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IN THE
COURT OF APPEALS OF INDIANA

SYLVESTER BUCKINGHAM, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-1102-CR-107
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause No. 71D01-1008-FD-852

September 1, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Sylvester Buckingham, Jr. ("Buckingham") appeals from his conviction for Possession of Paraphernalia, as a Class D felony.[1] We affirm.

Issues

Buckingham puts forth two issues for our review, which we reframe as:

I. Whether the trial court improperly denied him adequate opportunity for voir dire of prospective jurors; and

II. Whether there is sufficient evidence to support the conviction.

Facts and Procedural History

On August 27, 2010, at around 10:15 p.m., South Bend Police Department Officer Alan Weigand ("Officer Weigand") was driving to work. As he passed a car lot that was closed for the day, he noticed a black male, who would later be identified as Buckingham, getting into a car. Officer Weigand pulled into the car lot to investigate.

Officer Weigand approached the car and saw Buckingham in its back seat. After getting Buckingham out of the back of the car, Officer Weigand performed a pat-down for officer safety and felt a hard metal object in the "fifth pocket" of Buckingham's pants. Looking down at the pocket, Officer Weigand saw a small metal pipe, charred on both ends and with steel wool inside it. Recognizing this as a pipe used for smoking crack cocaine, Officer Weigand arrested Buckingham.

On August 28, 2010, the State charged Buckingham with Possession of Paraphernalia,

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[1] Ind. Code § 35-48-4-8.3(b).

as a Class A misdemeanor,[2] and with Possession of Paraphernalia, as a Class D felony, due to having previously been convicted of Possession of Paraphernalia. See I.C. § 35-48-4-8.3(b) (enhancing the offense of Possession of Paraphernalia from a Class A misdemeanor to a Class D felony for a prior unrelated judgment or conviction for the same offense).

On December 10, 2010, a bifurcated jury trial was conducted. At the conclusion of the first phase of the trial, the jury found Buckingham guilty of Possession of Paraphernalia, as a Class A misdemeanor. At the conclusion of the second phase of the trial, the jury found Buckingham had previously been adjudicated as having committed Possession of Paraphernalia offense, making the instant offense a Class D felony.

On January 20, 2011, the trial court entered its judgment of conviction against Buckingham for Possession of Paraphernalia, as a Class D felony, and vacated the jury's guilty verdict for the Class A misdemeanor count. The trial court then sentenced Buckingham to two years imprisonment.

This appeal followed.

Discussion and Decision

Whether Buckingham was Afforded Appropriate Opportunity for Voir Dire

Buckingham's first basis for appeal is that the trial court inappropriately limited the content of the questions he sought to ask during voir dire. Specifically, Buckingham contends that the trial court abused its discretion by directing Buckingham to cease a line of questioning to the venire about whether each potential juror would hold the State to its

[2] I.C. § 35-48-4-8.3(a).

burden of proof as to all elements of the charged offense. The State contends that Buckingham has waived our review for failure to timely object and seek relief, and that in any event the trial court's limits upon the questions do not amount to either fundamental error or an abuse of discretion.

The right to an impartial jury is guaranteed by Article I, Section 13 of our state's constitution. "The purpose of voir dire is to determine whether a prospective juror can render a fair and impartial verdict in accordance with the law and the evidence." Joyner v. State, 736 N.E.2d 232, 237 (Ind. 2000). We afford trial courts "'broad discretion in determining the propriety of questions posed to prospective jurors during voir dire.'" Barber v. State, 715 N.E.2d 848, 851 (Ind. 1999) (quoting 16B William Andrew Kerr, Indiana Practice § 21.5d (1998); Von Almen v. State, 496 N.E.2d 55, 59 (Ind. 1986)).

Where a defendant fails to timely object to a trial court's limits upon questions posed during voir dire, however, appellate review of that decision is waived unless the defendant can demonstrate that the trial court's decision constituted fundamental error, that is, "an error so prejudicial to the rights of the defendant as to make a fair trial impossible." Black v. State, 829 N.E.2d 607, 610 (Ind. Ct. App. 2005) (quoting Merritt v. State, 822 N.E.2d 642, 643 (Ind. Ct. App. 2005)), trans. denied. The fundamental error exception "is an extremely narrow one," available only where there are "clearly blatant violations of basic elementary principles of due process" where the harm posed by the trial court's decision "cannot be denied." Id. (quoting Benson v. State, 762 N.E.2d 748, 755 (Ind. 2002)).

Here, both the trial court and the State had told the venire that the State had to meet

the burden of demonstrating beyond a reasonable doubt that Buckingham had committed the charged offense before he could be found guilty. During its portion of voir dire, the State set forth the elements of Possession of Paraphernalia, and asked whether the venirepersons thought they could hold the State to its burden. During his portion of voir dire, Buckingham revisited this line of questioning, and several members of the venire indicated that they might return a conviction even when only three of the four substantive elements were proved beyond a reasonable doubt.

