



## STATEMENT OF THE CASE

Anthony Hollowell appeals his conviction for conspiracy to commit dealing in cocaine, as a Class B felony, and the sentence imposed following a jury trial. We consider the following restated issues:

1. Whether the evidence is sufficient to support his conviction.
2. Whether his conviction for conspiracy and his acquittals on two other charges violate double jeopardy principles.
3. Whether the trial court violated Hollowell's equal protection rights when it overruled his Batson challenges to the peremptory strikes of three African-American potential jurors.
4. Whether his sentence is inappropriate in light of his character and the nature of the offense.

We affirm.

## FACTS AND PROCEDURAL HISTORY

On July 6, 2010, a confidential informant ("the CI") reported to Detective Timothy Waters of the Indianapolis Metropolitan Police Department ("IMPD") that someone was selling cocaine on Addison Street in Indianapolis. Detective Waters, acting as case manager of the ensuing investigation, asked Detective Ethan McGivern to make an undercover buy with the CI. The CI was to take Detective McGivern to a home on Addison Street, introduce him to Grant Jenkins, negotiate the purchase, and then travel to another location to consummate the purchase.

In preparation for the operation, Detective Waters searched the CI. He also fitted Detective McGivern with a Kel, a recording and transmitting device, and photocopied two twenty-dollar bills to use for the drug purchase.

At approximately 7:20 p.m., Detective McGivern and the CI drove to 265 North Addison Street and saw two African-American men on the front porch. Jenkins was one of the men. When the CI and Detective McGivern approached the porch, the CI approached Jenkins and told him that Detective McGivern wanted a “40,” meaning forty dollars’ worth, or four-tenths of a gram, of cocaine. Jenkins made a phone call that lasted less than one minute. Jenkins then told the CI and Detective McGivern to wait for delivery from someone driving a Dodge Ram pickup truck. Detective McGivern asked to use the restroom in order to look around the house for mail or other identifying information.

Detective McGivern was in the house two minutes before he returned to the porch. About that same time, an older Dodge Ram truck with white over gray primer pulled in front of the house, with the driver’s side door closest to the house. Jenkins said “He’s here,” left the porch, and walked to speak with the driver, the only occupant of the truck. After Jenkins and the driver talked through the open driver’s side window, Jenkins returned to the porch and asked Detective McGivern for the money, saying that the guy “didn’t want to meet [McGivern] because [he] was white.” Transcript at 167. Detective McGivern gave Jenkins two twenty-dollar bills, which had been photocopied beforehand. Jenkins then “walked up to the truck and handed the driver the IMPD buy money, at which time the driver reached out with his right hand, had his hand cupped, dropped his hand into Mr. Jenkins’ hand, and Jenkins closed his hand and returned to the porch.” Id. at 168.

When Jenkins returned to the porch, he gave Detective McGivern forty dollars' worth of crack cocaine. From the time the truck approached the house until Jenkins delivered the cocaine to the detective, Jenkins' hands were never in his pockets. And the person in the Dodge truck drove away.

As the CI and Detective McGivern left the Addison Street house, they watched the Dodge pickup. Through the Kel, Detective McGivern gave Detective Waters the physical description of the driver and the truck and said that the driver was the person who had delivered the cocaine. Detective Waters then gave Officer Jason Norman a description of the truck and its driver. Then he met with the CI and Detective McGivern at a pre-arranged nearby location to debrief and drop off the cocaine.

After receiving a description of the Dodge pickup, Officer Norman waited in a Kroger parking lot between Holmes Street and King Street. A short time later, he observed a pickup and driver pass by that matched the description from Detective Waters. Officer Norman followed the pickup and, after observing the truck cross the center line a couple of times, initiated a traffic stop. In the traffic stop, Officer Norman collected identification from the driver, Anthony Hollowell.

The State charged Hollowell and Jenkins with conspiracy to commit dealing in cocaine, as a Class B felony; dealing in cocaine, as a Class B felony; and possession of cocaine, as a Class D felony. Jenkins pleaded guilty as charged without a plea agreement prior to Hollowell's trial.

During voir dire at Hollowell's trial, Hollowell objected to the State's use of three peremptory challenges to African-American prospective jurors. In two of the instances,

the State asserted race-neutral reasons for the strikes, and the trial court accepted those reasons. In the third case, the trial court excused the juror for cause. At the conclusion of voir dire, two African-Americans had been chosen as jurors and four had been struck.

