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# IN THE COURT OF APPEALS OF INDIANA

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| BYRON G. LEWIS, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 46A03-1004-CR-200 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE LAPORTE SUPERIOR COURT
The Honorable Kathleen B. Lang, Judge
Cause No. 46D01-0905-FB-83

**June 30, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## Case Summary

Byron G. Lewis appeals his convictions and thirty-year sentence for three counts of Class A felony dealing in cocaine. Lewis contends that the trial court abused its discretion by denying his motion for a mistrial, there is insufficient evidence to sustain his convictions, and the trial court erred by failing to enter an adequate sentencing statement. We conclude that the trial court did not abuse its discretion by denying his motion for a mistrial and that the evidence is sufficient to sustain his convictions. Further, although the trial court failed to enter an adequate sentencing statement, we exercise our authority to review sentences under Indiana Appellate Rule 7(B) and decline to revise Lewis's advisory sentence. Finally, as the sentencing order and chronological case summary indicate that Lewis was sentenced to three concurrent thirty-year terms, the abstract of judgment should be corrected to indicate this as well. We therefore affirm and remand for correction to the abstract of judgment.

## Facts and Procedural History

David Walsh was a confidential informant for the Michigan City Police Department Narcotics Task Force. On April 15, 2009, Walsh participated in three controlled buys of crack cocaine from Lewis. Each buy occurred within 1000 feet of Hansen Playground and Blue Chip Casino Hotel. Before and after each buy, detectives with the task force met Walsh at a predetermined location and searched him and his vehicle for money, weapons, or contraband. They also provided him with prerecorded buy money and equipped his vehicle with a recording device. Walsh was under continuous surveillance to, from, and during each buy.

For the first buy, Walsh called Lewis to buy twenty dollars of crack cocaine. Walsh then drove to Lewis's mother's house on E Street and pulled into an area behind the house. Lewis came out of the house, stepped into the passenger side of Walsh's vehicle, and made a call to "score the narcotics." Tr. p. 37. Walsh gave Lewis twenty dollars of prerecorded buy money, and Lewis left the vehicle on foot. When Lewis returned with crack cocaine about ten minutes later, he stepped back into Walsh's vehicle, took a portion of the crack cocaine for himself, and gave the rest to Walsh. After Lewis exited the vehicle, Walsh drove back to meet the detectives. Walsh gave the crack cocaine to the detectives.

The second and third buys were similar to the first buy. The only differences were that Walsh drove Lewis down an alley before giving him the buy money and that Walsh drove Lewis back to his mother's house after getting the crack cocaine.

The State charged Lewis with three counts of Class A felony dealing in cocaine. A jury trial was held in January 2010. During Walsh's direct examination, Lewis interrupted to deny that Walsh ever bought cocaine from him. He also interjected at the end of Walsh's testimony by repeatedly asking the trial court if he could ask Walsh questions that defense counsel declined to ask. The court explained that he could not ask questions himself because he was represented by counsel.

After Walsh's testimony and outside the presence of the other jurors, a juror told the trial court and the parties that she recognized Lewis's voice from an altercation that occurred at her workplace, Blue Chip Casino, where someone had stolen food. She was not directly involved in the altercation but overheard it. She explained that because at

trial Lewis "just keeps arguing and talking when he shouldn't" and because "when security [at the casino] was trying to talk to him too, he wouldn't listen either," the juror believed that Lewis was the person who had stolen food. *Id.* at 84. She stated that her recognition of Lewis might cause her to be biased.

When the State questioned the juror, she clarified that the altercation occurred about six weeks before trial. Lewis responded, "I was in jail." *Id.* at 86. The State then informed the juror that Lewis was incarcerated at the time:

> Q Would it surprise you . . . if I were to tell you and if the Court could even assure you just from a judicial notice standpoint that Mr. Lewis has been incarcerated since May of last year continuously and has not been out of jail?
>
> A Oh, I didn't know that. I honestly didn't know. But his voice to me seemed like -- like I said, I didn't recognize him. And that's what I wanted to do. I just wanted to bring it to your attention that the voice is the one -- the arguing voice was the one that -- which jarred me right away.

