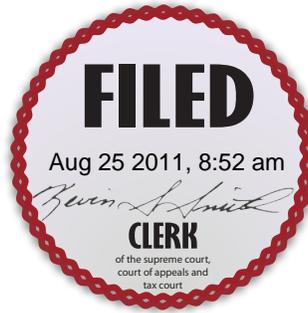


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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JATUN COMBS, )  
 )  
Appellant-Defendant, )  
 )  
vs. ) No. 46A03-1006-CR-403  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

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APPEAL FROM THE LAPORTE CIRCUIT COURT  
The Honorable Thomas J. Alevizos, Judge  
Cause No. 46C01-0910-FA-571

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**August 25, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Jatun Combs (“Combs”) appeals from his convictions after a jury trial of one count of Class B felony dealing in cocaine<sup>1</sup>, and one count of possession with intent to deliver cocaine,<sup>2</sup> also as a Class B felony. Combs presents several issues for our review, which we restate as the following:

- I. Whether the trial court abused its discretion by allowing the State to amend the charges against Combs by adding another felony count seven days prior to Combs’ jury trial;
- II. Whether the trial court abused its discretion by denying Combs’ request to sever the newly-added felony count;
- III. Whether the trial court’s failure to enter a finding on the State’s peremptory challenge of the only African-American juror in the venire was an abuse of discretion;
- IV. Whether the trial court abused its discretion by admitting certain statements Combs made while in police custody; and
- V. Whether the evidence was sufficient to sustain Combs’ convictions.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

On October 17, 2009, Justin Lubke (“Lubke”) stole a laptop computer from a friend in order to trade it for cocaine. Lubke took the laptop to 712 Tipton Street, LaPorte, Indiana, where he knew he could purchase cocaine. While at the house, Lubke set the laptop down, and Combs, who was known as “Nephew,” handed him a “teener,” which Lubke understood to be approximately 1.6 grams of cocaine. *Tr.* at 316-18. Lubke went into the kitchen and

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<sup>1</sup> See Ind. Code § 35-48-4-1.

<sup>2</sup> See Ind. Code § 35-48-4-1.

after consuming the cocaine, he became high.

On October 19, 2009, Lubke borrowed twenty dollars from his mother, went to the residence at 712 Tipton Street, and purchased more cocaine. Lubke consumed the cocaine at the residence before leaving. Later that day, police officers who were investigating the theft of the laptop computer detained Lubke. Captain Clyde Crass of the LaPorte Police Department questioned Lubke about the laptop computer, and Lubke admitted that he had stolen it in order to exchange it for cocaine. After receiving that information, Captain Crass obtained a search warrant for the residence at 712 Tipton Street.

That same afternoon, officers went to 712 Tipton Street to execute the search warrant. Police officers who went to the back door of the residence observed Kevin Shoemaker (“Shoemaker”), who had rented the house for fourteen years, sitting on the back step of the porch eating a sandwich. The officers placed Shoemaker under arrest.

Upon entering the residence, the officers found Michelle Carpenter (“Carpenter”), Shoemaker’s girlfriend, who was living at the residence, in a bed in one of the bedrooms. Officers found Carpenter’s friend, Kristina Kuta (“Kuta”), playing dice or cards at a table in the kitchen. Kuta had stopped by the residence in order to help care for Carpenter, who was sick with the flu. In the living room of the residence, officers found Eugene Thompson (“Thompson”) sitting in a recliner playing a video game. Thompson, who was one of Combs’ friends, was ordered to get on the ground, and officers secured him in handcuffs. When the officers first entered the residence, Combs ran down a hallway toward the kitchen and away from the living room where he had been playing video games with Thompson.

Officers found fifteen individually-packaged rocks of crack cocaine in the living room on the table next to a chair where Combs had been sitting. The rocks of cocaine were “dimes,” meaning they were worth ten dollars each, and were packaged for delivery. *Id.* at 562-68. Officers also found a small baggie of marijuana. Combs had been sitting in the chair when Kuta arrived at the house, approximately ten minutes prior to the arrival of the police officers.

