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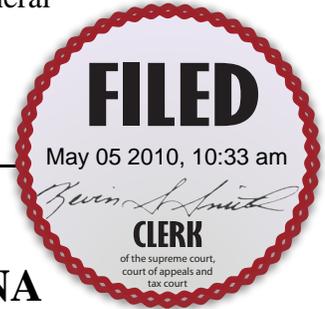
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**IN THE  
COURT OF APPEALS OF INDIANA**

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FREDERIC WILLIAMS, )  
 )  
Appellant-Defendant, )  
 )  
vs. )  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

No. 49A02-0909-CR-875

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Steven Eichholtz, Judge  
Cause No. 49G20-0708-FA-158510

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**May 5, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## **Case Summary**

Frederic Williams appeals his convictions for class A felony dealing in a narcotic drug and class C felony possession of a narcotic drug and a firearm. We affirm his class A felony conviction and remand with instructions to vacate his class C felony conviction.

## **Issues**

We address the following four issues:

- I. Whether Williams waived his claim that evidence seized pursuant to a search warrant was inadmissible;
- II. Whether the trial court abused its discretion in permitting Williams's wife to testify;
- III. Whether the trial court correctly determined that Williams's counsel misstated the law regarding the elements of class A felony dealing in a narcotic drug during closing argument; and
- VI. Whether Williams's convictions violate double jeopardy.

## **Facts and Procedural History**

On August 3, 2007, Indianapolis Metropolitan Police Department officers executed a search warrant for Williams's residence. Officer Marc Campbell showed Williams the search warrant and advised him of his Miranda rights. Officer Campbell asked Williams if there were narcotics in the house. Williams said that there were drugs in the bedroom. Officer Campbell and Williams went upstairs to the bedroom. Williams's wife, Patricia, was in the bedroom. Officer Campbell read her the search warrant and her Miranda rights. Williams informed Officer Campbell that drugs were in a blue bag on the floor underneath the bed. Officer Campbell retrieved a blue bag and a handgun from under the bed. Another

handgun and three digital scales were also found on the nightstand next to the bed. Williams told Officer Campbell that he sold heroin “to make ends meet.” Tr. at 52. He explained that “he was fronted approximately ten thousand dollars worth of heroin . . . and that whatever he made over that was for his self to keep.” *Id.* Analysis of the contents of the blue bag revealed an 18.32-gram chunk of heroin and 12.20 grams of heroin in one hundred individual foil packets.<sup>1</sup>

On August 8, 2007, the State charged Williams with Count I, class A felony dealing in a narcotic drug; Count II, class C felony possession of a narcotic drug; and Count III, class C felony possession of a narcotic drug and a firearm. On August 19, 2008, Patricia filed a motion to quash her subpoena on the basis of marital privilege, which the trial court denied. On September 12, 2008, Williams filed a motion to suppress the items found pursuant to the search, which was denied. On April 15, 2009, a jury trial found Williams guilty as charged. The trial court merged Count II into Count I and did not enter judgment of conviction on Count II. On May 4, 2009, the trial court sentenced Williams to thirty years on Count I and a concurrent four-year sentence on Count III. Williams appeals.

## **Discussion and Decision**

### ***I. Admissibility of Items Found During Search***

Williams contends that the heroin, guns, and scales recovered during the search of his residence were inadmissible because the probable cause affidavit supporting the search warrant was inadequate. The State asserts that he waived the issue. We agree with the State.

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<sup>1</sup> Police found three hundred and eighty-four foil packets but only one hundred were tested.

Prior to trial, Williams moved to suppress the evidence found during the search, and he objected at trial to the admission of the items themselves. However, prior to the admission of the items, Williams did not object to the officers' testimony about finding the blue bag, the heroin, guns, and scales, or to the photographs of the blue bag, scales, and heroin. Tr. at 43- 46, 77-78; State's Exs. 7 (blue bag), 8 (scales), and 9 (heroin). Further, he did not object to the chemist's testimony regarding the identity and weight of the substance in the blue bag. *Id.* at 114-16, 118-20. Also, he stipulated to the admission of the heroin analysis report. *Id.* at 117, State's Ex. 11.

Any error in the admission of evidence is harmless if the same or similar evidence has been admitted without objection. *Craun v. State*, 762 N.E.2d 230, 236-37 (Ind. Ct. App. 2002), *trans. denied*. As such, the failure to object to testimony regarding the photographs of the items renders the objections to the items themselves insufficient to preserve this issue for appellate review. *See Edwards v. State*, 730 N.E.2d 1286, 1289 (Ind. Ct. App. 2000) (holding that defendant waived his contention that trial court erred in admitting checks written against an account when State had already offered, without objection, testimony about the significance of checks and the bank statements upon which checks were drawn). Therefore, Williams has waived this issue.