*Id.* at 86-87. Defense counsel then questioned the juror:

> Q So what you're saying is, you feel you recognized a voice; correct?
> A A voice, yes.
> Q As a result of which you feel in fear for your safety; correct?
> A Not -- well, not so much in fear but I felt like --
> Q Intimidated?
> A That would implement -- yeah. I felt like I knew -- I -- that the voice was recognizable enough that I should tell somebody instead of keeping it to myself and not saying anything and then at the end still have it in my mind that that might have been him and would place, you know, verdict that I didn't want to -- that I wasn't sure. I was just being very careful.
>
> * * * * *
>
> Q I appreciate your caution. Have you communicated this to anyone else in the jury room?
> A Yes.
> Q And to whom have you spoken?
> A One of the ladies in there.
> Q Okay. So what did you tell her?

A I said I thought I recognized the voice from an altercation that I had at the Blue Chip.
Q Okay. What else did you tell the other jury lady?
A Well, then everybody else started talking about it. And then we just kind of blew it off. And then we just started talking about the Blue Chip in general. Another gentleman asked if -- how it was going, if it was busy, how the new hotel went. But it didn't get -- really.

*Id.* at 87, 88. The trial court and the juror had the following exchange:

Q Did you indicate to any of the other jurors that you were fearful?
A No.
Q And your motivation here was because you were following the instructions of the Court to inform the Court if you believe you knew any of the witnesses or the defendant?
A Absolutely, yes.
Q And not because you had some type of a fear?
A No. Not at all. The only fear that I had was that I would make a wrong, you know, thing over something that I didn't --

*Id.* at 90. The juror then indicated that Lewis could not have been the person at Blue Chip Casino.

The trial court said that it would instruct the jury that the juror thought she recognized Lewis as the person at Blue Chip Casino but that she was mistaken. Defense counsel moved to have the jury discharged. The court did not grant the request and instead instructed the jury:

> [O]ne of your fellow jury members has followed the strict rules of the Court and the trial and indicated to the bailiff that she may know one of the parties. And because of that, the juror was b[r]ought into court and questioned by the Judge and by the parties on both sides. She indicated that she observed a confrontation involving the defendant at her place of employment. And after being questioned by the Court and the attorneys she indicated that it could not and was not possibly that it was the defendant that she observed at her place of employment. And also following then the procedure that -- it's very important that there's no bias and that you're not influenced either way toward the State or the defendant. We've talked a lot about that so far since you've been here today. And so the record is clear, I'm going to ask each one of you individually if the information that was

> just brought forward, which you may not even have known about, would influence you in any way.

*Id.* at 93. The court questioned each juror if the information would cause any bias. Each juror responded no.

The video recordings taken from Walsh's vehicle were played for the jury. When Lewis testified in his own defense, he admitted being the person in each of the three videos that stepped into Walsh's vehicle, took Walsh's money, returned to the vehicle with crack cocaine, broke off a piece for himself, and gave Walsh the rest. But he denied dealing drugs to Walsh.

The jury found Lewis guilty as charged. In sentencing Lewis to thirty years, the trial court stated:

> The Court, considering the information in the presentence investigation report the arguments of counsel and evidence submitted finds as follows: It is ordered, adjudged and decreed by the Court that the defendant, Byron G. Lewis shall be committed [to] the Department of Correction for classification and confinement for a determinate period of 30 years.

*Id.* at 264; *see also* Appellant's App. p. 62 (sentencing order providing the same).[1]

Lewis now appeals.

## Discussion and Decision

Lewis contends that the trial court abused its discretion by denying his motion for a mistrial, there is insufficient evidence to sustain his convictions, and the trial court erred by failing to enter an adequate sentencing statement.

### I. Mistrial

[1] We note that the pages of Lewis's Appendix are not numbered in violation of Indiana Appellate Rule 51(C) ("All pages of the Appendix shall be numbered at the bottom consecutively . . . .").

Lewis contends that the trial court abused its discretion by denying his motion for a mistrial because the statements made by the juror who thought she recognized him caused the jury to be prejudiced.

The ruling on a motion for a mistrial is left to the sound discretion of the trial court as that court is in the best position to assess the circumstances of an error and its probable impact upon the jury. *Stokes v. State*, 922 N.E.2d 758, 762 (Ind. Ct. App. 2010), *trans. denied*. We reverse only upon an abuse of that discretion. *Id.* To prevail on appeal from the denial of a motion for a mistrial, the defendant must demonstrate that the statement or conduct in question was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected. *Id.* at 762-63. The gravity of the peril is assessed by the probable persuasive effect of the misconduct upon the jury's decision rather than upon the degree of impropriety of the conduct. *Id.* at 763. A mistrial is an extreme remedy that is justified only when less severe remedies will not satisfactorily correct the error. *Id.*