Following the close of evidence and deliberations, the jury found Hollowell guilty of conspiracy to commit dealing in cocaine but not guilty of dealing in cocaine or possession of cocaine. At sentencing, the trial court found Hollowell's criminal history, including his past violation of probation and Community Corrections, to be an aggravator, but the court found no mitigators. The court sentenced Hollowell to sixteen years executed in the Department of Correction with credit for time served. Hollowell now appeals.

## **DISCUSSION AND DECISION**

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

Hollowell contends that the evidence is insufficient to support his conviction for conspiracy to commit dealing in cocaine. 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 Hollowell committed the offense of conspiracy to commit dealing in cocaine, as a Class B felony, the State was required to show beyond a reasonable doubt

that Hollowell, with the intent to commit the felony of dealing in cocaine, agreed with Jenkins to commit the felony of dealing in cocaine and that Jenkins performed an overt act in furtherance of the agreement, namely, delivered cocaine to the undercover officer. See Ind. Code §§ 35-41-5-2(a), (b). One commits the offense of dealing in cocaine if one knowingly delivers to an undercover police officer a controlled substance, here, cocaine. See Ind. Code § 35-48-4-1.

When establishing the existence of a conspiracy, the State is not required to prove the existence of a formal express agreement. Dickenson v. State, 835 N.E.2d 542, 552 (Ind. Ct. App. 2005), trans. denied. Rather, an agreement can be inferred from circumstantial evidence, which may include the overt acts of one of the parties in furtherance of the criminal act. Id. Relationship and association with the alleged co-conspirator, standing alone, is insufficient to establish a conspiracy. Stokes v. State, 801 N.E.2d 1263, 1273 (Ind. Ct. App. 2004), trans. denied.

Hollowell first contends as follows:

Here the jury inferred Mr. Hollowell’s intent to commit dealing in cocaine from the events described at trial involving co-defendant Jenkins’ actions . . . . However, in [Hollowell’s] case-in-chief, Mr. Jenkins offered credible testimony that specifically negated the “knowing delivery” element of the conspiracy charge linking Mr. Hollowell to the alleged endeavor.

Appellant’s Brief at 8. In other words, Hollowell argues that the State did not prove his intent to commit dealing in cocaine.<sup>1</sup> Hollowell’s argument prevails only if we credit

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<sup>1</sup> A conspiracy requires proof of two intents: an intent to commit a felony and an intent to agree to commit a felony. Ind. Code § 35-41-5-2; Lewis v. State, 493 N.E.2d 822, 823 (Ind. Ct. App. 1986). Here, Hollowell challenges the sufficiency of evidence to prove only the intent to commit the underlying felony. But even if he had challenged the sufficiency of evidence to show his intent to agree to commit dealing in cocaine, the circumstantial evidence discussed in Issue One also proves that element of the offense.

Jenkins' testimony at trial. But, again, we may not reweigh the evidence. Rhoton, 938 N.E.2d at 1246. Thus, Hollowell's argument on this point must fail.

Hollowell next contends that the evidence is insufficient to support the conspiracy conviction because "it cannot be said with certainty that [Undercover Detective] McGivern saw [Hollowell] deliver cocaine to Mr. Jenkins." Appellant's Brief at 8-9. But the conspiracy charge alleged that Hollowell had agreed to commit the offense of dealing in cocaine and that Jenkins had taken an overt step in furtherance of that agreement, namely, the delivery of cocaine to Detective McGivern. The State was not required to show that Hollowell actually delivered cocaine to Jenkins in order to prove the conspiracy count as charged. Thus, this argument, too, must fail.

Hollowell also argues that his mere presence when Jenkins delivered the cocaine to Detective McGivern is insufficient to support Hollowell's conviction for conspiracy. Again, to prove conspiracy the State was only required to show, in relevant part, that Hollowell agreed to commit dealing in cocaine and that Jenkins took a step in furtherance of that agreement by delivering cocaine to Detective McGivern. See I.C. § 35-41-5-2. The State satisfied that burden here.

