MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Roland L. Smith,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 29, 2022

Court of Appeals Case No. 21A-CR-1544

Appeal from the Howard Circuit Court

The Honorable Lynn Murray, Judge

Trial Court Cause No. 34C01-1902-F3-373

Najam, Judge.

Statement of the Case

[1] Roland L. Smith appeals his conviction for dealing in a controlled substance, as a Level 3 felony. Smith raises the following three issues for our review, which we revise and restate as follows:

1. Whether the trial court abused its discretion when it admitted certain evidence.

2. Whether the State presented sufficient evidence to support his conviction.

3. Whether the trial court abused its discretion when it ordered his sentence for the present offense to run consecutive to his sentence for another offense.

[2] We affirm.

Facts and Procedural History

[3] In 2018, Labrittney Smith worked as a confidential informant for the Kokomo Police Department Drug Task Force. That summer, based on information Officer Shane Melton had received from Labrittney, the Task Force began an investigation into Amber Cooper. On August 22 and 30, Officer Melton used Labrittney to conduct two controlled buys of heroin from Cooper. When Cooper sold drugs to Labrittney, she sold heroin that she had received from Smith. *See* Tr. Vol. 2 at 136. At some point, Cooper introduced Labrittney to Smith so that Cooper "didn't have to be the middle person." *Id*. at 152.

[4] On December 13, Officer Melton again used Labrittney to conduct a controlled buy of heroin. The plan was for Labrittney to purchase "an eight ball"[1] of heroin in exchange for $455. *Id*. at 71. Officer Melton searched Labrittney and then provided her with money and equipment in order to conduct audio and video surveillance of the exchange. Labrittney then met up with Cooper, and the two drove to a gas station. Once there, Smith got into the backseat of Cooper's vehicle. Smith gave Labrittney a cellophane bag with folded paper that contained a grey substance. Following the transaction, Labrittney gave Officer Melton the "substance she had purchased from" Smith. *Id*. at 72. Officers later confirmed that that substance was 3.54 grams of heroin and diphenhydramine. *See id*. at 169.

[5] Then, on December 19, Task Force Officer Aaron Tarrh used Labrittney to conduct another controlled buy of heroin. Officer Tarrh searched Labrittney and provided her with money and audio and video equipment in order to record the transaction. Labrittney then drove to Cooper's house, got in Cooper's car, and the two drove to pick up Smith. Once in the car, Smith provided Labrittney with "a cellophane wrapper containing folded up pieces of paper" in exchange for $350. *Id*. at 199. After the transaction was complete, Labrittney met Officer Tarrh and provided him with the package she had

[1] An "eight ball" is three and one-half grams. Tr. Vol. 2 at 152.

received from Smith. Officers confirmed that the package contained 3.5 grams of heroin, fentanyl, and diphenhydramine. *See id*. at 172.

[6] And, on December 26, Labrittney conducted another controlled buy of heroin for Officer Melton. On that date, Labrittney again drove to Cooper's house, and the two drove to a location "kind of down from where" Smith was staying. *Id*. at 76. Smith got into the car and gave Labrittney a package that contained "folded paper with a grey/white substance." *Id*. at 77. Labrittney again recorded the exchange. After the transaction was complete, Labrittney provided Officer Melton with the package that she had purchased from Smith. That package contained 3.62 grams of heroin and diphenhydramine.

[7] On February 5, 2019, the State charged Smith under seal with five counts of dealing in a narcotic drug, as Level 4 felonies (Counts 1 through 5).[2] The State also charged Smith with dealing in a narcotic drug, as a Level 3 felony, based on the State's allegation that Smith had dealt an aggregate of at least seven grams but less than twelve grams of heroin between December 13 and 26 (Count 6). And the State sought to enhance the offense in Count 6 to a Level 2 felony based on a prior offense for dealing in a narcotic drug (Count 7).

