

Appellant-defendant Jeffrey Leonard McCrory appeals his convictions and sentence that was imposed for Burglary,¹ a class B felony; and Theft,² a class D felony. Specifically, McCrory argues that there was insufficient evidence to sustain his convictions, inasmuch as an eyewitness could not identify him with complete certainty from a photo display. Additionally, McCrory challenges his nineteen-year sentence, arguing that the trial court abused its discretion and that it is inappropriate in light of the nature of the offenses and his character. Finding that the evidence was sufficient and that McCrory was properly sentenced, we affirm the decision of the trial court.

FACTS

On May 5, 2009, seventy-five-year-old Ruth Bowser received a visit from her daughter. Around 10:30 a.m., Bowser's daughter left and Bowser walked out with her through the attached garage. Mother and daughter talked for about five minutes with the overhead garage door open. After Bower's daughter left, Bowser watered the plants around her home for approximately fifteen minutes.

When Bowser finished watering the plants, she went back inside her house through the garage and shut the overhead door. As she changed her shoes in her family room, she thought she heard "like walking and doors, drawers opening and closing." Tr. p. 227. She briefly looked in the garage to double check that she had put the overhead garage door down.

¹ Ind. Code § 35-43-2-1.

² I.C. § 35-43-4-2.

Bowser started toward the stairs to investigate the noises. As she walked through the kitchen and came to the steps, she found McCrory standing in her entryway. Bowser had never seen him before and asked him who he was. McCrory ran upstairs and Bowser heard him run into her bedroom. She then went back to the kitchen, grabbed her cell phone, and retreated to the screened-in porch where she called her neighbor for help, believing that this would be faster than calling the police.

While Bowser was still on the porch, McCrory came downstairs. They looked at one another and then McCrory “rushed” Bowser, grabbing her shoulders. Id. at 229. With their faces only twelve inches apart, she asked him, “who are you anyway?” Id. They remained that way for a few moments before McCrory finally let go of Bowser and forced his way into her backyard.

Bowser’s neighbor, Roger Shoot, saw McCrory running from the direction of Bowser’s house. A police officer spoke with Bowser and Shoot, both of whom gave similar descriptions. Shoot described McCrory as having “dreadlocks,” id. at 209, while Bowser described him as having “curly, messy, bouncy type hair, that when he ran his hair bounced,” id. at 217.

Bowser stated that her billfold had been stolen along with several pieces of jewelry, including a braided yellow and white gold necklace, a couple of rings, and some earrings. At around 5:30 p.m. the day of the burglary, McCrory sold a rope chain and a plain wedding band to a pawn shop for \$170. Unfortunately, by the time the police inquired about the pieces, the pawn shop had already sold them as scrap metal.

On June 18, 2009, Detective Randy Tracy of the Anderson Police Department assembled a photo display containing McCrory's photograph and showed it to Bowser and Shoot. Although Bowser and Shoot admitted that they could not be absolutely certain, both of them chose McCrory's photograph without hesitation.

On June 25, 2009, McCrory was charged with class B felony burglary and class D felony theft, and his two-day jury trial commenced on January 19, 2010. At trial, Bowser identified McCrory as the person who had been inside her home on May 5, 2009, and when asked about the photo display, she stated that she was positive about her identification. The jury found McCrory guilty as charged.

A sentencing hearing was conducted on February 22, 2010. The trial court found McCrory's criminal history, including his parole, work release, and community corrections violations, and that there were two discrete offenses to be aggravating factors. The trial court found no mitigating circumstances. McCrory was sentenced to nineteen years for burglary and to a concurrent term of two and one-half years for the theft conviction for a total executed term of nineteen years imprisonment. McCrory now appeals.

DISCUSSION AND DECISION

I. Insufficient Evidence

McCrory argues that there was insufficient evidence to sustain his convictions because Bowser was not absolutely certain when she chose his photograph. In reviewing a challenge to the sufficiency of the evidence, this court will neither reweigh the evidence

nor judge the credibility of the witnesses. Baumgartner v. State, 891 N.E.2d 1131, 1137 (Ind. Ct. App. 2008). We will consider only the evidence most favorable to the verdict and all reasonable inferences. Taylor v. State, 879 N.E.2d 1198, 1202 (Ind. Ct. App. 2008). Additionally, this court will affirm if there is probative evidence from which a jury could have found the defendant guilty beyond a reasonable doubt. Gray v. State, 871 N.E.2d 408, 416 (Ind. Ct. App. 2007).

Here, Bowser was able to look closely at McCrory when, after retreating to the screened-in porch, she encountered him and they “just looked at each other at first and then he rushed me.” Tr. p. 229. Bowser testified that McCrory grabbed her by her shoulders and stated that “we just kinda looked at each other.” Id. During the encounter, McCrory was “only about twelve (12) inches from [her] face so [they] really got a good look at each other.” Id. at 231. At trial, Bowser identified McCrory as the man she encountered in her house.

