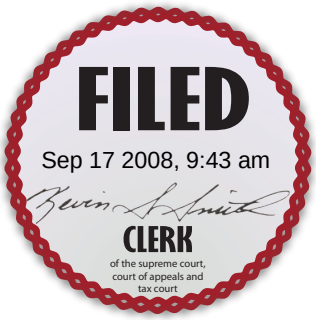

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IN THE
COURT OF APPEALS OF INDIANA

ANDRE CROSS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0711-CR-505
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0512-FA-218

September 17, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Andre Cross appeals his convictions for Possession of Cocaine with Intent to Deliver, as a Class A felony, and Possession of Marijuana, as a Class D felony, following a jury trial. He presents the following issues for our review:

1. Whether the trial court abused its discretion when it admitted evidence police obtained pursuant to a search warrant.

2. Whether the trial court abused its discretion when it admitted evidence allegedly lacking a sufficient chain of custody.

We affirm.

FACTS AND PROCEDURAL HISTORY

In December 2005, a confidential informant identified as number 05-249 ("CI 249"), working with the Elkhart County Interdiction and Covert Enforcement Unit ("the Unit"), advised officers that Cross had approached him[1] and offered to sell him marijuana. And on December 19, 2005, a confidential informant identified as number 05-270 ("CI 270") informed police officers that she had bought cocaine from Cross several times in the past, and she offered to participate in a controlled buy with Cross. CI 270 provided officers with Cross' cellular telephone number, and she called Cross and left a voicemail. Cross soon called CI 270 back, and they arranged a meeting at Cross' apartment in Elkhart so that CI 270 could purchase cocaine.

In advance of that meeting, officers searched CI 270 and found no contraband. Officers equipped her with a transmitter and gave her $100 in recorded buy money. An undercover police officer, Officer Travis Adamson, accompanied CI 270 to Cross'

[1] The record does not reveal the gender of CI 249, but for ease of discussion we will use male pronouns when discussing CI 249's actions.

apartment, but Cross told CI 270 that he would only permit her inside his apartment, so Officer Adamson waited in the car. When CI 270 and Cross returned to the car, they were arguing, and Officer Adamson had to intervene. Cross demanded that CI 270 return the cocaine to him, which she did, and Cross gave her the $100 back. Officer Adamson saw CI 270 hand Cross a baggie containing a white powdery substance.

The next day, December 20, 2005, Captain Wade Branson submitted a probable cause affidavit and obtained a search warrant for Cross' apartment. In the probable cause affidavit, Captain Branson stated in relevant part that: CI 249 had assisted the Unit in the past by providing "accurate and reliable" information that led to the arrests of three suspects on narcotics-related charges, Appellant's Supp. App. at 22; CI 249 had advised him that Cross had offered to sell him marijuana; CI 270, who had provided reliable information to the Unit in the past, had told him that she had bought cocaine from Cross on twenty occasions, most often at Cross' apartment; CI 270 had given Captain Branson Cross' cellular telephone number, which Captain Branson corroborated with information that officers had obtained directly from Cross in 2002; officers had monitored a telephone call between CI 270 and Cross arranging a cocaine buy; Officer Adamson and CI 270 had participated in a failed controlled buy, in which Officer Adamson saw CI 270 return a baggie containing a white powdery substance to Cross in exchange for the $100 buy money; CI 270 had explained that Cross had several grams of cocaine inside a pill bottle and that he kept a digital scale inside a kitchen cabinet; and CI 270 had seen Cross with a large sum of money on his person.

Officers immediately executed the search warrant and found more than three grams of cocaine and more than thirty grams of marijuana on the premises.[2] In addition, officers recovered digital scales, several boxes of plastic baggies, and more than $2000 in cash. The State charged Cross with possession of cocaine with intent to deliver, as a Class A felony, and possession of marijuana, as a Class D felony. Cross moved to suppress the evidence officers obtained pursuant to the search warrant, but the trial court denied that motion following a hearing. A jury found Cross guilty as charged, and the trial court entered judgment and sentence accordingly. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Search Warrant

Cross first contends that "the affidavit in support of the search warrant did not contain sufficient evidence justifying probable cause, as there were insufficient indicia of reliability related to the [CI's]." Brief of Appellant at 4. The determination of probable cause is a mixed question of law and fact. Moffitt v. State, 817 N.E.2d 239, 246 (Ind. Ct. App. 2004), trans. denied. When facts sufficient to create probable cause are undisputed, probable cause is a question of law. Id. Although we generally review a trial court's decision to admit evidence despite a motion to suppress under an abuse-of-discretion standard, the ultimate determination of whether there was sufficient probable cause to justify the search warrant in this case is reviewed de novo. See id.

In Newby v. State, 701 N.E.2d 593, 597-98 (Ind. Ct. App. 1998), this court explained:

[2] Officers found a set of keys in Cross' apartment that opened three storage lockers in the laundry room of Cross' apartment building. Officers found marijuana and cocaine inside those lockers.

