

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Gabriel Kowalskey,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 27, 2023

Court of Appeals Case No.
22A-CR-1629

Appeal from the
Hendricks Superior Court

The Honorable
Stephenie D. Lemay-Luken, Judge

Trial Court Cause No.
32D05-2203-F2-6

Memorandum Decision by Judge Foley
Judges Robb and Mathias concur.

Foley, Judge.

[1] Gabriel Kowalskey (“Kowalskey”) was convicted after a jury trial of dealing in methamphetamine¹ as a Level 2 felony, dealing in a substance represented to be a controlled substance² as a Level 6 felony, unlawful possession of a syringe³ as a Level 6 felony, and identity deception⁴ as a Level 6 felony, and he was found to be a habitual offender. The trial court sentenced him to an aggregate sentence of thirty-two years executed. On appeal, Kowalskey raises several issues for our review that we restate as:

- I. Whether the trial court abused its discretion in admitting the evidence discovered during the search of the car because the traffic stop exceeded the time necessary to complete the investigation;
- II. Whether the State presented sufficient evidence to support Kowalskey’s conviction for identity deception; and
- III. Whether there was a material variance between the charging information and the evidence used to prove the charge of identity deception.

[2] We affirm.

¹ Ind. Code § 35-48-4-1.1(a)(2), (e)(1).

² I.C. § 35-48-4-4.6(a).

³ I.C. § 16-42-19-18.

⁴ I.C. § 35-43-5-3.5(a).

Facts and Procedural History

- [3] At approximately 12:43 a.m. on March 12, 2022, Hendricks County Sheriff's Deputy Cole Smith ("Deputy Smith") initiated a traffic stop of a car because the window tint was darker than allowed by Indiana law. The tint was so dark that he "could not see any occupants inside the vehicle or identify the driver." Tr. Vol. II p. 175. The car turned into a McDonald's parking lot, pulling into the drive-thru lane. Deputy Smith used his intercom to instruct the driver, who was later identified as Billy Mackey ("Mackey"), to pull the car into a parking space. Mackey did so, and Deputy Smith exited his police vehicle and approached the rear passenger-side window of Mackey's car.
- [4] When Deputy Smith reached the rear passenger window, he could not see how many people were inside the car and knocked on the window to get the occupants' attention. Someone inside the vehicle rolled the window down, and Deputy Smith was able to see that there were five occupants inside the car, Mackey, a front-seat passenger, and three passengers in the backseat. A man, later identified as Kowalskey, was seated in the middle of the three backseat passengers and was wearing a Pittsburgh Pirates shirt. Deputy Smith observed that all three passengers in the back seat had bloodshot, glassy eyes, and constricted pupils, which, based on his training and experience, was unusual for that time of night and an indicator of possible drug use. He also observed that the backseat passengers had coloring books and gel pens, which he associated with methamphetamine use because through his training and experience, it was a "common activity associated with methamphetamine use, both in the

downside effect and while under the influence due to hyperactivity.” Tr. Vol. II p. 178.

[5] Deputy Smith began speaking with Mackey and explained the reason for the stop—the tinted windows—but did not make a lot of eye contact with him due to Deputy Smith’s focus on the back seat passengers. Deputy Smith then asked everyone in the car for their identification. Mackey provided his driver’s license, and none of the passengers had identification, so Deputy Smith had them write their names and birth dates down on a note pad. Deputy Smith returned to his car to run Mackey’s driver’s license and left the notepad with the passengers. He determined that Mackey had a valid driver’s license and returned to retrieve his notebook. Deputy Smith told Mackey that he needed to get his window tint inspected and would be giving him a warning. At that time, only one of the passengers had written down her information, and Kowalskey was holding the notebook. Deputy Smith repeated his request that all of the passengers write down their name and birth dates. Three of the passengers wrote down names and birth dates “immediately,” but “Kowalskey seemed to struggle with” the task. Tr. Vol. II p. 181. Kowalskey wrote down a fictitious name, “Gerard Green,” and a birthdate. *Id.* at 182–83. Another passenger, Madison Simpson (“Simpson”), wrote down the name of her sister, Jessica Simpson, and it was later discovered that Simpson had a warrant in Boone County. After receiving the information from the passengers, Deputy Smith returned to his police vehicle to try to identify them.

