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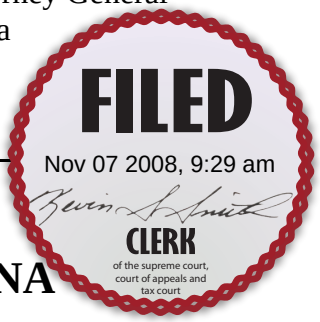

IN THE COURT OF APPEALS OF INDIANA

MICHELLE DEARING,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0803-CR-209
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jose Salinas, Judge
Cause No. 49G14-0707-FD-148254

November 7, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Michelle Dearing appeals her conviction for class D felony maintaining a common nuisance. We affirm.

Issues

I. Did the trial court abuse its discretion in admitting a police officer's testimony regarding his warrantless entry of Dearing's home?

II. Did the State present sufficient evidence to sustain Dearing's conviction?

Facts and Procedural History

The facts most favorable to the trial court's judgment indicate that on the evening of July 23, 2007, Butler University Police Officer Lauren Wilber was dispatched to an Indianapolis residence to investigate a noise complaint. When Officer Wilber parked on the street about twenty-five yards from the house, he could hear "loud music" coming from the residence. Tr. at 8. Officer Wilber approached the home and asked the two persons on the front porch who the owner of the house was. Officer Wilber heard someone yell, "Fuck the police." *Id*. at 9. He opened the screen door and was about to knock on the front door when Dearing opened it. Officer Wilber "immediately" smelled a "very strong" odor of burnt marijuana and saw that the inside of the home was "very smoky, like almost in a smoky bar." *Id*. at 12, 14.

Officer Wilber "stepped into the residence" and saw at least eight persons "sitting in the living room[.]" *Id*. at 14. He asked whose house it was, and Dearing replied that she owned and resided in the home. Dearing had an ashtray in her hand, inside of which was what Officer Wilber suspected to be the "remnants of a marijuana cigarette[.]" *Id*. at 15. He

"told everybody to stay where they're at" because he "didn't want anybody disposing of any contraband or evidence." *Id*. As Officer Wilber looked around the room, he could see "mostly in plain view different items that were either paraphernalia or suspected drugs." *Id*. at 16. Officer Wilber saw a "marijuana pipe" within the reach of Ryan Spaulding, a resident of Dearing's home, who was seated in a chair in the living room. *Id*. at 19.

Both Dearing and Spaulding were charged with class D felony maintaining a common nuisance and were tried to the bench on January 29, 2008. Citing *Ware v. State*, 782 N.E.2d 478 (Ind. Ct. App. 2003), Dearing objected to Officer Wilber's testimony regarding his warrantless entry of her home. The trial court took the objection under advisement, and Officer Wilber testified as outlined above. The parties submitted post-trial memoranda regarding the admissibility of Officer Wilber's testimony. On February 12, 2008, the trial court found Dearing guilty as charged and found Spaulding not guilty. Dearing now appeals.

Discussion and Decision

I. Admissibility of Officer Wilber's Testimony

Dearing contends that the trial court erred in admitting Officer Wilber's testimony regarding his warrantless entry of her home. She contends that this evidence resulted from a violation of both the Fourth Amendment to the U.S. Constitution and Article 1, Section 11 of the Indiana Constitution. As a preliminary matter, we agree with the State that Dearing has waived any argument regarding Article 1, Section 11, both by failing to raise it before the trial court and by failing to provide a separate Indiana constitutional analysis on appeal. *See Harvey v. State*, 751 N.E.2d 254, 258 n.6 (Ind. Ct. App. 2001) (concluding that appellant waived Article 1, Section 11 argument by raising it for first time on appeal); *Francis v. State*,

764 N.E.2d 641, 646-47 (Ind. Ct. App. 2002) (concluding that appellant waived Article 1, Section 11 argument by failing to provide "an analysis of his Indiana constitutional claim separate from the federal analysis").