As the exchange between Buckingham and the jurors proceeded over this matter, the trial court called both parties to the bench and stated, "I'm getting a little concerned that this case is turning into an argument in advance of the trial." (Tr. 76.) During the same sidebar, the trial court then said:

> I think you can ask them … generally if they can follow the law. If they are instructed they have to find the defendant guilty beyond a reasonable doubt, the State has to prove each of the following essential elements…. Beyond that, I really this is getting way too particular into this case.

(Tr. 78.) Though Buckingham asked the trial court the extent to which he could pursue his questions, at no point did he formally object to these limits upon or otherwise challenge proceeding onward with voir dire.

Having failed to formally object or seek any remedy as a result of the trial court's limits upon his examination of the jury, Buckingham has waived our review, subject only to the possible exception of the existence of fundamental error, that is, where there are "clearly blatant violations of basic elementary principles of due process." Black, 829 N.E.2d at 610.

Here, however, we find none. Both the State and Buckingham pursued lines of inquiry as to the State's burden of proof. Buckingham's questions revealed that several members of the venire would be willing to find an individual guilty even when the State had not proved all the elements of the charged offenses beyond a reasonable doubt. Buckingham was able, after the trial court's instructions on the questions asked of the venire, to continue this general line of questioning, and when later prompted by the trial court as to the length of his voir dire did not object to concluding his questions, selecting a jury, and proceeding to trial.

From this record, we cannot conclude that the trial court's limits upon Buckingham's voir dire amounted to fundamental error, and we therefore decline to find error on this basis.

Whether There Was Sufficient Evidence to Sustain the Conviction

Buckingham also contends that there was insufficient evidence of his intent to use the pipe to consume crack cocaine, and that his conviction for Possession of Paraphernalia must therefore be reversed.

Our standard of review in sufficiency matters is well settled. We consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess the credibility of witnesses or reweigh evidence. Id. We will affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." Id. (quoting Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000)). "The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict." Id. (quoting Pickens v. State, 751 N.E.2d 331, 334 (Ind. Ct. App. 2001)).

To convict Buckingham of Possession of Paraphernalia, as a Class D felony, the State was required to prove beyond a reasonable doubt that Buckingham possessed an instrument, here a metal tube with blackened ends, that he intended to use to introduce a controlled substance, namely, crack cocaine into his body, after having been previously convicted of Possession of Paraphernalia. I.C. § 35-48-4-8.3(a) & (b); App. 102-103.

Where, as here, the question of intent to use an instrument for the consumption of illegal drugs is at issue, such intent may be inferred from circumstantial evidence. McConnell v. State, 540 N.E.2d 100, 102 (Ind. Ct. App. 1989). Evidence of fitness of the instrument for use of illegal drugs is not enough, without more, to sustain a conviction. Thus, in McConnell, possession of a pipe "like those commonly used to smoke marijuana" was not sufficient absent other probative evidence, such as drug residue. Id. at 102-103.

Here, during the first phase of the trial, the State introduced the pipe found on Buckingham's person into evidence.[3] It also introduced Officer Weigand's testimony, which, based upon his training and experience, indicated that the only possible use for a small pipe of the type found on Buckingham—a small metal pipe burned on both ends, with a piece of steel wool as a filter—was for inhaling the fumes from burning crack cocaine without also inhaling the crack rock itself, and could be used multiple times for that purpose.

We recognize that the result in McConnell would seem to drive toward a different result. In the case now before us, however, it was within the province of the jury as fact-

[3] The second stage of the trial centered only upon proof of Buckingham's prior conviction for Possession of Paraphernalia necessary to enhance his offense from a Class A misdemeanor to a Class D felony.

finder to weigh the evidence before it, and Officer Weigand's testimony taken together with the pipe could permit the jury to make a reasonable inference that Buckingham possessed the pipe as paraphernalia with which he intended to later consume an illegal drug. This is particularly so because of Officer Weigand's testimony that the pipe he recovered from Buckingham could have no use other than to consume crack cocaine. To the extent that Buckingham presents other evidence, we observe the principle that "it is the jury's prerogative to weigh conflicting evidence." Smalley v. State, 732 N.E.2d 1231, 1236 (Ind. Ct. App. 2000) (quoting Soward v. State, 716 N.E.2d 423, 425 (Ind. 1999)). We therefore decline Buckingham's invitation to interfere with the jury's decision, and conclude that there was sufficient evidence presented at trial to sustain the conviction.

Conclusion

Buckingham was not deprived of adequate voir dire by the trial court's decision to limit the nature of the questions he posed to the venire. There was sufficient evidence to support his conviction for possession of paraphernalia.

Affirmed.

MATHIAS, J., and CRONE, J., concur.