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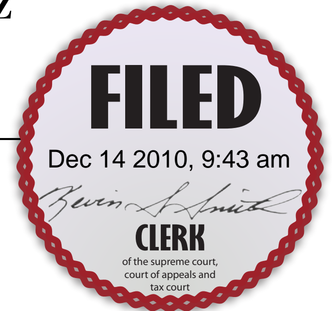

IN THE COURT OF APPEALS OF INDIANA

BRONSKEY SMITH, Appellant-Defendant, vs. STATE OF INDIANA, Appellee-Plaintiff.	)	No. 49A04-1003-CR-126

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven R. Eichholtz, Judge
The Honorable Peggy R. Hart, Commissioner
Cause No. 49G20-0901-FB-10001

December 14, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Bronskey Smith appeals his three convictions for dealing cocaine as class B felonies.[1] Smith raises two issues, which we revise and restate as:

I. Whether the trial court erred in denying Smith's motion to exclude certain evidence; and

II. Whether the evidence is sufficient to sustain his convictions.

We affirm.

The relevant facts follow. In September 2008, a confidential informant (the "C.I.") met with Indianapolis Metropolitan Police Detective Brad Nuetzman, whom the C.I. had worked with since May of 2004, and stated that an individual she knew as "B" or "Big Buddy," who was later determined to be Smith, was selling cocaine.[2] Transcript at 358. The C.I. had met Smith "[n]ot too long" after she moved to Indianapolis in the year 2000. Id. at 346. There was a period of time after the C.I. met Smith that the C.I. and Smith had regular contact, and then there was a period of a few years when the C.I. and Smith were not in touch with each other. In 2008, the C.I. saw Smith's wife at a grocery store, and the C.I. and Smith got back in touch and had contact "[a] few times a week." Id. at 348.

Police arranged three controlled drug buys. For each of the three controlled buys, the C.I. wore an electronic transmitter and kel system audio recordings were made. On September 17, 2008, Detective Nuetzman, Sergeant Mark Gregory, and Detective Jeff Sequin met with the C.I. Detective Nuetzman searched the C.I. for contraband, provided

[1] Ind. Code 35-48-4-1 (Supp. 2006).

[2] The C.I. testified at trial that she had not heard "the name Bronskey." Transcript at 358.

her with pre-recorded buy money, and placed a kel electronic transmitting recording device on her. The C.I. was taken by Sergeant Gregory to the location of the meeting in an undercover police vehicle. The C.I. exited the undercover vehicle, approached a vehicle parked on the street, opened the passenger side door, and gave Smith forty dollars. Smith said "there you go right there," and the C.I. picked up the cocaine on the passenger seat. Id. at 381. It was later determined that the substance Smith had given to the C.I. was 0.2048 grams of cocaine.

On September 24, 2008, Detective Nuetzman, Sergeant Gregory, and Detective Sequin again met the C.I. at an undisclosed location. Detective Nuetzman again searched the C.I. for contraband, provided her with pre-recorded buy money, and placed a kel electronic transmitting recording device on her. Sergeant Gregory took the C.I. in his undercover police vehicle to the meeting location, which was a detached garage behind a house. The C.I. exited the police vehicle, went into the garage through the open overhead door, and handed Smith the money. Smith said "here you go," and the C.I. took the cocaine which was sitting on top of the trunk of a vehicle in the garage. Id. at 398. It was later determined that the substance Smith had given to the C.I. was 0.1722 grams of cocaine.

On October 6, 2008, Detective Nuetzman and Detective Sequin met with the C.I to arrange a third controlled buy. Detective Nuetzman searched the C.I. for contraband, provided her with pre-recorded buy money, and placed a kel electronic transmitting recording device on her. Detective Nuetzman and Detective Sequin drove the C.I. in an

undercover police vehicle to within a block of the location of the previous buy, and the C.I. exited the vehicle. The C.I. walked up to the detached garage and gave Smith, who was standing outside, the buy money, and Smith handed her cocaine. It was later determined that the substance Smith had given to the C.I. was 0.1728 grams of cocaine.

On January 13, 2009, the State charged Smith with three counts of dealing cocaine as class B felonies and three counts of possession of cocaine as class D felonies. At an initial hearing on February 3, 2009, the trial court scheduled a jury trial for July 28, 2009. On March 24, 2009, Smith filed a verified motion to preserve and produce the audio and video tape recordings relevant to his arrest, and the court issued an order on March 26, 2009, finding the discovery to be completed. On June 17, 2009, Smith filed an emergency motion for continuance, and the court granted the motion and rescheduled the trial for September 1, 2009. At a pretrial conference on August 26, 2009, Smith verbally requested a continuance of trial, and the court rescheduled trial for November 10, 2009.

