

Carla Tabor appeals her convictions for obtaining a controlled substance by fraud or deceit as a class D felony¹ and possession of a controlled substance as a class D felony.² Tabor raises three issues, which we revise and restate as:

- I. Whether her convictions violate Indiana's prohibition against double jeopardy and Ind. Code § 35-38-1-6;
- II. Whether the evidence is sufficient to support her conviction for obtaining a controlled substance by fraud or deceit as a class D felony; and
- III. Whether the trial court erred when it denied her motion for involuntary dismissal.

We affirm in part, reverse in part, and remand.

The relevant facts most favorable to the conviction follow. In June or July 2009, Tabor entered a Walgreens in Beech Grove in Marion County and presented a prescription to Jennifer Holle, a pharmacy technician. The prescription was written on a form in the name of Caroline Martin, a clinical nurse specialist at St. Francis Psychiatric Specialists, and was made out to Carla Tabor for Xanax. Holle asked for a birth date and to see identification. With Tabor's identification in hand, Holle wrote down Tabor's birth date and driver's license number on the prescription. Whitney Pelley, another pharmacy technician, recognized that the signature on the prescription "didn't look right." Transcript at 24. Pelley contacted the police regarding the prescription.

¹ Ind. Code § 35-48-4-14 (2004).

² Ind. Code § 35-48-4-7 (2004).

On July 22, 2009, Pelley identified a person from a photo array as the individual involved in the transaction. The next day, Holle identified the same individual from a photo array. Martin later reviewed the prescription and indicated that the signature was not hers, that she does not prescribe more than four milligrams of Xanax a day as indicated in the prescription, and that she generally writes prescriptions for the generic alprazolam. Martin also indicated that she never treated an individual named Carla Tabor and did not recognize that name.

On August 18, 2009, the State charged Tabor with: Count I, forgery as a class C felony; Count II, obtaining a controlled substance by fraud or deceit as a class D felony; and Count III, possession of a controlled substance as a class D felony. On January 26, 2010, the State amended the charging information regarding a minor change to Count II.

A bench trial was conducted on April 22, 2010, and May 18, 2010, and Tabor was present on both dates. In its case-in-chief, the State introduced the prescription, the photo arrays, and Tabor's record from the Bureau of Motor Vehicles, all of which were later admitted. The State also presented the testimony of Martin, Pelley, and Holle in its case-in-chief. After the State rested, Tabor moved for involuntary dismissal pursuant to Ind. Trial Rule 41(b). The court granted Tabor's motion with regard to Count I, forgery as a class C felony. After defense counsel rested, the court found Tabor guilty of the remaining counts and sentenced Tabor to 365 days suspended to probation on each count and ordered the sentences to be served concurrently. The sentencing order stated:

“[Tabor] to receive AMS [(Alternate Misdemeanor Sentencing)] up front but any probation violation will result in FULL BACK-UP.” Appellant’s Appendix at 41.

I.

The first issue is whether Tabor’s convictions violate Indiana’s prohibition against double jeopardy and Ind. Code § 35-38-1-6. Tabor argues that Count III, possession of a controlled substance as a class D felony, is a lesser included offense of Count II, obtaining a controlled substance by fraud or deceit as a class D felony. The State concedes that “under the circumstances of this case . . . possession of the alprazolam constitutes a lesser-included offense of obtaining a controlled substance by fraud or deceit,” and states that “if this Court finds the evidence sufficient to sustain both convictions, the case should be remanded for the trial court to vacate the possession conviction.” Appellee’s Brief at 6. We agree with the parties and remand to the trial court to vacate Tabor’s conviction for Count III, possession of a controlled substance as a class D felony. See Stroup v. State, 810 N.E.2d 355, 360 (Ind. Ct. App. 2004) (addressing the defendant’s argument that her conviction for possession of a controlled substance and her conviction for obtaining a controlled substance by fraud or deceit violated the Double Jeopardy Clause of the Indiana Constitution, and remanding to the trial court to vacate the defendant’s conviction for possession of a controlled substance); Loman v. State, 640 N.E.2d 745, 747 (Ind. Ct. App. 1994) (holding that the court erred by entering judgment for both possession of a controlled substance without a valid prescription and obtaining a controlled substance by fraud or deceit).

II.

The next issue is whether the evidence is sufficient to support Tabor's conviction for obtaining a controlled substance by fraud or deceit as a class D felony. When reviewing the sufficiency of the evidence to support a conviction, we must 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 witness credibility or reweigh the evidence. Id. We consider conflicting evidence most favorably to the trial court's ruling. Id. We 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)). It is not necessary that the evidence overcome every reasonable hypothesis of innocence. Id. at 147. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. Id.

