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IN THE
COURT OF APPEALS OF INDIANA

DAVID ATKINS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 88A01-0906-CR-304
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WASHINGTON SUPERIOR COURT
The Honorable Frank Newkirk, Jr., Judge
Cause No. 88D01-0708-FA-309

December 29, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant David Atkins appeals his convictions from two counts of Dealing in Cocaine, one as a Class A felony and the other as a Class B felony,[1] two counts of Neglect of a Dependant, as Class C felonies,[2] Maintaining a Common Nuisance, a Class D felony,[3] and Possession of Paraphernalia, as a Class A misdemeanor.[4] We affirm.

Issues

Atkins raises the following issues:

I. Whether the trial court committed fundamental error by admitting evidence recovered during the search of the trailer that was allegedly in violation of his federal Fourth Amendment right against unreasonable searches and seizures; and

II. Whether there was sufficient evidence to support his convictions for Neglect of a Dependent.[5]

Facts and Procedural History

After a successful controlled buy of cocaine at Atkins's trailer, police were able to obtain and execute a search warrant for the trailer. During the execution of the search warrant on August 9, 2007, there were seven people in the trailer, including two children. Prior to the police arriving, all of the adults were smoking crack cocaine in one of the bedrooms. The adults had either purchased or received the cocaine from Atkins. The trailer was the residence of Atkins, his girlfriend, Vonnie, and Vonnie's two children, A.A. and

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[1] Ind. Code § 35-48-4-1.
[2] Ind. Code § 35-46-1-4(b).
[3] Ind. Code § 35-48-4-13.
[4] Ind. Code § 35-48-4-8.3.
[5] Atkins does not challenge his other convictions.

S.A., who were seven and ten years old, respectively.

The State charged Atkins with two counts of Dealing in Cocaine, two counts of Neglect of a Dependant, Maintaining a Common Nuisance, and Possession of Paraphernalia. After a jury trial, Atkins was found guilty as charged. The trial court sentenced Atkins to an aggregate term of imprisonment of thirty-four years with four years of probation.

Atkins now appeals.

Discussion and Decision

I. Admission of Evidence From Search

Atkins contends the trial court erred in admitting the evidence obtained during the search of his residence because it was obtained in violation of the Fourth Amendment prohibiting illegal searches and seizures. Specifically, he asserts the record does not demonstrate that the search warrant was supported by probable cause, making the search for and seizure of the evidence illegal.

A trial court has broad discretion in ruling on the admissibility of evidence, and we will only reverse a trial court's ruling on admissibility of evidence when the trial court has abused its discretion. Washington v. State, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). However, failure to object to the admission of evidence at trial results in waiver of the issue of admissibility on appeal. Kubsch v. State, 784 N.E.2d 905, 923 (Ind. 2003). Here, Atkins concedes that he did not object to admission of the evidence at trial.

In an attempt to evade waiver, Atkins couches his argument in terms of fundamental error. However, the Indiana Supreme Court has held that the admission of evidence obtained

in violation of the defendant's constitutional right against unlawful search and seizure does not elevate the issue to the status of fundamental error. Swinehart v. State, 268 Ind. 460, 465-67, 376 N.E.2d 486, 491 (1978). Therefore, we will not review the admission of the challenged evidence for fundamental error.

II. Neglect of a Dependent

Atkins contends that there was insufficient evidence to support his two convictions for Neglect of a Dependent because the children in the residence were not his and there was limited evidence demonstrating that the children were in his care. When reviewing the sufficiency of the evidence to support a conviction, we will consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We will not assess the credibility of the witnesses or reweigh the 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.

For the State to convict Atkins of Neglect of a Dependent, as charged, it was required to prove that Atkins, having care of A.A. and S.A., whether voluntarily assumed or because of legal obligation, did knowingly or intentionally place the dependents in a situation that endangered the dependents' lives or health by smoking crack cocaine in the same dwelling where cocaine was being dealt. Atkins does not challenge the fact that earlier that evening in his trailer, he sold crack cocaine to an informant for the police. As to whether the children were in the care of Atkins, the statute does not mandate that the defendant be the parent of the child but rather the language provides that it is sufficient that the defendant voluntarily

assumes the care of the child. Kellogg v. State, 636 N.E.2d 1262, 1264 (Ind. Ct. App. 1994). Here, the evidence was that Atkins resided in the trailer along with his girlfriend and her two children. Atkins is not the father of either child. The four had been living together for over a year. Family members of Atkins testified that Atkins also exhibited caretaking functions, such as cooking food and feeding the children. A sister of Atkins described Vonnie and Atkins as "good parents." Trial Transcript at 463. From this evidence, a jury could reasonably infer that Atkins had voluntarily assumed care of the children.

Atkins also challenges whether his action of smoking crack cocaine in the bedroom of the trailer placed the children in a situation that endangered their lives. The evidence presented revealed that all five of the adults present in the trailer were in a bedroom smoking crack cocaine that was provided by Atkins. A reasonable jury could infer that this circumstance endangered children present in the trailer. Therefore, the evidence is sufficient to support the convictions of Neglect of a Dependent.

Affirmed.

BAKER, C.J., and ROBB, J., concur.