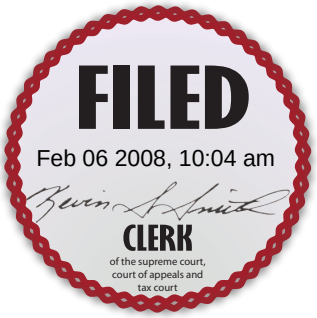

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IN THE
COURT OF APPEALS OF INDIANA

JASON GIBBS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 09A02-0701-CR-52
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CASS SUPERIOR COURT
The Honorable Rick Maughmer, Judge
Cause No.09D02-0507-FA-15

February 6, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Jason Gibbs appeals his three convictions of dealing in cocaine, two as Class A felonies and one as a Class B felony. On appeal, Gibbs raises three issues, which we consolidate and restate as: 1) whether the trial court properly admitted an audio-video recording into evidence; and 2) whether sufficient evidence supports Gibbs's Class A felony convictions of dealing in cocaine. Concluding that the trial court properly admitted the recording into evidence and that sufficient evidence supports Gibbs's convictions, we affirm.

Facts and Procedural History

On one occasion in February 2005 and two occasions in March 2005, Officers Richard Sholty and James Klepinger of the Logansport Drug Task Force used a confidential police informant (the "C.I.") to purchase cocaine from Gibbs. Before each sale, Officer Sholty strip-searched the C.I. to confirm he did not possess contraband, gave him money for the sale, and equipped him with a dime-sized surveillance device that recorded video and audio and transmitted audio to Officer Sholty. During each sale, Officer Sholty listened to the audio transmission while Officer Klepinger maintained visual surveillance of the C.I. and Gibbs. After each sale, Officer Sholty strip-searched the C.I. These searches resulted in Officer Sholty recovering 4.66 grams of cocaine from the first sale, 6.91 grams from the second sale, and 2.33 grams from the third sale.

The State charged Gibbs with two counts of dealing in cocaine as Class A felonies based on the first and second sales and one count of dealing in cocaine as a Class B felony

based on the third sale.[1] Prior to trial, the parties stipulated that the C.I. was unavailable to testify, apparently because he was incarcerated on an unrelated murder charge and the C.I.'s counsel indicated in a letter to Gibbs's counsel that he had advised the C.I. not to answer questions regarding his involvement in Gibbs's case. Instead, during a two-day trial on November 8 and 9, 2006, Officers Sholty and Klepinger testified, and the trial court admitted an audio-video recording of the third sale into evidence over Gibbs's objection. The jury found Gibbs guilty on all counts. The trial court sentenced Gibbs to forty years for the first conviction, forty years for the second conviction, and ten years for the third conviction. The trial court also ordered that the sentences run concurrently, resulting in a total executed sentence of forty years. Gibbs now appeals.

Discussion and Decision

I. Admission of Evidence

The trial court admitted an audio-video recording of the third sale into evidence over Gibbs's objections that the recording contained inadmissible hearsay and that it violated his right to confront witnesses as guaranteed by the United States and Indiana constitutions. This court reviews the trial court's decision to admit or exclude evidence for an abuse of discretion. Pickens v. State, 764 N.E.2d 295, 297 (Ind. Ct. App. 2002), trans. denied. Abuse of discretion occurs when the trial court's ruling is clearly against the logic and effect of the facts and circumstances before it. Id.

[1] The first and second sales were charged as Class A felonies because they involved more than three grams of cocaine. See Ind. Code § 35-48-4-1(b).

The portion of the recording to which Gibbs objected is approximately sixty-one seconds in duration. The recording shows a dark-colored Mustang pull into a parking lot and stop alongside the C.I. Gibbs is in the driver's seat and an unidentified person is in the front passenger's seat. For approximately three seconds, the recording shows Gibbs counting a roll of money in his lap and the person in the passenger's seat holding a small object in his hands before reaching his left hand toward the Mustang's center console. As the Mustang pulls away, the recording shows the C.I.'s right leg and his shadow for approximately three seconds. The audio portion of the recording is largely indiscernible.