[6] Deputy Smith was able to identify the two other passengers who gave correct names. The name “Gerard Green” with the date of birth Kowalskey provided did not produce a valid return, and Deputy Smith noticed that Simpson did not look like the photograph that returned for Jessica Simpson. *Id.* He then spoke to Kowalskey to gather more information about his identity, and Kowalskey told him that “Gerard Green” was from Cincinnati, Ohio. Deputy Smith went back to his police vehicle to search the Ohio database for “Gerard Green,” and again, there was no return for “Gerard Green.” Deputy Smith then contacted dispatch to request that they conduct a search. Deputy Smith returned to Mackey’s car and continued to try to identify Kowalskey, who maintained that he was “Gerard Green,” and then returned to his police vehicle to continue to search.

[7] Dispatch was also unable to find “Gerard Green” with the birth date Kowalskey provided in either Indiana or Ohio, and Deputy Smith called for additional officers to respond to the scene because he believed that Kowalskey had lied about his identity. Hendricks County Sheriff’s Deputy Robert Lenover (“Deputy Lenover”) arrived to assist and watched the occupants of the car while Deputy Smith removed Kowalskey from the car. Kowalskey maintained that he was “Gerard Green,” and Smith informed Kowalskey that he was being arrested. Deputy Smith performed a search incident to arrest and found “two wads of cash” totaling approximately \$4,500. *Id.* at 185.

[8] While Deputy Smith searched Kowalskey, Deputy Lenover, who was a drug recognition expert, observed that Mackey showed “signs of possible narcotics

usage, as well as impairment.” Tr. Vol. II pp. 186; Tr. Vol. III p. 58. Deputy Lenover observed that the occupants of the car had constricted pupils, which was unusual for the time of night, and noted that there were “many butane torches” inside the car that are used to heat narcotics for smoking, inhaling, or injecting. Tr. Vol. III pp. 61, 63. The deputies determined that they would transport Mackey to a police station to conduct field sobriety tests due to the weather conditions.

[9] At approximately 1:34 a.m., Hendricks County Sheriff’s Deputy Kyle Schaefer (“Deputy Schaefer”) responded to the scene with his canine partner, Deaks. All the occupants were removed from the car, and Deputy Schaefer had Deaks conduct a “free-air sniff” around the car. *Id.* at 43. Deaks alerted to the odor of narcotics in the car, and the deputies then searched the car. In the trunk, they found a Pittsburgh Pirates bag, which matched the logo on the shirt that Kowalskey was wearing. Inside the bag, the deputies found Simpson’s identification, Kowalskey’s identification, several male clothing and male hygiene items, two boxes of new syringes, a loaded syringe, an envelope containing what later was determined to be 10.4 grams of methamphetamine, and an envelope containing over 100 pills with markings that indicated they were Xanax, but were later determined to be Clonazepam, which is not a controlled substance. In later testing, it was determined that Kowalskey’s fingerprints were on the envelopes. Later, when Kowalskey was booked into jail, a further search was done, and one blue pill matching the pills found in the bag was discovered in Kowalskey’s pocket.

[10] The State charged Kowalskey with (1) Level 2 felony dealing in methamphetamine, (2) Level 6 felony dealing in a substance represented to be a controlled substance, (3) Level 6 felony unlawful possession of a syringe, and (4) Level 6 felony identity deception and alleged that he was a habitual offender. On May 9 and 10, 2022, the trial court conducted a two-phase jury trial. At trial, Kowalskey objected to the admission of the evidence found during the search of the vehicle and on his person, arguing that the traffic stop was unlawfully extended prior to the dog sniff. Kowalskey did not raise any objection to the charging information, or to the final instructions or argue that there was a variance in the identity deception charge that caused him prejudice. At trial, Kowalskey argued to the jury that he did not commit identity deception because he “wrote down a fictitious name” but that he “wasn’t trying to defraud anyone.” Tr. Vol. IV p. 11. At the conclusion of the jury trial, the jury found Kowalskey guilty of all counts and of being a habitual offender. The trial court sentenced him to an aggregate sentence of thirty-two years executed. Kowalskey now appeals.

