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**IN THE
COURT OF APPEALS OF INDIANA**

DAVUD COLE,)
)
 Appellant-Defendant,)
)
 vs.) No. 82A01-0612-CR-574
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable Carl A. Heldt, Judge
Cause No. 82C01-0410-FA-951

SEPTEMBER 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBERTSON, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Davud Cole is appealing his conviction by a jury of the Class A felony of dealing cocaine. He was sentenced to twenty-five years executed.

We affirm.

ISSUES

Davud Cole states the issues as:

- I. Whether the trial court erred when it allowed the State to introduce Davud's prior conviction for dealing marijuana as evidence of predisposition?
- II. Whether the trial court abused its discretion when it refused Davud's tendered instruction on the lesser-included instruction[sic] on[sic] possession of cocaine?
- III. Whether Davud's sentence is inappropriate?

FACTS

Detective Kennedy went to the residence of Eric Reed and told him that he had information that Reid was dealing cocaine. Reid admitted dealing and gave his consent for a search of his house. Reid showed the police where the cocaine was hidden. Reid agreed to act as an informant and to help in pursuing charges against the person from whom he had gotten the cocaine. That person was Davud Cole (hereinafter "Cole"). Reid told the police that he had gotten the cocaine from Cole and had obtained cocaine from him on several occasions.

The next day, Detective Kennedy returned to Reid's house where they telephoned Cole. The conversation was recorded. Cole said he would get the cocaine and that the price would be \$950 for an ounce. Several days later Reid eventually got in touch with

Cole, and Cole agreed to come to Reid's house. A controlled buy occurred with 26.17 grams of powdered cocaine in a baggie delivered by Cole to Reid.

Cole was found guilty and sentenced to an enhanced sentence of twenty-five years.

Additional facts will be added as needed.

DISCUSSION AND DECISION

Issue I.

Officer Simpson testified he participated in an arrest in 2000 resulting in Cole's conviction of dealing in marijuana. Cole had fifty-six pounds of marijuana and \$5000 in cash when arrested. Cole argues that the admission of this prior conviction was error. Cole made an oral motion in limine, based upon Ind. Evid. Rule 404(b), seeking to prevent testimony of the prior conviction. The trial court overruled the motion because the evidence went to Cole's predisposition.

A trial court has broad discretion in ruling on the admissibility of evidence. *Scott v. State*, 855 N.E.2d 1068, 1071 (Ind. Ct. App. 2006). Accordingly, we will only reverse a trial court's ruling on admissibility of evidence when the trial court has abused its discretion. *Id.* An abuse of discretion occurs when a trial court's decision is clearly against the logic and effect of the facts and the circumstances before the court. *Id.*

The defense of entrapment is defined at Ind. Code §35-41-3-9. Cole raised that defense. Once a defendant has both indicated his intent to rely on the defense of entrapment, and has established police inducement, the burden shifts to the State to show defendant's predisposition to commit the crime. *Dockery v. State*, 644 N.E.2d 573, 577

(Ind. 1994). Whether a defendant was predisposed to commit the crime charged is a question for the trier of fact. *Id.* The standard by which the State must prove the defendant's predisposition is beyond a reasonable doubt. *Id.* The State must prove the defendant's predisposition with evidence subject to the normal rules of admissibility. *Id.*

Evid. R. 404(b) controls this issue. That rule permits the admission of other crimes, wrongs, or acts if they are admissible to show, among other things, intent, plan, or knowledge. Evidence showing that the defendant had previously sold cocaine is admissible under the exception to the rule prohibiting the use of "other crimes" because it shows a propensity to commit the charged crime. *Dixon v. State*, 712 N.E.2d 1086, 1089 (Ind. Ct. App. 1999). The defendant's assertion of an entrapment defense, essentially claiming a contrary intent, makes such evidence relevant to prove the defendant's knowledge and intent to deal in cocaine. *Id.*

Cole also argues that there was no evidence relating to his propensity for dealing cocaine. *Dockery*, states that circumstantial evidence giving rise to the necessary inference might also be found in such things as the defendant's possession of such a large quantity of contraband that the purpose of selling might be inferred. 644 N.E.2d at 579. We surmise that a quantity permitting an inference of predisposition to sell would be such a quantity that could not be personally consumed or utilized, and therefore, of necessity available for delivery or sale. *Id.* The possession by Cole of approximately 55 pounds of marijuana in his prior conviction for dealing in marijuana is sufficient to demonstrate or infer predisposition.

Cole also argues that the admission of testimony regarding his prior conviction is fundamental error. The fundamental error doctrine is extremely narrow. *White v. State*, 846 N.E.2d 1026, 1033 (Ind. Ct. App. 2006). Fundamental error is defined as an error so prejudicial to the rights of the defendant a fair trial is rendered impossible. *Id.* To qualify as fundamental, an error “must constitute 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.” *Id.*

Cole insists that the evidence of his dealing in marijuana conviction constitutes another crime to defend in this case in addition to the current allegations of dealing in cocaine. We are of the opinion that the evidence of the prior conviction is not fundamental error for the reason, as we indicated above, it was evidence admitted pursuant to the rules of evidence and is documented by a police officer’s testimony and court documents.

Issue II.

Cole complains that the trial court did not give an instruction on the lesser-included offense of possession of cocaine. The record reveals that a discussion had occurred in the judge’s chambers relating to an instruction on the lesser-included offense of possession of cocaine. On the record, the judge denied the request for the instruction, and Cole made his objection known.

Instruction of the jury is left to the sound discretion of the trial court and we will not disturb the judgment of the trial court absent an abuse of discretion. *Scott v. State*,

771 N.E.2d 718, 725 (Ind. Ct. App. 2002), disapproved of on other grounds, *Louallen v. State*, 778 N.E.2d 794 (Ind. 2002).

When the asserted error is failure to give an instruction, as Cole now argues, a tendered instruction is necessary to preserve error because, without the substance of an instruction upon which to rule, the trial court has not been given a reasonable opportunity to consider and implement the request. *Ortiz v. State*, 766 N.E.2d 370, 375 (Ind. 2002). Failure to tender an instruction results in waiver of the issue for review. *Id.*

We have not been able to locate such a tendered instruction in the record.

Issue III.

When sentencing Cole the trial court found as mitigating circumstances Cole's poor health (blindness and dialysis), and letters from those supporting Cole. However, Cole's previous criminal history was treated as an aggravating circumstance resulting in a sentence of twenty-five years.

Cole argues that his sentence is inappropriate after considering the nature of the offense and the character of the offender. We may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *See* Ind. Appellate Rule 7(B).

Regarding the nature of the offense, Cole was convicted of dealing cocaine based upon the controlled buy of 26.17 grams of cocaine. The issue of his intent to deal was

resolved against him. Thus, there was nothing extraordinary about the nature of the offense.

Turning to the character of the offender, we note that Cole has a criminal history consisting of at least one prior dealing conviction. This prior history is not remote in time relative to the current offense nor is it of a different nature. The drug culture, by its nature, is a dangerous and illegal environment. Garnering an economic benefit from this illegal activity only magnifies the danger and potential harm to those involved and in close proximity to those illegal activities. From our review, we do not find any basis upon which to grant relief based upon the defendant's character or the nature of the offense.

CONCLUSION

No error occurred when the trial judge allowed the introduction of evidence relating to Cole's prior dealing in marijuana conviction. The second issue is waived because of the failure to include the tendered instruction in the record. Cole's sentence is not inappropriate.

Judgment affirmed.

VAIDIK, J., and BAILEY, J., concur.