

STATEMENT OF THE CASE

Appellant-Defendant, Roy Hersley (Hersley), appeals his conviction and sentence for Count I, dealing in marijuana, a Class C felony, Ind. Code § 35-48-4-10; Count II, theft, a Class D felony, I.C. § 35-43-4-2(a); and his two adjudications as a habitual offender, I.C. §§ 35-50-2-10, 35-50-28.

We affirm.

ISSUES

Hersley raises two issues on appeal, which we restate as:

- (1) Whether the trial court abused its discretion when it instructed the jury to continue deliberating; and
- (2) Whether Hersley's sentence is appropriate in light of his character and the nature of the crime.

FACTS AND PROCEDURAL HISTORY

In June of 2010, Indiana State Police Drug Enforcement Detective Tamara Watson (Detective Watson), together with the Greensburg Police Department, initiated an investigation into potential drug-dealing in Decatur County, Indiana. On June 10, 2010, while working undercover, Detective Watson received a text message from Dawn Roberts (Roberts), Hersley's niece, offering to obtain marijuana for Detective Watson. Detective Watson went to Roberts' house where she met with Hersley. Hersley told Detective Watson that "he could just about get anything [she] needed." (Transcript p. 168). They all left in Detective Watson's vehicle and Hersley gave Detective Watson

driving directions. When they reached a trailer park, Hersley exited the car and entered a trailer. Hersley returned with two bags of marijuana. Detective Watson handed Hersley \$260 in exchange for the marijuana, which weighed 50.2 grams, and Hersley took the money to the trailer. After Hersley returned, Detective Watson drove everyone back to Roberts' house. Hersley informed Detective Watson that he could take her to Indianapolis because "for what [she] paid [] he could get a lot more in Indianapolis." (Tr. p. 174). Detective Watson declined the offer.

On June 23, 2010, Detective Watson met again with Hersley because Hersley had texted her about more marijuana. During this buy, Detective Watson was also interested in buying Oxycontin. Hersley and Detective Watson drove to a trailer park together. Detective Watson handed Hersley \$300, Hersley exited the vehicle and told Detective Watson that he would obtain an ounce of marijuana and five Oxycontin. After twenty-five minutes, Hersley had still not returned. After texting him, Hersley replied that he was not coming back. When Detective Watson inquired after the money, Hersley replied "[w]hat money?" (Tr. p. 189). The money was never recovered.

On September 8, 2010, the State filed an Information, charging Hersley with Count I, dealing in marijuana, a Class C felony, I.C. § 35-48-4-10 and Count II, theft, a Class D felony, I.C. § 35-43-4-2(a). On September 24, 2010, the State amended the Information, including an habitual substance offender sentence enhancement, I.C. § 35-50-2-10 on Count I, and an habitual offender sentence enhancement, I.C. § 35-50-28 on Count II. On February 21, 2011, the State filed a second amendment, adding Count V, conspiracy to deal in a controlled substance, a Class B felony, I.C. §§ 35-48-4-2(a); 35-

41-5-2. On March 22, 2011 through March 23, 2011, a jury trial was conducted. At the close of the evidence, the jury found Hersley guilty of Counts I and II, and during the second phase of the trial, Hersley was found guilty on both enhancements. The jury found Hersley not guilty on the Class B felony conspiracy to deal in a controlled substance. On April 20, 2011, during a sentencing hearing, the trial court sentenced Hersley to eight years on Count I, with an eight-year enhancement for his habitual substance offender adjudication, and three years on Count II, with a four and one-half year enhancement for his habitual offender adjudication. The trial court ordered the sentences to run consecutively, with exception of the four and one-half year enhancement which was to run concurrent with the sentence for the first enhancement. Hersley's aggregate term amounted to nineteen years executed at the Department of Correction.

Hersley now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Jury Deliberations

Less than two hours into jury deliberations, the jurors sent a note to the trial court, asking "what do we do if eleven people say guilty, and one says not guilty?" (Tr. pp. 264-65). The trial court reconvened with counsel outside the presence of the jury and informed both parties of the jury's question. The State argued that the jury "should be instructed that they need to keep trying to deliberate and trying to come to a verdict." (Tr. p. 265). Defense counsel requested the trial court to inquire into the nature of the "impasse" because he did not "want to sent them a message that [] the one potential juror felt like they just need to change their vote[.]" (Tr. pp. 265-66). The trial court noted

that “I think we’re still a little bit too early in the game for the hopelessly deadlocked, so I’ll send them a note that says they need to continue deliberating.” (Tr. p. 266). The jury returned later that day and found Hersley guilty on four Counts and not guilty on one Count.

