

Case Summary

Marvin Jerro appeals his convictions for two counts of Class A felony dealing in cocaine and one count of Class C felony possession of cocaine, as well as the finding that he is an habitual offender. We affirm.

Issues

We restate the issues before us as:

- I. whether the trial court properly allowed the State to amend the habitual offender allegation in the charging information shortly before trial and properly allowed Jerro to stipulate that he was an habitual offender;
- II. whether the trial court properly admitted evidence related to whether Jerro dealt cocaine within 1000 feet of a public park; and
- III. whether the prosecutor committed misconduct during closing argument.

Facts

The evidence most favorable to the convictions is that on June 9, 2008, a confidential informant (“CI”) working for the Gary Police Department went to 4950 Pennsylvania Street in Gary to attempt to make a controlled buy of cocaine. The CI walked through Pittman Square Park to get to 4950 Pennsylvania Street, which is across the street from the park. Children were playing on a playground at the park at the time. The edge of the park is approximately sixty feet from the property line of 4950 Pennsylvania Street. Additionally, police measured the distance between the sidewalk in front of the residence to playground equipment at the park as being 830 feet.

The CI went into the residence and purchased \$20 worth of crack cocaine from an individual the CI knew as “TC.” Tr. p. 113. On June 16, 2008, the CI made an additional controlled buy of crack cocaine from Jerro at 4950 Pennsylvania Street, with Jerro being assisted by a woman. The woman stated that Jerro lived at 4950 Pennsylvania Street. Later, the CI identified Jerro as “TC” from a police photo lineup, and also identified Jerro as “TC” in court.

On June 18, 2008, the State filed an information charging Jerro with three counts of Class A felony dealing in cocaine and one count of Class A felony possession of cocaine. The charges were enhanced to A felonies based on the allegation that Jerro’s residence where he sold cocaine to the CI was within 1000 feet of a public park. On August 21, 2008, the State filed notice of its intention to file an amended information including an habitual offender allegation. The State did not file the amended information until September 25, 2009, in which it alleged that Jerro had prior convictions for Class C felony burglary and Class D felony possession of paraphernalia. On October 7, 2009, the State, over objection, amended the habitual offender allegation to remove the possession of paraphernalia conviction as one of the predicate felonies and replaced it with a prior conviction for Class B felony dealing in cocaine.

Jerro’s jury trial was held on October 22, 2009, with the State proceeding against him for only two counts of Class A felony dealing in cocaine and one count of Class A felony possession of cocaine. During closing argument, the prosecutor made comments regarding the “very real war on drugs” and how “[w]e have combative drug dealers,

fighting one another, killing one another, shooting one another over drug territory.” Tr. p. 451. Defense counsel objected to the prosecutor’s statements, which the trial court overruled, but he did not seek an admonishment to the jury or request a mistrial. The jury found Jerro guilty of two counts of Class A felony dealing in cocaine and one count of Class C felony possession of cocaine.¹

Before these verdicts were returned, defense counsel informed the trial court that Jerro was “willing to stipulate that he’s had the prior convictions,” as alleged by the State in the habitual offender information, while maintaining that the State should not have been permitted to amend that information. Id. at 524. The following colloquy subsequently took place:

The Court: All right. Now, let me make sure I understand this. If there is a conviction, then the parties are willing to stipulate that he is, in fact, an habitual offender, and you’re waving [sic] Phase II of the trial?

[Defense counsel]: Yes.

