MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Nicolas C. Alvarez,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 31, 2023

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

Appeal from the Posey Circuit Court

The Honorable Craig S. Goedde, Judge

Trial Court Cause No. 65C01-2006-F3-253

Memorandum Decision by Judge Brown
Judges Crone and Felix concur.

Brown, Judge.

[1] Nicholas C. Alvarez appeals his conviction and sentence for dealing in a narcotic drug as a level 3 felony. Alvarez raises eight issues which we consolidate and restate as:

I. Whether the trial court abused its discretion in admitting certain evidence;

II. Whether the court erred in allowing the State to amend its information;

III. Whether the court erred in refusing to give his lesser included instruction;

IV. Whether the court abused its discretion in denying his motion for funds to hire expert witnesses;

V. Whether the court erred in denying his motion to continue;

VI. Whether the evidence is sufficient to sustain his conviction; and

VII. Whether his sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

Facts and Procedural History

[2] In 2020, Posey County Prosecuting Attorney's Investigator Kenneth Rose worked for a drug investigation called Operation Aftershock to investigate numerous drug dealers. Investigator Rose utilized a confidential informant (the "C.I."). The C.I. communicated with Alvarez via text messages to set up deals. On February 18, 2020, the C.I. set up a purchase from Alvarez of about 2.5 grams of heroin, which Investigator Rose characterized as "a dealer amount" or "approximately 25 uses by a drug user." Transcript Volume III at 110.

Investigator Rose met with the C.I. at a pre-buy site where the C.I. and his vehicle were searched and he was given buy money and a recording device. Alvarez arrived with someone who was driving him. Alvarez entered the C.I.'s vehicle and gave him heroin in exchange for money. After the controlled buy, the C.I. provided the suspected heroin to law enforcement, and law enforcement retrieved video from the device given to the C.I., and determined the approximate gross field weight was 2.2 grams.

[3] On February 25, 2020, the C.I. communicated with Alvarez to set up another deal for approximately three grams of heroin for a controlled buy. Alvarez delivered heroin to the C.I. in exchange for money, and law enforcement retrieved the heroin and video of the buy.

[4] On March 6, 2020, the C.I. communicated with Alvarez through text messages to set up a third deal for "over three-plus grams." *Id.* at 155. Alvarez again delivered heroin to the C.I., and law enforcement retrieved video of the buy. Posey County Sheriff's Detective Dustin Seitz monitored and followed the C.I. during the three controlled buys.

[5] On June 23, 2020, the State charged Alvarez with dealing in a narcotic drug as a level 3 felony. Specifically, the State alleged that "between February 18, 2020 and March 1, 2020 . . . [Alvarez] did knowingly or intentionally deliver Heroin, pure or adulterated, a narcotic drug classified in schedule I, having an aggregate weight of at least seven (7) grams, but less than twelve (12) grams . . . contrary to . . . I.C. 35-48-4-1(a)(1) and I.C. 35-48-4-1(d)(3) . . . ." Appellant's Appendix

Volume II at 21. The probable cause affidavit, which was filed that same day, detailed the transactions between Alvarez and the C.I. on February 18 and 25, 2020, and March 6, 2020.

[6] On August 24, 2021, Alvarez filed a Motion for Specific Discovery asking the court to require the State to serve upon defense counsel evidence including any and all controlled buy videos, interviews in which Alvarez was mentioned, the identity of the C.I., recordings of meetings with the C.I., the criminal history of the C.I., and sealed cases pending against the C.I.

[7] On December 28, 2021, Alvarez filed a Request to Appoint Defense Experts including an independent forensic scientist to inspect and conduct forensic testing on the alleged controlled substances seized during the investigation and an independent forensic video analyst. On January 26, 2022, the State filed an objection to Alvarez's request to appoint defense experts. That day, the court held a hearing at which Alvarez's counsel requested "an expert to review the video footage to give us an opinion as to why we're seeing glitches and why we're seeing backgrounds change without any reason that this guy goes from normal color to dark blue in a matter of the blink of an eye." Transcript Volume II at 102. On July 18, 2022, the court denied Alvarez's request to appoint defense experts.

[8] On August 2, 2022, Alvarez filed a motion to exclude certain evidence from trial. Specifically, he asked that the following be excluded: ISP Laboratory Chain of Custody documents, which were not tendered to defense counsel until

July 16, 2022; text messages between him and the C.I., which were "not tendered to counsel until July 20, 2022 and then in an openable format on July 27, 2022"; undercover buy video "from primary wire," which was not tendered to counsel until July 20, 2022; photographs from controlled buys which were not tendered to counsel until July 22, 2022; "[t]he Defendant's CHIRPS from October 1, 2021," which "were not tendered until July 30, 2022"; Drug Task Force chain of custody documents which were tendered to counsel on August 1, 2022; and any and all information from Alvarez's cell phone. Appellant's Appendix Volume II at 107.

