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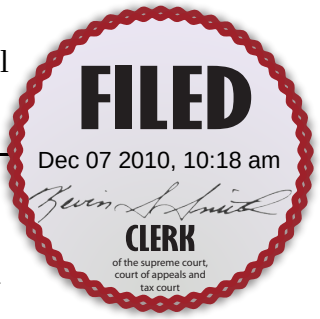

IN THE COURT OF APPEALS OF INDIANA

CHARLES J. GOOCH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1004-CR-382
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven Eichholz, Judge
The Honorable Michael S. Jensen, Magistrate Judge
Cause No. 49G23-0712-FB-267464

DECEMBER 7, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Appellant-Defendant Charles J. Gooch appeals his conviction for dealing in a controlled substance, a Class B felony. Ind. Code § 35-48-4-2 (2001). We affirm.

ISSUES

Gooch raises two issues, which we restate as:

I. Whether the trial court abused its discretion by refusing to admit certain testimony into evidence.

II. Whether the trial court deprived Gooch of his right to present a complete defense to the charges against him.

FACTS AND PROCEDURAL HISTORY

On December 13, 2007, Special Agent Matthew Hall, an employee of United States Immigrations and Customs Enforcement, was on duty at a FedEx shipping facility in Indianapolis. He saw a suspicious parcel that had been mailed by Jason Brown in Bronx, New York to John Brown at an address in Indianapolis. Agent Hall had his drug sniffing dog examine the parcel. The dog alerted on the parcel, which indicated that the parcel contained illegal narcotics.

Agent Hall obtained a search warrant for the parcel, opened the parcel, and discovered a large quantity of pills that he believed to be Ecstasy. Based upon this discovery, Agent Hall obtained an "anticipatory" search warrant for the destination address on the parcel. Tr. p. 46. Next, Agent Hall changed into a FedEx uniform, assembled a team of police officers, and went to the destination address listed on the parcel, which was an apartment.

When Agent Hall entered the apartment building and knocked on the apartment door, a man later identified as Gooch answered. Agent Hall asked Gooch if he was John Brown, and Gooch said yes. Gooch kept looking at the front door to the apartment building and was visibly shaking. He would not make eye contact with Agent Hall, who asked him if everything was okay. Gooch did not respond, but he took the parcel and signed for it. Gooch signed as "Joe" with an illegible last name. Exhibit 7. Agent Hall returned to his van, radioed a description of Gooch to his team, and drove away from the apartment building.

Meanwhile, police officer Marc Campbell was watching the front of the apartment building from an unmarked car. He saw Agent Hall leave the building. A couple of minutes later, Gooch left the building carrying what appeared to be a box under his shirt. Officer Campbell got out of his car and identified himself as a police officer. Gooch began to run but stopped, pulled out the parcel and threw it on the ground, and laid down on the ground with his hands out. Subsequent testing of the pills contained in the parcel demonstrated that Gooch had received six hundred and ninety-eight tablets of Ecstasy.

The State charged Gooch with dealing in a controlled substance and several other offenses. A jury found Gooch guilty of dealing in a controlled substance and possession of a controlled substance, a Class D felony. Ind. Code § 35-48-4-7 (2001). The court merged the possession conviction into the dealing conviction for sentencing purposes.

DISCUSSION AND DECISION

I. EXCLUSION OF EVIDENCE

Gooch contends that the trial court erroneously excluded testimony from his only witness, Tamela Buckner, regarding a telephone conversation he had with Buckner.

The admission or exclusion of evidence is a determination entrusted to the discretion of the trial court. *Saunders v. State*, 848 N.E.2d 1117, 1122 (Ind. Ct. App. 2006), *trans. denied*. We will reverse a trial court's decision only for an abuse of discretion, that is, when the trial court's decision is clearly erroneous and against the logic and effect of the facts and circumstances before the court. *Id.*

At trial, Buckner testified that she had leased the apartment at which Gooch had received the parcel. She further stated that Gooch, who is the father of one of her children, did not live in the apartment, but she had asked him to house sit on the day in question and wait for a maintenance person. At some point during that day, Gooch called Buckner. When Gooch asked Buckner what Gooch said to her on the phone, the State objected on grounds of hearsay. During a sidebar outside of the jury's hearing, Gooch stated that Buckner would have testified that Gooch told her "I've got a box here what do you want me to do with it." Tr. p. 156. Gooch asserted that the statement was not hearsay because it was not capable of being true or false. The court sustained the State's objection.

