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IN THE COURT OF APPEALS OF INDIANA

TERRY WASHINGTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0801-CR-53
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John Marnocha, Judge
Cause No. 71D02-0707-FA-30

June 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Terry Washington appeals his conviction for class A felony dealing in cocaine. We affirm.

Issues

I. Did the trial court abuse its discretion by admitting Washington's statements to police about his past drug-dealing activity?

II. Did the trial court err by allowing the parties to provide supplemental arguments in response to a jury question?

Facts and Procedural History

On July 10, 2007, a confidential informant met with two South Bend Police Department narcotics officers, Detective Paul Moring and Sergeant Kathy Fulnecky, to report that Washington, her neighbor, was dealing in cocaine. The informant agreed to participate in a controlled buy of cocaine from Washington. The officers searched informant and her car for drugs and weapons and found none. They gave the informant $240 and a recording device. The officers followed The informant as she drove to Washington's residence, and they watched from a parked car as she went inside. After exiting Washington's home a few minutes later, The informant drove to a pre-determined location and turned over to the officers a white powder substance in a clear plastic baggie that was later determined to be 2.3 grams of cocaine.

On July 12, 2007, police obtained a search warrant for Washington's residence. During the search, police recovered $429 from the pocket of a pair of Washington's jeans. Investigators later determined that the recovered money included the money police had given to The informant for the cocaine purchase two days earlier. Police also found a trace of

cocaine—later determined to be less than .01 grams—in Washington's mailbox, as well as some marijuana. No other drugs were discovered during the search.

Washington was present when the search warrant was executed. After being Mirandized, Washington told Detective Moring that he had sold small amounts of cocaine from his residence on "different occasions." Tr. at 140. He stated that he owed approximately $50,000 to his supplier, Curtis Smith. He also said that Smith had been to his house earlier that day to drop off an ounce of cocaine that Washington planned to sell to someone for $875.

After Washington was arrested and jailed, he placed a collect call to his child's mother, Frances Bianco. Eventually, the call became a four-way teleconference between Washington, Bianco, Washington's live-in girlfriend Kara Young, and Young's friend Paula. Washington told Young to return to their home, which she did during the phone call. He directed her to a specific place near the television and told her to look for a lump in the carpet. When she reached inside an opening in the carpet, she found a bag of cocaine that police had failed to discover during their search. Washington told Young to remove the cocaine from the house and to hide it somewhere. Young exited the house with the cocaine on her person.

Unbeknownst to those on the call, police had monitored and recorded the entire conversation. Police pulled Young over as she drove away from Washington's house. Police recovered the bag she had taken from the house and later determined that it contained 21.01 grams of cocaine. On July 13, 2007, the State charged Washington with one count each of class A felony dealing in cocaine, class B felony dealing in cocaine, and class D felony

failure to register as a sex offender. Because the third charge revealed by its very nature that Washington had a prior criminal conviction, it was severed from the first two charges for purposes of this trial. Prior to trial, Washington made an oral motion in limine regarding his statement to police about his prior drug-dealing activity. The trial court denied the motion. During the trial, Washington raised a continuing objection to any evidence of his prior criminal activity. The trial court overruled this objection.

The jury found Washington guilty of class A felony dealing in cocaine, but it was unable to reach a verdict as to the charge of class B felony dealing in cocaine. The trial court later dismissed the charges for class B felony dealing in cocaine and class D felony failure to register as a sex offender. On January 7, 2008, the trial court sentenced Washington to forty years. This appeal ensued.

Discussion and Decision

I. Admission of Washington's Statements to Police

Washington claims that the trial court erred in admitting testimony about certain statements he made to police during their search of his home. Specifically, Detective Moring testified that Washington had given a recorded statement, which included his admissions that he had sold small amounts of cocaine from his home "on different occasions" and that he had a "supplier," to whom he owed approximately $50,000. Tr. at 140-41.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Stringer v. State*, 853 N.E.2d 543, 546 (Ind. Ct. App. 2006). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id*.