[9] On August 2, 2022, Alvarez filed a proposed final instruction regarding the lesser included offense of dealing in a narcotic drug which stated:

> The crime of dealing in a narcotic drug is defined by law as follows:
>
> A person who knowingly or intentionally delivers a narcotic drug, pure or adulterated, classified in schedule I or II, commits dealing in a narcotic drug a Level 5 Felony. The offense is a Level 4 Felony if the drug is heroin and the amount of heroin involved, added together over a period of not more than ninety (90) days, is at least three (3) grams but less than seven (7) grams.
>
> Before you may convict Nicolas C. Alvarez, the State must have proved each of the following beyond a reasonable doubt:
>
> 1. Nicolas C. Alvarez;
>
> 2. Knowingly or intentionally delivered;
>
> 3. Heroin, a narcotic drug, pure or adulterated, which the Court instructs you is classified by statute as a controlled substance in schedule I or II;

> 4. And the drug was heroin and the amount of heroin involved, added together over a period of not more than ninety (90) days, was at least three (3) g[r]ams but less than seven (7) grams.
>
> If the State fails to prove each of these elements beyond a reasonable doubt, you must find Nicolas C. Alvarez not guilty of Dealing in a Narcotic Drug, a Level 4 Felony.

Id. at 105.

[10] On August 3, 2022, the court held a preliminary hearing. The prosecutor moved "to amend by interlineation the information to say 'on or between February 18th, 2020 and March 6th of 2020." Transcript Volume II at 158. He also stated that he would prefer "if that scrivener's error not have been made" but argued that statute and law allowed the amendment. *Id.* Alvarez's counsel objected to any amendment. The court took the matter under advisement. Alvarez's counsel also mentioned the motion to exclude and stated that he had received seven new pieces of evidence that had not previously been tendered and received an eighth piece of evidence that morning, and asked why there was a last-minute motion to amend. The prosecutor asserted that defense counsel was welcome to move for a continuance. Alvarez's counsel asserted there was "no good reason that we should be having discovery the two weeks before the fourth trial date" and asked the court to grant the motion to exclude, deny the amendment, and proceed with trial. *Id.* at 166. The prosecutor asserted that he had provided everything to defense counsel when he received it. After further argument, the court stated:

> Based upon the arguments the Court's hearing today, I think the proper remedy is a motion to continue, if the Defense wishes to move it, to give them an opportunity to be able to review any additional documents, seek additional documents, if they find out that what's been tendered to them has not been an extensive or complete discovery response.

Id. at 170. After further discussion, the court granted the State's request to modify the jury instructions related to the charging information to read "on or between February 18th of 2020 and March the 6th of 2020." *Id.* at 172. Alvarez's counsel moved for a continuance, and the court granted the motion and rescheduled the trial for November 9, 2022.

[11] On November 1, 2022, the court held a pretrial conference. Alvarez's counsel asserted: "Judge, this is pretty much a rerun based on – or a redo based on discovery issues that resulted in a continuance at the Defense's request." *Id.* at 187. After some discussion, the court stated: "We'll show the prior rulings of the Court affirmed here today. We'll show Mr. Alvarez's objection to his counsel with regards to the amendment of the pleadings being of record as of today." *Id.* at 189.

[12] On November 7, 2022, the court held a status conference. Alvarez's counsel stated the prosecutor had informed him that the C.I. was a suspect in a possible charge and "it could be something as serious as an attempted murder or an attempted aggravated battery, could be an attempted arson, and it may not result in charges at all." *Id.* at 197. After some discussion and a recess during

which Alvarez spoke with his counsel, Alvarez's counsel indicated that Alvarez wished to proceed to trial.

[13] On November 9, 2022, the court held a jury trial. At some point, Alvarez's counsel stated:

> This morning, I didn't anticipate this coming up again, but it came up as we were meeting privately. So I do want to give [Alvarez] an opportunity, if there's something he wants to place on the record. But what concerned me is [Alvarez's] comment is he's being forced to go to trial, and that's just absolutely not true. I'm not forcing anyone to do anything. I've made every record I could possibly make to make sure the record is protected in this case, as I do in every case. But if somebody feels forced, I think they have an absolute right to vet that.

Id. at 229. Alvarez stated that "anything that I've ever tried to file on my own, [the court] sent back replies before where I'd have to go through my Counsel" and "if it turns out that he does get charged in two weeks, and that has a big effect on my case." *Id.* at 230. The court explained that it wanted to ensure that there was no ex parte communication occurring and that Alvarez was provided ample time to discuss with his counsel on November 7th and indicated that he wished to proceed to trial. Alvarez's trial counsel stated in part that Alvarez "was adamant" on November 7th "that he wanted to go to trial today" and: "If he's pushing that back on to me, I will stick by what I said the other day, and that is I think the continuance is the best option. However, based on the record, I understand the Court may not entertain that at this

time." *Id.* at 232. Alvarez's counsel moved to continue the trial, and the court denied the motion.

