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IN THE
COURT OF APPEALS OF INDIANA

DAMON LEWIS ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 89A04-0812-CR-748
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WAYNE SUPERIOR COURT
The Honorable Gregory A. Horn, Judge
Cause No. 89D02-0602-FA-002

October 30, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

After his first conviction was vacated and a new trial was ordered by the trial judge,[1] Damon Lewis ("Lewis") was convicted for a second time in Wayne Superior Court of Class A felony dealing in cocaine and Class D felony maintaining a common nuisance and admitted to being a habitual substance offender. Lewis appeals and presents three issues, which we restate as:

I. Whether the trial court erred in denying Lewis's motion to dismiss;

II. Whether the trial court erred in admitting evidence discovered as a result of trash searches; and

III. Whether the trial court erred in admitting evidence found during the execution of a search warrant.

We affirm.

Facts and Procedural History

In September 2004, Captain William Shake ("Captain Shake") of the Richmond Police Department received a message from an individual whom he had known for approximately thirty years. This individual owned property and worked in the area of South Seventh Street in Richmond, Indiana and had observed what he thought to be suspicious behavior at a certain house in the 800 block of South Seventh Street ("the Seventh Street house"). Specifically, this individual saw a man and a woman parked in a car across the street from the Seventh Street house. The woman gave the man three to four pieces of currency. The man then exited the car, entered the Seventh Street house, and returned to the car shortly thereafter carrying an item wrapped in tin foil.

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[1] See Lewis v. State, 2007 WL 2769642, No. 89A01-0611-CR-508 (Ind. Ct. App. Sept. 25, 2007) (unpublished memorandum decision), trans. denied.

On October 1, 2004, Captain Shake drove to the Seventh Street house and saw two vehicles parked near the home—a car registered to Yvone Malone in Dublin, Ohio, and a black Dodge pickup truck registered to Joquetta Lewis on East Main Street in Richmond. Joquetta Lewis is the mother of the defendant, and Captain Shake knew that Lewis had lived at the East Main Street address several years back.

On October 4, 2004, Captain Shake returned to the Seventh Street house and went to the back side of the house, where two trash bins were located on a concrete slab between the back alley and the garage. The trash bins were positioned approximately two feet from the alley. The lid on one of the bins was open, and Captain Shake was able to see inside that bin. He could also see and smell loose cigar tobacco. Based on his experience as a member of the local drug task force, Captain Shake knew that marijuana users often removed tobacco from cigars and replaced it with marijuana. Captain Shake removed the trash bags from the open bin and found, among other things: two clear plastic bags with the corners cut out, a corner of a plastic bag with a white residue, a clear plastic bag with a white residue that was later determined to be cocaine, a cellophane wrapper containing a plant material that tested positive for marijuana, a laundry tag with Lewis's name, and an auto shop receipt dated October 1, 2004. This receipt listed Lewis's name and the Dodge truck, but listed his address as his mother's house on East Main Street.

On the morning of October 9, 2004, Captain Shake went back to the Seventh Street house and again took trash from the bins. Inside these bags, Captain Shake found a clear plastic bag containing a greenish brown plant material that tested positive for

marijuana. Captain Shake returned to the Seventh Street house yet again on October 10, 2004 and took more trash from the bins. This time, he found two paper towels containing small pieces of a white substance that tested positive for cocaine, plastic bags with the corners cut out, a corner of a plastic bag which contained what appeared to be marijuana seeds, a piece of plant matter that also appeared to be marijuana, and a piece of paper with the name "Damon" written on it.

Based on the items he found in the trash, Captain Shake obtained a warrant on October 11, 2004 to search the Seventh Street house. When the police executed the search warrant, they discovered two letters addressed to Damon Lewis, with the Seventh Street house as his address. They also found a police scanner, cigar boxes, a container of marijuana, two handguns, a plastic bag containing cocaine, a bong, Lewis's identification card, and a shoebox containing a digital scale, a spoon, and bags of cocaine. In the kitchen, the police found marijuana and the butts of marijuana cigarettes. In the kitchen trash, the police found a receipt with Lewis's name.

