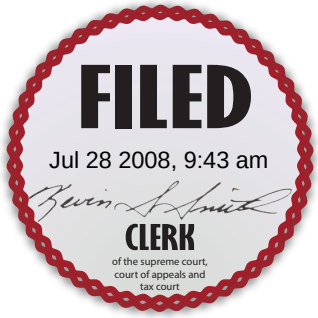


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# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| JOSE F. VALENCIA, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 79A04-0712-CR-685 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Jason Bennett, Judge Pro Tempore
Cause No. 79D01-0703-FA-8

**July 28, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Following a jury trial, Jose F. Valencia was convicted of five drug-related felonies: (1) conspiracy to commit dealing in cocaine[1] as a Class A felony; (2) dealing in cocaine as a Class A felony;[2] (3) possession of cocaine[3] as a Class C felony; (4) possession of a Schedule IV controlled substance[4] as a Class D felony; and (5) dealing in cocaine as a Class B felony.[5]

Valencia raises three issues, which we restate as:

I. Whether the evidence was sufficient to support his Class B felony dealing in cocaine conviction;

II. Whether the court erred when it excluded a defense exhibit; and

III. Whether his sixty-year sentence with twenty years suspended was inappropriate.

We affirm.

## FACTS AND PROCEDURAL HISTORY

Between August and November 2006, Valencia sold cocaine at least several times a week to a woman named Michelle Brevet, who was both a drug dealer and a long-time drug addict. In February 2007, Brevet owed Valencia money for cocaine he had delivered to her previously. At the end of February or early March 2007, Valencia found Brevet at a crack house operated by a man named "Pops," who at that time also owed Valencia money. *Tr*. at

[1] *See* IC 35-48-4-1(b); IC 35-41-5-2.

[2] *See* IC 35-48-4-1(b).

[3] *See* IC 35-48-4-6.

[4] *See* IC 35-48-4-7.

[5] *See* IC 35-48-4-1(a).

36, 47-48. Valencia told Brevet and Pops that they needed to distribute nine ounces in seven days for him. He further told Brevet that if she did not do so, he did not have a problem "putting a bitch down." *Id*. at 37.

On March 8, 2007, as part of their investigation into Brevet's dealing activity, the Tippecanoe Drug Task Force arranged to have a confidential informant ("CI") make a controlled buy from Brevet. The CI telephoned Brevet and asked to purchase "a ball for one-fifty."[6] *Id.* at 40, 184. Brevet replied that an eight ball generally costs $200, but said she would obtain as much as she could with that amount of money, which she expected would be a half of an eight ball, called a "sixteenth" or "teener." *Id*. at 29, 40, 64. Undercover officer, Detective Brian Cummins, who posed as the CI's cousin, drove the CI and himself to the Knights Inn motel in Lafayette, where Brevet was staying. Brevet entered their vehicle and explained that she intended to procure the cocaine from someone known to Brevet as "Diablo," later identified as Valencia, and they were to meet him at a nearby Burger King. *Id*. at 27. According to Brevet, Valencia was in the Burger King parking lot in his SUV, and she began walking toward his vehicle with $150 that the CI had given her. However, Valencia drove away, and Brevet returned to the vehicle containing Detective Cummins and the CI, telling them, "I'm pretty sure that was him. He took off." *Id.* at 189. Brevet made a call to Valencia, who told Brevet to meet him at Pops's house.

Brevet rode with Detective Cummins and the CI to Pops's house, and she directed

[6] A "ball" is shorthand for "an eight ball," which, in turn, is drug slang for one-eighth of an ounce, or 3.5 grams. *Tr*. at 28, 192.

them to an alley behind the residence on 16th Street. Brevet exited the vehicle and entered the home. While inside, Brevet gave Valencia the $150, and Valencia gave her two bags containing .8 grams of cocaine. Brevet returned to the vehicle and gave Detective Cummins the cocaine, which he weighed. Because it was only about half of the amount he expected to receive from her, Detective Cummins told Brevet he was not happy with the amount. Brevet said she would make up the difference later, and the men drove Brevet back to the Knights Inn, where Brevet exited the vehicle and told the CI to call her later.

Thereafter, on March 15, 2007, the Drug Task Force planned to make another purchase from Brevet and "take down the person that delivered to her." *Id*. at 308-09. That day, the CI telephoned Brevet and asked whether she could make up what she owed them from the last purchase and, in addition, asked if she could help with acquiring more cocaine. Brevet contacted Valencia and asked for a half-ounce. Valencia said he could provide that to her for $600.

