## MEMORANDUM DECISION




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# IN THE COURT OF APPEALS OF INDIANA

Jeremy M. Jones,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff.*

June 17, 2021

Court of Appeals Case No. 20A-CR-2292

Appeal from the Jennings Circuit Court

The Honorable Jon W. Webster, Judge

Trial Court Cause No. 40C01-1812-F4-9

**Kirsch, Judge.**

[1] Jeremy M. Jones ("Jones") appeals his convictions for four counts of dealing in a narcotic drug,[1] three as Level 5 felonies and one as a Level 4 felony, and his aggregate sentence of thirty years. Jones raises the following issues for our review:

> I. Whether the trial court abused its discretion when it denied his request for a continuance on the day of his trial;
>
> II. Whether application of the incredible dubiosity rule renders the evidence insufficient to sustain his convictions; and
>
> III. Whether the trial court's imposition of consecutive sentences resulting in an aggregate sentence of thirty-years is inappropriate.

[2] We affirm in part, reverse in part, and remand with instructions.

## Facts and Procedural History

[3] In November of 2018, Kalli Johnson ("Johnson") contacted the North Vernon Police Department regarding the sale of heroin by Jones. *Tr. Vol. 2* at 176, 223-25. Johnson indicated to law enforcement that she wanted to work as a confidential informant ("CI") because she was "unhappy with drug dealers operating in North Vernon so she wanted to do her part to try to alleviate that." *Id.* at 202. Johnson had been a heroin user for at least four years before she became a CI and had known Jones for several weeks and had previously

[1] *See* Ind. Code § 35-48-4-1.

purchased drugs from him. *Id.* at 220-21, 225-26. Johnson would stop by Jones's house several times per week and had also met Jones's girlfriend, Junara Bailey ("Bailey"). *Id.* at 228.

[4] Acting as a CI, Johnson participated in four controlled buys during the month of November 2018. *Id.* at 176-77, 230. Johnson participated in her first controlled buy on November 11, 2018. *Id.* at 177. Before the buy, Johnson met with law enforcement, who searched her and her vehicle to make sure that she did not have any contraband; law enforcement also provided her with $150.00 to purchase a gram of heroin along with a cellular phone to use as a recording device. *Id.* at 177-79, 182-83, 233-35; *State's Ex. 6*. Johnson drove her vehicle to Jones's house where she met with Jones and Bailey *Tr. Vol. 2* at 235, 245; *State's Ex. 6*. Johnson attempted to hand the $150.00 to Jones, but Jones indicated that Johnson should give the money to Bailey. *Tr. Vol. 2* at 245. Bailey provided Jones with the heroin, which Johnson gave to law enforcement after the controlled buy had concluded. *Id.* at 177-78, 245. Laboratory testing of the substance later showed it contained heroin and fentanyl. *Id.* at 158.

[5] Johnson participated in three other controlled buys in November during which law enforcement gave her specified amounts of currency to purchase drugs, searched her and her vehicle before each buy to be sure she had no contraband, and provided a cellular phone to use to record the transactions. *Tr. Vol. 2* at 188-90, 193-94; *Tr. Vol. 3* at 46-49; *State's Ex. 6*. During the November 12, 2018 controlled buy at Jones's residence, Johnson was provided with $300.00 by law enforcement and was able to purchase 0.97 grams of heroin and fentanyl from

Jones for $150.00 and returned with the remaining $150.00. *Tr. Vol. 2* at 158, 188-92; *State's Ex. 6*. During the November 14, 2018 controlled buy, Johnson purchased an additional 1.95 grams of fentanyl from Jones for $300.00. *Tr. Vol. 2* at 158-59; *Tr. Vol. 3* at 46-49; *State's Ex. 6*. Finally, a fourth controlled buy was conducted on November 17, 2018, and Johnson purchased 0.96 grams of fentanyl from Jones for $150.00. *Tr. Vol. 2* at 159, 193-98; *State's Ex. 6*.

