

STATEMENT OF THE CASE

Valdez Lashawn Reed¹ appeals his conviction, following a jury trial, for dealing in cocaine² as a class A felony, false informing,³ and visiting a common nuisance⁴ as class B misdemeanors.

We affirm.

ISSUES

1. Whether the trial court erred in denying Reed's motion for a continuance.
2. Whether sufficient evidence supports Reed's conviction for class A felony dealing in cocaine.
3. Whether the trial court erred in admitting evidence.

FACTS

On the evening of January 11, 2010, at approximately 5:40 p.m., Officer Brad Reed, Patrol Officer Jason Burton, and Detective Tonda Cockrell of the Kokomo Police Department ("KPD") briefly conducted surveillance of 629 East Jefferson Street in Kokomo before serving homeowner Patricia Mack ("Patricia") with an arrest warrant. Patricia was suspected of running a crack house, and had sold narcotics to confidential

¹ The appellant and a key law enforcement witness have the same surname; to avoid confusion, we refer to the appellant as "Reed" and the police officer as "Officer Reed."

² Ind. Code § 35-48-4-1.

³ I.C. § 35-44-2-2.

⁴ I.C. § 35-48-4-13.

informants working with KPD. As the officers watched, multiple persons entered and exited Patricia's house.

When the officers knocked at the door, Patricia's daughter -- Altricia Mack ("Altricia") -- answered and indicated that Patricia was in the house. The officers entered and observed approximately ten other people inside the house. The occupants of the house panicked, reached into their pockets, and dropped contraband and paraphernalia on the floor. Knotted plastic baggies of crack cocaine and/or drug paraphernalia were observed in plain view in the living room, dining room and kitchen. Immediately upon entering the house, Officer Jason Burton and Detective Cockrell had seen Reed emerge from a bedroom located to the left of the front door. Reed tried to duck back into the bedroom, but Officer Burton ordered him to remain within view. Despite Officer Burton's order that he remain in view, Reed still attempted to re-enter the front bedroom on two or three occasions. Concerned for officer safety, KPD conducted a protective sweep of the house. When police asked him for identification, Reed identified himself as "Michael D. Reed," and also provided a false birth date and social security number. (Tr. 32). Officer Reed tentatively decided to arrest everyone in the house for visiting a common nuisance. Based upon his observations of contraband in plain view, he left the scene to obtain a search warrant for the house and cars.

Pursuant to the search warrant, the following contraband was found inside the front bedroom from which Reed had emerged: ninety-nine individually-wrapped rocks of cocaine (14.53 grams) on top of a stereo; four rocks of crack cocaine (2.28 grams) next

to a coffee cup; and fourteen individually-wrapped rocks of cocaine (6.63 grams), with a street value of \$100.00 to \$150.00, in the pocket of a man's coat that was lying on the couch. The coat also contained a Greyhound bus ticket stub, dated January 12, 2010, in the name of "Shawn Reed" for travel from Detroit, Michigan, to Marion, Indiana. Reed's true identity was subsequently discovered when he was fingerprinted at the Howard County Jail.

On January 12, 2010, the State charged Reed with Count I, class A felony possession of cocaine with intent to deliver; Count II, class B misdemeanor false informing; and Count III, class A misdemeanor visiting a common nuisance.⁵ On January 21, 2010, Reed moved for a speedy trial. Trial by jury was slated for March 26, 2010.

On January 26, 2010, the State filed a Motion for Court-Ordered Production of Blood and Saliva Samples from Reed for DNA comparison to biological samples recovered from the black coat and the plastic bag that had held the fourteen rocks of crack cocaine.⁶ The trial court granted the motion that same day. On March 11, 2010, Reed orally moved for expedited DNA testing, which motion was denied. On Wednesday, March 24, 2010, the parties received the DNA test results, which identified Reed as the source of DNA recovered from the seized evidence found in the bedroom.

⁵ Each of the occupants of the house was charged with visiting a common nuisance. Patricia Mack was charged with possession of all of the contraband found in the house, with the exception of the fourteen rocks of crack cocaine that were recovered from the pocket of the black coat.

⁶ The State also obtained DNA samples from Altricia and Patricia.

