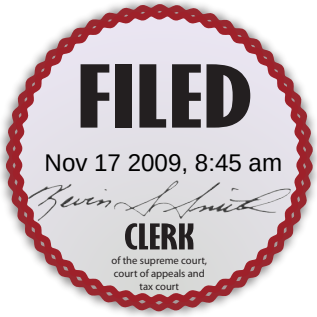

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IN THE
COURT OF APPEALS OF INDIANA

TRAVIS McDONALD,	)	
	)	
Appellant/Defendant,	)	
	)	
vs.	)	No. 88A05-0904-CR-219
	)	
STATE OF INDIANA,	)	
	)	
Appellee/Plaintiff.	)	

APPEAL FROM THE WASHINGTON SUPERIOR COURT
The Honorable Frank Newkirk, Jr., Judge
Cause Nos. 88D01-0805-FD-199, 88D01-0806-FB-253, 88D01-0811-FD-508

November 17, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Travis McDonald appeals his aggregate six-year sentence following his guilty plea to three counts of Class D felony Receiving Stolen Property,[1] one count of Class D felony Theft,[2] and one count of Class D felony Possession of a Controlled Substance.[3] Specifically, McDonald contends that the trial court abused its discretion in imposing an aggregate six-year sentence and that his sentence is inappropriate in light of the nature of his offenses and his character. We affirm.

FACTS AND PROCEDURAL HISTORY

According to the factual basis entered during the February 2, 2009 plea hearing, McDonald "knowingly or intentionally received, retained or disposed of a catalytic converter that belonged to [Partin Auto Salvage]" on April 9, 2008. Tr. p. 94. McDonald was aware that the catalytic converter had been taken from Partin. On June 10, 2008, McDonald "went out to the Red Barn Bait Shop and … knowing and intentionally received, retained or helped dispose of a boat and trailer that belonged to another person, which had been the subject of a theft." Tr. p. 94. Also on June 10, 2008, McDonald knowingly received stolen property belonging to Robert Schrieber. On June 11, 2008, McDonald entered a house that was not his and took some food products, namely hot dogs and Little Debbie cakes. Also on June 11, 2008, McDonald possessed the controlled substance Xanax for which he did not have a prescription.

In response to McDonald's actions relating to the catalytic converter on April 9, 2008,

[1] Ind. Code § 35-43-4-2(b) (2007).
[2] Ind. Code § 35-43-4-2.
[3] Ind. Code § 35-48-4-7(a) (2007).

the State charged McDonald under Cause Number 88D01-0805-FD-199 ("Cause 199") with one count of Class D felony receiving stolen property. With respect to his actions of entering the home of another on June 11, 2008, and stealing food items, his possession of the controlled substance Xanax without a prescription, and receiving the property belonging to Schrieber, which he knew to be stolen, the State charged McDonald with one count of Class D felony theft, one count of Class D felony possession of a controlled substance, and one count of Class D felony receiving stolen property under Cause Number 88D01-0806-FB-253 ("Cause 253"). The State subsequently charged McDonald under Cause Number 88D01-0811-FD-508 ("Cause 508") with one count of Class D felony receiving stolen property for his actions of June 10, 2008, relating to the stolen boat and trailer.

On February 2, 2009, McDonald pled guilty to one count of Class D felony receiving stolen property under Cause 199, one count of Class D felony theft, one count of Class D felony possession of a controlled substance, and one count of Class D felony receiving stolen property under Cause 253, and one count of Class D felony receiving stolen property under Cause 508. The trial court conducted a sentencing hearing on February 18, 2009. During this hearing, the trial court heard evidence relating to McDonald's character and criminal history, as well as the instant offenses. Following the sentencing hearing, the trial court issued the following sentencing statement in imposing an aggregate six-year sentence:

> The total sentence to the Indiana Department of Corrections [sic] is
> A. In [Cause 199]
> 1. Count 1, 1½ YEAR[S]; NONE of the period of imprisonment herein shall be suspended with 1 ½ YEARS to be executed.
> B. In [Cause 253]
> 1. Count 2, 1½ YEARS; NONE of the period of imprisonment

herein shall be suspended with 1 ½ YEARS to be executed.

2. Count 3, 1½ YEARS; NONE of the period of imprisonment herein shall be suspended with 1 ½ YEARS to be executed CONCURRENT to count 2.

3. Count 4, 1 ½ YEARS; NONE of the period of imprisonment herein shall be suspended with 1 ½ YEARS to be executed CONSECUTIVE to counts 2 & 3.

C. In [Cause 508]

1. Count 1, 2½ YEARS; 1 YEAR of the period of imprisonment herein shall be suspended with 1½ YEARS to be executed.

D. All cases shall be served consecutive to one another.

Appellant's App. p. 56. McDonald now appeals.

