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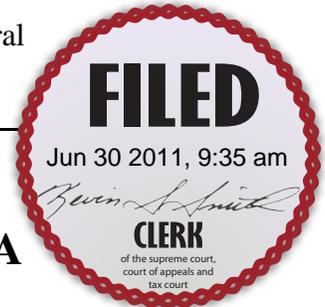
ATTORNEY FOR APPELLANT:

**MICHAEL FRISCHKORN**  
Frischkorn Law LLC  
Fortville, Indiana

ATTORNEYS FOR APPELLEE:

**GREGORY F. ZOELLER**  
Attorney General of Indiana

**ANDREW R. FALK**  
Deputy Attorney General  
Indianapolis, Indiana



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**IN THE  
COURT OF APPEALS OF INDIANA**

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JARROD W. FAIR,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 30A01-1012-CR-685

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APPEAL FROM THE HANCOCK SUPERIOR COURT  
The Honorable Terry K. Snow, Judge  
Cause No. 30D01-1003-FB-66

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**June 30, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## Case Summary

Police used an informant to set up a controlled buy of cocaine and a controlled buy of marijuana from Jarrod W. Fair. Fair deposed the informant prior to trial, but the informant later absconded, and the State was unable to subpoena him for trial. In addition, the State failed to produce the audio recording of the marijuana transaction until the day that the trial commenced. The recording and the informant's deposition were admitted at trial over Fair's objection. Fair was convicted of dealing and possession of cocaine and dealing and possession of marijuana, and the trial court imposed an aggregate sentence of ten years with two suspended.

On appeal, Fair argues that: (1) the admission of the informant's deposition violated his constitutional right to confrontation; (2) due to the discovery violation, the recording of the marijuana transaction should have been excluded; (3) his convictions of and sentences for both dealing and possessing each drug constitutes double jeopardy; (4) the evidence is insufficient to support his convictions; and (5) his sentence is inappropriate. We conclude that the State's efforts to secure the informant's testimony were reasonable. Therefore, because Fair had a prior opportunity to confront the informant, the admission of the deposition did not violate his right to confrontation. Fair has not shown that he needed additional time to prepare for trial despite the late production of the recording; therefore, we conclude that its admission was not an abuse of discretion. Even without this evidence, the testimony of the officers would have been sufficient to sustain his convictions. However, we agree with Fair that he cannot be convicted of and sentenced for possessing and dealing the

same drugs. Because the charges and the State's arguments to the jury did not reflect that the possession charges were based on drugs other than the drugs sold to the informant, we vacate his possession convictions. As to his sentence, we find that the offenses were fairly typical drug offenses, and given Fair's criminal record, we cannot say that his advisory sentence was inappropriate.

### **Facts and Procedural History**

In 2009, Joshua Poynter was being investigated in connection with a theft. In an effort to obtain lenient treatment, Poynter agreed to supply the police with information about drugs. On September 16, 2009, Poynter met with Detective Matt Holland of the Greenfield Police Department and Detective Tim Cicenas of the Hancock County Sheriff's Department to set up a controlled buy. The detectives searched Poynter and his car and supplied him with \$60 and an audio recording device. Poynter called Fair to set up a cocaine deal. The detectives followed Poynter to the place where he had agreed to meet Fair, and Poynter gave the \$60 to Fair. Fair then left to get the cocaine from another source. About an hour later, Poynter called Fair again to establish a meeting place to pick up the cocaine. The detectives searched Poynter and his car again, and then they followed him to the drop-off location. Afterward, Poynter met the detectives and gave them the cocaine that he had purchased.

The next day, Poynter helped the detectives set up a controlled buy of marijuana. Once again, the detectives searched Poynter and his car and gave him \$60 and a recording device. Poynter called Fair and agreed to meet him near an apartment complex. Detectives Holland and Cicenas drove separately. Detective Holland saw Fair get into Poynter's car, but

then lost sight of the car. Detective Cicenias saw Fair go back and forth between the car and an apartment several times during the transaction. Afterward, Poynter met the detectives and handed over the marijuana that he had purchased.