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[2] Count 1 alleged that Smith had sold heroin on December 13. Count 2 alleged that Smith had sold heroin on December 26. Count 3 alleged that Smith had sold heroin on August 22. Count 4 alleged that Smith had sold heroin on August 30. And Count 5 alleged that Smith had sold heroin on December 19. The State initially charged Smith with Level 3 felonies in Counts 1, 2, and 5 but later amended the charges and reduced them to Level 4 felonies.

[8] Officers arrested Smith on March 5.[3] At that time, he gave consent for officers to search his residence. *See id*. at 218. However, the other individuals who lived there refused to consent, so Officer Melton obtained a search warrant. During the search, officers discovered evidence that caused the State to charge Smith with possession of a narcotic, as a Level 5 felony, in Cause Number 34C01-1903-F3-695 ("F3-695"). The court ultimately entered judgment of conviction on that charge and sentenced Smith to a term of six years. *See* Appellant's App. Vol. 3 at 39.

[9] The court then held a bifurcated jury trial for the instant charges. During the first phase, the State presented the testimony of Officer Melton. Officer Melton testified that he had instructed Labrittney on how to operate the surveillance equipment. He also testified about the procedure that officers used to burn the surveillance files onto their computers. As he testified, the State asked Officer Melton to identify State's Exhibit 15, which he identified as a DVD that he had marked with his badge number and "12/13 of '18." Tr. Vol. 2 at 73. The State then asked Officer Melton: "And did you witness or did you review that video?" *Id*. Officer Melton responded that he had. Officer Melton then stated that he had taken still images from the videos, which images the State admitted as evidence over Smith's objection. Officer Melton testified that one of those

[3] Officers delayed arresting Smith in order to avoid "exposing" Labrittney because she was also conducting controlled buys from individuals other than Smith. Tr. Vol. 2 at 80.

images was a picture of Smith's hand and Labrittney's hand "coming together with the drugs[.]" *Id*. at 78.

[10] The State then questioned Cooper. When the State asked Cooper if she was present at the December 13, 2018, buy, Cooper responded: "I would say I was there. I don't remember the exact dates honestly." *Id*. at 153. She then testified that she had witnessed "a transaction" take place between Smith and Labrittney. *Id*. And she testified that she "assum[ed]" that Smith was selling heroin. *Id*. The State then asked Cooper if she had seen a video of the events from December 13. Cooper responded: "I seen [sic] multiple videos, yes." *Id*. at 154. And when the State asked if Smith was present on that date, Cooper stated: "There's . . . honestly so many videos. Sometimes he was present, sometimes he was not." *Id*. During Cooper's testimony, the State sought to admit Exhibit 15. Smith objected on the ground that the videos lacked a sufficient foundation. The court overruled Smith's objection and admitted the video. Cooper then testified that, on December 26, 2018, she and Labrittney had both purchased drugs from Smith.

[11] Officer Tarrh also testified at Smith's trial. Officer Tarrh testified that he had instructed Labrittney on how to use the surveillance equipment prior to the December 19 buy. Officer Tarrh then testified that he did not personally observe Smith get into Cooper's car on that date. But he testified that, after the transaction, he met Labrittney at a separate location, collected the evidence from her, and deactivated the surveillance equipment.

[12] During his testimony, the State asked Officer Tarrh to identify State's Exhibit 30, which he identified as a "disc containing a video from" the December 19 buy. *Id*. at 203. Officer Tarrh then testified about how that disc was made. Specifically, he testified that, after the buy, one officer had downloaded the video files and that another officer downloaded the audio files while he was present. *See id*. at 203-04. And Officer Tarrh testified that Labrittney did not have the ability to download anything. *See id*. at 204. Officer Tarrh then testified that he had reviewed the video and that it was "a true and accurate description of the events as they took place on December 19, 2018." *Id*. At that point, the State moved to admit Exhibit 30. Smith objected on the ground that it lacked an adequate foundation. The court overruled the objection and admitted the video as evidence.

