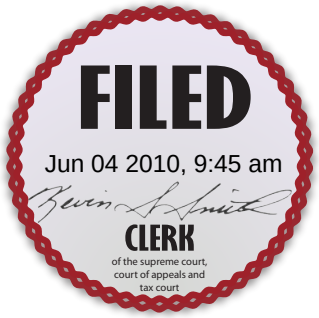

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IN THE
COURT OF APPEALS OF INDIANA

KERRY SNOW,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A02-1002-CR-106
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable William C. Menges, Judge
Cause No. 34D01-0902-FA-140

June 4, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Kerry Snow appeals his convictions for two counts of Dealing in Cocaine, as Class B felonies, following a jury trial. He presents two issues for our review:

1. Whether he was denied his right to confront witnesses under the Sixth Amendment to the United States Constitution when the trial court admitted into evidence certain testimony and photographs.

2. Whether the trial court abused its discretion when it instructed the jury on reasonable doubt.

We affirm.

FACTS AND PROCEDURAL HISTORY

On February 2, 2009, the Kokomo Police Department conducted two controlled drug buys involving a confidential informant ("CI") and a man named Joseph Tate. The CI arranged to buy crack cocaine from Tate at Tate's residence. Tate told the CI to wait in the rear porch of the house, while a man driving a green Buick arrived and entered Tate's residence. That man gave Tate crack cocaine and left the residence a short time later. Tate then gave the crack cocaine to the CI in exchange for money. Police followed the man in the green Buick and watched him enter a residence located at 1211 Apperson Street.

The CI arranged another purchase of crack cocaine from Tate later that day. After the CI arrived at Tate's residence, he stayed there while Tate left the residence and walked down the street to the residence at 1211 Apperson Street. There, the man who had been driving the green Buick earlier in the day gave Tate crack cocaine to deliver to the CI. When Tate returned to his residence, he gave the CI the crack cocaine in exchange for money.

Detective Jim Nielson determined that Snow had recently been issued a warning citation while driving the green Buick, and he obtained a copy of the photograph from Snow's Ohio driver's license. Detective Nielson then gave that photograph to Detective Gary Taylor, who had observed the controlled drug buys between Tate and the CI. Detective Taylor identified Snow as the man who had driven the green Buick to Tate's house and who entered the residence at 1211 Apperson Street.

Also, police contacted Tate and asked for his assistance in prosecuting the dealers from whom he had purchased crack cocaine, including the man involved in the controlled buys on February 2. Tate agreed, and he identified Snow as the man who provided him with the crack cocaine that the CI had purchased on that date. Accordingly, the State charged Snow with two counts of dealing in cocaine, as Class A felonies. At trial, Snow moved to dismiss the enhancement elevating the charges to Class A felonies, and the trial court granted that motion, reducing the charges to Class B felonies. The jury found Snow guilty of the amended charges, and the trial court entered judgment and sentence accordingly. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Sixth Amendment

Snow first asserts that the trial court denied him his Sixth Amendment right to confront and cross examine witnesses when it admitted into evidence testimony regarding a citation that had been issued to him, the photograph from his Ohio state driver's license, and a photograph obtained via searching a "jail book-in computer system." Appellant's Brief at 10. Snow maintains that that evidence was testimonial and should have been excluded. We cannot agree.

In 2004, the Supreme Court of the United States held that, "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Crawford v. Washington, 541 U.S. 36, 68-69 (2004). "Testimonial" statements are, among other things:

> "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;" "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;" and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

Jackson v. State, 891 N.E.2d 657, 659 (Ind. Ct. App. 2008) (discussing Crawford, 541 U.S. at 51-52), trans. denied. However, the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Crawford, 541 U.S. at 59 n.9.

Here, the State did not introduce the evidence of the citation or the photographs to prove the truth of the matter asserted in any regard. Instead, the State merely elicited testimony from the police officers to explain how they came to identify Snow as the man who drove the green Buick and entered the house on Apperson Street. Snow cannot show any Sixth Amendment violation here. See id.