Detective Cummins and the CI again met Brevet at the Knights Inn. Brevet entered the vehicle and told them that the location of the deal was in a CiCi's Pizza parking lot. While in the vehicle, Brevet was on the phone with Valencia and confirmed she had $600 and wanted to purchase a half ounce of cocaine and an additional $175 worth of cocaine. Valencia arrived in the parking lot in the same SUV that they had seen during the first buy on March 8. Brevet got into Valencia's vehicle and gave him the $600 in bills, which the police had photocopied before the sale. He handed her two baggies of cocaine. Brevet returned to the other vehicle and gave Detective Cummins the bag with half an ounce of cocaine in it; she kept the other bag, containing a sixteenth of an ounce for herself. Shortly thereafter,

officers stopped both vehicles.

Police arrested Brevet and made a simulated arrest of Detective Cummins and the CI. Police also stopped Valencia and discovered the photocopied six one-hundred-dollar bills from Brevet. Valencia said that he only had sold Brevet five Lortab pills for $25. He did not offer any explanation for the $600 in buy money found in his possession.

On March 20, 2007, the State charged Valencia with the following five counts: (I) conspiracy to commit dealing in cocaine, as a Class A felony; (II) dealing in cocaine, a Class A felony; (III) possession of cocaine, a Class C felony; (IV) possession of a Schedule IV controlled substance, a Class D felony; and (V) dealing in cocaine, a Class B felony.[7]

Shortly after their arrests, Brevet and Valencia appeared together for an initial probable cause hearing. Valencia and Brevet both entered a plea of not guilty. Valencia offered a transcript of that hearing into evidence at trial, but it was ruled inadmissible.

On June 28, 2007, a jury found Valencia guilty as charged. At the August 2007 sentencing hearing, the trial court merged Count III with Count II and merged Count V with Count I, thereby sentencing Valencia on Counts I, II, and IV. The trial court imposed an aggregate sixty-year sentence, with twenty years suspended for a forty-year executed sentence. Valencia now appeals.

## DISCUSSION AND DECISION

### I. Sufficiency

[7] Like Valencia, Brevet was also charged with dealing in cocaine as Class A felonies. *Tr.* at 57.

Valencia challenges his conviction for Class B felony dealing in cocaine, arguing that the evidence was insufficient to prove that he delivered cocaine to Brevet on March 8, 2007.[8] When we review a challenge to the sufficiency of the evidence, this court may not reweigh the evidence or judge the credibility of the witnesses. *Perez v. State*, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007), *trans. denied*; *Specht v. State*, 838 N.E.2d 1081, 1094 (Ind. Ct. App. 2005), *trans. denied* (2006); *Jacobs v. State*, 802 N.E.2d 995, 998 (Ind. Ct. App. 2004). We must affirm a conviction if the finder of fact heard evidence of probative value from which it could have inferred the defendant's guilt beyond a reasonable doubt. *Oldham v. State*, 779 N.E.2d 1162, 1168 (Ind. Ct. App. 2002), *trans. denied* (2003). We will consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Perez*, 872 N.E.2d at 213. A conviction may be based upon circumstantial evidence alone. *Id*. It may also rest solely on the uncorroborated testimony of an accomplice. *Thompson v. State*, 671 N.E.2d 1165, 1167 (Ind. 1996).

To convict Valencia of Class B felony dealing in cocaine as charged in Count V, the State was required to prove that, on March 8, 2007, Valencia knowingly or intentionally delivered cocaine to Brevet. IC 35-48-4-1(a); *Appellant's App*. at 21.

Valencia asserts that there was no evidence of the transaction other than Brevet's testimony, which Valencia asserts is incredibly dubious. *Appellant's Br*. at 11. Specifically,

[8] We note that the Class B felony dealing conviction originated from Count V, which the trial court merged with Count I. *Appellant's App*. at 633. Thus, Valencia was not sentenced on Count V.

Valencia emphasizes that Brevet entered the crack house alone, neither the officer nor the CI saw the exchange of money and drugs, and there were no taped conversations between Brevet and Valencia. Accordingly, Valencia argues, this case "rests on the dubious credibility of a drug dealer junkie, who tried to make a deal on her own, after months of incarceration, because she was expecting a baby. She was also facing over fifty-years [sic] on these charges, plus eighteen years on unrelated charges." *Id*.

Under the incredible dubiosity rule, a reviewing court may impinge upon the fact-finder's responsibility to judge witness credibility when a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion, and there is a complete lack of circumstantial evidence. *Jacobs*, 802 N.E.2d at 998. The application of the incredible dubiosity rule is precluded when circumstantial evidence supports a conviction. *Id*.