Prior to the beginning of the State's case, Washington made an oral motion in limine regarding his statements to police about his past drug-dealing activity. The trial court denied his motion on the basis that such statements were relevant to Washington's intent to deliver the cocaine recovered from his house. Washington did not object when Detective Moring testified that Washington told police that he had dealt drugs from his home and that he had a supplier who brought him more cocaine "whenever he need[ed] it." Tr. at 140. However, after Detective Moring and two other witnesses had testified, Washington stated to the trial court, "I would like to make a continuing objection to any testimony about prior drug related activity." *Id*. at 215. The trial court overruled the objection. *Id*. at 216.

An alleged error in the admission of evidence cannot be preserved without a contemporaneous objection. *Marsh v. State*, 818 N.E.2d 143, 145 (Ind. Ct. App. 2004); *see also Carter v. State*, 754 N.E.2d 877, 881 n.8 (Ind. 2001) (noting that defendant must reassert his objection at trial contemporaneously with the introduction of the evidence to preserve alleged error for appeal), *cert. denied* (2002). To the extent that Washington may be attempting to appeal the trial court's denial of his motion in limine, it is well settled that in order to preserve error in the denial of a pre-trial motion in limine, the appealing party must object to the admission of the evidence at the time it is offered. *Ried v. State*, 610 N.E.2d 275, 281 (Ind. Ct. App. 1993), *aff'd on transfer*, 615 N.E.2d 893 (Ind. 1993).

For these reasons, we agree with the State that Washington has waived any claim of error regarding the admission of his statements to police. Waiver notwithstanding, errors in the admission of evidence are to be disregarded as harmless error unless they affect the substantial rights of a party. *Gall v. State*, 811 N.E.2d 969, 976 (Ind. Ct. App. 2004), *trans.*

denied. An error will be found harmless if its probable impact on the jury, in light of all the evidence, is sufficiently minor so as not to affect the substantial rights of a party. *Id*.

Here, the State presented substantial evidence of Washington's guilt aside from his statements to police, including the testimony of Detective Moring and The informant regarding the circumstances of her controlled buy from Washington, and the recording of a phone conversation following his arrest during which he directed Kara Young to remove a bag of cocaine from his house that police did not find during their search. Moreover, Young testified that Washington did not use cocaine, evidence that also supports the jury's conclusion that Washington intended to sell the cocaine in his possession. In sum, any error in the admission of Detective Moring's testimony about Washington's statements was harmless. In light of the other evidence presented by the State, the impact of that testimony did not affect Washington's substantial rights, and we will not reverse his conviction on this ground.

II. Supplemental Arguments in Response to Jury Question

Next, Washington claims that the trial court erred by allowing the State to "incorrectly instruct[]" the jury during supplemental arguments. Appellant's Br. at 6. While deliberating, the jury submitted a note to the trial court requesting "a better explanation" of "actual or constructive transfer" (emphasis in original)[1] in the context of Indiana Code Section 35-48-1-

[1] The record does not include a copy of the jury's question, but the trial court indicated to the parties that the word "constructive" was underlined. Tr. at 340.

11, which defines "delivery" as "an actual or constructive transfer from one person to another of a controlled substance[.]" Tr. at 342. In the class A felony dealing in cocaine charge, the State had alleged that Washington possessed, with intent to deliver, cocaine in the amount of three grams or more. In class B felony dealing in cocaine charge, the State had alleged that Washington delivered cocaine to The informant during the controlled buy.

The trial court notified counsel of the question and proposed that each party have five minutes to address the jury on this question. The parties agreed, and the following exchange took place in front of the jury:

PROSECUTOR:	Can everyone see the speaker on the corner [indicating the amplifier on the witness stand]? I know it's there. [To Detective Moring:] Paul, do you know it's there, can you see that speaker?
DETECTIVE MORING:	[indicates affirmative]
PROSECUTOR:	So you see that speaker?
DETECTIVE MORING:	[indicates affirmative]
PROSECUTOR:	I have the ability to get to it, you have the ability to get to it. Constructive. Pick that up, will you? (Whereupon, [Detective] Moring picked up speaker.) Constructive. I didn't hand it directly to him. I knew it was there, gave him an instruction. Okay? Actual? Hand-to-hand. Constructive? Knowing it's there with an ability to get to it.
THE COURT:	Thank you. Mr. Skodinski?
DEFENSE COUNSEL:	Well, that's essentially what it is, I don't have anything to quarrel with about that definition. Actual is that I hand it to somebody, constructive is if I placed this cell phone here, I walk away and then I ask somebody to pick up the cell phone.

