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IN THE
COURT OF APPEALS OF INDIANA

HIRMAN JACKSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-1001-CR-85
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0907-FA-11

November 17, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Hirman Jackson ("Jackson") appeals his convictions of dealing in a schedule I controlled substance[1] as a Class B felony, and possession of a schedule I controlled substance[2] as a Class D felony, and challenges the sentences entered thereon. The following restated issues are presented for our review:

I. Whether the incredible dubiosity rule should apply such that Jackson's convictions require reversal;

II. Whether the trial court abused its discretion when sentencing Jackson by finding certain aggravating circumstances, failing to find mitigating circumstances, and imposing an inappropriate sentence; and

III. Whether the trial court erred by ordering Jackson to pay restitution in the amount of $1,000.00 for public defenders' fees.

We affirm in part, reverse and vacate in part, and remand.

FACTS AND PROCEDURAL HISTORY

A few days before the controlled buy in question, CI 09-201 ("the informant") called Jackson in order to buy fifteen ecstasy tablets from him. After locating a supplier, Jackson called the informant to tell her that he had the ecstasy tablets and instructed her to call him when she had the money to complete the transaction. The informant was searched by police, fitted with a body wire, and given $350.00 in recorded buy money prior to calling Jackson to advise him that she had the money and to request that he come to her apartment complex to deliver the pills. The telephone conversation was recorded, and the recording and transcript

[1] *See* Ind. Code § 35-48-4-2(a).

[2] *See* Ind. Code § 35-48-4-7(a).

of the conversation were admitted at trial.

The informant walked to the front of her housing complex near a bank of mailboxes where she waited for Jackson to arrive. Police officers in two different vehicles kept her under surveillance with one group videotaping the events, and the other group recording the feed from the body wire. Jackson arrived, driving an older yellow car, and pulled up alongside the bank of mailboxes where the informant was waiting. The informant approached the passenger window of the car, where an unidentified black male was seated, and asked Jackson if he would drive her to her house. The informant walked around to the driver's side back seat and entered the car. A young child, approximately two years old, was also in the back seat of the car.

Jackson drove off toward the informant's house. While she was riding in the car, the informant slipped the recorded buy money over the seat to Jackson. Jackson then handed a baggie of blue and green pills over the seat to the informant. The informant made a comment to Jackson that he should keep the baggie lower because anyone could see what they were doing through the windows of the car.

The informant exited the car once they had reached her house, and she approached the door shouting to her boyfriend to bring her a cigarette. The informant's boyfriend threw a pack of cigarettes to her, and the informant then walked toward the van where undercover officers were conducting surveillance. She gave the officers the baggie containing the pills and the pack of cigarettes. The officers searched the informant and debriefed her about the details of the transaction.

The baggie contained seven green benzolpierecene pills weighing a total of 2.15 grams and eight blue MDMA (ecstasy) pills weighing a total of 1.98 grams. Both sets of pills are controlled substances. The State charged Jackson with dealing in a schedule I controlled substance as a Class A felony and possession of a schedule I controlled substance as a Class C felony, with each offense enhanced because the transaction took place within 1,000 feet of a family housing complex. Jackson was also alleged to be an habitual substance offender and an habitual offender. At the conclusion of the bench trial, the trial court found Jackson guilty of the lesser-included offenses of dealing in a schedule I controlled substance as a Class B felony and possession of a schedule I controlled substance as a Class D felony. Jackson was found not guilty of the habitual substance offender and habitual offender allegations against him.

Jackson was sentenced to twelve years for his Class B felony conviction with one of those years executed in Tippecanoe Community Corrections and one year suspended to probation. On the Class D felony conviction, Jackson was sentenced to two years executed to be served concurrently with the Class B felony sentence. Consequently, Jackson's aggregate sentence was ten years executed in the Department of Correction with one year in Tippecanoe Community Corrections and one year suspended to probation. The trial court also ordered Jackson to pay $1,000.00 to reimburse the Public Defender's Office. Jackson now appeals.

DISCUSSION AND DECISION

I. Incredible Dubiosity

Jackson contends that the informant's testimony was incredibly dubious, and thus there was insufficient evidence he committed the offenses at issue here. Under the "incredible dubiosity" rule, a reviewing court will impinge on the factfinder's responsibility to judge the credibility of the witness only when it has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of "incredible dubiosity." *Copeland v. State*, 802 N.E.2d 969, 971 (Ind. Ct. App. 2004). When a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. *Id*. Application of this rule is rare. The standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it. *Id*.

When we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. *Jones v. State*, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the judgment and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. *Id*. If there is substantial evidence of probative value to support the conviction, it will not be set aside. *Id*.

