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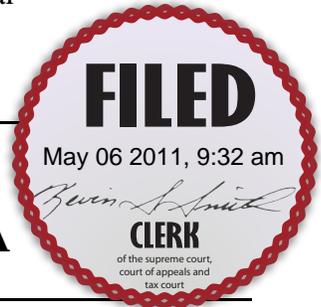
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**IN THE  
COURT OF APPEALS OF INDIANA**

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JERMARCUS L. GRANDBERRY, )  
 )  
Appellant-Defendant, )  
 )  
vs. )  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

No. 02A05-1010-CR-643

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APPEAL FROM THE ALLEN SUPERIOR COURT  
The Honorable John F. Surbeck, Jr., Judge  
Cause No. 02D04-1005-FB-79

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**May 6, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## **STATEMENT OF THE CASE**

Jermarcus L. Grandberry appeals his conviction and sentence for burglary, as a Class B felony, following a jury trial. Grandberry presents the following issues for review:

1. Whether the evidence is sufficient to support his conviction.
2. Whether the trial court abused its discretion when it refused to admit evidence of bias, prejudice, or interest of a State's witness under Indiana Evidence Rule 616.
3. Whether the trial court abused its discretion when it did not identify certain mitigating circumstances in sentencing Grandberry.
4. Whether Grandberry's sentence is inappropriate under Appellate Rule 7(B) in light of the nature of the offense and his character.

We affirm.

## **FACTS AND PROCEDURAL HISTORY**

On May 9, 2010, Grandberry lived with his then girlfriend, Takelia Stewart, at an apartment at 1910 Hobson Road in Allen County. Grandberry occasionally borrowed Stewart's green Ford Escort hatchback. On May 9, Grandberry borrowed Stewart's car and, at noon, he picked up his brother, Sedrick Grandberry.

At approximately two o'clock, a green Ford Escort pulled into the driveway of 3711 Glencairn Drive in Fort Wayne. Brett Coates, who lived nearby at 3204 Glencairn Drive in Fort Wayne observed from his living room the green Ford Escort pull into his neighbor's driveway. The neighbor was not home. Coates observed an African-American male exit the car and knock on the door at 3711 Glencairn. When there was no answer, the man returned to the car and left. Fifteen minutes later, Coates saw the car

return to the neighbor's home, this time backing up the driveway and through the yard. Coates found that activity to be suspicious and telephoned the police.

On the same afternoon, Harold Friedrich was walking his dog along Victoria Drive in Fort Wayne. When he was near the home at 4612 Victoria Drive, he observed a station wagon back out of the driveway very fast. About twenty-five minutes later, he was walking his dog again in the same area and saw between houses two African-American men carrying a television, but he did not see any cars. Friedrich assumed there had been a robbery, was able to note a partial license plate number from the car that had sped past him, and telephoned the police.

Edwina Snyder was living in Fort Wayne at 4612 Victoria Drive, which lies diagonally from Coates' home and is "directly behind" 3117 Glencairn Drive. Transcript at 160. On May 9, she returned home from a trip to find that her back door was "wide open." Id. at 113. She also found that the lock had been damaged and that the casement window in her kitchen had also been "jimmied open." Id. Snyder then noticed that her television and DVD player were missing. Further inspection revealed that her laptop computer, other computer equipment, CDs, and jewelry were also missing. And she found on the floor a nonoperational rifle that had been hanging over the fireplace. Snyder telephoned the Fort Wayne Police Department.

Grandberry and his brother returned in the car to Stewart's apartment at two-thirty in the afternoon. When they arrived at her apartment, they brought in electronics, a laptop computer, some jewelry, and a DVD player that they had not previously possessed. And they left a television in the car. The men later disposed of the television

in a dumpster. That afternoon, Stewart also found CDs in her car that had not been there before Grandberry had used the car.

Officer Matthew Cline of the Fort Wayne Police Department (“FWPD”) was dispatched to the area of Snyder’s home twice on May 9. On the first occasion, he went to 3117 Glencairn and spoke with Coates. The officer found CDs scattered in the yard and collected them for evidence. On Officer Cline’s second dispatch he went to Snyder’s home. There he assisted the primary officer on the scene and observed the damage to Snyder’s door and window.

Using the partial license plate number provided by Friedrich, police officers identified Stewart’s Escort as the car that had been in the area of Snyder’s home. On May 11, FWPD Detective Joseph Lyon interviewed Stewart at the police department. Stewart gave consent for police to search the vehicle, and officers found some of Snyder’s CDs inside. Stewart told officers that on May 9 she had loaned her vehicle to Grandberry, that Grandberry had returned with his brother in her vehicle at two-thirty on that day, and that Grandberry had in his possession at that time a television, CDs, a laptop computer, and jewelry that he had not had when he had originally borrowed the car.

