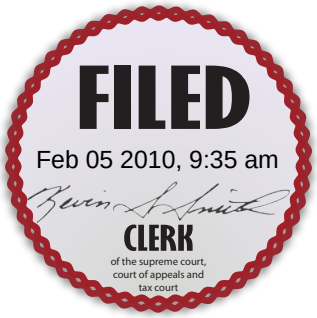

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IN THE
COURT OF APPEALS OF INDIANA

RODNEY EUGENE PERRY,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 29A02-0906-CR-557
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE HAMILTON CIRCUIT COURT
The Honorable Paul Felix, Judge
Cause No. 29C01-0807-FB-56

February 5, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Rodney Perry appeals his convictions for dealing in cocaine, a Class B felony, and possession of cocaine, a Class D felony. For our review, Perry raises a single issue, which we restate as whether the trial court abused its discretion when it excluded evidence of a witness's probation status. We also address sua sponte whether Perry's convictions violate double jeopardy. Concluding the trial court did not abuse its discretion, but Perry's convictions violate double jeopardy, we affirm in part, reverse in part, and remand.

Facts and Procedural History

On May 29, 2008, Detective Robert Locke of the Hamilton County Drug Task Force was working with Nicholas Riedman, a confidential informant, to set up a controlled drug purchase from Perry. Twice that day, Riedman contacted Perry by phone, while Detective Locke recorded the call, to inquire about purchasing cocaine. During the second call, Perry agreed to meet Riedman at the Meijer gas station in Carmel, and Perry told Reidman the cocaine would cost one hundred and twenty five dollars. As Detective Locke and several other police officers watched, Reidman purchased cocaine from Perry. Riedman wore a sound transmitting device, which allowed the officers to monitor and record his conversation with Perry. In addition, an officer videotaped the drug purchase from an unmarked vehicle a short distance away.

On July 8, 2008, Perry was arrested and charged with dealing in cocaine, a Class B felony, and possession of cocaine, a Class D felony. The trial court held a jury trial on April 20-21, 2009. During the trial, the State objected to Perry's desire to question

Riedman concerning a previous conviction for possession of marijuana and pending probation violation charges related to both of his prior convictions. The trial court heard testimony from Riedman outside the presence of the jury. Riedman testified his cooperation in the controlled buy and his testimony at the trial were both conditions of his plea agreement to a charge of possession of a controlled substance.[1] Riedman also testified his testimony at the trial was unrelated to his plea agreement in the marijuana case and would have no impact on his pending probation violation charges. The trial court permitted Perry to question Riedman regarding the plea agreement for possession of a controlled substance, which included the condition that Riedman cooperate with police in arranging controlled buys and testifying on behalf of the State, and to "bring out the fact that there is a violation of probation that has been filed." Transcript at 169. The trial court excluded evidence of the nature of Riedman's alleged probation violations and his conviction for possession of marijuana.

The jury found Perry guilty of dealing in cocaine and possession of cocaine. The trial court held a sentencing hearing on May 20, 2009, after which it entered judgments of conviction on both counts and sentenced Perry to fourteen years – eight years executed with the Department of Correction and six years suspended – for the dealing conviction and three years – two years executed and one year suspended – for the possession conviction with the sentences to be served concurrently. Perry now appeals.

[1] Riedman had been previously arrested after selling hallucinogenic mushrooms to another confidential informant. Riedman was charged with dealing a controlled substance but pled guilty to the lesser crime of possession pursuant to the plea agreement.

Discussion and Decision

I. Standard of Review

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. Iqbal v. State, 805 N.E.2d 401, 406 (Ind. Ct. App. 2004). Therefore, we will reverse the decision only if it is clearly against the logic and effect of the facts and circumstances before the trial court. Id. We note however, the State has failed to file an appellee's brief. When the Appellee fails to submit a brief, the appellant may prevail by making a prima facie case of error. Mateyko v. State, 901 N.E.2d 554, 557 (Ind. Ct. App. 2009), trans. denied. Prima facie error is error at first sight or appearance. Id.

