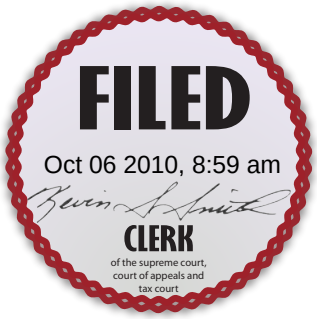

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IN THE
COURT OF APPEALS OF INDIANA

SAMUEL L. LEWIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-1001-CR-96
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0805-FA-18

October 6, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Samuel Lewis was convicted of four counts of class A felony Dealing in Cocaine[1] and one count of class B felony Dealing in Cocaine[2] and was subsequently sentenced to an aggregate executed sentence of forty-eight years. Lewis presents four issues for our review, which we restate as follows:

1. Did the trial court err in instructing the jury?

2. Is the evidence sufficient to support Lewis's convictions?

3. Did the trial court abuse its discretion when it granted only a short continuance of the sentencing hearing so that Lewis could review the pre-sentence investigation report?

4. Is the sentence imposed inappropriate in light of Lewis's character and the nature of the offenses?

We affirm.

The facts most favorable to the convictions follow. The Interdiction and Covert Enforcement Unit (ICE) for Elkhart County investigates narcotics activities through controlled-buy situations and reliance upon confidential sources. Over the course of four months (January 2008 to May 2008), ICE officers arranged for two confidential sources, identified as CS07-024 and CS08-07, to participate in controlled drug buys from a man known as "Flip" (*Transcript* at 329, 344), who the confidential sources later identified from a photographic array as Lewis. Both confidential sources had personally met Lewis and knew his appearance and voice. Both sources also provided the same phone number for Lewis and used that number to contact him to arrange the controlled buys.

[1] Ind. Code Ann. § 35-48-4-1 (West, Westlaw through 2010 2nd Regular Sess.).

[2] *Id*.

ICE has a standard protocol for conducting controlled buys. A controlled buy begins by meeting with the confidential source in a hidden location where the source and the source's car are searched. Any contraband or money is confiscated and the source is given money that has been photocopied to make the purchase. The source is also given a transmitting/recording device so that ICE officers can monitor the transaction. The source then travels to the pre-arranged location for the buy and is kept under visual and audio surveillance by ICE officers at all times. After the buy is complete, ICE officers follow the source to a given location where the source and his vehicle are again searched for contraband and money. The source also gives ICE officers a brief account of what occurred during the buy.

On January 14, 2008, undercover officers with ICE met with CS07-024 and arranged a controlled buy of cocaine from Lewis. The officers followed the standard protocol for controlled buys. CS07-024 purchased 2.78 grams of cocaine from Lewis for $140.

On April 23, 2008, CS08-07 cooperated with ICE and arranged a controlled buy of cocaine from Lewis. CS08-07 was given $400 in cash to make the purchase. After the buy, CS08-07 gave the officers a bag that was later determined to contain 13.27 grams of cocaine. On May 1, 2008, CS08-07 made a second controlled buy from Lewis in the driveway of the home on Hively Street believed to belong to Lewis. During this transaction, CS08-07 purchased 13.05 grams of cocaine from Lewis. On May 13, 2008, CS08-07 participated in a third controlled buy from Lewis during which CS08-07 purchased 13.45 grams of cocaine from Lewis. For each of these controlled buys, ICE officers followed the standard protocol set forth above.

On May 15, 2008, the ICE unit, along with the Indiana State Police SWAT team, served a search warrant on the residence located on Hively Street in Elkhart. Officers encountered Lewis outside of the residence. Lewis had in his possession a cell phone with the telephone number used by both confidential sources to arrange the controlled buys. Lewis also had over $1900 in cash in his pocket, $320 of which matched the photocopied money that was used during the May 13 controlled buy by CS08-07. After being placed under arrest and advised of his Miranda rights, Lewis told the officers that they could find cocaine in a pill bottle in the kitchen. The officers did in fact find a total of 20.57 grams of cocaine in eight knotted, plastic baggies in the pill bottle. When asked where he kept his extra baggies and scales, Lewis admitted to the officers that he used a separate home for bagging cocaine.

