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IN THE
COURT OF APPEALS OF INDIANA

JACOB L. JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 35A05-0608-CR-438
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HUNTINGTON SUPERIOR COURT
The Honorable Jeffrey R. Heffelfinger, Judge
Cause No. 35D01-0510-FB-246

February 27, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Jacob L. Johnson appeals his conviction, after a jury trial, of dealing in a schedule II controlled substance, a class B felony.

We affirm.

ISSUES

1. Whether the trial court erred when it admitted State's Exhibit 5, a compact disc of the recording made by a device worn by the State's confidential informant.

2. Whether the State presented sufficient evidence to support the jury's conclusion that Johnson had committed the offense of dealing in a controlled substance.

FACTS

In the early summer of 2005, Mike Tackett agreed to be a confidential informant and make drug buys for the Huntington Police Department. On July 15, 2005, Tackett advised Detective Chad Hacker that he had arranged to buy Oxycontin from Johnson. Thereafter, Hacker, Detective Pat Scher, and Detective Matt Hughes met with Tackett. Tackett was searched and relieved of all personal property except for his cell phone, fitted with a device that both transmitted and recorded sound – a "transcorder," and given $200 in buy money to use in the transaction with Johnson. (Tr. 178).

Hacker and Scher drove Tackett to the area near where the buy from Johnson was to take place. Tackett walked the last couple of blocks toward the meeting site. Before he reached it, a black sedan pulled alongside Tackett. Johnson was in the front passenger seat. Tackett testified that he then gave Johnson the $200; and Johnson "told [Tackett] he had to go get the pills" and that Tackett should wait. (Tr. 253). Because Johnson had

intercepted Tackett before he reached the arranged meeting place, none of the three detectives observed Tackett hand Johnson the money, but all three heard the conversation via the transcorder worn by Tackett. The black sedan drove away. Tackett joined Hacker and Scher, rode around in their van for a while, and then was dropped off near the area where Johnson had instructed him to be to receive the Oxycontin.

Shortly thereafter, Tackett called Johnson on his cell phone; Johnson said he was a block away. Then the black sedan pulled alongside Tackett. Hughes observed Tackett lean in the front passenger-side window. Tackett testified that Johnson gave him 7 pills of Oxycontin and then asked for "one for doing it." (Tr. 256). Tackett complied. All three detectives also heard this conversation between Tackett and Johnson via the transcorder. The sedan drove away, and Tackett began walking to where he had agreed to meet Hacker and Scher. Before Tackett reached the detectives, Kevin Perkins walked past the van in which they waited. Perkins continued toward Tackett. The detectives watched him approach Tackett and heard their conversation. Hacker called Tackett on his cell phone and told him to get rid of Perkins; he did. Tackett then met with the detectives and gave them the six remaining Oxycontin pills that he had received from Johnson.

Because the detectives planned to continue their undercover operations, Johnson was not immediately arrested. Tackett made several more buys for them. In October of 2005, Johnson appeared at the police station and asked to see Hacker. Johnson "indicated" to Hacker that he "was concerned that he had been recorded . . . and that it

involved" Tackett "making a buy off of him." (Tr. 359, 547). Johnson then sought, unsuccessfully, to arrange with Hacker to "be an informant." (Tr. 359, 357, 358).

On October 17, 2005, the State charged Johnson with having committed the offense of dealing in a schedule II controlled substance, a class B felony, on July 15, 2005. He was tried before a jury on May 11-12, 2006. Tackett testified about his two transactions with Johnson on that date – his handing of the $200 to Johnson, and his receipt from Johnson of 7 Oxycontin pills.[1]

Also, Tackett testified that he had listened to the recording of "the drug transaction with Johnson," and that it was accurate. (Tr. 260). The State then offered into evidence Exhibit 5, a compact disc (CD) of the recording made by the transcorder worn by Tackett. Johnson objected, arguing the lack of "a proper foundation laid for that recording" to be admitted into evidence. (Tr. 261). Tackett further testified that he had listened to the recording on the CD, and the trial court admitted it. Thereafter, Johnson elicited that Tackett did not know where the CD was before it was brought to the hearing, how it had been maintained or recorded, or how it had been transported to court. However, Tackett testified that he had listened to the CD the day before trial, when it was played for him by the prosecutor, and he knew that it was "the same recording" as the Exhibit 5 CD because "State vs. Johnson" was written on the face of the disc. (Tr. 263). Johnson then argued that the "chain of custody as to the disc" was lacking. (Tr. 264). At this point, the trial court asked whether Tackett had listened to the disc; Tackett

[1] At trial, it was stipulated that the remaining 6 pills were Oxycontin, a schedule II controlled substance.

answered, "Yes." *Id.* It asked if the disc was "a true and accurate recording of what transpired on that date," and Tackett again answered, "Yes." *Id.* The trial court ruled that it did not "matter how the disc got to him. All that matters is that it is accurate." *Id.* The CD was then played for the jury, with pauses wherein Tackett elaborated on some of its contents. Thus, Tackett testified that the voice heard when the sedan pulled alongside him the first time was Johnson's. Tackett is heard reporting on the transcorder after the car pulls away that he "just gave" Johnson the money. (Tr. 274). At another pause in the playing of the CD, Tackett testified that after the sedan stopped alongside him the second time, it was Johnson's voice saying how much the seven pills cost and that he wanted one back for having made the deal. Hacker and Hughes testified that they were familiar with Johnson's voice, having spoken to him numerous times, and both testified that they recognized the voice talking to Tackett during the drug transactions as Johnson's.

The jury convicted Johnson of dealing in a schedule II controlled substance, a class B felony. The trial court subsequently sentenced him to ten years.