We find the incredible dubiosity rule is inapplicable here. First, Brevet's testimony was not inherently improbable or coerced or wholly uncorroborated. Rather, her testimony regarding the purchase of cocaine from Valencia was inherently consistent and was corroborated by circumstantial evidence surrounding the March 8 controlled buy. The CI wore a wire, and his meetings and phone calls with Brevet were taped. When he called Brevet and asked for cocaine, Brevet advised him that she needed to obtain it, and she thereafter arranged to meet "Diablo" at the Burger King parking lot. *Tr*. at 42. When they arrived, Brevet saw Valencia in his SUV, but he "freaked out" and drove away as she approached him. *Id*. at 43. She then telephoned Valencia, and he instructed her to meet him at Pops's house. When they arrived at the residence, Brevet directed them to park in the

alley, but the CI could see around the front of the house and, after Brevet had gone inside the house, reported that Valencia's SUV was parked there. Brevet entered the home, met with Valencia, gave him $150, and he gave her .8 grams of cocaine.

In the end, Valencia's claims are simply a request for us to reweigh the evidence and judge Brevet's credibility as a witness, which we cannot do. *Perez*, 872 N.E.2d at 213. The State presented sufficient evidence from which the jury could reasonably infer that Valencia delivered cocaine to Brevet on March 8, 2007, and Valencia's conviction for dealing in cocaine as a Class B felony was supported by sufficient evidence.

## II. Exclusion of Evidence

At trial, Valencia attempted to have admitted as exhibits, the tape and the transcript of the initial probable cause hearing, where Valencia and Brevet appeared together, and Brevet purportedly made comments regarding whether the cocaine was Valencia's. The trial court excluded the exhibits as hearsay. Valencia argues that this exclusion of evidence was in error.

The decision to admit or exclude evidence lies within the sound discretion of the trial court and is afforded great discretion on appeal. *Fugett v. State*, 812 N.E.2d 846, 848 (Ind. Ct. App. 2004). Generally, an appellate court will not reverse that decision absent a showing of manifest abuse of discretion resulting in the denial of a fair trial. *Id*. An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id*.

The admissibility issue arose during the course of defense counsel's cross-examination of Brevet, when counsel began asking Brevet questions concerning a court

appearance she made with Valencia at a March 2007 joint probable cause hearing before a magistrate. In particular, during cross-examination, Valencia's counsel asked Brevet whether she had told the magistrate at that probable cause hearing that the cocaine "wasn't [Valencia's] stuff." *Appellant's Br*. at 12, *Tr*. at 77-80. Brevet denied making that statement and/or said that she did not recall making it. *Tr*. at 77-78. Thereafter, defense counsel attempted to have a tape and transcript of the March 2007 hearing admitted into evidence. The State argued that the tape included exculpatory hearsay evidence, where Valencia claimed the cocaine did not belong to him. Specifically, Valencia stated that the cocaine "had nothing to do with me." *Def's Ex.* B. The State argued that such evidence was not admissible unless Valencia testified at trial and would be subject to cross-examination.

Debate between counsel on the issue ensued, and one or more unrecorded sidebars occurred where the court and the parties listened to some portion of the tape and discussed its admissibility. The transcript reflects that after Valencia stated the cocaine was not his, Brevet uttered comments, somewhat inaudible but transcribed as, "That's a exactly," which may have represented her agreement with Valencia's statements (that the cocaine was not his) or, alternatively, may have been a response to a prior statement made by the court. *Id*. As the trial court observed, Valencia's and Brevet's statements are overlapping, and the jury reasonably could have interpreted them more than one way. Ultimately, the trial court

disallowed the tape on the basis of hearsay.[9]

Valencia initially argues that the tape (and its transcript) did not constitute hearsay because Brevet's statement was not "an out of court statement." Ind. Evid. R. 801(c). His argument is that, because the statement was made during the probable cause hearing, it was not an "out of court statement." The trial court responded that an "out of court statement" for purposes of the hearsay rule means a statement made outside of the present hearing or trial, such that cross-examination of Valencia on his prior exculpatory statements (that the cocaine did not belong to him) was not possible because he did not testify. *Tr*. at 434-42. We agree with the trial court's reasoning in this regard. *See Battles v. State*, 688 N.E.2d 1230, 1234 (Ind. 1997) (defendant was not permitted to use his prior exculpatory statements made to police as substantive evidence where he presented no evidence in his defense and thereby precluded State from cross-examining him).