Before addressing Gibbs's arguments regarding the trial court's admission of the recording into evidence, we note Gibbs's argument regarding a violation of the Indiana constitution is not separate from his argument regarding a violation of the United States constitution. Instead, Gibbs cites two cases that discuss the confrontation clause of the United States constitution and notes that "Indiana has adopted a similar position as it relates to confrontation rights pursuant to Article I Section Thirteen of the Indiana Constitution." Appellant's Brief at 15. Thus, Gibbs's failure to sufficiently develop his argument regarding a violation of the Indiana constitution results in waiver. See Gayden v. State, 863 N.E.2d 1193, 1195 n.2 (Ind. Ct. App. 2007), ("[The defendant] also claims that the admission of the 911 recording violated his rights under Article 1, Section 13 of the Indiana Constitution. Because [the defendant] fails to cite any authority or make any separate argument specific to the state constitutional provision, he waives this argument on appeal."), trans. denied. We now turn to Gibbs's remaining arguments regarding the trial court's admission of the recording into evidence.

A. Hearsay

Gibbs argues the trial court improperly admitted the recording because it contains inadmissible hearsay. The State counters that the recording does not contain hearsay because it depicts nonassertive conduct and, even assuming it depicts assertive conduct, such conduct is that of Gibbs and therefore nonhearsay. See Ind. Evidence Rule 801(d)(2)(A) ("A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . the party's own statement . . . .").

Indiana Evidence Rule 802 states that hearsay is inadmissible "except as provided by law or by these rules." Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ind. Evidence Rule 801(c). A person's nonverbal conduct is a "statement" within the meaning of Indiana Evidence Rule 801(c) "if it is intended by the person as an assertion." Ind. Evidence Rule 801(a). Indiana's rules of evidence do not indicate when nonverbal conduct constitutes an "assertion," but this court has described conduct as assertive when it is "the result of a thought, and through such conduct, that thought is being used as proof of the matter impliedly asserted." Watt v. State, 412 N.E.2d 90, 96 (Ind. Ct. App. 1980).

In Pritchard v. State, 810 N.E.2d 758, 760-61 (Ind. Ct. App. 2004), a panel of this court analyzed whether conduct depicted in a video recording was assertive. The defendant in Pritchard was charged with battering a fellow inmate. The evidence supporting the battery charge included the victim's testimony, as well as the testimony of a jail guard and a nurse who observed a video recording of the incident. The recording showed the defendant enter and leave the victim's cell and discard an object in the shower area. The recording also

showed the defendant's cellmate enter and leave the shower area. The recording was not introduced into evidence at trial. Instead, the guard and the nurse were permitted to testify over the defendant's hearsay objection regarding what they saw on the recording.

The court noted initially that the testimony of the guard and the nurse regarding what they saw on the recording was admissible because it was based on personal knowledge. Pritchard, 810 N.E.2d at 760. However, this did not end the inquiry, because if the video recording contained inadmissible hearsay, then the trial court's admission of the witnesses' testimony regarding what they saw on the recording would have been improper. In this respect, the court concluded the recording did not contain hearsay because the defendant's conduct "in entering [the victim's] cell, running from it, and throwing something into the shower area was not intended to be an 'assertion' . . . . Nor did his cellmate intend his conduct in entering and exiting the showers to be an assertion." Id. at 761.

Gibbs argues Pritchard is distinguishable because the recording in his case "was staged and done with the intention of trying to prove that [he] was dealing cocaine." Appellant's Br. at 14. In other words, Gibbs argues the recording is the equivalent of the C.I. pointing at Gibbs and stating, "He's dealing in cocaine." Although we agree with Gibbs that interpreting the recording in such a manner would constitute assertive conduct, see 13 Robert Lowell Miller, Jr., Indiana Practice, Indiana Evidence § 801.102, 649 (3d ed. 2007) ("That the victim pointed to the defendant instead of stating, 'That's the man' is no less offensive to the concerns that gave rise to the hearsay rule."), we are not convinced Gibbs has made the requisite showing that the C.I. intended his conduct as an assertion. In this respect, "[w]hether an actor intended conduct to be an assertion is a question for the trial court to

determine under Rule 104(a)." Id. at 650. Our review of the record indicates that Gibbs's counsel described the sale as "staged," transcript of hearing at 17, but did not present evidence to support a preliminary finding that by pointing the video surveillance device at Gibbs, the C.I. intended to assert that Gibbs was dealing in cocaine. Absent such evidence,[2] we are not convinced the trial court abused its discretion in admitting the recording.

