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**IN THE  
COURT OF APPEALS OF INDIANA**

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ERIC NEVELS, )

Appellant-Defendant, )

vs. )

No. 79A02-1006-CR-961

STATE OF INDIANA, )

Appellee-Plaintiff. )

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APPEAL FROM THE TIPPECANOE SUPERIOR COURT  
The Honorable Thomas H. Busch, Judge  
Cause No. 79D02-0909-FA-23

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**April 25, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**DARDEN, Judge**

## STATEMENT OF THE CASE

Eric Nevels appeals his convictions and sentences for two counts of class A felony dealing in cocaine;<sup>1</sup> class A felony conspiracy to commit dealing in cocaine;<sup>2</sup> and class D felony maintaining a common nuisance.<sup>3</sup>

We affirm.

### ISSUES

1. Whether the trial court abused its discretion in admitting evidence.
2. Whether the trial court erred in sentencing Nevels.

### FACTS

On or about August 20, 2009, Detective Brad Curwick, an undercover police officer with the Lafayette Street Crimes Unit, contacted Misty Carey. Claiming to have gotten Carey's telephone number from a mutual acquaintance, Detective Curwick asked Carey if she could obtain some crack cocaine for him. Carey agreed and arranged a drug buy with Eric Nevels, whom Carey knew as "Boy."

Since meeting Nevels in May of 2009, Carey had "met him a lot for drugs," (tr. vol. 1 at 157), "[p]robably on an every day basis." *Id.* at 158. At the time, Nevels lived

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<sup>1</sup> Ind. Code § 35-48-4-1.

<sup>2</sup> I.C. §§ 35-41-5-2; 35-48-4-1.

<sup>3</sup> I.C. § 35-48-4-13.

at 1416 Alabama Street with his girlfriend, Esther Harris, and Anthony Price, who went by the nickname “Dred.”<sup>4</sup>

After Carey obtained “a hundred dollars worth of crack” from Nevels, Detective Curwick met Carey at her apartment and completed the drug buy. *Id.* at 138. In return for arranging the drug buy, Carey took some of the crack cocaine. “About an hour later,” Carey telephoned Detective Curwick and arranged a second drug buy for him. *Id.* at 139.

The next evening, officers arrested Carey at her home. Officers informed Carey that “if [she] could help them, then [she] wouldn’t go to jail at that time.” *Id.* at 141. Carey therefore agreed to act as a confidential informant (“CI”).

At approximately 11:00 p.m. on August 24, 2009, officers with the Street Crimes Unit prepared Carey for a controlled drug buy. In so doing, they searched Carey to confirm that she had no illegal contraband or narcotics on her person, fitted her with a body wire transmitter, and gave her buy money. Carey then telephoned Nevels. Nevels agreed to sell Carey “a hundred dollars worth of crack,” *id.* at 124, and told her to meet him near the intersection of 14th and Grove Streets, “one block south of 14<sup>th</sup> and Alabama.” (Tr. Vol. 2 at 233). After undercover officers drove Carey to the meeting place, she again telephoned Nevels, who instructed her to exit the vehicle and wait for him.

Nevels and Price arrived shortly thereafter in a red Pontiac Grand Prix. Price sat in the front passenger’s seat. Carey could not see the driver’s face because it was dark,

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<sup>4</sup> Price’s nickname is spelled both as “Dread” and “Dred” in the transcript.

but when he spoke, she recognized Nevels' voice. Another person sat in the vehicle's back seat; Carey, however, could not identify the person.

Carey walked up to the front passenger side and "dropped the money on [Price's] lap[.]" (Tr. Vol. 1 at 125). Nevels "handed Dread the crack, Dread handed it to [Carey]," and then they "took off." *Id.* Carey returned to the undercover officers' vehicle and gave them "two knotted plastic corner baggies" containing 1.07 grams of crack cocaine. (Tr. Vol. 2 at 7).

Approximately one hour later, during the early morning of August 25, 2009, undercover officers prepared Carey for a second controlled drug buy. Carey again telephoned Nevels and asked for "another hundred dollars worth of crack." (Tr. Vol. 1 at 126). Nevels told her "to come on through." *Id.* Shortly thereafter, undercover officers dropped Carey off near Nevels' residence and watched her walk toward the back of the residence. Officers also observed a red Pontiac Grand Prix parked behind the residence.

Price let Carey into the kitchen. After Carey told Nevels that she wanted "[a] hundred dollars worth of crack," he took two baggies of crack cocaine out of the freezer and gave one to Carey. *Id.* at 128. Carey then returned to the officers' waiting vehicle and gave them a "knotted plastic corner baggie" containing 1.30 grams of crack cocaine. (Tr. Vol. 2 at 9). Carey subsequently identified both Nevels and Price from photographic arrays.