On November 3, 2009, Smith filed a motion to exclude testimony of three police officers. In the motion, Smith argued that defense counsel had sent to the three officers Notice of Tape Statements and Subpoenas for October 1, 2009, and October 30, 2009, and that the three officers failed to appear on both dates. On November 4, 2009, Smith filed a motion to compel discovery moving that the State be compelled to produce its witnesses or alternatively that the court exclude their testimony.

At a pretrial hearing on November 6, 2009, Smith verbally requested a continuance, and the court rescheduled the trial for January 12, 2010, and advised the

parties that no additional trial continuances would be granted. The parties also agreed at the hearing that "everyone" would appear for depositions at defense counsel's office on November 9, 2009. See Transcript at 597.[3]

On December 16, 2009, Smith filed a second motion to compel discovery. In the motion, Smith alleged that depositions of Officer Sequin, Officer Nuetzman, and the C.I. were taken and that during the course of the depositions it was discovered that the State was in possession of "kel set tapes" which contained recordings of the alleged controlled buys, and Smith requested the court to order the State to produce the kel set tape recordings within ten days. Appellant's Appendix at 59. An entry in the chronological case summary ("CCS") dated December 22, 2009, indicates that the court granted Smith's motion and states: "STATE TO PROVIDE DISCOVERY BY 123009."[4] Id. at 13.

On January 6, 2010, the State filed a motion for protective order and objection to release of the audio of the C.I. However, the State withdrew the motion on the same day and delivered copies of the audio recordings to Smith.

On Friday, January 8, 2010, the State obtained information that Smith had made two calls while he was in jail during the previous week. On Monday, January 11, 2010,

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[3] An entry in the chronological case summary dated November 6, 2009, indicates that the depositions "will occur Monday 11/11/09 . . . ." Appellant's Appendix at 13. November 11, 2009, was a Wednesday.

[4] A copy of the court's order is not included in the record. On January 12, 2010, the State indicated that it "didn't get a file stamped copy for some reason" and that "the last part of the last sentence regarding discovery says, 'And pertaining to the matter under the above cause number within fourteen days from the date of this order (December 30, 2009).'" Transcript at 8.

the State discovered that Smith had made a third call over the previous weekend. The State made copies of the three calls and delivered them to defense counsel on the afternoon of January 11, 2010.[5]

A jury trial commenced on January 12, 2010. Smith moved to exclude the kel set tapes and argued that the State's delivery of a copy of the tapes was untimely, and the court denied the motion. Smith also moved to exclude the recordings of Smith's three jail calls and argued that the State failed to lay a foundation for the admission and that the tapes were unduly prejudicial. The court permitted, over Smith's objection, the keeper of inmate phone records at Marion County Jail to testify and admitted the recording of the third phone call only.

The C.I. testified and made an in-court identification of Smith as the person who had sold the cocaine to her during each of the three controlled buys. Detective Nuetzman, Sergeant Gregory, and Detective Sequin testified regarding the controlled buys and police procedures. The jury found Smith guilty on all six counts as charged. The court entered judgment of conviction on Counts I, III, and V for dealing in cocaine, each as class B felonies, and merged Counts II, IV, and VI for possession of cocaine as class D felonies and lesser-included offenses into Counts I, III, and V, respectively. The court sentenced Smith to fifteen years for each of his three convictions and ordered the sentences to be served concurrently with each other.

[5] The State indicated that it filed a supplemental discovery notice with respect to the jail call recordings. The notice is not included in the record.

I.

The first issue is whether the court erred in denying Smith's motion to exclude certain evidence. Smith argues that the court "erroneously denied [Smith's] motion to exclude kel set recordings, a jail phone call recording, and a witness who testified about the jail call recording." Appellant's Brief at 9. With respect to the kel set recordings, Smith argues that the court ordered "the State to provide [the kel set recordings] by December 30, 2009" and that "the State failed to provide the items until a week later on January 6, 2010." Id. Smith argues that "[b]ecause of this unnecessary delay, [Smith's] defense was unable to prepare properly for trial and was thereby prejudiced, in that the defense had to rush to review the recordings and was not afforded sufficient opportunity to seek a voice recording expert to review the tapes and determine if [Smith] was in fact the person recorded on the tapes during the alleged cocaine buys by a confidential informant." Id. Smith argues that "[i]t appears the State blatantly and deliberately refused to comply with the discovery order, and the appropriate remedy at that point was for the court to exclude the evidence of the kel set tapes." Id. at 11. With respect to the jail phone call recording, Smith argues that "[t]he jail tape and a witness to testify about it were provided to Smith just a day before trial" and that his "defense was compromised by this late disclosure and it was provide [sic] no continuance to prepare for this new information." Id. Smith argues that he was prejudiced by the inclusion of the evidence.

