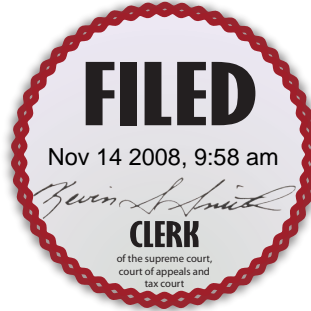


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

CHARLES E. STEWART, JR.
 Appellate Public Defender
 Crown Point, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
 Attorney General of Indiana

SHELLEY M. JOHNSON
 Deputy Attorney General
 Indianapolis, Indiana

**IN THE
 COURT OF APPEALS OF INDIANA**

SIDNEY L. KINCAID,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 45A04-0711-CR-626
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE LAKE SUPERIOR COURT
 The Honorable Kathleen A. Sullivan, Judge Pro Tempore
 Cause No. 45G01-0608-FA-49

November 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Sidney L. Kincaid appeals his conviction of dealing in cocaine, a Class A felony.¹

Finding the evidence sufficient to support the conviction, we affirm.

FACTS AND PROCEDURAL HISTORY

David Alcaraz's mother contacted Detective George Cossey of the East Chicago Police Department because she was concerned about Alcaraz's drug problem. Alcaraz met with Detective Cossey and claimed he was no longer using drugs. Alcaraz offered to act as an informant.

On August 5, 2006, Alcaraz made a controlled buy from Kincaid. Prior to the purchase, Detective Cossey conducted a patdown search of Alcaraz and had him lift up his pant legs and empty his pockets. Alcaraz did not have any money, weapons, or drugs. Detective Cossey gave Alcaraz a shirt with a video and audio recording device in the button, as well as a lighter that acts as a recording device. Alcaraz was given \$200 and was directed to buy approximately five grams of cocaine.

The purchase was to take place at Kincaid's girlfriend's apartment, a place where Kincaid often stayed. Detective Cossey drove Alcaraz to that neighborhood and parked in an alley. Detective Cossey watched Alcaraz until he turned to exit the alley. Detectives William Jansky and Jose Rivera were parked where they could see Alcaraz walk from the alley to the apartment building. Alcaraz was inside the building for a minute or less, and then he returned to Detective Cossey's car. None of the detectives saw Alcaraz do anything unusual or deviate from his course.

¹ Ind. Code § 35-48-4-1(a)(1)(C) and (b)(1).

When he returned to Detective Cossey's car, Alcaraz gave Detective Cossey a baggie containing 3.9 grams of cocaine. The baggie was knotted and did not appear to have been tampered with. Detective Cossey took back the recording devices and searched Alcaraz without finding anything.

A second controlled buy was arranged for the next day. Alcaraz was searched as before, and he had no drugs, money, or weapons. He was given the shirt and the lighter with the recording devices, along with forty dollars. Detectives Cossey and Jansky drove Alcaraz to the alley and observed him until he exited the alley. Detectives Gemeinhart and Harretos were parked where they could observe Alcaraz walk the rest of the way to the apartment building.

This time, Kincaid was not at the apartment. A woman who introduced herself as Jewel opened the door and let Alcaraz in. Alcaraz returned to Detective Cossey's car after about eight or nine minutes. The detectives did not see Alcaraz make any unusual movements or deviate from his course. Alcaraz gave Detective Cossey a bag containing 0.8 grams of cocaine. Alcaraz was searched, and nothing was found.

The detectives executed a search warrant for the apartment on August 10, 2006. The detectives seized cocaine, baggies, two scales, a bottle of Inositol (a cutting agent dealers use to add weight to crack cocaine), \$94 in cash (which did not match any of the buy money supplied to Alcaraz), and a phone bill addressed to Kincaid.

Kincaid was charged with two counts of dealing in cocaine as Class A felonies and maintaining a common nuisance as a Class D felony.² The case was tried to the bench. The trial court granted Kincaid's motion for a directed verdict on the charge of maintaining a common nuisance. Kincaid was found guilty of one count of dealing in cocaine.

DISCUSSION AND DECISION

Kincaid argues the evidence was insufficient to support his conviction because Alcaraz's testimony was not credible. In reviewing sufficiency of evidence, we do not reweigh the evidence or assess the credibility of the witnesses. *Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002). We consider the evidence most favorable to the verdict and the reasonable inferences drawn therefrom. *Id.* We will affirm if there is probative evidence from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.* We will impinge on the trier of fact's function to judge the credibility of a witness only within the narrow limits of the "incredible dubiousity" rule. *Id.* The rule applies when "a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence." *Id.* The rule is rarely applied and is appropriate only when the testimony is so inherently improbable or equivocal that no reasonable person could believe it. *Id.*

Kincaid argues Alcaraz is not credible because he has a criminal record. Alcaraz told Officer Cossey he was not using drugs, but later admitted he was addicted to cocaine while he served as an informant. He admitted in a deposition he found it easy to lie and

² Ind. Code § 35-48-4-13(b)(2)(B).

he was not trustworthy when he was using cocaine. Finally, the recording from the August 5 buy demonstrates that when Alcaraz returned to Detective Cossey's car, he announced he had gotten 4.5 grams of cocaine, and then whispered that he had kept half a gram.

The detectives noted they often need to rely on drug dealers and users to serve as informants:

Well, when you are dealing with trying to get somebody who is dealing drugs, you have to get somebody who can go there and buy the drugs, and that's the reason why you use somebody [who is a drug user] in that capacity. You can't send somebody who doesn't – a lot of times who doesn't know these individuals or isn't aware of how the operation actually works to go there and buy the drugs. You have to use somebody who has actually been there and done it.

(Tr. at 217.) Detective Cossey testified that the police do not make their own undercover buys because they would be recognized. The police use controlled buys in part because they often must use informants who are not ideal witnesses.

In Kincaid's case, the buy was properly controlled. Alcaraz was searched before the buy, and he had no weapons, drugs, or money. Alcaraz was equipped with audio and video recording devices. The detectives kept Alcaraz in sight except for about a minute when he was inside the apartment building. They did not see him make any unusual movements or deviate from his course. The bag containing the cocaine was tightly knotted and did not appear to have been tampered with. Alcaraz was searched again, and he had no weapons, drugs, or money.

Alcaraz did not remember making the comment that he took half a gram, and he believed he was trying to be funny. Detective Cossey testified that drug dealers often

cheat their customers, so he did not think it was unusual that Alcaraz brought back 3.9 grams after asking to buy five grams. Nothing in the record demonstrates Alcaraz took any of the cocaine. Even if Alcaraz took half a gram, it simply means he obtained more than 3.9 grams from Kincaid. Therefore, although Alcaraz might generally lack credibility, his account of the transaction is supported by circumstantial evidence, and the incredible dubiousity rule does not apply.

Affirmed.

ROBB, J., and NAJAM, J., concur.