[13] After the first phase of the trial, the jury found Smith guilty of Counts 1, 2, 5, and 6 but not guilty of Counts 3 and 4. Following the second phase, the jury found that Smith's conviction in Count 6 was not enhanced to a Level 2 felony. Accordingly, the court entered judgments of conviction on Counts 1, 2, 5, and 6 as charged. At the sentencing hearing, the court vacated Smith's convictions on Counts 1, 2, and 5 due to double jeopardy concerns. The court sentenced Smith to fourteen years in the Department of Correction. The court then found that the "circumstances" of Smith's conviction in F3-695 were "separate from" the present offenses and ordered his sentence for the instant conviction to run consecutive to his sentence in F3-695. Tr. Vol. 3 at 64. This appeal ensued.

Discussion and Decision

Issue One: Admission of Evidence

[14] Smith first contends that the trial court erred when it admitted certain evidence. As our Supreme Court has stated:

> Generally, a trial court's ruling on the admission of evidence is accorded "a great deal of deference" on appeal. *Tynes v. State*, 650 N.E.2d 685, 687 (Ind. 1995). "Because the trial court is best able to weigh the evidence and assess witness credibility, we review its rulings on admissibility for abuse of discretion" and only reverse "if a ruling is 'clearly against the logic and effect of the facts and circumstances and the error affects a party's substantial rights.'" *Carpenter v. State*, 18 N.E.3d 998, 1001 (Ind. 2014) (quoting *Clark v. State*, 994 N.E.2d 252, 260 (Ind. 2013)).

Hall v. State, 36 N.E.3d 459, 466 (Ind. 2015). Smith specifically contends that the trial court abused its discretion when it admitted State's Exhibits 15 and 30—the videos from the December 13 and 19 controlled buys, respectively—because the State failed to present sufficient evidence to authenticate the videos pursuant to the silent-witness theory.

[15] Indiana Evidence Rule 901(a) provides that, "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Photographs and videos "can be authenticated through either a witness's testimony or, in instances in which no witness observed what a photograph or video portrays, the silent-witness theory." *McFall v. State*, 71 N.E.3d 383, 388 (Ind. Ct. App. 2017). "In order to authenticate videos or

photographs using the silent-witness theory, there must be evidence describing the process or system that produced the videos or photographs and showing that the process or system produced an accurate result." *Id*. That is, the proponent must show that the photograph or video was not altered in any significant respect, and the date the photograph or video was taken must be established when relevant. *Id*.

[16] Here, Smith first contends that State's Exhibit 15 lacked a sufficient foundation because "Officer Melton did not testify that State's Exhibit 15 was recorded on December 13, and Amber Cooper did not testify that she had reviewed State's Exhibit 15 at all, merely that she had seen multiple videos." Appellant's Br. at 13. However, we agree with the State that there was a sufficient foundation for the court to admit Exhibit 15.

[17] Officer Melton testified that, when officers conduct a controlled buy, they turn the surveillance equipment on, provide it to the informant, and explain how to use it. *See* Tr. Vol. 2 at 57. He then testified that, when the informant comes back, the officers take the equipment to their offices, download the data, and put it onto a DVD. *See id*. At that point, the State asked Officer Melton about the December 13 controlled buy. Officer Melton testified that the "same thing" happens every time, which includes giving the confidential informant "wires" and "instructions" on how to use the equipment. *Id*. at 71-72. Officer Melton then confirmed that he had conducted audio and video surveillance of the controlled buy on that date. Officer Melton then identified State's Exhibit 15 as

a DVD that he had labeled with his badge number and "12/13 of '18." *Id*. at 73. And he testified that he had "witness[ed]" or "review[ed]" that video. *Id*.