The State argues with respect to the kel set recordings that "the recordings and the prosecutor's entire file were available for defense counsel to review at any time, and the

State informed [Smith] of this policy on February 3, 2009." Appellee's Brief at 7. The State argues that Smith "had reason to believe that recordings of the controlled buys existed as early as January 2009" and that "[t]he probable cause affidavit stated that the confidential informant was equipped with electronic transmitting and recording equipment during each of the three controlled buys." Id. The State argues that it "did not deliberately violate the trial court's discovery order but made an honest mistake that caused only a slight delay in complying with the court's order" and that "the prosecutor misread the order to mean that he had to comply within fourteen days of December 30, 2009 . . . ." Id. at 8. The State argues that Smith "has not demonstrated that he was prejudiced or denied a fair trial," that Smith "received copies of the audio recordings a week before trial," and that "[a]t most, the prosecutor's mistake deprived [Smith] of only one additional week to review the recordings . . . ." Id. With respect to the jail phone call recording, the State argues that "[a]s soon as the prosecutor figured out how to copy the calls to a CD, the CD was hand delivered to defense counsel's office that afternoon, the day before trial." Id. at 10. The State argues that only a small portion of the third jail call was admitted at trial. The State argues that "[t]hough the State did not know the identity of the foundational witness who would be available to testify until the morning of trial, the routine foundational testimony he provided should have been easy for [Smith] to anticipate and required little specialized preparation for [Smith] to address effectively at trial." Id. at 11.

The Indiana Supreme Court has held:

> A trial judge has the responsibility to direct the trial in a manner that facilitates the ascertainment of truth, ensures fairness, and obtains economy of time and effort commensurate with the rights of society and the criminal defendant. Where there has been a failure to comply with discovery procedures, the trial judge is usually in the best position to determine the dictates of fundamental fairness and whether any resulting harm can be eliminated or satisfactorily alleviated. Where remedial measures are warranted, a continuance is usually the proper remedy, but exclusion of evidence may be appropriate where the discovery non-compliance has been flagrant and deliberate, or so misleading or in such bad faith as to impair the right of fair trial. The trial court must be given wide discretionary latitude in discovery matters since it has the duty to promote the discovery of truth and to guide and control the proceedings, and will be granted deference in assessing what constitutes substantial compliance with discovery orders. Absent clear error and resulting prejudice, the trial court's determinations as to violations and sanctions should not be overturned.

Fosha v. State, 747 N.E.2d 549, 553-554 (Ind. 2001) (quoting Cliver v. State, 666 N.E.2d 59, 64 (Ind. 1996), reh'g denied), overruled on other grounds by Gutermuth v. State, 868 N.E.2d 427 (Ind. 2007)).

Here, the State does not dispute that it failed to disclose the kel set recordings prior to December 30, 2009, the date specified in the CCS and the court's order.[6] The record shows that Smith obtained copies of the kel set recordings on January 6, 2010, which was six days before the day the jury trial commenced. The record further shows that the State obtained information "at about five o'clock" on Friday, January 8, 2010, regarding two jail phone calls and on the morning of Monday, January 11, 2010, regarding a third phone

[6] The State indicated that, based upon the last sentence of the court's order, it "thought December 30th, 2009 was the date of the order." Transcript at 8. The State also noted that the order was dated December 21, 2009, and that the date fourteen days after the order was issued was January 5, 2009; the State conceded that it provided the recordings to Smith one day late but indicated that "it was an honest mistake because [it] was unclear about what December 30th meant." Id. at 9.

call, and that "[a]s soon as the CD [containing the three recordings] was burned, [the State] walked it over to [defense counsel's] office and . . . they got it about two or two thirty." Transcript at 10. The record shows that the State introduced the testimony of the keeper of inmate phone records at Marion County Jail to lay a foundation for the jail phone call recordings and that the court admitted the third jail phone call. Smith filed a motion to exclude the evidence of the kel set recordings and the jail phone call recordings on January 12, 2010, but did not alternatively request a continuance. "[A]s a general proposition, the proper remedy for a discovery violation is a continuance." Warren v. State, 725 N.E.2d 828, 832 (Ind. 2000). "Failure to alternatively request a continuance upon moving to exclude evidence, where a continuance may be an appropriate remedy, constitutes a waiver of any alleged error pertaining to noncompliance with the court's discovery order." Id. Accordingly, Smith's arguments are waived. See id.

