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IN THE COURT OF APPEALS OF INDIANA

STEVEN WRIGHT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A04-0604-CR-193
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable William C. Menges, Jr., Judge
Cause No. 34D01-0410-FA-325

December 12, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Chief Judge

Following a jury trial, Steven Wright appeals his convictions for possession of cocaine as a Class B felony,[1] and resisting law enforcement, a Class A misdemeanor.[2] Wright raises three issues that we consolidate and restate as:

I. Whether the trial court erred when it refused Wright's tendered jury instruction that identified statutory defenses to the element of possessing the cocaine within one thousand feet of a family housing complex.

II. Whether the trial court erred in sentencing Wright.

We affirm.

FACTS AND PROCEDURAL HISTORY

At approximately 10:00 p.m. on October 4, 2004, under the direction of the Kokomo Police Department, a confidential informant ("CI") went to an apartment building on Mulberry Street in Kokomo to attempt to make a controlled buy of cocaine from a man known as "Popcorn." The CI wore an audio transmit wire that allowed police to monitor and record the drug transaction, and police gave her five twenty dollar bills to use to purchase the drugs. If she encountered trouble or danger, she was told to use the code phrase "big brother." *Tr*. at 48, 71. This was the first occasion that the CI had worked as a confidential informant.

Detective Matthew Roberson dropped off the CI at the designated building, and she went to Popcorn's apartment looking for him; he was not home. She then went to the apartment located downstairs, where she expected to find cocaine. *Id.* at 73. At that location,

[1] *See* IC 35-48-4-6(b)(2)(B)(iii).

[2] *See* IC 35-44-3-3(a).

the CI met Wright, known to Officer Bruce Rood of the Howard County Drug Task Force as "Steve-O." *Id*. 51, 53. The CI spoke with Wright, who she did not know prior to that meeting, and he told her that he "could get [her] some better cocaine" than Popcorn's. *Id*. at 73. The CI gave her one hundred dollars to Wright.

After approximately five minutes, the CI left the apartment with Wright to obtain the drugs. They walked about five blocks to a house located at 703 East Jefferson Street, where a man named Jeremiah lived. While the CI waited in the bathroom of the house, Wright left for approximately fifteen minutes, taking with him the money the CI had given him earlier. Wright returned and made a phone call, then left again for approximately ten minutes. When he returned he gave the CI two fifty-dollar baggies of cocaine. Jeremiah's house was within one thousand feet of a public family housing complex known as the Dunbar Housing Complex in Kokomo. *Id.* at 86, 125.

While the CI was pretending to make a call to a friend to pick her up, Wright became suspicious, and he eventually observed the audio wire she was wearing. Before Wright removed the wire, the CI succeeded in communicating the code phrase "big brother" to police. The CI eventually exited the house and ran down the street until she met Detective Roberson. Officer Rood testified that the audio recording of the CI's encounter with Wright included one full side of one cassette tape and part of the other side, which he testified might be up to forty minutes long. *Tr*. at 61.

When the police arrived at the residence, Wright fled and continued to do so even after officers identified themselves and ordered him to stop. An officer eventually apprehended Wright.

The State initially charged Wright with seven counts related to the events of that night; however, the State later dismissed one charge. During the jury trial, Wright requested that the trial court read to the jury his proposed instruction regarding certain statutory defenses relative to the cocaine possession charge, which was enhanced to a B felony from a D felony because the possession occurred within one thousand feet of the family housing complex. The trial court refused the instruction over Wright's objection, and the jury convicted Wright of the Class B felony possession charge and the Class A misdemeanor resisting law enforcement charge; the jury acquitted Wright of the remaining four charges.

At the sentencing hearing, the trial court identified one aggravator, Wright's "lengthy criminal history." *Tr*. at 288. The court identified no mitigators. For the cocaine possession conviction, the court imposed a fifteen-year sentence with five years suspended, for a ten-year executed sentence; on the resisting law enforcement conviction, the court imposed a one-year sentence, which was to run concurrently to the ten-year executed sentence. Wright now appeals.

DISCUSSION AND DECISION

I. Jury Instruction

Wright was convicted of a Class B felony for possessing cocaine within one thousand feet of a family housing complex. IC 35-48-4-6(b)(2)(B)(iii). Possession of less than three grams of cocaine is ordinarily a Class D felony, but it is elevated to a Class B felony if the possession occurs within one thousand feet of a family housing complex. *Id*. IC 35-48-4-16 provides certain statutory defenses to the offense of possessing near a family housing complex. That statute reads, in relevant part:

(a) For an offense under this chapter that requires proof of:

(3) possession of cocaine, . . . ;

within one thousand (1,000) feet of . . . a family housing complex . . . the person charged may assert the defense in subsection (b) or (c).

(b) It is a defense for a person charged under this chapter . . . that:

(1) a person was briefly in, on, or within one thousand (1,000) feet of . . . a family housing complex . . .; and

(2) no person under eighteen (18) years of age at least three (3) years junior to the person was in, on, or within one thousand (1,000) feet of the . . . family housing complex . . . at the time of the offense.