On August 26, 2009, officers with the Street Crimes Unit collected the trash from 1416 Alabama Street. They discovered several plastic baggies with missing corners,

which was indicative of crack cocaine being packaged by “twist[ing] it into the bottom of the bags” and then tying and tearing off the corners. (Tr. Vol. 1 at 86). Some of the baggies later tested positive for crack cocaine. Officers also found what appeared to be marijuana leaves, stems, and seeds.

At approximately 6:20 a.m. on August 28, 2009, officers executed a search warrant for 1416 Alabama Street. Officers found and secured Price and Harris in the downstairs living room. While securing Price, Officer Brandon Withers noticed a handgun sticking out from under the sofa. A search revealed a second handgun under the sofa. Officers located and secured Nevels in an upstairs bedroom.

In the kitchen, officers discovered a digital scale on top of a cabinet. The scale “appeared to have cocaine residue” on it. (Tr. Vol. 2 at 180). Officers also found a “small amount of loose marijuana” near the scale. *Id.* at 183. A search of the freezer revealed twelve plastic baggies, containing 8.18 grams of “crack cocaine inside a plastic freezer bag full of frozen hamburger patties.” *Id.* at 10. Officers also discovered three plastic baggies, containing a total of “16.88 grams of crack cocaine,” hidden inside of a man’s Polo-brand shoe. *Id.* at 14. Officers discovered the shoe in the closet of an upstairs bedroom used by Price. A map of the area later revealed that 1416 Alabama Street was located within 1,000 feet of an elementary school.

On September 3, 2009, the State charged Nevels with Count 1, dealing in cocaine as a class A felony; and Count 2, possession of cocaine as a class A felony. On October 29, 2009, the State filed an amended information, charging Nevels with Count 1, dealing

in cocaine as a class A felony; Count 2, possession of cocaine as a class A felony; Count 3, dealing in cocaine as a class A felony; Count 4, possession of cocaine as a class B felony; Count 5, maintaining a common nuisance as a class D felony; and Count 6, conspiracy to commit dealing in cocaine as a class A felony.

On April 26, 2010, Nevels' counsel filed a motion to exclude Carey's testimony, or in the alternative, to continue the trial because he had not obtained Carey's information until the morning of April 26, 2010. On April 27, 2010, the trial court heard counsels' arguments regarding Nevels' motion to exclude; denied the motion to exclude; but granted Nevels' counsel time to depose Carey prior to her testifying. Thereafter, the trial court commenced the three-day jury trial.

During the trial, Carey testified regarding her role as a CI. Also during the trial and over Nevels' objection, the trial court admitted into evidence two photographs taken from Nevels' bedroom during the search of his house.

The jury found Nevels guilty as charged. For purposes of sentencing, the trial court merged Count 2 with Count 1 and merged Count 4 with Count 3. The trial court ordered a pre-sentence investigation report ("PSI") and held a sentencing hearing on June 8, 2010.

The PSI showed that Nevels had the following convictions arising out of Cook County, Illinois: six counts of felony aggravated unlawful use of a weapon in 2005, which the trial court merged into one count; criminal damage to property in 2007; and felony possession of a controlled substance in 2008. The PSI further showed that Nevels

had been arrested in Illinois for possession of marijuana in 2002, 2003, and 2005 and had been arrested for misdemeanor battery in 2007; according to the PSI, these charges subsequently were “stricken from docket with leave to reinstate . . . .” (State’s App. 3). The PSI also indicated that Nevels was on probation for possession of a controlled substance when he was arrested for the instant offenses on August 28, 2009.

Nevels presented several mitigating factors, including his age of twenty-five years; that he graduated from high school; his enrollment in community college at the time of his arrest; his employment history; the hardship his imprisonment would impose on his mother and sister; his remorse; and his acceptance of responsibility.

As to Nevels’ age, the trial court found him “old enough . . . to take full responsibility for [his] actions.” (Tr. Vol. 4 at 58). The trial court further found as follows:

The Defendant does have a history of criminal . . . behavior . . . . There is not a lot of employment on your record. Last worked four years ago. . . . [I]t does appear that you are supporting yourself with selling drugs and perhaps your student loans. Committing the crime while on probation is an aggravating factor . . . . The Court does find that the seriousness of the crime is an aggravating factor because there were large quantities of drugs and the presence of firearms. I will find that the lack of community ties is an aggravating factor. I don’t think you finished a semester at Ivy Tech so it’s not clear that that was an educational effort as much as a way of getting some money and certainly there’s nothing in the . . . record that indicates any positive connections with this community. And the gang affiliation I think I need to say something about that. Your self-report is that you were in the gang until you were eighteen but that after you’re eighteen is when the trouble began. The aggravated use of a weapon occurred when you were eighteen almost nineteen. The other arrests occurred, over the time the only arrests you had prior to that time were relatively minor and didn’t lead to convictions. . . . [A]nd so I do find that to be an aggravating factor

as well. The mitigating factors, the Defendant's remorse, his family support, and his difficult childhood having lost his . . . father.