Waiver notwithstanding, Smith cannot prevail. "Exclusion of evidence as a remedy for a discovery violation is only proper where there is a showing that the State's actions were deliberate or otherwise reprehensible, and this conduct prevented the defendant from receiving a fair trial." Id. In this case, Smith has not demonstrated that the State's action was deliberate or otherwise reprehensible, nor has he demonstrated that he was prevented from receiving a fair trial. The record shows that although the State delivered the kel set recordings to Smith on January 6, 2010, Smith was notified of their existence and could have reviewed them in advance of trial.[7] The State's notice of

[7] As previously mentioned, the record shows that on March 24, 2009, Smith filed a verified

discovery compliance filed February 3, 2009, stated that "[a]ll items of physical evidence referred to in the materials listed below may be used as exhibits at trial and can be viewed by contacting the deputy prosecutor below," that "[t]he Marion County Prosecutor's Office has an 'open file' policy," and that "[t]he defense attorney of record may review the prosecutor's file by appointment during the pendency of this case." Appellant's Appendix at 33. The "Probable Cause Affidavit" was one of the materials listed in the notice. Id. The probable cause affidavit stated, with respect to each of the three controlled buys, that an undercover officer "provid[ed] the confidential informant with buy money and an electronic, transmitting, and recording device . . . ." Id. at 23-25. Moreover, Smith obtained copies of the kel set recordings six days prior to trial, and other evidence was presented against him including the testimony of the C.I., Detective Nuetzman, Sergeant Gregory, and Detective Sequin. We conclude that the court did not err in denying Smith's motion to exclude the evidence of the kel set recordings as a discovery violation sanction. See Warren, 725 N.E.2d at 832 (holding that the court did not err when it failed to exclude evidence as a sanction for a discovery violation and noting that "even though the State did not actually furnish the photographs to [the defendant], he was aware of their existence and could have reviewed them in advance of trial" and that "[t]his is not a case of the State ambushing the defense or failing to disclose discovery items").

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motion to preserve and produce the audio and video tape recordings relevant to his arrest. The record also shows that on March 26, 2009, the court found the discovery to be completed.

Further, with respect to the jail call recordings, the record shows that the State obtained information regarding two jail phone calls on the Friday evening prior to trial and obtained information regarding the third call on Monday morning, the day before trial. The State delivered recordings of the three jail phone calls to Smith's defense counsel on Monday afternoon after it burned the recordings to a CD. The inference here is that the prosecutor apprised and delivered to Smith the recordings shortly after obtaining them. "There is no error when the State provides a defendant evidence as soon as the State is in possession of requested evidence." Id. at 832. We also note that Smith reviewed the jail call recordings prior to trial, cross-examined the keeper of the inmate phone records at trial, and argued, successfully in part, that the recordings should not be admitted into evidence based upon relevancy and probative value. Smith has not demonstrated that the State's conduct was deliberate or reprehensible or that he was prejudiced by the admission of the third jail call recording, and we cannot say that the court erred in failing to exclude the evidence of the third jail call recording. See id. (holding that the trial court did not err in failing to exclude evidence of a 911 call and noting that "the inference here is that the prosecutor apprised [the defendant] about the tape shortly after he obtained it" and that the defendant "has not demonstrated that the State's conduct was deliberate or reprehensible").

II.

The next issue is whether the evidence is sufficient to sustain Smith's convictions. When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence

or judge the credibility of witnesses. Jordan v. State, 656 N.E.2d 816, 817 (Ind. 1995), reh'g denied. Rather, we look to the evidence and the reasonable inferences therefrom that support the verdict. Id. We will affirm the conviction if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. Id.

The offense of dealing in cocaine as a class B felony is governed by Ind. Code § 35-48-4-1, which provides that "[a] person who . . . knowingly or intentionally . . . delivers . . . cocaine or a narcotic drug . . . commits dealing in cocaine or a narcotic drug, a Class B felony . . . ."