(c) It is a defense for a person charged under this chapter . . . that a person was in, on, or within one thousand (1,000) feet of . . . a family housing complex . . . at the request or suggestion of a law enforcement officer or an agent of a law enforcement officer.

In this appeal, Wright maintains that the trial court abused its discretion by refusing his tendered instruction no. 4, which tracked the language of IC 35-48-4-16. *See Appellant's App*. at 34.

The purpose of an instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict. *Gravens v. State*, 836 N.E.2d 490, 493 (Ind. Ct. App. 2005). We review a trial court's refusal to give a tendered instruction for an abuse of discretion. *Springer v. State*, 798 N.E.2d 431, 433 (Ind. 2003). We consider: (1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions that are given. *Id*. Each party to an action is entitled to have the jury instructed

on his particular theory of complaint or defense. *Collins v. Rambo*, 831 N.E.2d 241, 245 (Ind. Ct. App. 2005) (quotations omitted). "As a general rule, a defendant in a criminal case is entitled to have the jury instructed on any theory of defense which has some foundation in the evidence." *Howard v. State*, 755 N.E.2d 242, 247 (Ind. Ct. App. 2001). This is the case even if the evidence supporting the defense is weak and inconsistent. *Id*. However, the evidence presented at trial must have some probative value to support the defense. *Id*.

Because the language of Wright's proposed instruction is taken directly from IC 35-48-4-16, it certainly presents a correct statement of the law. We also observe that the defenses of IC 35-48-4-16 were not covered by any other instructions. Accordingly, the essential inquiry in deciding whether the trial court properly refused the instruction is whether there is evidence in the record that supports the giving of the instruction. *Springer*, 798 N.E.2d at 433. Specifically, we examine the question of whether there was evidence in the record to show that (1) Wright was at Jeremiah's house[3] for only a "brief" period of time and no children less than eighteen years of age were at the Dunbar housing complex; and (2) Wright was at the residence at the suggestion or request of an agent of law enforcement, namely the CI. *See* IC 35-48-4-16(b), (c).

In refusing the instruction, the trial court determined that the evidence established that Wright was not at the house for a "brief" time. We agree. Two law enforcement officers testified that the audio tape recording of the entire encounter was between one half hour and an hour in length. *Tr*. at 61, 162. The CI's testimony indicated that she waited in the

[3] It appears to be undisputed that Jeremiah's house sat within one thousand feet of a family housing complex.

bathroom of Jeremiah's house for about twenty-five minutes while Wright obtained the cocaine, which he gave to her upon his return. Jeremiah's testimony was consistent with the CI's estimate of the time spent at his home. No testimony was presented that indicated the time at Jeremiah's house, where the drug deal was consummated, was anything less than thirty to forty minutes. Because we, like the trial court, find that the time was not brief, there is no need to determine whether there were children present because the defense under IC 35-48-4-16(b) requires both prongs: the time within one thousand feet of the housing complex was brief *and* no children were present.[4] Considering the record before us, the evidence did not support the giving of the instruction relative to that defense, and the trial court did not err in refusing it.

Having found a lack of evidence to support the first defense under IC 35-48-4-16, we next examine whether Wright was at the location at the request or suggestion of an agent of law enforcement, here the CI. IC 35-48-4-16(c). Wright argues that the CI, as an agent of law enforcement, instigated the drug sale within one thousand feet of the housing complex, and thus the court should have given the requested instruction. The trial court refused the instruction, finding that the evidence did not support the instruction. Specifically, the evidence at trial was that Wright told the CI that he could obtain better drugs for her than what Popcorn would have had to offer, and he walked with her to Jeremiah's home to get the product. The CI did not previously know Wright or Jeremiah, nor had she ever been to

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[4] We note that the evidence presented at Wright's trial was that Dunbar was a low-rent public housing complex, consisting of twenty-four units, which primarily housed families with children. The evidence further established that this drug sale occurred at 10:00 or 11:00 p.m.

Jeremiah's home. Accordingly, the CI did not select that location as the place for Wright to obtain the drugs for her. We agree with the trial court and find that the evidence did not support giving the instruction.