[18] Thus, contrary to Smith's contentions on appeal, Officer Melton's testimony demonstrates that he conducted surveillance of the controlled buy on December 13, 2018. And the fact that he labeled State's Exhibit 15 with "12/13 of '18" demonstrates that that DVD was a video of the December 13, 2018, controlled buy. In addition, Officer Melton testified as to the procedure the officers had used for creating a DVD from the footage. Based on that evidence, we hold that the State laid a proper foundation for the admission of State's Exhibit 15. *See Mays v. State*, 907 N.E.2d 128, 132 (Ind. Ct. App. 2009) (holding that the court did not abuse its discretion when it admitted an audio-video recording where the officer testified that he had prepared the equipment for recording and that he personally took the equipment from the informant and downloaded the video onto his computer).

[19] As for State's Exhibit 30, Smith contends that, "[a]t no point during the trial did Amber Cooper identify State's Exhibit 30, state she viewed video recorded from December 19th, or verify the accuracy of any such recording." Appellant's Br. at 13-14. And he asserts that, while Officer Tarrh "believed" that another officer had downloaded the data from the surveillance equipment, the other officer did not provide any testimony "regarding downloading or retrieving the video, nor to the video's unaltered state." *Id*. at 14. As such, he maintains that "the State failed to authenticate the State's Exhibit 30 by testimony of a person present[.]" *Id*. We cannot agree.

[20] Officer Tarrh testified that, on December 19, 2018, he provided Labrittney with "audio/video surveillance equipment" prior to the controlled buy and that he instructed her on how to use it. *Id*. at 197. Officer Tarrh then identified State's Exhibit 30 as a "disc containing a video" from the December 19, 2018, buy. *Id*. at 203. At that point, Officer Tarrh testified as to how the video was made. Specifically, he stated that, after the controlled buy, Labrittney gave him the surveillance equipment. He then testified that, after he received the equipment, he went back to the office with other officers, where one officer downloaded the video files and another downloaded the audio files. And he testified that all of that was done was while he and the other officers were "in the office together working together." *Id*. at 204. Officer Tarrh further testified that Labrittney did not have the ability to download anything from the equipment. And he testified that he had reviewed State's Exhibit 30 and that it was "a true and accurate depiction of the events as they took place on December 19th, 2018." *Id*. We therefore again conclude that the State laid a proper foundation for the admission of State's Exhibit 30. The trial court did not abuse its discretion when it admitted either State's Exhibits 15 or 30 as evidence.[4]

[4] Smith also appears to contend that, because the court improperly admitted the two videos as evidence, it also erred when it admitted any still photographs officers had taken from those videos. As we hold that the court did not abuse its discretion when it admitted the videos, we also hold that it did not abuse its discretion when it admitted the still images derived from the videos.

Issue Two: Sufficiency of the Evidence

[21] Smith next contends that the State failed to present sufficient evidence to support his conviction. Our standard of review on a claim of insufficient evidence is well settled:

> For a sufficiency of the evidence claim, we look only at the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess the credibility of witnesses or reweigh the evidence. *Id*. We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id*.

Love v. State, 73 N.E.3d 693, 696 (Ind. 2017).

[22] To prove that Smith committed dealing in a narcotic drug, as a Level 3 felony, the State was required to show that Smith knowingly or intentionally delivered an aggregate of seven to twelve grams of heroin over a period of not more than ninety days. Ind. Code § 35-48-4-1(d)(4). Here, to support that charge, the State relied on the controlled buys from December 13, December 19, and December 26. On appeal, Smith does not dispute that he sold 3.62 grams of heroin on December 26. However, he contends that the State failed to present sufficient evidence to demonstrate that he sold heroin on either December 13 or December 19 and, thus, that the State failed to prove that he sold between seven and twelve grams of heroin over a ninety-day period.

[23] Smith's argument on this issue is premised on his contention that the court improperly admitted State's Exhibits 15 and 30 and any still images that officers

had taken from those videos. Specifically, Smith maintains that, without State's Exhibits 15 and 30, "there was no evidence offered to connect" him to the still images and that "no actual evidence beyond the improperly admitted video" was presented. Appellant's Br. at 16. But as discussed above, the court did not abuse its discretion when it admitted the video recording of the December 13 and 19 controlled buys and, thus, the court did not err when it admitted the still photographs therefrom. And Officer Melton testified that one of the images from the December 13 video was a picture of Smith's hand and Labrittney's hand "coming together with the drugs[.]" Tr. Vol. 2 at 78.