As a result, Fair was charged with class B felony dealing in cocaine, class D felony possession of cocaine, class A misdemeanor dealing in marijuana, and class A misdemeanor possession of marijuana. Before trial, Fair deposed Poynter. However, when the State attempted to subpoena Poynter for the trial, he could not be located. Detective Trent Smoll testified that he attempted to find Poynter while he was serving subpoenas in the Indianapolis area. During the week before trial, Detective Smoll went to the house where Poynter was believed to be living on three different days, but never found him there. Detective Smoll researched another possible address for Poynter and determined that it did not exist. Another detective who had been trying to locate Poynter told Detective Smoll that he had spoken to Poynter's parents and found out that he was "on the run" because there was a warrant for his arrest. Tr. at 198. Detective Smoll did not attempt to contact the parents himself. He confirmed that there was a warrant for Poynter's arrest issued in Marion County that was still active as of the Friday before trial. Poynter was supposed to be on work release at the time, but had absconded.

Because Poynter could not be located, the State sought to admit his deposition at trial. Poynter objected, arguing that the deposition was hearsay and that its admission would violate his right to confrontation. The trial court found that Poynter was unavailable and permitted the State to read his deposition to the jury. In his deposition, Poynter

acknowledged that he was incarcerated at the time, that he had theft and habitual offender charges pending, that he had a drug habit, and that he had participated in the buys in an effort to obtain leniency in his own case. Poynter described the first buy, which corresponded with the detectives' account of the transaction. Fair's counsel did not delve into the specifics of the second transaction during the deposition. Poynter claimed that in each transaction, Fair was a middle man, and Poynter would "break him off some," meaning that he would give Fair a portion of the drugs as compensation. *Id.* at 218. The State also stipulated that Poynter had prior convictions for class B felony burglary, class C felony forgery, and two convictions for class D felony theft.

During the trial, the State also sought to admit the audio recordings of the controlled buys. State's Exhibit 3 was a CD with four tracks: Poynter's initial call to Fair, Poynter dropping off the money, Poynter's second call to establish a meeting place to pick up the drugs, and Poynter picking up the drugs. State's Exhibit 6 was a CD with two tracks: Poynter's call to Fair and the actual transaction. For reasons not disclosed in the record, Detective Holland first provided Exhibit 6 to the prosecutor on the first day of the trial; therefore, neither the prosecutor, nor Fair, nor defense counsel had listened to the CD at that time. Fair objected to the admission of the CDs on hearsay grounds and also objected to Exhibit 6 because of its late disclosure. The trial court ruled that it would not allow Exhibit 6 to be admitted on the first day of trial so that Fair and his counsel could review it during the break between the first and second days of the trial.

Ultimately, both CDs were admitted over Fair's objection. Detectives Holland and Cicenias both testified that at the time of the buys, they could hear only Poynter's end of the phone calls; however, they both stated that they could identify Fair's voice in the recordings because he worked at a restaurant where they frequently ate lunch. Detective Cicenias testified that when Poynter talked about "breaking off" in the recordings, that meant that Poynter was going to give Fair a portion of the drugs, and Detective Cicenias also stated that this is common in drug transactions.

The jury found Fair guilty as charged, and the court entered judgment on all four counts. The trial court sentenced Fair to ten years with two suspended on the dealing in cocaine conviction, two years on the possession of cocaine conviction, and one year on each of the marijuana-related convictions, with all sentences to be served concurrently. Fair now appeals.

### **Discussion and Decision**

Fair raises six issues, which we restate as the following five: (1) whether the admission of Poynter's deposition violated his right to confrontation; (2) whether the trial court abused its discretion by admitting the recording of the second drug transaction; (3) whether his convictions and sentences for both dealing and possession of each drug constituted double jeopardy; (4) whether the evidence was sufficient to support his convictions; and (5) whether his sentence is appropriate.