Detective Tracy, who showed Bowser the photo display, testified that although Bowser could not say with one hundred percent certainty that McCrory was the person in her house, she immediately chose McCrory’s photograph. Likewise, when Shoot was showed the photo display, he immediately chose McCrory but was not absolutely certain because of the intervening time between the burglary and viewing the photo display. Additionally, like Bowser, Shoot testified that McCrory was the same man he had seen running from Bowser’s house. Under these circumstances, we cannot say that Bowser’s

failure to identify McCrory's photograph with absolute certainty rendered the evidence insufficient, and, accordingly, this argument fails.

II. Sentence

In its essence, McCrory makes two arguments challenging his nineteen-year sentence. McCrory contends that the trial court abused its discretion by relying on improper aggravating factors. Additionally, McCrory maintains that his sentence is inappropriate in light of the nature of the offenses and his character and requests that this Court revise it pursuant to our authority under Appellate Rule 7(B).

A. Abuse of Discretion—Improper Aggravating Factors

McCrory argues that “[s]ince neither aggravating factor relied on by the trial court is proper, the enhanced sentence may not stand.” Appellant’s Br. p. 9. Specifically, McCrory challenges the trial court’s findings that his criminal history and that there were two discrete offenses were aggravating factors.

Initially, we observe that sentencing decisions rest within the trial court’s sound discretion and are reviewed on appeal only for an abuse of that discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh’g, 875 N.E.2d 218 (2007). A trial court may abuse its discretion by entering a sentencing statement that includes reasons for imposing a sentence not supported by the record, omits reasons clearly supported by the record, or includes reasons that are improper as a matter of law. Id. at 490-91.

As for McCrory's argument that his criminal history is an improper aggravator, Indiana Code section 35-38-1-7.1 provides that "[i]n determining what sentence to impose for a crime, the court may consider the following aggravating circumstances . . . [t]he person has a history of criminal or delinquent behavior." Our Supreme Court has held that the significance of past criminal conduct "varies based on the gravity, nature and number of prior offenses as they relate to the current offense." Cotto v. State, 829 N.E.2d 520, 526 (Ind. 2005) (quoting Wooley v. State, 716 N.E.2d 919, 929 n.4 (Ind. 1999)).

Here, the record reveals that McCrory has three prior burglary convictions, one attempted burglary conviction, and one robbery conviction. Additionally, McCrory has been convicted of forgery and attempted forgery. In light of the convictions in this case, we cannot say that McCrory's criminal history is insignificant, and the trial court did not abuse its discretion by concluding that it was an aggravating factor.

As stated above, McCrory also claims that the trial court erred by relying on the fact that he committed two offenses. More particularly, McCrory points out that "[w]hen a defendant is charged with and convicted of multiple offenses, it is improper to rely on the fact that there were multiple offenses committed since the commission of multiple crimes is a material element of the crimes of which the defendant was convicted." Appellant's Br. p. 9.

McCrory directs us to Kien v. State, in support of his argument that the trial court's consideration that there were two discrete offenses was improper. In Kien, the

defendant was convicted of three counts of child molesting. 782 N.E.2d 398, 411 (Ind. Ct. App. 2003). Nevertheless, the trial court considered that several acts of molestation were committed as an aggravating circumstance to support an enhanced sentence, and a panel of this Court determined that this was error. Id.

Even assuming solely for argument's sake that the trial court erred by considering that there were two offenses committed, McCrory's nineteen-year sentence was within the range authorized by statute. See Ind. Code § 35-50-2-5 (stating that "[a] person who commits a Class B felony shall be imprisoned for a fixed term between six (6) and twenty (20) years, with the advisory sentence being ten (10) years"). Moreover, the trial court noted several other aggravating factors, including McCrory's criminal history and his community corrections, parole, and work release violations. Furthermore, the trial court found no mitigating circumstances. Under these circumstances, the trial court did not abuse its discretion when it sentenced McCrory to nineteen years imprisonment.

B. Inappropriate Sentence

Finally, McCrory argues that his nineteen-year sentence is inappropriate in light of the nature of the offenses and his character pursuant to Rule 7(B). When reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

As for the nature of the offenses, McCrory entered the home of an elderly woman while she was outside watering her plants. McCrory was still in Bowser's home when

she went back inside and eventually, there was a confrontation. While it is undisputed that Bowser was not physically harmed during this confrontation, the fact that McCrory entered her house while she was there heightened the risk. Moreover, Bowser has suffered consequences because of McCrory's intrusion into her home, including loss of sleep, anxiety, and fear of being alone in her home where she has lived for forty-three years.

As for McCrory's character, as discussed above, he has amassed convictions for burglary, attempted burglary, robbery, forgery, and attempted forgery. Likewise, McCrory has violated work release, parole, and community corrections. Indeed, McCrory has spent the vast majority of the twenty-seven years of his adult life either incarcerated or on parole. Therefore, in light of the nature of the offenses and McCrory's character, he has failed to persuade us that his nineteen-year sentence is inappropriate, and we affirm the judgment of the trial court.

The judgment of the trial court is affirmed.

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