

STATEMENT OF THE CASE

Defendant-Appellant David Cavinder appeals his conviction of aiding a burglary, a Class B felony, Ind. Code §§ 35-43-2-1, 35-41-2-4, and the habitual offender enhancement to his sentence, Ind. Code § 35-50-2-8.

We affirm.

ISSUES

Cavinder presents two issues for our review, which we restate as:

- I. Whether the trial court abused its discretion by admitting into evidence a prior consistent statement of a witness.
- II. Whether Cavinder's sentence is inappropriate.

FACTS AND PROCEDURAL HISTORY

In January 2006, Cavinder, Nicholas Bolin and Curtis Henderson coordinated their efforts to rob the home of the grandparents of Bolin's friend. At Cavinder's trial, the State sought to admit a letter that Bolin wrote to his friend apologizing for the misdeed. Cavinder objected to the letter, but the trial court admitted the letter over his objection. The jury found Cavinder guilty as charged of aiding burglary and found him to be a habitual offender. Cavinder was sentenced to ten years for his conviction, which was enhanced by thirty (30) years for his adjudication as a habitual offender. Cavinder now appeals.

DISCUSSION AND DECISION

- I. ADMISSION OF EVIDENCE

Cavinder first contends that the trial court erred by admitting into evidence the letter written by Bolin to his friend. Cavinder argues that the letter constitutes a prior consistent statement of Bolin that should not have been admitted because it does not meet all the requirements of Ind. Evidence Rule 801(d)(1)(B).

The admissibility of evidence is within the sound discretion of the trial court, and we will not disturb the decision of the trial court absent a showing of abuse of that discretion. *Gibson v. State*, 733 N.E.2d 945, 951 (Ind. Ct. App. 2000). Included in this discretion are rulings on the admissibility of arguably hearsay statements. *Cline v. State*, 726 N.E.2d 1249, 1253 (Ind. 2000). Though a trial court errs in admitting hearsay evidence, we will only reverse when the error is inconsistent with substantial justice. *Id.* Thus, evidence improperly admitted under Indiana Evidence Rule 801(d)(1)(B) will not give rise to a new trial if its probable impact on the jury, considering all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties. *Id.*

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. *See* Ind. Evidence Rule 801(c). As a general rule, hearsay is inadmissible. *See* Ind. Evidence Rule 802. One exception to the rule is found in Indiana Evidence Rule 801(d)(1)(B). Under Indiana Evidence Rule 801(d)(1)(B), a statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (a) consistent with the declarant's testimony, (b) offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, and (c) made before the motive to fabricate arose.

Here, Cavinder concedes that Bolin's prior statement (i.e., his apology letter to his friend) is consistent with Bolin's testimony at trial and is offered to rebut an express or implied charge against Bolin of recent fabrication or improper influence or motive. Cavinder challenges only the requirement that Bolin's statement be made before a motive to fabricate arose.

This crime occurred in the late evening hours and/or early morning hours of January 22 and 23, 2006. A month later, on February 27, 2006, Bolin met with a police officer and lied as to his involvement in this crime. He told the officer that he had no idea what the officer was talking about and that he was with his girlfriend on the night in question. When the officer indicated that he already had Henderson's statement about the burglary, Bolin made a statement indicating that he, Henderson and Cavinder planned the burglary and carried it out. Bolin then wrote an apology letter to his friend stating the same facts and apologizing for burglarizing her grandparents' home. It is this letter to which Cavinder objected at trial and which he asserts was made after a motive to fabricate arose.

Cavinder suggests no motive for Bolin to fabricate and provides no real argument on the issue. Rather, he simply asserts that because Bolin was a co-defendant of Cavinder, his motive to fabricate arose at the time of the crime. Although our supreme court has been willing to conclude that a motive to fabricate *likely* arises immediately upon the commission of the crime, it has cautioned that there is no bright-line rule for determining whether or when a motive to fabricate has arisen, even if the declarant is a co-defendant. *Stephenson v. State*, 742 N.E.2d 463, 475 (Ind. 2001), *cert. denied*.

Determining the existence of a motive or when it arose is a fact-sensitive inquiry. *Id.* “We do not automatically find that a participant in a crime has a motive to fabricate, even where the police are inquiring into the declarant’s involvement in the crime.” *Holsinger v. State*, 750 N.E.2d 354, 360 (Ind. 2001) (citing *Stephenson*, 742 N.E.2d at 475).

While we acknowledge the possibility of a motive to fabricate on Bolin’s part because he knew he was going to be charged in connection with the burglary, he did not have a motive to implicate Cavinder. First, Bolin had a motive to fabricate in order to shift culpability for the burglary and clear his own name, yet he implicated himself. Second, to the extent Bolin is guilty of burglary and/or aiding a burglary, his culpability is the same whether or not Cavinder aided in the burglary. There is no evidence that Bolin had a motive to lie about Cavinder’s involvement in the burglary. Thus, without evidence to that effect, we cannot conclude the trial court abused its discretion in admitting Bolin’s prior consistent statement.

II. INAPPROPRIATE SENTENCE

Cavinder avers that the thirty (30) year enhancement he received for his adjudication as a habitual offender is inappropriate. He does not challenge his ten-year sentence for the underlying offense of aiding a burglary.

Under Article VII, Section 6 of the Indiana Constitution, we have the constitutional authority to review and revise sentences. However, we will not revise the sentence imposed unless it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B).