[14] The State presented the testimony of multiple witnesses including Investigator Rose, Detective Seitz, the C.I., Posey County Sheriff's Detective Kyle Reidford, and Shanda Armstrong, a forensic chemist. During the beginning of the second day of the trial, Alvarez's counsel mentioned making an offer of proof concerning the C.I.'s "current investigation." Transcript Volume III at 182. Upon questioning by defense counsel and outside the presence of the jury, Detective Reidford testified that he started an investigation into the C.I. "last Wednesday" to "investigate his ex-fiancée's house," the investigation involved possible accelerants being placed nearby or in the furnace, and he was "looking into" the C.I. *Id.* at 185-186. He also stated that he spoke to the C.I., who did not make any admissions. On cross-examination, Detective Reidford indicated he was not recommending any criminal charges in the investigation at that time.

[15] During cross-examination, Investigator Rose indicated that he asked the C.I. during a meeting: "Who can you get from Evansville to bring drugs to Posey County?" *Id.* at 214. Rose testified that the C.I. said he could tell people his truck broke down. He also indicated that Alvarez's name was not mentioned during the initial interview with the C.I.

[16] Armstrong, the forensic chemist, testified that State's Exhibit 2 was found to contain heroin and fentanyl with a net weight of 2.03 grams, State's Exhibit 25

contained heroin and had a net weight of 3.75 grams, and State's Exhibit 47 contained heroin and fentanyl and had a net weight of 2.82 grams. She also testified that "[a]ll three cases' net weights added together is 8.60 grams." Transcript Volume IV at 21.

[17] Alvarez's counsel requested a lesser included instruction and stated that it was appropriate to add "the level five felony." *Id.* at 118. The prosecutor asserted that there was no serious evidentiary dispute, the only evidence was from the lab chemist who stated that the net weight was 8.6 grams, and she testified that they do not "quantitate because Indiana law does not require that." *Id.* After some discussion, the court denied giving the instruction.

[18] The jury found Alvarez guilty as charged. At the sentencing hearing, Alvarez introduced and the court admitted a certificate of completion dated May 23, 2022, for a finance management course and a letter from Reverend Sergio Scataglini written in reply to a letter from Alvarez. The court found that the harm, injury, loss, or damage suffered by the victim of the offense was significant and greater than the elements necessary to prove the commission of the offense and "[t]hat victim being our society." *Id.* at 222. It stated: "Heroin rises to a different level, not only by statute, but for purposes of the fact that people are in fact overdosing on heroin, specifically heroin laced or dosed or cut with fentanyl." *Id.* at 223. It found Alvarez's criminal history to be an aggravator. It stated: "It appears to the Court, even though there may be a minimal amount of convictions, that the criminal activity itself, sir, I think is quite alarming to this Court." *Id.* at 227. It found that Alvarez had recently

violated conditions of his probation, parole, pardon, community corrections, placement or pretrial release as an aggravator. The court found the aggravating circumstances substantially outweighed the mitigating circumstances and sentenced Alvarez to fifteen years.

Discussion

I.

[19] The first issue is whether the trial court abused its discretion in admitting certain evidence. Alvarez asserts that his "ability to formulate a defense based on the evidence was prejudiced by the passage of time," "[h]ad the trial court properly excluded the evidence, the State would have been unable to authenticate documents and could not have laid a proper foundation for many of the exhibits presented at trial," the motion to exclude should have been granted, and "[t]o allow the State to fail to comply with discovery orders to the extent that nearly every trial Exhibit was affected rises to the level of exclusion rather than being remedied by continuance." Appellant's Brief at 16-18.

[20] Generally, the trial court is afforded wide discretion in ruling on the admissibility of evidence. *Shinnock v. State*, 76 N.E.3d 841, 842 (Ind. 2017). "On appeal, evidentiary decisions are reviewed for abuse of discretion and are reversed only when the decision is clearly against the logic and effect of the facts and circumstances." *Id.* at 842-843. "A trial judge has the responsibility to direct the trial in a manner that facilitates the ascertainment of truth, ensures fairness, and obtains economy of time and effort commensurate with the rights

of society and the criminal defendant." *Vanway v. State*, 541 N.E.2d 523, 526 (Ind. 1989). "Where there has been a failure to comply with discovery procedures, the trial judge is usually in the best position to determine the dictates of fundamental fairness and whether any resulting harm can be eliminated or satisfactorily alleviated." *Id.* at 526-527. "Where remedial measures are warranted, a continuance is usually the proper remedy, but exclusion of evidence may be appropriate where the discovery non-compliance has been flagrant and deliberate, or so misleading or in such bad faith as to impair the right of fair trial." *Id.* at 527. "The trial court must be given wide discretionary latitude in discovery matters since it has the duty to promote the discovery of truth and to guide and control the proceedings, and will be granted deference in assessing what constitutes substantial compliance with discovery orders." *Id.* "Absent clear error and resulting prejudice, the trial court's determinations as to violations and sanctions should not be overturned." *Id.*

[21] On August 3, 2022, the court addressed Alvarez's August 2, 2022 motion to exclude certain evidence, the court found that the proper remedy was a motion to continue, Alvarez's counsel moved for a continuance, and the court granted the motion and rescheduled the trial for November 9, 2022. Under these circumstances, we cannot say reversal is warranted.

