



Ashley J. Straub appeals his convictions for two counts of dealing in a Schedule I controlled substance as class B felonies and one count of possession of a Schedule I controlled substance as a class D felony. Straub raises two issues, which we revise and restate as:

- I. Whether the court's admission of evidence related to a failed buy attempt constituted fundamental error; and
- II. Whether the trial court abused its discretion by denying Straub's request to represent himself.

We affirm.

The relevant facts follow. Straub came to the attention of the City of Columbia Police Department through different investigations in reference to drug activity. Two confidential informants independently advised the Drug Task Force that they could purchase drugs from Straub. One of the confidential informants called Straub and asked him if he could provide heroin, and Straub indicated that he could.

On March 4, 2009, Whitley County Sheriff's Detective Scott Geist conducted a thorough search of both informants and the vehicle they were using and did not notice any drugs or contraband. City of Columbia Police Detective Sergeant Robert Anderson gave \$120 to one of the confidential informants and gave \$150 to the other informant. The informants then drove to the parking lot of a grocery store in Columbia City. After the informants arrived in the parking lot, Straub entered the backseat of the informants' vehicle, indicated via hand gestures that he had heroin in his hand, and handed heroin to the informants in exchange for money. When asked, "Is this shit any f----- good,"

Straub replied “No, it’s alright, it’s not as f----- good as Chicago.” State’s Exhibit 1. The informants then met with police and provided Detective Geist with heroin and informed him that they received the heroin from Straub.

On March 27, 2009, the State charged Straub with two counts of dealing in a Schedule I controlled substance as class B felonies and one count of possession of a Schedule I controlled substance as a class D felony.

During the jury trial, a video recording of the March 4, 2009 transaction was admitted without objection. Detective Anderson testified, without objection, that approximately seventy-two hours prior to March 4, 2009, one of the confidential informants attempted to speak with Straub and perform a “fronted buy” which is when an “informant delivers money and at a later time the target delivers drugs.” Transcript at 24-25. Detective Anderson testified that the informant met Straub in the same location as the March 4, 2009 transaction and gave Straub money, but Straub did not deliver drugs because Straub advised the informant that he owed Straub money. A video recording of the attempted fronted buy was played to the jury without objection.

After the prosecutor’s closing argument, the following exchange occurred:

COURT: [Defense Counsel], you may present your final argument on behalf of the defendant.

[Straub]: Judge. Can I speak to you in private for just one second?

COURT: No you may not. Proceed.

[Defense Counsel]: Good morning. This case boils down to is the word, words of . . .

[Straub]: Judge, Judge . . . .

COURT: Mr. Straub, you need to be quiet, we're hearing final . . . .

[Straub]: I want to relieve him of his duty.

COURT: I'm going to deny that request and remain silent during the final argument.

Id. at 100. Straub's counsel then completed his closing argument. After the court read the jury instructions and the jury began deliberations, the following exchange occurred:

COURT: Mr. Straub, I denied you the opportunity to make a statement in the presence of the jury while the final arguments were in process. If you want to make a statement on the record outside the presence of the jury at this point, I'll allow you that opportunity. Do you want to say something?

[Straub]: Yeah, I just wanted to relieve my court-appointed attorney because I felt with my requests and everything I've asked him to do, he did roughly ten percent of what I've asked. Therefore, I wanted to do be able to do my closing argument myself because what we discussed he decided he didn't want to do it and I felt that the points I had were right on and needed to be expressed by me if he wasn't willing to do it himself. I felt I could do a better job than him. But that doesn't matter now.

Id. at 110-111.

The jury found Straub guilty as charged. The court sentenced Straub to ten years with two years suspended for each B felony and one and one-half years for the class D felony. The court ordered the sentences to be served concurrently for an aggregate sentence of ten years with two years suspended.