An enhancement for an adjudication as a habitual offender is governed by Ind. Code § 35-50-2-8(h), which provides that the court sentence a habitual offender to an additional fixed term that is not less than the advisory sentence for the underlying offense nor more than three (3) times the advisory sentence for the underlying offense. In addition, the habitual offender enhancement may not exceed thirty (30) years. Here, the advisory sentence for the underlying offense, a Class B felony, is ten years. *See* Ind. Code § 35-50-2-5. Accordingly, the trial court was authorized to enhance Cavinder's sentence from ten years to three times that amount, or thirty (30) years. The trial court imposed a thirty (30) year enhancement.

Generally, our review of the appropriateness of a sentence begins by looking to the aggravating and mitigating circumstances identified by the trial court. *Goodall v. State*, 809 N.E.2d 484, 486 (Ind. Ct. App. 2004). However, the habitual offender statute does not “impose a requirement that pronouncement of the habitual offender enhancement must be accompanied by a statement setting forth aggravating and mitigating circumstances, regardless of whether the court imposes the maximum allowable enhancement.” *Merritt v. State*, 663 N.E.2d 1215, 1217 (Ind. Ct. App. 1996), *trans. denied*; *see also Goodall*, 809 N.E.2d 484 (stating that because there is no presumptive sentence for habitual offender enhancement, trial court does not have to set forth any aggravating or mitigating circumstances that explain particular habitual offender enhancement).

In his brief, Cavinder urges us to follow the rationale set forth in *McMahon v. State*, 856 N.E.2d 743 (Ind. Ct. App. 2006). As we have recently noted in several

decisions of this Court, our felony sentencing statutes were amended effective April 25, 2005. For instance, Ind. Code § 35-38-1-7.1 was amended by adding subsection (d), which states that the trial court may impose any sentence that is authorized by statute and permissible under the Indiana Constitution regardless of the presence or absence of aggravating or mitigating circumstances. In determining whether a defendant's seven-and-one-half-year sentence was inappropriate, the *McMahon* panel stated that even under the amended sentencing statutes, like Ind. Code § 35-38-1-7.1(d), mitigating and aggravating circumstances continue to be part of this Court's Appellate Rule 7(B) review. *See McMahon*, 856 N.E.2d at 748-50. Therefore, Cavinder posits, with regard to the Appellate Rule 7(B) review of his habitual offender enhancement, we should look at the mitigating and aggravating circumstances upon which the trial court relied in determining his Class B felony offense sentence.

Cavinder's reliance on *McMahon* is misplaced. The defendant in *McMahon* was challenging the appropriateness of his sentence for three felony offenses. Cavinder, on the other hand, is challenging the appropriateness of his habitual offender enhancement. The habitual offender statute does not require the trial court to set forth aggravating and mitigating circumstances explaining the particular enhancement chosen by the court. *See Merritt, supra; see also* Ind. Code § 35-50-2-8. Further, the length of a habitual offender sentence enhancement is left to the trial court's sound discretion. *Merritt*, 663 N.E.2d at 1216. In addition, although Ind. Code § 35-50-2-8(h) was amended in 2005, it was only to substitute the word "advisory" for the word "presumptive." We believe this indicates the legislature's desire to leave intact the completely discretionary aspect of determining

habitual offender enhancements. Therefore, because the trial court is not required to set forth any aggravating or mitigating circumstances to explain the particular habitual offender enhancement it selected, we will proceed with our Appellate Rule 7(B) review by addressing the nature of the offense and the character of the offender.

Our review of the nature of the offense reveals that Cavinder, a man in his mid-thirties, joined with two young men who were only eighteen and seventeen (a juvenile) to commit this burglary of the home of a friend's grandparents. Although there was no violence involved in the commission of the offense, several irreplaceable items of immeasurable sentimental value were taken in addition to other items, such as a television and DVD.

Our examination of the character of the offender discloses that Cavinder has an extensive criminal history, commencing with a finding of delinquency as a juvenile for an act of theft in 1988. He then continued to commit offenses on a steady basis: driving while suspended in 1988; criminal conversion in 1988; burglary as a Class B felony in 1989; unauthorized use of a motor vehicle in 1992; operating while suspended in 1992; three counts of forgery as Class C felonies in 1993; two counts of dealing in cocaine as Class B felonies in 1993; operating while suspended in 1997; public intoxication and reckless driving in 2000; operating while intoxicated and possession of marijuana in 2002; false informing in 2002; receiving stolen property as a felony in 2003; battery and check deception in 2003; check deception as a Class D felony in 2004; three counts of theft as Class D felonies in 2004; and the instant offense of aiding a burglary as a Class B felony in 2006. Further, Cavinder had an unsatisfactory release from probation in 1991.

In a single case, Cavinder had his probation revoked in 1999 and was sent to the Indiana Department of Correction to serve the balance of his sentence. However, in 2000, he was given shock probation, and, in 2001, a petition for probation revocation was filed, and Cavinder was eventually discharged from probation in that case. In 2002, Cavinder's suspended sentence for operating while intoxicated and possession of marijuana was revoked. In addition, Cavinder was on probation at the time of the instant offense. Cavinder has been given numerous chances at rehabilitation, and he has failed at them all. In light of Cavinder's character, the habitual offender enhancement is appropriate.

CONCLUSION

Based upon the foregoing discussion and authorities, we conclude that the trial court did not abuse its discretion in admitting the prior consistent statement of a witness and that the thirty year habitual offender enhancement is not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

NAJAM, J., and VAIDIK, J., concur.