## ***II. Patricia's Testimony***

The trial court denied Patricia's motion to quash her subpoena based on her assertion of the marital privilege.<sup>2</sup> Patricia was charged with Williams as a co-defendant and pled

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<sup>2</sup> Williams renewed his objection at trial, thereby properly preserving the issue for review.

guilty to the lesser included offense of class B felony dealing in a narcotic drug. Prior to Williams's trial, Patricia had already willingly testified at her own guilty plea and sentencing hearings regarding the heroin found at their residence. Thus, the trial court found that she had waived the privilege, reasoning that one "can't testify as to matters that occurred during the marital relationship when it benefits them, such as at their sentencing hearing, and then later when called to testify as a witness assert the privilege." Tr. at 27. The State notes that it submitted copies of the transcripts of Patricia's guilty plea and sentencing hearings to the trial court as a supplement to its response to the motion to quash, but that the transcripts are not in the record before us. Appellee's Br. at 19 n.1. Because these transcripts are not before us and we cannot therefore determine exactly what Patricia testified to at her guilty plea and sentencing hearings, we decline to find that she waived the marital privilege and will review the merits of Williams's claim that the trial court erred in allowing Patricia to testify.

Initially, we observe that the decision to admit or exclude evidence is within a trial court's sound discretion and is afforded great deference on appeal. *Carpenter v. State*, 786 N.E.2d 696, 702 (Ind. 2003). We will not reverse the decision unless it represents a manifest abuse of discretion that results in the denial of a fair trial. *Id.* An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances before the court or it misinterprets the law. *Id.* at 703.

The marital privilege is codified at Indiana Code Section 34-46-3-1, which provides in relevant part, "Except as otherwise provided by statute, the following persons shall not be required to testify regarding the following communications: ... Husband and wife, as to

communications made to each other.” The marital communications privilege is restricted to confidential communications passing from one marriage partner to the other because of the confidence resulting from their intimate marriage relationship. *Rubalcada v. State*, 731 N.E.2d 1015, 1022 (Ind. 2000). The marital communications privilege does not protect all communications. *Glover v. State*, 836 N.E.2d 414, 421 (Ind. 2005). Among the exceptions to the marital privilege are: (1) where a spouse’s testimony concerns disclosures by the other spouse not made in reliance upon the marital relationship but because the disclosing spouse was in need of his mate’s assistance and attempted to coerce his spouse by force and fear, (2) where the communication between spouses was intended to be transmitted to a third person, (3) where one spouse discloses a threat made by the other; and (4) where acts and communications to the spouse were made in the presence of third parties. *Dixson v. State*, 865 N.E.2d 704, 713 (Ind. Ct. App. 2007), *trans. denied*. Also, “acts of spouses not intended to convey a message are not covered by the statute.” *Gordon v. State*, 609 N.E.2d 1085, 1087 (Ind. 1993).

Our review of the record before us reveals that Patricia did not provide any testimony that is protected by the marital privilege. She testified that (1) Williams is her husband; (2) State’s Exhibit 2 is an accurate depiction of the layout of their house; (3) she was present during the search of the house; (4) she is a long-time heroin user; (5) she was aware that a substantial amount of heroin was recovered during the search; (6) she was unaware that heroin was in the house prior to the search; (7) she was in poor health the day of the search and could not walk; (8) heroin addicts get sick when they cannot use heroin regularly; (9)

multiple people have provided her with heroin in the past; (10) Williams has provided her with heroin in the past; (11) she uses about half a gram of heroin every four hours; (12) the price of heroin ranges from \$75 to \$150 per gram; and (13) on the day of the search, she received heroin from T.T. Tr. at 88-100. None of Patricia's testimony touched on confidential marital communications between her and Williams. Even her testimony that Williams provided her with heroin in the past is not protected by the marital privilege because it is not a communication resulting from their intimate marriage relationship. Put another way, it was an act not intended to convey a message. Accordingly, we conclude that the trial court did not abuse its discretion in permitting Patricia to testify.

### ***III. Closing Argument***

Williams was charged pursuant to Indiana Code Section 35-48-4-1, which provides in pertinent part,

(a) A person who:

(1) knowingly or intentionally:

(A) manufactures;

(B) finances the manufacture of;

(C) delivers; or

(D) finances the delivery of;

cocaine or a narcotic drug, pure or adulterated, classified in schedule I<sup>3</sup> or II; or

(2) possesses, with intent to:

(A) manufacture;

(B) finance the manufacture of;

(C) deliver; or

(D) finance the delivery of;

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<sup>3</sup> Heroin is a schedule I narcotic drug. Ind. Code § 35-48-2-4.

cocaine or a narcotic drug, pure or adulterated, classified in schedule I or II;

commits dealing in cocaine or a narcotic drug, a Class B felony, except as provided in subsection (b).

(b) The offense is a Class A felony if:

(1) the amount of the drug *involved* weighs three (3) grams or more[.]