While the officers were detaining him, Combs volunteered that the officers had “missed the big guy,” who Combs identified as “Holiday.” Combs said that he suspected that Holiday’s disappearance was related to the arrival of the police officers. Combs also stated that he should be telling the officers about Holiday’s activities instead of the other way around. Captain Crass offered Combs the opportunity to speak with him, but Combs declined. Captain Crass had not asked Combs any questions.

Shoemaker, who was unemployed and collecting unemployment benefits, was trying to keep his rent payments covered. He had attempted to sub-lease a room to Combs, but the arrangement did not work out, and Combs did not pay Shoemaker. Shoemaker had asked Combs to pay rent whenever he stayed for four or five nights. Instead of paying Shoemaker, Combs began staying just two nights at Shoemaker’s home before leaving to go home, or to visit his girlfriend, and then returning to Shoemaker’s residence. On the morning of October 19, 2009, Combs had told Shoemaker that he could not help with the rent because he had no money. Thompson also had no cash that morning.

When the officers searched Combs, they found cash totaling four hundred ninety-six

dollars. Combs was the only person there who had any significant amount of cash in their possession, and no one had any illegal drugs on their person. A search of Combs' room resulted in the discovery of a small digital scale used to weigh illegal drugs and a box of plastic baggies. The scale had a white powder residue on it. The officers did not find the missing laptop computer.

The State charged Combs with two counts of dealing in cocaine, and both counts were enhanced to Class A felonies because they were committed within one thousand feet of a public park. The State moved to amend the charging information to include an additional count of dealing in cocaine as a Class A felony seven days prior to trial. At the conclusion of the second day of trial, Combs moved for a judgment on the evidence regarding the enhancement of each of the charged counts to Class A felonies. The trial court took the matter under advisement and granted that motion. At the conclusion of his jury trial, Combs was found guilty of one count of dealing in cocaine, and one count of possession with intent to deliver cocaine, each as Class B felonies, and not guilty of the other count. The trial court sentenced Combs to eighteen years executed on each count to be served concurrently. Combs now appeals. Additional facts will be provided where necessary.

## **DISCUSSION AND DECISION**

### **I. Amendment of Charges**

Combs challenges the trial court's decision to allow the State to amend the information against him to add another felony charge one week before trial. In general, Indiana Code section 35-34-1-5(b) permits the State to amend a charging information even in

matters of substance at any time before the commencement of trial so long as the amendment does not prejudice the defendant's substantial rights. *Brown v. State*, 912 N.E.2d 881, 890 (Ind. Ct. App. 2009). The "substantial rights" of a defendant include an opportunity to be heard regarding the charge and a right to sufficient notice. *Id.* "Ultimately, the question is whether the defendant had a reasonable opportunity to prepare for and defend against the charges." *Id.* (quoting *Sides v. State*, 693 N.E.2d 1310, 1313 (Ind. 1998), *abrogated on other grounds by Fajardo v. State*, 859 N.E.2d 1201 (Ind. 2007), *superseded by statute*, Ind. Code § 35-34-1-5). A defendant's substantial rights are not prejudiced if: (1) a defense under the original information would be equally available after the amendment; and (2) the defendant's evidence would apply equally to the information in either form. *Id.* "[A]n amendment is of substance only if it is essential to making a valid charge of the crime." *McIntyre v. State*, 717 N.E.2d 114, 125-26 (Ind. 1999).

In the present case, Combs moved for a continuance because of the State's late amendment of the information, and also moved to sever the new charge. Both requests were denied by the trial court. Combs argues that his trial strategy had to be altered due to the addition of the new felony count against him. More specifically, Combs argued that he had intended to use an alibi defense at trial, but with the addition of the new count alleging possession with the intent to deliver cocaine, such defense was no longer available. Although the new charge does remove a potential alibi defense, as Combs was arrested during the execution of the search warrant at the 712 Tipton Street residence, it is unlikely that such a defense would have been successful at trial on the original charges. Combs was

arrested at the residence Lubke identified, and each of the people present, in addition to Lubke, identified Combs as the person known as “Nephew.” Therefore, while the trial court’s decision to allow the State to amend the information just one week prior to trial is somewhat troublesome, in this particular situation Combs’ substantial rights were not prejudiced. The facts supporting the additional charge were set out in the original probable cause affidavit, and Combs’ evidence was equally applicable to the charges against him, i.e., he was not the person who possessed the cocaine which was pre-packaged for delivery, and was not the person who twice sold cocaine to Lubke. We find no reversible error here.