Hollowell's agreement to commit dealing in cocaine can be inferred from circumstantial evidence. Again, the evidence shows that the CI told Jenkins that Detective McGivern wanted to buy cocaine; Jenkins made a call and then said the cocaine would be delivered in a Dodge Ram truck; a few minutes later Hollowell drove up in a Dodge Ram truck; Jenkins spoke with the driver of the truck and then reported to Detective McGivern that the driver would not deal with the detective because he was

white; Detective McGivern gave the documented buy money to Jenkins, Jenkins gave the money to the driver, and then Jenkins handed the cocaine to the detective; shortly thereafter, Officer Norman stopped a Dodge Ram pickup driven by Hollowell, the same person who had received the money from Jenkins, and Hollowell had in his possession the buy money that Detective McGivern had used for the drug transaction. From that evidence, the jury could have reasonably inferred that Hollowell had agreed with Jenkins to commit the offense of dealing in cocaine. And whether or not Hollowell gave cocaine to Jenkins after he gave the money to Hollowell, the evidence is undisputed that Jenkins gave cocaine to Detective McGivern.

Finally, Hollowell contends that his conviction for conspiracy to commit dealing in cocaine must be reversed because he was acquitted of the substantive offense. In support he cites Sawyer v. State, 583 N.E.2d 795 (Ind. Ct. App. 1991), as holding that an acquittal on the substantive charge may operate as an implicit acquittal of the overt act element of the conspiracy count. In Sawyer this court held:

Generally, acquittal of the substantive offense does not preclude conviction of conspiracy to commit the felony. Weekley v. State, (1981), Ind. App., 415 N.E.2d 152, 156. However, an exception to the general rule exists “where the necessary proof on the substantive charge is identical with that required for conviction on the conspiracy count.” Id. at 157.

In addressing the issue raised here, the court in Weekley stated:

Where the substantive offense is the overt act necessary to sustain the conviction on the conspiracy count, an acquittal of the substantive offense operates as an acquittal of the conspiracy count, if the acquittal of the substantive offense constitutes a determination that the overt act was not committed. However, if the acquittal on the substantive count does not necessarily constitute a determination that the overt

act was not committed, the acquittal does not preclude a conviction on the conspiracy count.

Sawyer, 583 N.E.2d at 798-99 (emphasis in original).

In Sawyer, the State alleged that Sawyer had agreed to commit the offense of bribery and that the overt step in furtherance of that agreement was Sawyer's receipt of money to be paid to a third party for the third party's future conduct regarding a zoning issue. A jury acquitted Sawyer of bribery but convicted him of conspiracy to commit bribery. On appeal, this court held that "Sawyer's acquittal on the bribery count does not necessarily constitute a determination that the charged overt act was not committed. There are many reasons why the jury may have found Sawyer not guilty of the substantive offense of bribery, including impossibility." Id. at 799. Thus, we held that his conviction for conspiracy to commit bribery was not contrary to law.

Although the rule stated in Sawyer is applicable here, the facts are distinguishable. Here, the jury's acquittal of Hollowell of dealing in cocaine did not constitute a determination regarding the overt act. In fact, the overt act charged alleged conduct by Jenkins, not by Hollowell. Hollowell's contention would require acquittal on every conspiracy charge where the defendant agreed with another to commit an offense but then merely directed the activities of others. That is not the law. Hollowell's acquittal on the substantive charge of dealing in cocaine had no effect on the jury's determination on the conspiracy charge. Hollowell's argument must fail.

### **Issue Two: Double Jeopardy**

Hollowell next contends that his conviction for conspiracy to commit dealing in cocaine, when considered with his acquittals for dealing in cocaine and possession of

cocaine, violates the Indiana Constitution's prohibition against double jeopardy. Specifically, Hollowell argues that "the jury's finding that [he] was not guilty of either possessing or dealing the same cocaine confounds its finding that he was guilty of conspiracy to deal cocaine where the charged overt act in furtherance was delivery of the very cocaine the jury found he never possessed." Appellant's Brief at 12. But a double jeopardy violation requires at least two convictions. See Swaynie v. State, 762 N.E.2d 112, 113 (Ind. 2002) ("The double jeopardy rule prohibits multiples punishments for the same offense."). Hollowell has not cited any legal authority to show that his single conviction and two acquittals violate double jeopardy. Thus, his double jeopardy argument is waived.<sup>2</sup>

