MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Tiyo Lewis,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 3, 2021

Court of Appeals Case No. 20A-CR-1636

Appeal from the Posey Circuit Court

The Honorable Craig S. Goedde, Judge

Trial Court Cause No. 65C01-1904-F2-158

Bailey, Judge.

Case Summary

[1] After a jury found Tiyo Lewis ("Lewis") guilty of Level 2 felony Dealing in Methamphetamine[1] and Level 6 felony Maintaining a Common Nuisance,[2] Lewis admitted to having the status of a habitual offender.[3] Lewis now appeals, challenging the admission of two recorded interviews with his ex-girlfriend.

[2] Concluding that any evidentiary error amounts to harmless error, we affirm the judgment in all respects. However, having identified errors concerning the habitual offender enhancement, which was denominated as a consecutive sentence, we remand for the limited purpose of correcting the sentencing errors.

Facts and Procedural History

[3] The Posey County Drug Task Force worked with a confidential informant (the "CI") to conduct two controlled buys from Karen Sitzman ("Sitzman"). As of March 4, 2019, Lewis and Sitzman were in a romantic relationship and lived together in a residence on East 5th Street in Mount Vernon. On that date, the CI was fitted with an audio/video recording device to capture a third controlled buy from Sitzman that was to be conducted at that East 5th Street residence.

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[1] Ind. Code § 35-48-4-1.1.

[2] I.C. § 35-45-1-5.

[3] I.C. § 35-50-2-8.

[4] When the CI arrived at the residence, Lewis answered the door. Lewis led the CI to a bedroom, where Sitzman was on the bed. After the CI spoke with Sitzman about purchasing methamphetamine, Lewis handed Sitzman a cannister, a tray, and a scale. Sitzman removed methamphetamine from the cannister and began to weigh it. Later, Lewis retrieved packaging material.

[5] Following the transaction, the CI provided to law enforcement two baggies of methamphetamine. Subsequent laboratory testing confirmed that the baggies collectively contained a net weight of 11.51 grams of methamphetamine.

[6] In April 2019, the State charged Lewis with Dealing in Methamphetamine, as a Level 2 felony, and Maintaining a Common Nuisance, as a Level 6 felony. The State later alleged that Lewis had the status of a habitual offender. Lewis was eventually arrested in November 2019. Following his arrest, Lewis waived his *Miranda* rights and participated in a police interview. During the recorded interview, Lewis admitted that he knew Sitzman had sold methamphetamine from the residence on East 5th Street. Lewis said that he knew there was methamphetamine in the cannister, and that he had given the cannister to Sitzman on approximately five occasions at the residence. Lewis also told the police that a supplier would bring methamphetamine to the residence.

[7] A jury trial was held in July 2020. At the trial, the CI testified about Lewis's participation in the transaction on March 4, 2019. The video of that transaction was admitted into evidence, as was the video of Lewis's police interview. There was also testimony from Sitzman, who testified that Lewis had driven

her to Evansville to meet up with a supplier. Sitzman testified that Lewis helped with sales of methamphetamine at their residence on East 5th Street: "[H]e would sometimes hand the product to the person. He would get the baggies. Sometimes he would deliver the product to people." Tr. Vol. 2 at 154.

[8] Throughout the trial, there were references to two police interviews held with Sitzman. Lewis elicited testimony from a police officer that, during the first interview, Sitzman said that Lewis was not involved with the transactions, but that, during the second interview, her story changed. Sitzman also testified that, in her first interview, she said that Lewis "had nothing to do with the methamphetamine," but that she was "more truthful" in the second interview. *Id.* at 155. She testified that, in the second interview, she said Lewis was more involved. Lewis cross-examined Sitzman about her conflicting statements.

[9] Later, the State sought to have the recordings of the two police interviews with Sitzman admitted into evidence. Lewis objected. Following argument on the matter, the videos were ultimately admitted into evidence over the objection.

[10] The jury found Lewis guilty of both offenses. Following the guilt phase, Lewis admitted to having the status of a habitual offender. A sentencing hearing was held, and Lewis was sentenced to twenty years in the Indiana Department of Correction for the Level 2 felony with a concurrent term of two years for the

Level 6 felony.[4] The trial court also imposed a ten-year sentence enhancement. As to the enhancement, the trial court issued a Sentencing Order stating that Lewis would serve "Ten (10) years at the Indiana Department of Correction[]," with the "Habitual Offender to run consecutive to counts 1 and 2." App. Vol. 2 at 92. The trial court also issued an Abstract of Judgment showing that it was imposing ten years for the enhancement. On the line next to "DOC Executed," the Abstract of Judgment states "10 Months" rather than ten years. *Id.* at 94.

[11] Lewis now appeals.

Discussion and Decision

Admission of Evidence

[12] Lewis challenges the admission of the recorded police interviews with Sitzman.[5] He argues that the recordings contain inadmissible hearsay and were improperly used for the purpose of impeachment. Lewis also asserts that admitting the evidence ran afoul of his right to confront witnesses.[6]

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[4] Although Lewis requested the transcript of the sentencing hearing in his Notice of Appeal, it does not appear that this Court received that transcript.