¹ There appear to be discrepancies in the record regarding precisely what Jerro was charged with and convicted of. An amended information filed on October 19, 2009, purported to charge Jerro with three counts of Class A felony dealing in cocaine, one count of Class A felony possession of cocaine, one count of Class D felony possession of cocaine, one count of Class D felony possession of a controlled substance, one count of Class D felony maintaining a common nuisance, and one count of Class A misdemeanor possession of marijuana. At the beginning of trial, the jury was preliminary instructed that Jerro was charged with two counts of Class A felony dealing in cocaine in counts I and II and one count of Class A felony possession of cocaine in count III. The jury returned guilty verdict forms for count I, Class A felony dealing in cocaine, count II, Class C felony possession of cocaine, and count III, Class A felony possession of cocaine. The trial court’s sentencing order states that it entered judgments of conviction for counts I and III, Class A felony dealing in cocaine, and count II, Class C felony possession of cocaine. The abstract of judgment relates that Jerro was convicted of one count of Class A felony dealing in cocaine, one count of Class A felony possession of cocaine, and one count of Class C felony dealing in cocaine. We will adhere to the trial court’s official written sentencing order and state that Jerro was convicted of two counts of Class A felony dealing in cocaine and one count of Class C felony possession of cocaine.

* * * * *

[Prosecutor]: I mean in essence, is that just tantamount to him pleading guilty to Phase II?

The Court: Yeah. Well, habitual offender is not a crime, it's a status. So there's no guilty plea. It would simply be a stipulation. . . .

Id. at 525-26. After the jury returned guilty verdicts on the substantive charges, the trial court addressed the jury:

The Court: There was going to be a second phase to this case in which you would have been asked to determine whether or not Mr. Jerro is an habitual offender. That is what we call Phase II of the trial and it would have involved opening statements, some evidence being presented, and a second round of deliberations on your part to make that determination.

However, the parties have reached some stipulations as to his status as an habitual offender. . . .

Id. at 531-32. The State then introduced documents relating Jerro's prior convictions.

The trial court then addressed defense counsel:

The Court: Counsel, what is the nature of the stipulation, if you would?

[Defense counsel]: We would stipulate to his two prior convictions, your Honor, the Class C burglary and the Count [sic] B dealing.

* * * * *

The Court. All right. . . . Let's make sure the record is clear. Parties are stipulating that based on today's convictions and the prior convictions that [defense counsel] just alluded to, that under the law that would, in fact, amount to a finding by the Court of habitual offender of Mr. Jerro?

[Defense counsel]: Yes, your Honor.

[Prosecutor]: That's correct.

Id. at 533-34.² Per this discussion, the trial court found Jerro to be an habitual offender and sentenced him to thirty years for the Class A felony convictions and four years for the Class C felony conviction, all to run concurrently but enhanced thirty years by the habitual offender finding. Jerro now appeals.

Analysis

I. Habitual Offender Finding

We first address Jerro's claims regarding the habitual offender enhancement of his sentence. He contends that the trial court erred in permitting the State to amend the habitual offender allegation on October 7, 2009, in order to change one of the alleged predicate felonies.³ Indiana Code Section 35-34-1-5(e) states:

An amendment of an indictment or information to include a habitual offender charge under IC 35-50-2-8, IC 35-50-2-8.5, or IC 35-50-2-10 must be made not later than ten (10) days after the omnibus date. However, upon a showing of good cause, the court may permit the filing of a habitual offender charge at any time before the commencement of the trial.

² The trial court never addressed Jerro directly during these colloquies.

³ The State argues Jerro waived any argument regarding the filing of the amended information by failing to request a continuance. See Haymaker v. State, 667 N.E.2d 1113, 1114 (Ind. 1996). Jerro, however, did orally request a continuance at the hearing regarding the amendment, which the trial court did not rule on. We believe Jerro did what was required to preserve this issue for our review.

The State's filing on October 7, 2009, appears to have occurred much later than ten days after the omnibus date.⁴

However, the State originally filed the habitual offender allegation on September 25, 2009, and Jerro is not challenging that filing. He only is challenging the subsequent amendment to that information on October 7, 2009. As such, this case does not fall under Indiana Code Section 35-34-1-5(e), which only governs the initial filing of an habitual offender information and not amendments to that information. Haymaker v. State, 667 N.E.2d 1113, 1114 (Ind. 1996).