Discussion and Decision

I. Admission of Evidence

[11] Kowalskey argues that the trial court abused its discretion in admitting the evidence discovered during the search of the car and his person because, although the initial traffic stop was constitutional, the stop was unreasonably prolonged such that it became unconstitutional, and therefore, the evidence should not have been admitted. The trial court has broad discretion to rule on

the admissibility of evidence. *Thomas v. State*, 81 N.E.3d 621, 624 (Ind. 2017). Generally, evidentiary rulings are reviewed for an abuse of discretion, and we will reverse when admission is clearly against the logic and effect of the facts and circumstances. *Id.* However, when a challenge to an evidentiary ruling is predicated on the constitutionality of a search or seizure of evidence, it raises a question of law that is reviewed de novo. *Id.*

[12] “It is unequivocal under our jurisprudence that even a minor traffic violation is sufficient to give an officer probable cause to stop the driver of a vehicle.” *Austin v. State*, 997 N.E.2d 1027, 1034 (Ind. 2013). A seizure that is lawful at its inception may violate the Fourth Amendment “if its manner of execution unreasonably infringes interests protected by the Constitution.” *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). “A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.” *Id.* Moreover, a dog sniff is not a search protected by the Fourth Amendment. *State v. Hobbs*, 933 N.E.2d 1281, 1286 (Ind. 2010) (citing *Caballes*, 543 U.S. 405 at 490). Therefore, “no degree of suspicion is required to summon the canine unit to the scene to conduct an exterior sniff of the car or to conduct the sniff itself.” *Id.* A narcotics dog sweep “is an unreasonable investigatory detention if the motorist is held for longer than necessary to complete the officer’s work related to the traffic violation and the officer lacks reasonable suspicion that the motorist is engaged in criminal activity.” *Austin*, 997 N.E.2d at 1034.

[13] Here, after Deputy Smith initiated the valid traffic stop on Mackey's car, he made contact with the occupants of the car and explained the reason for the stop. At that time, he observed that the passengers in the car all had bloodshot, glassy eyes, and constricted pupils even though it was nighttime, which are all indicators of recent drug use. He then asked everyone in the car for their identification, and Mackey was the only one who had a driver's license, so Deputy Smith had the passengers write their names and birth dates down on a note pad. When asked by Deputy Smith to write down their information, three of the passengers wrote down names and birth dates "immediately," but "Kowalskey seemed to struggle" with the task. Tr. Vol. II p. 181. Kowalskey eventually wrote down a fictitious name, "Gerard Green," and a birthdate. *Id.* at 182–83. Simpson wrote down her sister's name and date of birth because Simpson had a warrant from another county. After obtaining the names and birthdates from the passengers, Deputy Smith attempted several times to get a valid return on the name Gerard Green that Kowalskey had provided but was unable to do so. In his attempts to ascertain Kowalskey's identity, Deputy Smith asked for clarification, and Kowalskey told the officer that he was from Ohio. Deputy Smith was unable to get a valid return through Ohio.

[14] Within approximately eighteen minutes of the initial traffic stop, Deputy Smith called for backup because he believed that Kowalskey was lying to him about his identity. Within approximately three minutes of that call, a backup officer arrived, and approximately two minutes later, Deputy Smith arrested Kowalskey. At the time, not only did Deputy Smith have reasonable suspicion

that there was drug activity in the car, he had probable cause to believe that Kowalskey committed identity deception when he presented a fake name and birthdate. *See* Ind. Code § 35-43-5-3.5(a) (“[A] person who, with intent to harm or defraud another person, knowingly or intentionally obtains, possesses, transfers, or uses identifying information to profess to be another person, commits identity deception, a Level 6 felony.”). Probable cause exists “when the totality of the circumstances establishes ‘a fair probability’ . . . of criminal activity, contraband, or evidence of a crime.” *Hodges v. State*, 125 N.E.3d 578, 581–82 (Ind. 2019) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). To determine if probable cause existed, we view the totality of the circumstances “from the standpoint of an objectively reasonable police officer.” *Id.* at 582. “A law enforcement officer may arrest a person when the officer has . . . probable cause to believe the person has committed or attempted to commit, or is committing or attempting to commit, a felony . . . or has committed or attempted to commit a misdemeanor in the officer’s presence.” I.C. § 35-33-1-1(a)(2), (4). Although Deputy Smith tried several times and in two different states, the fake name that Kowalskey provided and purported to be his name never produced a valid return from either his in-car computer or through dispatch. Deputy Smith asked Kowalskey multiple times if “Gerard Green” from Cincinnati was his accurate identity, and Kowalskey maintained that it was, never providing his real name. Deputy Smith had probable cause to arrest Kowalskey.