## **II. Motion to Sever**

Combs asserts that the trial court abused its discretion by denying Combs’ request to sever Count III, the newly added count of the information against him. Count I of the information alleged that Combs delivered cocaine within 1000 feet of a public park on October 19, 2009. Count II alleged that Combs delivered cocaine within 1000 feet of a public park on October 17, 2009. Count III alleged that, on October 19, 2009, Combs possessed with the intent to deliver cocaine within 1000 feet of a public park.

Two or more offenses may be joined if: (1) they are of the same or similar character; *and* (2) they are based on the same conduct or series of acts connected together or constituting parts of a single scheme or plan. Ind. Code § 35-34-1-9(a) (emphasis added). If two offenses are joined solely on the basis that they are of the same or similar character, the defendant is entitled to a severance as a matter of right, and the trial court is without discretion to deny such a motion. Ind. Code § 35-34-1-11(a); *see also Craig v. State*, 730

N.E.2d 1262, 1265 (Ind. 2000); *Harvey v. State*, 719 N.E.2d 406, 409 (Ind. Ct. App. 1999). If, however, two offenses also share a single scheme or plan, e.g., *modus operandi*, the trial court has discretion to sever the counts where a severance will promote a fair determination of the defendant's case. Ind. Code § 35-34-1-11(a); *Harvey*, 719 N.E.2d at 409 (citing *Ben-Yisrayl v. State*, 690 N.E.2d 1141, 1145 (Ind. 1997)). In exercising its discretion, the trial court should consider the following three factors: “(1) the number of offenses charged; (2) the complexity of the evidence to be offered; and (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.” Ind. Code § 35-34-1-11(a). A trial court abuses its discretion when the denial of a severance interferes with a fair determination of the charges against the defendant. *Brown v. State*, 650 N.E.2d 304, 305 (Ind. 1995). A defendant must show that “in light of what actually occurred at trial, the denial of a separate trial subjected him to . . . prejudice.” *Id.* at 306 (quoting *Hunt v. State*, 455 N.E.2d 307, 312 (Ind. 1983)).

Combs contends that Count III was added solely because it was of the same and similar character as Counts I and II. As such, Combs claims that he was entitled to a severance of right, and the trial court's denial of his motion was erroneous. We disagree. The three counts charged against Combs arose from a series of acts that were connected by Combs' drug dealing enterprise. The offenses were interrelated, close in time, and part of the same undertaking. We do not find that the trial court erred by denying the motion to sever as a matter of right.

Further, the trial court analyzed the three statutory factors involved in the

determination of whether a discretionary severance of the charges should be granted and concluded that the number of the offenses was not too great, the evidence necessary to try the counts was not complex, and that jury should be able to distinguish between the evidence required to establish each offense and apply the law to each offense. The trial court did not abuse its discretion by denying Combs' motion. Here, the jury acquitted Combs of the offense charged in Count II. "Acquittal on one charge is evidence a jury has the ability to treat offenses separately." *Spindler v. State*, 555 N.E.2d 1319, 1321 (Ind. Ct. App. 1990) (citing *Burst v. State*, 499 N.E.2d 1140, 1144 (Ind. Ct. App. 1986)). The trial court did not abuse its discretion here.

