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**IN THE
COURT OF APPEALS OF INDIANA**

STEVEN HOLLIN,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 69A01-0609-CR-401

APPEAL FROM THE RIPLEY CIRCUIT COURT
The Honorable Carl Taul, Judge
Cause No. 69C01-0511-FB-11

March 29, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Steven Hollin (Hollin), appeals his conviction and sentence for Count II, conspiracy to commit burglary, a Class B felony, Ind. Code. § 35-43-2-1 and his sentence enhancement for Count III, habitual offender, I.C. § 35-50-2-8.

We affirm.

ISSUES

Hollin raises two issues on appeal, which we restate as follows:

- (1) Whether it was fundamental error for the trial court to admit evidence of Hollin's criminal history; and
- (2) Whether the trial court properly sentenced Hollin.

FACTS AND PROCEDURAL HISTORY

On November 7, 2005, Hollin and Nathan Vogel (Vogel) made plans to go into the country the next day and burglarize homes. The plan was to knock on doors until they reached unoccupied homes, then go inside and look for money.

On November 8, 2005, Hollin and Vogel walked into the country. They knocked on the doors of two homes that morning. At the first residence a woman answered the door. They asked for directions to Greensburg, Indiana, in order not to look suspicious. After receiving the directions, the two proceeded to look for an unoccupied house.

Upon finding another house, Hollin and Vogel knocked on both the front and back doors to make sure no one was home. They then entered the Wuestefeld's house without permission or knowing who owned the home. They entered through the garage and proceeded into the kitchen. Hollin remained in the kitchen while Vogel proceeded into a

bedroom. In the bedroom closet Vogel found a camera case that contained five to six hundred dollars in coins. They left the residence with the camera case and coins and headed back to Batesville. In the meantime, Linda Kanning (Kanning), the resident of the first house where Hollin and Vogel stopped, called the police to report two suspicious men walking down the street.

Officer Jeff Thielking (Officer Thielking) received the call from Kanning. He drove to the area and observed Hollin and Vogel walking down the street. After pulling to the side of the road he became suspicious when he noticed Vogel was wearing a winter coat despite the warm weather that day, and that he was trying to hide something in the coat. Officer Thielking also thought it was odd that Hollin would be asking for directions since he recognized Hollin and knew he was from the area. Vogel told Officer Thielking his car was broken down and located down the road, but Officer Thielking had been driving along the country roads in response to the dispatch and had not seen any broken down cars. Officer Thielking also noticed the bag Vogel was holding bore the name Wuestefeld. Officer Thielking called the county authorities to alert them the Wuestefeld residence may have been burglarized. The police met the Wuestefelds at their residence where the Wuestefelds confirmed the missing property.

Detective Stan Holt (Detective Holt) assisted Officer Thielking with the investigation by transporting Hollin to jail. After reading Hollin his rights, Detective Holt interviewed Hollin and he denied any involvement in the burglary. Then, after Vogel gave a statement, Hollin changed his statement making it closely consistent with Vogel's statement: that they planned to burglarize a house in the country; entered a home;

and Hollin waited in the kitchen until Vogel returned with “a little pack.” (Transcript p. 188-89).

On November 10, 2005, the State filed an Information charging Hollin with Count I, burglary of a dwelling, a Class B felony, I.C. § 35-43-2-1, and Count II, theft, a Class D felony, I.C. § 35-43-4-2(a). The Information was later amended to include Count III, habitual offender, I.C. § 35-50-2-8. On April 7, 2006, the State moved to dismiss Count I and it was dismissed the next day. Count II was then amended to conspiracy to commit burglary, a Class B felony, I.C. § 35-43-2-1 and Count III, habitual offender, remained the same.

On April 8, 2006, a jury trial was held. After the close of evidence Hollin was found guilty of Count II, conspiracy to commit burglary. The jury then found Hollin to be an habitual offender. On September 7, 2006, the trial court sentenced Hollin to twenty years for Count II, conspiracy to commit burglary, a Class B felony, and an additional twenty years for the habitual offender adjudication for an aggregate sentence of forty years.

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

DISCUSSION AND DECISION

I. Admission of Evidence

Hollin contends the trial court’s decision to admit evidence of his criminal history during his cross-examination constitutes fundamental error. Specifically, he argues that his stealing cars in the past has no bearing on his intent to conspire to burglarize a house.

Rather, Hollin suggests his criminal history goes only to his character and is inadmissible.

The State argues the trial court's decision to admit evidence of his criminal history does not constitute fundamental error for four reasons. First, Hollin did not object to the admission of his criminal history at trial. Second, his criminal history was admissible pursuant to Evid R. 609. Third, his criminal history was admissible pursuant to Evid. R. 404. Fourth and finally, the trial court issued a limiting instruction regarding Hollin's criminal history.

A trial court has broad discretion in ruling on the admissibility of evidence. *Scott v. State*, 855 N.E.2d 1068, 1071 (Ind. Ct. App. 2006). We will only reverse a trial court's ruling on admissibility of evidence when the trial court has abused its discretion. *Id.* An abuse of discretion occurs when a trial court's decision is clearly against the logic and effect of the facts and the circumstances before the court. *Id.* However, any error caused by the admission of evidence is harmless error if the erroneously admitted evidence was cumulative of other evidence properly admitted. *Truax v. State*, 856 N.E.2d 116, 124 (Ind. Ct. App. 2006).