Subsequently on May 11, Detective Lyon interviewed Grandberry. After being advised of and waiving his Miranda rights, Grandberry admitted that he had borrowed Stewart’s car on the afternoon of May 9, that he had been the only one in control of the car that afternoon, and that he had been with his brother. But he denied having committed the robbery. The detective advised Grandberry that property from 4612 Victoria Drive had been found in a search of Stewart’s car and reminded him that he had

already admitted that only he had had control of the car on the afternoon of May 9. Grandberry replied, “If I had known you were talking about a burglary I never would have admitted to being in that car.” Appellant’s App. at 8.

The State charged Grandberry with burglary, as a Class B felony. A one-day jury trial commenced on September 2, 2010. During the trial, the court sustained the State’s objection to certain testimony by Stewart that was intended to show bias, prejudice, or interest for or against a party. After the close of evidence and deliberations, the jury returned a verdict convicting Grandberry as charged. On September 27, the court held a sentencing hearing. Following arguments, the court sentenced Grandberry to fifteen years executed in the Department of Correction. Grandberry now appeals.

## **DISCUSSION AND DECISION**

### **Issue One: Sufficiency of Evidence**

Grandberry first contends that the evidence is insufficient to support his conviction. When reviewing the claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Rhoton v. State, 938 N.E.2d 1240, 1246 (Ind. Ct. App. 2010), trans. denied. We look only to the probative evidence supporting the verdict and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

To prove that Grandberry committed the offense of burglary, as a Class B felony, the State was required to show that Grandberry broke and entered the dwelling of another

person with the intent to commit a theft. See Ind. Code § 35-43-2-1(1)(B)(i). In challenging the sufficiency of evidence, Grandberry argues only that the State did not prove that he was the person involved in the burglary of Snyder's home. But Stewart testified that Grandberry had borrowed her green Ford Escort on May 9, and Grandberry admitted that he had been the only person in control of the car until he returned it at two-thirty that afternoon. The burglary was committed during that time period, and two witnesses place a green Ford Escort containing one or two African-American men in the car and carrying a television across a yard near Snyder's home. Finally, items taken from Grandberry's home were found in Stewart's car, and Stewart testified that those items had not been in her car before Grandberry's use of the car that day.

Based on the evidence and reasonable inferences from the evidence, the jury could reasonably have concluded Grandberry was one of the men who committed the burglary. Grandberry makes much of the inability of Coates and Friedrich to identify him as the burglar. And he questions Stewart's credibility.<sup>1</sup> But Grandberry's arguments amount to a request that we reweigh the evidence, which we cannot do. Rhoton, 938 N.E.2d at 1246. As such, the evidence is sufficient to support Grandberry's conviction for burglary, as a Class B felony.

### **Issue Two: Exclusion of Evidence**

Grandberry next contends that the trial court abused its discretion when it refused to allow him to cross-examine Stewart on certain issues. The admission or exclusion of evidence rests within the sound discretion of the trial court, and generally we review its

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<sup>1</sup> The State originally charged Stewart with four counts of receiving stolen property, arising from Stewart's attempt to pawn some of the items taken from Snyder's home. The State later dropped those charges.

rulings for an abuse of that discretion. Hinds v. State, 906 N.E.2d 877, 879 (Ind. Ct. App. 2009). An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. Id. Even if the trial court errs in admitting or excluding evidence, this court will not reverse the defendant's conviction if the error is harmless. See Ind. Trial Rule 61. An error is harmless when the probable impact of the erroneously admitted or excluded evidence, in light of all the evidence presented, is sufficiently minor so as not to affect the defendant's substantial rights. Fleener v. State, 656 N.E.2d 1140, 1141-42 (Ind. 1995).<sup>2</sup>

At trial Grandberry attempted to cross-examine Stewart under Evidence Rule 616. That rule provides: "For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible." Evidence Rule 616 should be read in conjunction with Evidence Rule 403, which requires the balancing of probative value against the danger of unfair prejudice. Wood v. State, 804 N.E.2d 1182, 1187 (Ind. 2004) (citation omitted), trans. denied. Under Rule 403, 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 considerations of undue delay, or needless presentation of cumulative evidence."

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<sup>2</sup> In Fleener, our supreme court distinguished the above stated harmless error standard, which applies to evidentiary and other state law rulings, from the reasonable doubt standard that applies to errors potentially affecting the defendant's federal constitutional rights. 656 N.E.2d at 1141-42. We apply the evidentiary standard here in part because Grandberry does not argue that the trial court's evidentiary rulings violated his federal constitutional rights. See Ind. Appellate Rule 46(A)(8)(a).