Instead, we look to subsection (b) of Section 35-34-1-5, which governs amendments to informations generally. That subsection states:

The indictment or information may be amended in matters of substance and the names of material witnesses may be added, by the prosecuting attorney, upon giving written notice to the defendant at any time:

(1) up to:

(A) thirty (30) days if the defendant is charged with a felony; or

(B) fifteen (15) days if the defendant is charged only with one (1) or more misdemeanors;

before the omnibus date; or

(2) before the commencement of trial;

if the amendment does not prejudice the substantial rights of the defendant. When the information or indictment is

⁴ That precise date is not in the record.

amended, it shall be signed by the prosecuting attorney or a deputy prosecuting attorney.

Ind. Code § 35-34-1-5(b).

This subsection does not require the State to show “good cause” for amending an already-existing habitual offender information. Rather, it permits any amendment as to substance at any point before the commencement of trial, so long as the amendment does not prejudice the substantial rights of the defendant. As to prejudice, Jerro admitted at the conclusion of trial that he had been convicted of the two prior felonies as listed in the State’s amended habitual offender information. This court has held that where a defendant concedes that he has the prior unrelated felonies as listed in an amended habitual offender information, he cannot demonstrate that he was prejudiced by a late amendment to the information. See Stringer v. State, 690 N.E.2d 788, 791 (Ind. Ct. App. 1998), trans. denied. Jerro has not indicated that he could have developed any defense to the amended habitual offender information if he had had more time to do so. As such, he has not established that the late amendment of the information prejudiced his substantial rights.

Jerro also contends the trial court should not have found him to be an habitual offender following his stipulation that he had the required two prior unrelated felony convictions as listed in the information. Essentially, he contends the trial court erred in not conducting a full guilty plea hearing following that stipulation to ensure that he was

advised of his rights under Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969), and Indiana Code Section 35-35-1-2.⁵

⁵ Indiana Code Section 35-35-1-2 states:

(a) The court shall not accept a plea of guilty or guilty but mentally ill at the time of the crime without first determining that the defendant:

(1) understands the nature of the charge against him;

(2) has been informed that by his plea he waives his rights to:

(A) a public and speedy trial by jury;

(B) confront and cross-examine the witnesses against him;

(C) have compulsory process for obtaining witnesses in his favor; and

(D) require the state to prove his guilt beyond a reasonable doubt at a trial at which the defendant may not be compelled to testify against himself;

(3) has been informed of the maximum possible sentence and minimum sentence for the crime charged and any possible increased sentence by reason of the fact of a prior conviction or convictions, and any possibility of the imposition of consecutive sentences;

(4) has been informed that the person will lose the right to possess a firearm if the person is convicted of a crime of domestic violence (IC 35-41-1-6.3); and

(5) has been informed that if:

(A) there is a plea agreement as defined by IC 35-35-3-1; and

(B) the court accepts the plea;

the court is bound by the terms of the plea agreement.

At the outset, we observe that, as a matter of statute, a defendant who is alleged to be an habitual offender has a right to have a jury determine whether he or she is an habitual offender, “irrespective of the uncontroverted proof of prior felonies.” Seay v. State, 698 N.E.2d 732, 736-37 (Ind. 1998). Thus, a defendant’s stipulation to the fact that he or she has two prior unrelated felony convictions does not by itself equal an admission that he or she is an habitual offender for sentencing purposes. See Garrett v. State, 737 N.E.2d 388, 392 (Ind. 2000). This court has held, however, that if a defendant goes beyond merely stipulating to the underlying convictions and also expressly admits that he or she is an habitual offender, such an admission is the functional equivalent of a guilty plea. See Vanzandt v. State, 730 N.E.2d 721, 726 (Ind. Ct. App. 2000).

Jerro urges that his case is more akin to Vanzandt than to the situation of a mere stipulation, as in Garrett. Indeed, Jerro expressly argues that “everyone involved treated this like a guilty plea” Appellant’s Br. p. 12. The difficulty with this argument is that if Jerro did plead guilty, as he urges us to find, then he cannot challenge the validity of that plea in this direct appeal. See Vanzandt, 730 N.E.2d at 726. It is well-settled that guilty pleas can only be challenged via post-conviction relief, not direct appeal, even if it is claimed that the record of the guilty plea hearing should be sufficient by itself to invalidate the plea. See Tumulty v. State, 666 N.E.2d 394, 395-96 (Ind. 1996).