Tabor argues that the evidence is insufficient to show that she was the person who committed the crimes because Holle testified that she had no recollection regarding the events upon which this case was based, there was no in-court identification of Tabor, and no law enforcement officer testified regarding the photo arrays.

Identification testimony need not necessarily be unequivocal to sustain a conviction. Heeter v. State, 661 N.E.2d 612, 616 (Ind. Ct. App. 1996). Elements of offenses and identity may be established entirely by circumstantial evidence and the logical inferences drawn therefrom. Bustamante v. State, 557 N.E.2d 1313, 1317 (Ind. 1990). The unequivocal identification of the defendant by a witness in court, despite

discrepancies between his description of the perpetrator and the appearance of the defendant, is sufficient to support a conviction. Emerson v. State, 724 N.E.2d 605, 610 (Ind. 2000), reh'g denied. Inconsistencies in identification testimony impact only the weight of that testimony, because it is the fact finder's task to weigh the evidence and determine the credibility of the witnesses. Gleaves v. State, 859 N.E.2d 766, 770 (Ind. Ct. App. 2007) (citing Badelle v. State, 754 N.E.2d 510 (Ind. Ct. App. 2001), trans. denied). As with other sufficiency matters, we will not weigh the evidence or resolve questions of credibility when determining whether the identification evidence is sufficient to sustain a conviction. Id. Rather, we examine the evidence and the reasonable inferences therefrom that support the verdict. Id.

The record reveals that the prescription was made out to Tabor. Holle testified that pharmacy technicians ask for a birth date and identification or driver's license and must have the identification in their hands before writing down the information. Holle testified that the handwriting on the prescription listing a date of birth and a driver's license number looked like her handwriting. At trial, the State introduced, and the court admitted, the prescription and Tabor's record from the Bureau of Motor Vehicles. The prescription had a date written on it which matches Tabor's date of birth in her BMV record. The prescription also had a number written on it which matches Tabor's driver's license number.

Pelley testified that the prescription was actually filled and given to the individual who came to pick up the prescription and identified the person involved in the transaction

at the time that she was shown a photo array by the police on July 22, 2009. The next day, Holle identified the same individual from the photo array as the person associated with the prescription. The court as the trier of fact was able to review the photo arrays and Tabor, who was present at trial.

Based upon the evidence most favorable to the conviction as set forth in the record, we cannot say that it was unreasonable for the trier of fact to believe the identification testimony and evidence presented by the State. See Fozzard v. State, 518 N.E.2d 789, 792 (Ind. 1988) (finding that documents of prior convictions containing both the same birth date and a photograph which the jury could compare with the defendant seated in the courtroom constituted sufficient evidence of identification). Accordingly, we affirm Tabor's conviction for obtaining a controlled substance by fraud or deceit as a class D felony.

III.

The next issue is whether the court erred when it denied Tabor's motion for involuntary dismissal. Tabor argues that the court erred in denying her Trial Rule 41(B) motion for involuntary dismissal of Counts II and III. The grant or denial of a motion to dismiss made under Trial Rule 41(B) is reviewed under the clearly erroneous standard. Todd v. State, 900 N.E.2d 776, 778 (Ind. Ct. App. 2009) (citation omitted). In a criminal action, the defendant's Rule 41(B) motion is essentially a test of the sufficiency of the State's evidence, and our review of the denial of the motion for involuntary dismissal is limited to the State's evidence presented during its case-in-chief. Id. The evidence

discussed above was all presented during the State's case-in-chief. Our review of the evidence presented by the State during its case-in-chief as set forth in the record does not point unerringly to a conclusion different from the one reached by the trial court on the motion to dismiss. Accordingly, we must affirm the court's ruling to deny Tabor's Rule 41(B) motion to dismiss. See Todd, 900 N.E.2d at 779 (noting that the State's evidence from its case-in-chief did not point "unerringly to a conclusion different from the one reached" by the trial court on the defendant's Trial Rule 41(B) motion to dismiss and holding that it "must affirm the court's ruling to deny that motion") (citation omitted).

For the foregoing reasons, we affirm Tabor's conviction for obtaining a controlled substance by fraud or deceit as a class D felony, reverse Tabor's conviction for possession of a controlled substance as a class D felony, and remand to the trial court to vacate Tabor's conviction for possession of a controlled substance as a class D felony.

Affirmed in part, reversed in part, and remanded.

RILEY, J., and ROBB, J., concur.