On October 13, 2004, the State charged Lewis with Class A felony dealing in cocaine and Class D felony maintaining a common nuisance. The State also alleged that Lewis was a habitual substance offender. Lewis filed a motion to suppress on April 28, 2005, and a hearing was held on this motion on June 27, 2005. The trial court denied Lewis's motion to suppress on July 11, 2005. Lewis then filed a motion to correct error or, in the alternative, a motion to certify the trial court's order for interlocutory appeal. The trial court denied both motions. Lewis filed another motion to suppress on

November 4, 2005, and a hearing was held on this motion on February 22, 2006. The trial court denied Lewis's motion to suppress on March 26, 2006.

A jury trial commenced on September 24, 2006, and we refer to Lewis's appeal from his first trial and conviction for the operative facts from that trial. See Lewis v. State, 2007 WL 2769642, No. 89A01-0611-CR-508 (Ind. Ct. App. Sept. 25, 2007) (unpublished memorandum decision), trans. denied. During a pre-trial recess, the trial court was told that one of the empanelled jurors, Sarah Orcutt ("Orcutt"), was the daughter of Officer Bradley Berner ("Officer Berner") of the Richmond Police Department. The trial court denied Lewis's motion to excuse Orcutt from the jury, and the jury found Lewis guilty as charged. Id., slip op. at 2-3. During the habitual substance offender phase of the trial, the State offered into evidence documents signed by Officer Berner in order to establish one of Lewis's prior convictions. Lewis did not immediately object, but during a recess, Lewis's counsel informed the trial court that Officer Berner was the head of the local drug task force in 1996. Id. Lewis's counsel expressed concern that Orcutt might have learned about Lewis's prior convictions from her father and might share this information with the other jurors. Id. Lewis therefore requested that the jury be dismissed. Id. The trial court denied Lewis's request, concluding that Lewis had waived the issue by failing to bring it to the court's attention until the habitual offender stage of the proceedings. Id. The jury then found Lewis to be a habitual substance offender. Id.

Despite having previously denied Lewis's motions to remove Orcutt from the jury, the trial court filed its own motion to correct error on October 9, 2006, alleging that

Orcutt's inclusion in the jury panel constituted a due process violation. Id. The State filed a response in opposition to the motion to correct error, attaching thereto numerous discovery responses it had provided to both Lewis and the trial court. Id. Included in these discovery responses were the documents signed by Officer Berner. Id. The trial court issued an order granting its motion to correct error on October 24, 2006. Id. at 4. The trial court's order vacated not only the habitual substance offender finding, but also vacated Lewis's convictions and ordered a new trial. Id. The State appealed the trial court's order.

On appeal, a panel of this court wrote:

> The State correctly points out that it provided various discovery documents to Lewis, including the charging information and probable cause affidavit from Lewis's 1997 conviction, which were signed by Officer Berner. As such, *both Lewis and the trial court should have been aware of Officer Berner's involvement with the case prior to trial and habitual offender proceeding.*

Id. at 4-5 (emphasis added). The court also noted that "Orcutt had no duty to volunteer an answer to a question that she had not been asked." Id. at 5 n.1. Nevertheless, the court concluded:

> [T]he parties' failure to establish during voir dire that Orcutt was related to Officer Berner, and the trial court's refusal to allow further questioning of Orcutt once that information came to light, prevented all concerned from determining whether Orcutt could render a fair and impartial verdict. Under these circumstances, we cannot conclude that the trial court abused its discretion in ordering a new trial.

Id.[2]

On November 20, 2006, Lewis filed a motion to dismiss, claiming that any retrial was barred by the prohibition against double jeopardy. The trial court denied this motion on May 19, 2008. Lewis's second jury trial was held on October 27-29, 2008. At the conclusion of this trial, Lewis was again found guilty as charged. Lewis then admitted to being a habitual substance offender. At a hearing held on November 24, 2008, the trial court sentenced Lewis to an aggregate term of forty-three years. Lewis now appeals.