Even if we did conclude the trial court abused its discretion in admitting the recording, the error would have been harmless. An error is harmless unless it affects a party's substantial rights. Ind. Evidence Rule 103; Montgomery v. State, 694 N.E.2d 1137, 1140 (Ind. 1998). The admission of inadmissible hearsay evidence does not affect a party's substantial rights if it is cumulative of other evidence presented. Montgomery, 694 N.E.2d at 1140.

Here, Officer Sholty testified he strip-searched the C.I. prior to the third sale and did not recover contraband. Officer Sholty testified he strip-searched the C.I. again following the sale and recovered cocaine. Officer Klepinger testified that he observed the C.I. approach the driver's side of a black Mustang as it pulled into the parking lot and that Gibbs was the driving the Mustang. Officer Klepinger also testified that based on his observations, "it

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[2] We recognize it would have been difficult for Gibbs to present evidence indicating that the C.I. intended his conduct to be an assertion due to the fact that the C.I. was incarcerated prior to and during Gibbs's trial. However, the trial court suggested ways such evidence could have been gathered despite the C.I.'s absence. Specifically, the trial court expressed concern regarding the recording's admissibility if it was established that the recording was made based on the officers' instructions to the C.I. that "every chance you get . . . make sure Jason tells you exactly why we're here and what we're doing," tr. of hearing at 29, or a set-up situation where the C.I. tells Gibbs, "I'll give you two hundred bucks if you sell me cocaine. You don't see Jason ever say anything or do anything on the video, but you've got [the C.I.] saying that, making that clear statement to the jury now without ever being challenged by the Defendant or his attorney," id. at 26. Thus, the trial court's suggestions demonstrate that direct testimony from the C.I. was not the only way Gibbs

appeared that there was a conversation going on" between the C.I. and Gibbs and that Gibbs drove away when the two had finished their conversation. Transcript of Trial at 285. Officer Klepinger admitted he did not see Gibbs and the C.I. exchange anything. Based on this testimony, we conclude the recording was cumulative of the other evidence admitted. Cf. Douglas v. State, 746 N.E.2d 424, 428 (Ind. Ct. App. 2001), (concluding the trial court's admission of hearsay testimony regarding an informant's movements and statements made during a drug buy were cumulative because an officer observed the same buy and his testimony and the hearsay testimony contained substantially similar observations), trans. denied. Thus, it follows that even if the trial court abused its discretion in admitting the recording, the error would have been harmless.

B. Confrontation Clause

Gibbs argues the trial court's admission of the recording into evidence violated his Sixth Amendment right "to be confronted with the witnesses against him." U.S. Const. amend. VI. This clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Crawford v. Washington, 541 U.S. 36, 53-54 (2004). However, "[t]he Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Id. at 59 n.9 (citing Tennessee v. Street, 471 U.S. 409, 414 (1985)). Because we have already concluded that the recording did not contain hearsay, it follows that admission of the recording does not raise confrontation clause

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could have proved that the C.I. intended his conduct to be an assertion; he could have proved intent by

concerns. See Street, 471 U.S. at 414; United States v. Tolliver, 454 F.3d 660, 664-66 (7th Cir. 2006) (concluding the trial court's admission of an audio recording containing statements made by the defendant and an informant during a drug buy were not hearsay and therefore "not subject to the strictures under Crawford and the Confrontation Clause"), cert. denied, 127 S. Ct. 1019 (2007).

II. Sufficiency of the Evidence

Gibbs argues there was insufficient evidence to support his Class A felony convictions for dealing in cocaine. In reviewing whether there is sufficient evidence to support a conviction, "appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict." McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). It is the trier of fact's duty to weigh the evidence and determine whether the State has proved each element of the offense beyond a reasonable doubt. Wright v. State, 828 N.E.2d 904, 906 (Ind. 2005). Accordingly, we will consider only the probative evidence and reasonable inferences supporting the trial court's decision and "must affirm 'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" McHenry, 820 N.E.2d at 126 (quoting Tobar v. State, 740 N.E.2d 109, 111-12 (Ind. 2000)).