### **Issue Three: Batson Challenges**

Hollowell also contends that the State struck jurors based on race in violation of Batson v. Kentucky, 476 U.S. 79 (1986), thus violating his equal protection rights. Our supreme court has explained the Batson rule as follows:

In Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), modified by Powers v. Ohio, 499 U.S. 400, 405-06, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991) (applying Batson where the defendant and the excluded juror were of different races), the United States Supreme Court determined that the prosecutor's use of a peremptory challenge to strike a potential juror solely on the basis of race violated the Equal Protection Clause of the Fourteenth Amendment. The Court has extended the reach of Batson to include criminal defendants as well. "We hold that the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges." Georgia v. McCollum, 505 U.S. 42, 59, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992).

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<sup>2</sup> To the extent Hollowell intended to argue that his verdicts were inconsistent, such claims are no longer available in Indiana. See Beattie v. State, 924 N.E.2d 643, 649 (Ind. 2010) ("verdicts in criminal cases are not subject to appellate review on grounds that they are inconsistent, contradictory, or irreconcilable").

The Batson Court developed a three-step test to determine whether a peremptory challenge has been used improperly to disqualify a potential juror on the basis of race. First, the party contesting the peremptory challenge must make a prima facie showing of discrimination on the basis of race. Batson, 476 U.S. at 96. Second, after the contesting party makes a prima facie showing of discrimination, the burden shifts to the party exercising its peremptory challenge to present a race-neutral explanation for using the challenge. Id. at 97. Third, if a race-neutral explanation is proffered, the trial court must then decide whether the challenger has carried its burden of proving purposeful discrimination. Id. at 98.

Jeter v. State, 888 N.E.2d 1257, 1262-63 (Ind. 2008), cert. denied, Jeter v. Indiana, 555 U.S. 1055 (2008). Upon appellate review, a trial court's decision concerning whether a peremptory challenge is discriminatory is given great deference and will be set aside only if found to be clearly erroneous. Forrest v. State, 757 N.E.2d 1003, 1004 (Ind. 2001).

Here, we first consider the State's contention that Hollowell has not made a prima facie showing of discrimination in the State's exercise of challenges to strike potential jurors Easley, Kimbrough, and Beckem. Again, the first step in raising a Batson challenge is for the complaining party to make a prima facie showing of discrimination based on race. Batson, 476 U.S. at 96. But "once the proponent 'has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the [opponent of the challenge] had made a prima facie showing becomes moot." Jeter, 888 N.E.2d at 1264 (internal quotation marks omitted, citation omitted, alteration in original). Here, following Hollowell's objections under Batson, the State provided race-neutral explanations for two of the three strikes, and the trial court then determined there was no

racial discrimination. Thus, we need not consider whether Hollowell made a prima facie showing of discrimination. See id.

We also consider another preliminary matter, namely, Hollowell's contention that the trial court applied an incorrect legal standard in determining whether there was a Batson violation. Specifically, he argues that the trial court erred when it determined that there was no Batson violation because he had not demonstrated a pattern of discrimination. Hollowell is correct that he was not required to show a pattern of discrimination in order to demonstrate a Batson violation. See Batson, 476 U.S. at 98; Jeter, 888 N.E.2d at 1264; Jones v. State, 859 N.E.2d 1219, 1223 (Ind. 2007), trans. denied. Thus, we will consider the State's peremptory challenges under the second and third parts of the three-step Batson framework, namely, whether in each case the State provided a racially neutral reason for striking the juror and then whether the court erred when it determined that Hollowell had not demonstrated purposeful discrimination.

“ ‘The second step of this process does not demand an explanation that is persuasive, or even plausible.’ ” Jeter, 888 N.E.2d at 1264 (quoting Purkett v. Elem, 514 U.S. 765, 767-68 (1995) (per curiam)). At this second step of the inquiry, the issue is simply the facial validity of the prosecutor's explanation. Id. “ ‘Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.’ ” Id. (quoting Purkett, 514 U.S. at 768). A “neutral explanation” is one that provides a “clear and reasonably specific” explanation of “legitimate reasons” for exercising the challenges related to the case to be tried. Batson, 476 U.S. at 89, 98 n.20.

“What is meant by a ‘legitimate reason’ is not a reason that makes sense, but a reason that does not deny equal protection.” Elem, 514 U.S. at 769.