II.

[22] The next issue is whether the trial court erred in allowing the State to amend its information. Alvarez contends "[t]he amendment was made orally on the day

of trial, after the charges had been on file for nearly two (2) years, and after depositions of the witnesses had been taken." Appellant's Brief at 21. He asserts that the amendment was a substantive change and required him to present a defense that was different from his defense to the prior information. He argues that, "[b]y using the language 'over a period of not more than 90 days,' I.C. § 35-48-4-1(d)(3) makes time an element of the offense." Appellant's Brief at 21. He also contends that the grant of the motion to amend forced him to request a continuance.

[23] Ind. Code § 35-34-1-5 governs amendment of charges and provides:

> (a) An indictment or information which charges the commission of an offense may not be dismissed but may be amended on motion by the prosecuting attorney at any time because of any immaterial defect . . . .
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> (b) The indictment or information may be amended in matters of substance . . . by the prosecuting attorney, upon giving written notice to the defendant at any time . . . before the commencement of trial; if the amendment does not prejudice the substantial rights of the defendant. . . .
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> (c) Upon motion of the prosecuting attorney, the court may, at any time before, during, or after the trial, permit an amendment to the indictment or information in respect to any defect, imperfection, or omission in form which does not prejudice the substantial rights of the defendant.
>
> (d) Before amendment of any indictment or information other than amendment as provided in subsection (b), the court shall give all parties adequate notice of the intended amendment and an opportunity to be heard. Upon permitting such amendment, the court shall, upon motion by the defendant, order any

> continuance of the proceedings which may be necessary to accord the defendant adequate opportunity to prepare the defendant's defense.

[24] "A defendant's substantial rights 'include a right to sufficient notice and an opportunity to be heard regarding the charge; and, if the amendment does not affect any particular defense or change the positions of either of the parties, it does not violate these rights.'" *Erkins v. State*, 13 N.E.3d 400, 405 (Ind. 2014) (quoting *Gomez v. State*, 907 N.E.2d 607, 611 (Ind. Ct. App. 2009), *trans. denied*), *reh'g denied*. "Ultimately, the question is whether the defendant had a reasonable opportunity to prepare for and defend against the charges." *Id.* at 405-406 (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, 1206-1207 (Ind. 2007)).

[25] The record reveals that the probable cause affidavit, which was filed the same day as the charging information, detailed the alleged transactions between Alvarez and the C.I. on February 18 and 25, 2020, and March 6, 2020. Further, the trial court granted the State's request to modify the jury instructions related to the charging information to read "on or between February 18th of 2020 and March the 6th of 2020" at the August 3, 2022 preliminary hearing, and it granted Alvarez's motion for a continuance and rescheduled the trial for November 9, 2022. Under these circumstances, reversal is not warranted.

III.

[26] The next issue is whether the trial court erred in refusing to give Alvarez's lesser included instruction. Alvarez argues that the trial court misinterpreted Ind. Code § 35-48-4-1, "the heroin enhancements specifically state the amount of 'heroin,'" and "the trial court should have applied the plain language which requires the State to prove the amount of heroin, rather than the amount of the entire substance." Appellant's Brief at 25-26.

[27] Generally, to determine whether to instruct a jury on a lesser included offense, the trial court must engage in a three-part analysis. *Leonard v. State*, 80 N.E.3d 878, 885 (Ind. 2017). The first two parts require the trial court to consider whether the lesser included offense is inherently or factually included in the greater offense. *Id.* If it is, "then the trial court must determine if there is a serious evidentiary dispute regarding the element that distinguishes the lesser offense from the principal charge." *Id.* "When considering whether there is a serious evidentiary dispute, the trial court examines the evidence presented by both parties regarding the element(s) distinguishing the greater offense from the lesser one." *Id.* "This involves evaluating the 'weight and credibility of [the] evidence,' and then determining the 'seriousness of any resulting dispute.'" *Id.* (quoting *Fish v. State*, 710 N.E.2d 183, 185 (Ind. 1999)). Because the trial court found no serious evidentiary dispute existed, we will reverse only if that finding was an abuse of discretion. *See id.* "In our review, 'we accord the trial court considerable deference, view the evidence in a light most favorable to the decision, and determine whether the trial court's decision can be justified in

light of the evidence and circumstances of the case.'" *Id.* (quoting *Fish*, 710 N.E.2d at 185).