Grandberry contends that the trial court abused its discretion when it prevented him from cross-examining Stewart about a civil case in which she is a party in order to show that she was biased against him. On this point, Grandberry argues:

During the present case, [Grandberry] attempted to introduce Ms. Stewart's civil litigation and custody battle for her children as a motive for implicating Mr. Grandberry as the burglar. Felony charges and/or incarceration would have an adverse affect [sic] on Ms. Stewart's lawsuit regarding her children in civil family court. The trial court ruled to exclude any testimony of custody matters. The trial court therefore abused its discretion by excluding evidence of bias, prejudice, or interest for Ms. Stewart to testify against Mr. Grandberry.

Appellant's Brief at 14. We cannot agree.

Grandberry's argument turns on the fact that the State had charged Stewart with four counts of receiving stolen property for pawning items taken from Snyder's home and then later dropped the charges. Those facts alone show that Stewart may have had an incentive to cooperate with the State in Grandberry's prosecution. But the jury was made aware of the charges and that they had been dropped. Although the criminal charges against Stewart may have affected her credibility in her custody proceeding, Grandberry has not shown how her status as a party to a custody proceeding makes the filing and dropping of charges more relevant than the mere fact that the charges had been filed and later dropped. Stewart had sufficient incentive to avoid prosecution and possible incarceration regardless of her involvement in the custody proceeding. Grandberry has not shown that the trial court abused its discretion when it refused to allow him to cross-examine Stewart about her custody matter.

Grandberry also contends that the trial court should have allowed him to cross-examine Stewart about mental illness "as evidence of her ability to observe, remember or

recount information regarding this case.” Appellant’s Brief at 14. He asserts that such evidence is admissible to attack a witness’s credibility, as is evidence that a witness has a mental or physical defect that reduces the witness’s ability to perceive or remember events correctly.

But a party may not attempt to impeach a witness by inquiring about that witness’s mental health without also arguing that the witness’s mental health or treatment for mental health issues has affected her ability to observe, remember, or recount events. See Witte v. State, 516 N.E.2d 2, 5 (Ind. 1987). Grandberry has not shown that he argued at trial that Stewart’s mental illness or treatment affected her ability to testify about relevant matters in his case, nor has he asserted as much on appeal. Thus, he has not shown that her mental illness is at all relevant. See id. Grandberry has not shown that the trial court abused its discretion when it refused to allow his cross-examination of Stewart about her mental health.

### **Issue Three: Identification of Mitigators**

Grandberry also argues that the trial court abused its discretion when it sentenced him because it failed to identify certain mitigating factors. Sentencing decisions rest within the sound discretion of the trial court 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 other grounds 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. (quotation omitted).

One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a sentencing statement that 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. Under those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.

Id. at 490-91. Further, “the trial court no longer has any obligation to ‘weigh’ aggravating and mitigating factors against each other when imposing a sentence.” Id. at 491.

Grandberry contends that the trial court abused its discretion when it did not identify certain mitigating factors that he proffered at the sentencing hearing. In particular, he contends that the trial court should have identified the following to be mitigators: the undue hardship of Grandberry’s incarceration on his dependent; Grandberry’s history of substance abuse; his enrollment in college; and that he would benefit from a short term of imprisonment and probation. Again, we cannot agree.

A trial court is free to disregard mitigating factors it does not find to be significant. See Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999). And Grandberry carries the burden on appeal of showing that a disregarded mitigator is significant. See id. Here, in support of his argument that the trial court should have identified his proffered mitigators, Grandberry reasons:

The above listed mitigating circumstances advanced at sentencing were all both significant and clearly supported by the record and imply that the trial court has failed to properly consider them. Had the court not abused it’s [sic] discretion and properly considered the additional mitigating circumstances, reasonably balanced against the lone aggravating

circumstance, Mr. Grandberry should have received the advisory sentence of ten (10) years in the Indiana Department of Correction.

Appellant's Brief at 17. Without more, Grandberry's bald assertion that the circumstances listed above were clearly significant is insufficient. He has not supported his argument with cogent reasoning or citation to the record. As such, the argument is waived. See Ind. Appellate Rule 46(A)(8)(a).

Waiver notwithstanding, Grandberry's argument is without merit. First, Grandberry has not shown that he pays or is ordered to pay any child support for his minor child. And, in the Pre-Sentence Investigation Report ("PSI") he denied the use of marijuana since age seventeen, and he denied ever having used cocaine.<sup>3</sup> Regarding his enrollment in school, Grandberry argued at sentencing that the PSI shows that he was attending Ivy Tech College. But the PSI shows only that Grandberry had attended Ivy Tech "in the past" and had "expressed an interest in returning to college in the future." PSI at 6. Moreover, Grandberry has not shown how attendance at Ivy Tech, without details, constitutes a significant mitigator. Finally, the record does not support his contention that he is a good candidate for short-term imprisonment and probation. Grandberry had his probation revoked in 2003, two suspended sentences revoked in 2008, parole revoked in 2008, and a suspended sentence revoked in 2010. In sum, Grandberry has not shown that any of his proffered mitigators are significant. Therefore, he has not demonstrated that the trial court abused its discretion when it did not identify any of those circumstances as mitigators.

