

STATEMENT OF THE CASE

Dmitriy Sklyarov appeals his convictions for robbery as a class B felony¹ and pointing a firearm at another person as a class D felony and sentence for robbery.²

We affirm.

ISSUES

1. Whether the evidence was sufficient to support Sklyarov's convictions.
2. Whether the trial court abused its discretion in admitting evidence.
3. Whether the trial court erred in sentencing Sklyarov.

FACTS

On November 30, 2009, Sklyarov, Brandon Conner, Garrison Wood, and Ashlie Wilkinson were at Conner's Muncie apartment when a discussion took place regarding robbing a CVS Drug Store for Oxycontin. Sklyarov said "he would do it" and had a ".9 millimeter black handgun" he could use during the robbery. (Tr. 97). Conner agreed to go with Sklyarov.

At approximately 7:50 p.m., Wood drove Sklyarov and Conner to a Muncie CVS, which Sklyarov and Conner entered separately. Sklyarov proceeded directly to the pharmacy counter, located at the back of the store. As he pointed a gun at pharmacist Anas Alsouri and pharmacist technician Kendra Vickery, he demanded Oxycontin. He threatened to shoot Vickery if she and Alsouri did not comply.

¹ Ind. Code § 35-42-5-1.

² I.C. § 35-47-4-3.

Alsouri retrieved six bottles from the store's safe and gave them to Sklyarov. The bottles contained a total of six hundred tablets; each tablet contained forty milligrams of oxycodone.

Once he got the Oxycontin, Sklyarov left the store, and Conner followed. They walked a short distance to Wood's waiting vehicle. Once they got back to Conner's apartment, Conner transferred the tablets to plastic baggies and divided them between Sklyarov and himself.

Conner and Sklyarov were at Conner's apartment when Wilkinson returned later that night. Conner showed Wilkinson "a clear bag of Oxycontin forties." (Tr. 99). Subsequently, both Conner and Wilkinson sold some of the Oxycontin.

On December 3, 2009, Wilkinson, who had been arrested on unrelated charges, spoke with Muncie Police Detective George Hopper regarding the robbery. Wilkinson provided details about the robbery that had not been released to the public, including the number of bottles taken and the amount of oxycodone in each tablet.

The following morning, Muncie police officers executed a search warrant for Conner's residence. Officers found Conner and Sklyarov in the apartment. Officers collected a blue knit hat; a green hooded sweatshirt; Sklyarov's wallet, which contained almost three hundred dollars; drug paraphernalia; and several Oxycontin tablets.

On December 9, 2009, the State charged Sklyarov with Count I, robbery as a class B felony; and Count II, pointing a firearm as a class D felony. On February 17, 2010,

Sklyarov, by counsel, filed a motion in limine, seeking to exclude any reference to Satanism. The trial court granted Sklyarov's motion.

The trial court commenced a two-day jury trial on February 17, 2010. Alsouri and Vickery testified that they could not identify Sklyarov as the person who robbed the store on November 30, 2009. They both, however, described the perpetrator as a white male in his twenties, wearing a knit cap and a green hooded sweatshirt.

Conner testified as to his and Sklyarov's planning and participation in the robbery. He also described the clothing he and Sklyarov wore during the robbery, including Sklyarov's "dark hooded sweatshirt," which he believed to be green, and "navy blue beanie" (Tr. 139).

Conner admitted that in addition to the pending charge arising from the robbery on November 30, 2009, the State had charged him with class B felony robbery for the robbery of another pharmacy on November 13, 2009; and class B felony dealing in a schedule II controlled substance for "selling the Oxycontin which [he] got as a result of the robberies" (Tr. 132). Conner, however, testified that he did not receive any deals from the State in exchange for his testimony, but he "hop[ed] to get treated fairly" (Tr. 155).

Sklyarov also testified during the trial. Regarding the cash found his wallet, he testified that his mother and several friends gave it to him.

The trial court admitted into evidence surveillance footage from the store's security system, showing two males in the store at the time of the robbery. Wilkinson

and Conner identified the man wearing a hooded sweatshirt and cap as Sklyarov. The sweatshirt and cap matched the clothing found during the search of Conner's apartment. Without objection, the trial court also admitted Sklyarov's wallet into evidence. Sklyarov, however, objected to its publication to the jury.

The jury found Sklyarov guilty as charged. The trial court ordered a pre-sentence investigation report ("PSI") and held a sentencing hearing on March 18, 2010. According to the PSI, Sklyarov pleaded guilty to class C misdemeanor operating a vehicle without a license in 2007, for which he was placed on probation; class A misdemeanor possession of marijuana on December 3, 2009; and class D felony battery on February 9, 2009, for which the trial court sentenced him to one year.

