MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Marcus M. Wilson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

July 25, 2023

Court of Appeals Case No. 23A-CR-22

Appeal from the Vanderburgh Circuit Court

The Honorable David D. Kiely, Judge

Trial Court Cause No. 82C01-1909-F2-6176

Memorandum Decision by Judge Brown
Judge Crone and Senior Judge Robb concur.

Brown, Judge.

[1] Marcus M. Wilson appeals his conviction for dealing in a narcotic drug. He claims the evidence is insufficient to sustain his conviction and the trial court erred in not giving a special unanimity jury instruction. We affirm.

Facts and Procedural History

[2] On September 5, 2019, Evansville Police Detective Monty Guenin received information about a possible sale of narcotics at an address in Evansville, Indiana. While watching the reported address, he saw a black SUV stop and two individuals exit and enter the house. The two individuals returned to the SUV, and Detective Guenin followed the SUV in an unmarked police vehicle, observed the vehicle exceed the posted speed limit, and reported the information to Evansville Police Detective Robert Schmitt.

[3] Detective Schmitt initiated a traffic stop of the SUV and requested identification from the driver, Wilson, who provided an ID for Latroy Stovall which included a photograph that did not look like Wilson, and from the passenger, Nadija Goodnight, who identified herself as Brianna Hanley. Detective Schmitt confirmed that Wilson was not Latroy Stovall. He searched the vehicle and discovered an open purse with a black plastic bag on top, and the bag contained multiple smaller plastic bags holding heroin, cocaine, marijuana, and various pills. Detective Schmitt located an ID for Goodnight at the bottom of the purse. He found cash totaling $1,952 on Wilson's person and four cell phones in the vehicle, one of which belonged to Goodnight, and the other three were unclaimed.

[4] On September 19, 2019, the State charged Wilson with: Count I, dealing in cocaine as a level 2 felony; Count II, dealing in a narcotic drug as a level 2 felony; Count III, possession of a controlled substance as a class A misdemeanor; and Count IV, possession of marijuana as a class B misdemeanor. On January 21, 2020, Wilson filed a motion to suppress evidence of the search of his vehicle, which the trial court denied. In his interlocutory appeal, this Court affirmed the trial court's denial of his motion to suppress.

[5] On November 9 and 10, 2022, the court held a jury trial. The State presented the testimony of Detective Guenin and Detective Schmitt. Detective Guenin testified that the two individuals at the house left after an amount of time consistent with "short-term traffic," and he defined "short-term traffic" as when "people come in to a house where they sell narcotics," "they stay a short period of time, maybe thirty seconds, maybe five minutes," and throughout the day there would be "a consistent flow of traffic in and out of a residence, apartment, of that type of nature that would lead you to believe that narcotics distribution sells or use is going on." Transcript Volume II at 19.

[6] Former Evansville Police Detective Todd Seibert testified that he was a narcotics detective, he was familiar with cocaine and heroin usage, and "a typical usage [of heroin] would be about . . . a tenth of a gram." *Id.* at 28. He stated that "drug dealing is basically a cash business," and that cocaine and heroin were usually sold in "[a] corner baggie would be just like a typical sandwich bag . . . they just put the drugs down at the bottom, they'll tear off the

bottom in a knot and . . . rip it off there and it will just be the very end of the corner baggie." *Id.* at 31, 33.

[7] Detective Schmitt testified about the black plastic bag he discovered in the car, stating that he found "an open purse sitting on the passenger floorboard, [and] on top of the purse was a black plastic bag, a small trash bag," and "[i]nside the trash bag were numerous other plastic baggies . . . [and] one baggie contained Heroin, one baggie contained Cocaine, and the other one contained Marijuana, and then there were several pills . . . ." *Id.* at 45. Evidence of the weight of the drugs was admitted.[1]

[8] Goodnight testified that she did not know Wilson's real name, she knew him by the name "Manifest," and they "met at a gas station probably like a week or two before." *Id.* at 81-82. She stated that, on September 5, 2019, Wilson asked her "if [she] wanted to come . . . to Evansville with him, [they] were just supposed to be coming to the Mall," and he picked her up in a black SUV. *Id.* at 83. She testified that after picking her up, Wilson drove to a house that he entered while she remained in the SUV, he returned after she had been sitting "awhile" and told her that she could come into the house, she entered, and she