*Id.* at 58-60. The trial court then sentenced Nevels to forty-six years for each class A felony conviction and two years for the class D felony conviction. The trial court ordered that the sentences be served concurrently for an executed sentence of forty-six years.

Additional facts will be provided as necessary.

## DECISION

### 1. Admission of Evidence

Nevels asserts that the trial court abused its discretion in admitting certain evidence. Specifically, he argues that the trial court improperly admitted Carey's testimony and the two photographs discovered in Nevels' bedroom during the execution of the search warrant.

[T]he admission or exclusion of evidence is within the sound discretion of the trial court, and we will reverse the trial court's determination only for an abuse of that discretion. An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the trial court. In reviewing the admissibility of evidence, we consider only the evidence in favor of the trial court's ruling and any unrefuted evidence in the appellant's favor. As a rule, errors in the admission or exclusion of evidence are to be disregarded as harmless unless they affect the substantial rights of a party. In determining whether an evidentiary ruling affected a party's substantial rights, we assess the probable impact of the evidence on the trier of fact.

*Redding v. State*, 844 N.E.2d 1067, 1069 (Ind. Ct. App. 2006) (internal citations omitted).

a. *Carey's testimony*

Nevels maintains that the late-disclosure of Carey's identity required the exclusion of her testimony at trial. We disagree.

Several specific factors have been deemed helpful in determining whether to exclude witness testimony: (1) the point in time when the parties first knew of the witness; (2) the importance of the witness's testimony; (3) the prejudice resulting to the opposing party; (4) the appropriateness of instead granting a continuance or some other remedy; and (5) whether the opposing party would be unduly surprised and prejudiced by the inclusion of the witness's testimony.

*Rohr v. State*, 866 N.E.2d 242, 245 (Ind. 2007).

Generally, a continuance is the proper remedy for a discovery violation. *Warren v. State*, 725 N.E.2d 828, 832 (Ind. 2000). "Exclusion of evidence as a remedy for a discovery violation is only proper where there is a showing that the State's actions were deliberate or otherwise reprehensible, and this conduct prevented the defendant from receiving a fair trial." *Id.*

Here, the State disclosed Carey's identity, impeachable offenses and other pertinent information to Nevels' counsel on April 23, 2010, several days prior to the trial's commencement. Due to a miscommunication, however, Nevels' counsel did not receive the information until the day before trial, on April 26, 2010. The State, however, represented to the trial court that Nevels' counsel knew Carey's identity prior to the State identifying her; Nevels' counsel did not deny this assertion. The trial court granted Nevels' time to depose Carey before she testified. Nevels' counsel also cross-examined Carey extensively regarding her drug use, prior convictions, charges against her, and her

motives for cooperating with the State. We therefore cannot say that inclusion of Carey's testimony prejudiced Nevels. Accordingly, we find no abuse of discretion in admitting her testimony.

b. *Photographs*

Nevels also argues that the trial court abused its discretion in admitting the two photographs discovered in this bedroom. He contends that the photographs "were irrelevant, misleading, extremely prejudicial and unnecessary given the evidence presented." Nevels' Br. at 11.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Ind. Evidence Rule 401. "Generally speaking, relevant evidence is admissible, and irrelevant evidence is inadmissible." *Southern v. State*, 878 N.E.2d 315, 321 (Ind. Ct. App. 2007) (quoting *Sandifur v. State*, 815 N.E.2d 1042, 1048 (Ind. Ct. App. 2004)).

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, or needless presentation of cumulative evidence.

Evid. R. 403. "The trial court has wide latitude in weighing these factors, and we review its decision only for an abuse of discretion." *Prewitt v. State*, 761 N.E.2d 862, 869 (Ind. Ct. App. 2002).

Both of the photographs admitted into evidence depict Nevels and Price together. In one of the photographs, both men are holding cash, and Nevels is seen making an obscene hand gesture. The other photograph shows Price making an ambiguous hand gesture while Nevels again is seen making an obscene hand gesture. Nevels maintains that the photographs' prejudicial effect outweighs their probative value because "the uncontroverted evidence at trial . . . was that the defendants knew one another well," and "although the photographs show money in the hands of Price and Nevels, it is impossible to know how much money they are holding." Nevels' Br. at 10.