Therefore, we address only Dearing's claim under the Fourth Amendment, which provides,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Generally, the Fourth Amendment prohibits "warrantless entry into the home for purposes of arrest or search[.]" *Hawkins v. State*, 626 N.E.2d 436, 438-39 (Ind. 1993). In *Hawkins*, our supreme court explained that

> a search and seizure must be supported by a judicially issued warrant unless exigent circumstances exist that place the search and seizure within certain narrowly defined exceptions. The burden is on the prosecution to demonstrate exigent circumstances to overcome the presumption of unreasonableness that accompanies all warrantless home entries.
>
> One such exception permits the State to enter a home when government agents believe evidence may be destroyed or removed before a search warrant is obtained. The police must have an objective and reasonable fear that the evidence is about to be destroyed.

Id. at 439 (citations omitted). "The remedy for an illegal warrantless search is the suppression of the evidence obtained from the search." *Cudworth v. State*, 818 N.E.2d 133, 137 (Ind. Ct. App. 2004), *trans. denied* (2005).

"Although an exception may justify proceeding without a warrant, it does not eliminate the need for probable cause." *Haley v. State*, 696 N.E.2d 98, 101 (Ind. Ct. App. 1998), *trans. denied*.

> Probable cause to search exists where the facts and circumstances within the knowledge of the officer making the search, based on reasonably trustworthy information, are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed. Furthermore, the determination is to be based on the factual and practical considerations of everyday life upon which reasonable and prudent persons act.

State v. Hawkins, 766 N.E.2d 749, 751 (Ind. Ct. App. 2002) (citation omitted), *trans. denied*.

Dearing does not specifically contend that Officer Wilber lacked probable cause to believe that criminal activity was being or had been committed inside her home.[1] Rather, she claims that no exigent circumstances existed to justify the warrantless entry. Dearing frames the issue as whether the trial court erred in denying a motion to suppress the evidence obtained as a result of the warrantless entry. Because Dearing made the motion to suppress during trial, however, the issue is more appropriately framed as whether the trial court erred in admitting Officer Wilber's testimony over her objection. Our standard of review is well settled:

> A trial court has broad discretion in ruling on the admissibility of the evidence. We will reverse a trial court's ruling on the admissibility of the evidence only when it has been shown that the trial court abused its discretion. An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. We consider the evidence most favorable to the court's decision and any uncontradicted evidence to the contrary.

D.L. v. State, 877 N.E.2d 500, 502-03 (Ind. Ct. App. 2007) (citations omitted), *trans. denied* (2008).

[1] In *Hawkins*, 766 N.E.2d 749, we held that "when a trained and experienced police officer detects the strong and distinctive odor of burnt marijuana coming from a vehicle, the officer has probable cause to search the vehicle. That is true under both the Fourth Amendment of our federal constitution and under Article 1, Section 11 of the Indiana Constitution." *Id*. at 752. We have not yet addressed this issue with respect to a dwelling.

Once again, Dearing relies on *Ware*, 782 N.E.2d 478, in contending that Officer Wilber's warrantless entry of her home was illegal. In that case, Officer Carpenter went to Ware's address to obtain assistance in locating a suspect in an unrelated case. As he approached Ware's apartment, Officer Carpenter smelled "'burnt or burning marijuana.'" *Id.* at 480. Officer Carpenter knocked on the door, and when Ware opened it, the officer "detected 'the strong smell of burning marijuana.'" *Id.* Officer Carpenter saw no one else inside the apartment, inquired about the suspect, and asked Ware for identification. "Ware closed the door and went to retrieve his identification." *Id.* Ware was gone for approximately three minutes, during which time Officer Carpenter heard him "walking around the apartment." *Id.* "After Ware handed Officer Carpenter his identification, Officer Carpenter, without Ware's consent or a search warrant, entered Ware's apartment in order to secure it to prevent the destruction of possible evidence." *Id.* Ware consented to a search of his apartment and signed a consent-to-search form. The search yielded "marijuana, cocaine, a Schedule II generic drug, scales, guns, and a large amount of cash bundled in rubber bands." *Id.* Ware filed a motion to suppress this evidence, which the trial court denied.