[28] "In construing statutes, our primary goal is to determine the legislature's intent." *D.P. v. State*, 151 N.E.3d 1210, 1216 (Ind. 2020). "[T]o ascertain that intent, we must first look to the statutes' language." *Id.* "Penal statutes should be construed strictly against the State and ambiguities should be resolved in favor of the accused." *Merritt v. State*, 829 N.E.2d 472, 475 (Ind. 2005). "At the same time, however, statutes should not be narrowed so much as to exclude cases they would fairly cover." *Id.* We assume that the language in a statute was used intentionally and that every word should be given effect and meaning. *Id.* "We seek to give a statute practical application by construing it in a way favoring public convenience and avoiding absurdity, hardship, and injustice." *Id.* Statutes concerning the same subject matter must be read together to harmonize and give effect to each. *Id.* "When interpreting statutes defining drug offenses, we will construe the statute to 'encompass[ ] the common understanding of those in the drug trade.'" *Buelna v. State*, 20 N.E.3d 137, 142 (Ind. 2014) (quoting *Riley v. State*, 711 N.E.2d 489, 493 (Ind. 1999)), *reh'g denied*.

[29] The Indiana Supreme has consistently held that adulterated drugs means the total weight of the product. *See id.* at 142-143 ("For over thirty years, we have held that the General Assembly's references to other 'adulterated' drugs means the total weight of the delivered product, consistent with the meaning common in drug trafficking."); *Woodson v. State*, 501 N.E.2d 409, 410 (Ind. 1986) (rejecting the defendant's argument "that since the total mixture contained only

1.2 percent pure heroin and since the police conducted only preliminary tests on some of the separate bindles, it was thus improper for the police to empty the contents of each of the 100 bindles, mix them thoroughly and then test them for total heroin content," finding "no merit whatever to this argument," and observing the Court had previously held in *Lawhorn v. State*, 452 N.E.2d 915 (Ind. 1983), that "[t]his statute and all those involving controlled substance dealing utilizes (sic) the weight of the entire substance delivered by the dealer"), *reh'g denied*.

[30] With respect to Alvarez's assertion that the 2017 amendment to Ind. Code § 35-48-4-1 warrants reversal on this issue, we disagree. At the time of Alvarez's offense, Ind. Code § 35-48-4-1 provided:

> (a) A person who . . . knowingly or intentionally . . . delivers . . . cocaine or a narcotic drug, pure or adulterated, classified in schedule I or II; or
>
> * * * * *
>
> commits dealing in cocaine or a narcotic drug, a Level 5 felony, except as provided in subsections (b) through (e).
>
> * * * * *
>
> (d) The offense is a Level 3 felony if:
>
> * * * * *

> (3) the drug is heroin and the amount of heroin involved, aggregated over a period of not more than ninety (90) days, is at least seven (7) grams but less than twelve (12) grams . . . .[1]

(Subsequently amended by Pub. L. No. 48-2023, § 8 (eff. July 1, 2023)).[2]

[31] While subsection (d)(3) mentions "the amount of heroin involved," we note that this phrase is preceded by the language "the drug is heroin" and subsection (a) refers to "a narcotic drug, pure or *adulterated*, classified in schedule I or II." At the time of the offense, Ind. Code § 35-48-2-4 listed heroin as a schedule I substance.[3] Thus, we conclude that "the amount of heroin involved" references "pure or adulterated" heroin. We also note that Armstrong, the forensic chemist, testified that she was not surprised to find heroin and fentanyl in two items because "[m]ost often you see both together, or fentanyl on its own. Heroin is actually pretty rare at this point." Transcript Volume IV at 20. Thus, our interpretation encompasses the common understanding of those in the drug trade. *See Buelna*, 20 N.E.3d at 142 (holding that "[w]hen interpreting statutes defining drug offenses, we will construe the statute to 'encompass[ ] the common understanding of those in the drug trade,'" and citing trial testimony) (quoting *Riley*, 711 N.E.2d at 493). As for whether there was a serious evidentiary dispute, Armstrong, the forensic chemist, testified that the net

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[1] Pub. L. No. 44–2016, § 2 (eff. July 1, 2017), added the language in Ind. Code § 35-48-4-1(d)(3).

[2] Pub. L. No. 48-2023, § 8 (eff. July 1, 2023), added portions related to fentanyl.

[3] Subsequently amended by Pub. L. No. 61-2020, § 6 (eff. July 1, 2020); Pub. L. No. 10-2021, § 1 (eff. July 1, 2021); Pub. L. No. 48-2023, § 4 (eff. July 1, 2023).

weight of adulterated heroin was 8.60 grams, which was greater than the seven grams mentioned in Ind. Code § 35-48-4-1(d)(3). Reversal on this basis is not warranted.

IV.

[32] The next issue is whether the trial court abused its discretion in denying Alvarez's motion for funds to hire expert witnesses. Alvarez argues that he sought funds to prepare and present his defense regarding drug weight. He also asserts he was denied the ability "to have the glitches in the video analyzed and was denied an expert opinion as to why the color of the sky 'goes from normal color to dark blue in a matter of the blink of an eye.'" Appellant's Brief at 36 (quoting Transcript Volume II at 102).