On May 21, 2008, the State charged Lewis with five counts of class A felony dealing in cocaine. Count I stemmed from the cocaine found during the search of Lewis's residence. Counts II through V centered on each controlled buy. On December 7, 2009, the State was granted permission to amend one of the charges (Count II) from a class A felony dealing offense to a class B felony dealing offense based on the amount of cocaine being less than three grams. A three-day jury trial commenced on December 7, 2009. At the conclusion of the evidence, the jury found Lewis guilty as charged. On December 30, 2009, the trial court sentenced Lewis to concurrent sentences of forty-eight years for each class A felony conviction and twenty years for the class B felony conviction, for a total aggregate sentence of forty-eight years. Additional facts will be provided where necessary.

1.

Lewis argues that with respect to Count I, the trial court erred in failing to instruct the jury on the meaning of intent to deliver and on cocaine possession as a lesser-included offense of dealing in cocaine. In Count I the State charged Lewis as follows: "SAMUEL L. LEWIS did knowingly possess, with intent to deliver, cocaine, pure or adulterated, and the amount of the drug involved weighed three (3) grams or more . . . ." *Appellant's Appendix* at 40. A key element of the offense is that Lewis intended to deliver the cocaine found in his possession. Here, as part of the final instructions, the trial court instructed the jury on intent to possess in explaining the difference between constructive and actual possession. The court, however, did not instruct the jury on the element of intent to deliver. Lewis maintains that giving only an instruction on intent to possess was misleading because the jury "could have concluded that merely having the cocaine in his constructive possession was enough to prove intent to deliver." *Appellant's Brief* at 14. Lewis also argues that the trial court should have instructed the jury on the lesser included offense of possession of cocaine.

It is well established that instructing the jury is within the discretion of the trial court. *White v. State*, 846 N .E.2d 1026 (Ind. Ct. App. 2006), *trans. denied.* Jury instructions are to be considered as a whole and in reference to each other. *Id.* As always, a timely objection is generally required to preserve an issue for appeal. *Id.* A defendant who fails to object to the court's final instructions and fails to tender a set of instructions at trial waives a claim of error on appeal. *Sanchez v. State*, 675 N.E.2d 306 (Ind. 1996). Acknowledging that he did not object to the omission of or tender instructions he now claims should have been given, Lewis contends that fundamental error occurred.

"The 'fundamental error' exception is extremely narrow, and applies only when the

error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006). In other words, fundamental error is defined as an error so prejudicial to the rights of a defendant that a fair trial is rendered impossible. *Id.*

We first consider whether it was error to omit an instruction defining for the jury the element of intent to deliver. We begin by noting that the jury was instructed to "consider all the instructions that are given to you as a whole" and to "not single out any certain instruction, sentence, or any individual point and ignore the others." *Transcript* at 636. The jury was also instructed on the elements of the offense as follows:

> Before you may convict the defendant, the State must have proved each of the following elements beyond a reasonable doubt:
>
> 1. The defendant;
> 2. knowingly
> 3. possessed with intent to deliver
> 4. cocaine, pure or adulterated;
> 5. and the amount of the cocaine involved weighed 3 grams or more.
>
> If the State failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty of Dealing in Cocaine, a Class A felony as charged in Count I.

Id. at 639. After the trial court separately instructed the jury on the statutory definition of "knowingly" and the difference between actual and constructive possession, the court reiterated through yet another instruction the State's burden of proving each element of the crime charged beyond a reasonable doubt. One such element was explicitly set forth as possession "with intent to deliver." *Id*.

Where terms are in common use and are such as can be understood by a person of ordinary intelligence, they need not be defined or explained in the absence of anything in the

charges to obscure their meaning. *Manley v. State*, 656 N.E.2d 277 (Ind. Ct. App. 1995), *trans. denied*. This is true even where the word is statutorily defined. *Id*.; *see also* I.C. § 35-48-1-11 (West, Westlaw through 2010 2nd Regular Sess.) (defining delivery) and Ind. Code Ann. § 35-41-2-2(a) (West, Westlaw through 2010 2nd Regular Sess.) (defining intentionally). Here, we find nothing misleading or confusing about the instructions specifically with regard to the element of intent to deliver. Those terms, although statutorily defined, are common in every day speech and were most likely understood by the jurors. Although instructing the jury on the statutory definition of those terms would have been preferable, under the facts of this case, and reading the instructions as a whole, we cannot say that failing to give such instructions amounted to fundamental error.

