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IN THE
COURT OF APPEALS OF INDIANA

DEJUAN HURT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0903-CR-210
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION COUNTY SUPERIOR COURT
The Honorable Steven Eichholtz, Judge
Cause No. 49G23-0708-FA-154880

October 6, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Dejuan Hurt appeals his convictions for class A felony dealing in cocaine, class C felony possession of cocaine and a firearm, class C felony possession of cocaine, class A misdemeanor resisting law enforcement, and class A misdemeanor carrying a handgun without a license. We vacate Hurt's two class C felony convictions and affirm his other convictions.

Issues

We restate the issues as follows:

I. Whether we must vacate Hurt's convictions for class C felony possession of cocaine and a firearm and class C felony possession of cocaine?

II. Whether the trial court abused its discretion when it admitted into evidence Hurt's statement to police?

Facts and Procedural History

The relevant facts indicate that on August 1, 2007, Sergeant Mark Gregory and Officer Christopher Faulds of the Indianapolis Metropolitan Police Department were on foot patrol near 219 West North Street in Marion County. The officers were patrolling that area in response to numerous complaints of open air narcotics dealing. During their patrol, the officers encountered two individuals, one of which was Hart. As the officers approached the two men, the officers began a friendly conversation with Hart and the other individual. When the officers were ten to fifteen feet away from the men, Sergeant Gregory observed a bulge near Hurt's right hip that he believed was a handgun. As Sergeant Gregory got within six feet of Hurt, Hurt twice attempted to turn the right side of his body away from the officers

so as to obstruct their view of his right hip. Sergeant Gregory began to ask Hurt a question when Hurt fled.

As Hurt turned to run, Sergeant Gregory saw Hurt grab the object on his side. It became evident that the object on Hurt's side was a handgun because Sergeant Gregory could see the outline of the handle through Hurt's shirt. Both Sergeant Gregory and Officer Faulds chased Hurt. During the chase, Hurt jumped over an iron fence. Sergeant Gregory, who was close behind, heard the sound of metal hitting the fence which he assumed was Hurt's handgun falling against the fence. Shortly thereafter, Sergeant Gregory found a bag of cocaine on a bush directly next to the fence and a .38 caliber Ruger handgun at the base of the fence. The bag of cocaine contained multiple smaller baggies of cocaine inside of it. Officer Faulds apprehended Hurt after discovering him hiding on a patio nearby.

While still at the scene, the officers read Hurt his Miranda rights and Officer Faulds asked Hurt if he would be willing to speak to the officers. Hurt indicated that he would be willing to communicate. The officers took Hurt to their district role call site in order to conduct an interview. The interview was tape recorded. Officer Faulds again read Hurt his Miranda rights before the start of the interview. Officer Faulds advised Hurt that he had the right to have an attorney present and also that Hurt had the right to stop answering questions at any time in order to consult with an attorney. Hurt verbally waived his rights. Hurt also acknowledged that he understood that the interview was being tape recorded. Hurt responded to all of the officers' questions and admitted that, during the chase, he dropped his gun and threw his eight ball of cocaine. While Hurt was giving his statement, Officer Faulds

interrupted Hurt and reminded him that he could stop talking at anytime. State's Exhibit 9 at 14. At the conclusion of the interview, Hurt agreed that his statement was made voluntarily and without threat of any force or promises. State's Exhibit 9 at 17.

The State charged Hurt in a five count information which included class A felony dealing in cocaine, class C felony possession of cocaine and a firearm, class C felony possession of cocaine, class A misdemeanor resisting law enforcement, and class A misdemeanor carrying a handgun without a license. A bench trial was held on January 8, 2008. During trial, Hurt's counsel objected to the admission of the tape recorded statement Hurt gave to police on grounds that it was not voluntarily given. The trial court overruled that objection. Tr. at 41-43. Hurt also testified during trial. The court found Hurt guilty as charged. On January 22, 2008, the court sentenced Hurt to concurrent sentences on all five counts for a total sentence of twenty years.

Discussion and Decision

I. Multiple Convictions

Hurt contends and the State concedes that we must vacate Hurt's class C convictions for possession of cocaine and a firearm and possession of cocaine. We agree.

Our supreme court has explicitly held that where the same cocaine supports both possession of cocaine pursuant to Indiana Code Section 35-48-4-6 and dealing in cocaine pursuant to Indiana Code Section 35-48-4-1, possession of cocaine is a lesser included offense of dealing in cocaine. *Hardister v. State*, 849 N.E.2d 563, 575 (Ind. 2006); s*ee also Harrison v. State*, 901 N.E.2d 635, 643 (Ind. Ct. App. 2009), *trans. denied*. Moreover,

Indiana Code Section 35-38-1-6 provides 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.[1] It is undisputed that the same cocaine was used to support Hurt's class A dealing conviction and both possession convictions. Accordingly, we vacate Hurt's convictions and sentences for class C felony possession of cocaine and a firearm and, class C felony possession of cocaine.

II. Admissibility of Statement

Next, Hurt contends that the trial court abused its discretion when it admitted his recorded statement into evidence.[2] Specifically, Hurt argues that his statement was not voluntarily given. We disagree.

The admissibility of a defendant's incriminating statement or confession is a matter within the discretion of the trial court based on an evaluation of the totality of the circumstances. *Miller v. State*, 770 N.E.2d 763 (Ind. 2002). In making this determination, the trial court must determine whether the confession was voluntarily made, and not provided through inducement, violence, threats, or other improper influences. *Crain v.* State, 736 N.E.2d 1223, 1230 (Ind. 2000). When a challenge to the admissibility of a confession is made, the State has the burden to prove beyond a reasonable doubt that the confession was voluntarily given. *Ringo v. State*, 736 N.E.2d 1209, 1212 (Ind. 2000). We review the trial

[1] While Hurt frames his argument in terms of both double jeopardy and a statutory violation, we resolve the issue as a matter of statutory construction as set out in *Hardister* and need not reach a constitutional claim.

[2] Following the trial court's denial of Hurt's objection to the admission of the statement, the trial judge asked Hurt's counsel to allow him to simply read the transcript of the recording rather than listen to the tape. Defense counsel agreed to the request. Tr. at 43.

court's ruling as to the admissibility of a confession without reweighing the evidence. *Id*. Instead, we examine the record for substantial probative evidence of voluntariness. *Id*.[3]

Here, Hurt was advised of his Miranda rights twice before making his statement to police. During the interview that lasted all of five minutes, Officer Faulds interrupted Hurt to remind him of his right to stop speaking at any time. Hurt expressly denied being threatened or improperly influenced to make his statement. Indeed, our review of the transcript of the recorded statement indicates a cooperative environment absent of coercion.

On appeal, Hurt ignores the testimony of the police officers as well as the transcript of his statement. He simply points to his own trial testimony where he claimed that the officers did in fact threaten him and that he only gave his statement out of fear. Hurt essentially asks that we reweigh the evidence, something we will not do. Considering the totality of the substantial probative evidence of voluntariness shown by the record, we find that Hurt's statement was voluntarily given. The trial court did not abuse its discretion when it admitted the statement into evidence.

Affirmed in part and reversed in part.

MAY, J., and BROWN, J., concur.

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[3] When reviewing the totality of the circumstances, we may consider several factors including the duration of the interrogation, the defendant's maturity, intelligence, physical condition, police deception, and rights communicated to the defendant. *See Miller*, 770 N.E.2d at 767 (citations omitted).