I. Motion to Dismiss

Lewis first claims that the trial court should have granted his motion to dismiss because his retrial constitutes double jeopardy. The Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, prevents the State from placing a defendant in jeopardy twice for the same offense. Pavey v. State, 764 N.E.2d 692, 700 (Ind. Ct. App. 2002), trans. denied (citing Brown v. State, 703 N.E.2d 1010, 1015 (Ind. 1998)). Article 1, Section 14 of the Indiana Constitution similarly provides, "No person shall be put in jeopardy twice for the same offense."[3] These constitutional provisions against double jeopardy are codified by statute as follows:

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[2] Chief Judge Baker dissented, concluding that because Lewis did not question the potential jurors about their relationships to law enforcement officers during voir dire, "Lewis should not be permitted to take a second bite of the apple with a second trial." Id. at 8 (Baker, C.J., dissenting).

[3] Although Lewis mentions Article 1, Section 14, he does not provide an independent analysis supporting a separate standard under the Indiana Constitution. Any independent State constitutional claim is therefore waived. Brown, 703 N.E.2d at 1015 n.4.

> (a) A prosecution is barred if there was a former prosecution of the defendant based on the same facts and for commission of the same offense and if:
>
> * * *
>
> (2) the former prosecution was terminated after the jury was impaneled and sworn or, in a trial by the court without a jury, after the first witness was sworn, unless (i) the defendant consented to the termination or waived, by motion to dismiss or otherwise, his right to object to the termination, (ii) it was physically impossible to proceed with the trial in conformity with law, (iii) there was a legal defect in the proceedings that would make any judgment entered upon a verdict reversible as a matter of law, (iv) prejudicial conduct, in or outside the courtroom, made it impossible to proceed with the trial without injustice to either the defendant or the state, (v) the jury was unable to agree on a verdict, or (vi) false statements of a juror on voir dire prevented a fair trial.
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> (b) If the prosecuting authority brought about any of the circumstances in subdivisions (a)(2)(i) through (a)(2)(vi) of this section, *with intent to cause termination of the trial*, another prosecution is barred.

Ind. Code § 35-41-4-3 (2004) (emphasis added).

The prohibition against double jeopardy will not prevent a retrial if: (1) the defendant waives his right to raise double jeopardy claims; (2) the defendant consents to the termination of proceedings after jeopardy has attached; or (3) the termination is required by "manifest necessity." State v. Erlewein, 755 N.E.2d 700, 704 (Ind. Ct. App. 2001). In the absence of manifest necessity, discharge of the jury serves as an acquittal. Brown, 703 N.E.2d at 1015. The standard for manifest necessity is that trial courts are authorized to discharge a jury "'whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.'" Brown, 703 N.E.2d at 1015 (quoting United States v. Perez, 22 U.S. 579, 580 (1824)). These words "'do not describe a standard that can be

applied mechanically or without attention to the particular problem confronting the trial judge.'" Id. (quoting Arizona v. Washington, 434 U.S. 497, 506 (1978)). "Necessity" is not to be interpreted literally, and there need be only a "high degree" of necessity before concluding that termination of the proceedings is appropriate. See id. (quoting Washington, 434 U.S. at 506). One important factor in determining whether manifest necessity exists is whether the reason for termination of the proceedings can be laid at the feet of the State. See id. If the error in the proceedings is the fault of the prosecution, then the burden on the State to show manifest necessity is much higher. Id. at 1015-16.

In the present case, Lewis argues that there was no manifest necessity because he did not move for a mistrial; he further argues that the verdicts against him were set aside due to the State's "misconduct." Specifically, Lewis claims that the State had information showing that Orcutt's father was a police officer and a former member of the drug task force, yet failed to inform the trial court of this. We disagree. As noted in our decision in the first appeal in this case, "both Lewis and the trial court should have been aware of Officer Berner's involvement with the case prior to trial" because the discovery materials provided by the State. Lewis, slip op. at 4-5. We further observed that it was "*the parties' failure* to establish during voir dire that Orcutt was related to Officer Berner." Id. (emphasis added).