To convict Jackson of dealing in a schedule I controlled substance as a Class B felony, the State was required to prove that Jackson knowingly or intentionally delivered to the informant, ecstasy, pure or adulterated, a schedule I controlled substance. Ind. Code § 35-48-4-2(a). Here, the informant testified that she called Jackson in order to arrange the purchase of fifteen ecstasy pills. Jackson returned her call when he had located the pills and instructed

her to call him when she had the purchase money. The informant made the telephone call and asked Jackson to meet her near her house. The informant was searched prior to the transaction and was given the recorded buy money. After the transaction, the informant no longer had the buy money, but instead had the baggie containing the ecstasy pills. The undercover officers testified that they recognized Jackson as the driver of the vehicle, though none actually saw the transaction. Jackson acknowledged setting up the transaction with the informant and admitted to being present when the transaction occurred. However, Jackson denied completing the transaction arguing instead that the unidentified male passenger received the money from the informant and delivered the pills to her.

The audio tape of the transaction was admitted at trial, as was the transcript of the conversation. During that conversation, the informant does not specifically address Jackson by name when speaking with him. However, her comments are made in a manner indicative of familiarity with the other person. At trial, the informant identified her voice and identified the other voice on the audio tape as that of Jackson. She also testified that she did not know the identity of the other male occupant of the car.

Since corroborating evidence of most if not all of the informant's testimony supporting the dealing in a schedule I controlled substance conviction is present, we conclude that the incredible dubiosity rule is inapplicable here. There is enough evidence, both circumstantial and direct, to corroborate the informant's testimony, which was unequivocal, uncoerced, and not inherently improbable.

We do not address the incredible dubiosity argument in regard to the possession of a schedule I controlled substance conviction noting, *sua sponte*, that this charge must be vacated due to a violation of double jeopardy principles. Jackson was charged with and convicted of both dealing in ecstasy, a schedule I controlled substance and possession of ecstasy, a schedule I controlled substance. "Possession of a narcotic drug is an inherently included lesser offense of dealing that drug, and a defendant generally may not be convicted and sentenced separately for both dealing and possession of the same drug." *Quick v. State*, 660 N.E.2d 598, 601 (Ind. Ct. App. 1996). Separate convictions for dealing and possession based upon a single sale of narcotics may be sustained, but the State must make clear that only the quantity sold forms the basis of the dealing charge, while only the quantity retained after the sale forms the basis of the possession charge. *Id.* Here, the same controlled substance, ecstasy, was used to support the dealing and possession charges. Although there was another controlled substance in the baggie, none of the charges filed against Jackson related to that substance. Therefore, we vacate Jackson's conviction and sentence for possession of a schedule I controlled substance as a Class D felony.

II. Sentencing Challenges

Jackson advances several arguments relating to his sentence, which we address in turn. First, Jackson claims that the trial court abused its discretion by finding certain aggravating circumstances.

Trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. *Anglemyer v. State*, 868 N.E.2d 482, 490 (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 may abuse its discretion is if the sentencing statement "explains reasons for imposing a sentence--including a finding of aggravating and mitigating factors if any--but the record does not support the reasons, . . . or the reasons given are improper as a matter of law." *Id*. at 490-91.

Here, Jackson challenges the trial court's reliance upon Jackson's lack of remorse and failure to take responsibility and his history of illegal use of alcohol and drugs as aggravating circumstances, claiming that they are improper bases upon which to enhance his sentence because they have no support in the record.

We note that in regard to his lack of remorse and failure to take responsibility, the record reflects that Jackson made the following statement to the trial court immediately prior to sentencing:

> Yeah I feel like I shouldn't get a lot of time for something that I didn't do. Like I got found guilty of an offense without no evidence that I ever possessed or dealt any drugs. I got locked up for that offense. A warrant issued for my arrest without any evidence that I ever possessed or dealt any drugs a whole

> month after this incident had occurred. I've been in jail five months for something that I didn't do. I feel that I shouldn't even get sent to the department--Indiana department of corrections for something that I didn't do. I know I did stuff in my past, that's from me being young and being dumb but I got kids now. I not even supposed to be sitting right here in front of you right now but I am though I can't cry over spilled milk.

Tr. at 209-10. Our Supreme Court consistently has held that it is not error for a trial court to consider as an aggravating factor the lack of remorse by a defendant who insists upon his innocence. *Georgopulos v. State*, 735 N.E.2d 1138, 1145 (Ind. 2000). However, it is a factor of only modest significance. *Id*.