Trial by jury commenced on Friday, March 26, 2010, and continued the following week on March 29, 30 and 31 of 2010. On March 26, after voir dire was completed, defense counsel orally moved to waive Reed's prior request for speedy trial and also requested a continuance. Specifically, he asked for additional time to prepare with regard to the DNA test results. The trial court denied the motion. Defense counsel then orally moved to exclude the DNA evidence because the test results were untimely disclosed and because the testifying chemist would not be available to defense counsel until the following Tuesday, when trial would already be underway. The trial court denied the motion, but advised defense counsel that he would be granted recesses to interview or depose DNA witnesses before they testified. Defense counsel did not avail himself of the opportunity.

On March 30, 2010, Reed orally moved to suppress the DNA evidence, arguing that the probable cause affidavit was defective and, therefore, could not support the trial court's order authorizing the taking of the DNA sample. After hearing the testimony of affiant Officer Reed, the trial court denied the motion finding "ample" probable cause to support the issuance of the warrant for blood or saliva samples from Reed. (Tr. 226). Subsequently, defense counsel entered continuing objections to the DNA evidence.

On March 31, 2010, the jury found Reed guilty as charged. On April 28, 2010, he was sentenced as follows: on Count I (class A felony possession of cocaine with intent to deliver), thirty years, with twenty years executed and ten years ordered suspended to

probation on; and on Counts II and III, concurrent 180-day sentences for false informing and visiting a common nuisance as class B misdemeanors. Reed now appeals.

Additional facts will be provided as necessary.

DECISION

Reed argues that the trial court erred in denying his motion for a continuance; that the evidence was insufficient to support his conviction for dealing in cocaine; and that the trial court erred in admitting evidence.

1. Continuance

Reed argues that “[t]he fact that the DNA evidence was not produced until just before trial and the [Indiana State Police] lab technician would be unavailable for deposition prior to trial necessitated a continuance.” Reed’s Br. at 3. We are not persuaded.

Rulings on non-statutory⁷ motions for continuance lie within the discretion of the trial court and will be reversed only for an abuse of that discretion and resultant prejudice. *Jackson v. State*, 758 N.E.2d 1030, 1033 (Ind. Ct. App. 2001). An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances before the trial court. *Maxey v. State*, 730 N.E.2d 158, 160 (Ind. 2000). Further, “[c]ontinuances for additional time to prepare for trial are generally disfavored, and courts should grant such motions only where good cause is shown and such a continuance is in the interest of justice.” *Jackson*, 758 N.E.2d at 1033. “To determine

⁷ Reed does not argue that he was entitled to a continuance by statute -- namely, Indiana Code section 35-36-7-1.

whether good cause exists, the trial court may review the circumstances of the case, as well as the allegations of the motion itself.” *Poulton v. State*, 666 N.E.2d 390, 393 (Ind. 1996).

The record reveals that both parties received the DNA test results on March 24, 2010. At the onset of trial on March 26, 2010, in arguing the motion to exclude the DNA evidence as untimely disclosed, defense counsel acknowledged that he had been trying since March 24, to persuade Reed to waive his speedy trial request and seek a continuance; but Reed had not agreed until the day of trial.

In denying the motion, the trial court noted that “had the motion been made earlier, [it] might have considered [the continuance] but on the morning of trial, it’s too late,” (tr. 3), stating,

I think first of all what we have to look at is that 64 days ago the defendant had his initial hearing and requested a speedy trial and about 6 days thereafter . . . is when the State requested the swabs so we’re down under 60 days from the time the samples were taken until today. * * * There’s nothing to indicate that [the State] could or could not have gotten [the DNA test results] to you any faster I would agree that your client is entitled to a fair trial, there’s absolutely no question about that, and you may be entitled to some recesses to question witnesses or even take depositions based on new evidence or the DNA tests, chemists, so forth, as we go through this. I would note that if the DNA chemist, or the chemist that prepared the report is local and available, that the deposition could take place sometime between now and Monday morning if you thought that that was necessary.

I do think, however, that when the defendant starts asserting conflicting constitutional rights, that he then makes the decision as to which right he wants to proceed on. You received this information on Wednesday and up until this morning at . . . approximately 9 o’clock or a little bit after, Mr. Reed was still insisting upon his speedy trial. I think by his doing that, what he’s done is waiving his right to have you be as

prepared as is humanly possible under all circumstances, but he still has the right for you to be prepared as humanly possible in the 60 days or so you've had the case. And quite frankly, from my observations of the voir dire, what you've done at the bond reduction hearing and what we've talked about as far as the off-the-record conferences, it would be my opinion . . . that you are adequately prepared to represent Mr. Reed, so I'm not going to exclude the evidence.