On appeal, Ware contended that "the police officers made an illegal entry into his home, which invalidated his subsequent consent to search." *Id.* at 481. In addressing the legality of the entry, we observed that a police officer may enter a home without a warrant if he "believe[s] that evidence may be destroyed or removed before a search warrant can be obtained" and that the officer "must have an objective and reasonable fear that the evidence is about to be destroyed." *Id.* We noted, however, that "'[t]he fact that narcotics are involved does not, standing alone, amount to exigent circumstances justifying a warrantless

search or arrest.'" *Id*. (quoting *Esquerdo v. State*, 640 N.E.2d 1023, 1027 (Ind. 1994)) (alteration in *Ware*).

Our analysis continued as follows:

> Here, the State asserts that the warrantless entry into Ware's apartment was legal because Officer Carpenter had an objective and reasonable fear that marijuana was about to be destroyed. In support, the State relies upon the following facts: Officer Carpenter smelled burning marijuana when Ware opened the door; Ware shut the door when he went to retrieve his identification; Ware was gone three minutes before he returned with his identification; and during those three minutes, Officer Carpenter heard Ware walking around the apartment. The facts of this case, however, are much different from the facts in those cases where this exigent circumstance was found to exist. For example, in *Sayre v. State*, 471 N.E.2d 708 (Ind. Ct. App. 1984), *reh'g denied*, *trans. denied*, police officers went to the defendant's home to question her about a theft. The officers knocked on the door and stated that they were police officers when questioned by a female inside. The female reacted by shouting "Police!" and ran away from the door. Through a window, the officers could see people inside the home moving rapidly away from the kitchen table with drug paraphernalia. The officers subsequently entered the home without a warrant. The court held that this warrantless entry was proper since the actual or imminent destruction of evidence was most likely to occur. *Id*. at 715; *see also Diggs v. State*, 531 N.E.2d 461, 464 (Ind. 1988); *cf*. *Hawkins v. State*, 626 N.E.2d 436, 439 (Ind. 1993) (finding police officers' warrantless entry into the defendant's home illegal under the destruction of evidence exigent circumstance where the officers heard nothing before knocking on the defendant's door and as they waited at the door, they did not hear anyone running inside); *Harless v. State*, 577 N.E.2d 245, 248-49 (Ind. Ct. App. 1991) (finding police officers' warrantless search illegal under the destruction of evidence exigent circumstance in part because the officers did not "observe any persons inside the home scrambling frantically to destroy evidence of controlled substances before the officers entered").
>
> Unlike the facts of *Sayre*, Officer Carpenter did not hear Ware yell to anyone inside the apartment that the police were there. In fact, when Ware opened the door, Officer Carpenter did not see anyone else inside the apartment or any drugs in plain view. Additionally, Ware cooperated with Officer Carpenter the entire time and returned to the door with his identification after his initial encounter with Officer Carpenter. Although Ware was gone for approximately three minutes before returning with his identification, during that time period Officer Carpenter did not hear Ware running through the apartment; rather, he just heard Ware "walking around."

> Furthermore, Officer Carpenter did not hear any toilets flushing or anything else indicative of the destruction of the marijuana. Based on the facts of this case, we cannot conclude that the State met its burden of proving that Officer Carpenter had an objective and reasonable fear that the marijuana was about to be destroyed. As such, the officers' warrantless entry into Ware's home was not justified by this exigent circumstance and was therefore illegal.

Id. at 481-82 (citation to transcript omitted).