[15] At approximately the same time that Deputy Smith was placing Kowalskey under arrest and performing a search incident to arrest, Deputy Lenover noted that he believed that Mackey, the driver of the car, was impaired. Deputy Lenover, who was a drug recognition expert, observed that Mackey showed “signs of possible narcotics usage, as well as impairment.” Tr. Vol. II pp. 186; Tr. Vol. III p. 58. Deputy Lenover further observed that all the occupants of the car had constricted pupils, which was unusual for the time of night, and noted that there were “many butane torches” inside the car that are used to heat narcotics for smoking, inhaling, or injecting. Tr. Vol. III pp. 61, 63. These observations led to reasonable suspicion that Mackey was committing a crime that required further investigation. *See* I.C. § 9-30-5-1(c) (“A person who operates a vehicle with a controlled substance...or its metabolite in the person’s blood commits a Class C misdemeanor”). The deputies determined that they would transport Mackey to a police station to conduct field sobriety tests due to the weather conditions.

[16] While the investigations into the crimes of Kowalskey and Mackey were ongoing, Deputy Schaefer arrived at the scene with Deaks and conducted a free-air sniff around the car. Deaks alerted to the odor of narcotics in the car, and the deputies then searched the car. When Deaks alerted, he gave the officers further probable cause to search the vehicle under a valid warrant exception. An alert from a dog sniff gives police probable cause to search a vehicle, triggering the automobile exception to the warrant requirement. *Hobbs*, 933 N.E.2d at 1286. In the trunk, they found a Pittsburgh Pirates bag, which

contained Simpson's identification, Kowalskey's identification, male clothing and male hygiene items, two boxes of new syringes, a loaded syringe, an envelope containing 10.4 grams of methamphetamine, and an envelope containing over 100 pills with markings that made them appear to be Xanax but were later determined to be Clonazepam.

[17] A constitutional extension of the traffic stop requires reasonable suspicion of some criminal activity other than the activity that prompted the original stop. *Powers v. State*, 190 N.E.3d 440, 445 (Ind. Ct. App. 2022). Here, the stop was not unreasonably prolonged due to the dog sniff. The stop was ongoing, and the deputies were involved in a continuing criminal investigation when the dog sniff was performed because Kowalskey continued to lie about his identity and insist that he was "Gerard Green," and the deputies were also investigating whether Mackey was impaired. *See Hansbrough v. State*, 49 N.E.3d 1112, 1115–16 (Ind. Ct. App. 2016) (traffic stop not extended by dog sniff when officer was still checking defendant's name for outstanding warrants), *trans. denied*.

[18] Although approximately fifty-one minutes elapsed between the initial traffic stop and the dog sniff, the traffic stop was not complete when Deaks began his sniff because the identity deception and operating while impaired investigations were still ongoing. Although Kowalskey argues that the tasks related to the initial traffic stop should have been completed well before Deaks arrived, this argument ignores that he affirmatively extended the traffic stop by providing false identification information to Deputy Smith that necessitated further investigation. He also asserts that the investigation into Mackey's impairment

did not extend the stop because Mackey was simply allowed to leave the scene; however, the testimony reflected that Deputy Smith began performing field sobriety tests on Mackey but decided to transport him to a police station to complete the investigation due to weather conditions. Tr. Vol. II p. 187. Under the circumstances, the traffic stop was not extended due to dog sniff, but instead, by the conduct of Mackey and Kowalskey, which necessitated further independent investigation. We, therefore, conclude that subsequent search of the car was not unconstitutional. The trial court did not abuse its discretion in admitting the evidence discovered during that search.

II. Sufficient Evidence

[19] Kowalskey next argues that the State did not present sufficient evidence to support his conviction for identity deception. When there is a challenge to the sufficiency of the evidence, “[w]e neither reweigh evidence nor judge witness credibility.” *Gibson v. State*, 51 N.E.3d 204, 210 (Ind. 2016), *reh’g denied, cert. denied*. Instead, “we consider only that evidence most favorable to the judgment together with all reasonable inferences drawn therefrom.” *Id.* (internal quotation marks, bracket, and ellipses omitted). “We will affirm the judgment if it is supported by substantial evidence of probative value even if there is some conflict in that evidence.” *Id.* (internal quotation marks, ellipses, and brackets omitted). Further, “[w]e will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.” *Love v. State*, 73 N.E.3d 693, 696 (Ind. 2017).

[20] To convict Kowalskey of identity deception, the State was required to prove that he, “with intent to harm or defraud another person, knowingly or intentionally obtain[ed], possesse[d], transfer[red], or use[d] identifying information to profess to be another person” I.C. § 35-43-5-3.5(a). “It is not a defense in a prosecution under subsection (a) . . . that no person was harmed or defrauded.” I.C. § 35-43-5-3.5(d). For purposes of this statute, “identifying information” is defined as “information, genuine or fabricated, that identifies or purports to identify a person” and includes a name or date of birth. I.C. § 35-42-5-1(i)(1). Kowalskey concedes that the State proved the intentional use of identifying information to profess to be another person. He only argues that the State failed to present evidence to prove that he had the intent to defraud another person when he gave false information to Deputy Smith.

