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IN THE
COURT OF APPEALS OF INDIANA

DHAVARES BUREAU,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 46A03-1004-CR-201
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAPORTE SUPERIOR COURT
The Honorable Kathleen B. Lang, Judge
Cause No. 46D01-0902-FA-20

AUGUST 23, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

GARRARD, Senior Judge

Defendant Dhavares Bureau appeals his two convictions of dealing in cocaine within 1,000 feet of a youth program center, both Class A felonies, Indiana Code section 35-48-4-1 (2006), and the trial court's determination that he is a habitual offender, Indiana Code section 35-50-2-8 (2005). We affirm.

On January 16, 2009, Detective Matthew Barr and Detective Bryan Maxey of the Michigan City Police Department met with John Thrower, who at that time was working as a confidential informant. Thrower had agreed to participate in a controlled buy of cocaine from Bureau. Before going to Bureau's neighborhood, the detectives searched Thrower for money or contraband, gave him prerecorded buy money, and equipped him with a "button camera" that could record audio and video. Next, Maxey drove Thrower to a spot a few blocks from Bureau's home. Meanwhile, Barr had gone to a spot near Bureau's residence, and he watched Thrower walk away from Maxey's car, approach Bureau's home, meet Bureau outside the home, and go inside the home with Bureau. In addition, Barr used a video recorder to capture Thrower's interaction with Bureau. Thrower's "button camera" ran out of memory before he entered Bureau's residence and did not record anything in the home. Subsequently, Thrower came out of Bureau's home and returned to Maxey's location as Barr watched his movements. At that point, Thrower turned over a substance later identified as cocaine.

An hour later, the detectives and Thrower prepared for a second buy from Bureau. The officers searched Thrower again, gave him more prerecorded buy money, and put a button camera on him. Once again, Maxey dropped Thrower off several blocks from Bureau's home, and Barr watched Thrower approach Bureau's home. On this occasion,

Bureau was working on his car, and after a conversation the two men got into the car. Barr recorded Bureau and Thrower's encounter outside of the car by video camera, and Thrower's button camera recorded their discussion inside the car. After the purchase, Thrower returned to Maxey and gave the detectives a substance that was later identified as cocaine.

Finally, on January 23, 2009, the detectives and Thrower performed a third controlled buy from Bureau. The detectives followed the same pre-buy procedures that they used on January 16, 2009. On this occasion, Thrower drove his own car to and from Bureau's home, but the officers searched the car in advance for contraband. Barr watched Thrower approach and leave Bureau's residence. The drug buy occurred in Bureau's home, and Thrower's button camera picked up audio and video recordings of the purchase. The button camera also recorded Thrower's movements from the time he drove away from Maxey until the time he drove back to Maxey and was debriefed. After the buy, Thrower gave the detectives a substance that was later identified as cocaine. Bureau's home was located within 250 feet of a child care center.

The detectives arrested Bureau in February 2009. The State charged him with three counts of Class A felony drug dealing and alleged that he was a habitual offender. Prior to trial, the State moved the court to declare Thrower to be an unavailable material witness pursuant to Indiana Evidence Rule 804. The court denied the State's motion. Bureau was tried to the bench, and Thrower did not testify. At the beginning of the trial, the State dismissed one of the three charges of Class A felony dealing in cocaine. At the end of the trial, the court determined that Bureau was guilty of the remaining two charges

of dealing in cocaine. The trial court further determined that Bureau was a habitual offender and sentenced him accordingly.

Bureau raises three issues, which we restate as:

I. Whether the evidence is sufficient to sustain Bureau's convictions for dealing in cocaine.

II. Whether the trial court abused its discretion in admitting portions of Barr's testimony regarding recordings of the drug buys from Bureau.

III. Whether the trial court erred in determining that Bureau is a habitual offender.

A. SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE CONVICTIONS FOR DEALING IN COCAINE

When an appellant raises a sufficiency of evidence challenge, we do not reweigh the evidence or judge the credibility of the witnesses. *Joslyn v. State*, 942 N.E.2d 809, 811 (Ind. 2011). We consider only the probative evidence and reasonable inferences supporting the verdict. *Id.* We will affirm if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. *Id.*

In this case, in order to convict Bureau as charged of two counts of dealing in cocaine as Class A felonies, the State was required to prove beyond a reasonable doubt that on January 16, 2009, and January 23, 2009, Bureau (1) knowingly or intentionally (2) delivered (3) cocaine (4) in an amount less than three grams (5) within 1,000 feet of a youth program center. Ind. Code § 35-48-4-1.

Bureau contends that on both counts the State failed to prove the element of delivery, that is, that Bureau had the cocaine before the buy and transferred it to Thrower.

Specifically, Bureau contends that this element cannot be established without testimony from Thrower, who did not testify at trial.