Moreover, our supreme court has indicated that whether a defendant pled guilty to being an habitual offender or merely stipulated to the underlying prior convictions is a factual matter to be determined by a post-conviction court. In Hopkins v. State, 889

N.E.2d 314 (Ind. 2008), the defendant argued that he effectively pled guilty to being a habitual offender and the trial court erred in not advising him of his Boykin rights, while the State countered that the defendant had merely stipulated to the underlying convictions. On post-conviction relief, the post-conviction court found that what had occurred was a stipulation and not a guilty plea. Without deciding whether Boykin rights are required in the context of an habitual offender proceeding, our supreme court held the defendant had not overcome his burden of proving that the evidence was without conflict and led to a conclusion opposite that reached by the post-conviction court regarding the nature of what had occurred. Hopkins, 889 N.E.2d at 317. Thus, we conclude it is inappropriate in this direct appeal to definitively resolve whether Jerro pled guilty to the habitual offender allegation or whether he merely stipulated to the underlying felony convictions.

We additionally are compelled to point out that Jerro was represented by counsel at all times. Defense counsel initially offered the stipulation to Jerro's two prior felony convictions, and furthermore did not object when the trial court proceeded to find Jerro to be an habitual offender without the matter being submitted to the jury and without advising Jerro of his Boykin rights. Generally, the failure to object to a trial court's actions results in a waiver of the issue on appeal. Benson v. State, 762 N.E.2d 748, 755 (Ind. 2002). In sum, we will not review in this direct appeal Jerro's claim of error with respect to his "stipulation."

II. Introduction of Evidence—Proximity of Park

Jerro frames his next contention as whether the State failed to prove he dealt cocaine within 1000 feet of a public park, as required to enhance his dealing convictions to Class A felonies. See I.C. § 35-48-4-1(b)(3)(B)(ii). His primary argument, however, is that the trial court erred in permitting the State to introduce into evidence a letter from the Recreation Director of the Gary Parks Department, describing the boundaries of Pittman Square Park and verifying that it borders on Pennsylvania Street, directly across from Jerro's residence. Jerro asserts that the letter, clearly prepared solely for the purposes of his trial, was inadmissible hearsay.

We review a trial court's decision regarding the admission of evidence for an abuse of discretion. Rogers v. State, 897 N.E.2d 955, 959 (Ind. Ct. App. 2008), trans. denied. "A trial court abuses its discretion if its decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law." Id. Even if evidence was erroneously admitted, no such error is grounds for setting aside a conviction unless such erroneous admission appears inconsistent with substantial justice or affects the substantial rights of the parties. Lafayette v. State, 917 N.E.2d 660, 666 (Ind. 2009) (citing Ind. Trial Rule 61). "The improper admission of evidence is harmless error when the conviction is supported by such substantial independent evidence of guilt as to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction." Id. Generally, admission of hearsay is not grounds for reversal where it is merely cumulative of other

properly admitted evidence. Sparkman v. State, 722 N.E.2d 1259, 1262 (Ind. Ct. App. 2000).

At trial, the State asserted the letter was admissible hearsay under Indiana Evidence Rule 803(6) as a business record. That rule provides that the following is admissible, even if the declarant is available as a witness:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony or affidavit of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. The term “business” as used in this Rule includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

It is evident that the letter from the Gary Parks Department was not a document that was “kept in the course of a regularly conducted business activity,” nor was it “the regular practice . . . to make” such a letter. The letter was dated October 21, 2009, or the day before Jerro’s trial, and was addressed to the trial court. Clearly, it was written for the express purpose of Jerro’s trial. Such a letter does not constitute a “record of regularly conducted business activity.”

