis. On August 18, 2004, Heather called her father, Sergeant Ellis, and told him that she believed that Ayon was involved with the assault on Carpenter based on statements made to her by Mundy. Sergeant Ellis prepared a photo array including Ayon's photo. Heather called Carpenter

to tell him that her father was coming to see him to show him some photographs. Sergeant Ellis arrived at Carpenter's house and informed him that he was going to view a photo lineup with a possible suspect in it, to take his time, and to try to identify the person who assaulted him. The sergeant told Carpenter that the suspect's photograph might or might not have been in the lineup he was about to view. Nearly immediately, Carpenter identified Ayon as one of the assailants. Stansberry later identified Ayon as one of the assailants in a photo array shown to her by Plainfield Police Detective Jeffrey Stephens.

Detective Stephens located Ayon on August 20, 2004, at an address in Mooresville. When the detective arrived, he found Ayon asleep in bed with Mundy. Mundy later told investigators and attested in a deposition that Ayon admitted to her that he had committed the burglary and robbery and that she believed that he had also committed the Indianapolis robbery. Although the State subpoenaed Mundy to testify at Ayon's trial, she did not appear. Consequently, the deposition transcript was read into evidence in lieu of live testimony.

The State charged Ayon with class A felony burglary, class B felony robbery, class D felony confinement, class D felony theft, and alleged that he was a habitual offender. Following a jury trial that finished on March 29, 2006, the jury found Ayon guilty as charged and he subsequently admitted to being a habitual offender. The trial court vacated the confinement and theft convictions and reduced the robbery conviction to a class C felony. On May 23, 2006, the trial court sentenced Ayon to forty years for burglary and eight years for robbery, to run concurrently, and to an enhanced thirty-year

term for being a habitual offender, for an aggregate sentence of seventy years imprisonment. Ayon now appeals.

DISCUSSION AND DECISION

I. Admission of Mundy's Testimony

Ayon argues that prior to Mundy's deposition,[3] the State should have disclosed the following information: Mundy and the State allegedly had an agreement that the State would reduce or dismiss charges against her in another matter in exchange for her testimony against Ayon; Mundy had worked in the past as a confidential informant for the State; Mundy had a prior criminal history including a theft conviction; and Sergeant Ellis and Mundy were intimately involved at some point in time. Because the State failed to disclose that information prior to the deposition, Ayon argues that his due process rights were violated and that the State committed misconduct.

"'The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.'" Badelle v. State, 754 N.E.2d 510, 526 (Ind. Ct. App. 2001) (quoting Brady v. Maryland, 373 U.S. 83, 87 (1963)). To prevail on a Brady claim, a defendant must establish that (1) the evidence is favorable to the defendant, meaning that it either exculpates the defendant or impeaches a State's witness; (2) the evidence was willfully or inadvertently suppressed by the State; and (3) the evidence was material. Id. Evidence is material if there is a

[3] Mundy ignored a State subpoena and failed to appear at Ayon's trial to testify; consequently, her deposition transcript was read into evidence.

reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Id. A reasonable probability is one that undermines confidence in the outcome of the trial. Id. Evidence cannot be regarded as "suppressed" when the defendant has access to the evidence before trial by the exercise of reasonable diligence. Id. at 527. Furthermore, if the favorable evidence actually becomes known to the defendant before or during the course of a trial, Brady is not implicated. Williams v. State, 714 N.E.2d 644, 649 (Ind. 1999).

Here, there is no evidence from which we can conclude that an agreement existed between Mundy and the State. The prosecutor, Sergeant Ellis, and a Plainfield Police lieutenant flatly denied that any such agreement existed. Tr. p. 70, 223, 249. To the extent that Ayon directs our attention to testimony provided by Mundy in another criminal proceeding, we note that these records were not introduced into evidence herein and are not part of the record on appeal. Thus, we will not consider them. See Turner v. State, 508 N.E.2d 541, 543 (Ind. 1987) (observing that any matter not contained in the record is not a proper subject for review). Moreover, even if we were to consider Mundy's testimony, it would not suffice to establish that an agreement existed. See Lambert v. State, 743 N.E.2d 719, 748-49 (Ind. 2001) (holding that a witness's unilateral expectation of relief from a sentence in exchange for testimony is insufficient to establish the existence of an agreement that must be disclosed). Inasmuch as the only evidence in the record establishes that no agreement existed between the State and Mundy, we find that Ayon is not entitled to relief for the State's failure to disclose such an agreement.