Dearing claims that the facts of this case

> are very similar to those in *Ware*. The differences appear to be that in this case there were approximately eight people inside, as opposed to one in *Ware*, and in this case someone yelled "fuck the police" to someone while the officer was outside. However, the fact that there were eight people inside was not known to the officer here until he entered the home. And the statement made by someone to someone while the officer was outside did not appear to cause any of the efforts observed by the officers in *Sayre* to dispose of or conceal the paraphernalia that justified their entry.

Appellant's Br. at 7-8.

Dearing ignores the fact that when she opened her front door, Officer Wilber "immediately" smelled a "very strong" odor of burnt marijuana and saw that the interior of the home was "very smoky, like almost in a smoky bar." Tr. at 12, 14. From this evidence, a reasonable inference could be drawn that more than one—and possibly many more than one—person was smoking or had been smoking marijuana in Dearing's home. Officer Wilber's warrantless entry merely confirmed the reasonableness of this inference. Also, a reasonable inference could be drawn that a significant quantity of marijuana was currently being consumed—and thus destroyed as evidence—in Dearing's home, that the occupants had been alerted to Officer Wilber's presence, and that additional marijuana could quickly be

consumed, destroyed, or removed before a search warrant could be obtained.[2] As such, we conclude that the facts of this case are sufficiently distinguishable from those in *Ware* to compel a different result. We conclude that Officer Wilber's warrantless entry of Dearing's home was justified by exigent circumstances and that therefore the trial court did not abuse its discretion in admitting his testimony.

II. Sufficiency of Evidence

Dearing contends that the State failed to present sufficient evidence to sustain her conviction for class D felony maintaining a common nuisance. In reviewing a challenge to the sufficiency of the evidence, we will not reweigh the evidence or assess witness credibility. *Turner v. State*, 878 N.E.2d 286, 295 (Ind. Ct. App. 2007), *trans. denied* (2008). "We will consider only the evidence most favorable to the judgment, together with all reasonable and logical inferences to be drawn therefrom." *Id*. We will affirm the conviction if there is substantial evidence of probative value to support the determination of the trier of fact. *Id*.

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[2] Dearing asserts,

> In this case, the odor of the marijuana smoke and a haze spotted in the room when the door was opened were the only reasons given by Officer Wilbur [sic] for his entry into the home. As stated by this court in *Ware*: "a warrantless home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense has been committed. *Haley v. State*, 696 N.E.2d 98, 103 (Ind. Ct. App. 1998) (noting that possession of one marijuana cigarette is a minor offense for purposes of warrantless home entries), *trans. denied*."

Appellant's Br. at 8. Dearing did not raise this argument before the trial court and therefore has waived it on appeal. *Harvey*, 751 N.E.2d at 258 n.6. Waiver notwithstanding, given the significant amount of marijuana smoke in Dearing's home, it was reasonable for Officer Wilber to infer that its occupant(s) possessed much more than a single marijuana cigarette.

The State alleged and was required to prove beyond a reasonable doubt that Dearing knowingly or intentionally maintained a building, structure, vehicle, or other place that was used one or more times by herself and other persons to unlawfully use, keep, offer for sale, or sell a controlled substance, in this case marijuana. *See* Appellant's App. at 17 (charging information); Ind. Code § 35-48-4-13 (defining class D felony maintaining a common nuisance). Dearing acknowledges Officer Wilber's testimony that she possessed what appeared to be the remnants of a marijuana cigarette, but contends that "no evidence was elicited to show that any of the other people there were in possession of or used marijuana." Appellant's Br. at 9. Dearing's claim is contradicted by Officer Wilber's testimony that he smelled a "very strong" odor of burnt marijuana, that he saw paraphernalia in plain view (including a marijuana pipe within Spaulding's reach), and that the inside of Dearing's home was "very smoky, like almost in a smoky bar." Tr. at 12, 14. We must decline Dearing's request to reweigh the evidence in her favor and therefore affirm her conviction.

Affirmed.

KIRSCH, J., concurs.

VAIDIK, J., dissents with opinion.

