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IN THE
COURT OF APPEALS OF INDIANA

JULIE A. GARDINER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 08A05-0612-CR-694
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CARROLL CIRCUIT COURT
The Honorable Donald E. Currie, Judge
Cause No. 08C01-0602-FA-6

July 2, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Julie A. Gardiner appeals her conviction for Visiting a Common Nuisance,[1] a class B misdemeanor, claiming that her conviction must be reversed because the trial court's instruction to the jury on the offense of attempt to visit a common nuisance and its refusal to provide a verdict form for that crime constituted fundamental error. Alternatively, Gardiner claims that the evidence was insufficient to support the conviction because there was no evidence that the house was a common nuisance when Gardiner arrived there and the sole witness's testimony regarding drug use on the premises was inconsistent and inherently improbable. Finding no error, we affirm the judgment of the trial court.

FACTS

On February 21, 2006, at approximately 8:15 p.m., the Carroll County Emergency Response Team (ERT) executed a search warrant at the residence of Bryan and Tammy Pancake in Delphi. A confidential informant apparently told Sheriff's Deputy Kevin Hammond that Gardiner would be arriving at the residence that day with some pills to give to Bryan for the purpose of making a batch of methamphetamine. Although the officers wore helmets and carried weapons, there were no marked police vehicles within sight of the residence.

The ERT searched the house and the outbuildings on the property. One of those buildings, which was approximately twenty yards from the house, contained an operational methamphetamine lab. Several bags of marijuana were also seized during the course of the search.

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[1] Ind. Code § 35-48-4-13(a).

At some point during the investigation, Gardiner arrived at the house and knocked on the front door. There were no police officers outside the Pancakes' residence at the time. Sheriff's Deputy Tony Liggett, a police officer with whom Gardiner was familiar, answered the door and directed Gardiner to the back door. The officers informed Gardiner that the Pancakes had been arrested for manufacturing methamphetamine, and they asked Gardiner why she was there. Gardiner replied that she had stopped by "to say hi." Appellant's App. p. 54. After searching Gardiner's purse and finding nothing illegal, Gardiner was arrested and charged with several offenses, including visiting a common nuisance.[2]

At a jury trial that commenced on October 16, 2006, Bryan testified that Gardiner had been at his residence on several occasions. Bryan stated that Gardiner had observed him smoking methamphetamine. Gardiner had also been to the Pancakes' residence on other occasions with her boyfriend, who also used methamphetamine at the house.

At the conclusion of the evidence, the State submitted a final instruction regarding the offense of attempt to visit a common nuisance. Gardiner's counsel objected, arguing that the State had not provided notice that it was altering the charge it had originally filed and that the instruction effectively eliminated one of the elements of the charged crime. Thus, Gardiner argued that this instruction deprived him of the right to a fair trial. The trial court overruled the objection and modified the instruction. However, the trial court also informed counsel

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[2] Gardiner was also charged with conspiracy to commit dealing in methamphetamine, possession of methamphetamine, and possession of marijuana. Appellant's App. p. 7-10. After Gardiner was arrested, the police towed her vehicle and searched it. Although the police recovered some methamphetamine and a large quantity of pseudoephedrine pills that are used to produce methamphetamine, Gardiner successfully moved to suppress this evidence. As a result, the State dismissed these counts. Appellant's App. p. 14-19, 37.

that it would provide only one set of verdict forms to the jury regarding the offense of visiting a common nuisance. Gardiner did not object, and the jury found her guilty of visiting a common nuisance, despite the instruction that pertained to attempt.

Thereafter, Gardiner was sentenced to 180 days in jail with 140 days suspended, and placed on probation for one year. She now appeals.

I. Instructions

Gardiner contends that her conviction must be reversed because the trial court erred in instructing the jury on the offense of attempted visiting a common nuisance. Gardiner also argues that the instruction was prejudicial because verdict forms for that offense were not provided to the jury. Hence, Gardiner maintains that the conviction cannot stand because "it is impossible to be sure that the jurors all believed [that she] had committed [the crime of] Visiting a Common Nuisance." Appellant's Br. p. 7.

We initially observe that while Gardiner objected to the trial court's instruction on attempt, she did not object with regard to the verdict forms that were given. Gardiner also failed to tender any proposed verdict forms of her own. Appellant's App. p. 81. Therefore, any error regarding the propriety of the verdict form is waived. See Scuro v. State, 849 N.E.2d 682, 687-88 (Ind. Ct. App. 2006) (holding that the failure to object at trial generally result in waiver of the claim on appeal), trans. denied.