[6] On December 21, 2018, the State charged Jones in a twelve-count information as follows: Counts 1 through 4, Level 4 felony dealing in a narcotic drug; counts 5 through 8, Level 6 felony possession of a narcotic drug; and counts 9 through 12, Level 6 felony maintaining a common nuisance. *Appellant's App. Vol. 2* at 17-18. On July 17, 2019, the State filed a motion to amend the information, which the trial court granted. *Id.* at 58-60. In the amended information, three of the four Level 4 felony charges of dealing in a narcotic drug were reduced to Level 5 felonies. *Id.*

[7] Jones filed a "motion to extend time to file a continuance" on March 14, 2019, which the trial court granted on March 18, 2019. *Id.* at 4-5, 42-43. On March 21, 2019, Jones filed a motion to continue the jury trial that had been set for April 15, 2019, and in an April 17, 2019 order, among other matters, the trial court reset the date of the jury trial to July 29, 2019, ordered that discovery be completed by May 30, 2019, and that after the jury venire was called on July 5, 2019, there would be no further continuances granted. *Id.* at 44-45. On April 25, 2019, Jones filed a notice of deposition of "Confidential Informant 425," which was Johnson's assigned CI identifier. *Id.* at 46. A final attorneys

conference report dated July 5, 2019 indicated the previously scheduled July 29, 2019 trial would be continued, and July 9, 2019 CCS entries showed the July 29, 2019 jury trial as cancelled. *Id.* at 7-8, 57. Jones filed another continuance on September 3, 2019, which was granted on September 8, 2019. *Id.* at 8, 63. On October 29, 2019, Jones's appointed trial counsel ("first attorney") filed a motion to withdraw due to a communication breakdown between himself and Jones. *Id.* at 67-69. On November 6, 2019, the trial court denied the motion to withdraw. *Id.* at 70.

[8] On March 5, 2020, the trial court issued an order on the State's motion for jury trial, which specified it would set the matter for a jury trial and that it would not continue the trial. *Id.* at 77. On April 14, 2020, the trial court issued an order, which among other matters, scheduled the jury trial to begin on October 5, 2020, required discovery to be concluded by August 6, 2020, and specified that no further continuances would be granted and that the trial would not be continued. *Id.* at 9, 78. On April 22, 2020, Jones's new trial counsel ("second attorney") filed a motion seeking discovery, which the trial court granted on April 24, 2020 and required the State to provide the requested discovery within thirty days of the date of the order.[2] *Id.* at 79-86, 88-91.

[9] On September 2, 2020, Jones's second attorney filed a motion to continue the jury trial scheduled for October 5-7, 2020 and the final attorneys conference

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[2] The trial court granted Jones's first attorney's motion to withdraw on May 13, 2020. *Appellant's App. Vol. 2* at 87, 92.

scheduled for September 11, 2020 on the basis that he needed to engage in additional discovery and that the State was agreeable to a continuance. *Id.* at 93. The following day, the trial court issued an order denying Jones's motion to continue citing its April 14, 2020 order in which it had specified that the trial would not be continued. *Id.* at 94. Jones filed a witness and exhibit list on September 4, 2020, listing Bailey as a witness, and on September 11, 2020, the parties indicated that following the final attorneys conference that they were prepared to go to trial on October 5, 2020. *Id.* at 95, 99.

[10] On September 25, 2020, the trial court issued an order stating that Jones's counsel had informed the court that Jones would accept a plea offer, but that Jones's counsel had subsequently contacted the court that same day, indicating that Jones would not be accepting any plea offer and wanted to proceed to trial. *Id.* at 100. The trial court noted that the matter remained set for trial as previously scheduled. *Id.* On September 30, 2020, Jones filed a notice of deposition for "Confidential Informant 425," the CI identifier for Johnson, which was to be conducted on October 1, 2020. *Id.* at 103. Following the October 1, 2020 deposition of Johnson, Jones filed a motion for continuance on the day of the trial to conduct additional discovery because: (1) during the deposition, Johnson said that Bailey gave her the drugs on certain instances; (2) Jones had not seen the "poor quality" audio and video footage of the controlled buys until October 1, 2020; and (3) Jones wanted to subpoena the officer who had arrested Johnson on June 4, 2020 for operating while intoxicated and leaving the scene of an accident because Johnson had initially denied the use of

illegal drugs to the arresting officer but at her deposition had indicated that she was on drugs at the time. *Id.* at 105.