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	)	
Appellant-Defendant,	)	
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vs.	)	No. 49A02-0803-CR-209
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	
	)	

VAIDIK, Judge, dissenting

I respectfully dissent from the majority's conclusion that Officer Wilber's warrantless entry of Dearing's home was justified by exigent circumstances. Specifically, I believe that the State has failed to prove that Officer Wilber had a reasonable belief that marijuana was being destroyed or about to be destroyed.[3] As such, I would exclude Officer Wilber's testimony regarding his warrantless entry of Dearing's home and reverse her conviction for maintaining a common nuisance.

The rationale for the clearly-defined exception to the warrant requirement in cases of

[3] I note that Dearing has limited her argument to the exigent circumstance of destruction of evidence. The State likewise limits its argument to this exception.

destruction of evidence is based on the need for quick action because the evidence is actually in the process of being destroyed or is about to be destroyed. *Esquerdo v. State*, 640 N.E.2d 1023, 1028 (Ind. 1994). The arresting officer must have a reasonable belief that there are people within the premises who are destroying or about to destroy the evidence. *Id.* at 1027. In such a case, the evidence's nature must be evanescent, and the officer must fear its imminent destruction. *Id.* "The fact that narcotics are involved does not, standing alone, amount to exigent circumstances justifying a warrantless search or arrest." *Id.* (quoting *Harless v. State*, 577 N.E.2d 245, 248 (Ind. Ct. App. 1991)).

Here, the record reflects that Officer Wilber entered Dearing's home not because he believed that evidence was being destroyed or about to be destroyed but simply because he mistakenly thought that the smell of "burnt" marijuana gave him probable cause to enter a home without a warrant. Tr. p. 12.[4] I do not believe that the destruction of evidence exception to the warrant requirement applies here for several reasons.

First, the claim that this exception applies is an after-the-fact justification for Officer Wilber's warrantless entry into Dearing's home. Officer Wilber simply did not articulate his concern that marijuana would be destroyed as his reason to enter Dearing's home without first obtaining a warrant.

Second, I believe that the destruction of evidence exception requires destruction of the evidence with intent to evade law enforcement. There was simply no evidence that the

[4] Officer Wilber testified as follows: "When I opened the screen door, I was going to knock on the door. About the same time I opened the screen door, the other door was opened and I immediately smelled burnt marijuana. At that point, I had probable cause." Tr. p. 12. The trial court asked, "You had probable cause to go into the house," and Officer Wilber replied, "If I smell burnt marijuana, yes, Your Honor." *Id.* at 12-13. At this point, the defense objected.

occupants of Dearing's home were attempting to wholly destroy the marijuana with the intent to evade law enforcement.

Finally, just because Officer Wilber smelled marijuana and saw smoke while he was standing at the front door does not mean that marijuana was currently being consumed such that quick action needed to be taken.[5] In fact, Officer Wilber testified that he smelled "burnt" marijuana, not "burning" marijuana. As such, it was just as likely that marijuana had already been smoked and thus was not in the process of being destroyed or was about to be destroyed. This was apparently the case, as Officer Wilber testified that when he entered Dearing's home, he "didn't see anybody using marijuana." *Id.* at 33. Because I believe that the State has failed to prove that Officer Wilber had a reasonable belief that marijuana was being destroyed or was about to be destroyed, I would exclude Officer Wilber's testimony regarding his warrantless entry into Dearing's home and reverse Dearing's conviction for maintaining a common nuisance because the evidence is otherwise insufficient to support her conviction.

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[5] This is not to say that a police officer, without a warrant, cannot enter a house that smells of ether or other chemicals associated with the manufacture of methamphetamine, which is markedly different from marijuana, under a different exigent circumstance, such as a reasonable belief of risk of bodily harm or death, a person in need of assistance, or a need to protect private property. *See Baird v. State*, 854 N.E.2d 398, 404 (Ind. Ct. App. 2006), *trans. denied*.