## I.

The first issue is whether the court's admission of evidence related to the failed fronted buy constituted fundamental error. Generally, we review the trial court's ruling on the admission of evidence for an abuse of discretion. Noojin v. State, 730 N.E.2d 672, 676 (Ind. 2000). Straub, however, failed to object to the admission of Detective Anderson's testimony or the video recording of the attempted fronted buy. Failure to object to the admission of evidence at trial normally results in waiver and precludes appellate review unless its admission constitutes fundamental error. Cutter v. State, 725 N.E.2d 401, 406 (Ind. 2000), reh'g denied. To rise to the level of fundamental error, an error "must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process." Maul v. State, 731 N.E.2d 438, 440 (Ind. 2000). "The standard for fundamental error is whether the error was so prejudicial to the rights of the defendant that a fair trial was impossible." Boatright v. State, 759 N.E.2d 1038, 1042 (Ind. 2001).

Straub appears to argue that the admission of the testimony and video recording was fundamental error. Specifically, Straub argues that this evidence was inadmissible pursuant to Ind. Evidence Rules 404(b)<sup>1</sup> and 403.<sup>2</sup> Even assuming that the evidence that

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<sup>1</sup> Ind. Evidence Rule 404(b) provides in part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

Straub had previously met with one of the informants and taken money for a debt was erroneously admitted, evidence admitted in violation of Evidence Rules 403 or 404 will not require a conviction to be reversed “if its probable impact on the jury, in light of all the evidence in the case, is sufficiently minor so as not to affect a party’s substantial rights.” Houser v. State, 823 N.E.2d 693, 698 (Ind. 2005) (citations omitted). In light of the overall strength of the State’s case, we conclude that the probable impact on the jury of the evidence of the attempted fronted buy was minor.

The State played a video recording of the March 4, 2009 transaction which included audio. Detective Geist testified that he conducted a thorough search of the informants and their vehicle prior to the transaction and did not find any drugs. The police never lost contact with the informants’ vehicle and identified Straub as the person that entered the informants’ vehicle. After meeting with Straub, the police recovered heroin from the informants and the informants informed Detective Geist that they received the heroin from Straub.

When the evidence of the failed fronted buy is viewed in light of the other evidence of Straub’s guilt, we conclude that any error was not so prejudicial to the rights of Straub that a fair trial was impossible. Accordingly, we cannot say that the court’s

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<sup>2</sup> Ind. Evidence Rule 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

admission of the evidence regarding the failed fronted buy constituted fundamental error. See Wertz v. State, 771 N.E.2d 677, 684 (Ind. Ct. App. 2002) (holding that any error in the admission of prior drug transactions was harmless where there was substantial evidence of defendant's guilt).

## II.

The next issue is whether the trial court abused its discretion by denying Straub's request to represent himself. Straub argues that he was denied the opportunity to represent himself when he attempted to assert his right of self-representation prior to his counsel's final argument. Straub also argues that the court abused its discretion by denying his right to be heard. The State argues that Straub's request was untimely and that the record reveals only Straub's generalized concern with his counsel.

The right to self-representation is one which must be asserted first clearly and unequivocally, and second, within a reasonable time prior to the first day of trial. Broadus v. State, 487 N.E.2d 1298, 1304 (Ind. 1986). "[I]t is within the trial court's discretion to allow a defendant to eschew counsel and represent himself after trial has begun." Koehler v. State, 499 N.E.2d 196, 198-199 (Ind. 1986).

Here, Straub expressed his desire to relieve his attorney after the prosecutor had made his closing argument and just before his counsel was about to begin his closing argument. Straub asserts no prejudice arising from the denial of the request and has failed to show an abuse of discretion by the trial court. See Moore v. State, 557 N.E.2d 665, 669 (Ind. 1990) (holding that the defendant asserted no prejudice and failed to show

that the trial court abused its discretion where the court denied defendant's request to proceed *pro se* as untimely); Russell v. State, 270 Ind. 55, 64, 383 N.E.2d 309, 315 (1978) (“Any self-representation request made the day of trial or later may be summarily denied, for self-representation after this point is completely a matter of the trial court’s discretion.”); Campbell v. State, 732 N.E.2d 197, 204 (Ind. Ct. App. 2000) (holding that even if the defendant had clearly and unequivocally asserted his right to self-representation during the course of his trial, such request was untimely and its denial would have been proper).

For the foregoing reasons, we affirm Straub’s convictions for two counts of dealing in a Schedule I controlled substance as class B felonies and one count of possession of a Schedule I controlled substance as a class D felony.

Affirmed.

ROBB, C.J., and RILEY, J., concur.