Valencia also asserts on appeal that, even if the statements were not admissible as substantive evidence, Brevet's statement should have been admitted for impeachment purposes under Evid. R. 613. However, as stated above, Valencia's exculpatory statements and Brevet's comments that followed were both unclear and overlapping and did not leave

[9] In its Appellee's Brief, the State asserts that Valencia waived his claim of error in the exclusion of the evidence because he failed to make an offer of proof at trial and thereby failed to preserve the issue for appeal. *Appellee's Br*. at 8-9. However, subsequent to the filing of the State's brief, Valencia moved the trial court for an order amending the record to reflect that Valencia made one or more offers to prove the exhibit. The State did not object to the motion, and thereafter, the trial court executed an order modifying the clerk's record to reflect that: (1) Valencia made one or more offers to prove, when, outside of the jury's presence, the parties and the trial court listened to the tape's contents and discussed its admissibility; and (2) the trial court ultimately sustained the State's objection and refused to admit the exhibit. That trial court's order was filed timely with this court. Accordingly, we proceed on the premise that Valencia did not fail to preserve the claimed error for our review.

open the possibility of redaction of Valencia's statement such that only Brevet's comments would be admitted because her statements, in isolation and without the surrounding remarks to provide context, made no sense and served no purpose.

We note that because the sidebar conferences were not recorded, we do not have the benefit of the parties' full arguments or the court's precise reasoning for excluding the offered exhibits. However, regardless of the somewhat limited record before us on this issue, we do not find that the trial court's decision to exclude the tape and transcript was an abuse of discretion that denied Valencia a fair trial.

## III. Sentencing

Here, the trial court imposed a sentence of sixty years of imprisonment, with twenty years suspended, for two Class A felonies and one Class D felony. The trial court had discretion to impose a sentence of up to 100 years for these convictions. *See* IC 35-50-2-4; 35-50-2-7. Valencia nevertheless argues that his sentence was inappropriate. "A Court may revise a sentence authorized by statute 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). The question under Indiana Appellate Rule 7(B) is not whether another sentence is more appropriate; rather, the question is whether the sentence imposed is inappropriate. *Fonner v. State*, 876 N.E.2d 340, 344 (Ind. Ct. App. 2007). The defendant has the burden of persuading us that his or her sentence is inappropriate. *Id*. at 343. Additionally, sentencing decisions rest within the sound discretion of the trial court and are reviewed for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007).

Valencia urges that the nature of his crimes were not "egregious," noting that he did not "seek[] out school children and lur[e] them into a life of drugs" *Appellant's Br*. at 22. While Valencia may consider it commendable that he did not deliver cocaine to children, other trial evidence indicated that Valencia, known in the drug community as "Diablo," had a practice of selling cocaine, in large amounts, and also sometimes required others to distribute it for him. Based on the record before us, we are not convinced that the nature of his crimes renders his forty-year executed sentence inappropriate.

Valencia also argues that the sentence is inappropriate in light of his character. In particular, Valencia highlights that he has only two misdemeanors in his adult criminal record, and he has two children, a wife, and a stepdaughter that he provided for through legal employment. Unfortunately for Valencia, the positive nature of his lack of significant criminal history is diminished by evidence of his drug sales that, based on the record, were not isolated incidents, suggesting that his employment was supplemented by non-legitimate sources. Specifically, Brevet testified that Valencia had sold drugs to her in 2006 and 2007, and did so "more times than I can count." *Tr*. at 25. She also testified that he preferred to sell at least 3.5 grams of cocaine at a time and that he told her that he "didn't have a problem putting a bitch down" if she failed to distribute cocaine as he instructed her. *Id*. at 37. At the sentencing hearing, Detective Daniel Shumaker of the Lafayette Police Department, and formerly with the Tippecanoe County Drug Task force, testified that in his opinion Valencia was a "high level drug dealer" in the community. *Id*. at 555, 560. Detective Cummins, who participated in the controlled buy with the CI, likewise testified that Valencia led a network of drug dealing. *Id*. at 563. Another witness, Lawrence Newman, testified at trial that he

attempted to burglarize Valencia's house to steal cocaine because Valencia "always had it." *Id*. at 89-90. Valencia was convicted of delivering fourteen grams of cocaine on March 15, 2007; this is a significant amount of cocaine and supports the characterization of Valencia as a high level drug dealer.

We also observe that Valencia's criminal record illustrates that he has had relatively consistent contact with law enforcement and the juvenile and adult legal systems since 1993, which has progressed from arrests, to convictions, to probation violations, to felonies. Also, the trial evidence demonstrated that not only did Valencia instruct Brevet and Pops to deliver nine ounces of cocaine in seven days for him; Valencia also threatened Brevet's life if she failed to comply, which obviously does not reflect favorably on the nature of his character. Lastly, we observe that Valencia's claim that his sentence is inappropriate because he is "not the worst type of the offender committing the worst type of crime" is not persuasive, as he did not receive the worst possible 100-year-sentence for two Class A felonies. *Appellant's Br*. at 22.

In sum, Valencia has not carried his burden of persuading this court that his forty-year executed sentence is inappropriate based upon the nature of the offense and his character.

Affirmed.

FRIEDLANDER, J., and BAILEY, J., concur.