As for the remaining information about Mundy, the fact that she had acted as a confidential informant in the past was disclosed to Ayon in open court two months before the trial, tr. p. 70, her prior criminal history was made known to Ayon and the jury during the trial, id. at 254-55, and Ayon was clearly aware of the nature of the relationship between Mundy and Sergeant Ellis, inasmuch as he extensively cross-examined the sergeant on that subject. Because Ayon became aware of this information before and/or during his trial, Brady is not implicated. Williams, 714 N.E.2d at 649.

Ayon emphasizes that Mundy ignored the State's subpoenas and, consequently, was unavailable to testify at trial. The State, therefore, read her deposition testimony into evidence at trial.[4] Ayon contends that the fact that he learned of the information about Mundy's past before and during trial is of no moment, inasmuch as he was unable to use it to impeach her because she did not testify at trial.

Initially, we note that there is no evidence that, upon learning of Mundy's status as a confidential informant before trial and her criminal history and relationship with Sergeant Ellis during trial, Ayon sought a continuance to adjust his trial strategy as a result. There is also no evidence that Ayon sought to introduce evidence regarding Mundy's history as a criminal informant. Moreover, the trial court informed the jury about Mundy's criminal history and Ayon was able to cross-examine Sergeant Ellis extensively about the nature of his relationship with Mundy. Under these circumstances, we simply cannot conclude that Ayon suffered any prejudice as a result of the State's

[4] Ayon did not object to the admission of the deposition testimony into evidence at trial and does not argue on appeal that it was erroneously admitted.

failure to disclose this information before Mundy's deposition. Thus, Ayon's argument that his convictions must be overturned based on the arguably late disclosure of this information must fail.

II. Evidence of Extrinsic Acts

Ayon next argues that the trial court erroneously admitted evidence regarding the August 5, 2004, incident in which he allegedly threatened Carpenter with a gun and then stole Carpenter's money. Based on this incident, Ayon was charged with a number of offenses in a separate criminal proceeding, tried, and ultimately acquitted of the charges.

The admission of evidence is within the trial court's sound discretion, and we will reverse only if we find an abuse of that discretion. Sallee v. State, 777 N.E.2d 1204, 1210 (Ind. Ct. App. 2002). 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. Id.

Relevant evidence, which is evidence having any tendency to make the existence of any fact of consequence more or less probable, is admissible. Ind. Evid. Rules 401, 402. Relevant evidence should be excluded, however, if its probative value is substantially outweighed by its prejudicial effect. Ind. Evid. Rule 403. Indiana Evidence Rule 404(b) provides that

> evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . . .

In determining the admissibility of extrinsic act evidence, the court must determine whether the evidence is relevant to a matter at issue other than the person's propensity to

engage in a wrongful act and balance the probative value of the evidence against its prejudicial effect. Bassett v. State, 795 N.E.2d 1050, 1053 (Ind. 2003). The State must be able to prove by a preponderance of the evidence that the prior misconduct actually occurred. Camm v. State, 812 N.E.2d 1127, 1140 (Ind. Ct. App. 2004). A "preponderance of the evidence simply means the greater weight of the evidence." Gash v. Kohm, 476 N.E.2d 910, 916 (Ind. Ct. App. 1985).

Here, evidence regarding the August 5, 2004, incident was relevant because it bolstered Carpenter's identification of Ayon as his assailant. Without evidence of the subsequent alleged robbery, Carpenter saw Ayon only during a relatively brief attack in the middle of the night. Thereafter, however, Carpenter saw Ayon for a second time in four days, and the second incident occurred in broad daylight and involved Ayon holding a gun to Carpenter's head. Based on the second incident, Carpenter was confident in his identification of Ayon as one of the perpetrators of the robbery of Carpenter's home.

That Ayon was acquitted of the charges stemming from the August 5, 2004, incident, is of no moment. Our Supreme Court has held that a crime of which a defendant has been acquitted is admissible to show proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Hare v. State, 467 N.E.2d 7, 18 (Ind. 1984). The fact of the acquittal goes to the weight of the evidence, not its admissibility. Id. And indeed, the trial court permitted Ayon to introduce evidence establishing that he had, in fact, been acquitted of the other crimes. It was for the jury to decide how and whether the acquittal affected the weight to be given to the evidence.

Ayon argues that even if the evidence is admissible, its prejudicial effect outweighs its probative value. Admittedly, this is a close call. That the decision is a close call, however, is all the more reason for the trial court, which is vested with discretion to rule on the admissibility of evidence, to make it. Nothing in the record persuades us that the trial court erroneously concluded that the probative value of this evidence outweighed its potentially prejudicial effect on Ayon, and we will not second guess its decision. Thus, Ayon's argument must fail.