### **III. *Batson*<sup>3</sup> Challenge**

Combs, an African-American male, contends that the State exercised its peremptory challenge to remove the only African-American from the jury venire, Juror T, in violation of his rights to equal protection guaranteed by the Fourteenth Amendment to the United States Constitution. "The use of a peremptory challenge to strike a potential juror solely on the basis of race violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." *Killebrew v. State*, 925 N.E.2d 399, 401 (Ind. Ct. App. 2010) (citing *Jeter v. State*, 888 N.E.2d 1257, 1262 (Ind. 2008), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 129 S. Ct. 645, 172 L. Ed. 2d 626(2008)), *trans. denied*. On appeal, a trial court's decision concerning whether a peremptory challenge is discriminatory is given great deference and will be set aside only if found to be clearly erroneous. *Id.* When a party raises a *Batson*

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<sup>3</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986).

challenge, the trial court must undertake a three-step test. *Jeter*, 888 N.E.2d at 1263. The first determination is whether the party making the *Batson* objection has made a *prima facie* showing that a peremptory challenge was exercised on the basis of race. *Id.* Our supreme court has held that the use of a peremptory challenge to strike the sole member of a cognizable racial group establishes the showing required. *McCants v. State*, 686 N.E.2d 1281, 1284 (Ind. 1997). Next, after the *prima facie* showing has been made, the burden shifts to the party exercising its peremptory challenge to present a race-neutral explanation for striking the juror. *Jeter*, 888 N.E.2d at 1263. The explanation need not be “persuasive, or even plausible.” *Id.* at 1264. A valid reason for a challenge need not rise to the level required to justify a challenge for cause. *Patterson v. State*, 729 N.E.2d 1035, 1039 (Ind. Ct. App. 2000). Last, if a race-neutral explanation is proffered, the trial court must make a determination whether the challenging party has carried its burden of proving purposeful discrimination. *Jeter*, 888 N.E.2d at 1263.

Here, Combs raised a claim of an impermissible peremptory strike of a potential juror based on race. Juror T was the only African-American member of the venire. The burden thus shifted to the State to provide a race-neutral explanation for its use of a peremptory challenge. After the trial court noted with surprise that Juror T was the only African-American member of the venire, the State noted that Juror T had a son who was incarcerated in Illinois on a probation violation, that Juror T did not like the way the system had treated her son, that she did not think that she could give the State a fair trial, and that she had a problem with the system in general. *Tr.* at 285-86. Each of these reasons is a valid, race-

neutral reason for exercising a peremptory strike of Juror T.

As Combs correctly notes, however, once the State has come forward with race-neutral reasons for exercising the peremptory strike, reasons that Combs concedes are race-neutral, the trial court must then determine if the party making the *Batson* challenge has carried its burden of proving purposeful discrimination. Combs takes issue with the trial court's statement that "I think all he [the State] has to do is to make his record as to why." *Id.* at 286. Indeed, this statement does appear to indicate a misunderstanding of the complete *Batson* analysis. However, the trial court went on to observe that Juror T did not seem interested in serving on the jury, and that the trial court had tried to "stop her from digging herself a hole that she couldn't get out of . . . [r]ealizing that she was the only person called of color to this, in this call for some reason." *Id.* at 285. Although better practice would be to make more fully detailed findings one way or the other, the trial court in this case did make an express finding, i.e., that Juror T did not seem interested in serving on the jury, that indicated the trial court agreed with the State. We find that the trial court's finding, while meager, is not clearly erroneous.

#### **IV. Admission of Statements**

Combs presents this issue as error based on the trial court's order denying in part his motion to suppress. However, a ruling on a pretrial motion to suppress is not intended to serve as the final expression on the admissibility of evidence, and once the matter proceeds to trial, the question of whether the trial court erred in denying a motion to suppress is no longer viable. *Kelley v. State*, 825 N.E.2d 420, 424-25 (Ind. Ct. App. 2005). Rather, the issue is

more appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial. *Miller v. State*, 846 N.E.2d 1077, 1080 (Ind. Ct. App. 2006). Our standard of review of rulings on the admissibility of evidence is essentially the same whether the challenge is made by a pre-trial motion to suppress or by trial objection. *Id.* We will reverse a trial court's ruling on the admissibility of evidence only when the trial court abused its discretion. *Kelley*, 825 N.E.2d at 427. An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.* We do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling. *Miller*, 846 N.E.2d at 1080. We must also consider the uncontested evidence favorable to the defendant. *Id.*

Combs contends that the statements he made to Captain Crass should not have been admitted at trial because the statements were made while Combs was in custody, but had not yet received his *Miranda* warnings.<sup>4</sup> Captain Crass testified about Combs' comments that the officers had "missed the big guy," who Combs identified as "Holiday," and that he suspected that Holiday's disappearance was related to the arrival of the police officers. *Tr.* at 540. Combs also stated that he should be telling the officers about Holiday's activities instead of the other way around. Captain Crass testified that he then offered Combs the opportunity to speak with him, but Combs declined, hanging his head and shaking it to indicate "no." *Id.* at 542.