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<sup>3</sup> Despite those denials, Grandberry was convicted of possession of marijuana at age thirty-one and tested positive for cocaine and marijuana at age twenty-two while on felony probation. At the time of sentencing in the present case, Grandberry was thirty-four years old.

#### **Issue Four: Appellate Rule 7(B)**

Finally, Grandberry contends that his sentence is inappropriate in light of the nature of the offense and his character. Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution “authorize[] independent appellate review and revision of a sentence imposed by the trial court.” Roush v. State, 875 N.E.2d 801, 812 (Ind. Ct. App. 2007) (alteration original). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. Revision of a sentence under Appellate Rule 7(B) requires the appellant to demonstrate that his sentence is inappropriate in light of the nature of his offenses and his character. See App. R. 7(B); Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We assess the trial court’s recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). However, “a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.” Roush, 875 N.E.2d at 812 (alteration original).

The Indiana Supreme Court recently stated that “sentencing is principally a discretionary function in which the trial court’s judgment should receive considerable deference.” Cardwell v. State, 895 N.E.2d 1219, 1222 (Ind. 2008). Indiana’s flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented. See id. at 1224. The principal role of appellate review is to attempt to “leaven the outliers.” Id. at 1225. Whether we regard a sentence as inappropriate at the end of the day turns on “our sense of the culpability of the defendant,

the severity of the crime, the damage done to others, and myriad other facts that come to light in a given case.” Id. at 1224.

We first consider Grandberry’s argument that his sentence is not appropriate in light of the nature of the offense. In support, he argues that the offense did not occur while the victim was home and occurred in the middle of the day. Grandberry does not explain how those circumstances show that the breaking and entering of Snyder’s home and theft of her computer and stereo equipment and jewelry render his fifteen-year sentence inappropriate. And the offense left Snyder’s home damaged, and she claimed more than \$17,000 damages.

Grandberry further maintains that “only circumstantial evidence linked [him] to this burglary[.]” Appellant’s Brief at 19. But circumstantial evidence may be sufficient to support a verdict of guilty, provided the jury believe beyond a reasonable doubt that the accused is guilty as charged. Davenport v. State, 749 N.E.2d 1144, 1150 (Ind. 2001). Neither direct evidence nor circumstantial evidence is entitled to any greater weight than the other. Id. We have already determined that the evidence is sufficient to support Grandberry’s conviction. Thus, that point is without merit.

Grandberry next argues that he is “not the most culpable offender that the Indiana Court of Appeals has scrutinized under the statute.” Id. Generally, maximum sentences are appropriate for the worst offenders. Harris v. State, 897 N.E.2d 927, 929 (Ind. 2008). But this is not a guideline to determine whether a worse offender would be imagined. Id. “Despite the nature of any particular offense and offender, it will always be possible to identify or hypothesize a significantly more despicable scenario.” Id. (internal quotation

marks and citation omitted). Here, Grandberry did not receive the maximum sentence, nor are we required to imagine a “more despicable scenario” against which to gauge whether his sentence is inappropriate. See id.

Grandberry also contends that his sentence is inappropriate in light of his character. However, in support, he merely concedes his criminal history: three felony convictions and nine misdemeanor convictions. His convictions span three states and include two prior burglary convictions and a conviction for receiving stolen property. He also points to his enrollment at Ivy Tech. As discussed above, he has not shown how his past enrollment in school has any bearing on our review. And he maintains that he was actively seeking employment at the time of the offense. But he does not cite the record in support of that contention. Grandberry has not shown that his sentence is inappropriate in light of his character.

### **Conclusion**

The evidence is sufficient to support Grandberry’s conviction. He admitted that he had been driving a car at the time of the burglary that eyewitnesses had seen at Snyder’s home around the time of the offense. After he returned the car to his girlfriend, he possessed items that had been taken from Snyder’s home. Grandberry also has not shown that the trial court abused its discretion when it refused to allow him to cross-examine Stewart to show bias, prejudice, or an interest for or against a party. The fact that the State had filed and later dropped charges against Stewart relating to items taken in the burglary did not make her child custody matter relevant. And Grandberry has not

shown or even alleged that her mental illness had any impact on her ability to observe, remember, or recount information. We affirm Grandberry's conviction.

Grandberry also has not demonstrated that the trial court abused its discretion when it did not identify four proffered mitigators. And he has not shown that his fifteen-year sentence is inappropriate in light of the nature of the offense or his character. Thus, we affirm his sentence.

Affirmed.

ROBB, C.J., and CRONE, J., concur.