We also conclude the letter was not admissible under Evidence Rule 803(8), pertaining to public records and reports. Among other things, the rule does not permit the

admission of “factual findings offered by the government in criminal cases” Evid. R. 803(8)(c). When deciding whether hearsay is inadmissible under Evidence Rule 803(8)(c), a trial court must first “consider whether the ‘findings’ objected to address a materially contested issue in the case.” Ealy v. State, 685 N.E.2d 1047, 1054 (Ind. 1997). If so, the trial court must next consider whether the report clearly contains no factual findings; material which would not be considered factual findings would include simple listings or recordation of numbers. Id. If the report does contain factual findings, then the trial court must determine whether the report was prepared for advocacy purposes or in anticipation of litigation. Id. “If it was not, then the evidence is admissible.” Id.

Here, Jerro disputed where the precise boundaries of Pittman Square Park lay. The State sought to definitively resolve this dispute by introduction of the letter, stating facts related to the park’s boundaries. Finally, as already noted, the letter clearly was prepared in anticipation of litigation, i.e. Jerro’s trial. The State seems to be contending that the information related in the letter—i.e. the dimensions and boundaries of Pittman Square Park—was not hearsay but was instead a matter of public record. Be that as it may, the letter itself was hearsay and was not admissible under Evidence Rule 803(6) or 803(8). See Sparkman, 722 N.E.2d at 1263 (holding that map produced by county surveyor’s office that had 1000-foot radius circle drawn on it was inadmissible under Evidence Rule 803(8)).

Despite the trial court’s erroneous admission of the letter, we conclude it was merely cumulative of other properly admitted evidence and, therefore, the error was

harmless. Several witnesses, including police officers and the CI, testified that Pittman Square Park was located directly across the street from Jerro's residence at 4950 Pennsylvania Street. Sergeant John Jelks, Commander of the Gary Police Department's Narcotics and Vice Unit, testified that he has been living in the area near Jerro's residence since 1979, and stated that the park was bordered on the west by Pennsylvania Street, or directly across from Jerro's residence. He also pointed out the park on a map in relation to Jerro's residence. He noted that there used to be a school on the park property, but it had been torn down several years earlier and the land had been ceded to the park.

Detective Christopher Stark of the Gary Police Department testified that he measured from the edge of Pittman Square Park to the edge of the grass on Jerro's property and it was approximately sixty feet. It is true that in order to support an enhancement for dealing drugs within 1000 feet of a public park, the measurement must be made to a point where the dealing actually took place, including the inside of a residence, and not merely to the edge of the defendant's property line. See Doty v. State, 730 N.E.2d 175, 180 (Ind. Ct. App. 2000). Although Detective Stark did not measure to the point where Jerro actually sold cocaine inside of his residence, we conclude the jury reasonably could have inferred that it was not more than 940 feet away from the edge of Jerro's property.⁶

⁶ As for the 830-foot measurement from the edge of Jerro's property to the playground equipment at the park, we are not as comfortable in believing the jury could have assumed it was only 170 feet or less to the inside of Jerro's residence.

Jerro does not cite any authority for the proposition that a city surveyor or other “expert” of some kind had to testify regarding the precise dimensions or legal characteristics of a park. The letter from the Gary Parks Department regarding the park’s precise location and boundaries was merely cumulative of the testimony of the officers and CI. That evidence was sufficient to support enhancement of Jerro’s two dealing convictions to Class A felonies for dealing within 1000 feet of a public park.⁷

III. Prosecutorial Misconduct

Lastly, we address Jerro’s claim that the prosecutor committed misconduct during closing argument. When reviewing a properly preserved claim of prosecutorial misconduct, we must determine (1) whether the prosecutor engaged in misconduct, and if so, (2) whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she should not have been subjected. Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006). We measure whether a prosecutor’s argument constitutes misconduct by reference to case law and the Rules of Professional Conduct. Id. “The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury’s decision rather than the degree of impropriety of the conduct.” Id.