[11] On October 5, 2020, the trial court commenced a jury trial. *Id.* at 11-13. The trial court issued an order on October 6, 2020, noting "after discussion off the record," Jones's motion for continuance was denied.[3] *Id.* at 127. At the conclusion of the trial, the jury found Jones guilty as charged. *Id.* On November 12, 2020, a sentencing hearing was held, and the trial court vacated the convictions for all of the offenses except for the four counts of dealing in a narcotic drug. *Id.* at 233. The trial court sentenced Jones to six years on each of the three Level 5 felonies and twelve years on the Level 4 felony, with all counts to run consecutively for an aggregate sentence of thirty years. *Id.* at 233-34, 248-49. Jones now appeals.

## Discussion and Decision

## I. Denial of Continuance

[12] Jones contends that the trial court abused its discretion when it denied his request for a continuance on the day of trial. As our Supreme Court noted in *Gibson v. State*:

> Courts are generally reluctant to grant continuances in criminal cases merely to allow for additional preparation. But a defendant

[3] The transcript shows that the continuance was put "on the record" in a brief discussion between the trial court and the parties and that trial court was going to deny the motion and proceed with the trial. *Tr. Vol. 2* at 139, 163-64.

> is statutorily entitled to a continuance where there is an absence of material evidence, absence of a material witness, or illness of the defendant, and the specially enumerated statutory criteria are satisfied. If none of those conditions are present, however, a trial court has wide discretion to deny a motion to continue. We will only find an abuse of that discretion where a defendant was prejudiced as a result of not getting a continuance. To demonstrate such prejudice, a party must make a specific showing as to how the additional time requested would have aided counsel.

43 N.E.3d 231, 235-36 (Ind. 2015) (internal citations and quotations omitted), *cert. denied*, 137 S. Ct. 54 (2016). Jones makes no argument that he was entitled to a statutory continuance pursuant to Indiana Code section 35-36-7-1. Thus, "continuances . . . will be granted only in the furtherance of justice on a showing of good cause." *Harbert v. State*, 51 N.E.3d 267, 279 (Ind. Ct. App. 2016), *trans. denied*. "'There is a strong presumption that the trial court properly exercised its discretion.'" *Robinson v. State*, 91 N.E.3d 574, 577 (Ind. 2018) (quoting *Warner v. State*, 773 N.E.2d 239, 247 (Ind. 2002)).

[13] Jones argues that he was prejudiced by the trial court's refusal to grant him a continuance because the denial of his motion hindered the preparation of his defense by preventing him from engaging in "further investigation of [Johnson's] background, the investigation of [Bailey] as an alternative perpetrator, and the deposition of an officer with first-hand knowledge regarding [Johnson's] testimony." *Appellant's Br.* at 11. We disagree.

[14] Here, during the nearly two-year period between Jones's arrest and his October 2020 jury trial, the record indicates that the only reason Jones would not have known that Johnson was the CI earlier in this case was due to his own pretrial choices. For example, Jones's first attorney filed a notice on April 25, 2019 that Jones was going to depose the CI on May 28, 2019 but did not follow through at that time.[4] *Appellant's App. Vol. 2* at 46. Then, on March 5, 2020, when the trial court set the matter for a jury trial to begin on October 5, 2020, it ordered that the trial would not be continued. *Id.* at 77-78. That order also specified that all discovery was to be completed by August 6, 2020, and that a final attorneys conference would be held on September 11, 2020 to resolve any anticipated evidentiary problems. *Id.* at 78.