III. Evidence of Identification Based on Photo Array

Ayon next contends that the trial court erroneously admitted evidence of Carpenter's identification of Ayon as the assailant in a lineup of photographs presented by Sergeant Ellis. The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires suppression of testimony concerning a pretrial identification when the procedure employed was impermissibly suggestive. Williams v. State, 774 N.E.2d 889, 890 (Ind. 2002).

A photo array is impermissibly suggestive "if it raises a substantial likelihood of misidentification given the totality of circumstances." Id. More specifically, a photo array is impermissibly suggestive "only where the array is accompanied by verbal communications or the photographs in the display include graphic characteristics that distinguish and emphasize the defendant's photograph in an unusually suggestive manner." Dillard v. State, 827 N.E.2d 570, 573 (Ind. Ct. App. 2005), trans. denied. Law enforcement officers, however, "are not required to 'perform the improbable if not impossible task of finding four or five other people who are virtual twins to the

defendant' when compiling a photo array." Id. (quoting Pierce v. State, 267 Ind. 240, 246, 369 N.E.2d 617, 620 (1977)).

Here, the suspects in the photo array wore the following clothing, respectively: a blue checked collared shirt, a grey hooded sweatshirt (Ayon), a white uncollared shirt, a dark uncollared shirt with a dark jacket, and two other dark uncollared shirts. State's Ex. 4. No clothing, hairstyle, or other physical characteristics caused Ayon to stand out in the array. Moreover, there is no evidence in the record[5] that the array was accompanied by improper verbal communications. We conclude, therefore, that the admission of this evidence did not violate Ayon's due process rights.

IV. Sufficiency of the Evidence

Ayon next argues that the evidence was insufficient to support his convictions.[6] When reviewing a claim of insufficient evidence, we consider only the probative evidence and reasonable inferences that support the judgment, without weighing evidence or assessing witness credibility, and determine therefrom whether a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. Miller v. State, 770 N.E.2d 763, 775 (Ind. 2002). If so, we must affirm. Id.

Ayon's sufficiency arguments rest on the alleged unreliability of the eyewitness testimony provided by Carpenter and Stansberry. He attempts to apply the "rarely applicable" incredible dubiosity rule, Gray v. State, 871 N.E.2d 408, 416 (Ind. Ct. App.

[5] Ayon directs us to Mundy's testimony that was elicited months after Ayon's trial in a different criminal matter. Obviously, her testimony was not part of the record before the trial court in this case. Consequently, it is not properly part of the record on appeal and we will not consider it.

[6] Ayon does not contest the trial court's finding that he is a habitual offender.

2007), pursuant to which we may overturn a conviction if it is based solely on the inherently contradictory testimony of a single witness and there is a complete lack of circumstantial evidence supporting the defendant's guilt, Weis v. State, 825 N.E.2d 896, 905 (Ind. Ct. App. 2005). And indeed, here, the rule does not apply, inasmuch as two witnesses—Carpenter and Stansberry—identified Ayon as one of the assailants and another witness—Mundy—testified that Ayon confessed to her that he committed the instant crimes.

The uncorroborated testimony of one witness may be sufficient by itself to sustain a conviction on appeal. Scott v. State, 871 N.E.2d 341, 343 (Ind. Ct. App. 2007). Here, we have the corroborated testimony of two victims and Mundy's testimony linking Ayon to the crimes. We find that evidence to be sufficient; consequently, Ayon's sufficiency argument must fail.

V. Sentencing

Finally, Ayon challenges the sentences imposed by the trial court, arguing that the trial court improperly weighed aggravating and mitigating circumstances and that the sentences are inappropriate in light of the nature of the offenses and his character.[7] Sentencing determinations are within the sound discretion of the trial court, and we will only reverse for an abuse of discretion. Krumm v. State, 793 N.E.2d 1170, 1186 (Ind. Ct.

[7] Between the date of Ayon's offense, August 2, 2004, and the date of sentencing, May 23, 2006, the General Assembly replaced the former presumptive sentencing scheme with the current advisory sentencing scheme. Nonetheless, because the sentencing statute in effect at the time a crime is committed governs the sentence for that crime, we address Ayon's sentences under the former presumptive sentencing scheme. Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007).

App. 2003). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Id.