[5] In appellate briefing, Lewis focuses on Exhibit 11, which was the first interview. However, he repeatedly refers to Exhibit 11 as "Sitzman's second interview with police officers." Br. of Appellant at 9. We regard Lewis's challenge as a challenge to the admission of both recordings.

[6] Lewis declines to cite to a specific law conferring the right to confront witnesses. We remind counsel of Indiana Appellate Rule 46(A)(8)(a), which requires that each contention be supported by cogent reasoning along with "citations to the authorities . . . relied on[.]" We further remind counsel that noncompliance with this rule could result in appellate waiver. *See, e.g.*, *Cardosi v. State*, 128 N.E.3d 1277, 1284 n.3 (Ind. 2019).

[13] "In reviewing the admission or exclusion of evidence, we determine whether the trial court abused its discretion." *McCallister v. State*, 91 N.E.3d 554, 561 (Ind. 2018). However, even if there was an abuse of discretion, we generally will not reverse where the error was harmless, *i.e.*, where the "probable impact on the jury was slight, considering other evidence that was properly admitted." *Id.*; *see also, e.g.*, *Stewart v. State*, 754 N.E.2d 492, 496 (Ind. 2001) ("Errors in the admission or exclusion of evidence are to be disregarded as harmless error unless they affect the substantial rights of a party." (quoting *Fleener v. State*, 656 N.E.2d 1140, 1141 (Ind. 1995))). Furthermore, even if the evidentiary error runs afoul of the right to confront witnesses, we will not reverse where the error was "harmless beyond a reasonable doubt." *Koenig v. State*, 933 N.E.2d 1271, 1274 (Ind. 2010). Whether error was harmless beyond a reasonable doubt "turns on a number of factors," including the importance of the evidence in the State's case, whether the evidence was cumulative, the presence or absence of corroborating or contradictory evidence on material points, the extent of cross-examination allowed, "and, of course, the overall strength of the prosecution's case." *Id.* (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)).

[14] Lewis asserts that admitting the evidence did not amount to harmless error because the recordings "contained substantially more information than Sitzman could properly identify or corroborate during her direct and cross examination before the jury." Br. of Appellant at 11. However, the content of the second police interview—the one in which Sitzman implicated Lewis—was generally cumulative of her trial testimony. Moreover, putting aside the two recordings,

the State's case against Lewis was strong. Indeed, not only did the CI testify about Lewis's involvement in a specific transaction, with video evidence corroborating that testimony by depicting Lewis's involvement, but there was also a recording of Lewis in which he admitted to retrieving Sitzman's cannister of methamphetamine on several occasions. Further, Sitzman testified, and was subject to cross-examination, about Lewis's involvement in drug transactions.

[15] All in all, assuming *arguendo* that there was error in the admission of the two recorded interviews with Sitzman and further assuming *arguendo* that admitting the evidence amounted to a violation of Lewis's right to confront witnesses, in light of the overwhelming independent evidence against Lewis, we readily conclude that any alleged error was harmless beyond a reasonable doubt.

Enhancement

[16] Pursuant to Indiana Code Section 35-50-2-8(j), "Habitual offender is a status that results in an enhanced sentence. It is not a separate crime and does not result in a consecutive sentence." Further, "[t]he court shall attach the habitual offender enhancement to the felony conviction with the highest sentence imposed and specify which felony count is being enhanced." *Id.* "This specific application or 'attachment' of the enhancement is necessary to avoid potential double jeopardy and Eighth Amendment problems." *Jackson v. State*, 105 N.E.3d 1081, 1086 (Ind. 2018) (discussing the habitual offender enhancement).

[17] Here, the written Sentencing Order and the Abstract of Judgment indicate that the trial court improperly denominated the sentence enhancement as a

consecutive sentence. Moreover, neither document specifies which count is being enhanced.[7] There is also inconsistency in the record regarding executed time on the ten-year enhancement. Indeed, whereas the Sentencing Order indicates that Lewis would serve the ten years at the Indiana Department of Correction, the Abstract of Judgment states "10 Months" next to "DOC executed." App. Vol. 2 at 94. This appears to be a clerical error. *See* I.C. § 35-50-2-8(i) (specifying that the enhancement is a "nonsuspendible" fixed term).

[18] Due to the foregoing sentencing errors, we remand for the trial court to amend its Sentencing Order and Abstract of Judgment as necessary to remedy any clerical error and to comply with the requirements of Section 35-50-2-8. *See, e.g.*, *Morrison v. State*, 462 N.E.2d 72, 75-76 (Ind. 1984) (addressing a sentence-enhancement issue *sua sponte* and remanding for correction of the sentence).

[19] Affirmed and remanded for the limited purpose of addressing sentencing error.

May, J., and Robb, J., concur.

[7] As to this issue, we note that the Abstract of Judgment also states that the enhancement is included in "[t]he total sentence listed above" but the above-listed sentences do not reflect the enhancement. App. Vol. 2 at 94.