[1] Laboratory analysis revealed that the black plastic bag contained smaller bags, which included: one bag containing cocaine weighing 36.46 grams; another with heroin and fentanyl weighing 15.54 grams; "a zip-lock plastic bag containing two tied plastic bags containing" heroin and fentanyl and weighing 25.91 grams; "a [s]ealed plastic bag containing two plastic bags containing" marijuana weighing 27.4 grams; a "[s]ealed plastic bag containing eight pink star shaped tablets" that contained methamphetamine and the presence of Dimethylsulfone, a non-controlled substance, weighing a total of 1.31 grams; and a "[s]ealed plastic bag containing ten (10) clear capsules containing" methamphetamine and the presence of Dimethylsulfone, a non-controlled substance, weighing 1.34 grams. Exhibits Volume III at 42-43.

saw Wilson and another man in a back bedroom "talking and like exchanging money back and forth." *Id.* at 84. She stated that she saw "drugs out in plain view," "like white drugs." *Id.* at 85. She agreed that she had brought a purse with her when she left with Wilson that day, and after leaving the house she took her purse with her. As they were driving, she stated they were pulled over, Detective Schmitt approached their car, and she gave him her sister's name instead of her own. She noticed that, after Detective Schmitt walked back to his vehicle, "this black trash bag . . . appeared," Wilson "was moving around and getting nervous and he handed [her] something at that time and with him like moving around in the car the bag just falls over and lands on [her] side of the vehicle," he handed her "a Marijuana blunt" and told her to hide it, and she hid it in her pants. *Id.* at 88-89. She stated that "the bag was on top of the purse, like it was never inside where they would have to dig in and pull the bag out." *Id.* at 91. According to her, after exiting the vehicle, Wilson told her "you're going to have to take the charge because they're going to give me a million years." *Id.* at 92. On cross-examination, she testified that, after being removed from the vehicle and handcuffed, Wilson talked "about [her] taking the charges and that he will have someone take care of [her] while [she] was in jail, something like that along those lines, that [she] wasn't going to have to worry for anything." *Id.* at 107.

[9] The court dismissed Count III on the State's motion. The court read final instructions to the jury, which included the elements of the offenses with which Wilson had been charged, definitions for active and constructive possession,

that the State must prove Wilson's guilt beyond a reasonable doubt, and provided a definition for reasonable doubt. The court further informed them to "consider all of [the court's] preliminary and final instructions together," "not [to] single out any individual sentence, point, or instruction and ignore the others," "refuse to vote for conviction unless [they] are convinced beyond a reasonable doubt of the Defendant's guilt," and that their verdict had to be unanimous. Appellant's Appendix Volume II at 211, 216. The jury found Wilson guilty on Counts I, II, and IV, and the court sentenced him to a total of seventeen years.

Discussion

[10] Wilson argues the evidence was insufficient to support his conviction for dealing in heroin, it was fundamental error for the jury not to have "received a unanimity instruction regarding the weight of heroin," the State "relied on the sheer weight of the drugs to support its conviction," and the jury was not informed that "to find [Wilson] guilty of possession with intent to distribute it must find that both bags of heroin belonged to Wilson or it would have to unanimously find another indication that Wilson had the intent to distribute the heroin." Appellant's Brief at 9-11.

[11] Ind. Code § 35-48-4-1(a)(2) and (e) provided at the time of the offense that a person who possesses, with intent to manufacture, finance the manufacture of, deliver, or finance the delivery of cocaine or a narcotic drug, commits dealing in

cocaine or a narcotic drug, and that the offense is a level 2 felony if the amount of the drug involved is at least ten grams.[2]

[12] Wilson argues that "the evidence supporting the conviction for possession of heroin based on weight alone is insufficient," "conflicts with the statutory text" and "the evidence was insufficient to support Wilson's conviction for dealing in heroin." Appellant's Brief at 12. We note that when reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. *Jordan v. State*, 656 N.E.2d 816, 817 (Ind. 1995), *reh'g denied*. We look to the evidence and the reasonable inferences therefrom that support the verdict. *Id.* The conviction will be affirmed if there exists evidence of probative value from which a reasonable jury could find the defendant guilty beyond a reasonable doubt. *Id.* It is well established that "circumstantial evidence will be deemed sufficient if inferences may reasonably be drawn that enable the trier of fact to find the defendant guilty beyond a reasonable doubt." *Pratt v. State*, 744 N.E.2d 434, 437 (Ind. 2001).