(Emphasis added.) The charging information alleged that Williams “did knowingly possess with intent to deliver a narcotic drug.” Appellant’s App. at 31.

During closing argument, Williams’s counsel contended, “There is no evidence that Mr. Williams – it is not only with intent to deliver, it is with intent to deliver greater than 3 grams, which means *in one transaction* that his intention was to give greater than 3 grams to somebody.” Tr. at 156 (emphasis added). The State objected: “I believe that is a misstatement of the law. It does not – it is possession of over 3 grams with the intent to distribute any amount. It does not have to be proof that one transaction was going to be 3 grams.” *Id.* at 156-57. The trial court sustained the objection.

On appeal, Williams argues that by prohibiting defense counsel from presenting his interpretation of the statute to the jury, the trial court violated Article 1, Section 19 of the Indiana Constitution, which provides, “In all criminal cases whatever, the jury shall have the right to determine the law and the facts.” It is well settled that the proper scope of final argument is within the trial court’s sound discretion. *Taylor v. State*, 457 N.E.2d 594, 599 (Ind. Ct. App. 1983). We will not find an abuse of discretion unless the trial court’s decision is clearly against the logic and effect of the facts and circumstances before it. *Id.*

Williams argues that his interpretation is reasonable under the language of the statute, but fails to elaborate any further or cite any case law. The State contends that neither the statute nor case law requires that the State prove an intent to deliver over three grams *in a single transaction*, citing *Woodford v. State*, 752 N.E.2d 1278 (Ind. 2001).

In *Woodford*, the defendant was convicted of possession of more than three grams of cocaine with intent to deliver. On appeal, the defendant contended that the State failed to prove that the weight of the cocaine was three grams or over. Police had seized nine rocks of cocaine from defendant, but the forensic scientist tested only two of the rocks for cocaine, determining that the amount of the two rocks was .76 grams. The supreme court specifically stated, “The conviction is elevated to a Class A Felony if the State proves beyond a reasonable doubt that *the amount of cocaine possessed* weighed three grams or more.” *Woodford*, 752 N.E.2d at 1282 (emphasis added). Ultimately, the supreme court affirmed the defendant’s conviction: “Here, it is undisputed that the total weight of the nine rocks equaled 3.21 grams, and the two-rock sample from this group tested positive for cocaine. As such, the testing of a representative sample consisting of two rocks of cocaine was sufficient for Defendant’s dealing in cocaine conviction.” *Id.* at 1283.

We observe that nothing in the *Woodford* court’s opinion suggests that the State was

required to prove that the defendant intended on delivering all nine rocks of cocaine at once.<sup>4</sup> Accordingly, we conclude that the trial court did not err in prohibiting Williams's interpretation of Indiana Code Section 35-48-4-1 from being presented to the jury.

### ***VI. Double Jeopardy***

The State concedes that Williams's "convictions for class A felony dealing a narcotic drug and class C felony possession of a narcotic drug and a firearm violate double jeopardy and that the class C felony possession conviction and sentence should be vacated." Appellee's Br. at 21; *see Hardister v. State*, 849 N.E.2d 563, 575 (Ind. 2006) (concluding that class C felony possession of cocaine and a firearm is a lesser included offense of class A felony dealing based on possession of the same cocaine that supports the class C felony count); *see also* Ind. Code § 35-38-1-6 (providing that where a defendant is found guilty of both a greater and a lesser included offense, judgment and sentence may not be entered on the lesser included offense). Therefore, we remand with instructions to vacate Williams's conviction and sentence for class C felony possession of a narcotic drug and a firearm.

Affirmed in part and remanded in part.

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<sup>4</sup> Williams asserts that *Simmons v. State*, 828 N.E.2d 449 (Ind. Ct. App. 2005), holds that while the State is not prohibited from charging and proving intent to deliver over three (3) grams when no individual transaction is over that amount, each case must be evaluated on its [sic] own facts." Appellant's Reply Br. at 1 (citing *Simmons*, 828 N.E.2d at 453-54). *Simmons* is inapplicable. There, the defendants were convicted of *conspiracy* to deal in cocaine in excess of three grams. The case highlights a subtle distinction between Indiana Code Section 35-48-4-1 paragraphs (a)(1) and (2). For example, under (a)(1), a person who knowingly or intentionally *delivers* a narcotic drug commits class B felony dealing in a narcotic drug. Since (a)(1) requires only "delivery," the enhancement to a class A felony if the drug involved weighs three grams or more must apply to the amount "delivered." Under (a)(2), a person who knowingly or intentionally *possesses, with intent to deliver* a narcotic drug commits dealing in a narcotic drug. As our supreme court stated, "The conviction is elevated to a Class A Felony if the State proves beyond a reasonable doubt that *the amount of cocaine possessed* weighed three grams or more." *Woodford*, 752 N.E.2d at 1282 (emphasis added).

BAKER, C.J., and DARDEN, J., concur.