If the State proffers a facially neutral reason for the peremptory strike, then the court must proceed to the third step to determine whether the objecting party established discriminatory intent. Jeter, 888 N.E.2d at 1263. A trial court’s determination in step three is a finding of fact. See Batson, 476 U.S. at 98 n.21 (citation omitted). “Since the trial judge’s findings in the context under consideration . . . largely turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference.” Id. (citation omitted). We address Hollowell’s arguments regarding each prospective juror in turn.

Hollowell argues that the State’s asserted reasons for striking Easley were not “clear and reasonably specific” as required under Williams v. State, 669 N.E.2d 1372, 1380 (Ind. 1996), writ of habeas corpus granted sub nom Aki-Khuam v. Davis, 203 F. Supp. 2d 1001 (N.D. Ind. 2003), aff’d, Aki-Khuam v. Davis, 339 F.3d 521 (7th Cir. 2003). Appellant’s Brief at 19-20. Following Hollowell’s allegation of a Batson violation, the State replied in part that it had used a peremptory challenge to strike Easley because she had looked disinterested. Hollowell contends that the State’s reliance on Easley’s alleged disinterest is not “clear and reasonably specific” because the State did not base that “impression” on any specific response given by Easley during voir dire. Appellant’s Brief at 19.

We disagree with Hollowell’s contention that the State’s reason was a mere impression without any basis in the voir dire record. At trial, the State pointed to

Easley's behavior during voir dire, observing that she "was looking very disinterested when you were speaking with her, she was out there just looking very—like she did not want to be here." Transcript at 89. Thus, the State had not relied merely on vague impressions but, instead, had pointed to Easley's behavior observed in the courtroom that related to Easley's ability to serve as a juror. Hollowell has not shown that the stated reason of Easley's disinterest was not sufficiently clear and reasonably specific to state a legitimate neutral reason for striking her from the jury pool.

Hollowell also takes issue with the second reason given by the State for Easley's challenge, namely, that she is a teacher. In response to the Batson challenge, the State asserted that, "[b]ecause [Easley]'s a teacher, a lot of times in drug cases teachers are not preferred for us for specific reasons." Transcript at 89. Hollowell contends that "the 'specific reasons' were never articulated as to why teachers are anathema to the State in drug cases." Appellant's Brief at 20. But a "juror's occupation, to the extent it may indicate a predisposition and is not a pretext, is a permissible ground for a peremptory strike." Highler v. State, 854 N.E.2d 823 (Ind. 2006). Hollowell has not shown that the State was required to state specifically why Easley's occupation made her less desirable as a juror to the prosecution.

Having determined the State asserted two race-neutral reasons for striking Easley, we move on to step three of the Batson test to determine whether Hollowell has shown that the trial court clearly erred when it determined that the State's reasons for striking Easley were not pretextual. On this point, Hollowell simply asserts that the State's reasons are insufficient. But he has not directed us to any place in the record to show that

the State's reasons for striking Easley were inconsistent with action taken regarding other prospective jurors. Hollowell's mere assertion that the State reasons for striking Easley were insufficient amounts to a request that we reweigh the circumstances considered by the trial court to whom we owe great deference. See Forrest, 757 N.E.2d at 1004. This we will not do. Hollowell has not shown that the trial court clearly erred when it allowed the State to use a peremptory challenge to strike prospective juror Easley.

We next turn to Hollowell's argument that the trial court clearly erred when it allowed the State to strike prospective juror Kimbrough. On this issue, Hollowell argued only:

Regarding the strike of Mr. Kimbrough, the State's reason was that he had made multiple comments during voir dire about prosecutorial and police unfairness in his nephew's case. (Tr. At 89). In fact, the record reveals that a prospective juror—presumably Mr. Kimbrough—did make comments of that nature regarding a nephew's murder trial in Marion County some months previous. (Tr. At 67-68). However, Mr. Kimbrough also noted that his cousin was a police officer in Lawrence, Indiana[,] and that he had a good relationship with him. (Tr. At 74)[.] Again, the trial court clearly erred by failing to make specific findings as to the State's offered race-neutral explanations.

Appellant's Brief at 20.