Issue Two: Jury Instruction

Snow next contends that the trial court abused its discretion when it instructed the jury on reasonable doubt. In Snell v. State, 866 N.E.2d 392, 395-96 (Ind. Ct. App. 2007), we set our standard of review as follows:

> The trial court has broad discretion in the manner of instructing the jury and we review its decision thereon only for an abuse of that discretion. We review the refusal of a tendered instruction by examining whether the tendered instruction correctly states the law, whether there is evidence in the record to support giving the instruction, and whether the substance of the tendered instruction is covered by other given instructions. Jury instructions are to be considered as a whole and in reference to each other. The ruling of the trial court will not be reversed unless the instructions, when taken as a whole, misstate the law or mislead the jury. Before a defendant is entitled to a reversal, he must affirmatively show that the erroneous instruction prejudiced his substantial rights.

(Citations omitted).

The transcript shows that Snow proffered the following jury instruction: "A reasonable doubt may arise from the evidence, or from a lack of evidence, or from a conflict in the evidence on or concerning a given fact or issue." Appellant's App. at 13-14. But the State objected to that instruction as "duplicative of the court's instructions[.]" Transcript at 20. And the trial court declined to give the instruction.

The trial court gave the following jury instruction on reasonable doubt:

> FINAL INSTRUCTION NO. 10
>
> The State has the burden of proving the Defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the Defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the Defendant is guilty of the crimes charged, you should find him guilty. If, on the other hand, you think there is a real possibility that he is not guilty, you should give him the benefit of the doubt and find him not guilty.

Appellee's App. at 13. Snow points out that that instruction omitted the following sentence found in the pattern jury instruction on this issue: "A reasonable doubt may arise either from the evidence or from a lack of evidence." Indiana Pattern Jury Instruction 1.15. Snow maintains that the jury was misled and that the jury might have acquitted him in light of the lack of evidence if properly instructed.

The State concedes that Snow's proffered instruction was a correct statement of the law, but asserts that "the better practice would have been to give the pattern instruction as opposed to Defendant's proposed instruction in isolation." Brief of Appellee at 8. Nonetheless, the State contends that the jury instructions, read as a whole, "were sufficient to inform the jury as to the concept of reasonable doubt." Id. at 7. In particular, the trial court also instructed the jury as follows:

> FINAL INSTRUCTION NO. 7
>
> The defendant has entered a plea of not guilty and the burden rests upon the State of Indiana to prove to each of you, beyond a reasonable doubt, every essential element of the crime charged.
>
> The charge which has been filed is the formal method of bringing the defendant to trial.
>
> The fact that charges have been filed, the defendant arrested and brought to trial is not to be considered by you as any evidence of guilt.
>
> FINAL INSTRUCTION NO. 8
>
> Under the law of this State, a person charged with a crime is presumed to be innocent. To overcome the presumption of innocence, the State must prove the defendant guilty of each essential element of the crime charged, beyond a reasonable doubt.
>
> The defendant is not required to present any evidence to prove his innocence or to prove or explain anything.

Appellee's App. at 10-11.

In support of his contention on appeal, Snow relies on this court's opinion in VanWanzeele v. State, 910 N.E.2d 240 (Ind. Ct. App. 2009), trans. denied. In VanWanzeele, we held that the trial court abused its discretion when it refused to instruct the jury that reasonable doubt can arise from a lack of evidence. But we further held that the defendant was not entitled to reversal because she had not demonstrated that her substantial rights had been affected by the erroneous instruction. See id.

Here, Snow maintains that there was a lack of evidence implicating him in the charged crimes. In particular, he asserts that the CI never saw him during the controlled buys; that the detectives' identification of him was equivocal; and that the State otherwise did not have any direct evidence of his guilt. Thus, Snow contends that had the jury been properly instructed on reasonable doubt, it would have acquitted him.

But Snow ignores Tate's eyewitness testimony that Snow provided the crack cocaine he sold to the CI during both controlled buys. That evidence, in combination with the detectives' testimony and the circumstantial evidence of Snow's guilt undermine Snow's contention on this issue. Thus, Snow cannot demonstrate that his substantial rights were prejudiced by the instruction on reasonable doubt.

Affirmed.

VAIDIK, J., and BROWN, J., concur.