[15] When Jones's second attorney filed a motion on September 2, 2020 seeking to continue the jury trial, the trial court denied the motion and cited the March 5, 2020 order in which it had specified that the trial would not be continued and showed that it did not intend to revisit the prior order regarding additional continuances. *Id.* at 93-94. Jones seems to argue that even though the trial court had ordered the State to produce the requested discovery within thirty

[4] The record does not indicate why Jones did not depose Johnson at that time. To the extent Jones argues that Johnson's identity should have been disclosed sooner, we note that, in general, the disclosure of a CI's identity is not required unless disclosure is relevant and helpful or necessary for a fair trial. *See Beverly v. State*, 543 N.E.2d 1111, 1114 (Ind. 1989) ("The general policy in Indiana is to prevent disclosure of an informant's identity unless the defense can demonstrate that disclosure is relevant and helpful or is necessary for a fair trial"); *Beville v. State*, 71 N.E.3d 13, 19 (Ind. 2017) (discussing Indiana caselaw and policies behind the general prohibition on disclosure of a CI's identity).

days of its April 24, 2020 order, it did not do so until October 1, 2020, when Johnson was deposed and that was the earliest opportunity that he could have discovered Bailey's possible involvement, Johnson's identity, and the controlled buy videos. On the contrary, the role of the CI, the involvement of Bailey, and the video of the controlled buys were referenced in the December 21, 2018, charging information and in police reports accompanying the probable cause affidavit, and were also referred to in the State's November 7, 2019 witness and exhibit list. *Id.* at 18, 20-23, 71. Jones does not explain why he did not attempt to depose Johnson, view the videos, or investigate Bailey's role earlier in the proceedings, but he would have known at the latest by September 3, 2020, that he had approximately one month to wrap up his preparation for the trial that was scheduled to begin on October 5, 2020. In addition, there is no indication that Jones raised any discovery issues at the final September 11, 2020 attorneys conference.

[16] In light of the over one-and-one-half-year period from the filing of the charges to the beginning of the trial and based on the above facts, the trial court could have reasonably concluded that the delay in deposing Johnson, viewing the videos, and investigating Bailey's possible involvement was due to Jones's choices, and we cannot say that he made a specific showing of how the additional time would have aided his defense or how he was prejudiced. *See Gibson*, 43 N.E.3d at 236 (noting a party must "make a specific showing as to how the additional time requested would have aided counsel"); *see also Elmore v. State*, 657 N.E.2d 1216, 1218-19 (Ind. 1995) (denial of continuance upheld in

case involving five felony charges, when the attorney had only one month to prepare); *Tharpe v. State*, 955 N.E.2d 836, 844 (Ind. Ct. App. 2011) (no abuse of discretion in denying continuance of defendant's case, which consisted of one felony count and had been ongoing for over a year), *trans. denied*. Accordingly, the trial court did not abuse its discretion in denying Jones's request for a continuance.

## II. Incredible Dubiosity

[17] When we review the sufficiency of the evidence to support a conviction, we do not reweigh the evidence or assess the credibility of the witnesses. *Peppers v. State*, 152 N.E.3d 678, 682 (Ind. Ct. App. 2020). We consider only the evidence most favorable to the trial court's ruling and the reasonable inferences that can be drawn from that evidence. *Lock v. State*, 971 N.E.2d 71, 74 (Ind. 2012). We also consider conflicting evidence in the light most favorable to the trial court's ruling. *Oster v. State*, 992 N.E.2d 871, 875 (Ind. Ct. App. 2013), *trans. denied*. A conviction will be affirmed if there is substantial evidence of probative value that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt. *Wolf v. State*, 76 N.E.3d 911, 915 (Ind. Ct. App. 2017).