Gooch now asserts that his statement to Buckner was admissible as a present sense impression pursuant to Indiana Evidence Rule 803(1). Gooch did not present this argument below, so it is waived. *See Bryant v. State*, 802 N.E.2d 486, 496 (Ind. Ct. App. 2004), *trans. denied* (determining that the appellant's claim that a statement should have

been admitted as a present sense impression was raised for the first time on appeal and was waived).

Waiver notwithstanding, we find no error. Indiana Rule of Evidence 803(1) provides, "A statement describing or explaining a material event, condition or transaction, made while the declarant was perceiving the event, condition or transaction, or immediately thereafter," is not excluded by the general prohibition on hearsay. This rule requires the statement to describe or explain the event or condition during or immediately after its occurrence, and it must be based on the declarant's perception. *Jones v. State*, 780 N.E.2d 373, 376-77 (Ind. 2002).

In this case, there is no evidence as to when Gooch called Buckner in relation to his receipt of the box. In fact, there is no evidence that the parcel containing the Ecstasy was the box to which Gooch was referring in his phone call to Buckner. Furthermore, Gooch's alleged statement does not describe or explain an event, condition, or transaction that Gooch was perceiving as he spoke to Buckner. *See Jones*, 780 N.E.2d at 377 (holding that a victim's statement that she feared her landlord did not describe "an event contemporaneously perceived.").

Gooch cites *Amos v. State*, 896 N.E.2d 1163 (Ind. Ct. App. 2008), *trans. denied*, to support his claim, but that case is distinguishable. In that case, a panel of this court determined that a witness's testimony that the victim had told her during a telephone conversation that the defendant had just called, and that the victim described the subject of the discussion between the victim and the defendant, was admissible as a present sense impression. *Id.* at 1169. This court noted that the phone call between the defendant and

the victim was an event, and it occurred in close proximity in time to the conversation between the witness and the victim. *Id.* at 1168-69. By contrast, in this case Gooch's statement to Buckner that he had a box was not a description of an event, and there is no evidence as to when Gooch received the box in question.

Gooch further argues that his telephonic statement to Buckner was not hearsay because it ended with a question. We disagree. The fundamental purpose of the hearsay rule is to preserve the right to cross examine the declarant. *Powell v. State*, 714 N.E.2d 624, 628 (Ind. 1999). If a report of a question or command in effect transmits the questioner's claimed observations, the need for cross examination is as great as if the witness reported a direct statement. *Id.* Here, Gooch's question contained a factual statement, specifically that he had a box. Thus, the question was susceptible of being true or false and constituted hearsay. *See id.* (determining that the utterance at issue, a question, was offered for the truth of the matter asserted and was hearsay).

After the trial court sustained the State's objection to Buckner testifying as to what Gooch said to her during their telephonic conversation, Gooch asked Buckner what she said to Gooch during that conversation. The State objected again on grounds of hearsay. At sidebar, Gooch stated that Buckner would testify that she told him to "take the box out the door." Tr. p. 157. Gooch further asserted, "the person who made the statement is here, Judge." Tr. p. 158. The trial court ruled that the statement was hearsay and asked Gooch if it fell under any exceptions to the hearsay rule. Gooch responded, "I can't think of an exception, Judge." Tr. p. 158.

On appeal, Gooch argues that Buckner's statement to Gooch on the telephone was a statement of her state of mind, which is an exception to the hearsay rule pursuant to Indiana Rule of Evidence 803(3). Gooch did not present this argument to the trial court, so it is waived on appeal. *See Hightower v. State*, 866 N.E.2d 356, 365 (Ind. Ct. App. 2007), *trans. denied* (holding that the appellant's challenge to the admission of evidence on appeal on grounds of hearsay was waived because the appellant had not presented that ground to the trial court).