(Tr. 7-8).

In our review of “the circumstances of the case,” we observe that it was Reed’s delay which may have interfered with defense counsel’s ability to timely request a continuance. *Poulton*, 666 N.E.2d at 393. The trial court indicated that it would have been amenable to granting the motion for a continuance had Reed requested it before the trial date -- before the prospective jurors appeared in court; before *voir dire* was conducted; and before the jury was sworn and impaneled. Moreover, despite the trial court’s offer to allow defense counsel to interview or depose the State’s DNA witnesses during the course of the trial from March 26 – 30, counsel did not avail himself of that opportunity. Thus, Reed cannot demonstrate undue prejudice in this regard. *See Davis v. State*, 714 N.E.2d 717, 723 (Ind. Ct. App. 1999) (defendant who is given opportunity to depose a surprise witness but declines to do so cannot claim prejudice when the court allows the witness to testify).

We cannot overlook the fact, as acknowledged by Reed’s counsel, that Reed continued to insist upon exercising his constitutional right to a speedy trial despite his having received the DNA report a few days before trial. In light of the foregoing, we conclude that the trial court did not abuse its discretion, under the circumstances herein,

in finding that no good cause existed for granting Reed's last-minute motions for a continuance. Moreover, Reed has not carried his burden of demonstrating that he suffered prejudice therefrom. We find no reversible error.

2. Sufficiency

Reed argues that there was insufficient evidence of his intent to deliver the cocaine. We disagree.

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.

Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007) (internal citations and quotations omitted).

In order to convict Reed of dealing in cocaine as a class A felony, the State was required to prove that he (1) knowingly (2) possessed three or more grams of cocaine (3) with the intent to deliver that cocaine.

Because intent is a mental state, the trier of fact must generally resort to the reasonable inferences arising from the surrounding circumstances in order to determine whether the requisite intent exists. Circumstantial evidence showing possession with intent to deliver may support a conviction. Possessing a large amount of a narcotic substance may be considered as circumstantial evidence of intent to deliver. The more narcotics a person possesses, the stronger the inference that he intended to deliver it and not personally consume it.

Love v. State, 741 N.E.2d 789, 792 (Ind. Ct. App. 2001), *trans. denied*.

“Mere presence at the crime scene is insufficient proof to support a conviction[.]” *Rohr v. State*, 866 N.E.2d 242, 248-49 (Ind. 2007). However, “presence at the scene coupled with other circumstances tending to show participation in the crime may be sufficient to sustain a guilty verdict.” *Id.* “Such circumstantial evidence is sufficient if it allows for reasonable inferences enabling the jury to determine guilt beyond a reasonable doubt.” *Id.*

Here, the State presented the following evidence: Reed lives in Detroit, Michigan. Officer Reed testified that based upon his law enforcement experience, he has observed a pattern of activity wherein “subjects from out of town [] come to our community to sell drugs,” and that Detroit is among the sources of cocaine entering and sold in Kokomo. (Tr. 367). On January 11, 2010, at approximately 5:40 p.m., police entered Patricia’s residence with an arrest warrant for her. Altricia, Patricia’s daughter, told police that she and Reed had just arrived from Detroit. Officer Burton and Detective Cockrell saw Reed emerge from the front bedroom. Reed later identified himself to police as “Michael D. Reed,” but not before attempting several times to re-enter the bedroom after being ordered to remain within view. (Tr. 32). A subsequent search of that bedroom revealed no other occupants inside and a man’s coat containing a Greyhound bus ticket in the name of “Shawn Reed” for travel from Detroit to Marion, Indiana on January 11, 2010

with an arrival time of 4:15 p.m.⁸ The same pocket of the coat also contained a plastic bag that held fourteen bindles of individually-wrapped rocks of crack cocaine totaling 6.63 grams with a street value of \$100.00-\$150.00. The police investigation later revealed that Reed's name was actually Valdez Lashawn Reed.

The State's evidence also included the following: DNA testing of biological samples recovered from inside the pocket of the coat identified Reed as "the source of the major⁹ DNA profile to a reasonable degree of scientific certainty"; and, DNA testing of the plastic bag revealed that "[i]n the absence of an identical twin, Valdez Reed is the source of the DNA to a reasonable degree of scientific certainty." (Tr. 305, 307).