II. Evidence of Prior Bad Acts

Perry argues the trial court should have allowed him to question Riedman regarding "his interest in lenient treatment from the State … on his two pending probation violations." Appellant's Brief at 12. Perry further argues this evidence is admissible in light of Indiana Evidence Rule 616, which provides: "For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible." Perry is correct that pursuant to Rule 616, evidence that Riedman was testifying as a condition of a plea agreement is admissible. See Bell v. State, 655 N.E.2d 129, 132-33 (Ind. Ct. App. 1995). However, Riedman testified his testimony affected only his plea agreement for the possession of a controlled substance. Riedman further testified his testimony would not affect either his possession of marijuana conviction or his pending probation violation charges. Thus,

while evidence of his plea agreement and the conditions requiring his cooperation and testimony are admissible under Evidence Rule 616, the rule does not require the admission of evidence of Riedman's pending probation violations because they are not probative of a possible bias or interest in Riedman's testimony.

In addition, evidence of Riedman's prior possession of marijuana conviction and his pending probation violations is specifically prohibited by Evidence Rules 608(b) and 609(a). See Pierce v. State, 640 N.E.2d 730, 732 (Ind. Ct. App. 1994) (holding a conviction of dealing cocaine may not be used to impeach a witness because it is not one of the "infamous crimes" enumerated in Evidence Rule 609(a) and does not make it any more likely than not the witness is untruthful), trans. denied. The trial court permitted Perry to elicit testimony from Riedman regarding the fact he had been charged with violating his probation for the possession of a controlled substance conviction because it related directly to Riedman's plea agreement for that charge. However, Perry failed to present any evidence to the trial court linking Riedman's testimony at the trial to preferential treatment regarding his possession of marijuana conviction or his pending probation violation charge for that crime. Similarly, Perry does not demonstrate how evidence of the nature of Riedman's alleged probation violation would be probative of his truthfulness. Therefore, the trial court did not abuse its discretion when it excluded evidence of Riedman's possession of marijuana conviction and the nature of his pending probation violations.[2]

[2] In addition, we note that any error in the exclusion of evidence was harmless in light of the other substantial evidence of Perry's guilt. See Williams v. State, 714 N.E.2d 644, 652 (Ind. 1999) ("[W]e will find an error in the exclusion of evidence harmless if its probable impact on the jury, in light of all the evidence in the case, is sufficiently minor so as not to affect the defendant's substantial rights."). Police recorded video and audio of the

III. Double Jeopardy

We next address sua sponte whether Perry's conviction for possession of cocaine is barred by double jeopardy. See Smith v. State, 881 N.E.2d 1040, 1047 (Ind. Ct. App. 2008) ("We raise the issue sua sponte because a double jeopardy violation, if shown, implicates fundamental rights."). Our supreme court has made clear that where the same cocaine supports convictions of both possession of cocaine pursuant to Indiana Code section 35-48-4-6 and dealing in cocaine pursuant to Indiana Code section 35-48-4-1, possession of cocaine is a lesser included offense of dealing in cocaine. Hardister v. State, 849 N.E.2d 563, 575 (Ind. 2006). The double jeopardy clause bars conviction of a lesser crime where conviction of a greater crime cannot be had without conviction of the lesser crime and sentencing is imposed on the greater crime. Mason v. State, 532 N.E.2d 1169, 1172 (Ind. 1989); see also Ind. Code § 35-38-1-6 (prohibiting entry of judgment and sentence for a lesser included offense when a defendant is found guilty of both an offense and a lesser included offense).

The only evidence of cocaine presented at trial was the bag recovered from Riedman following the controlled buy. Thus, Perry's convictions for both dealing in cocaine and possession of cocaine are supported solely by that single bag of cocaine, making possession of the cocaine a lesser included offense of dealing in the cocaine. Perry may not be convicted and sentenced on both the greater and lesser offenses. Therefore, we reverse his conviction for possession of cocaine and remand to the trial court with instructions to vacate the conviction and accompanying sentence.

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entire drug sale, and Detective Locke gave a detailed eyewitness account of the controlled drug sale, including a positive identification of Perry as the dealer.

Conclusion

The trial court did not abuse its discretion when it excluded evidence of Reidman's prior conviction and probation violation charges. However, Perry's conviction for possession of cocaine violates double jeopardy. Therefore, we affirm Perry's conviction for dealing in cocaine, but we reverse Perry's conviction for possession of cocaine and remand to the trial court with instructions to vacate the conviction and accompanying sentence.

Affirmed in part, reversed in part, and remanded.

BAKER, C.J., and BAILEY, J., concur.