[18] Jones does not specifically challenge the sufficiency of the State's evidence as to any particular element of his convictions for four counts of dealing in a narcotic drug. Instead, he argues that Johnson's testimony was incredibly dubious and that, as a result, the State's evidence against him was insufficient. Under the

incredible dubiosity rule, "a court will impinge on the jury's responsibility to judge the credibility of the witnesses only when it has confronted 'inherently improbable' testimony or coerced, equivocal, wholly uncorroborated testimony of 'incredible dubiosity.'" *Moore v. State*, 27 N.E.3d 749, 754 (Ind. 2015) (quoting *Tillman v. State*, 642 N.E.2d 221, 223 (Ind. 1994)). To invoke the application of the incredible dubiosity rule, a defendant must show that there is: (1) a sole testifying witness; (2) the testimony is inherently contradictory, equivocal, or the result of coercion; and (3) a complete absence of circumstantial evidence. *Id.* at 756.

[19] Jones's argument appears to be premised on the notion that Johnson was the sole eyewitness to testify to the drug dealing and that the video of the buys did not capture "illicit activity." *Appellant's Br.* at 13. He acknowledges that the jury heard other testimony surrounding the events and circumstances of the controlled buy as he also acknowledges that the testifying officers were able to corroborate Johnson's location. We reject Jones's argument that application of the incredible dubiosity is warranted in this case.

[20] First, Johnson was not the sole witness to testify at the trial. Jones's claim that Johnson was the sole eyewitness to testify to the drug dealing overlooks that the jury was presented with audio and video of each of the four controlled buys, which was played during Johnson's testimony, from which the jury could assess and weigh Johnson's testimony regarding the drug dealing. *Tr. Vol. 2* at 243, 248-50; *Tr. Vol. 3* at 3, 8; *State's Ex. 6*. Second, Jones does not point us to what in Johnson's testimony regarding his role in dealing drugs underlying the four

felony counts of dealing in a narcotic drug is inherently improbable, as her testimony that Jones dealt drugs on the days in question was not inherently improbable. *Tr. Vol. 2* at 235-45; *State's Ex. 6.* Instead, he directs our attention to other matters impacting Johnson's credibility, such as her motivation in becoming a CI, that she did not admit in her prior deposition testimony that she had worked as a CI in other cases, and that she had been a regular heroin user before becoming a CI. *See Reed v. State*, 748 N.E.2d 381, 395-96 (Ind. 2001) (concluding that the evidence was sufficient to support the defendant's conviction for felony murder where the only witness to place the defendant at the scene of the crime and identify him as the triggerman "was not a model witness," some of his testimony was "improbable," and "he was impeached by a number of prior inconsistent statements"); *Moore*, 27 N.E.3d at 755-56 (noting that it is the role of the fact-finder to resolve any conflicts in the evidence and to decide which witnesses to believe or disbelieve). Third, there was circumstantial evidence corroborating that illegal activity occurred. Here, the electronic recordings and police surveillance were consistent with Johnson's testimony that Jones had dealt drugs. The jury heard the recordings in which Jones: (1) asked Johnson to lift up her shirt so that he could confirm that she was not wearing a wire; (2) told Johnson that his "stuff" was "stronger"; and (3) spoke with Jones during the second buy. *Tr. Vol. 2* at 190, 196; *Tr. Vol. 3* at 13; *State's Ex. 6*. Johnson was under law enforcement surveillance at each of the controlled buys. *Tr. Vol. 2* at 193, 195; *Tr. Vol. 3* at 36-38, 41-43. During one of the controlled buys, the surveilling law enforcement officer saw Jones exit the residence and dig for something in the ground before he went back inside and

several minutes after that Johnson left the house with drugs, which tended to suggest that Jones had retrieved the drugs from an area where they had been hidden. *Tr. Vol. 3* at 43. Given the circumstantial evidence of Jones's guilt, his reliance on the incredible dubiosity rule is misplaced. *See Moore*, 27 N.E.3d at 759 (observing that reliance on the incredible dubiosity is not warranted where there is circumstantial evidence of an individual's guilt).