Waiver notwithstanding, we find no error. A statement of a witness's "then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health)" is not excluded by the rule against hearsay, even though the declarant is available as a witness. Ind. Evid. Rule 803(3). Our Supreme Court has noted three situations where such testimony is admissible: (1) to show the intent of the victim to act in a particular way; (2) when the defendant puts the victim's state of mind in issue; and (3) sometimes to explain physical injuries suffered by the victim. *Hatcher v. State*, 735 N.E.2d 1155, 1161 (Ind. 2000).

In this case, Buckner was not a victim of the offense at issue. In any event, Buckner's intent to act a certain way was not at issue, Gooch did not put Buckner's state of mind into issue, and Buckner did not allege any physical injuries suffered in relation to this case. Consequently, Bucker's statement to Gooch was not a statement of her state of mind and was not admissible. *See Bassett v. State*, 795 N.E.2d 1050, 1052 (Ind. 2003) (holding that a witness's testimony that the victim said that she was afraid of the

defendant was not admissible as proof of her state of mind because the defendant did not put the victim's state of mind into issue).

Gooch further contends that Buckner's statement to Gooch was not hearsay because it was an instruction and contained no assertion of fact. Gooch did not present this argument to the trial court, so it is waived. *See Hightower*, 866 N.E.2d at 365.

Waiver notwithstanding, we find no error. Our Supreme Court has determined that if a report of a question or command in effect transmits the questioner's claimed observations, the need for cross examination is as great as if the witness reported a direct statement. *Powell*, 714 N.E.2d at 628.

In this case, Buckner's instruction to Gooch does contain an implicit factual assertion, specifically, that Gooch was in possession of a box. Therefore, the instruction was inadmissible hearsay. We conclude that the trial court did not abuse its discretion by excluding Buckner's testimony regarding the telephone call she had with Gooch.

II. RIGHT TO PRESENT A COMPLETE DEFENSE

Gooch contends that the trial court's refusal to allow Buckner to testify about the telephone conversation that she had with Gooch violated his rights under the United States Constitution to present a complete defense to the charges against him.[1]

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Kubsch v. State*, 784 N.E.2d 905, 923-24 (Ind. 2003) (quoting *Crane*

[1] Gooch is not presenting a claim under the Indiana Constitution.

v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986) (internal quotation and citations omitted)).

Due process rights are subject to waiver, and claims are generally waived if raised for the first time on appeal. *Pigg v. State*, 929 N.E.2d 799, 803 (Ind. Ct. App. 2010), *trans. denied*; *see also Pinkston v. State*, 836 N.E.2d 453, 457 (Ind. Ct. App. 2005), *trans. denied* (stating, "A claim of error involving a constitutional violation can be waived if the error is not properly objected to at trial.").

In this case, Gooch did not cite the Sixth or Fourteenth Amendments in response to the State's objections to Buckner's testimony. Therefore, Gooch's claims are waived. *See Pigg*, 929 N.E.2d at 803 (determining that the appellant waived his due process claim because he did not object to the trial court's decision to proceed without holding a hearing on appellant's motion).

Waiver notwithstanding, we find no error. Gooch contends that Buckner's testimony about the telephone conversation would have demonstrated that he was unaware that the parcel had been sent to the apartment. However, as we discussed above, the trial court acted within its discretion when it excluded Buckner's hearsay testimony regarding her telephone conversation with Gooch. Gooch had a right to advance his theory of defense, but he was not entitled to submit otherwise inadmissible evidence to support his theory. *See Kubsch*, 784 N.E.2d at 925 (holding that the appellant was not denied the right to present a complete defense where the trial court excluded a pathologist's testimony that would have been irrelevant and therefore inadmissible). The court did not bar Gooch from presenting his theory of defense by excluding hearsay

testimony. *See id.* at 926 (holding that the appellant was not prevented from presenting a complete defense, but rather was stopped from asking an improper question of a crime scene investigator).

CONCLUSION

For the reasons stated above, we affirm the judgment of the trial court.

Affirmed.

MAY, J., and BARNES, J., concur.