Lewis also argues that the trial court committed reversible error when it failed to *sua sponte* give a jury instruction on the lesser included offense of possession of cocaine. When the asserted error is failure to give an instruction, "a tendered instruction is necessary to preserve error because, without the substance of an instruction upon which to rule, the trial court has not been given a reasonable opportunity to consider and implement the request." *Ortiz v. State*, 766 N.E.2d 370, 375 (Ind. 2002) (quoting *Mitchell v. State*, 742 N.E.2d 953, 955 (Ind. 2001)). Again acknowledging his failure to tender an instruction on the lesser-included offense, Lewis argues that the court's failure to give such instruction amounted to fundamental error.

An instruction on a lesser-included offense is proper "if the lesser included offense is either inherently or factually included in the crime charged, and if, based upon the evidence presented in the case, there existed a serious evidentiary dispute about the element or

elements distinguishing the greater from the lesser offense such that a jury could conclude that the lesser offense was committed but not the greater." *Ellis v. State*, 736 N.E.2d 731, 733 (Ind. 2000) (citing *Wright v. State*, 658 N.E.2d 563 (Ind. 1995)). If there is no meaningful evidence from which the jury could properly find the lesser offense was committed while the greater was not, then the court should not give the lesser-included offense instruction. *Wright v. State*, 658 N.E.2d 563.

The State acknowledges that cocaine possession is an inherently-included offense of cocaine dealing when the same cocaine is used to prove both crimes. *See Hardister v. State*, 849 N.E.2d 563 (Ind. 2006). Contrary to Lewis's assertions, however, there is no serious evidentiary dispute regarding Lewis's intent to deliver, a key element that distinguishes the lesser-included offense of cocaine possession from the greater offense of dealing cocaine as charged in Count I. Although no scales, baggies, or ledgers, items commonly associated with dealing cocaine, were found during the search of Lewis's residence, Lewis admitted that he used a different residence to bag the cocaine. Moreover, telling of Lewis's intent is that during the search of the residence, Lewis directed the officers to a pill bottle that contained eight, knotted plastic baggies containing a combined total of 20.57 grams of crack cocaine, significantly more than associated with personal use. After his arrest, Lewis was found in possession of over $1900 in cash, $320 of which was traceable to the controlled buy that occurred two days prior to the search and a cell phone that was used to arrange the controlled buys. Furthermore, the two confidential sources each testified that Lewis was the individual from whom they purchased cocaine during the controlled buys. Given the evidence, we conclude that there was no serious evidentiary dispute to warrant the giving of a lesser-

included offense instruction. *See Wright v. State*, 766 N.E.2d 1223 (Ind. Ct. App. 2002). Because Lewis was not entitled to an instruction on the lesser-included offense of cocaine possession, there was no error, let alone fundamental error, in not so instructing the jury.

2.

Lewis argues that the evidence is insufficient to support his convictions. With regard to Count I, Lewis argues that the evidence does not prove he had the requisite intent to deliver. With regard to Counts II, III, IV, and V, Lewis argues that the evidence does not prove that he was the individual who sold the cocaine to the confidential sources during the controlled drug buys.

When considering a challenge to the sufficiency of evidence to support a conviction, we respect the fact-finder's exclusive province to weigh the evidence and therefore neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the conviction, and "must affirm 'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" *Id*. at 126 (*quoting Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

We begin with Lewis's challenge to his conviction under Count I, which stems from the cocaine found during the execution of the warrant at Lewis's residence. Lewis maintains that the amount of cocaine discovered could have been for personal use and therefore, is not evidence of his intent to deliver.

Because intent is a mental state, the trier of fact must generally resort to the reasonable inferences arising from the surrounding circumstances in order to determine whether the requisite intent exists. *Love v. State*, 741 N.E.2d 789 (Ind. Ct. App. 2001), *trans. denied*. Circumstantial evidence showing possession with intent to deliver may support a conviction. *Id*. Possessing a large amount of a narcotic substance may be considered as circumstantial evidence of intent to deliver. *Id*. The more narcotics a person possesses, the stronger the inference that he intended to deliver it and not personally consume it. *Id*.