We find that a jury could reasonably infer from the foregoing facts and evidence that Reed possessed cocaine with the requisite intent to deliver. *See Washington v. State*, 902 N.E.2d 280, 289 (Ind. Ct. App. 2009) (intent to deliver supported by evidence that police found nine rocks of cocaine in defendant's pocket individually wrapped in knotted "baggie corners," which is a common way dealers package cocaine), *trans. denied*. Thus, we conclude that the State's evidence was sufficient in this regard.

3. Probable Cause

Reed argues that the trial court erred in denying his motion to suppress the DNA evidence. Specifically, he argues that the State's search warrant to seize his bodily fluid and other sources of DNA was based upon a fundamentally defective probable cause

⁸ Officer Reed testified that it takes approximately 45 minutes to drive from Marion to Kokomo.

⁹ DNA forensic testing excluded Patricia and Altricia as sources of the minor profile recovered from the coat.

affidavit that “lacked the substantial basis to link the criminal activity that was the subject of the search warrant and the evidence to be sought, namely Reed’s DNA[.]” Reed’s Br. at 10. We cannot agree.

Generally, a trial court’s ruling on the admissibility of evidence is reviewed for an abuse of discretion. *Combs v. State*, 895 N.E.2d 1252, 1255 (Ind. Ct. App. 2008). We will reverse only where the decision is clearly against the logic and effect of the facts and circumstances. *Id.* Even if the trial court’s decision was an abuse of discretion, we will not reverse if the admission of evidence constituted harmless error. *Id.*

The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Indiana Constitution require search warrants to be supported by probable cause. *Query v. State*, 745 N.E.2d 769, 771-72 (Ind. 2001). The drawing of blood for the purpose of administering a compulsory blood test is a search that implicates the Fourth Amendment to the United States Constitution. *Schlesinger v. State*, 811 N.E.2d 964, 966-67 (Ind. Ct. App. 2004). Therefore, to obtain a blood sample, law enforcement officers must have a warrant, probable cause to obtain a warrant, or consent. *Id.* at 967. The task of the trial court when deciding whether to issue a search warrant is “simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Query*, 745 N.E.2d at 771 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

A neutral and detached magistrate must draw his or her own conclusion whether probable cause existed and cannot act as a “rubber stamp for the police.” *Aguilar v. Texas*, 378 U.S. 108, 111, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). In assessing the validity of an issued warrant, the reviewing court must “determine whether the magistrate had a ‘substantial basis’ for concluding that probable cause existed.” *Figert v. State*, 686 N.E.2d 827, 830 (Ind. 1997) (quoting *Gates*, 462 U.S. at 238-39). “[S]ubstantial basis requires the reviewing court, with significant deference to the magistrate’s determination, to focus on whether reasonable inferences drawn from the totality of the evidence support the determination” of probable cause. *Houser v. State*, 678 N.E.2d 95, 99 (Ind.1997).

Here, in support of his request for a search warrant to obtain a saliva sample from Reed, Officer Reed presented an affidavit of probable cause that informed the issuing judge of the following: (1) KPD encountered Reed pursuant to its execution of an arrest warrant upon Patricia in her house; (2) that upon entering Patricia’s house, officers saw in plain view copious quantities of crack rocks and knotted plastic packages containing an off white rock like substance in plain view in various rooms, including the front bedroom; (3) that a man’s coat in the front bedroom, which Reed was seen exiting, contained a bus ticket for a “Shawn Reed” as well as a plastic bag containing (14) fourteen individually knotted plastic baggie corners each containing an off white rock like substance, weighing 6.63 grams [later identified as cocaine]”; (4) that no other person was observed in the front bedroom; and (5) that approximately 17 grams of crack cocaine, packaged for sale, was also found in the front bedroom. (App. 172, 174).

The foregoing facts support the finding of a nexus between the ongoing criminal activity and Reed. Taken in their totality, the above circumstances reflected a “fair probability” that Reed was engaging in criminal activity and was the owner of the man’s coat that contained the fourteen bindles of crack cocaine that were individually packaged for sale. *See Query*, 745 N.E.2d at 771. Thus, the issuing magistrate had a “substantial basis” for concluding that probable cause existed for the issuance of the warrant to obtain Reed’s blood and/or saliva samples. *See Houser*, 678 N.E.2d at 99. Accordingly, we conclude that the trial court did not abuse its discretion in admitting the DNA test results into evidence; and we affirm its denial of Reed’s motion to suppress the DNA evidence.

Affirmed.

NAJAM, J., and BAILEY, J., concur.