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IN THE COURT OF APPEALS OF INDIANA

ROBERT LEE SMITH,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

No. 20A03-0905-CR-206

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0608-FA-39

December 29, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Robert Lee Smith appeals his conviction for Dealing in Cocaine,[1] a class B felony, arguing that the evidence is insufficient to support the conviction. He also contends that the twenty-year sentence imposed by the trial court is inappropriate in light of the nature of the offense and his character. Finding sufficient evidence and finding the sentence to be appropriate, we affirm.

FACTS

On March 14, 2006, a Confidential Informant (CI) who was working with the Elkhart Police Department informed Detective Shawn Turner that drugs could be purchased at a Goshen apartment belonging to Amanda Leemon. The CI and Detective Turner met Detective Anderson[2] in the area of Leemon's apartment.

The CI and Detective Anderson entered Leemon's apartment. In the kitchen area, Detective Anderson produced a scale, and a man who identified himself as "Huss" produced a bag containing a white powdery substance. Tr. p. 105-06. At this point, Leemon ordered the men into the first floor bathroom because the kitchen window blinds were open and Leemon did not want anyone to observe the illegal activity.

Detective Anderson, the CI, and Huss entered the bathroom. The detective told Huss that he wanted to buy an "eight-ball," which is slang for 3.5 grams of cocaine. Id. at 32-33, 107-09. Huss gave Detective Anderson some cocaine, and after the detective

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[1] Ind. Code § 35-48-4-1(a)(1)(C).

[2] Detective Anderson is an undercover officer whose real name is not revealed herein. At Smith's jury trial, the parties and the trial court simply referred to him as "Detective Anderson," and we will do the same.

weighed it, the scale revealed that Huss had provided only 2.1 grams of cocaine. Detective Anderson complained about the shortfall.

At that point, Huss left the bathroom and then returned, followed by Smith. Smith reached into his pocket and removed a plastic baggie, from which he took cocaine and dropped it onto Detective Anderson's scale until the baggie held 3.1 grams of cocaine. Smith and Huss refused to provide anymore cocaine, and the men eventually agreed that Detective Anderson would purchase the 3.1 grams of cocaine for $140. The CI and Detective Anderson then left the apartment and rendezvoused with Detective Turner. Later laboratory examination revealed that the substance Huss and Smith had sold to Detective Anderson was cocaine.

Detective Turner instructed Goshen Police Officer Robert Warstler to conduct a traffic stop of two men leaving Leemon's apartment. Officer Warstler collected identifying information from the two men, including Smith, and let them pass. Using this information, Officer Warstler obtained a photograph of Smith from the Michigan Department of Motor Vehicles, and Detective Anderson later identified the man in the photograph as the man who had entered the drug transaction midway through the process in Leemon's bathroom.

On August 25, 2006, the State charged Smith with class A felony dealing in cocaine weighing three grams or more. On February 23, 2009, the State filed an amended information charging Smith with class B felony dealing in cocaine. Smith's jury trial commenced on that date, and at the conclusion of the trial, the jury found Smith

guilty of class B felony dealing in cocaine. On March 19, 2009, the trial court sentenced Smith to twenty years imprisonment. Smith now appeals.

DISCUSSION AND DECISION

I. Sufficiency

Smith first argues that the evidence is insufficient to support his conviction. When reviewing the sufficiency of the evidence, we will neither reweigh the evidence nor assess witness credibility. Dillard v. State, 755 N.E.2d 1085, 1089 (Ind. 2001). Instead, we look to the evidence most favorable to the verdict and the reasonable inferences that may be drawn therefrom. Id. We will affirm if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt. Id.

To convict Smith of class B felony dealing in cocaine, the State was required to prove beyond a reasonable doubt that Smith knowingly or intentionally delivered cocaine to Detective Anderson. I.C. § 35-48-4-1(a)(1)(C). As noted above, Detective Anderson testified at Smith's trial that Smith was one of the two men who had sold him cocaine in Leemon's apartment. Smith directs our attention to the testimony of Leemon and the CI, who both testified that Smith was the man identified as "Huss" rather than the man who entered the bathroom midway through the transaction. As explained above, Detective Anderson remembers Huss and Smith being two different people.

Initially, we observe that it is the factfinder's exclusive province to weigh conflicting evidence. Alkhalidi v. State, 753 N.E.2d 625, 627 (Ind. 2001). In reaching a verdict, the factfinder is the sole judge of the effect that any discrepancies, contradictions,

or different versions of events have on the outcome of the trial. Murray v. State, 761 N.E.2d 406, 409 (Ind. 2002). Here, the jury was free to credit Detective Anderson's testimony over that of the CI and Leemon. We will not second-guess the jury's decision in that regard. And in any event, there is no dispute that Smith was one of the two men who sold drugs to Detective Anderson—the only dispute surrounds which of those two men he was. Under these circumstances, we find the evidence sufficient to support Smith's conviction.[3]

II. Sentence

Smith also argues that the sentence imposed by the trial court is inappropriate in light of the nature of the offense and his character. In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Smith received a twenty-year sentence, which is the maximum possible sentence for a class B felony conviction. Ind. Code § 35-50-2-5.

As for the nature of the offense, Smith delivered cocaine to Detective Anderson. The record reveals that Smith and Huss were careful that each contributed less than three grams of cocaine to Detective Anderson's baggie. We infer from this behavior that

[3] Smith attempts to apply the incredible dubiosity rule, which, when applicable, permits a court to impinge upon a jury's function to assess witness credibility. Dillard, 755 N.E.2d at 1089. This rule applies only when "a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence . . . ." Id. (emphasis added). Here, multiple witnesses testified, and even if Detective Anderson had been the only witness, we do not find his testimony to be inherently improbable. Therefore, the incredible dubiosity rule does not apply herein.

Smith had a studied knowledge of the significance that delivering three grams or more of cocaine has in Indiana. <u>See</u> I.C. § 35-48-1-1(b) (providing that delivering three or more grams of cocaine is a class A, rather than a class B, felony).

As for Smith's character, he has a significant criminal history. His adult criminal record begins when Smith was twenty years old in 1994, when he committed felony carrying a concealed weapon and felony possession of a controlled substance in Michigan. In 1997, Smith was convicted of felony malicious destruction to personal property in Michigan. In 2004, Smith was again convicted of felony possessing a controlled substance in Michigan. On March 8, 2006—six days before committing the instant offense—Smith was convicted of felony possession of crack cocaine and sentenced to four years of non-reporting community control sanctions. While the present case was pending, Smith was sentenced to eight years for class A felony dealing cocaine within 1,000 feet of a school in Kosciusko County. Also while the present case was pending, a bench warrant was issued in Pennsylvania, stemming from February 3, 2006, charges of burglary, criminal trespass, possessing instrument of a crime, theft, and criminal conspiracy.

It is evident that Smith has little or no respect for the rule of law. His criminal behavior has spanned decades and multiple jurisdictions, and he has failed to take advantage of the multiple chances given to him by the justice system to reform his behavior. Under these circumstances, we do not find the twenty-year sentence imposed by the trial court to be inappropriate.

The judgment of the trial court is affirmed.

BAILEY, J., and ROBB, J., concur.