Smith argues that the evidence is insufficient to support the convictions "because it did not establish beyond a reasonable doubt his identify as the person who allegedly delivered cocaine to a confidential informant." Appellant's Brief at 12. Smith argues that "[n]one of the officers knew the target's name at the time of the buys, none saw the person to be able to identify [him,]" and that "none knew where he lived or what he drove, none knew his phone number or the phone number of the person the [C.I.] called prior to each buy or who picked up the phone on the other end." Id. at 13. Smith argues that none of the officers "ever actually saw a transaction in which cocaine was delivered to the CI." Id. Smith further argues that the C.I. "did not know the name of the target person," had "smoked marijuana just two days before testifying at the trial," "regularly used marijuana 3 to 4 times a week," was a "heavy cocaine user for five to six years between 2000 and 2005," was paid for each buy and had several of her own drug arrest

cases dismissed, "did not know who actually lived in the house she took the officers to to complete two buys and did not know the correct address of the residence," and that the C.I.'s memory is "messed up sometimes." Id. at 13-14.

The State argues that the three controlled buys were recorded and the audio recordings were played for the jury. The State further argues that the C.I. knew Smith by a nickname and his first initial, had personally known and regularly interacted with Smith for several years, and identified Smith in court as the person from whom she purchased cocaine during each of the three buys.

Smith essentially challenges the testimony and evidence at trial identifying him as the person who committed the crimes for which he was charged. Identification testimony need not necessarily be unequivocal to sustain a conviction. Heeter v. State, 661 N.E.2d 612, 616 (Ind. Ct. App. 1996). Elements of offenses and identity may be established entirely by circumstantial evidence and the logical inferences drawn therefrom. Bustamante v. State, 557 N.E.2d 1313, 1317 (Ind. 1990). The unequivocal identification of the defendant by a witness in court, despite discrepancies between his description of the perpetrator and the appearance of the defendant, is sufficient to support a conviction. Emerson v. State, 724 N.E.2d 605, 610 (Ind. 2000), reh'g denied. Inconsistencies in identification testimony impact only the weight of that testimony, because it is the jury's task to weigh the evidence and determine the credibility of the witnesses. Gleaves v. State, 859 N.E.2d 766, 770 (Ind. Ct. App. 2007) (citing Badelle v. State, 754 N.E.2d 510 (Ind. Ct. App. 2001), trans. denied). As with other sufficiency matters, we will not weigh

the evidence or resolve questions of credibility when determining whether the identification evidence is sufficient to sustain a conviction. Id. Rather, we examine the evidence and the reasonable inferences therefrom that support the verdict. Id.

Here, the record reveals that the jury was presented with evidence regarding the identification of Smith. The C.I. identified Smith in court as the person from whom she purchased the cocaine during each of the three controlled buys. The C.I. testified that she knew Smith by his nicknames, had known Smith since the year 2000, and had regular contact with Smith for periods of time. After seeing Smith's wife at a grocery store in 2008, the C.I. and Smith got back in touch and had contact "[a] few times a week." Transcript at 348. In addition, the three controlled buys were recorded and the recordings were played for the jury. We cannot say that it was unreasonable for a jury to believe the identification testimony and evidence presented by the State. See Emerson, 724 N.E.2d at 610 (holding it was reasonable for a jury to believe in-court identification testimony).

To the extent that Smith argues that the C.I. had smoked marijuana two days before trial, had been a heavy cocaine user, was paid for each buy, and had several of her drug arrest cases dismissed, we note that the C.I. was questioned before the jury as to these issues and the jury was able to assess the testimony of the C.I. and other evidence presented at trial and determine the C.I.'s credibility. Smith's arguments regarding why the C.I. should not be believed amount to an invitation that we reweigh the evidence, which we cannot do. See Jordan, 656 N.E.2d at 817.

Based upon our review of the record, we conclude that evidence of probative value exists from which the jury could have found that Smith committed the charged offenses. See Murrell v. State, 747 N.E.2d 567, 574 (Ind. Ct. App. 2001) (holding the evidence was sufficient to support the defendant's conviction for dealing in cocaine where the jury weighed all evidence regarding identification and chose to believe that the defendant was the person who sold cocaine to an undercover officer where the officer had met the defendant two times and shook the defendant's hand and made an in-court identification of the defendant), reh'g denied, trans. denied; see also Ross v. State, 908 N.E.2d 626, 630-631 (Ind. Ct. App. 2009) (holding that the evidence was sufficient to sustain the defendant's conviction for dealing in cocaine where a confidential informant, who did not testify at the trial, participated in a controlled drug buy with an audio recording device which recorded the transactions between the defendant and the informant).

For the foregoing reasons, we affirm Smith's three convictions for dealing in cocaine as class B felonies.

Affirmed.

RILEY, J., and ROBB, J., concur.