Hollowell's argument implies that the trial court clearly erred when it determined that the State's reason for striking Kimbrough, his ill-will toward prosecutors and police, was not pretextual.<sup>3</sup> But that reason is clearly race-neutral on its face, which is all that is required in step two of the Batson test. See Jeter, 888 N.E.2d at 1264 (quoting Elem, 514 U.S. at 767-68). As such, Hollowell has not met his burden on appeal regarding step two

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<sup>3</sup> Hollowell also argues, in a single sentence, that the trial court erred by failing to make specific findings as to the State's asserted reason for the strike. Hollowell has not cited any legal authority or parts of the record in support of that contention. As such, the argument is waived. See Ind. Appellate Rule 46(A)(8)(a).

of the Batson test. And Hollowell has not shown by citation to support in the record that the State's use of that reason to strike Kimbrough was inconsistent with the State's voir dire of other panelists, nor has he shown that the circumstances as a whole demonstrate that the stated reason was pretextual. So, as to step three, again, Hollowell's argument merely requests us to reweigh the circumstances considered by the trial court in reaching its determination, which we cannot do. See Forrest, 757 N.E.2d at 1004. Hollowell has not demonstrated on appeal that the trial court clearly erred in finding no Batson violation when the State struck prospective juror Kimbrough.

Finally, Hollowell contends that the trial court erred when it "fail[ed] to make a reviewable record" regarding the State's use of a peremptory challenge to strike prospective juror Beckem. Appellant's Brief at 20. Specifically, Hollowell asserts that the trial court erred when it "precluded any explanation from the State regarding Ms. Beckem. Rather, the trial court provided its own rationale[.]" Id.

During voir dire, defense counsel asked if anyone had any reason to believe they would be distracted. Beckem replied that her mentally disabled, thirty-nine-year-old sister would arrive home at five o'clock that evening, that the sister required assistance in the bathroom, that only Beckem's husband would be there to take care of her, and that he cannot assist the sister in the bathroom.<sup>4</sup> A review of the transcript shows that the State used a peremptory challenge to strike Beckem, at which point Hollowell claimed a Batson violation. The trial court responded:

The Court:                   We're striking her based on—one of the main reasons is that her—essentially it is almost 2 o'clock in the afternoon by the time

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<sup>4</sup> Beckem's replies are in part attributed to "Potential Juror" in the transcript. See Transcript at 102. However, a reading of the preceding and following pages clarifies that speaker was Beckem.

we even come back. She made (Undecipherable), so I'm going to strike her for cause, but that she's worried about her husband being home well enough to take care of her (Undecipherable) relative that can't even go to the restroom by herself, and worried about that that's going to be a distraction for her. (Undecipherable)

[Defense counsel]: Well, Judge, I don't think she's—put that aside

The Court: She said that—I think she said that she was concerned about her daughter that was (Undecipherable), but she didn't say she couldn't listen. So that's why—(Undecipherable). So once again with regards to Rounds 1 and 2, I would like to make a record there's been five African-Americans, State struck three, two are on the panel, okay. With regard to Round 3, there's been two. One was excused for cause and that was Ms. Beckem who just left because she was unable to sit here and listen because her five-year[-]old daughter was in the hands of somebody who was diabetic. . . .

Transcript at 106-07 (emphasis added).

The trial court originally stated that it had struck Beckem for cause because she needed to be home by early evening to assist her mentally disabled adult sister. After Hollowell pressed the matter, the court stated that it had dismissed Beckem for cause because she was concerned about her daughter and child care issues.<sup>5</sup> Because the transcript contains several “Undecipherable” references, it is unclear whether the court's second statement was a mistake or, instead, referred to another potential juror, Benberry. Hollowell had the burden of providing a record from which we could determine the issues presented on appeal. Davis v. State, 935 N.E.2d 1215, 1217 (Ind. Ct. App. 2010), trans. denied. Hollowell had the opportunity during voir dire to clarify the record regarding the reason Beckem was struck, but he did not do so. Thus, to the extent he

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<sup>5</sup> Potential Juror Benberry stated during voir dire that her five-year-old daughter was in the care of Benberry's morbidly obese, diabetic mother who was not feeling well and had asked to be relieved of watching the grandchild.

relies on the confusion evidenced by this quote from the voir dire transcript, the error, if any, is waived.