[13] The record reveals that Detective Guenin received information about the possible sale of narcotics at an address in Evansville, and he watched Wilson's SUV stop at the address for an amount of time consistent with short-term traffic. Detective Schmitt pulled Wilson over, Wilson provided a false name, and the detective searched the vehicle and found four cell phones and a black

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[2] Subsequently amended by Pub. L. No. 252-2017, § 21 (eff. July 1, 2023).

plastic bag lying on top of a purse on the passenger-side floorboard, which contained smaller plastic bags of separately wrapped heroin with fentanyl, cocaine, and marijuana. Detective Schmitt found cash totaling $1,952 on Wilson. Goodnight testified that, after picking her up in a black SUV, she and Wilson entered a residence in which she witnessed him exchange money with another man, and she saw "drugs out in plain view," "like white drugs." Transcript Volume II at 85. Once Detective Schmitt pulled Wilson over, Goodnight noticed a black plastic bag appear on the center console and fall on top of her purse, Wilson handed her a "Marijuana blunt" and asked her to hide it, and he asked her "to take the charge." *Id.* at 89, 92.

[14] Based upon the record, we conclude the State presented evidence of probative value from which a reasonable trier of fact could find beyond a reasonable doubt that Wilson knowingly or intentionally possessed more than ten grams of heroin with intent to deliver.

[15] Wilson did not object or request his own jury unanimity instruction. Accordingly, this issue is waived, and to obtain relief Wilson must establish fundamental error. *See Baker v. State*, 948 N.E.2d 1169, 1178 (Ind. 2011). In order to be fundamental, the error must represent a blatant violation of basic principles rendering the trial unfair to the defendant and thereby depriving the defendant of fundamental due process. *Id.* The error must be so prejudicial to the defendant's rights as to make a fair trial impossible. *Id.* In considering whether a claimed error denied the defendant a fair trial, we determine whether the resulting harm or potential for harm is substantial. *Id.* at 1178-1179. Harm

is not shown by the fact that the defendant was ultimately convicted. *Id.* at 1179. Rather, harm is determined by whether the defendant's right to a fair trial was detrimentally affected by the denial of procedural opportunities for the ascertainment of truth to which he would have been entitled. *Id.*

[16] In Indiana, a verdict in a criminal case must be unanimous. *Calvert v. State*, 177 N.E.3d 107, 111 (Ind. Ct. App. 2021) (citing *Fisher v. State*, 259 Ind. 633, 291 N.E.2d 76, 82 (1973)). A jury must unanimously agree regarding which crime a defendant committed, and each count of an information may include only a single offense. *State v. Sturman*, 56 N.E.3d 1187, 1203 (Ind. Ct. App. 2016) (citations omitted). Thus, an instruction which allows the jury to find a defendant guilty if he commits either of two or more underlying acts, either of which is in itself a separate offense, is ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense. *Id.* Nevertheless, the State is permitted to "allege alternative means or 'theories of culpability' when prosecuting the defendant for a single offense." *Id.* (citing *Baker*, 948 N.E.2d at 1175 (citation omitted)). In other words, the State is permitted to "present the jury with alternative ways to find the defendant guilty as to one element." *Id.* (brackets omitted) (citing *Baker*, 948 N.E.2d at 1175 (quoting *Cliver v. State*, 666 N.E.2d 59, 67 (Ind. 1996) ("In criminal cases, as in all litigation, different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line.") (citation and internal quotation marks omitted), *reh'g denied*)). "[W]hile jury unanimity is required as to the defendant's guilt, it is not required as to the

theory of the defendant's culpability." *Calvert*, 177 N.E.3d at 112 (citing *Taylor v. State*, 840 N.E.2d 324, 333 (Ind. 2006)).

[17] Wilson argues that the jury was not informed that "to find [him] guilty of possession with intent to distribute it must find that both bags of heroin belonged to [him] or it would have to unanimously find another indication that [he] had the intent to distribute the heroin." Appellant's Brief at 11. The record reveals the court provided jury instructions reciting the elements of the counts with which Wilson had been charged in Instructions Nos. 2-6, defining intent in Instruction No. 7, defining actual and constructive possession in Instruction No. 8, and informing them that the elements must be proven beyond a reasonable doubt, and they "are to consider all of [the court's] preliminary and final instructions together," and their verdict "must be unanimous." Appellant's Appendix Volume II at 211, 216, 219. The record further reveals the jury was presented with other evidence of Wilson's intent to distribute heroin, and in light of the jury instructions and the record, we cannot say Wilson has demonstrated fundamental error. *See Wilson v. State*, 754 N.E.2d 950, 957 (Ind. Ct. App. 2001) (possession of a large quantity of drugs, money, and packaging materials sufficient to prove Wilson committed Class A felony dealing in cocaine).

[18] For the foregoing reasons, we affirm the trial court.

[19] Affirmed.

Crone, J., and Robb, Sr.J., concur.