Hersley now contends that the trial court abused its discretion when it informed the jury that they had to continue deliberating. Specifically, he asserts that the “jury had clearly reached a stalemate,” and therefore, the trial court should have “attempted to ferret out the source of the potential deadlock” before advising them to deliberate further. (Appellant’s Br. p. 9). Hersley maintains that “[t]elling the jury to continue deliberating when they’ve reached a potential deadlock places the deliberative process at risk” as the dissenter may feel pressured to change his or her vote to end the process. (Appellant’s Br. p. 10).

Indiana trial courts have a great leeway to facilitate and assist jurors in the deliberative process, in order to avoid mistrials. *Ronco v. State*, 862 N.E.2d 257 (Ind. 2007). Indiana Jury Rule 28 instructs trial courts on how to proceed when faced with a jury impasse:

If the jury advises the court that it has reached an impasse in its deliberations, the court may, but only in the presence of counsel, and, in a criminal case the parties, inquire of the jurors to determine whether and how the court and counsel can assist them in their deliberative process. After receiving the jurors’ response, if any, the court, after consultation with counsel, may direct that further proceedings occur as appropriate.

Thus, Rule 28 confers discretionary authority for “further proceedings” only at moments of “impasse.” An impasse is defined as “a position from which there is no escape, a

deadlock; [] a complete standstill.” *See Litherland v. McDonnell*, 796 N.E.2d 1237, 1241 (Ind. Ct. App. 2003).

In *Ronco*, relied upon by Hersley, one of the jurors, upon being read a final instruction, commented that “it was going to be a long night.” *Id.* at 258. Our supreme court concluded that a question about a jury instruction did not come close to a deadlocked jury. *Id.* at 260. The court noted that a question is not an impasse, nor does one juror’s long night comment suffice to make it such. *Id.* Rather, the supreme court stated that indication of an impasse must come from the jury’s leader or from the jury as a whole. *Id.* Likewise, here, we cannot find that the jury had entered an impasse or was hopelessly deadlocked. The jury was barely two hours into deliberations and its question did not give an indication that it was deadlocked and unable to progress further.

Additionally, when an impasse has not occurred, the trial court may continue further proceedings as necessary:

If, after the jury retires for deliberation:

(1) there is a disagreement among the jurors as to any part of the testimony;
or

(2) the jury desires to be informed as to any point of law arising in the case; the jury may request the officer to conduct them into court, where the information required shall be given in the presence of, or after notice to, the parties or the attorneys representing the parties.

I.C. § 34-36-1-6.

In the case before us, upon receipt of the jury’s question, the trial court consulted with counsel of both parties and instructed the jury to continue deliberating. The trial court did not focus on a single piece of evidence or an instruction. There is no evidence in the record that a juror felt compelled to change his or her vote based on the trial court’s

advice. As a matter of fact, the jury even acquitted Hersley on one Count. Therefore, we conclude that the trial court's instruction was not an abuse of discretion.

II. Sentencing

Next, Hersley contends that the trial court abused its discretion when it imposed an aggregate term of nineteen years executed. As long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *aff'd 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.* Although a trial court may have acted within its lawful discretion in determining a sentence, Appellate Rule 7(B) provides that the appellate court may revise a sentence authorized by statute if the appellate court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Id.* On appeal, it is the defendant's burden to persuade us that the sentence imposed by the trial court is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

With respect to the nature of the crime, we note that Hersley offered to supply Detective Watson with any drugs she wanted, and ended up selling her more than 50 grams of marijuana. Although he claims he was merely a middleman, he knew where to get his hands on large quantities of marijuana in both Greenwood and in Indianapolis. Moreover, not content with just one drug sale, Hersley took the initiative to set up a second transaction and then stole \$300 from Detective Watson. Hersley now makes the disingenuous argument that “[w]hile society doesn't want to encourage drug addiction,

this buyer was already allegedly addicted, thus one would expect she'd find her drug from someone else if Hersley hadn't help provide it.” (Appellant's Br. p. 13). By refusing to acknowledge the root of the problem, Hersley sticks his head in the sand, making it sound as if he is providing society with an invaluable service—nothing could be further from the truth.

Turning to his character, we note that Hersley's extensive criminal history spans the past nineteen years, starting from when he was eighteen years old. He has eleven criminal convictions, ranging from thefts, driving while intoxicated, possession of marijuana, resisting law enforcement, and forgery. As noted by the trial court, Hersley was released from jail in March of 2010 and less than three months later he was again breaking the law. At no point did Hensley accept responsibility or show remorse. Rather, he attempted to shift blame to the officers, objecting that “I just got kind of suckered into it.” (Tr. p. 351). Additionally, in his pre-sentence investigation report, Hersley admitted to being an alcoholic and daily user of marijuana. Therefore, on these considerations, we find that Hersley's sentence is not inappropriate in light of the nature of the charges and his character.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion when it advised the jury to continue deliberating and we find that Hersley's sentence is not inappropriate in light of his character and the nature of the crime.

Affirmed.

NAJAM, J. and MAY, J. concur