MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE COURT OF APPEALS OF INDIANA

Adrian Caldwell,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 12, 2021

Court of Appeals Case No. 20A-CR-1785

Appeal from the Marion Superior Court

The Honorable Alicia Gooden, Judge

The Honorable Richard Hagenmaier, Magistrate

Trial Court Cause No. 49G21-1906-F4-23028

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Adrian Caldwell (Caldwell), appeals his conviction for dealing in a narcotic drug, a Level 2 felony, Ind. Code §§ 35-48-4-1(a)(1)(c), (e)(1).

[2] We affirm.

ISSUE

[3] Caldwell presents this court with one issue, which we restate as: Whether the State proved beyond a reasonable doubt that he had the requisite intent to deliver heroin.

FACTS AND PROCEDURAL HISTORY

[4] On June 6, 2019, Officer Stacy Riojas (Officer Riojas) of the Indianapolis Metropolitan Police Department (IMPD) was patrolling on the east side of Indianapolis when she observed a car fail to signal a right turn from Adams Street onto 28th Street. Officer Riojas initiated a traffic stop, and the car stopped around the intersection of Rural and 28th Streets. When Officer Riojas approached the car, she could smell the scent of marijuana coming from the open driver's side window.

[5] The car had two occupants. The driver, Raven Hanyard (Hanyard), produced her identification for Officer Riojas. The passenger, Caldwell, initially provided a false name to Officer Riojas but subsequently provided his correct name after being informed that the person whose name he had initially supplied had an

active warrant for his arrest. Based upon the fact that she had detected the odor of marijuana coming from the vehicle, Officer Riojas removed Hanyard and Caldwell from the car and searched it. Underneath the right front passenger seat where Caldwell had been seated, Officer Riojas found a ziplock bag containing a digital scale, a baggie of 14.7531 grams of heroin, a second baggie of 4.6480 grams of heroin, and a third baggie containing 8.24 grams of marijuana. Officer Riojas provided Hanyard and Caldwell with their *Miranda* advisements. When asked whether the drugs belonged to him, Caldwell responded, "[D]oes she look like a drug dealer, yeah, it's mine." (Transcript p. 8).

[6] On July 3, 2019, the State filed an Information, charging Caldwell with Level 4 felony possession of a narcotic drug; Class A misdemeanor possession of marijuana; and Level 2 felony dealing in a narcotic drug. On February 24, 2020, the trial court convened Caldwell's bench trial. IMPD narcotics detective Jacob Tranchant (Detective Tranchant) testified that a dealer uses a scale to weigh heroin in the presence of the buyer so that the buyer can be assured that he or she is not being shorted on the amount being sold. Detective Tranchant also related that users typically consume between 0.1 and one gram of heroin at a time, up to two times per day, and that heroin users usually do not possess more than one day's doses at a time.

[7] The trial court found Caldwell guilty as charged. On September 25, 2020, the trial court vacated Caldwell's heroin possession conviction due to double

jeopardy concerns. The trial court sentenced Caldwell to an aggregate sentence of ten years for his remaining convictions.

[8] Caldwell now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

[9] Caldwell challenges the evidence supporting his conviction for Level 2 felony dealing in a narcotic drug. Our standard of review of such matters is well-established: We consider only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is not our role as an appellate court to assess witness credibility or to weigh the evidence. *Id*. We will affirm the conviction unless no reasonable factfinder could find the elements of the crime proven beyond a reasonable doubt. *Id*.

II. *Intent to Deliver*

[10] The State charged Caldwell with dealing in a narcotic drug as follows:

> On or about June 6, 2019, [] Caldwell did knowingly or intentionally possess with the intent to deliver Heroin, pure or adulterated, a narcotic drug classified in schedule I said narcotic drug having a weight of at least 10 grams[.]

(Appellant's App. Vol. II, p. 21). Therefore, in order to make its case, the State was required to prove beyond a reasonable doubt that Caldwell intended to deliver the heroin he possessed. I.C. §§ 35-48-4-1(a)(1)(c), (e)(1). A presumption of intent to deliver arises if a defendant possesses twenty-eight

grams or more of a narcotic drug. I.C. § 35-48-4-1(b)(2). If a lesser amount is at issue, the State must show evidence in addition to the weight of the drug to prove the requisite intent. I.C. § 35-48-4-1(b)(1). "Intent, being a mental state, can only be established by considering the behavior of the relevant actor, the surrounding circumstances, and the reasonable inferences to be drawn therefrom." *Richardson v. State*, 856 N.E.2d 1222, 1227 (Ind. Ct. App. 2006), *trans. denied*.