To convict Gibbs of dealing in cocaine as a Class A felony, the State had to prove beyond a reasonable doubt that Gibbs knowingly or intentionally delivered three grams of cocaine or more to the C.I. See Ind. Code § 35-48-4-1. Indiana Code section 35-48-1-11

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eliciting testimony from Officers Sholty and Klepinger.

defines "delivery" as "an actual or constructive transfer from one (1) person to another of a controlled substance . . . ."[3]

Regarding the first two sales, Gibbs argues there was insufficient evidence to support a finding that he delivered cocaine because "there were other people in the vehicle, the officers did not see Gibbs deliver cocaine to [the C.I.], and the State presented no testimony from [the C.I.] that Gibbs was the one who sold him cocaine." Appellant's Br. at 17.

We agree with Gibbs that these points support an inference that he did not deliver cocaine to the C.I., but it does not necessarily follow that they render the State's evidence of delivery insufficient. Indeed, the presence of other people in the vehicle suggests, but does not compel, an inference that someone other than Gibbs delivered the cocaine to the C.I.; the jury was free to consider that either Gibbs or someone else in the vehicle delivered the cocaine. Moreover, contrary to Gibbs's claim that the officers' failure to witness the transaction renders the evidence of delivery insufficient, our supreme court has stated that in a controlled buy situation, "[t]here is no requirement that [the police] actually see the illegal transaction take place" to sustain a conviction. Haynes v. State, 431 N.E.2d 83, 86 (Ind. 1982). Instead, it is sufficient "that the informant goes up to the house empty-handed and comes back with the controlled substance" to support a finding of delivery. Id. Finally, regarding Gibbs's point that the C.I. did not testify, this court has concluded that a confidential informant's testimony regarding the sale is required when the informant is either

[3] The statute also defines "delivery" as "the organizing or supervising" of a "transfer from one person to another of a controlled substance," Ind. Code § 35-48-1-11(2), but our review of the record indicates the State did not attempt to prove delivery based on this theory.

inadequately searched or not searched prior to the sale. See Watson v. State, 839 N.E.2d 1291, 1294 (Ind. Ct. App. 2005) ("[W]e find the lack of a pre-buy search is fatal to the State's charge of dealing in cocaine. We emphasize that had the [confidential informant] testified or had she been properly searched before the buy, the jury would have had a reasonable basis for believing [the defendant] had the cocaine before the buy."). In this case, however, Officer Sholty testified the C.I. was strip-searched prior to each sale, and Gibbs does not challenge the adequacy of either search. Thus, the points supporting Gibbs's argument that there was insufficient evidence to support a finding of delivery are unavailing.

Nor does our review of the record indicate there was insufficient evidence to support findings of delivery in both instances. Officer Sholty testified that he strip-searched the C.I. and gave him money to purchase cocaine prior to each sale, and that after each sale he strip-searched the C.I. again and recovered cocaine. Although Officer Sholty admitted he allowed the C.I. to take his cellular phone with him, he also testified he inspected it to make sure there were no "secret spots." Tr. of Trial at 198. Officer Klepinger testified that during the first sale he observed Gibbs pull his vehicle alongside the C.I. and observed the C.I. "hand something in to the vehicle and in return . . . Mr. Gibbs hand[ed] an unknown item to [the C.I.] and then the vehicle left." Id. at 272. Officer Klepinger also testified that during the second sale he observed the C.I. enter the vehicle and sit next to Gibbs, but did not see the two exchange anything. We conclude this evidence was sufficient to support a finding that Gibbs delivered cocaine in both instances. Thus, it follows that sufficient evidence supports Gibbs's convictions.

Conclusion

The trial court properly admitted the recording of the third sale into evidence. Moreover, sufficient evidence supports Gibbs's convictions for the first and second sales.

Affirmed.

BARNES, J., concurs in result as to Issue I and concurs as to Issue II.

KIRSCH, J., concurs as to Issue I and dissents as to Issue II.