[33] The appointment of experts for indigent defendants is left to the trial court's sound discretion. *Beauchamp v. State*, 788 N.E.2d 881, 888 (Ind. Ct. App. 2003) (citing *Jones v. State*, 524 N.E.2d 1284, 1286 (Ind. 1988)). It is within the trial court's discretion to determine whether the requested service would be needless, wasteful, or extravagant. *Id.* The defendant requesting the appointment of an expert bears the burden of demonstrating the need for the appointment. *Id.*

[34] The central inquiries in deciding this issue are whether the services are necessary to assure an adequate defense and whether the defendant specifies precisely how he would benefit from the requested expert services. *Scott v. State*, 593 N.E.2d 198, 200 (Ind. 1992). A defendant cannot simply make a blanket statement that he needs an expert absent some specific showing of the benefits

that the expert would provide. *Id.* The trial court may consider whether the proposed expert's services would bear on an issue for which expert opinion would be necessary or the request for an expert appears to be exploratory only, whether the expert services will go toward answering a substantial question or simply an ancillary one, the severity of the possible penalty the defendant faces, the cost of the expert services, and the complexity of the case. *Id.* at 200-202.

[35] As discussed above, we conclude that the relevant amount of heroin is the amount of adulterated heroin, and thus, we cannot say that the court abused its discretion in denying Alvarez's request to hire a defense expert related to the drug weight. As to his request for a video expert, Alvarez does not point to the portion of the State's video which he asserts contained the "glitches." Appellant's Brief at 36. We cannot say that expert testimony was necessary to ensure Alvarez received an adequate defense or that the court abused its discretion in denying his request for defense experts. *See Kocielko v. State*, 938 N.E.2d 243, 255 (Ind. Ct. App. 2010) (holding the trial court did not abuse its discretion in deciding not to provide the defendant with a DNA expert at public expense and that the defendant failed to provide specifics as to identity, cost, and the precise benefit to be gained by an expert), *reh'g granted on other grounds*, 943 N.E.2d 1282 (Ind. Ct. App. 2011), *trans. denied*.

V.

[36] The next issue is whether the trial court erred in denying Alvarez's motion to continue. Alvarez maintains that he was prejudiced by his inability to use the

C.I.'s potential upcoming criminal charge during the trial and the trial court should have granted the continuance so that he had an opportunity to investigate the possibility of criminal charges against the C.I.

[37] Rulings on non-statutory motions for continuance are within the trial court's discretion and will be reversed only for an abuse of that discretion and resultant prejudice. *Robinson v. State*, 91 N.E.3d 574, 577 (Ind. 2018). "There is a strong presumption that the trial court properly exercised its discretion." *Id.* (quoting *Warner v. State*, 773 N.E.2d 239, 247 (Ind. 2002)). "We will not conclude that the trial court abused its discretion unless the defendant can demonstrate prejudice as a result of the trial court's denial of the motion for continuance." *Stafford v. State*, 890 N.E.2d 744, 750 (Ind. Ct. App. 2008). Continuances to allow more time for preparation are not favored and are granted only by showing good cause and in the furtherance of justice. *Id.* (citing *Timm v. State*, 644 N.E.2d 1235, 1237 (Ind. 1994)). Further, motions to allow more time for preparation "require a specific showing as to how the additional time would have aided counsel." *Zanussi v. State*, 2 N.E.3d 731, 734 (Ind. Ct. App. 2013).

[38] The record reveals that, after Alvarez's counsel moved for a continuance on November 9, 2022, the court stated:

> At this time, the Court is going to deny the motion to continue. We are on the morning of trial. That's why we had the hearing, I think – well, we started the hearing on November the 7th, I think, in the premise of the new offer that was extended to Mr. Alvarez to see whether or not he did or did not wish to accept that.

> Obviously, there was a precipitating phone call that obviously raised issues with regards to the proceeding of the trial. I think the Court outlined all of those, and with regards to – not just the issues, but I think [defense counsel] on Monday, meaning November the 7th, outlined all the issues very clearly for the Court and what was at stake if there was going to be a continuance. Obviously, the Court wanted the courtesy to have enough time to be able to contact the potential jurors who were coming in this morning, and to give them notice, so they did not further interrupt, you know, their personal lives to come serve us in this particular matter.
>
> Mr. Alvarez, again, was given plenty of time to be able to consult with his attorney on that date and time with regards to that, very adamantly, this Court remembers, wanted to proceed to trial, and so we confirmed the trial date. We did not bother trying to call anybody and let anybody know. It was just going to be show up today, just as they were summonsed to do, and all that was placed on the record.
>
> So here we are this morning, had a preliminary hearing already this morning. Went off the record. Everybody was ready to proceed to trial, and then this issue now comes up, just as the jury is finishing their jury video this morning and finishing taking a restroom break so that we can get started actually picking the jury.
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> So with that all in mind, the Court is going to deny the motion at this late hour.

Transcript Volume II at 233-234.