Where the trial court is presented with the possibility that the jury has been exposed to extraneous material having a potential to taint the jury's verdict, upon motion by the defendant the trial court is required to interrogate and admonish the jurors collectively and individually. *West v. State*, 758 N.E.2d 54, 55 (Ind. 2001) (citing *Lindsey v. State*, 260 Ind. 351, 295 N.E.2d 819, 824 (1973)). We presume that the jury follows the trial court's instructions. *Harris v. State*, 824 N.E.2d 432, 440 (Ind. Ct. App. 2005). When the trial court admonishes the jury to disregard what has occurred or employs other reasonable curative measures, the court's refusal to grant a mistrial will

not be reversible error unless it can be shown that irreversible prejudice has resulted. *Boyd v. State*, 494 N.E.2d 284, 294 (Ind. 1986), *reh'g denied*.

Here, the juror thought she recognized Lewis as the person involved in the altercation at Blue Chip Casino, but after learning that he had been incarcerated at the time of the altercation, the juror admitted that Lewis could not have been the same person. The trial court took curative action by informing the jury that although the juror thought Lewis was the person at Blue Chip Casino, she later realized that he could not have possibly been the same person. The trial court then questioned each juror whether the information would cause him or her to be biased, and each juror responded no. We fail to see how any potential prejudice was not cured. *See Hampton v. State*, 873 N.E.2d 1074, 1078-79 (Ind. Ct. App. 2007) (trial court in murder trial did not abuse discretion by denying motion for mistrial where jurors heard alternate juror say defendant might be a suspect in other murders and trial court took curative action by excusing that alternate juror, questioning other jurors whether they could remain impartial, and excusing juror who responded he could not remain impartial).

Lewis nonetheless argues that the juror's statements led to irreversible prejudice. *See* Appellant's Br. p. 7 ("[T]his harmful and prejudicial opinion is simply not one that can be cured with questioning by counsel or an admonition."). Specifically, Lewis argues that there are "unique factual circumstances" that compel a finding of irreversible prejudice: (1) the juror was sure Lewis was the person at Blue Chip Casino because she recognized his voice, (2) the juror compared Lewis's behavior at trial with the behavior of the person at Blue Chip Casino, noting their argumentativeness and refusal to listen,

(3) the juror said her belief that Lewis was the person at Blue Chip Casino would cause her to be biased, and (4) "Blue Chip Casino, the site of the altercation allegedly witnessed by the juror, was a key location in this case which was referenced in multiple occasions throughout the trial. At one point, a representative of Blue Chip Casino was even called to testify about the casino and its facilities." Appellant's Reply Br. p. 2-3 (citations omitted).

The juror's comments to the court and the parties that she recognized Lewis's voice, noted similar behavior between Lewis and the person at Blue Chip Casino, and would be biased against Lewis all occurred before she was told that Lewis was incarcerated at the time of the altercation. She subsequently admitted that the person at Blue Chip Casino could not have been Lewis and assured the court that she would remain unbiased. Further, we fail to see the significance of the fact that Blue Chip Casino was referenced throughout trial. Lewis's dealing charges were elevated to Class A felonies because he delivered the crack cocaine within one thousand feet of a public park and family housing complex. The Blue Chip Casino Hotel representative's testimony was therefore introduced to establish where the hotel was located and whether the hotel constituted a family housing complex. We refuse Lewis's invitation to conclude that references to Blue Chip Casino at trial caused jurors to continue to believe that Lewis was the person at Blue Chip Casino. We decline to find that any of the facts highlighted by Lewis, individually or as a whole, led to irreversible prejudice.

Lewis next argues that he was subjected to grave peril when the State informed the juror that he had been incarcerated since May. It was Lewis himself, however, who first

told the juror that he was in jail at the time of the altercation. *See* Tr. p. 86 ("[State]: I'm concerned . . . . When did you say that took place? [Juror]: It was about a month, a month-and-a-half ago[.] [Lewis]: I was in jail."). Even if Lewis had not first informed the juror, we would still conclude that he was not subjected to grave peril. *See Stokes v. State*, 919 N.E.2d 1240, 1244 (Ind. Ct. App. 2010) (trial court did not abuse discretion by denying mistrial where jury learned that defendant was incarcerated pending trial), *trans. denied*; *see also Lucio v. State*, 907 N.E.2d 1008, 1011 (Ind. 2009) (trial court did not abuse discretion by denying mistrial where witness violated pretrial order by inadvertently stating that she thought defendant and alleged co-conspirator met in jail).