[21] Jones's argument is nothing more than an invitation to reweigh the evidence and judge the credibility of the witness, which we decline to do. *See Peppers*, 152 N.E.3d at 682. The jury had an opportunity to observe Johnson's testimony and demeanor, heard and weighed her testimony along with the audio and video of the controlled buys and other testimony, and believed that Jones dealt drugs to her, which was sufficient to support the guilty verdict. We decline to impinge on the jury's credibility determinations. Because Jones has failed to show that Johnson's testimony was so inherently improbable that no reasonable trier of fact could believe it and because there was supporting circumstantial and probative evidence from which the jury could have found Jones guilty beyond a reasonable doubt, we find that the incredible dubiosity rule is inapplicable and that sufficient evidence was presented to support Jones's convictions.

## III. Inappropriate Sentence

[22] Jones contends that his thirty-year consecutive sentence is inappropriate and asks us to reduce it to concurrent sentences pursuant to Indiana Appellate Rule 7(B), which provides that an appellate court "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." Among other things, Jones principally contends that imposing consecutive sentences was error pursuant to *Beno v. State*, 581 N.E.2d 922 (Ind. 1991). In *Beno*, our Supreme Court found that, although the trial court properly sentenced Beno to the maximum term on each count, the trial court erroneously ordered the sentences to be served consecutively because the Court noted that, although a trial court has discretion to impose both maximum and consecutive sentences, where a defendant is enticed by the police to commit nearly identical crimes as a result of a police sting operation, consecutive sentences are inappropriate. *Id.* at 924.

[23] Since then, Indiana courts have repeatedly held that "[c]onsecutive sentences are not appropriate when the State sponsors a series of virtually identical offenses." *Gregory v. State*, 644 N.E.2d 543, 544 (Ind. 1994); *see also, Eckelbarger v. State*, 51 N.E.3d 169, 170 (Ind. 2016); *Davis v. State*, 142 N.E.3d 495, 507 (Ind. Ct. App. 2020); *Rios v. State*, 930 N.E.2d 664, 669 (Ind. Ct. App. 2010); *Williams v. State*, 891 N.E.2d 621, 635 (Ind. Ct. App. 2008); *Hendrickson v. State*, 690 N.E.2d 765, 767 (Ind. Ct. App. 1998). The State acknowledges this authority and concedes that the above precedent indicates "the sentences must run concurrently." *Appellee's Br.* at 20. Here, Jones sold similar amounts of heroin and fentanyl to Johnson in state-sponsored controlled buys occurring on November 11, 12, 14, and 17 of 2018. Thus, Johnson's sentence on each of

these convictions must run concurrently.[5] We therefore remand this matter to the trial court for the entry of a revised sentencing order and abstract of judgment indicating that the sentences on counts 1 through 4 will run concurrently.

[24] Affirmed in part, reversed in part, and remanded with instructions.

Altice, J., and Weissmann, J., concur.

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[5] Jones's claim is principally that he should have received concurrent sentences rather than consecutive sentences. *See Appellant's Br.* at 14-17. To the extent that Jones contends that the trial court's imposition of maximum sentences on each count was error, we disagree. As we have determined that precedent calls for concurrent rather than consecutive sentences where multiple, state-sponsored drug buys comprise the nature of the offense, we note that Jones's character is such that his maximum sentences for each count of dealing in a narcotic drug are justified. Jones has extensive criminal history, which includes felony and misdemeanor convictions for possession of marijuana in 1998, theft and receiving stolen property in 1999, promoting an animal fighting contest in 2001, check deception in 2005, criminal mischief in 2009, and three counts of maintaining a common nuisance in 2018 under separate cause numbers. *Appellant's Conf. App. Vol. 2* at 217-21. He had also violated his probation and home detention on multiple prior occasions and was serving a sentence on home detention at the time he committed the instant offenses. *Id.* at 217-19, 221; *Tr. Vol. 3* at 115. In addition, Jones has accumulated a record of arrests for other offenses, including armed robbery, criminal confinement, battery resulting in serious bodily injury, battery by means of a deadly weapon, and impersonation of a public servant, which also reflects poorly on his character. *Appellant's Conf. App. Vol. 2* at 219. Jones's maximum sentences are not inappropriate.