We note, though, that a defendant demonstrates lack of remorse by displaying "disdain or recalcitrance, the equivalent of 'I don't care.'" *See Cox v. State*, 780 N.E.2d 1150, 1158 (Ind. Ct. App. 2002) (quoting *Bluck v. State*, 716 N.E.2d 507, 512 (Ind. Ct. App. 1999)). The fact that a defendant maintains his innocence by making statements akin to "I didn't do it" is not properly considered an aggravating circumstance. *Id*. Jackson's statement appears to be more in the nature of "I didn't do it" than "I don't care." Therefore, it appears that reliance upon this aggravating circumstance was improper.

Jackson also challenges the trial court's reliance upon his history of illegal use of drugs and alcohol as an aggravating circumstance, again claiming that it is not supported by the record. We agree with the State, however, that the pre-sentence investigation report includes Jackson's admission of the use of alcohol and marijuana from the ages of seventeen to twenty-four. The use of marijuana is always illegal regardless of a person's age, and the use of alcohol by someone under the age of twenty-one is illegal. Contrary to Jackson's claim, this aggravator is supported by the record. The trial court indicated that it was "not a

heavy aggravator." *Tr.* at 211. A trial court may consider uncharged crimes as a part of a defendant's criminal history. *Willoughby v. State*, 552 N.E.2d 462, 470 (Ind. 1990). Jackson's admission to this conduct is tantamount to an admission of uncharged criminal conduct. The trial court did not abuse its discretion by relying upon this aggravating circumstance, which is an aspect of his criminal history.

The sentencing range for a Class B felony is a fixed term of between six and twenty years with the advisory sentence being ten years. Ind. Code § 35-50-2-5. The trial court found Jackson's criminal history to be an aggravating circumstance, and Jackson does not challenge the trial court's reliance upon it for purposes of sentencing. Jackson's criminal history includes four prior felony convictions, and one petition to revoke probation which was found true.

Based upon Jackson's criminal history alone, the sentence imposed by the trial court, a moderate elevation of the sentence from the advisory sentence, does not reflect an abuse of discretion. A single aggravating circumstance may support the imposition of an enhanced sentence. *McNew v. State*, 822 N.E.2d 1078, 1082 (Ind. Ct. App. 2005). Further, a criminal history suffices by itself to support an enhanced sentence. *Soliz v. State*, 832 N.E.2d 1022, 1030 (Ind. Ct. App. 2005). Absent consideration of Jackson's lack of remorse, a factor to be given modest weight even when properly found, there is no abuse of discretion in sentencing Jackson.

Although appearing in the argument section of his brief concerning the inappropriateness of his sentence, Jackson argues that there were mitigating circumstances

that were not found by the trial court. In particular, Jackson notes that he obtained his G.E.D. and had future educational and career goals. A finding of mitigating circumstances lies within the trial court's discretion. *Plummer v. State*, 851 N.E.2d 387, 391 (Ind. Ct. App. 2006). Further, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. *Id*. Additionally, a trial court is not required to place the same value on a mitigating circumstance as does the defendant. *Id*. Even though there is evidence in the record that Jackson did obtain his G.E.D. and has stated his career goals, we find that Jackson has failed to carry his burden of establishing that these factors were significantly mitigating such that the trial court abused its discretion by failing to assign the same value as does Jackson to them.

Jackson also alleges that his sentence is inappropriate in light of the nature of the offense and the character of the offender. Indiana Appellate Rule 7(B) provides that the court may revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

Here, assuming without deciding that the nature of Jackson's crime was not remarkable, Jackson's character, as shown by his criminal history, renders his slightly enhanced sentence appropriate. Even a limited criminal history can be considered an aggravating factor. *Atwood v. State*, 905 N.E.2d 479, 488 (Ind. Ct. App. 2009). At the time of the crimes at issue here, Jackson was twenty-four years old and had already amassed a

record consisting of four felony convictions for drug offenses. Some of those offenses occurred in Illinois, and Jackson's drug-related activity continued after he relocated here to Indiana. While not ignoring the positive aspects of Jackson's character, we find that Jackson's slightly enhanced sentence is not inappropriate in light of the nature of the offense and the character of the offender.

III. Restitution

Jackson argues that the trial court abused its discretion by ordering him to pay $1,000.00 for public defenders' fees. We agree.

Indiana Code section 35-33-7-6(c) provides in relevant part:

> If the trial court finds that the person is able to pay part of the cost of representation by the assigned counsel, the court shall order the person to pay the following:
>
> (1) For a felony action, a fee of one hundred dollars ($100).

The State concedes that the trial court did not inquire into Jackson's ability to reimburse the county $100.00 toward the cost of his representation. As a result, we must remand this issue to the trial court for a determination of Jackson's ability to pay $100.00 to reimburse the county in part for the costs of his representation.

Affirmed in part, reversed and vacated in part, and remanded.

RILEY, J., and BAILEY, J., concur.