In an effort to avoid waiver, Gardiner claims that the trial court committed fundamental error when it did not provide the jury with a verdict form that permitted it to convict her of an "attempt" to visit a common nuisance because "some of the jurors might

have believed she only attempted to visit a common nuisance, while others might have believed she actually succeeded in completing the crime." Appellant's Br. p. 17. To constitute fundamental error, the error must amount to a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process. Bostick v. State, 773 N.E.2d 266, 271 (Ind. 2002). In other words, the error must be so prejudicial to the rights of the defendant that a fair trial was impossible. Barany v. State, 658 N.E.2d 60, 64 (Ind. 1995).

Instructing the jury is within the trial court's discretion and is reviewed only for an abuse of that discretion. Wood v. State, 804 N.E.2d 1182, 1190 (Ind. Ct. App. 2004). Instructions are provided to inform the jury of the law applicable to the facts and enable it to understand the case clearly and arrive at a just, fair, and correct verdict. Id. Jury instructions must correctly state the law, apply to the evidence admitted during trial, and be relevant to the issues the jury must decide in reaching its verdict. Wright v. State, 766 N.E.2d 1223, 1234 (Ind. Ct. App. 2002).

We note that an attempted crime is an included offense of the completed crime. State ex rel. Camden v. Gibson Circuit Court, 640 N.E.2d 696, 701 (Ind. 1994). Moreover, this court has determined that a defendant has fair notice when charged with any crime that he or she would have to defend against a charge of the attempted crime. Ledesma v. State, 761 N.E.2d 896, 900 (Ind. Ct. App. 2002). In Wright v. State, 658 N.E.2d 563, 566-67 (Ind. 1995), our Supreme Court set forth a three-part test that the trial court should employ to determine whether or not to give a lesser-included offense instruction. First, the trial court

should determine whether the lesser offense is inherently included in the charged offense. Id. at 566. If the offense is not inherently included, then the trial court should determine if it is factually included in the charged offense. Id. at 567. Finally, if the offense is either inherently or factually included in the charged offense, the court should examine the evidence and determine whether there is a serious evidentiary dispute about the element or elements distinguishing the greater from the lesser offense. Id.

Because an attempted crime is an inherently included offense of the completed crime, Gardiner cannot successfully argue that she was deprived of fair notice with regard to the crime of attempt to visit a common nuisance or that the jury was improperly instructed on that offense. Indeed, the two theories of liability that the State pursued had precisely the same degree of culpability and the same punishment. As our Supreme Court observed in Taylor v. State, 840 N.E.2d 324, 333 (Ind. 2006), "while jury unanimity is required as to the defendant's guilt, it is not required as to the theory of the defendant's culpability." In Taylor, it was held that if a jury convicts a defendant of a crime, it is not necessary for the jurors to agree whether the guilt is a result of aiding and abetting or the result of being the direct perpetrator. Id. at 334.

Notwithstanding this pronouncement, Gardiner urges that Castillo v. State, 734 N.E.2d 299, 304-05 (Ind. Ct. App. 2000), summ. aff'd, 741 N.E.2d 1196 (Ind. 2001), should control the outcome here. In Castillo, the defendant was charged with one act of dealing in cocaine, but the State presented evidence that the defendant had committed one of two entirely separate acts of dealing. Consequently, the jury was instructed that it could find that Castillo

had made either sale, and it was not instructed that a unanimous verdict was required regarding which act he had committed. On appeal, we noted the possibility that some of the jurors believed that Castillo had committed the first dealing crime, while others might have believed that he committed the second. Therefore, because the jury's verdict may not have been unanimous, we reversed Castillo's conviction. Id. at 303-05.

Unlike the circumstances in Castillo, the State alleged that Gardiner had committed only one criminal act, and the sole question was whether or not the act was completed. In our view, the circumstances here are more akin to Taylor, where the issue was whether the defendant actually killed the victim, or whether he merely aided in the killing. The Taylor court observed that

> The jury . . . had to determine only whether Taylor committed the one act of murder. There were two different theories upon which the jury could have found that Taylor committed this one act—either as the principal or an accomplice. But "the Indiana statute governing accomplice liability does not establish it as a separate crime, but merely as a separate basis of liability for the crime charged." Hampton v. State, 719 N.E.2d 803, 807 (Ind. 1999). It is important to note that Taylor would have been equally guilty of murder whether he acted as the principal shooter or merely an accomplice. Johnson v. State, 687 N.E.2d 345, 349 (Ind. 1997).

840 N.E.2d at 333.

Applying the rationale advanced in Taylor to the circumstances here, juror unanimity is not at issue. See Ind. Code § 35-41-5-1 (recognizing that "an attempt to commit a crime is a felony or misdemeanor of the same class as the crime attempted"). Moreover, Gardiner has failed to establish how she was prejudiced by the instruction and submission of the verdict form. Therefore, we conclude that the trial court did not commit fundamental error when it

provided verdict forms that pertained only to the completed crime of visiting a common nuisance.