I've made a constructive transfer of that cell phone. Which is the same example that he used. Essentially I gave it to you, even though I actually didn't give it to you, but because it was sitting there. And it was in your control and my control, I left it there, I knew it was a cell phone when I left it there and I gave it to you and I asked you to take it.

COURT: Thank you. Ladies and gentlemen, that concludes that supplemental argument, and I will excuse you to the jury room to continue your deliberations.

BAILIFF: All rise.

[Whereupon, at 1:28, the jury was returned to the jury room to commence deliberations.]

Tr. at 342-44. Again, Washington's claim of error is waived, this time due to his own participation in the alleged error. Pursuant to the doctrine of invited error, a party may not take advantage of any error that she commits, invites, or which is the natural consequence of her own neglect or misconduct. *Wright v. State*, 828 N.E.2d 904, 907 (Ind. 2005). Upon receiving the jury's question, the trial court notified counsel and proposed that each side take five minutes to respond to the jury's question.[2] Washington's counsel agreed with this

[2] Indiana Code Section 34-36-1-6 states as follows:

If, after the jury retires for deliberation:
(1) there is a disagreement among the jurors as to any part of the testimony; or
(2) the jury desires to be informed as to any point of law arising in the case;

proposal, as did the prosecutor. Following the prosecutor's argument on the issue, Washington's counsel stated, "Well, that's essentially what it is, I don't have anything to quarrel with about that definition." Tr. at 343. Then he presented an example of actual and constructive possession, presumably to clarify the prosecutor's explanation.

Washington now claims that the State actually offered an explanation of constructive *possession* instead of constructive transfer. He states that the trial court erred by "let[ting] the State's incorrect argument of the law stand without clarification." Appellant's Br. at 8. He ignores the fact that he expressed to the jury his agreement with the State's explanation. Moreover, he failed to raise any alleged error on this issue until this appeal. Therefore, his argument is waived for our review. *See Pinkins v. State*, 799 N.E.2d 1079, 1089 (Ind. Ct. App. 2003) (holding that failure to object at trial typically means that a party has waived appellate review of the claim).

Waiver notwithstanding, in order to obtain a reversal of his conviction, Washington would be required to affirmatively demonstrate that the alleged instructional error prejudiced

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> the jury may request the officer to conduct them into court, where the information required shall be given in the presence of, or after notice to, the parties or the attorneys representing the parties.
>
> In reference to this statute, our supreme court has stated,
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> > Under appropriate circumstances, and with advance consultation with the parties and an opportunity to voice objections, a trial court may, for example, directly seek further information or clarification from the jury regarding its concerns, may directly answer the jury's question (either with or without directing the jury to reread the other instructions), may allow counsel to briefly address the jury's question in short supplemental arguments to the jury, or may employ other approaches or a combination thereof.

Tincher v. Davidson, 762 N.E.2d 1221, 1223 (Ind. 2002).

his substantial rights. *Hero v. State*, 765 N.E.2d 599, 602 (Ind. Ct. App. 2002). As discussed above, we simply cannot conclude that Washington's substantial rights have been affected, in light of the evidence that supports his conviction, which includes the following: the informant's controlled buy, which demonstrated that Washington had in fact sold drugs from his residence; the phone call during which Washington frantically directed Young to remove the bag of cocaine from his home that police had failed to discover; and Young's testimony that Washington did not use cocaine. Moreover, the fact that the bag contained 21.01 grams of cocaine also supports the jury's verdict in this case. A defendant's possession of a large amount of a narcotic substance is circumstantial evidence of intent to deliver. *Hirshey v. State*, 852 N.E.2d 1008, 1015 (Ind. Ct. App. 2006), *trans. denied*.

In sum, even if Washington had preserved his claims of error, and even if we were to conclude that one or both of the alleged errors in fact occurred, Washington has failed to prove that his substantial rights were affected, either by the admission of his statements to police about past drug-dealing activity or by the prosecutor's supplemental argument and the trial court's alleged failure to clarify or correct the same. Therefore, Washington's conviction must stand.

Affirmed.

BARNES, J., and BRADFORD, J., concur.