Jerro acknowledges that, although defense counsel objected to the argument, he did not request an admonishment or move for a mistrial. When a defendant contends that a prosecutor has committed misconduct during closing argument, the defendant must

⁷ Jerro also mentions the possibility that some of the State’s witnesses violated the trial court’s separation of witnesses order and improperly discussed the park’s boundaries among themselves during trial. He fails to develop a cogent argument, however, that this alleged violation requires reversal of his convictions.

request the trial court to admonish the jury. Id. “If the party is not satisfied with the admonishment, then he or she should move for mistrial. Failure to request an admonishment or to move for mistrial results in waiver.”⁸ Id.

Where, as here, a claim of prosecutorial misconduct has not been properly preserved, “the defendant must establish not only the grounds for the misconduct but also the additional grounds for fundamental error.” Id. The “fundamental error” rule “applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process.” Purifoy v. State, 821 N.E.2d 409, 412 (Ind. Ct. App. 2005) (quoting Boesch v. State, 778 N.E.2d 1276, 1279 (Ind. 2002)), trans. denied. “The mere fact that error occurred and that it was prejudicial will not satisfy the fundamental error rule.” Id. In other words, fundamental error requires a defendant to show greater prejudice than ordinary reversible error. Id.

Jerro contends the prosecutor should not have spoken out generally on the harm that drug dealing can have in communities, or linked his alleged offenses with drug dealers who are “fighting one another, killing one another, shooting one another over drug territory,” where there was no evidence that he engaged in such violent conduct. Tr. p. 451. As for the prosecutor’s general comments about the harm caused by illegal drugs

⁸ Jerro asserts that his objection to the prosecutor’s argument alone should have been sufficient to preserve his claim of prosecutorial misconduct, and that the requirement of additionally requesting an admonishment and a mistrial should be discarded. See Dumas v. State, 803 N.E.2d 1113, 1117 (Ind. 2004). Of course, it is the prerogative of our supreme court, not this court, to change a rule that it has established. See Ramirez v. Wilson, 901 N.E.2d 1, 3 (Ind. Ct. App. 2009), trans. denied.

and drug dealing, particularly in close proximity to a park, this court previously has found similar comments not to constitute improper argument. See Gregory v. State, 885 N.E.2d 697, 708 (Ind. Ct. App. 2008) (holding prosecutor's argument regarding methamphetamine's harmful effects on communities was not improper), trans. denied; Steelman v. State, 602 N.E.2d 152, 159 (Ind. Ct. App. 1992) (holding prosecutor's argument emphasizing the seriousness of dealing illegal drugs near schools was not improper).

The prosecutor's comments linking Jerro with violent acts committed by some drug dealers are a little more troubling. Generally, a prosecutor must confine closing argument to comments based only upon the evidence presented in the record. Gasper v. State, 833 N.E.2d 1036, 1042-43 (Ind. Ct. App. 2005), trans. denied. Although Class A felony dealing in cocaine certainly is a serious offense not to be trivialized, there was no evidence in the record that Jerro committed any acts of violence in connection with his drug dealing. It arguably was improper for the prosecutor to attempt to group Jerro with drug dealers who commit such acts.

Nevertheless, we cannot conclude these comments constituted fundamental error. The trial court properly instructed the jury that arguments of counsel are not to be considered evidence, which lessens the potential prejudicial effect of the prosecutor's remarks. See Gamble v. State, 831 N.E.2d 178, 185 (Ind. Ct. App. 2005), trans. denied. There was considerable evidence presented that Jerro twice sold crack to the CI. The bulk of the prosecutor's argument was entirely proper, as we have noted, with only one,

possibly two, sentences nearing the line of impropriety. As such, we cannot say the prosecutor's argument blatantly violated basic legal principles or fundamental due process as needed to establish fundamental error.

Conclusion

The trial court did not err in permitting the State to amend the habitual offender charge shortly before trial; whether the trial court properly accepted Jerro's stipulation regarding that charge is not properly before us on direct appeal. Any error in the admission of the Gary Parks Department letter regarding the boundaries of Pittman Square Park was harmless, given that it was cumulative of other properly admitted evidence. Finally, Jerro has not established that the prosecutor's closing argument amounted to fundamental error. We affirm Jerro's convictions and sentence.

Affirmed.

FRIEDLANDER, J., and CRONE, J., concur.