For purposes of sentencing, the trial court merged Count II with Count I. As to the mitigating and aggravating circumstances, the trial court found as follows:

Mitigating circumstances: Defendant has maintained some gainful employment and tried to meet financial obligations. Number two (2), Defendant has some family backing and support from this mother that would aid him in his rehabilitation should he choose to avail himself of her support. Number three (3), Defendant's mother indicates that he has been diagnosed with congenital heart failure. Aggravating circumstances: Number one (1), the Defendant has a history of adult criminal activity. As an adult he has been charged and convicted of two (2) criminal misdemeanors and one (1) felony Number two (2), prior attempts at correctional treatment and rehabilitation through probation have not been successful. The Defendant is in need of correctional or rehabilitative treatment that can best be provided by commitment of him to a penal facility. Number three (3), Defendant's actions in committing these crimes have had a continuing adverse effect on the victims. Number four (4), Defendant's role in this crime included substantial care and planning and he was the principal in the commission of the crime. Number five (5), Defendant put everyone in the CVS Pharmacy, employees and patrons, in

danger. Also, it is noteworthy that in less than four (4) short years the Defendant's criminal conduct has escalated from Operating a Vehicle Without Ever Receiving a License, a class C misdemeanor, to Possession of Marijuana, a class A misdemeanor, to Battery Causing Bodily Injury, a class D felony, to the instant offense of Armed Robbery, a class B felony. He has served sentences including probation and a term of imprisonment wherein he was . . . released within months of committing Armed Robbery. So in imposing sentence, the Court does consider these facts and circumstances and the nature of the crime. The Court finds that the aggravating circumstances outweigh the mitigating circumstances.

(Tr. 294-96). Accordingly, the trial court sentenced Sklyarov to fourteen years, with two years suspended.

Additional facts will be provided as needed.

DECISION

1. Sufficiency of the Evidence

Sklyarov asserts that the evidence is insufficient to support his convictions, where “[t]he only question is whether the testimony of Brandon Conner was probative.”

Sklyarov's Br. at 15. We disagree.

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted).

Conner testified that he and Sklyarov robbed the CVS. “It is well-established that ‘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) (quoting *Toney v. State*, 715 N.E.2d 367, 369 (Ind. 1999)), *trans. denied*. However, when identification is the only evidence, the identification must be unequivocal. *Scott*, 871 N.E.2d at 344.

This interpretation is in accord with the “incredible dubiousity” rule, under which we will impinge upon the trier of fact’s responsibility to weigh the evidence only “where a sole witness presents inherently contradictory testimony which is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the appellant’s guilt.”

Id. at 344-45 (quoting *Tillman v. State*, 642 N.E.2d 221, 223 (Ind. 1994)).

In this case, Conner unequivocally identified Sklyarov as his cohort in the crime. We cannot say that his testimony was inherently dubious or inherently improbable. Sklyarov’s counsel cross-examined him, and the jury was able to independently evaluate his testimony. Thus, Sklyarov’s argument is nothing more than an invitation to judge Conner’s credibility, which we decline to do.

Furthermore, the State presented evidence that of the two men inside the CVS at the time of the robbery, the one most closely resembling Sklyarov, and later identified as Sklyarov by both Wilkinson and Conner, pointed a firearm at the store’s employees and demanded drugs. Officers subsequently found clothing matching that worn by the perpetrator in the apartment where Sklyarov was staying. Officers also found several

Oxycontin tablets in the apartment as well as Sklyarov's wallet, containing almost three hundred dollars. Thus, the State presented circumstantial evidence of Sklyarov's guilt.

Sklyarov is asking this Court to reweigh the evidence and judge Conner's credibility, which we will not do. The evidence presented at trial is sufficient to support his convictions.

2. Admission of Evidence

Sklyarov asserts that the trial court abused its discretion in admitting his wallet into evidence and publishing it to the jury. Specifically, he argues that the publication prejudiced him because satanic symbols were inscribed on the wallet.³

"Generally, a trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion." *Hape v. State*, 903 N.E.2d 977, 991 (Ind. Ct. App. 2009), *trans. denied*. We will reverse a trial court's decision only if it is clearly against the logic and effect of the facts and circumstances of the case. *Id.* "Even if the decision was an abuse of discretion, we will not reverse if the admission of evidence constituted harmless error." *Id.*

Here, we do not decide whether the trial court improperly admitted and published the wallet because we conclude any error to be harmless.

No error in the admission of evidence is grounds for setting aside a conviction unless such erroneous admission appears inconsistent with substantial justice or affects the substantial rights of the parties. The improper admission of evidence is harmless error when the conviction is supported by such substantial independent evidence of guilt as to satisfy the

³ According to Sklyarov, the wallet "was clearly marked with [s]atanistic symbols." Sklyarov's Br. at 12. Sklyarov, however, has failed to provide a photograph of this exhibit for our review.

reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction.