## *I. Admission of Deposition*

Fair argues that the admission of Poynter's deposition violated his right to confrontation under the Sixth Amendment of the United States Constitution and Article 1, Section 13 of the Indiana Constitution because the State did not make reasonable efforts to secure Poynter's attendance at trial and because he did not have the opportunity to cross-examine Poynter on the recording of the second transaction.<sup>1</sup> "Generally, deposition testimony of an absent witness offered in court to prove the truth of the matter asserted constitutes classic hearsay." *Garner v. State*, 777 N.E.2d 721, 724 (Ind. 2002). However, Indiana Trial Rule 32(A)(3)(d) authorizes the admission of a deposition when the proponent of the testimony has been unable to secure the witness's presence by subpoena. In addition, Indiana Evidence Rule 804 provides, in relevant part:

**(a) Definition of Unavailability.** "Unavailability as a witness" includes situations in which the declarant

...

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance by process or other reasonable means.

....

**(b) Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.

(1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken

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<sup>1</sup> The Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him...." Article 1, Section 13(a) states, "In all criminal prosecutions, the accused shall have the right ... to meet the witnesses face to face...."

in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

The decision to admit evidence is within the sound discretion of the trial court.

*Garner*, 777 N.E.2d at 724.

Nevertheless, the constitutional right of confrontation restricts the range of admissible hearsay by requiring (1) that the statements bear sufficient indicia of reliability and (2) that the prosecution either produce the declarant or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant. Depositions that comport with the principal purposes of cross-examination provide sufficient indicia of reliability.

....

... A witness is unavailable for purposes of the Confrontation Clause requirement only if the prosecution has made a good faith effort to obtain the witness's presence at trial.... Even if there is only a remote possibility that an affirmative measure might produce the declarant at trial, the good faith obligation *may* demand effectuation. Reasonableness is the test that limits the extent of alternatives the State must exhaust.

*Id.* at 724-25 (citations omitted). *See also Crawford v. Washington*, 541 U.S. 36, 68 (2004)

("Where testimonial [hearsay] evidence is at issue ... the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

#### ***A. Sixth Amendment***

During the week before trial, Detective Smoll went to the house where Poynter was believed to be living on three different days, but never found him there. Detective Smoll researched another possible address for Poynter and determined that it did not exist. Another detective spoke to Poynter's parents and learned that he was "on the run" because there was a

warrant for his arrest. Tr. at 198. Detective Smoll confirmed that there was a warrant for Poynter's arrest issued in Marion County that was still active as of the Friday before trial.

Fair suggests that the State should have subpoenaed Poynter while he was still incarcerated. However, the trial date was set on September 29, 2010, just a few days before Poynter was expected to be released from the Department of Correction and begin work release. There is nothing in the record that suggests that the State was aware that Poynter was a flight risk, such that it was necessary to subpoena him as soon as possible and keep close tabs on his whereabouts. *See Tiller v. State*, 896 N.E.2d 537, 546 (Ind. Ct. App. 2008) (finding that the State's efforts to secure a witness's presence were reasonable; despite witness's initial reluctance to testify, he later cooperated and gave no further indication that he would not appear at trial). Fair takes issue with the fact that Detective Smoll was not the lead detective on his case and that he relied on information from yet another detective, but Fair provides us with no reason why the search for Poynter should have been conducted by the lead detective alone. Fair also suggests that the State could have attempted to mail the subpoena. However, because Poynter was attempting to evade arrest, it seems unlikely that he would have appeared in court simply because the State mailed a subpoena to his last known address. Fair also asserts that the State should have requested a continuance to find Poynter. The record does not reflect that the State had any additional leads to follow, and we decline to hold that the State must request a continuance when it is apparent that the witness intends to absent himself indefinitely. *See id.* at 547 (holding that the State was not required to request a continuance where the witness had fled to Wisconsin to avoid testifying and

there was no indication that he would return as long as the case was pending). Therefore, we conclude that the State's efforts to secure Poynter's attendance at trial were reasonable.