DISCUSSION AND DECISION

McDonald challenges his aggregate six-year sentence on appeal arguing that the trial court abused its discretion in considering and weighing certain aggravating and mitigating factors and in imposing consecutive sentences. McDonald also argues that the aggregate six-year sentence is inappropriate in light of the nature of his offenses and his character.

I. Abuse of Discretion

McDonald contends that the trial court abused its discretion in finding his criminal history to be an aggravating factor, in failing to consider certain mitigating factors, and in giving certain mitigating factors appropriate weight when it imposed an aggregate six-year sentence. McDonald also contends that the trial court abused its discretion in imposing consecutive sentences. Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *modified on other grounds on reh'g*, 875 N.E.2d 218 (Ind. 2007). "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*. (quotation omitted). The trial court is under no obligation to "weigh" aggravating and mitigating factors against each other when imposing a sentence, and therefore, a trial court cannot now be said to have abused its discretion in failing to "properly weigh" such factors. *Id*. at 491.

A. Aggravating Factors

McDonald claims that the trial court abused its discretion in finding "that the offense McDonald committed as a juvenile was an aggravating factor." Appellant's Br. p. 12. Specifically, McDonald argues that his prior juvenile adjudication was too remote in time to warrant aggravating weight. Indiana Code section 35-38-1-7.1(a)(2) (2007) provides that a trial court may consider the fact that an individual has a history of delinquent behavior to be an aggravating factor at sentencing. With respect to "remoteness," the Indiana Supreme Court has held that while the chronological remoteness of a defendant's prior criminal history should be taken into account, the remote nature of the defendant's prior conviction or adjudication does not render a prior conviction or delinquent adjudication irrelevant. *See Buchanan v. State*, 767 N.E.2d 967, 972 (Ind. 2002) (providing that defendant's criminal history is not irrelevant because it is remote in time to the current offense). The "remoteness" of prior criminal or delinquent history does not preclude the trial court from considering it as an aggravating circumstance. *Id*.

Here, McDonald was convicted of one count of theft, three counts of receiving stolen property, and one count of possession of a controlled substance. At sentencing, the trial court

found McDonald's history of delinquent activity to be an aggravating factor. McDonald's history of prior delinquent activity includes an act which would constitute the property crime felony burglary if committed by an adult. The record indicates that on June 21, 2004, the State filed a "Petition Alleging Delinquency" stating that McDonald "had committed the act of Burglary." Appellant's App. Vol. 1(B) p. 14. On August 12, 2004, McDonald was "adjudicated a Delinquent for the offense of Burglary." Appellant's App. Vol. 1(B) p. 14. McDonald's delinquent adjudication for burglary indicates that McDonald had committed at least one prior delinquent act relating to the property of another. Given the similarity between McDonald's prior delinquent adjudication and the instant offenses, we conclude that McDonald's prior juvenile adjudication was not too remote to warrant aggravating consideration in sentencing McDonald for the instant offenses. The trial court, therefore, did not abuse its discretion in finding McDonald's history of delinquent behavior to be an aggravating factor at sentencing.

B. Mitigating Factors

1. "Unfound" Mitigators

McDonald also claims that the trial court abused its discretion in failing to find the unlikelihood that his crimes would recur to be a mitigating circumstance. "A trial court is not required to find the presence of mitigating factors or to give the same weight or credit to mitigating evidence as does the defendant, nor is it obligated to accept the defendant's assertions as to what constitutes a mitigating circumstance." *Allen v. State*, 722 N.E.2d 1246, 1252 (Ind. Ct. App. 2000) (quotations omitted). Further, although a trial court must consider

evidence of mitigating factors presented by a defendant, the trial court is not obligated to explain why it found that the factor does not exist. *Id*.

McDonald argues that he was unlikely to commit the crime of theft again because at the time he committed the criminal act, he was intoxicated. McDonald argues that he can now be trusted because "he had to undergo various drug screenings." Appellant's Br. p. 11. McDonald, however, presented no evidence in support of this claim. The trial court was under no obligation to accept McDonald's assertions relating to the likelihood that he would reoffend. Therefore, we conclude that the trial court did not abuse its discretion in failing to find the unlikelihood that his crimes would recur to be a mitigating factor at sentencing.

Furthermore, to the extent that McDonald argues that the trial court abused its discretion in failing to find his age and family hardship to be mitigating factors at sentencing, we observe that McDonald did not argue before the trial court that his age and any alleged family hardship should be considered as mitigating factors. Therefore, McDonald has waived this challenge for appellate review. "If the defendant fails to advance a mitigating circumstance at sentencing, this court will presume that the circumstance is not significant and the defendant is precluded from advancing it as a mitigating circumstance for the first time on appeal." *Sargent v. State*, 875 N.E.2d 762, 770 (Ind. Ct. App. 2007) (citing *Simms v. State*, 791 N.E.2d 225, 233 (Ind. Ct. App. 2003)).

