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IN THE COURT OF APPEALS OF INDIANA

TYRONE WILLIAMS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0606-CR-534
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patrick Murphy, Commissioner
Cause No. 49G20-0504-FB-56405

August 17, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Tyrone Williams appeals his jury conviction and sentence for conspiracy to commit dealing in cocaine[1] as a Class B felony. Williams raises five issues on appeal that we restate as:

I. Whether the trial court erred in sending two photographs not admitted into evidence to the jury while it deliberated.

II. Whether the State demonstrated a proper chain of custody for the admission of the cocaine into evidence.

III. Whether the trial court properly instructed the jury on conspiracy and reasonable doubt.

IV. Whether there was sufficient evidence to support Williams's conviction.

V. Whether the trial court abused its sentencing discretion.

We affirm.

FACTS AND PROCEDURAL HISTORY

On April 1, 2005, officers with the Lawrence Police Department met with a man they regularly used as a confidential informant ("CI"). The officers searched the CI for weapons, drugs, and money and wired him with a transmitting device. The CI directed the officers to drop him off near 42nd Street and Post Road in Marion County.

Upon arrival, the CI walked around the area until Williams approached him and asked if he wanted some crack cocaine. Williams then led the CI to a townhome. An individual wearing an orange shirt answered the door, said something to Williams, and Williams then walked over to the CI to get money. Williams returned to the individual in the orange shirt, gave him the money, and received the cocaine from him. Williams then took the cocaine to the CI. The CI and Williams walked in their separate directions.

[1] *See* IC 35-41-5-2; IC 35-48-4-1.

Once out of Williams's sight, Officer Daryl Jones picked up the CI.

Officer Jones recovered the cocaine purchased by the CI and gave it to Officer Travis Cline. The CI identified Williams, and he was taken into custody. Officer Cline heat-sealed the cocaine in an evidence bag and transported the bag to the property locker at the Lawrence Police Station. Detective Gregory Woodruff later transported the evidence bag to the crime lab where chemist Brenda Keller conduct a test that established the substance to be 0.168 of a gram of cocaine.

The State charged Williams with conspiracy to commit dealing in cocaine, dealing in cocaine, and possession of cocaine. During the trial, the State used two aerial photographs of the area where the purchase took place for demonstrative purposes. The State never offered the photographs into evidence, and they were not otherwise admitted. The photographs were sent to the jury during its deliberations. Williams objected to the photographs being with the jury, and the court instructed the bailiff to remove them from the jury room.

The jury returned a guilty verdict on the conspiracy count and could not reach a verdict on the remaining charges. The State later dismissed those remaining charges. During sentencing, the trial court identified Williams's criminal history as an aggravating factor. The trial court gave Williams a 12-year executed sentence. Williams now appeals.

DISCUSSION AND DECISION

I. Non-Admitted Exhibits

Williams first claims that the trial court erroneously submitted the two blow-up

photographs of the crime scene to the jury during deliberations and that the error was not harmless. When reviewing errors in the application of state evidentiary or procedural law, we determine if the probable impact of the error, in light of all the evidence, is sufficiently minor so as not to affect the defendant's substantial rights. *See Black v. State*, 794 N.E.2d 561, 565 (Ind. Ct. App. 2003).

Here, the two blow-up photographs at issue were used as demonstrative evidence throughout the trial without Williams's objection. Prior to deliberations, the jury had already seen the photographs several times. Contrary to Williams's contention, this case is not like *Franklin v. State*, 533 N.E.2d 1195, 1196 (Ind. 1989), where the jury improperly received a fingerprint record revealing for the first time that defendant had a previous drug conviction. Here, the jury was presented information it had already received. The error in the submission of the photographs to the jury during deliberations did not affect Williams's substantial rights and was harmless.

II. Chain of Custody

Williams next challenges the chain of custody of the cocaine. Specifically, he asserts that the State failed to establish a proper chain of custody from the date the CI made the purchase to the date the evidence was presented at trial.

The State bears a higher burden to establish the chain of custody of "fungible" evidence. *Troxell v. State*, 778 N.E.2d 811, 814 (Ind. 2002). In order to establish a proper chain of custody, the State must give reasonable assurances that the evidence remained in an undisturbed condition. *Id.* (citing *Cliver v. State*, 666 N.E.2d 59, 63 (Ind. 1996)). "However, the State need not establish a perfect chain of custody, and once the

State 'strongly suggests' the exact whereabouts of the evidence, any gaps go to the weight of the evidence and not to admissibility." *Troxell*, 778 N.E.2d at 814; *see also Jenkins v. State*, 627 N.E.2d 789, 793 (Ind. 1993) (noting that failure of FBI technician to testify did not create error). There is a presumption that officers undertake the same reasonable care of samples taken as evidence. *Troxell*, 778 N.E.2d at 814. To successfully challenge chain of custody, a defendant must present evidence that does more than raise a mere possibility that the evidence may have been tampered with. *Id.* (citing *Cliver*, 666 N.E.2d at 63).