Fair argues that his opportunity to depose Poynter was insufficient because he was unable to question Poynter about the recording of the second transaction, which Fair did not receive until the first day of the trial. However, Fair does not suggest what additional questions he would have asked or explain how this would have impacted the outcome of his trial.<sup>2</sup>

We conclude that Poynter was unavailable and that Fair had a prior opportunity to cross-examine him; therefore, Fair's Sixth Amendment right to confrontation was not violated.

### ***B. Article 1, Section 13***

Fair notes that the Indiana Constitution affords him the right "to meet the witnesses face to face." Ind. Const. Art. 1, § 13(a). He further notes that our supreme court has stated that Article 1, Section 13 "places a premium upon live testimony" and the "defendant's right to meet the witnesses face to face has not been subsumed by the right to cross-examination." *Brady v. State*, 575 N.E.2d 981, 988 (Ind. 1991). Nevertheless, the right is not absolute and is satisfied when the witness has been deposed. *Id.* at 987. As noted above, Fair deposed Poynter and has not shown that any additional cross-examination on the recording of the

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<sup>2</sup> Probably the most damaging statements on the recording were Fair's own references to the drug transaction that had occurred the previous day. Fair's statements are not hearsay and would be admissible regardless of the admissibility of Poynter's statements, and it is not apparent how a more complete opportunity to depose Poynter would have helped him to mitigate the negative impact of his own statements.

second transaction would benefit his case. Therefore, although Article 1, Section 13 sometimes affords greater protection than the Sixth Amendment, Fair has not demonstrated that this is one of those cases. As the admission of the deposition did not violate Fair's rights under either provision, we conclude that the trial court did not abuse its discretion by admitting it.

## ***II. Admission of Recording***

Fair argues that the trial court abused its discretion by admitting State's Exhibit 6, the recording of the second transaction, despite the fact that the State violated the court's discovery order by providing it to him on the first day of his trial.<sup>3</sup> Our standard of review is well settled:

The trial court has broad discretion in dealing with discovery violations and may be reversed only for an abuse of that discretion involving clear error and resulting prejudice. Generally, the proper remedy for a discovery violation is a continuance. Exclusion of the evidence is an extreme remedy and is to be used only if the State's actions were deliberate and the conduct prevented a fair trial.

*Berry v. State*, 715 N.E.2d 864, 866 (Ind. 1999) (citations omitted).

The trial court ruled that the recording would not be admitted the first day of trial so that Fair and his counsel could review it during the break between the first and second days of trial. Although Fair complains that this was not really a "continuance" because he would have had that time to prepare anyway, Fair did not request a longer continuance, nor has he suggested what additional steps he would have taken to prepare if he had been given more

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<sup>3</sup> Fair does not renew his hearsay argument on appeal, nor does he challenge the admission of State's Exhibit 3, the recording of the first transaction.

time. Therefore, we cannot say that the trial court abused its discretion by admitting State's Exhibit 6 on the second day of trial.

### *III. Double Jeopardy*

Fair argues that the possession charges were lesser-included offenses of the dealing charges, and therefore, his convictions and sentences for all four charges constitute double jeopardy.

Possession of a narcotic drug is an inherently included lesser offense of dealing that drug, and a defendant generally may not be convicted and sentenced separately for dealing and possessing the same drug. However, our Supreme Court has indicated that separate convictions for dealing and possession are sustainable when the defendant deals a portion of a drug and retains the rest, if the dealing and possession charges are specifically based only on the respective quantities.

*Johnson v. State*, 659 N.E.2d 242, 245 (Ind. Ct. App. 1995).