[24] In addition to the video recordings and still images, the State also presented as evidence Officer Melton's testimony that he had used Labrittney as a confidential informant on December 13. Officer Melton testified that, prior to the buys, he searched Labrittney for any contraband but did not find any. Officer Melton then testified that, after he provided Labrittney with money, she met up with Cooper and the two of them drove to meet Smith, at which point Smith provided Labrittney with a cellophane bag that contained a grey substance. Officer Melton testified that, after the transaction was complete, Labrittney gave him the "substance she had purchased from" Smith. *Id*. at 72. And the State presented evidence that that substance was 3.54 grams of heroin and diphenhydramine. Tr. Vol. 2 at 169. Further, Cooper testified that she "would say [she] was there" for the December 13 buy and that she witnessed "a transaction" take place between Smith and Labrittney. Thus, the evidence most

favorable to the judgment demonstrates that Smith sold Labrittney 3.54 grams of heroin on December 13, 2018.

[25] Similarly, the State presented sufficient evidence to demonstrate that Smith sold Labrittney 3.5 grams of heroin on December 19. Indeed, Officer Tarrh testified that, on that date, he used Labrittney as a confidential informant and that Labrittney and Cooper met up with Smith. He further testified that Smith provided Labrittney with "a cellophane wrapper containing folded up pieces of paper" in exchange for $350. *Id*. at 199. And he testified that, after the transaction, Labrittney gave Officer Tarrh the package she had received from Smith, which contained 3.5 grams of heroin, fentanyl, and diphenhydramine.

[26] Because the State presented sufficient evidence to demonstrate that Smith sold 3.54 grams of heroin on December 13 and 3.5 grams of heroin on December 19, and because Smith does not dispute that he sold 3.62 grams of heroin on December 26, the State presented sufficient evidence to prove that Smith sold between seven and twelve grams of heroin over a period of not more than ninety days. Ind. Code § 35-48-4-1(d)(4). The State therefore presented sufficient evidence to support his conviction for dealing in a narcotic drug, as a Level 3 felony. We affirm Smith's conviction.

Issue Three: Sentencing

[27] Finally, Smith asks us to reduce his sentence 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." Because we generally defer to the judgment of trial courts in sentencing matters, defendants have the burden of persuading us that their sentences are inappropriate. *Schaaf v. State*, 54 N.E.3d 1041, 1044-45 (Ind. Ct. App. 2016). "Whether a sentence is inappropriate ultimately turns on the culpability of the defendant, the severity of the crime, the damage done to others, and a myriad of other factors that come to light in a given case." *Thompson v. State*, 5 N.E.3d 383, 391 (Ind. Ct. App. 2014).

[28] On appeal, Smith does not assert that his sentence in inappropriate in light of the nature of the offense or his character. Rather, Smith contends that his sentence is inappropriate under *Beno v. State*, 581 N.E.2d 922 (Ind. 1991), and its progeny.[5] In *Beno*, the Indiana Supreme Court held that it was manifestly unreasonable to impose consecutive sentences for multiple drug-dealing convictions where the convictions were based upon nearly identical State-sponsored controlled buys. *Id*. at 924. Then, in *Eckelbarger v. State*, the Court extended the *Beno* principle to hold that consecutive sentences were inappropriate for drug convictions arising from two controlled buys and a