Lewis points to *Stroud v. State*, 787 N.E.2d 430 (Ind. Ct. App. 2003), *trans. denied*, to show that the trial court abused its discretion here. There, jurors in a drug trial read a newspaper article showing a photograph of the defendant shackled and stating that he had already been convicted of a similar offense, had exhibited bizarre and disruptive behavior in previous criminal proceedings, and was charged with triple homicide in a separate case. *Id.* at 433. This Court determined that the highly prejudicial information irreversibly tainted the jury and concluded that the trial court abused its discretion by denying the defendant's motion for a mistrial. *Id.* at 436. The article in *Stroud* divulged highly prejudicial information to the jury. Here, the juror thought Lewis was someone who had stolen food but then realized that it could not have been Lewis. Any potential prejudice to Lewis was cured by the trial court when it informed the jury that the juror was mistaken and questioned the jurors as to their impartiality.

Lewis also argues that Indiana Code section 35-37-2-3 supports the conclusion that the trial court should have granted a mistrial. Subsection (b) of that statute provides:

> If the court finds that the juror has personal knowledge of a material fact, the juror shall be excused and the court shall replace that juror with an alternate. If there is no alternate juror, then the court shall discharge the jury without prejudice, unless the parties agree to submit the cause to the remaining jurors.

*See also* Ind. Jury Rule 24 ("If the court finds that the juror has personal knowledge of a material fact, the juror shall be excused, and the court shall replace that juror with an alternate."). The State responds that the juror did not in fact have personal knowledge of a material fact. We agree. The juror's belief that she recognized Lewis was mistaken. She acknowledged that she was mistaken, and the trial court informed the jury that she acknowledged she was mistaken. All of the jurors indicated that they would remain impartial. Section 35-37-2-3 is of no avail to Lewis. *See Hampton*, 873 N.E.2d at 1079 (where alternate juror told other jurors that defendant *might* have been involved in other murders, none of them had personal knowledge of a material fact to trigger violation of Indiana Jury Rule 24).

We conclude that the trial court did not abuse its discretion by denying Lewis's motion for a mistrial.

## II. Sufficiency of the Evidence

Lewis next contends that there is insufficient evidence to sustain his convictions.

Our standard of review with regard to sufficiency claims is well settled. In reviewing a sufficiency of the evidence claim, this Court does not reweigh the evidence or judge the credibility of the witnesses. *Bond v. State*, 925 N.E.2d 773, 781 (Ind. Ct.

App. 2010), *reh'g denied, trans. denied*. We consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and affirm if the evidence and those inferences constitute substantial evidence of probative value to support the verdict. *Id.* Reversal is appropriate only when reasonable people would not be able to form inferences as to each material element of the offense. *Id.*

The charging information on each count of Class A felony dealing in cocaine alleged that Lewis knowingly delivered cocaine within one thousand feet of a public park (Hansen Playground) and a family housing complex (Blue Chip Casino Hotel). *See* Appellant's App. p. 29; *see also* Ind. Code § 35-48-4-1.

Lewis does not contest the sufficiency of the evidence showing that the transactions occurred within one thousand feet of a public park and a family housing complex. Instead, he argues that he only possessed cocaine and did not deal cocaine. Specifically, he argues that his transactions with Walsh were not the type of "delivery" that satisfies the requirements of Indiana Code section 35-48-4-1.

A person who knowingly or intentionally manufactures, finances the manufacture of, delivers, or finances the delivery of cocaine commits dealing in cocaine. I.C. § 35-48-4-1(a)(1). "Delivery" is defined as "(1) an actual or constructive transfer from one (1) person to another of a controlled substance, whether or not there is an agency relationship; or (2) the organizing or supervising of an activity described in subdivision (1)." *Id.* § 35-48-1-11.

The evidence shows that on three separate occasions, Lewis received a call from Walsh that he wanted to buy twenty dollars of crack cocaine, met with Walsh in Walsh's

vehicle, made a call to "score the narcotics," received twenty dollars of prerecorded buy money from Walsh, left the vehicle, returned with crack cocaine about ten minutes later, took a portion of the crack cocaine for himself, and gave the rest of the crack cocaine to Walsh. This evidence is sufficient to show that Lewis made an actual transfer of crack cocaine to Walsh.

Lewis nonetheless argues that he did not own the crack cocaine or personally profit from the transactions. We initially note that the evidence of Lewis taking a portion of the crack cocaine for himself shows that he personally profited. Regardless, neither our statute criminalizing dealing in cocaine nor our statute defining "delivery" requires a person to own the drug or profit from the provision of the drug before he is considered a dealer. *See* I.C. §§ 35-48-1-11, -4-1; *see also Smalley v. State*, 732 N.E.2d 1231, 1236 (Ind. Ct. App. 2000) (finding evidence sufficient to show defendant dealt in cocaine by means of "delivery" where defendant offered to get cocaine for undercover detective, took detective's money, gave money to third party, and third party obtained cocaine and gave it to detective).