Wright argues that by refusing the instruction, the trial court improperly removed from the jury's consideration the factual questions of whether the time at the location near the housing complex was "brief" and whether Wright was at the location at the request or suggestion of the CI. Under Indiana law, a defendant is entitled to an instruction on a defense if there is some foundation in the evidence, even if it is weak or inconsistent. *Smith v. State*, 777 N.E.2d 32, 37 (Ind. Ct. App. 2002), *trans. denied* (2003). However, here, we find that the trial court did not err in refusing the requested instruction because Wright did not present *any* evidence that (1) he was at the home near the housing complex for a brief time and that no children were present, or (2) the CI requested or suggested that he go there. Because no evidence supported the giving of the instruction, the trial court did not err in refusing it.[5]

II. Sentencing

Next, Wright challenges his sentence, which was fifteen years for the Class B felony cocaine possession conviction, with five years suspended, and one year for the Class A misdemeanor resisting law enforcement conviction, to be served concurrently with the

[5] We note that the defenses of IC 35-48-4-16 are defenses only to the enhancement element of the possession charge. Subsection (d) expressly states:

> The defense under this section applies only to the element of the offense that requires proof that the . . . possession of cocaine . . . occurred in, on, or within one thousand (1,000) feet of . . . a family housing complex[.]

possession sentence. Sentencing decisions are within the trial court's discretion and will be reversed only upon a showing of an abuse of discretion. *McCray v. State*, 823 N.E.2d 740, 744 (Ind. Ct. App. 2005). We may revise a sentence if, after consideration of the trial court's decision, we conclude that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B).

A Class B felony conviction carries a term of imprisonment for a fixed term of between six and twenty years, with the advisory sentence being ten years. IC 35-50-2-5. A Class A misdemeanor conviction carries the possibility of up to one year of imprisonment. IC 35-50-3-2. Wright asserts that the trial court erred when it imposed an enhanced sentence. Under *Blakely v. Washington*,[6] a trial court may enhance a sentence based only on those facts that are established in one of several ways: (1) as a fact of a prior conviction; (2) by a jury beyond a reasonable doubt; (3) when admitted by a defendant; and (4) in the course of a guilty plea where the defendant has stipulated to certain facts or consented to judicial factfinding. *See Trusley v. State*, 829 N.E.2d 923 (Ind. 2005).

In sentencing Wright, the trial court identified as an aggravator Wright's "lengthy criminal history," noting that Wright had nine previous misdemeanor convictions, ranging from theft to possession of a controlled substance. *Appellant's App*. at 114. Wright concedes he has a criminal history, but essentially claims that it was not serious enough to warrant an enhanced sentence, noting that "[o]nly the worst offense and offenders should be sentenced under the maximum enforcement permitted by law." *Appellant's Br*. at 19. While that is a

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IC 35-48-4-16(d).

[6] 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

correct statement of our law, it has no bearing on Wright; he is not one of the worst offenders, and he did not receive the maximum sentence. To the contrary, Wright's ten-year executed sentence is the equivalent of the advisory sentence under the B felony statute. *See* IC 35-50-2-5. His criminal history was sufficient to justify the five-year enhancement above the advisory ten years. *See McCray v. State*, 823 N.E.2d 740, 744 (Ind. Ct. App. 2005) (defendant's criminal history comprised of mostly nonviolent misdemeanors sufficient to use as aggravator for B felony criminal confinement).

In challenging his sentence, Wright also asserts that the trial court failed to consider two mitigators, namely: (1) he has addiction problems that need attention, which he would not receive if incarcerated; and (2) he made good use of his time while in jail, earning certain certificates. It is within a trial court's discretion to determine both the existence and the weight of a significant mitigating circumstance. *Pennington v. State*, 821 N.E.2d 899, 905 (Ind. Ct. App. 2005). Although a trial court must consider evidence of mitigating factors presented by a defendant, it is neither required to find that any mitigating circumstances actually exist, nor is it obligated to explain why it has found that certain circumstances are not sufficiently mitigating. *Id*. An allegation that the trial court failed to identify or find a mitigating circumstance requires the defendant on appeal to establish that the mitigating evidence is both significant and clearly supported by the record. *Id*.

Here, the presentence investigation report, which the court reviewed prior to the sentencing hearing, established that Wright made good use of his time while incarcerated by earning certain certificates. Then, at the hearing, the trial court acknowledged Wright's "significant cocaine problem." *Appellant's App*. at 114. However, the court explained,

"While that may make your activities understandable it certainly is not a mitigating factor, nor is it something that should be taken lightly by this court." *Id*. at 115. Thus, while the court recognized Wright's proffered mitigators, it did not find either to be significant, nor was it required to do so. *Pennington*, 821 N.E.2d at 905 (court is not compelled to credit mitigating factors in same manner as would the defendant). The trial court did not err in the manner it evaluated the aggravating and mitigating circumstances.

Lastly, Wright briefly invites us to revise his sentence under App. R. 7(B), contending that his sentence was excessive in light of the nature of the offense and his character. For the most part, Wright repeats his claims that no consideration was given to the two offered mitigating circumstances, and his criminal history was not substantial enough to warrant enhancing his sentence. He provides no other argument regarding the nature of the offenses or his character. As we explained, we are not persuaded that the trial court abused its discretion in either its identification or evaluation of the aggravating and mitigating circumstances. We recognize that Wright's criminal history was not the most egregious; however, he did not receive the type of sentence that is reserved for the worst offenders. Wright's sentence was not excessive considering either the nature of his offenses or his character.

Affirmed.

SHARPNACK, J., and MATHIAS, J., concur.