## MEMORANDUM DECISION





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# IN THE COURT OF APPEALS OF INDIANA

Levell Stewart,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff.*

June 27, 2023

Court of Appeals Case No. 22A-CR-2953

Appeal from the Marion Superior Court

The Honorable Helen W. Marchal, Judge

Trial Court Cause No. 49D26-2201-F6-572

**Memorandum Decision by Judge Tavitas**
Judges Bailey and Kenworthy concur.

**Tavitas, Judge.**

## Case Summary

[1] Levell Stewart appeals his conviction for possession of a narcotic drug, a Level 6 felony. Stewart argues that the trial court abused its discretion by admitting drug evidence that was not included in the State's final exhibit list. We find no error and, accordingly, affirm.

## Issue

[2] Stewart raises one issue on appeal, which we restate as whether the trial court abused its discretion by admitting drug evidence that was not included in the State's final exhibit list.

## Facts

[3] On November 17, 2021, Stewart was arrested at his workplace in Marion County pursuant to a warrant for an unrelated matter. Law enforcement then transported Stewart to the Marion County Arrestee Processing Center. At the processing center, Marion County Sheriff's Department Deputy Shane Durocher instructed Stewart to remove his shoes and socks. When Deputy Durocher turned Stewart's left sock inside out, a baggie containing two folded pieces of aluminum foil fell out of the sock. Deputy Durocher observed that one of the pieces of foil contained a white powdery substance, which laboratory testing later revealed to be fentanyl.

[4] On January 6, 2022, the State charged Stewart with possession of a narcotic drug, a Level 6 felony. According to the probable cause affidavit, the baggie and pieces of foil were placed in a "HSE [heat sealed envelope] and transported [to] the [Indianapolis Metropolitan Police Department] property room." Appellant's App. Vol. II p. 19. Stewart obtained the probable cause affidavit no later than January 18, 2022.

[5] At the August 5, 2022 pretrial conference, Stewart requested that the trial court continue the jury trial because the State had not accommodated his request to view the drug evidence in person, or in the alternative, to receive photographs of the evidence. The prosecutor explained that it was "attempting to fulfill th[e] request and not stalling." Tr. Vol. II p. 50. The trial court granted the motion to continue and set a discovery deadline for August 26, 2022.

[6] By August 26, 2022, the State had neither produced photographs of the drug evidence nor permitted defense counsel to view it in person, and Stewart moved to exclude the evidence. The prosecutor explained that she had been having difficulty contacting the law enforcement officials responsible for the evidence but would be able to take photographs or permit defense counsel to view the evidence in person later that afternoon. Defense counsel stated that she would accept "photos in lieu of" viewing the evidence in person. *Id*. at 58.

[7] The trial court denied the motion to exclude the evidence and ordered the State to produce the photographs by September 2, 2021; the State produced them on August 30, 2022. On October 24, 2022, the State filed its final witness and

exhibit list, which listed as exhibits "[p]hotos"; "[l]abs"; "[p]olice [r]eport"; and "[o]fficer's [r]eport." Appellant's App. Vol. II p. 67.[1]

[8] The trial court held a jury trial on October 26, 2021. Deputy Durocher testified regarding the baggie of drugs falling out of Stewart's sock. The State introduced photographs of the drug evidence, but when the State sought to admit the physical evidence itself, Stewart objected on the grounds that the physical evidence was not listed on the State's final exhibit list and, again, moved to exclude the evidence.

[9] Defense counsel explained that Stewart was prejudiced by the State's introduction of the physical evidence because:

> The bag has physical dimension to it. The dimension and that – that you can actually see the front and the back plays into the trial preparation we did including all the way up till this morning, everybody has gone over the final exhibit list and everything. So, the prejudice would be it would alter the – potentially the way that we approach the case as far as potential closing argument; what we would ask on cross. Just preparation in general . . . .

Tr. Vol. II p. 139. Defense counsel further stated:

> [I]t prejudices us in that it removes a defense that we would've had when we were starting today. I mean this trial began. We

[1] On October 25, 2022, the State amended its final witness and exhibit list to add information regarding its witnesses but did not alter its exhibits.

> [can't make] the argument that they did not see physical evidence.

*Id*. at 143. The State conceded that the physical evidence was "inadvertently left off of the exhibit list" but explained that Stewart was aware of the physical evidence and that the parties never agreed that the physical evidence would not be introduced at trial. *Id*. at 141.

[10] The trial court declined to exclude the physical evidence, stating:

> I don't find that the belated introduction of this evidence – that it should be excluded at this point. If it was something completely, you know, out of left field, not mentioned in the probable cause affidavit, then most certainly.

*Id*. at 144. The trial court, however, admonished the State to "please do better next time." *Id*. The trial continued, and the State presented testimony that the law enforcement officials responsible for the evidence followed the "standard operating procedures" for handling and maintaining the drug evidence. *Id*. at 151. Additionally, the State presented testimony that laboratory testing revealed the powdery substance to be .1921 grams of fentanyl.

[11] The jury found Stewart guilty of possession of a narcotic drug. The trial court entered judgment of conviction and sentenced Stewart to 365 days in the Marion County Jail with 316 days suspended. Stewart now appeals.

## Discussion and Decision

[12] Stewart argues that the trial court abused its discretion by admitting physical evidence of the drugs when that evidence was not included in the State's final exhibit list. We disagree.