The evidence discussed above establishes that the detectives searched Thrower (and his car, for the January 23, 2009 purchase) for contraband before each controlled buy. Furthermore, for each buy, the detectives monitored Thrower from the time he approached Bureau's property until he entered Bureau's car (for the second buy on January 16, 2009) or home (on January 23, 2009). The detectives monitored Thrower as he left Bureau's property. After each buy, Thrower surrendered a substance to the detectives that was later identified as cocaine. Furthermore, recordings from the hidden camera on Thrower's person during the second buy on January 16, 2009, and the buy on January 23, 2009, demonstrate that Thrower purchased a substance from Bureau on each occasion. This evidence is sufficient to demonstrate that Bureau delivered cocaine to Thrower on two occasions as charged. *See Heyen v. State*, 936 N.E.2d 294, 302 (Ind. Ct. App. 2010), *trans. denied* (determining that the evidence was sufficient to sustain a conviction for dealing in methamphetamine where officers searched an informant before a controlled buy, the informant was kept under constant surveillance before and after the buy, the informant used audio and video recording devices during the buy, and a search of the informant after the buy revealed methamphetamine).

B. ADMISSION OF BARR'S TESTIMONY ABOUT HIS SURVEILLANCE RECORDINGS

Rulings on the admission of evidence are subject to appellate review for abuse of discretion. *McHenry v. State*, 820 N.E.2d 124, 128 (Ind. 2005). We reverse the trial

court's decision only when it is clearly against the logic and effect of the facts and circumstances before the court. *Granger v. State*, 946 N.E.2d 1209, 1213 (Ind. Ct. App. 2011).

During trial, Barr testified about preparing Thrower for the three controlled buys and his observations during the buys. Next, Barr explained that he recorded his observations of the controlled buys, and the State submitted his recordings as State's Exhibit 4. After the exhibit was entered into evidence without objection, the State played it for the court. As the recording of the first narcotics purchase on January 16, 2009 played, Barr described what was being shown. The recording showed Thrower talking with Bureau, and the prosecutor asked Barr what they were saying. Bureau objected, citing the best evidence rule and his right to confront witnesses under the Indiana Constitution. The court, during a lengthy colloquy with counsel, stated as follows:

> The best evidence would be what was actually introduced into evidence. If you're asking what—if he's asking of a statement of the defendant then that would be admissible. But he can't just repeat what's on—or what he thinks was on that tape. . . .
> He can testify as to his observations. He can testify under Rule 701 to his opinion on what was going on since he was the one who actually observed it. But he cannot say—repeat what's on the tape because that's in evidence. . . .
> And he can testify to what he saw. And he can testify to the statements of the defendant. But he can't reiterate what he heard on the tape because the tape's in evidence, and the best evidence rule will say the tape will speak for itself. But I'm not sure it does, so his opinion under 701 may be relevant and admissible. . . .
> Right. I've stated my response to the objection certainly as a trier of the facts. I'll separate out in my consideration what's admissible and what's not admissible. But I think the record's clear on what the Court would rule as admissible in this case. You've made your record, Counsel.

Tr. pp. 31-32, 33, 33-34, 35.

Next, Barr testified that during the recording of the first controlled buy, to him "it sounded like [Bureau and Thrower] were speaking of a future transaction and talking about when he said if it's good, you know, talking about the quality of the product." Tr. p. 35. The State also played Barr's recordings of the second buy on January 16, 2000, and the third buy on January 23, 2009. As the recordings played, Barr described what was occurring and gave his opinion that a drug transaction occurred on each occasion.

Bureau argues that the admission of Barr's testimony regarding the recordings of the three controlled buys violated Indiana Evidence Rule 1002, also known as the best evidence rule. That rule states, in relevant part: "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." Ind. Evidence Rule 1002. The purpose of the rule is to assure that the trier of the facts has submitted to it the evidence upon any issue that will best enable it to arrive at the truth. *Crosson v. State*, 268 Ind. 511, 518, 376 N.E.2d 1136, 1141 (Ind. 1978).

In this case, the trial court correctly noted that Barr could not simply reiterate what was on the recordings, because that would not comply with the best evidence rule. The trial court further promised to "separate out" what was and was not admissible in its deliberations. Tr. p. 35. We presume on appeal that trial courts know and follow the applicable law. *Thurman v. State*, 793 N.E.2d 318, 321 (Ind. Ct. App. 2003). Bureau has not demonstrated that the trial court inappropriately considered evidence in violation of the best evidence rule.

Next, Bureau argues that the trial court should not have allowed Barr to testify as to what Thrower said during the first controlled buy because the testimony violated Bureau's right to confront witnesses. During the trial, Bureau cited Article I, Section 13 of the Indiana Constitution, so our discussion is limited to that provision. That section states, in relevant part, "[i]n all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face . . . ." Ind. Const. Art. I, Section 13.

The trial court correctly noted that Barr could testify as to Bureau's statements, but Barr could not reiterate statements that were captured on tape. Again, the trial court also indicated that it would separate out what was admissible in the course of deliberating on the case. We presume that the trial court did not consider Barr's representation of what Thrower may have said, and Bureau has not pointed to any evidence in the record to rebut that presumption. Furthermore, Barr's description of what Thrower and Bureau said, and his narration as the recordings were played, were cumulative of his prior testimony of what he observed and were cumulative of the recordings themselves. Consequently, any error from the admission of Barr's narration was harmless. *See Tobar v. State*, 740 N.E.2d 106, 108 (Ind. 2000) (stating that "[e]vidence that is merely cumulative is not grounds for reversal"). Consequently, we find no abuse of discretion in the trial court's partial admission of Barr's testimony.