Even if the trial court improperly admitted the photographs, we conclude that any error in the admission of the evidence was harmless. "The improper admission of evidence is harmless error when the conviction is supported by substantial independent evidence of guilt sufficient to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction." *Wertz v. State*, 771 N.E.2d 677, 684 (Ind. Ct. App. 2002) (quoting *Headlee v. State*, 678 N.E.2d 823, 826 (Ind. Ct. App. 1997)).

In this case, the State presented substantial evidence of Nevels' guilt. Carey testified regarding Nevels' participation in the controlled drug buys, and a search of Nevels' residence revealed large quantities of drugs and drug paraphernalia. In light of this evidence, any error in admitting the photographs was harmless.

## 2. Sentencing

Nevels asserts that the trial court erred in sentencing him. Specifically, he argues that the trial court found improper aggravating circumstances; failed to consider his age as a mitigating circumstance; 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. *Aggravating circumstances*

Nevels maintains that the trial court abused its discretion in finding his lack of community ties, former gang affiliation, and “seriousness of the crime” as aggravating circumstances. Nevels’ Br. at 14. Nevels, however, does not dispute his criminal history or that he was on probation when he committed the instant offenses.

A single circumstance may be sufficient to support an enhanced sentence. *Edwards v. State*, 842 N.E.2d 849, 855 (Ind. Ct. App. 2006). Here, the record clearly

supports the finding of Nevels' criminal history, including felony convictions, one of which was a drug-related conviction, as an aggravating circumstance.<sup>5</sup> In addition, the record shows that Nevels committed the instant offenses while still on probation, which is a separate aggravating circumstance. *See Ramon v. State*, 888 N.E.2d 244, 255 (Ind. Ct. App. 2008) (finding that "the fact that a defendant committed a crime while on probation is a factor distinct from the defendant's criminal history"). Accordingly, we find any error in the finding of aggravating circumstances to be harmless.

b. *Mitigating circumstance*

Nevels also argues that the trial court failed to find his youthful age to be a mitigating circumstance.

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).

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<sup>5</sup> We question the trial court's finding of "lack of community ties," without more, as a valid aggravating circumstance. This court has held that lack of community ties "is more properly considered as reflecting the offender's character for the purpose of sentencing," as an offender's community ties "assist[s] the trial court in determining whether the offender is suitable for community corrections or probation and when an offender lacks those ties, the trial court is less able to make an accurate determination of the offender's character." *Lamar v. State*, 915 N.E.2d 193, 196 (Ind. Ct. App. 2009). Where the trial court finds this to be an aggravating circumstance, it must explain why this circumstance is considered an aggravator. *See Anglemyer*, 868 N.E.2d at 490 ("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.").

It is clear from the sentencing statement that the trial court considered Nevels' age as a mitigating factor but did not find it to be significant. As to the weight assigned to this mitigating circumstance, it is not subject to review for abuse of discretion. *See Anglemyer*, 868 N.E.2d at 490. Thus, we find no abuse of discretion.

*c. Inappropriate sentence*

Nevels also asserts that his sentence is inappropriate "given the relatively minor amount of drugs seized"; "the fact that [he] was not in possession of, nor used the guns seized at the home"; and "no drugs were found on [his] person." Nevels' Br. at 16. Again, we disagree.

We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 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. The advisory sentence for a class A felony is thirty years. I.C. § 35-50-2-4. The potential maximum sentence is fifty years. *Id.* Pursuant to Indiana Code section 35-50-2-7, the advisory sentence for a class D felony is one and one-half years, and the potential maximum sentence is three years. Here, the

trial court sentenced Nevels to concurrent sentences of forty-six years for each class A felony conviction and two years for the class D felony conviction.

As to the nature of Nevels' offense, the record discloses that he possessed more than twenty-five grams of crack cocaine and sold crack cocaine on at least two occasions. Evidence found in Nevels' home and trash, including several plastic baggies and a scale, indicated that Nevels dealt drugs on an ongoing basis. Furthermore, this activity took place near an elementary school.

As to Nevels' character, this is neither his first drug-related conviction nor felony conviction. He has a criminal history of convictions, charges, arrests, and at least one probation violation. Thus, Nevels clearly has a disregard for the law. *See, e.g., Cotto v. State*, 829 N.E.2d 520, 526 (Ind. 2005) (finding that a defendant's record of arrests "may be relevant to the trial court's assessment of the defendant's character in terms of the risk that he will commit another crime").

In this case, the jury convicted Nevels of four class A felonies, one class B felony and one class D felony. The trial court sentenced Nevels to a total executed sentence of forty-six years, four years less than the maximum sentence for a class A felony. We cannot say that this sentence is inappropriate.

Affirmed.

NAJAM, J., and BAILEY, J., concur.