[11] Because Caldwell did not possess twenty-eight grams or more of heroin, no presumption of his intent to deal arose based merely upon the amount of heroin involved, and the State was required to provide additional evidence of his intent to deliver. I.C. § 35-48-4-1(b). Caldwell argues that there was inadequate additional evidence of his intent to deliver because the heroin in his possession was not packaged for individual sale; no baggies, cutting agents, or guns were found; there was nothing indicating the scale in his possession had been used; and his statement, "[D]oes she look like a drug dealer, yeah, it's mine," may not have been a verbatim quote. (Tr. p. 8). However, Caldwell's possession of a scale, coupled with Detective Tranchant's testimony that dealers use a scale to weigh illegal substances prior to their sale, was additional evidence of Caldwell's intent to deliver. *See Richardson*, 856 N.E.2d at 1227 (considering Richardson's possession of a scale as part of the evidence supporting his intent to deliver). A factfinder could have reasonably interpreted Caldwell's statement, "[D]oes she look like a drug dealer, yeah, it's mine," as a tacit admission. (Tr. p. 8). Caldwell possessed over nineteen grams of heroin, and

Detective Tranchant testified that a user would only typically possess up to two grams at a time. This was evidence from which a factfinder could have reasonably inferred that Caldwell was dealing, as opposed to using, the heroin in his possession. *See Hirshey v. State*, 852 N.E.2d 1008, 1015-16 (Ind. Ct. App. 2006) (considering evidence that Hirshey possessed more methamphetamine than a person would generally have for personal use as supporting his intent to deliver), *trans. denied*; *see also Davis v. State*, 791 N.E.2d 266, 270 (Ind. Ct. App. 2003) (considering Davis' possession of amounts of cocaine more consistent with dealing than with personal use), *trans. denied*. Evidence of Caldwell's possession of a scale, his tacit admission at the scene of the traffic stop, and the amount of heroin in his possession gave rise to a reasonable inference that he possessed heroin with intent to deal.

[12] Caldwell's arguments otherwise are essentially a request to reweigh the evidence and reassess the credibility of the witnesses, a request we decline in light of our standard of review. *See Drane*, 867 N.E.2d at 146. We also reject Caldwell's argument that Detective Tranchant's testimony regarding the amounts of heroin a user would possess in a day went "only to the quantity of the drug, which, if it is less than the 28 grams, cannot by itself establish possession with intent to deal." (Appellant's Br. p. 9). We have already concluded that other evidence apart from the amount of the heroin at issue supported an inference of intent to deliver, and, while no presumption of intent arises below the twenty-eight-gram-threshold, we may properly consider evidence of the amount of a drug possessed by a defendant as part of the

circumstances establishing intent. *See Love v. State*, 741 N.E.2d 789, 792 (Ind. Ct. App. 2001) ("Possessing a large amount of a narcotic substance is circumstantial evidence of intent to deliver.").

[13] The State argues that Caldwell's statement to his presentence report investigator that he only used marijuana is further evidence supporting an inference that he was dealing, as opposed to using, the heroin in his possession. In his Reply, Caldwell contends that, by citing information contained in his presentence report, the State violated Indiana Code section 35-38-1-13(a)(1) and Indiana Access to Court Records Rule 5(b)(2) which exclude documents such as presentence reports from public access. Presentence reports are generally excluded from public access "except where specifically required or permitted by statute or upon specific authorization by the court and the convicted person." Ind. Code § 35-38-1-13(b). Our supreme court has authorized the disclosure in appellate filings of materials referenced in presentence reports where it is necessary to resolve issues presented on appeal. *See*, *e.g.*, *Malenchik v. State*, 928 N.E.2d 564, 566 n.2 (Ind. 2010) (authorizing and declaring publicly accessible information contained in Malenchik's presentence report where he challenged his sentence). Caldwell does not challenge his sentence, and, because the information referenced by the State in its argument was not presented to the trial court during his trial, his report to his presentence investigator is irrelevant to our determination of whether sufficient evidence of his intent supported his conviction. Therefore, we conclude that the State's inclusion of a reference to Caldwell's presentence report was improper.

[14] Because Caldwell did not file a separate motion to strike, we decline to strike the State's reference to Caldwell's presentence report. However, we strongly caution the State to refrain from disclosing confidential information in this manner in the future. We did not consider Caldwell's presentence report in rendering our decision but affirm because the State produced sufficient evidence at trial to support the trial court's determination that Caldwell possessed heroin with intent to deliver.

CONCLUSION

[15] Based on the foregoing, we conclude that the State proved beyond a reasonable doubt that Caldwell possessed the requisite intent to deliver heroin sufficient to sustain his conviction for dealing in a narcotic drug.

[16] Affirmed.

[17] Najam, J. and Crone, J. concur