In other words, we cannot lay the blame for what happened solely at the feet of the State because Lewis too had access to the discovery materials that showed that Officer Berner was involved with Lewis's prior convictions. As such, this case is distinguishable from the case cited by Lewis, Crim v. State, 156 Ind.App. 66, 77, 294 N.E.2d 822, 830

(1972). In Crim, the events which led to the termination of the defendant's first trial were the result of actions by the prosecutor and the trial judge, not the defendant. Here, however, Lewis failed to ask any questions of the potential jurors which would have led to the discovery that Orcutt was related to Officer Berner.

Furthermore, there is no indication that the State intended to cause the termination of the trial. See I.C. § 35-41-4-3(b). Indeed, it was the State who objected to the trial court's motion to correct error. Lewis, slip op. at 3. There is also no indication that Lewis objected to the trial court's decision to vacate his convictions and order a retrial. Under these facts and circumstances, we cannot say that the Lewis's retrial was barred by the prohibitions against double jeopardy. Cf. Berry v. State, 725 N.E.2d 939, 944 (Ind. Ct. App. 2000) (general prohibition against successive prosecutions does not prevent the State from retrying a defendant who succeeds in getting his first conviction set aside because of some error in the proceedings leading to conviction).

II. Trash Search

Lewis also claims that the trial court erred in admitting the evidence discovered during the searches of the trash bins behind the Seventh Street house, arguing that Captain Shake searched his trash without articulable individualized suspicion, contrary to our supreme court's holding in State v. Litchfield, 824 N.E.2d 356 (Ind. 2005). In Litchfield, the court held that, to be reasonable under Article 1, Section 11 of the Indiana Constitution, "trash must be retrieved in substantially the same manner as the trash collector would take it." Id. at 363. The court also held that random searches, or searches of those individuals whom the officers merely hope to find in possession of

incriminating evidence, are unreasonable and improper under Article 1, Section 11. Id. "A requirement of articulable individualized suspicion, essentially the same as is required for a 'Terry stop' of an automobile, imposes the appropriate balance between the privacy interests of citizens and the needs of law enforcement." Id.

Here, Lewis claims that Captain Shake had no articulable individualized suspicion that would make his searches of the trash at the Seventh Street house reasonable. The State's response is two-fold. First, the State claims that Lewis waived any challenge to the propriety of the trash searches by failing to object to the admission of the items found during the searches. Second, the State argues that Litchfield is not applicable here. We agree on both counts.

Prior to his first trial, Lewis filed a motion to suppress the evidence found as a result of the trash searches. Lewis then renewed his motion at the beginning of his retrial, "to make sure that they are preserved on the record." Tr. p. 49. However, when the State moved to admit the items found in the trash searches, Lewis's counsel stated, "No objection, Judge." Tr. p. 199. Later, when the State moved to admit more items found in the trash, Lewis again stated, "No objection, Your Honor." Tr. p. 209.

Generally, a party must make a contemporaneous objection to the admission of evidence; otherwise, the issue is not properly preserved for appeal. Rembusch v. State, 836 N.E.2d 979, 982 (Ind. Ct. App. 2005), trans. denied. The denial of a motion to suppress, without a contemporaneous objection to the admission of the evidence, is insufficient to preserve error for appeal. Dawson v. State, 786 N.E.2d 742, 744 (Ind. Ct. App. 2003), trans. denied. Here, although Lewis did file a motion to suppress, he did not

object to the admission of the evidence he now claims was improperly admitted. As such he has failed to properly preserve this issue for appeal.[4] See Rembusch, 836 N.E.2d at 983.

