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IN THE COURT OF APPEALS OF INDIANA

RAFAEL A. DEJESUS,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 20A03-1002-CR-95
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0807-FA-37

November 29, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Rafael DeJesus appeals his convictions, following a jury trial, of three counts of dealing in cocaine, Class A felonies. For our review, DeJesus raises three issues, which we restate as: 1) whether sufficient evidence supports his conviction of Count I; 2) whether the admission of certain testimony violated DeJesus's Sixth Amendment confrontation right; and 3) whether the jury instructions as a whole improperly invaded the province of the jury to determine the law and the facts. DeJesus raises the latter two issues as claims of fundamental error because he did not object to the alleged errors at trial. Concluding the evidence is sufficient and finding no error, fundamental or otherwise, in the admission of testimony or instruction of the jury, we affirm.

Facts and Procedural History

This case arises from three controlled buys arranged by an undercover police officer ("UC 193") and a confidential source ("CS"), whose personal identities were protected from disclosure on motion by the State.

The first controlled buy took place on December 5, 2007. UC 193 and CS drove in an undercover police vehicle to a residence in the Harrison Ridge subdivision in Goshen. UC 193 parked the vehicle in the driveway and observed as CS walked to the front door. DeJesus opened the door and let CS into the residence. Approximately five minutes later CS returned to the undercover vehicle and informed UC 193 that he and DeJesus had agreed for DeJesus to sell him cocaine. A tape recording of the conversation was admitted into evidence and UC 193 identified DeJesus's voice as the only person who spoke with CS inside the residence.

UC 193 and CS left the residence and returned fifteen to twenty minutes later. CS was searched and UC 193 verified he had no contraband on him. UC 193 observed from the undercover vehicle parked in the driveway as DeJesus again let CS inside the residence. A few minutes later, CS returned to the undercover vehicle with "the purported cocaine that he had purchased from [DeJesus]." Transcript at 131. As soon as he got inside the undercover vehicle, CS handed the cocaine to UC 193. Subsequent testing showed the adulterated cocaine recovered from this buy weighed 4.45 grams excluding packaging.

Additional controlled buys were conducted on December 10 and December 13, 2007. On both occasions, UC 193 and CS drove in an undercover vehicle to an address in Elkhart, and DeJesus approached the vehicle and handed cocaine to CS in return for $260 each time. DeJesus delivered 6.52 grams of adulterated cocaine in the December 10 buy and 6.48 grams in the December 13 buy.

The State charged DeJesus with three counts of dealing in cocaine, Class A felonies. A jury trial was held at which UC 193, but not CS, testified. The jury found DeJesus guilty of all three counts as charged. On January 14, 2010, the trial court sentenced him to forty years on each count, the sentences to be served concurrently. DeJesus now appeals.

Discussion and Decision

I. Sufficiency of the Evidence

A. Standard of Review

When reviewing the sufficiency of the evidence to support a conviction, we consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We neither reweigh the evidence nor judge the credibility of witnesses. Id. If there is probative evidence from which a reasonable trier of fact could find all elements of the crime proven beyond a reasonable doubt, we must affirm. Id.

B. Evidence of Identity

DeJesus argues there is insufficient evidence to prove he was the person who delivered cocaine as alleged in Count I, the first controlled buy on December 5, 2007. As DeJesus points out, CS did not testify at trial, and UC 193, who did testify, could not see what transpired inside the residence where CS met DeJesus on December 5, 2007. There is therefore no direct evidence by any witness who saw DeJesus deliver the cocaine as alleged in Count I. However, it is well settled that a conviction may rest upon circumstantial evidence alone if the circumstantial evidence supports a reasonable inference of guilt. E.g., Blanchard v. State, 802 N.E.2d 14, 37-38 (Ind. Ct. App. 2004).

The evidence favorable to the verdict is that DeJesus opened the door and went inside the Harrison Ridge residence with CS and the two had a tape-recorded conversation where DeJesus agreed to sell cocaine to CS. During that time, DeJesus and CS were the only voices on the tape. When CS returned fifteen to twenty minutes later,

DeJesus again met him at the door, the two were inside the residence for a few minutes, and CS left with the cocaine which he immediately turned over to UC 193. Because CS was searched just prior to the buy and had no contraband on him at that time, the cocaine could have come only from this buy. From these circumstances taken together, the jury could reasonably have inferred it was DeJesus who delivered the cocaine to CS. This inference is strengthened by DeJesus's unquestioned delivery of cocaine to CS in the presence of UC 193 during the subsequent buys five and eight days later. Cf. Ind. Evidence Rule 404(b) (providing that evidence of other crimes, though generally not admissible to show action in conformity therewith, may be relevant and admissible as "proof of . . . identity"). In other words, the jury could reasonably have looked to the December 5 agreement between DeJesus and CS and their entire series of similar dealings to conclude that on December 5, DeJesus not only opened the door to the residence where the deal took place but also provided the cocaine. We therefore conclude the evidence is sufficient to support DeJesus's conviction of Count I.