The State points to Poynter's statements about "breaking off" some of the drugs for Fair and contends that that evidence is the basis for Fair's possession convictions, while the drugs given to Poynter are the basis for his dealing convictions. However, the State did not use this approach in the charging information.<sup>4</sup> In its closing argument, the State walked the

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<sup>4</sup> The dealing in cocaine charge alleged that Fair, "on or about 09/16/2009, in Hancock County, State of Indiana, ... did knowingly deliver to CI 83 [Poynter], Cocaine." Appellant's App. at 7. The possession of cocaine charge alleged that Fair, "on or about/between [sic] 09/16/2009, in said County of Hancock, State of Indiana, did then and there knowingly possess cocaine." *Id.* at 8. The dealing in marijuana charge alleged that Fair, "on or about/between [sic] 09/17/2009, in said County of Hancock, State of Indiana, did then and there knowingly or intentionally manufacture or deliver, or possess with intent to manufacture or deliver marijuana in the aggregate weight of not more than thirty (30) grams." *Id.* at 9. The possession of marijuana charge alleged that Fair, "on or about/between [sic] 09/17/2009, in said County of Hancock, State of Indiana, did then and there knowingly possess marijuana in the aggregate weight of not more than thirty (30) grams." *Id.* at 10.

jury through the evidence supporting each element of dealing cocaine, but not the other charges. Although the State in passing referenced Poynter's statements about "breaking off" some of the drugs in its closing argument, the State did not indicate to the jury that this was the basis for the possession charges. Therefore, we conclude that Fair's convictions and sentences for both dealing and possession constitute double jeopardy, and we reverse his convictions of possession of cocaine and possession of marijuana.<sup>5</sup> *See id.* at 246 (finding

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<sup>5</sup> In his reply brief, Fair concedes that he did not make a double jeopardy argument to the trial court and therefore must establish fundamental error. Our supreme court has stated that double jeopardy violations do not always constitute fundamental error. *Taylor v. State*, 717 N.E.2d 90, 95 n.7 (Ind. 1999). *See also Patton v. State*, 789 N.E.2d 968, 974 (Ind. Ct. App. 2003) (rejecting defendant's double jeopardy argument and declining to find fundamental error where defendant pled guilty to the charges), *aff'd in relevant part*, 810 N.E.2d 690 (Ind. 2004); *Bayes v. State*, 779 N.E.2d 77, 80-81 (Ind. Ct. App. 2002) (declining to find fundamental error based on a variance between the proof and the charging information for unlawful possession of a firearm by a serious violent felon where the evidence was sufficiently specific to protect the defendant from subsequent prosecution for possession of the same firearm), *trans. denied*. In *Johnson*, where the defendant was also convicted after trial of both dealing and possession of cocaine, we raised the double jeopardy issue sua sponte. 659 N.E.2d at 245. *See also Logan v. State*, 729 N.E.2d 125, 136-37 (Ind. 2000) (after rejecting the defendant's sentencing argument, the court sua sponte determined that the defendant's convictions for both murder and class A felony robbery constituted double jeopardy under the actual evidence test). As in *Johnson*, Fair's criminal record has been inflated due to an error that should have been readily apparent; therefore, we conclude that he has established fundamental error.

double jeopardy violation where neither the charging information nor the arguments distinguished between the drugs that were possessed and the drugs that were dealt).<sup>6</sup>

#### *IV. Sufficiency of the Evidence*

Fair argues that there was insufficient evidence to support his convictions for dealing in cocaine and marijuana. When reviewing the sufficiency of the evidence to support a conviction, we consider only the probative evidence and the reasonable inferences supporting the verdict. *Ross v. State*, 908 N.E.2d 626, 629 (Ind. Ct. App. 2009). We do not assess the credibility of witnesses or weigh the evidence. *Id.* We will affirm the conviction if a reasonable factfinder could find the elements of the crime proven beyond a reasonable doubt. *Id.* at 630.