2. Weight Assigned to "Found" Mitigators

McDonald additionally claims that the trial court abused its discretion in failing to attribute appropriate mitigating weight to the fact that he accepted responsibility for his

actions and agreed to pay restitution to the victims. However, to the extent that McDonald asserts that the trial court abused its discretion in failing to assign these factors appropriate mitigating weight, we acknowledge that the trial court is under no obligation to "give the same weight or credit to the mitigating evidence as does the defendant." *Allen*, 722 N.E.2d at 1252. Here, the trial court specifically found McDonald's acceptance of responsibility and agreement to pay restitution to be mitigating factors and considered these factors in imposing the advisory sentence for McDonald's Class D felony convictions. Because the trial court cannot now be said to have abused its discretion in failing to "properly weigh" such factors, we conclude that the trial court did not abuse its discretion in this regard. *See Anglemyer*, 868 N.E.2d at 491.

C. Consecutive Sentences

McDonald additionally claims that the trial court abused its discretion in imposing consecutive sentences. Specifically, McDonald argues that the trial court "ordered all cases to run consecutive to one another although it can be argued from the date of the crimes that [Cause 508] was a continuation of the sequence of criminal events associated with the charge incurred in [Cause 253]." Appellant's Br. p. 14. McDonald presents no evidence suggesting that the instant offenses were part of a continued sequence of criminal events but relies solely on the fact that he committed most of the instant offenses on consecutive days. However, even if the trial court had accepted McDonald's argument, the trial court did not abuse its discretion in imposing consecutive sentences.

The Indiana Supreme Court had held that when a perpetrator commits the same or

similar offenses against multiple victims, "enhanced and consecutive sentences seem necessary to vindicate the fact that there were separate harms and separate acts against more than one person." *Serino v. State*, 798 N.E.2d 852, 857 (Ind. 2003). Here, McDonald was convicted of four separate property crimes against five different victims. In light of the *Serino* Court's holding, we conclude that the decision to impose consecutive sentences was well within the discretion of the trial court.

Moreover, to the extent that McDonald argues that the imposition of consecutive sentences constituted an abuse of discretion because the trial court reviewed testimony of McDonald's alleged uncharged crimes and alleged bad acts, we disagree. Despite McDonald's claims to the contrary, Indiana law provides that a trial court properly may consider evidence of prior criminal conduct which has not been reduced to conviction, as well as evidence of prior uncharged crimes, so long as such evidence was not gleaned from plea negotiations which did not result in a plea agreement that was accepted by the court. *Hensley v. State*, 573 N.E.2d 913, 917 (Ind. Ct. App. 1991), *trans. denied*. The Indiana Supreme Court has held that such information may be relevant to the trial court's assessment of the defendant's character in terms of the risk that he will commit another crime. *Cotto v. State*, 829 N.E.2d 520, 526 (Ind. 2005). The trial court admitted evidence regarding McDonald's alleged uncharged crimes and bad acts finding that such evidence was relevant to the extent that it related to McDonald's character. Pursuant to *Hensley* and *Cotto*, the trial court did not err in this regard.

In sum, we conclude that the trial court did not abuse its discretion in sentencing

McDonald to a six-year aggregate sentence.

II. Appropriateness of Sentence

McDonald also contends that his aggregate six-year sentence is inappropriate in light of the nature of his offenses and his character. Indiana Appellate Rule 7(B) provides that "The 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." The defendant bears the burden of persuading us that his sentence is inappropriate. *Sanchez v. State*, 891 N.E.2d 174, 176 (Ind. Ct. App. 2008).

With respect to the nature of McDonald's offenses, the record reveals that McDonald committed property crimes against five different victims. McDonald claims that he was under the influence of drugs and alcohol at the time he committed at least one of the instant offenses and that he is unlikely to reoffend. However, McDonald's criminal history, which includes similar delinquent actions, suggests otherwise. In addition, McDonald violated his victims' sense of security and his actions resulted in not only financial but also emotional hardship to his victims. Appellant's App. p. 53.

With respect to McDonald's character, the record reveals that McDonald's criminal history includes prior delinquent activity that was similar to the property crimes committed in the instant offenses. McDonald was twenty years old at the time he committed the instant offenses and had a history of drug and alcohol use. In light of the nature of McDonald's offenses, which include crimes against the property of five different victims, and

McDonald's character as is evidenced by his prior similar delinquent activity, we are unable to say that McDonald's aggregate six-year sentence is inappropriate.

The judgment of the trial court is affirmed.

BAILEY, J., and VAIDIK, J., concur.