[39] Further, Investigator Rose testified that the C.I. did not have any pending charges at the time he volunteered as an informant, it was typical of confidential informants to have pending charges, and the C.I.'s pending charges

at the time of the trial were unrelated to the undercover buys. The C.I. testified that he did not have pending charges at the time he was a confidential informant and purchasing heroin for the Drug Task Force, he was charged with a crime sometime after he signed up as a confidential informant, and he had pending charges. When asked if he was hoping for leniency in his pending criminal case, he answered: "It's always hopeful, but it's not to be expected, sir." Transcript Volume IV at 30. He confirmed that he had a prior criminal conviction for theft of a firearm in Gibson County in 2018. On cross-examination, the C.I. acknowledged he had a pending theft charge in Posey County. Under these circumstances, we conclude that Alvarez did not demonstrate prejudice as a result of the trial court's ruling.

VI.

[40] The next issue is whether the evidence is sufficient to sustain Alvarez's conviction. Alvarez argues he was entrapped by Posey County law enforcement and the State did not prove beyond a reasonable doubt that he was not the victim of entrapment. Generally, 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*. Rather, we look to the evidence and the reasonable inferences therefrom that support the verdict. *Id.* We will affirm the conviction if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. *Id.*

[41] At the time of the offense, Ind. Code § 35-48-4-1(a)(1) provided that "[a] person who . . . knowingly or intentionally . . . delivers . . . cocaine or a narcotic drug, pure or adulterated, classified in schedule I or II . . . commits dealing in cocaine or a narcotic drug, a Level 5 felony . . . ."[4] Ind. Code § 35-48-4-1(d)(3) provided that "[t]he offense is a Level 3 felony if . . . the drug is heroin and the amount of heroin involved, aggregated over a period of not more than ninety (90) days, is at least seven (7) grams but less than twelve (12) grams . . . ."[5]

[42] With respect to entrapment, the Indiana Supreme Court has held that "[t]he government may use undercover agents to enforce the law" and "undercover agents can be invaluable in the prevention, detection, and prosecution of crime." *Griesemer v. State*, 26 N.E.3d 606, 608 (Ind. 2015). "But their tactics must be measured; we do not tolerate government activity that lures an otherwise law-abiding citizen to engage in crime." *Id.* "After all, the job of law enforcement is to catch established criminals, not manufacture new ones." *Id.*

[43] Ind. Code § 35-41-3-9 is titled "Entrapment" and provides:

> (a) It is a defense that:
>
> > (1) the prohibited conduct of the person was the product of a law enforcement officer, or his agent, using persuasion or other means likely to cause the person to engage in the conduct; and

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[4] Subsequently amended by Pub. L. No. 48-2023, § 8 (eff. July 1, 2023).

[5] Subsequently amended by Pub. L. No. 48-2023, § 8 (eff. July 1, 2023).

(2) the person was not predisposed to commit the offense.

(b) Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

[44] "A defendant does not need to formally plead the entrapment defense; rather, it is raised, often on cross-examination of the State's witnesses, by affirmatively showing the police were involved in the criminal activity and expressing an intent to rely on the defense." *Griesemer*, 26 N.E.3d at 609. "Officers are involved in the criminal activity only if they 'directly participate' in it." *Id.* (quoting *Shelton v. State*, 679 N.E.2d 499, 502 (Ind. Ct. App. 1997) (finding, where officers merely placed deer decoy in field, they did not "directly participate in the criminal activity of road hunting," and the defendants thus failed to raise the entrapment defense)). "The State then has the opportunity for rebuttal, its burden being to disprove one of the statutory elements beyond a reasonable doubt." *Id.* "There is thus no entrapment if the State shows either (1) there was no police inducement, or (2) the defendant was predisposed to commit the crime." *Id.*

[45] The record reveals that Detective Seitz testified that Alvarez's reference to "fire gray" in the text messages to the C.I. referred to heroin. Transcript Volume IV at 74. He also testified that Alvarez told the C.I. the following in a message:

> Dude, this fire s---, people been overdosing on man. Like dude, can't even do a whole tenth. You'd be asleep for like 15 hours or overdose. But dude, three-tenths of this would get you right. That dude you got from last time hasn't been back. Dude is pissing me off because it's f------ me over because I had to go to

> another – go to other people and not really be able to re-up because it's cost me more to even try to make a profit.

Id. at 80. He testified that he was observing the recording of the video of Alvarez weighing the products out on a scale inside the C.I.'s vehicle. He further testified the C.I. was using a cover story that he was buying a portion of the heroin he was buying for his friend because he was purchasing "a lot of drugs." *Id.* at 88. He also testified that a message from Alvarez on June 18, 2020, stated in part: "[W]ish your dude would pick up sometime and buy a good amount." *Id.* at 98. On redirect examination, Detective Seitz testified that no one within the Drug Task Force or the C.I. pressured or threatened Alvarez to sell heroin. He indicated that Alvarez "made arrangements on every purchase we made to make the deals happen." *Id.* at 145. When asked if the text messages between the C.I. and Alvarez contained "a lot of drug slang terminology," he answered affirmatively. *Id.* at 146. The prosecutor asked: "Based upon your training and experience as a narcotics investigator, viewing all of the conversations you've seen between the CI and the Defendant, Nicolas Alvarez, and the drug talk therein, what does that drug talk lead you to believe about Mr. Alvarez?" *Id.* at 147. Detective Seitz answered: "He's involved in the drug trade." *Id.* He also indicated that Alvarez was "[v]ery knowledgeable about it." *Id.* He testified that he heard Alvarez state during one of the undercover buy videos: "I usually sell. I usually have my own stuff." *Id.* at 148. He also testified that Alvarez offered to sell the C.I. drugs at a hospital parking lot while the C.I.'s mother was hospitalized. We conclude the State

presented evidence of a probative nature from which the jury could find beyond a reasonable doubt that Alvarez committed the charged offense.