Here, the State established a proper chain of custody. After the CI purchased the cocaine from Williams, Officer Jones picked up the CI and took the cocaine from him. Officer Jones then took the cocaine to Officer Cline. Officer Cline testified that he placed the cocaine into an evidence bag, sealed it, and placed the bag into the police station property room. Detective Woodruff testified that he later signed the sample out of the property room and transported it to the forensic lab for testing. Keller, the chemist at the forensic lab, took the sealed bag, tested its contents, and determined it to be cocaine. During trial, all of these individuals testified that the substance and the bag were in substantially the same condition as when in their control. This evidence strongly suggests the location of the cocaine at all times. Any doubt that Williams alleges about gaps in the exhibit's location goes to the weight of the evidence and not its admissibility. *Livingston v. State*, 544 N.E.2d 1364, 1371 (Ind. 1989).

III. Jury Instructions

Williams next argues that the trial court improperly instructed the jury on

conspiracy and reasonable doubt. As to conspiracy, Williams contends the instruction failed to inform the jury that it must find two separate intents – intent to commit conspiracy and intent to commit dealing in cocaine; as to reasonable doubt, Williams claims the instruction misstates the burden of proof. Jury instructions are left to the trial court's discretion. *Stringer v. State*, 853 N.E.2d 543, 548 (Ind. Ct. App. 2006). Because Williams objected to the instructions at trial and tendered alternatives, we review the trial court's final instructions for whether: (1) they correctly state the law; (2) there is evidence in the record that support the giving of the instruction; and (3) the substance of the tendered instruction is covered by the instructions that are given. *Id.* Williams must convince us that the instruction interfered with his substantive rights. *Id.*

While conspiracy requires proof of two intents, i.e., intent to commit the conspiracy and intent to commit the underlying crime, an instruction does not have to set forth both. *See Grant v. State*, 623 N.E.2d 1090, 1095 (Ind. Ct. App. 2003) ("instruction which simply states that conspiracy requires intent to commit a felony and an intent to agree to the same, is duplicative and need not have been given."). Here, the conspiracy instruction followed the conspiracy statute, IC 35-41-5-2, with one variation shown in brackets: "A person conspires to commit a felony when, with the intent to commit the felony, he [knowingly] agrees with another person to commit the felony. . . ." Williams argues that this instruction fails to advise the jury that there are two intents necessary and that the court's addition of "knowingly" does not cure the defect. Because the instruction need not contain both intents, we hold there was no defect to be cured. Therefore, the trial court did not abuse its discretion in its conspiracy instruction.

Williams also challenges the reasonable doubt instruction, which stated the jury *should* find him guilty if all reasonable doubt is removed. *Appellant's App.* at 81. Our Supreme Court has affirmed the language of the instruction verbatim. *See Wright v. State*, 730 N.E.2d 713, 716 (Ind. 2000). The reasonable doubt instruction was a correct statement of law, and the trial court did not abuse its discretion.

IV. Sufficiency of Evidence

Williams also challenges the sufficiency of evidence to support his conviction. Specifically, he claims that testimony of the CI was not credible. In reviewing a sufficiency of the evidence claim, we neither reweigh the evidence nor assess the credibility of the witnesses. *Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002). We look to the evidence most favorable to the verdict and reasonable inferences drawn therefrom. *Id.* We will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *Id.*

Our standard of review dictates that the evidence was sufficient. Credibility determinations are within the province of the trier of fact's judgment. Here, the trier of fact found the CI's testimony to be credible enough to support Williams's conviction for conspiracy to commit dealing in cocaine. We do not assess the credibility of witnesses. The CI's testimony along with the remaining evidence was sufficient to convict Williams.

V. Sentencing

Williams lastly contends that the trial court abused its discretion in enhancing his sentence and that his sentence is inappropriate based on the nature of the offense and his

character. A sentencing decision is within the sound discretion of the trial court. *Edwards v. State*, 842 N.E.2d 849, 854 (Ind. Ct. App. 2006), *trans. denied* (citing *Jones v. State*, 790 N.E.2d 536, 539 (Ind. Ct. App. 2003)). We can only review the presence or absence of reasons justifying a sentence for an abuse of discretion, but we cannot review the weight given to these reasons. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007). If the sentence imposed is lawful, this court will not reverse unless the sentence is inappropriate based on the character of the offender and the nature of the offense. Ind. Appellate Rule 7(B); *Boner v. State*, 796 N.E.2d 1249, 1254 (Ind. Ct. App. 2003).

Williams's 12-year sentence is neither an abuse of discretion, nor inappropriate. Williams has eight previous felony convictions.[2] His criminal record alone justifies his sentence. *Mitchell v. State*, 844 N.E.2d 88, 91 (Ind. 2006) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (fact of prior convictions may always be used in consideration of defendant's sentence)). While Williams makes arguments in his brief concerning the war on drugs and the ways in which the Lawrence Police Department utilizes its resources, such arguments should be directed to the Indiana General Assembly and the Lawrence City Council, not this court. While we acknowledge that Williams is not the worst offender, and that his offense is not the worst of its class, this is his *ninth felony*. An enhanced sentence is clearly justified. The trial court did not abuse its discretion, and we do not find Williams's sentence inappropriate.

Affirmed.

DARDEN, J., and MATHIAS, J., concur.

[2] The trial court stated that it counted five previous felonies, four of which the defendant admitted to having committed. *Tr.* at 360. Our review of Williams's criminal history revealed he had eight prior felony convictions.