Lafayette v. State, 917 N.E.2d 660, 668 (Ind. 2009) (internal citations omitted). “A reversal may be obtained only if the record as a whole discloses that the erroneously admitted evidence was likely to have had a prejudicial impact upon the mind of the average juror, thereby contributing to the verdict.” *Wales v. State*, 768 N.E.2d 513, 521 (Ind. Ct. App. 2002).

Conner testified that he and Sklyarov robbed the store. Wilkinson identified Sklyarov from surveillance footage, and Sklyarov matched the description given by CVS employees. Officers also found clothing matching that worn by the perpetrator where Sklyarov was staying.

As to references to Satanism, Sklyarov testified regarding the money found in his wallet as follows:

Q. What did they give you the money for?

A. Basically, to sum it up, I’m a high priest of magic and I was teaching them some magic and they were helping me out once in a while. It was basically that.

Q. You were teaching them magic. What type of magic?

A. Paganism, things—dark forms of paganism, things like that basically. Satanism, you can call it that.

....

Q. Talk to me again about this, you were a high priest in what?

A. In Satanism.

(Tr. 240-41).

Given the evidence and testimony, we cannot say that the probable impact of the admission and publication of the wallet affected Sklyarov's substantial rights or prejudiced him. Therefore, any error in admitting the evidence must be disregarded as harmless.

3. Inappropriate Sentence

Sklyarov asserts that the trial court erred in sentencing him. Specifically, he argues that the trial court failed to consider mitigating circumstances and that his sentence is inappropriate.

A sentence that is within the statutory range is subject to review only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). A trial court may abuse its discretion 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 sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law.

Id. at 490-91. However, the relative weight or value assignable to reasons properly found, or to those which should have been found, is not subject to review for abuse of discretion. *Id.*

a. *Mitigating circumstances*

Sklyarov asserts that the trial court failed to consider the following mitigators: his minor criminal history and that he “was born and raised in the Ukraine (Russia) until he was nine (9) years of age, at which time he moved to the United States.” Sklyarov’s Br. at 19.

The failure to find a mitigating circumstance clearly supported by the record may imply that the trial court overlooked the circumstance. The trial court, however, is not obligated to consider “alleged mitigating factors that are highly disputable in nature, weight, or significance.” The trial court need enumerate only those mitigating circumstances it finds to be significant. On appeal, a defendant must show that the proffered mitigating circumstance is both significant and clearly supported by the record.

Rawson v. State, 865 N.E.2d 1049, 1056 (Ind. Ct. App. 2007) (internal citations omitted), *trans. denied*.

We note that Sklyarov provides no authority in support of the mitigating circumstances set forth in his brief. Thus, these issues are waived. *See Bonner v. State*, 776 N.E.2d 1244, 1251 (Ind. Ct. App. 2002) (stating that a party waives any issue raised on appeal where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record), *trans. denied*. Waiver notwithstanding, we shall address these purported mitigating circumstances.

Sklyarov argues that the trial court should have considered his criminal history to be a mitigating circumstance. We disagree.

“Trial courts are not required to give significant weight to a defendant’s lack of criminal history.” *Stout v. State*, 834 N.E.2d 707, 712 (Ind. Ct. App. 2005), *trans.*

denied. “This is especially so when a defendant’s record, while felony-free, is blemished.” *Id.*

In this case, the record shows that Sklyarov has three prior convictions, one of which is a felony conviction. Thus, we cannot say that the trial court abused its discretion in failing to find his criminal history to be a mitigating circumstance.

Sklyarov also contends that the trial court should have considered his immigration to the United States approximately thirteen years ago as a mitigating circumstance. We, however, can discern no reason to afford mitigating weight to Sklyarov’s immigration history; furthermore, Sklyarov cites no authority in support of his position.

Sklyarov has failed to show that the proffered mitigating circumstances are both significant and clearly supported by the record. Thus, we find no abuse of discretion in the finding of mitigating circumstances. *See Rawson*, 865 N.E.2d at 1056.

b. *Inappropriate sentence*

Sklyarov also argues that his sentence is inappropriate. We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. App. R. 7(B). It is the defendant’s burden to “persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.” *Anglemyer*, 868 N.E.2d at 494 (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

In determining whether a sentence is inappropriate, the advisory sentence “is the starting point the Legislature has selected as an appropriate sentence for the crime committed.” *Childress*, 848 N.E.2d at 1081. Indiana Code section 35-50-2-5 provides

that a person who commits a class B felony “shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years.” Here, the trial court sentenced Sklyarov to fourteen years.

As to the nature of Sklyarov’s offense, the record discloses that he put two people in fear as he pointed a handgun at them and demanded drugs. He then took six hundred tablets of Oxycontin, some of which he sold.

As to Sklyarov’s character, this is neither his first drug-related conviction nor felony conviction. Thus, he clearly has a disregard for the law. We cannot say that his sentence is inappropriate.

Affirmed.

BRADFORD, J., and BROWN, J., concur.