Fair contends that, without Poynter's deposition or State's Exhibit 6, there is insufficient evidence that he supplied the drugs to Poynter. However, we have concluded that the trial court did not abuse its discretion in admitting the deposition and Exhibit 6 into evidence. Moreover, we have previously held that even if an informant does not testify, the

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<sup>6</sup> In *Richardson v. State*, our supreme court enunciated the test to be applied to double jeopardy claims pursuant to Article 1, Section 14 of the Indiana Constitution: "two or more offenses are the 'same offense' ... if, with respect to *either* the statutory elements of the challenged crimes *or* the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense." 717 N.E.2d 32, 49 (Ind. 1999). By contrast, "[f]or claims asserting violations of the federal Double Jeopardy Clause, 'the test to be applied to determine whether there are two offenses or only one, is whether each [statutory] provision requires proof of [an additional] fact which the other does not.'" *Id.* at 48 n. 34 (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

Fair does not specify which provision or which test he relies on, but relies primarily on *Johnson*. *Johnson* was decided prior to *Richardson*, and the *Johnson* court's analysis flowed from the fact that possession of a drug is a lesser-included offense of dealing that drug; therefore, *Johnson* presumably was applying the statutory elements test. Fair's convictions of both possession and dealing of each drug would also violate the actual evidence test. Given that the charges and arguments did not specify that the drugs retained by Fair were the basis for the possession charges, there is a reasonable possibility that the jury relied solely on the drugs that Fair dealt to support its verdict on all the charges. *See id.* at 53 (defendant must demonstrate a reasonable possibility that the factfinder used the same evidentiary facts to establish both offenses).

testimony of a police officer alone may be sufficient to support a conviction for dealing drugs when the officer's testimony establishes that the buy was properly controlled. *Id.* at 630-31. In Fair's case, the buys were properly controlled. Both detectives identified Fair's voice on State's Exhibit 3, the recording of the first transaction, which Fair has not challenged on appeal, and Detective Cicenias identified Fair as the person he saw get in and out of Poynter's car during the second transaction. Therefore, we conclude that there was sufficient evidence to prove that Fair was the person who supplied the drugs to Poynter.

#### ***V. Appropriateness of the Sentence***

Fair asserts that his sentence is inappropriate based on the nature of the offense and his character. Article 7, Section 6 of the Indiana Constitution authorizes this Court to independently review and revise a sentence imposed by the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. Indiana Appellate Rule 7(B) states, "The 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." "Although appellate review of sentences must give due consideration to the trial court's sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied." *Purvis v. State*, 829 N.E.2d 572, 587 (Ind. Ct. App. 2005) (internal citations and quotations omitted), *trans. denied, cert. denied*. The defendant bears the burden of persuading us that the sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

As to the nature of his offenses, Fair notes that he was acting as a middle man, that the amount of drugs involved was relatively small, and that Poynter instigated the transactions. As to his character, Fair acknowledges that he has a criminal record, but characterizes it as “not particularly serious.” Appellant’s Br. at 18. Fair has previous convictions for class C felony burglary and class D felony possession of cocaine as well as a juvenile record. He has had several probation violations as an adult and as a juvenile, most of which involved using drugs or alcohol or noncompliance with treatment.

Fair was sentenced to ten years with two suspended.<sup>7</sup> Ten years is the advisory sentence for a class B felony. Ind. Code § 35-50-2-5. Fair’s offenses were fairly typical drug offenses, but his criminal record could have supported a higher sentence. As such, we cannot say that his sentence was inappropriate.

### **CONCLUSION**

Fair’s convictions and sentences for both dealing and possessing the same drugs is a double jeopardy violation; therefore, we vacate his convictions and sentences for possessing cocaine and possessing marijuana. Finding that Fair has failed to establish any other error, we affirm his convictions and sentences for dealing cocaine and dealing marijuana.

Affirmed in part and vacated in part.

NAJAM, J., and ROBB, C.J., concur.

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<sup>7</sup> The vacation of Fair’s possession convictions does not affect the aggregate length of his sentence.