C. PREDICATE FELONIES FOR THE HABITUAL OFFENDER DETERMINATION

Bureau contends that the State failed to demonstrate that he had two prior unrelated felony convictions, so there is insufficient evidence to sustain the trial court's habitual offender determination. When reviewing the sufficiency of the evidence for a

habitual offender determination, we do not reweigh the evidence or judge the credibility of the witnesses. *Heyen*, 936 N.E.2d at 301. We will consider only the evidence most favorable to the verdict and the reasonable inferences to be drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id.* at 301-02.

The statute that governs habitual offender status provides, in relevant part,

> (a) Except as otherwise provided in this section, the state may seek to have a person sentenced as a habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two (2) prior unrelated felony convictions.
>
> (b) The state may not seek to have a person sentenced as a habitual offender for a felony offense under this section if:
>
> > (1) the offense is a misdemeanor that is enhanced to a felony in the same proceeding as the habitual offender proceeding solely because the person had a prior unrelated conviction;
> > (2) the offense is an offense under IC 9-30-10-16 or IC 9-30-10-17; or
> > (3) all of the following apply:
> >
> > > (A) The offense is an offense under IC 16-42-19 or IC 35-48-4.
> > > (B) The offense is not listed in section 2(b)(4) of this chapter.
> > > (C) The total number of unrelated convictions that the person has for:
> > >
> > > > (i) dealing in or selling a legend drug under IC 16-42-19-27;
> > > > (ii) dealing in cocaine or a narcotic drug (IC 35-48-4-1);
> > > > (iii) dealing in a schedule I, II, III controlled substance (IC 35-48-4-2);
> > > > (iv) dealing in a schedule IV controlled substance (IC 35-48-4-3; and
> > > > (v) dealing in a schedule V controlled substance (IC 35-48-4-4);
> > >
> > > does not exceed one (1). . . .

> (d) A conviction does not count for purposes of this section as a prior unrelated felony conviction if:
>
> (1) the conviction has been set aside;
>
> (2) the conviction is one for which the person has been pardoned; or
>
> (3) all of the following apply:
>
> (A) The offense is an offense under IC 16-42-19 or IC 35-48-4.
>
> (B) The offense is not listed in section 2(b)(4) of this chapter.
>
> (C) The total number of unrelated convictions that the person has for:
>
> (i) dealing in or selling a legend drug under IC 16-42-19-27;
>
> (ii) dealing in cocaine or a narcotic drug (IC 35-48-4-1);
>
> (iii) dealing in a schedule I, II, III controlled substance (IC 35-48-4-2);
>
> (iv) dealing in a schedule IV controlled substance (IC 35-48-4-3; and
>
> (v) dealing in a schedule V controlled substance (IC 35-48-4-4);
>
> does not exceed one (1).

Indiana Code § 35-50-2-8 (2005).

In this case, the State demonstrated at trial that Bureau has previous unrelated convictions for being a serious violent felon in possession of a handgun, a Class B felony, and dealing in cocaine, a Class B felony. Bureau argues that Indiana Code section 35-50-2-8, subsections (b) and (d), preclude citing his Class B felony dealing conviction in support of his habitual offender determination because that is his only narcotics dealing conviction. Our Supreme Court's opinion in *Peoples v. State*, 929 N.E.2d 750 (Ind. 2010), is controlling on this issue. In that case, Peoples pleaded guilty to dealing cocaine after having accumulated unrelated felony convictions for forgery and dealing cocaine. The trial court determined that Peoples was a habitual offender. On appeal, Peoples argued that his instant conviction for dealing in cocaine could not be considered an

unrelated conviction for the purpose of a habitual offender determination. Our Supreme Court disagreed. After reviewing the language and history of Indiana Code section 35-50-2-8, the Court concluded that Peoples' instant conviction for drug dealing qualified, noting, "while a single felony drug conviction is not enough to qualify a person for habitual offender status, a second such conviction is, be it a prior conviction or the instant offense." *Id.* at 754.

In the current case, Bureau has only one prior conviction for dealing in cocaine, but in the instant case he accrued two convictions for dealing in cocaine. Following the reasoning in *Peoples*, we must reject Bureau's argument and conclude that, when his instant convictions are considered along with his prior convictions, there is sufficient evidence of predicate unrelated felonies to support the habitual offender determination.[1]

For the reasons stated above, we affirm the judgment of the trial court.

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.

[1] Bureau notes that the *Peoples* decision was handed down after his trial and sentencing, and he asks this Court to apply a "less harsh" reading of the statute to him under the rule of lenity. Appellant's Reply Br. p. 6. We must decline his request due to our Supreme Court's unambiguous interpretation of Indiana Code section 35-50-2-8 in *Peoples.*