We conclude that the evidence is sufficient to sustain Lewis's convictions.

## III. Sentencing

Lewis finally contends that the trial court erred by failing to enter an adequate sentencing statement.

Sentencing decisions rest within the sound discretion of the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). So long as the sentence is within the statutory range, it is subject to review only for an

abuse of discretion. *Id.* To review a trial court's sentencing discretion, we must be told of its reasons for imposing the sentence. *Id.* "The trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." *Id.* at 491; *see also* Ind. Code § 35-38-1-1.3 ("After a court has pronounced a sentence for a felony conviction, the court shall issue a statement of the court's reasons for selecting the sentence that it imposes.").

In determining Lewis's sentence, the trial court stated only that it had considered Lewis's presentence investigation report, the arguments of counsel, and the evidence submitted. The sentencing order provides no more insight into the court's reasoning than its statement at sentencing. Because the trial court failed to enter an adequate sentencing statement, we may either remand for a new sentencing statement or exercise our authority to review the sentence under Indiana Appellate Rule 7(B). *Windhorst v. State*, 868 N.E.2d 504, 507 (Ind. 2007), *reh'g denied*. We choose the latter.

Article 7, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer*, 868 N.E.2d at 491). If the defendant's sentence is not inappropriate, we may affirm the sentence despite an inadequate sentencing statement. *See Windhorst*, 868 N.E.2d at 507 (where options were to either remand for new sentencing order or exercise authority to review and revise,

"[T]he Court of Appeals . . . reviewed Windhorst's sentence under Indiana Appellate Rule 7(B) and declined to revise it. . . . [W]e summarily affirm that portion of the Court of Appeals' opinion.").

Lewis was convicted of three counts of Class A felony dealing in cocaine. The statutory range for a Class A felony is between twenty and fifty years, with the advisory sentence being thirty years. Ind. Code § 35-50-2-4. The trial court sentenced Lewis to three concurrent thirty-year terms.

As to the nature of the offenses, Lewis dealt twenty dollars of crack cocaine to Walsh three times in one day. As to the character of the offender, Lewis, who was fifty-six years old at the time of these offenses, has an extensive criminal history of thirteen felony and eight misdemeanor convictions. His presentence investigation report states:

> His adult criminal history began at the age of 18 on a conviction for a misdemeanor Assault and Battery. Of record, he has had 8 misdemeanor convictions. Also of record are 13 felony convictions for Attempted Theft, Aggravated Robbery, 1st Degree (four), Burglary, 1st degree, Attempted Aggravated Robbery, 1st Degree, Attempted Offering a Forged Check, Amended Simple Robbery (twice), Simple Robbery (twice), and Passing/Possession Counterfeit Currency. He has had one probation revocation. A charge of being an Habitual Offender was dismissed in 2005. Two cases are currently pending in Superior Court 4 that includes a felony Possession of Cocaine.

PSI p. 8. This criminal history alone warrants Lewis's advisory thirty-year sentence. We decline to revise his sentence.

Finally, we note that the sentencing order includes a handwritten notation indicating "each ct – SE to be served conc.," Appellant's App. p. 62, and the chronological case summary shows that Lewis was sentenced to "a determinate period of thirty (30) years on each count to be served concurrently," *id.* at 5. The abstract of

judgment, however, indicates that the trial court merged the three counts and sentenced Lewis on only one count of Class A felony dealing in cocaine. *Id.* at 65. As a general rule, when faced with a discrepancy between a sentencing order and an abstract of judgment, the sentencing statement controls. *McElroy v. State*, 865 N.E.2d 584, 588 (Ind. 2007). "This is so because an abstract of judgment is distinct from a written sentencing order and is not the 'judgment of conviction.'" *Id.* We therefore remand to the trial court with instructions to correct the abstract of judgment to indicate that Lewis was sentenced to three concurrent thirty-year terms. *See Mendoza v. State*, 869 N.E.2d 546, 560 (Ind. Ct. App. 2007) (remanding for correction to abstract of judgment where it indicated defendant was convicted of attempted murder and not attempted aggravated battery), *trans. denied*.

Affirmed and remanded for correction to the abstract of judgment consistent with this opinion.

KIRSCH, J., and MATHIAS, J., concur.