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[5] The State contends that Smith has waived this issue for our review. The State is correct that Indiana Appellate Rule 46(A)(8)(a) requires an appellant to support each contention with "citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on[.]" Here, Smith does not support his contention with any citation to the Appendix or parts of the Record on Appeal. Thus, Smith has failed to comply with the appellate rules. However, the failure to comply with the appellate rules does not necessarily result in waiver of an issue. *See Vandenburg v. Vandenburgh*, 916 N.E.2d 723, 729 (Ind. Ct. App. 2009). Rather, an issue is waived if the failure to comply with the appellate rules impedes our review. *See id*. Here, given the fact that Smith provided citations to the Record in his Statement of the Facts and given our preference for resolving issues on their merits, we will address his contention on this issue.

subsequent search of the defendant's home. 51 N.E.3d 169 (Ind. 2016). The Court reasoned that the sentences arising from the search should be served concurrent with the sentences arising from the controlled buys because the convictions arising from the search were "supported by evidence seized pursuant to a search warrant procured based on the dealing methamphetamine by delivery counts[.]" *Id*. at 170.

[29] More recently, in *Walton v. State*, the State conducted a series of controlled buys and then obtained a warrant to search Walton's home. 81 N.E.3d 679, 680 (Ind. Ct. App. 2017). The controlled buys resulted in five convictions for dealing, and the search resulted in additional drug-related convictions. *Id*. Walton was convicted on all counts, and the court imposed consecutive sentences of thirty-four years for the controlled buys and thirty years for the additional drug charges. *Id*. at 681. On appeal, this Court held that, "because the drug-related convictions are supported by evidence seized as a direct result of the controlled buys," running the sentences consecutively "would be inappropriate." *Id*. at 683.

[30] Here, Smith contends that this matter "is nearly identical to the circumstances in *Walton*" in that his conviction in F3-695 "was supported by evidence seized as a direct result of the controlled buys[.]" Appellant's Br. at 17. Thus, he contends that the proper remedy is to revise his sentence for the instant offense and order it to run concurrent with his sentence in F3-695. We cannot agree.

[31] The facts demonstrate that the State conducted a series of controlled buys from Smith in December 2018. Then, in February 2019, the State charged Smith under seal with several counts of dealing in a controlled substance based on the controlled buys, and the court issued a warrant for his arrest. *See* Appellant's App. Vol. 2 at 3, 88-89. And, on March 5, officers arrested Smith for the dealing charges. At that time, Smith took officers to his residence. *See* Tr. Vol. 3 at 49. Smith consented to a search of his residence, but other individuals who lived there did not, so officers obtained a search warrant. *See* Tr. Vol. 2 at 218. Upon searching the residence, officers discovered items that led to his conviction and sentence in F3-695.

[32] However, there is nothing in the record to indicate why the State sought to search Smith's home on that date or on what grounds. Indeed, Smith has not provided a copy of the application for the search warrant in his Appendix, nor did he elicit any testimony from the officers as to why they searched his home several months after they had completed the controlled buys. Further, the State had already charged Smith in the instant offense, and the court had issued a warrant for his arrest at the time officers obtained the search warrant. In other words, the investigation into the controlled buys was completed, and the instant cause had already been initiated at the time officers applied to search Smith's home. As a result, Smith has not demonstrated that the search warrant that led to his charge in F3-695 was obtained as a direct result of the controlled buys.

[33] Because Smith has not demonstrated that his charge in F3-695 was derived from his earlier dealing charges, we cannot say that the trial court abused its

discretion when it imposed consecutive sentences. *See Cannon v. State*, 117 N.E.3d 643, 647 (Ind. Ct. App. 2018) (holding that the court did not abuse its discretion in imposing consecutive sentences where the officers obtained a warrant to search the defendant's home after they had completed a series of controlled buys, filed charges, and obtained a warrant for the defendant's arrest). We therefore affirm Smith's sentence.

Conclusion

[34] In sum, the trial court did not abuse its discretion when it admitted State's Exhibits 15 and 30 as evidence. In addition, the State presented sufficient evidence to support Smith's conviction. Finally, the trial court did not abuse its discretion when it sentenced Smith. We therefore affirm Smith's convictions and sentence.

[35] Affirmed.

Vaidik, J., and Weissmann, J., concur.