Even if Lewis had properly preserved this issue, he would not prevail. The trash searches in the present case occurred in October 2004—prior to March 24, 2005 when Litchfield was decided. And Lewis filed his motion to suppress the evidence found during the trash searches *after* Litchfield was decided. His claim is therefore governed by pre-Litchfield case law. See Membres v. State, 889 N.E.2d 265, 274 (Ind. 2008) ("challenges to pre-Litchfield searches that did not raise Litchfield-like claims in the trial court before Litchfield was decided are governed by pre-Litchfield doctrine even if the cases were 'not yet final' at the time Litchfield was decided."). Lewis, however, makes no argument that the searches of the trash at the Seventh Street house were improper under pre-Litchfield case law, and we will not make this argument for him.[5]

III. Search Warrant

Lastly, Lewis claims that the search warrant for the Seventh Street house was improperly issued and that the evidence obtained during the execution of this warrant was improperly admitted at trial. Again, we disagree. Although Lewis did file a motion to

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[4] We note that, at the beginning of his retrial, Lewis did renew his motions to suppress in order to "preserve the record." However, even if we were to generously consider this as being akin to a continuing objection, Lewis's counsel later stated "no objection" when the exhibits were actually entered into evidence. This acts to waive even a continuing objection to the admission of this evidence. See Hayworth v. State, 904 N.E.2d 684, 693-94 (Ind. Ct. App. 2009).

[5] Moreover, Captain Shake's behavior seems to be in compliance with pre-Litchfield doctrine. See Bowles v. State, 820 N.E.2d 739, 744 (Ind. Ct. App. 2005) (affirming denial of motion to suppress evidence found in trash search under pre-Litchfield law where detective went one or two feet onto defendant's property to retrieve trash set out for collection), trans. denied.

suppress the evidence found in the home, a motion to suppress is insufficient to preserve error for purposes of appeal. Dawson, 786 N.E.2d at 744. Furthermore, when the State moved to admit into evidence the items discovered during the search of the home, Lewis repeatedly stated, "No objection." Tr. pp. 242, 245-46, 251. Any objection to the admission of these items has therefore been waived. Rembusch, 836 N.E.2d at 983.

Even if the admissibility of these items had properly been preserved, Lewis would not prevail. Lewis's challenge to the search warrant is premised upon his argument, which we have rejected above, that the trash searches were improper. We therefore reject Lewis's challenge to the search warrant. Instead, we observe that the police found numerous items in the trash bins behind the Seventh Street house that strongly suggested that marijuana and cocaine were being used and/or sold there, items and inferences that fully support the search warrant Lewis challenges.

Conclusion

Because Lewis's retrial did not constitute double jeopardy, the trial court properly denied Lewis's motion to dismiss. Lewis waived any objection to the admission of the evidence found during the trash searches, and even if he had not waived his objection, the trash searches were not governed by the Litchfield requirement of articulable individualized suspicion. Lewis similarly waived any objection to the admission of the evidence found during the execution of the search warrant, and even if he had not waived this objection, the items discovered in the trash searches establish probable cause supporting the search warrant Lewis challenges.

Affirmed.

DARDEN, J., concurs.

ROBB, J., concurs with opinion.

IN THE
COURT OF APPEALS OF INDIANA

DAMON LEWIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 89A04-0812-CR-748
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

ROBB, Judge, concurring with opinion

I concur in the majority opinion, but note that we have not been provided with a transcript of voir dire from the first trial from which we could more fully assess Lewis's double jeopardy argument. Based solely upon statements regarding voir dire from our decision in the first appeal of this case, it appears that neither the trial court nor the State nor the defense asked the appropriate questions to ascertain Orcutt's relationship to Officer Berner.[6] I write separately only to emphasize the necessity for providing a full and complete record from which we can evaluate a party's issue.

[6] I do note, however, that during voir dire for the re-trial, the trial judge (the same trial judge, incidentally, who presided over the first trial) asked the entire venire before turning the questioning over to counsel, "Is there anyone here that is related to or close friends with anyone in law enforcement in Wayne County, Indiana?" Tr. at 71.