> In determining whether to issue a search warrant, "'[t]he task of the issuing magistrate is simply to make a practical, common sense 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.'" Jaggers v. State, 687 N.E.2d 180, 181 (Ind. 1997) (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)). . . .
>
> The United States Supreme Court has held that uncorroborated hearsay from a source whose credibility is itself unknown, standing alone, cannot support a finding of probable cause to issue a search warrant. Gates, 462 U.S. at 227. The federal test for ensuring the reliability of a hearsay statement in a probable cause determination allows the use of hearsay only if the totality of the circumstances corroborates the hearsay. Lloyd, 677 N.E.2d at 74 (citing Gates, 462 U.S. at 230-31). The reliability of hearsay can be established in a number of ways, including where: (1) the informant has given correct information in the past, (2) independent police investigation corroborates the informant's statements, (3) some basis for the informant's knowledge is demonstrated, or (4) the informant predicts conduct or activities by the suspect that are not ordinarily easily predicted. Jaggers, 687 N.E.2d at 182.

Further, Indiana Code Section 35-33-5-2(b) provides:

> When based on hearsay, the affidavit must either:
>
> > (1) contain reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there is a factual basis for the information furnished; or
> >
> > (2) contain information that establishes that the totality of the circumstances corroborates the hearsay.

Again, Cross' sole contention on appeal is that the hearsay information provided by the confidential informants was not sufficiently corroborated to provide probable cause. But the probable cause affidavit contains statements regarding "accurate," "corroborated," and "reliable" information provided by CI 249 and CI 270 in the past. Appellant's Supp. App. at 22-23. In addition, the telephone number provided by CI 270 was corroborated by officers from information that Cross had provided to them in 2002.

Finally, officers monitored a phone call between CI 270 and Cross, and Officer Adamson witnessed an incriminating portion of the failed drug buy between CI 270 and Cross. We hold that the probable cause affidavit contains sufficient indicia of the confidential informants' reliability. And there is sufficient evidence to support the determination of probable cause in issuing the search warrant. Cross cannot prevail on this issue.

Issue Two: Chain of Custody

Cross next contends that the State failed to establish the chain of custody regarding the cocaine and marijuana the trial court admitted into evidence at trial. We review the trial court's ruling on the admission of evidence for an abuse of discretion. Beer v. State, 885 N.E.2d 33, 41 (Ind. Ct. App. 2008). We 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 constituted harmless error. Id.

It is well established in Indiana that an exhibit is admissible if the evidence regarding its chain of custody strongly suggests the exact whereabouts of the evidence at all times. Culver v. State, 727 N.E.2d 1062, 1067 (Ind. 2000). That is, in substantiating a chain of custody, the State must give reasonable assurances that the property passed through various hands in an undisturbed condition. Id. We have also held that the State need not establish a perfect chain of custody, and any gaps go to the weight of the evidence and not to admissibility. Id.

Here, Cross points to evidence showing that the cocaine and marijuana introduced at trial had been involved in "an internal investigation that dealt with the specific issue of

the whereabouts of the evidence" while in police custody. Brief of Appellant at 8. Indeed, Officer Joseph Pinch testified that an internal investigation had been conducted on certain evidence, including the cocaine and marijuana in this case, being stored in a police vault. Officer Pinch stated that there was concern that some of the evidence was either lost or missing for an unknown period of time. But Officer Pinch did not know whether it was determined that the evidence had actually been lost or was missing for any period of time.

Other than that suggestion of a gap in the chain of custody, Cross does not make any specific challenges to the State's showing of the chain of custody. Again, the State need not establish a perfect chain of custody, and any gaps go to the weight of the evidence and not to admissibility. Culver, 727 N.E.2d at 1067. The State presented detailed testimony regarding who was responsible for the confiscated drugs and how they were secured from the time of confiscation until trial. And Officer Jeff Eaton testified that the contraband appeared to be in substantially the same condition at trial as when he collected it at the scene. We hold that the trial court did not abuse its discretion when it admitted the cocaine and marijuana into evidence.

Regardless, even assuming the admission of that evidence was in error, the error was harmless. The State presented Captain Branson's testimony that the white powdery substance officers found in Cross' apartment field-tested positive for cocaine; a forensic expert's testimony that the green leafy material found in Cross' storage lockers was marijuana; and a forensic expert's testimony that the white powdery substance officers found was cocaine. Cross did not make a contemporaneous objection to any of those

statements at trial. See Transcript at 84, 267, 270. Thus, the tangible evidence of marijuana and cocaine was merely cumulative evidence. See Gunter v. State, 605 N.E.2d 1209, 1211 (Ind. Ct. App. 1993) (applying harmless error analysis to State's alleged failure to establish chain of custody), trans. denied.

Affirmed.

ROBB, J., and MAY, J., concur.