[13] Trial courts have "broad latitude" with respect to fashioning remedies for discovery violations, and their rulings receive "great deference" on appeal. *Cain v. State*, 955 N.E.2d 714, 718 (Ind. 2011) (quoting *Williams v. State*, 714 N.E.2d 644, 649 (Ind. 1999)). "The primary factors that a trial court should consider when addressing a discovery violation are 'whether the breach was intentional or in bad faith and whether substantial prejudice has resulted.'" *Id*. (quoting *Wiseheart v. State*, 491 N.E.2d 985, 988 (Ind. 1986)). Generally, the preferred remedy for a discovery violation is a continuance. *Id*. "Exclusion of evidence is only appropriate if the defendant shows 'that the State's actions were deliberate or otherwise reprehensible, and this conduct prevented the defendant from receiving a fair trial.'" *Id*. (quoting *Warren v. State*, 725 N.E.2d 828, 832 (Ind. 2000)).[2]

[2] The State argues, as a threshold issue, that Stewart has waived his challenge to the trial court's admission of the drug evidence by failing to request a continuance. *Warren*, 725 N.E.2d at 828 (noting that "[f]ailure to alternatively request a continuance upon moving to exclude evidence, where a continuance may be an appropriate remedy, constitutes a waiver of any alleged error"). Stewart contends that he was not required to request a continuance because a continuance would not have been "an effective remedy." Appellant's Br. p. 14 (quoting *Long v. State*, 431 N.E.2d 875, 877 (Ind. Ct. App. 1982)). The State does not dispute Stewart's contention, and we, therefore, address Stewart's argument on the merits regardless of any possible waiver. *See Pierce v. State,* 29 N.E.3d 1258, 1267 (Ind. 2015) (noting that appellate courts prefer to resolve cases on the merits instead of on procedural grounds like waiver).

[14] In support of his argument that the trial court should have excluded the evidence, Stewart relies on *Lewis v. State*, 700 N.E.2d 485 (Ind. Ct. App. 1998), and *Beauchamp v. State*, 788 N.E.2d 881 (Ind. Ct. App. 2003). In *Lewis*, the defendant was charged with burglary, and before trial, the State "affirmatively represented to the court and to defense counsel that there would be no fingerprint evidence." 700 N.E.2d at 486. Nonetheless, two days before trial, the State informed the defendant that it intended to introduce fingerprint evidence at trial. *Id*. The trial court denied the defendant's motion to exclude the evidence. *Id*. On appeal, we noted that the State characterized the fingerprint evidence as "awfully damning" for the defendant, and we reversed. *Id*. at 487.

[15] In *Beauchamp*, Beauchamp was charged with several offenses after his child died from head injuries. 788 N.E.2d at 884. Beauchamp's theory of the case was that the child died from previous, unrelated injuries, not the recent injuries that were at issue in the case. *Id*. at 885. Before trial, Beauchamp deposed one of the State's medical experts, who "was unable to form an opinion as to the relationship" between the child's previous and recent injuries. *Id*. The State did not provide "any reports or summaries of [the expert's] expected testimony to Beauchamp's counsel that differed from the deposition testimony." *Id*. At trial, however, the expert testified on rebuttal that Beauchamp's "explanation for [the child's] injuries . . . was not compatible." *Id*. On appeal, we held that the expert's testimony should have been excluded. *Id*. at 894.

[16] We find *Lewis* and *Beauchamp* distinguishable. Unlike in *Lewis*, the State here included photographs of the evidence on the exhibit list, "inadvertently" omitted the physical evidence from its exhibit list, and never affirmatively represented that it would not offer the physical evidence at trial. Tr. Vol. II p. 141. Further, unlike the fingerprints in *Lewis*, the physical evidence here was not crucial in light of the other evidence presented at trial. Additionally, unlike *Beauchamp*, the physical evidence itself did not change in the time between discovery and trial. Stewart was aware of the physical evidence and had the opportunity to view it before trial. He simply elected to receive photographs of the evidence instead.

[17] Although the State failed to include the physical evidence on its final exhibit list, we cannot say that the State's conduct was deliberate or reprehensible. The State initially had difficulty contacting law enforcement officials responsible for the evidence but ultimately produced photographs of the evidence for the defense two months before trial. The prosecutor explained that the omission of the physical evidence from the exhibit list was inadvertent and not prejudicial because Stewart was aware of the physical evidence and turned down an opportunity to view it in person.

[18] We also cannot say that the failure to exclude the physical evidence resulted in the denial of a fair trial. Again, Stewart had knowledge of the physical evidence but elected to receive photographs of the drugs. Moreover, at trial, the State presented testimony that the powdery substance was recovered from a baggie in Stewart's sock, that law enforcement followed the operating procedures for

handling and maintaining that evidence, and that the powdery substance tested positive for fentanyl. We cannot say that the admission of the physical evidence made any difference in the outcome of the trial. *Cf. Beauchamp*, 788 N.E.2d at 896-97 (finding that the failure to exclude photographs, which depicted the child in a healthy and happy state prior to his admission to the hospital and which were not produced to the defense before trial, was harmless in light of testimony that the child was in good health, energetic, and playful at the time). The trial court, thus, did not abuse its discretion by admitting the physical evidence. Accordingly, we affirm.

## Conclusion

[19] The trial court did not abuse its discretion by admitting the physical evidence at trial. Accordingly, we affirm.

[20] Affirmed.

Bailey, J., and Kenworthy, J., concur.