II. Confrontation and Cross-Examination

DeJesus argues the testimony of UC 193 contained hearsay statements by CS and that because CS did not testify at trial, he was denied his fundamental right to confront and cross-examine CS. DeJesus acknowledges he did not object to UC 193's testimony or otherwise raise at trial the issue of his confrontation right. In order to avoid waiver, he frames the alleged violation of his confrontation right as a claim of fundamental error. Fundamental error exists only where there is a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant

fundamental due process. Brown v. State, 929 N.E.2d 204, 207 (Ind. 2010). Fundamental error, therefore, requires a showing of greater prejudice than ordinary reversible error. Purifoy v. State, 821 N.E.2d 409, 412 (Ind. Ct. App. 2005), trans. denied.

The Sixth Amendment to the United States Constitution guarantees to a criminal defendant the right to confront adverse witnesses. The Confrontation Clause bars the admission of "testimonial" hearsay, absent a showing of unavailability of the declarant and a prior opportunity to cross-examine. Crawford v. Washington, 541 U.S. 36, 53-54 (2004). The Confrontation Clause applies only to testimonial hearsay. Davis v. Washington, 547 U.S. 813, 823-24 (2006). Thus, the Confrontation Clause does not bar admission of nonhearsay statements, even if those statements are testimonial. Williams v. State, 930 N.E.2d 602, 609 (Ind. Ct. App. 2010), trans. denied. Hearsay for this purpose means a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Id. at 608 n.3 (citing Evid. R. 801). A "statement" in turn is defined as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Evid. R. 801(a).

The only instance in the record where DeJesus contends a testimonial hearsay statement was admitted is the following exchange during the direct testimony of UC 193, with our emphasis on the sentence DeJesus cites:

> Q. Can you describe to the jury what happened once you arrived again at [the Harrison Ridge address]?
> A. After arriving the second time, I again parked in the driveway where I remained in the vehicle. The CS exited my vehicle and approached the

> residence and was then let into the residence again by the defendant Mr. DeJesus.
> Q. And again you are outside in the car?
> A. Yes, sir.
> Q. Approximately how much time passes?
> A. Only a few minutes.
> Q. What happens after those few minutes passed?
> A. The C.S. then returns to the vehicle and then handed me the purported cocaine that he had purchased from the defendant.
> Q. I am going to hand you what has been marked for identification purposes as State's Exhibit 4. Could you please identify what has been marked as State's Exhibit 4?
> A. Yes, sir. This is the cocaine that was purchased from the defendant that day, and it is sealed in a bag which was done by myself.

Tr. at 130-31 (emphasis added).

In context it is evident that UC 193's testimony regarding the "purported cocaine that [CS] had purchased from [DeJesus]" did not incorporate any statement by CS. None of the State's questions inquired regarding what CS said or communicated; rather, they inquired regarding what UC 193 observed happen. UC 193's testimony was not an account of what, if anything, CS said or communicated. Rather, it related the officer's conclusion based upon seeing CS being let into the residence by DeJesus and return a few minutes later with cocaine he could not have obtained elsewhere. Because UC 193's testimony contained no verbal statement by CS or nonverbal conduct intended as an assertion, it contained no hearsay and therefore did not implicate DeJesus's Sixth Amendment confrontation right. Moreover, Williams asserts no violation of his right "to meet the witnesses face to face" under Article 1, section 13 of the Indiana Constitution. Accordingly we find no error, let alone fundamental error, by the trial court in permitting UC 193's testimony.

III. Jury Instructions

DeJesus acknowledges he did not object to the jury instructions given by the trial court and, in order to avoid waiver, argues the instructions as a whole constituted fundamental error. The thrust of DeJesus's claim is that the instructions improperly impinged on the province of the jury as defined in Article 1, section 19 of the Indiana Constitution, which states: "In all criminal cases whatever, the jury shall have the right to determine the law and the facts."