The evidence most favorable to Count I is that during the search of his residence, Lewis directed officers to a pill bottle that contained eight individually wrapped baggies containing a total of 20.57 grams of crack cocaine. An ICE officer testified that cocaine is sold for personal use in amounts as little as .2 grams. We further note that the amount Lewis was found to have constructively possessed (20.57 grams) is significantly more than the threshold of three grams required to convict Lewis of class A felony dealing cocaine. *See* I.C. 35-48-4-1(b). The amount of cocaine itself supports an inference of an intent to deliver.

Lewis was also found in possession of a large amount of cash, some of which was traceable to a controlled drug buy that occurred two days prior to the search of Lewis's residence. Additionally, the two confidential sources identified Lewis as the individual that sold them cocaine during four separate controlled buys. When asked by investigators where he kept his extra baggies and scales, Lewis informed the officers that he used a separate residence for bagging cocaine. From this evidence, a more-than-reasonable inference can be drawn that Lewis had the requisite intent to deliver in order to sustain his conviction for dealing cocaine under Count I.

With regard to the remaining counts, Lewis argues that the evidence does not establish beyond a reasonable doubt that he was the individual who sold the cocaine to the confidential sources during the controlled buys. Lewis points out that none of the officers who conducted surveillance during each of the controlled buys was able to affirmatively identify Lewis as the individual who sold the cocaine. Specifically, at trial the officers were only able to provide a basic description of race, sex, and size of the individual who sold the cocaine to the confidential sources. In support of his argument, Lewis also attempts to discount the identification testimony of the confidential sources. Lewis asserts that the confidential sources could not affirmatively identify him by name until after they were shown a photo array and also points out their motives for cooperating with ICE investigators during the controlled buys.

Although the confidential sources identified their supplier as "Flip", when they were each shown a photo array, both affirmatively identified Lewis as "Flip" and as the person who sold them the cocaine during the controlled buys. Both confidential sources had personally met Lewis on prior occasions and knew his appearance and voice. With regard to the confidential sources' motives, such matters were brought to the attention of the jury and would have served only to impact their credibility, a matter completely within the jury's province. Simply put, Lewis's arguments are nothing more than a request that we reweigh the evidence and judge the credibility of witnesses. The jury was advised of matters bearing upon the credibility of the confidential sources and it was incumbent upon the jury to assess their credibility. We will not second-guess the jury as the finder of fact.

Lewis also argues that the audio recordings that were played for the jury do not indicate that during the controlled buys a drug deal occurred. Lewis views this evidence in isolation, ignoring the overwhelming evidence to the contrary. During each controlled buy, the officers complied with the ICE procedures, including searching the confidential sources and their vehicles prior to the controlled buy and photocopying money that was provided to the confidential source to make the buy. The confidential sources were monitored during the entire transaction through auditory devices and visual surveillance. After the buy was complete, the confidential sources were followed to a pre-arranged location and again searched for contraband, at which time the sources would turn over the cocaine that was purchased during the buy and provide the officers with a summary of what transpired. Even without the audio recordings, there is sufficient evidence to establish that a drug deal occurred during each of the controlled buys. The evidence is sufficient to sustain each of Lewis's convictions.

3.

Lewis argues that the trial court abused its discretion in denying his motion to continue the sentencing hearing. The decision whether to grant a continuance, when the motion is not based upon statutory grounds, lies within the discretion of the trial court and will not be reversed absent a clear showing of an abuse of discretion. *Evans v. State*, 855 N.E.2d 378 (Ind. Ct. App. 2006), *trans. denied*. The appellant must overcome a strong presumption that the trial court properly exercised its discretion. *Id*. "'Additionally, the defendant must make a specific showing of how he was prejudiced as a result of the trial

court's denial of his motion.'" *Id*. at 386-87 (quoting *Harris v. State*, 659 N.E.2d 522, 527 (Ind. 1995)).

At the start of the sentencing hearing, Lewis's counsel made an oral request for a one-week continuance. From the record, it appears that Lewis was not provided a copy of the PSI prior to the sentencing hearing and that it was on this basis that Lewis's attorney sought the continuance. After a bench conference, which was not recorded, the trial court provided Lewis with the court's copy of the PSI and then adjourned Lewis's sentencing hearing. When the court resumed the sentencing hearing a short time later,[3] the court confirmed with Lewis's counsel that he had had an opportunity to review the PSI. At the prosecutor's request, Lewis clarified that his 1997 felony robbery conviction had been overturned on appeal. Lewis then personally confirmed that the PSI was otherwise accurate. Lewis did not renew his motion for continuance of the hearing. On appeal, Lewis maintains that the brief period of time he was afforded to review the contents of the PSI was "insufficient to do a thoroughly diligent review of its accuracy, much less formulate any kind of meaningful defense with regard to its contents." *Appellant's Brief* at 17. To demonstrate prejudice, Lewis points out that the prosecutor may have argued inaccurately that Lewis was on federal parole at the time of the instant offenses.