To preserve this argument for appeal a contemporaneous objection is necessary at the time the evidence is offered. *Prewitt v. State*, 761 N.E.2d 862, 871 (Ind. Ct. App. 2002). A contemporaneous objection allows the trial court an opportunity to make a final ruling on the matter in the context in which the evidence is introduced. *Id.* A party's failure to make a contemporaneous objection to evidence offered at trial precludes later appellate review of its admissibility. *Id.*

In the instant case, Hollin did not make a contemporaneous objection. Thus, to avoid waiver of this issue, he alleges that the trial court's error constituted fundamental error. To qualify as fundamental error, an error must be a clear and a substantially blatant violation of basic elementary principles that renders a proceeding unfair. *Id.* In determining whether an alleged error rendered a judicial proceeding unfair, we must consider whether the resulting harm or potential for harm is substantial. *Id.* We look to the totality of the circumstances and decide whether the error had a substantial influence upon the outcome. *Id.*

Here, the trial court admitted into evidence Hollin's criminal history which includes the following convictions: (1) a Class C felony for auto theft in 2005; (2) a Class D felony for auto theft in 2004; and (3) a Class D felony for auto theft in 2004. Our review of the record indicates additional evidence on which the jury could rely to convict Hollin of this offense. Particularly, the testimony of Vogel that on the night of November 7, 2005, he and Hollin made a plan to "[go] out in the country [and knock] on doors to see if anybody was home. If no one was home, proceed from there. Break into the residence and look for money." (Tr. p. 84).

Since Hollin did not object to the admissibility of the evidence, the trial court gave the following limiting instruction with respect to the admission of his prior convictions:

Evidence has been introduced that [Hollin] was involved in crimes other than those charged in the information. This evidence has been received solely on the issue of [Hollin's] intent and credibility. This evidence should be considered by you only for those limited purposes.

(Appellant's App. p. 75).

Hollin additionally argues the only evidence of his intent comes from Vogel, who was also in trouble for his actions that day. Hollin is essentially asking us to reweigh the evidence. We decline the invitation. We will not reweigh evidence or assess the credibility of the witnesses. *White v. State*, 846 N.E.2d 1026, 1030 (Ind. Ct. App. 2006), *trans. denied*. We will consider only the evidence most favorable to the judgment, together with all reasonable and logical inferences to be drawn therefrom. *Id.* Thus, in spite of any error the trial court may have committed by introducing evidence of Hollin's prior convictions, based on the totality of the circumstances we find there was still sufficient evidence to convict Hollin of conspiracy to commit burglary.

II. *Hollin's Sentence*

Next, Hollin argues the trial court improperly sentenced him. Specifically, he contends (1) the trial court improperly balanced the aggravating and mitigating factors and failed to recognize two mitigating factors, (2) the trial court erred by relying on his criminal history to support both an enhanced sentence and his being a habitual offender, and (3) his sentence is inappropriate with respect to his character and the nature of the offense.

Hollin's offense occurred and he was sentenced prior to Indiana's new advisory sentencing scheme, which went into effect on April 25, 2005. Under this scheme, "Indiana's appellate courts can no longer *reverse* a sentence because the trial court abused its discretion by improperly finding and weighing aggravating and mitigating circumstances[;]" appellate review of sentences in Indiana is now limited to Appellate Rule 7(B). *McMahon v. State*, 856 N.E.2d 743, 748-49 (Ind. Ct. App. 2006) (emphasis

added). Thus, the burden is on the defendant to persuade this court that his or her sentence is inappropriate. *Id.* at 749. First though, we will address whether the trial court erred by relying on Hollin's criminal history to support both finding him to be a habitual offender and enhancing his sentence, as that issue may be dispositive of all sentencing issues presented.

Hollin argues it is improper for a trial court to rely on a defendant's criminal history to find he or she is a habitual offender and also uses the defendant's criminal history to enhance his or her sentence. The State contends, however, that the trial court is not relying on the same prior convictions to adjudicate Hollin as an habitual offender and also enhance his sentence. The State suggests that because the habitual offender information relied upon the two 2004 auto theft convictions the trial court still had ample authority to enhance Hollin's sentence based on his other prior convictions. The trial court does not specifically state upon which portions of Hollin's criminal history it relies, in either its oral or written sentencing statement, but we agree with the State that it is possible for the trial court to use separate portions of Hollin's criminal history to both adjudicate Hollin as a habitual offender and enhance his sentence. Consequently, we will review whether Hollin's sentence is inappropriate with respect to his character and the nature of the offense.

Indiana Appellate Rule 7(B) gives us the authority to revise a sentence authorized by statute if, after due consideration of the trial court's decision, we find a sentence is inappropriate in light of the nature of the offense and the character of the offender. *See* Ind. App. R. 7(B). Our review of the record indicates Hollin's character warrants the

maximum sentence of twenty years. His criminal career began in 1998 when he was eleven years old and ran away. Four years later, in 2002, he committed his first round of felony offenses and as a result was placed in the Indiana Department of Correction Juvenile Facility. Since 2002 Hollin has committed three more felony offenses, not including the instant offense, and has violated probation. Additionally, he has admitted to a drug problem and was going to use the proceeds from the instant burglary to purchase drugs. Moreover, Officer Thielking recognized Hollin as growing up in the area and from his past run-ins with law enforcement. Thus, based on Hollin's character we find his sentence appropriate.

The nature of Hollin's crime also supports an enhanced sentence. Hollin had many opportunities to disengage and part ways with Vogel. He did not. Instead, Hollin accompanied Vogel to two different houses in an attempt to carry their plan through to fruition. On the second try they were successful. Thus, the nature of the offense combined with Hollin's character makes the sentence imposed by the trial court appropriate.

CONCLUSION

Based on the foregoing, we find the trial court did not fundamentally error by admitting Hollin's criminal history into evidence and that the forty year sentence imposed by the trial court is appropriate.

Affirmed.

KIRSCH, J., and FRIEDLANDER, J., concur.