In a sentencing statement, a trial court must identify all significant aggravating and mitigating factors, explain why such factors were found, and balance the factors in arriving at the sentence. Bryant v. State, 841 N.E.2d 1154, 1156 (Ind. 2006). A trial court is not obligated to weigh a mitigating factor as heavily as the defendant requests. Smallwood v. State, 773 N.E.2d 259, 263 (Ind. 2002). A single aggravating factor may support the imposition of an enhanced sentence. Payton v. State, 818 N.E.2d 493, 496 (Ind. Ct. App. 2004), trans. denied.

At the sentencing hearing, the trial court explained its reasoning as follows:

> Mr. Ayon, the court has reviewed the pre-sentence investigation report, the lengthy criminal history that you have accumulated is more than sufficient to cause the court to impose the maximum sentence allowed under statute and case law. All started when you were actually when you were 15, and you're now 30, so half your life you've been involved with the criminal justice system. And unfortunately because of the statutes, the better portion of the rest of your life is going to be involved with the criminal justice system. Those are actions that you chose. Even if the court would find that you have a dependent, that it would be a mitigating factor, the number of prior criminal convictions excluding the two felony convictions that cause the habitual [offender enhancement] to be imposed here, outweigh any possible mitigating factors.

Tr. p. 335-36. Ayon argues that the trial court should have considered the fact that he "grew up fatherless" and had a serious drug addiction as mitigating factors. Appellant's Br. p. 31. He fails to explain how growing up without a father is a mitigating factor, and untreated substance abuse is more often found to be an aggravating, rather than

mitigating, circumstance. Bryant v. State, 802 N.E.2d 486, 501 (Ind. Ct. App. 2004). Thus, we find no error on this basis.

Ayon also complains that in considering his criminal history to be an aggravator, the trial court relied on "the unproven, unsworn, and unverified pre-sentence investigation report." Appellant's Br. p. 31. In Ryle v. State, our Supreme Court explained that there are strict statutory requirements governing the preparation of a presentence investigation report. 842 N.E.2d 320, 323-24 (Ind. 2005), cert. denied. There are "specific and thorough instructions" to the probation officer charged with "acquiring and reporting the required information." Id. at 324. The

> requirements governing probation officers and their presentation of information to the sentencing court ensure the reliability of their work product. Thus, probation officers can properly contribute to the character and outcome of prior convictions by researching the judicial documents sanctioned in Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254, 1259-60, 161 L.Ed.2d 205 (2005).

Id. Presentence investigation reports, therefore, are reliable and proper sources on which a trial court may rely in sentencing a defendant. Here, as in Ryle, the trial court's conclusion that Ayon has a long and serious criminal history "rested on prior judicial records as reflected in the presentence investigation report prepared by the probation officer." Id. at 325. We find, therefore, that the trial court here properly relied on the information contained in the presentence investigation report.

The report reveals that Ayon has amassed, among other things, three true findings that he committed acts as a juvenile that would have been felonies had they been committed by an adult, seven felony convictions as an adult, and at least four probation

violations. Appellee's App. p. 5-9. Notwithstanding Ayon's argument that the trial court improperly weighed the lone aggravator—his lengthy criminal history—against the lone mitigator—hardship on his dependent—we find that the depth and breadth of Ayon's criminal history amply supports the sentences imposed by the trial court.

Finally, Ayon insists that his sentences are inappropriate in light of the nature of the offenses and his character. As for the nature of the offenses, Ayon and a cohort broke into a residence in the middle of the night, damaging the door and awakening the sleeping residents with a baseball bat. They did further damage to the inside of the home and stole a purse belonging to one of the victims. We do not find the nature of the offenses to aid Ayon's inappropriateness argument.

Turning to Ayon's character, as the trial court aptly noted, he has been heavily involved with the criminal justice system for half of his thirty years of life. Since he was fifteen, he has amassed a sobering number of true findings, felony convictions, and probation violations. Ayon has an apparent disregard for the law and his fellow citizens, and his myriad contacts with the criminal justice system have not rehabilitated him in any way. Ayon faced a maximum term of eighty-eight years imprisonment[8] for the two convictions and the habitual offender enhancement. Under these circumstances, we do not find the aggregate seventy-year sentence imposed by the trial court to be inappropriate.

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[8] The maximum term for a class A felony is fifty years, I.C. § 35-50-2-4, the maximum term for a class C felony is eight years, I.C. § 35-50-2-6(a), and the maximum habitual offender enhancement is thirty years, I.C. § 35-50-2-8(h), for a total of eighty-eight years imprisonment.

The judgment of the trial court is affirmed.

DARDEN, J., and BRADFORD, J., concur.