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<sup>4</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966) (prior to interrogation by police, person in custody must be informed of right to remain silent, that statements made may be used against defendant in court, and right to counsel, including appointed counsel).

The decision whether to admit a defendant's statement is within the discretion of the trial court. *Schmitt v. State*, 730 N.E.2d 147, 148 (Ind. 2000). "Rights under *Miranda* apply only to custodial interrogation." *White v. State*, 772 N.E.2d 408, 412 (Ind. 2002). In this case, there appears to be no dispute that Combs was in custody. The issue is whether he was subject to interrogation. "Under *Miranda*, 'interrogation' includes express questioning and words or actions on the part of the police that the police know are reasonably likely to elicit an incriminating response from the suspect." *Id.* Volunteered statements do not constitute interrogation. *Id.*

The statements made here, while incriminating, were not made in response to questioning by Captain Crass. Combs shook his head indicating "no" in response to the only question Captain Crass asked of him. The trial court did not abuse its discretion by admitting testimony about Combs' statements into evidence as the statements were spontaneous and voluntary.

## **V. Sufficiency of the Evidence**

Combs' final argument is that the evidence is insufficient to support his convictions. Our standard of reviewing claims of sufficiency of the evidence is well settled. When reviewing the sufficiency of the evidence, we consider only the probative evidence and reasonable inferences supporting the verdict. *Mork v. State*, 912 N.E.2d 408, 411 (Ind. Ct. App. 2009). We do not reweigh the evidence or reassess witness credibility. *Id.* We consider conflicting evidence most favorably to the trial court's ruling. *Id.* We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven

beyond a reasonable doubt. *Id.* It is not necessary that the evidence overcome every reasonable hypothesis of innocence. *Id.* The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. *Id.*

Combs was convicted of one count of dealing in cocaine as a Class B felony. The State was required to prove that Combs knowingly and intentionally delivered cocaine. Ind. Code § 35-38-4-1-(a)(1). The evidence adduced at trial established that on October 19, 2009, Lubke borrowed twenty dollars from his mother and went to the residence on 712 Tipton Street. Once there, Lubke handed the twenty dollars to Combs who then gave Lubke the cocaine. Lubke went to the kitchen, consumed the cocaine, and left. Combs argues that Lubke was not to be believed and was untrustworthy. This argument, however, is merely an invitation to reassess Lubke's credibility, a task we may not undertake. Furthermore, the information provided to Captain Crass by Lubke, including his identification of the person from whom he bought drugs, "Nephew," was corroborated. Our standard of review compels us to find that the evidence was sufficient to support this conviction.

As for the offense charged in Count III, the State was required to prove that Combs knowingly and intentionally possessed cocaine with the intent to deliver. Ind. Code § 35-48-4-1(a)(2). The evidence adduced at trial established that when the officers first entered the residence at 712 Tipton Street, Combs was running down a hallway toward the kitchen and away from the living room where he had been playing video games with Thompson. On a table next to the chair where Combs had been sitting, the officers found fifteen individually-packaged rocks of crack cocaine, which were "dimes" or worth ten dollars each, and

packaged for delivery. There was also a small baggie of marijuana. When the officers conducted the patdown search of Combs, they discovered a wad of cash totaling four hundred ninety-six dollars in small denominations. A search of Combs' room revealed a small digital scale commonly used to weigh narcotics, with white powder residue on it, and a box of plastic baggies. Once again, our standard of review compels us to sustain this conviction as there was sufficient evidence. Combs' argument amounts to no more than a request that we reweigh the evidence, which we will not do.

Affirmed.

VAIDIK, J., and MATHIAS, J., concur.