II. Sufficiency of the Evidence

Gardiner also claims that the evidence was insufficient to support the conviction. Specifically, Gardiner argues that the State failed to prove that the Pancakes' residence was a common nuisance when Gardiner arrived because the methamphetamine laboratory was found in a nearby outbuilding. Gardiner further contends that the State failed to prove that Gardiner knew what the residence was being used for because Bryan's testimony was inconsistent and "inherently improbable." Appellant's Br. p. 6.

When reviewing challenges to the sufficiency of the evidence, we neither reweigh the evidence nor judge the credibility of witnesses. Vasquez v. State, 741 N.E.2d 1214, 1216 (Ind. 2001). Rather, we will examine the evidence and the reasonable inferences that may be drawn therefrom that support the verdict and will affirm a conviction if there is probative evidence based on which a jury could find the defendant guilty beyond a reasonable doubt. Id. Put another way, we will affirm unless "no rational fact-finder" could have found the defendant guilty beyond a reasonable doubt. Clark v. State, 728 N.E.2d 880, 887 (Ind. Ct. App. 2000).

In addressing Gardiner's arguments, we note that Indiana Code section 35-48-4-13(a) provides in relevant part that "[a] person who knowingly or intentionally visits a building [or] structure . . . that is used by any person to unlawfully use a controlled substance commits visiting a common nuisance." Thus, the State was required to prove that Gardiner knew that

the Pancakes' home "was used for the unlawful use of a controlled substance." Zuniga v. State, 815 N.E.2d 197, 199 (Ind. Ct. App. 2004). Additionally, the State was required to prove that the home "was used on more than one occasion for the unlawful use of a controlled substance." Id. at 200.

In this case, Bryan readily acknowledged that he was addicted to methamphetamine. Appellant's App. p. 71. He admitted smoking the drug every day and he occasionally used the drug at his residence. Although Bryan produced the drug in his garage, Gardiner's boyfriend had used methamphetamine in the Pancakes' home on several occasions. Id. at 71-74. Bryan also testified that prior to February 21, Gardiner had seen methamphetamine in the house. Moreover, Gardiner had been present "more than a couple times" when individuals had smoked the drug in the residence. Id. at 72-74. This was sufficient to show that Gardiner knew that the Pancakes' residence was a common nuisance. See Mayotte v. State, 172 Ind.App. 252, 254, 360 N.E.2d 34, 35 (1977) (observing that the defendant's admission to previously smoking marijuana on the premises was sufficient to establish the requisite knowledge under the visiting a common nuisance statute).

Notwithstanding this evidence, Gardiner maintains that her conviction must be set aside because the State failed to establish that methamphetamine was being produced inside the residence. In our view, the lack of actual production of the drug inside the house matters not for purposes of the statute. Rather, it was the activity of using the drug—and not the presence of a methamphetamine lab in an outer building—that caused the home to be a common nuisance. Moreover, nothing in the statute suggests that the State must prove that a

defendant is required to enter the structure or intend to do anything illicit inside. Rather, the offense is committed when a person simply "visits" a structure that he or she knows to be a place where controlled substances have been used in the past. See Dorn v. State, 819 N.E.2d 516, 520 (Ind. Ct. App. 2004) (observing that the State is not required to prove some level of completed act beyond enticement to be guilty of promoting prostitution when the statute is silent as to further acts). Thus, Gardiner's challenge to the sufficiency of the evidence fails on this basis.

Finally, Gardiner invokes the incredible dubiosity rule and maintains that her conviction must be set aside because Bryan's testimony was not believable. In other words, Gardiner claims that Pancake's testimony was inherently improbable because he "could not tell a consistent story." Appellant's Br. p. 12.

In Murray v. State, 761 N.E.2d 406, 408 (Ind. 2002), our Supreme Court observed that an appellate court will impinge upon the responsibility of the fact-finder to judge the credibility of witnesses only when confronted with inherently improbable, coerced, equivocal, or wholly uncorroborated testimony of incredible dubiosity. The application of this rule is limited to cases where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the appellant's guilt. Id. Thus, the rule is rarely applied, and it is limited to cases in which "the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it." Fajardo v. State, 859 N.E.2d 1201, 1208 (Ind. 2007).

As noted above, Bryan clearly and repeatedly placed Gardiner at his home on more

than one occasion. Appellant's App. p. 72-75. Although Bryan was not absolutely certain about the number of times that Gardiner had been at the residence, he knew that Gardiner had been there more than once. While one could consider Bryan's testimony somewhat imprecise, it was not equivocal or contradictory. And a reasonable person could have believed it. Fajardo, 859 N.E.2d at 1209 (noting that simple uncertainties and inconsistencies do not amount to incredibly dubious testimony). Thus, it was for the jury to decide the value of Bryan's testimony, and we decline Gardiner's invitation to reweigh the evidence. As a result, we conclude that the evidence was sufficient to support the conviction.

The judgment of the trial court is affirmed.

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