Instructions 4, 5, and 6 set forth the elements of the three counts of dealing in cocaine. Each of these instructions stated:

> In order to convict the defendant of the offense charged herein in Count [I/II/III], Dealing in Cocaine, the State must have proved each of the following elements beyond a reasonable doubt:
>
> The defendant
> 1. knowingly;
> 2. delivered;
> 3. cocaine, pure or adulterated; and,
> 4. the amount of the cocaine weighed three (3) grams or more.
>
> If the State failed to prove each of these elements beyond a reasonable doubt, you should find the defendant not guilty.
>
> If the State did prove each of these elements beyond a reasonable doubt, you should find the defendant guilty of Count [I/II/III], Dealing in Cocaine, a Class A felony.

Appellant's Appendix at 29, 30, 31.

Instructions 12 and 13 stated the following regarding the presumption of innocence and the State's burden of proof:

> Under the law of this State, a person charged with a crime is presumed to be innocent. To overcome the presumption of innocence, the

> State must prove the defendant guilty of each essential element of the crime charged beyond a reasonable doubt.
>
> The defendant is not required to present any evidence to prove his innocence or to prove or explain anything.

Id. at 37 (Instruction 12).

> The State of Indiana has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases where you were told that it is only necessary to prove that a fact is more likely true than not. In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt. . . . If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you should find him/her guilty. If on the other hand, you think there is a real possibility that he/she is not guilty, you should give him/her the benefit of the doubt and find him/her not guilty.

Id. at 38 (Instruction 13).

Instruction 19 stated the following regarding the jury's right to determine the law:

> You are the exclusive and sole judges of what facts have been proven and you may also determine the law for yourselves. This statement does not mean that you have the right to disregard the law, or to set it aside and make your own law. You should determine the law as it is enacted by the legislature of this State and considered and interpreted by the higher courts of record, and in that way you have a right to determine the law for yourselves, but not make your own laws. The instructions of the court are your best source in determining what the law is.

Id. at 44. Instruction 29 instructed the jury "to consider all the instructions as a whole" and "not single out any certain sentence or any individual point or instruction and ignore the others." Id. at 53.

Our supreme court has addressed similar sets of instructions in light of the jury's role under Article 1, section 19. First, "[t]he principle is established that a trial court may instruct the jury that if they find that all the material allegations of the indictment or affidavit are proven beyond a reasonable doubt that they 'should' convict the

defendants." Wright v. State, 730 N.E.2d 713, 716-17 (Ind. 2000) (quoting Loftis v. State, 256 Ind. 417, 269 N.E.2d 746, 747 (1971)). "However, such an instruction would be erroneous where the court failed to set forth all the material allegations which the state must prove . . . or where the court failed to instruct the jury that they were the judges of the law as well as the facts." Id. at 717 (quoting Loftis, 269 N.E.2d at 747). Second, it is error for an instruction to "mandate that jurors return a guilty verdict upon a finding of certain specifically mentioned facts." Id. In other words, an instruction should not have "the effect of directing a verdict if certain testimony is believed," an effect strengthened by use of the word "shall," as opposed to "should," in a context that "would logically lead to an interpretation that a conviction is mandatory." Loftis, 269 N.E.2d at 748.

The instructions given in this case conform to the above two principles. The instructions set forth the elements of each charged offense and stated the jury "should" find DeJesus guilty if the State proved all the elements beyond a reasonable doubt. The jury was also instructed that it had authority to determine the law as well as the facts. Contrary to DeJesus's assertion, the instructions did not direct a guilty verdict if the jury believed a specific set of historical facts; they simply set forth the material elements the State needed to prove in order to obtain a conviction. DeJesus complains the jury's law-determining authority was undermined by instructing it that the trial court's instructions were the best source of law. However, our supreme court has indicated it is generally proper to tell the jury that the court's instructions are the best source of law, provided the instructions otherwise correctly state the law. See Sample v. State, 932 N.E.2d 1230, 1233 (Ind. 2010) (noting that "[o]rdinarily, the trial court's instructions are indeed the

best source of the law," but finding error only because another instruction misstated the law). Therefore, the trial court did not err in instructing the jury let alone commit fundamental error.

Conclusion

The circumstantial evidence is sufficient to support DeJesus's conviction of Count I, his confrontation right was not implicated by the admission of UC 193's testimony regarding the first controlled buy, and the trial court did not err in its instruction of the jury. DeJesus's convictions are therefore affirmed.

Affirmed.

MAY, J., and VAIDIK, J., concur.