Regardless, both women were dismissed for cause. Hollowell has not shown or asserted that Batson applies to the removal of potential jurors for cause. Nor has our research disclosed such to be the case. See, e.g., Gray v. Mississippi, 481 U.S. 648, 653, n.3 (1987) (“motion to excuse a venire member for cause of course must be supported by specified causes or reasons that demonstrate that, as a matter of law, the venire member is not qualified to serve”). Therefore, a claim regarding the dismissal of Beckem for cause from the jury does not lie under Batson, and Hollowell’s claim regarding Beckem’s dismissal must fail.

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

Finally, Hollowell 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.

Again, the court sentenced Hollowell to sixteen years for conspiracy to commit dealing in cocaine, as a Class B felony. The sentence for a Class B felony is six to twenty years with an advisory sentence of ten years. Hollowell’s sentence is greater than the advisory but less than the maximum. But the trial court may impose any sentence within the allowable range without a requirement to identify any specific aggravating or mitigating circumstances. See Cardwell v. State, 895 N.E.2d 1219, 1221 (Ind. 2008).

We first consider Hollowell’s argument that his sentence is not appropriate in light of the nature of the offense. In support, he argues that the “unusual nature of the verdicts likely was reached by the jury as some type of compromise and should be regarded as a mitigating factor for sentencing purposes.” Appellant’s Brief at 22. As explained above,

the verdicts are not inconsistent. The jury did not find that Hollowell personally possessed or dealt cocaine, but it also determined that he had agreed with Jenkins to deal in cocaine and that Jenkins took a step in furtherance of that agreement. Hollowell has not shown that his sixteen-year sentence is inappropriate in light of the nature of the verdicts. And, in any event, 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 Hollowell carries the burden on appeal of showing that a disregarded mitigator is significant. See id. Hollowell has not met that burden here.

Hollowell also argues that the court should have considered as a possible mitigating factor the fact that his conviction is based on a “controlled buy instigated by the IMPD[.]” Appellant’s Brief at 22. But, again, Hollowell has not shown that this alleged mitigator is significant. Nor has he demonstrated why the nature of these controlled buys warrants a lower sentence than the one imposed by the trial court. Hollowell’s argument is without merit.

We next consider whether Hollowell’s sentence is inappropriate in light of his character. At sentencing, Hollowell made a statement to the court, noting that he had been released from probation, had been employed at the time of the alleged offense, had started attending college, had maintained a 4.0 grade point average, had earned a commercial driver’s license, and had never dealt drugs. Still, the trial court found no mitigators and, instead, found three aggravators: Hollowell’s criminal history, the fact that he had previously violated conditions of probation and Community Corrections, and had multiple disciplinary write-ups while previously in the Department of Correction.

Although not clear, Hollowell appears to argue that the trial court should have found as mitigating the factors he had argued on his own behalf at sentencing. But Hollowell has only restated his argument without showing that any of the points he raised to the trial court and again on appeal are significant. Thus, he has not met his burden on appeal. See Carter, 711 N.E.2d at 838.

Hollowell also contends that the trial court “failed to acknowledge [his] acceptance into the Marion County Community Corrections programs” and that that acceptance “lends expert support to the argument that [his] sentence is better served through participation in programs which implement the [reformation] aspirations found in the Indiana Constitution, Art. I, § 18[.]” Appellant’s Brief at 24-25. But Hollowell has not demonstrated the criteria for acceptance into such programs, nor has he pointed to any evidence to demonstrate that a sentence of executed time is inappropriate when a defendant has previously been accepted into a Community Corrections program. Hollowell’s argument must fail.

Hollowell has not shown that his sixteen-year sentence is inappropriate in light of the nature of the offense or his character. As such, he has not shown that his sentence is inappropriate or warrants revision under Appellate Rule 7(B).

### **Conclusion**

The evidence is sufficient to support Hollowell’s conviction for conspiracy to commit dealing in cocaine, as a Class B felony. And he has not shown how his conviction for conspiracy and acquittal on two other charges violates double jeopardy. Hollowell also has not shown that the State’s use of peremptory challenges in any of the

three instances violated the Batson rule or his right to Equal Protection under the federal Constitution. Finally, Hollowell has not shown that his sentence is inappropriate in light of his character and the nature of the offense. Thus, we affirm Hollowell's conviction and sentence.

Affirmed.

ROBB, C.J., concurs.

CRONE, J., concurs in result without opinion.