[21] “An intent to defraud involves an intent to deceive and thereby work a reliance and an injury.” *Diallo v. State*, 928 N.E.2d 250, 252 (Ind. Ct. App. 2010) (citation omitted). “[T]here must be a *potential benefit to the maker or potential injury to the defrauded party.*” *Id.* at 252 (quoting *Jacobs v. State*, 640 N.E.2d 61, 65 (Ind. Ct. App. 1994), *trans. denied*) (emphasis added). Because intent is a mental state, the factfinder often must look to the reasonable inferences based upon an examination of the surrounding circumstances to determine whether—from the person’s conduct and the natural consequences therefrom—there is a showing or inference of the requisite criminal intent. *Id.*

[22] Here, Kowalskey repeatedly told Deputy Smith that his name was “Gerard Green” to avoid detection by the police and with the intent to harm or defraud

the police. It was Kowalskey's intent to misrepresent a material fact—his name and identity—in order to place the police at a disadvantage—and to gain an advantage of his own. By giving a false name, Kowalskey was attempting to gain an advantage over the police to avoid detection and to conceal his criminal activities, dealing in over ten grams of methamphetamine and dealing in pills purporting to be Xanax. *See Thornton v. State*, 636 N.E.2d 140, 141-42 (Ind. Ct. App. 1994) (signing false name to fingerprint card was sufficient evidence of intent to defraud by gaining advantage over police), *trans. denied*.

[23] Although Kowalskey contends that, under the circumstances, Deputy Smith was not harmed by Kowalskey's deception because he was not taken in by the deception and recognized almost immediately that Kowalskey was being deceitful, it is not a defense under the statute that "no person was harmed or defrauded." *See* I.C. § 35-43-5-3.5(d). Therefore, it does not matter that Deputy Smith was not harmed or defrauded by Kowalskey's false statements. Sufficient evidence was presented that when Kowalsky gave Deputy Smith a false name, Kowalskey intended to deceive him and to obtain a potential benefit by avoiding detection of his drug offenses. We, therefore, conclude that sufficient evidence was presented to support Kowalskey's conviction for identity deception.

III. Variance

[24] Lastly, Kowalskey argues that there was a material variance between the charging information and the evidence presented at trial. However, Kowalskey did not raise this issue to the trial court and did not object to the charging

information. “A variance is an essential difference between proof and pleading.” *Reinhardt v. State*, 881 N.E.2d 15, 17 (Ind. Ct. App. 2008). A variance issue is waived on appeal unless the defendant makes a specific objection at trial. *Id.* (citing *Hall v. State*, 791 N.E.2d 257, 261 (Ind. Ct. App. 2003)). Further, “[a]bsent fundamental error, [a] failure to lodge a specific objection at trial waive[s] any material variance issue.” *Bayes v. State*, 779 N.E.2d 77, 80 (Ind. Ct. App. 2002), *trans. denied*.

[25] Kowalskey did not object before or during the trial to the challenged difference between the charging information and the proof at trial that he intended to harm or defraud another person by using identifying information to profess to be another person. He also never objected to the final instructions or verdict form. “[A] trial court cannot be found to have erred as to an issue or argument that it never had an opportunity to consider,” and “[a]ccordingly, as a general rule, a party may not present an argument or issue on appeal unless the party raised that argument or issue before the trial court.” *Washington v. State*, 808 N.E.2d 617, 625 (Ind. 2004). By failing to object in the trial court, Kowalskey has waived his variance argument on appeal.⁵

⁵ Kowalskey has also failed to raise any argument that the challenged difference between the charging information and the proof at trial was fundamental error. Although an issue is generally waived on appeal if not raised at the trial level, an appellate court may address the issue if a party alleges fundamental error occurred. *Curtis v. State*, 948 N.E.2d 1143, 1148 (Ind. 2011). Because Kowalskey failed to allege fundamental error on appeal, this issue is waived.

Conclusion

[26] In conclusion, the trial court did not abuse its discretion when it admitted the evidence discovered during the search of the car because the stop was not unreasonably prolonged due to the dog sniff. Further, sufficient evidence was presented to support Kowalskey's conviction for identity deception, and he has waived his variance argument.

[27] Affirmed.

Robb, J., and Mathias, J., concur.