VII.

[46] The next issue is whether Alvarez's sentence is inappropriate in light of the nature of the offense and the character of the offender. Alvarez argues there was no evidence that his offense was any more egregious than the typical version of the offense of dealing in heroin. He also argues that he completed the only class he had been offered by the jail, presented a certificate of completion for the financial management course, presented a letter from Reverend Scataglini indicating his involvement and study, and suffered from addiction.

[47] Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). "[W]hether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008).

[48] Ind. Code § 35-50-2-5 provides that a person who commits a level 3 felony shall be imprisoned for a fixed term of between three and sixteen years with the advisory sentence being nine (9) years.

[49] Our review of the nature of the offense reveals that Alvarez delivered 8.6 grams of adulterated heroin over the course of three sales in February and March 2020. Our review of the character of the offender reveals that, as a juvenile, Alvarez was alleged to have committed "possession of marijuana, hash oil, or HA" in 2009 and was adjudicated a delinquent. Appellant's Appendix Volume II at 146 (capitalization omitted). As an adult, Alvarez was convicted of operating a motor vehicle without ever receiving a license, conversion as a class A misdemeanor, illegal consumption of an alcoholic beverage in 2014 and operating a vehicle while intoxicated endangering a person, operating a vehicle with alcohol concentration equivalent to .15 or more as a class A misdemeanor, and obstruction of justice as a level 6 felony in 2020. At the time of the presentence investigation report ("PSI"), Alvarez had warrants related to pending charges of unlawful possession of a syringe as a level 6 felony, theft as a level 6 felony, and theft as a class A misdemeanor. The PSI indicates that Alvarez was expelled from high school for numerous reasons including fighting and substance use and later earned his diploma through the Boys School in Logansport. It indicates that he described working for an uncle doing odd jobs and not working at the time prior to his arrest due to Covid-19. Alvarez stated he had never been evaluated for any mental health concerns as an adult but did suffer from attention deficit disorder as a child "but pretty well outgrew this."

Id. at 152. He also mentioned attending counseling as a juvenile for anger management. The PSI indicates Alvarez first used alcohol when he was fifteen years old, was a daily user of marijuana from fourteen years old until he was twenty-six years old, experimented with LSD, mushrooms, and ecstasy when he was twenty-five years old, used methamphetamine occasionally "around ages 25 to 26," used cocaine a few times, and became addicted to heroin beginning when he was twenty-five years old. *Id.* The PSI states that Alvarez's overall risk assessment score using the Indiana Risk Assessment System places him in the moderate risk to reoffend category. After due consideration, we conclude that Alvarez has not sustained his burden of establishing that his sentence is inappropriate in light of the nature of the offense and his character.[6]

[50] For the foregoing reasons, we affirm Alvarez's conviction and sentence.

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[6] To the extent Alvarez asserts the trial court abused its discretion in sentencing him because it relied on the drug being heroin and the identification of the drug as heroin was already an element of his conviction, we need not address this issue because we find that his sentence is not inappropriate. *See Chappell v. State*, 966 N.E.2d 124, 134 n.10 (Ind. Ct. App. 2012) (noting that any error in failing to consider the defendant's guilty plea as a mitigating factor is harmless if the sentence is not inappropriate) (citing *Windhorst v. State*, 868 N.E.2d 504, 507 (Ind. 2007) (holding that, in the absence of a proper sentencing order, Indiana appellate courts may either remand for resentencing or exercise their authority to review the sentence pursuant to Ind. Appellate Rule 7(B)), *reh'g denied*; *Mendoza v. State*, 869 N.E.2d 546, 556 (Ind. Ct. App. 2007) (noting that, "even if the trial court is found to have abused its discretion in the process it used to sentence the defendant, the error is harmless if the sentence imposed was not inappropriate"), *trans. denied*), *trans. denied*. Even if we were to address Alvarez's abuse of discretion argument, we would not find it persuasive in light of the record. *See Glass v. State*, 801 N.E.2d 204, 208 (Ind. Ct. App. 2004) (rejecting defendant's argument that the trial court abused its discretion in finding the "expense, harm, and threat" of methamphetamine manufacture and the "scourge" of methamphetamine use on society as aggravating circumstances "[s]ince application of the presumptive sentence takes into account that which is necessary to commit the crime," and holding that the aggravating circumstances at issue were not material elements of the crime of dealing in methamphetamine but instead were more akin to the nature and circumstances of the crime, which a trial court may properly consider as an aggravator).

[51] Affirmed.

Crone, J., and Felix, J., concur.