While it appears that Lewis was not provided with the eight-page PSI report until after the start of the sentencing hearing, we note that, other than his criminal history, which is a matter of public record, Lewis provided the majority of information contained in the report.

We further note that after being given an opportunity to review the PSI, Lewis confirmed that the information contained therein was accurate and did not further seek a continuance of the hearing. With regard to the prosecutor's statement regarding federal parole, we agree that there is no definitive statement as to such matter in the PSI. Nevertheless, the trial court did not rely upon such fact in deciding what sentence to impose. The trial court clearly indicated that it considered Lewis's extensive criminal history and his drug abuse as aggravating factors, but did not mention Lewis's parole status at the time of the offenses. Aside from the fact that Lewis did not renew his motion for a continuance after he was afforded an opportunity to review the PSI, Lewis has also not established prejudice resulting from the denial of his motion for a continuance.

[3] It is unclear how long the court adjourned the proceedings. The notation in the record is that after the matter was adjourned, "Other cases were heard", followed by the court indicating "we're back" in Lewis's sentencing hearing. *Transcript* at 665.

4.

Lewis argues that his sentence is inappropriate. In explaining the sentence imposed, the court identified as aggravating the circumstances of the crimes and the fact that there were multiple offenses. The court also noted that the evidence presented at trial indicated that Lewis had made a threat to a witness. The court found Lewis's criminal history to be "substantial", specifically noting that Lewis had six prior controlled substance convictions, four misdemeanors, five felonies, four juvenile actions, one failure to appear, and two probation violations. *Transcript* at 672. Finally, the court considered as aggravating that lesser sanctions and prior efforts at rehabilitation had proven unsuccessful. As mitigating circumstances, the court considered Lewis's statement to the court that he is a drug addict and comments by Lewis's counsel that Lewis is a thoughtful and considerate person who is not predisposed to commit criminal offenses. The court concluded that the aggravating factors outweighed the mitigating factors. Based on its evaluation of the aggravating and mitigating factors, the court sentenced Lewis to forty-eight years for each of his four class A felony dealing cocaine convictions and to twenty years for his class B felony dealing cocaine conviction, with all sentences to be served concurrently for a total aggregate sentence of forty-eight years.

We have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. *See* Ind. Appellate Rule 7(B); *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g by* 875 N.E.2d 218. Although we are not required under App. R. 7(B) to be "extremely" deferential to a trial court's sentencing decision, we

recognize the unique perspective a trial court brings to such determinations. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). Moreover, we observe that Lewis bears the burden of persuading this court that his sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867.

With regard to the nature of the offenses, we note that the amount of cocaine Lewis sold during the April 23, May 1, and May 23, 2008 controlled buys, i.e., over thirteen grams on each occasion, and the amount of cocaine found in his residence, over twenty grams, far exceeds the three grams required to prove the offenses. Moreover, we note that Lewis sold cocaine on at least four occasions and was found in possession of eight individual packages of cocaine. Lewis admitted to investigators that he used a different residence to bag the cocaine he sold. These facts demonstrate the ongoing nature of Lewis's drug-dealing activities. The nature of the offenses does not convince us that the sentence imposed was not warranted.

Turning to the character of the offender, Lewis's criminal history is quite telling. Lewis has four misdemeanor convictions and five felony convictions and at least six of his prior offenses involve controlled substances. We acknowledge that the offenses occurred during a relatively short period of time over ten years prior to the instant offenses when Lewis claims he was addicted to drugs. In any event, his propensity to turn to drugs and the nature of the current offenses do not weigh in favor of a lesser sentence. Additionally, we note, as did the trial court, that less restrictive measures and prior attempts at rehabilitation have not deterred Lewis's behavior.

Considering the nature of the offenses and the character of the offender, we cannot say that the aggregate forty-eight year sentence for four class A felony dealing offenses and one class B felony dealing offense is inappropriate.

Judgment affirmed.

BARNES, J., and CRONE, J., concur.