DECISION

1. Admission of Evidence

As we have recently noted,

> The admission of evidence is within the sound discretion of the trial court, and the decision whether to admit evidence will not be reversed absent a showing of manifest abuse of discretion by the trial court resulting in the denial of a fair trial. A decision is an abuse of discretion if it is clearly against the logic and effect of the facts and circumstances before the court. In reviewing the decision, we consider the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor.

Johnson v. State, 831 N.E.2d 163, 168-69 (Ind. Ct. App. 2005), *trans. denied* (citing *Williams v. State*, 782 N.E.2d 1039, 1045 (Ind. Ct. App. 2005)).

Johnson first argues that the trial court abused its discretion in admitting the CD because the State "failed to provide a proper evidentiary foundation" for its admission. Johnson's Br. at 8. We cannot agree.

The foundational requirements for the admission of a "recording made in a non-custodial setting are: (1) that the recording is authentic and correct; (2) that it does not contain evidence otherwise inadmissible; and (3) that it be of such clarity as to be intelligible and enlightening to the jury." *Kidd v. State*, 738 N.E.2d 1039, 1042 (Ind. 2000). The first prong was satisfied when Tackett testified that he had listened to the CD, and it was an accurate recording of his transactions with Johnson on July 15, 2005. As to the second prong, Johnson's brief asserts that the CD "alluded to other criminal conduct by Johnson and contained other extraneous information which could only prejudice the jury." Johnson's Br. at 11. However, Johnson did not object or make this argument to the trial court. The grounds for objection must be both specific and raised to the trial court or they "are not available on appeal." *Grace v. State*, 731 N.E.2d 442, 444 (Ind. 2000). Further, although the transcript reflects the contents of the CD as it was played for the jury, Johnson does not direct us to the record to support his assertion that it alluded to other criminal conduct and extraneous prejudicial information. *See* Ind. Appellate Rule 46(A)(8)(a) (argument must be supported by citation to record). Therefore, we do not find the second prong of *Kidd* dispositive. Finally, Johnson does not suggest that the CD lacked clarity or was unintelligible, and we do not find that to be the case. We conclude

that the trial court did not abuse its discretion when it held that the State had established the foundational requirements for admission of the CD.

Johnson also contends that the State failed to establish that the CD was an "accurate duplicate of the original recording." Johnson's Br. at 8. Again, we are not persuaded.

This argument more directly concerns whether the CD met the requirements of Evidence Rule 901(a) – that "authentication or identification" is "a condition precedent to admissibility." Such authentication or identification "may be satisfied by evidence sufficient to support that the matter in question is what its proponent claims." *Id.* Authentication of a recording is sufficient to sustain its admission "when evidence establishes a reasonable probability that an item is what it is claimed to be." *Thomas v. State*, 734 N.E.2d 572, 575 (Ind. 2000).

Tackett, the person who wore the transcorder as it recorded his actions on July 15th, testified that he had listened to Exhibit 5 CD and that it was an accurate recording of the drug transactions with Johnson. He also testified that he had listened to the State's Exhibit 5, "the same" CD, upon which was written "State vs. Johnson," with the prosecutor on the previous day. (Tr. 263). We find that the evidence before the trial court was sufficient to establish that the CD was "what it was claimed to be." *Kidd*, 734 N.E.2d at 575. Therefore, the trial court did not abuse its discretion when it admitted the CD. *Johnson*, 831 N.E.2d at 169.

2. <u>Sufficiency of the Evidence</u>

When addressing a claim of insufficient evidence, we do not reweigh the evidence or judge the credibility of the witnesses. *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005). Moreover, we "must consider only the probative evidence and reasonable inferences supporting the verdict." *Id.* Thus, we "must affirm" if the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. *Id.*

Johnson argues that the evidence was insufficient to sustain his conviction because the State was required to "prove beyond a reasonable doubt that Johnson delivered or intended to deliver" the Oxycontin; the "only evidence of such delivery arose from the testimony of Tackett"; and Tackett's "testimony was inherently unreliable." Johnson's Br. at 12. We disagree.

The offense of dealing in a schedule II controlled substance is defined as, *inter alia*, the knowing or intentional delivery of a schedule II controlled substance. Ind. Code § 35-48-4-2. It is true, as Johnson emphasizes, that Tackett was the only eyewitness who testified that it was Johnson who delivered to Tackett the Oxycontin pills. However, all three detectives testified to having contemporaneously heard the transaction via the transcorder worn by Tackett. Further, two of the detectives testified that they were familiar with Johnson's voice based upon previous encounters with him and that they recognized Johnson's voice as the person with whom Tackett conducted the transaction. In addition, several months after the buy by Tackett, Johnson had approached Hacker and made statements supporting the inference that he had been the other party in the drug transaction with Tackett. Also, Tackett was searched before the scheduled meeting with

Johnson and given $200 in marked buy money, there were no pills on his person; thereafter, upon his return, he had no money and the six Oxycontin pills. Thus, Tackett's testimony was not the "only evidence" that Johnson delivered the Oxycontin.

Johnson directs our attention to portions of Tackett's testimony to suggest that he was not a credible witness. However, we do not assess witness credibility. *McHenry*, 820 N.E.2d at 126. Moreover, Tackett expressly admitted to the jury that he had been incarcerated and facing criminal charges when he entered into the confidential informant arrangement; that he did not complete the arrangement "because of the fact that [he] was still using drugs," thus conceding that he was a drug user (Tr. 242); that at the time of this trial testimony he was incarcerated on criminal charges; and that he had previously been convicted of other felonies.

The probative evidence and reasonable inferences therefrom support the jury's determination that the State proved beyond a reasonable doubt that Johnson committed the offense of dealing in a schedule II controlled substance.

Affirmed.

BAKER, J., and ROBB, J., concur.