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IN THE
COURT OF APPEALS OF INDIANA

PHILLIP L. WHITE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A05-0602-CR-90
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Wayne J. Lennington, Judge
Cause No. 18C05-0509-FA-15

December 8, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Phillip White appeals his conviction for dealing in cocaine in an amount greater than three grams, a Class A felony. We affirm.

Issues

White raises three issues for our review:

I. whether the trial court erred by failing to instruct the jury regarding the lesser included offense of dealing in cocaine as a Class B felony;

II. whether the trial court erred by denying his motion for a mistrial; and

III. whether the trial court erred by restricting the scope of his cross-examination.

Facts

The facts most favorable to White's conviction reveal that on May 24, 2005, Muncie-Delaware County Drug Task Force officers Jeff Stanley, Mike Meuller, and Brad Tucker met with a confidential informant ("CI") and arranged for that informant to purchase cocaine from White. The officers supplied the CI with $450 in previously-photocopied bills and fitted him with an electronic listening device. They then followed the CI to an address in Muncie where they observed a man later identified as White speaking to the CI. The officers heard the CI use a particular phrase that signaled the transaction was complete and observed White toss away the marked money the CI had given him in exchange for cocaine. The officers followed the CI as he left the scene of the purchase, and White was arrested. The CI then turned over to the police three bags of crack cocaine that the State's chemist testified weighed a combined total of 3.89 grams.

The State charged White with Class A felony dealing in cocaine, and he was tried by a jury on January 18 and 19, 2006. The jury found White guilty, and he now appeals his conviction.

Analysis

I. Lesser-Included Instruction

White first argues that the trial court erred by declining to instruct the jury that it could find him guilty of the lesser-included offense of Class B felony dealing in cocaine in an amount less than three grams and that by doing so, the trial court deprived him of his right to a jury trial as guaranteed by the Sixth Amendment to the United States Constitution and Article 1, Section 13 of the Indiana Constitution.

Instruction of the jury is within the trial court's discretion and is reviewed only for an abuse of that discretion. Wood v. State, 804 N.E.2d 1182, 1190 (Ind. Ct. App. 2004), trans. denied. Instructions are provided to inform the jury of the law applicable to the facts and enable it to understand the case clearly and arrive at a just, fair, and correct verdict. Id. Jury instructions must correctly state the law, apply to the evidence admitted during trial, and be relevant to the issues the jury must decide in reaching its verdict. See Wright v. State, 766 N.E.2d 1233, 1234 (Ind. Ct. App. 2002).

In their respective briefs, both White and the State correctly delineate the three-part analysis we must undertake to determine whether an instruction on a lesser-included offense should have been given. See Wright v. State, 658 N.E.2d 563, 567 (Ind. 1995).

> First, we must determine whether the lesser offense is inherently or factually included in the greater offense by looking at the statutes and the charging document. An

> offense is an inherently lesser-included one if all the statutory elements of the lesser offense are part of the statutory definition of the greater offense . . . [I]f the alleged lesser included offense is either inherently or factually included in the crime charged, we must look at the evidence presented to determine if there is a serious evidentiary dispute about the element or elements distinguishing the greater from the lesser offense and if, in view of this dispute, a jury could conclude that the lesser offense was committed but not the greater. The resolution of this question hinges on whether a serious evidentiary dispute exists with respect to the element which distinguishes the greater from the lesser offense. If an offense is inherently included in the crime charged, we may proceed directly from step one to step three.

Wright, 766 N.E.2d at 1235. (quotations omitted) (citations omitted). Because the State conceded at trial that Class B felony dealing in cocaine is inherently included in the Class A felony, we need only determine whether the trial court abused its discretion by finding that no serious evidentiary dispute existed with respect to the amount of cocaine dealt by White.[1] Waibel v. State, 808 N.E.2d 750, 755 (Ind. Ct. App. 2004), trans. denied. We conclude that the trial court did not abuse its discretion in this regard.

During the trial, the State introduced testimony from two witnesses—Officer Stanley and chemist Kristi Long—related to the amount of cocaine dealt by White. Officer Stanley testified that in his probable cause affidavit, he estimated the cocaine weighed 7.3 grams. He further testified that his police report listed the approximate weight of the cocaine as 4.6 grams. Long testified that she weighed the cocaine and that,

[1] The State's appellee's brief, too, notes that the prosecutor conceded the inclusion of the Class B felony within the Class A felony but provides that the prosecutor recognized the Class B felony as a factually included offense. Our review of the transcript indicates that the prosecutor instead conceded to the inherent inclusion of the Class B felony. See Tr. pp. 203-04.

minus the baggies in which it was kept, the aggregate weight of the cocaine was 3.89 grams. Clearly the State's evidence regarding the weight of the cocaine varied, and White argues that because of these discrepancies, the jury "should have been allowed to consider whether there was reasonable doubt as to the weight . . . . and properly conclude that the lesser offense was committed but not the greater." Appellant's Br. p. 12 (quotations omitted) (citations omitted).

We agree with White to the extent that there may exist some doubt about whether the cocaine weighed 3.89 grams, 7.3 grams, or some weight in between. There is absolutely no evidence, however, that White dealt less than three grams of cocaine. We further note that despite White's contention that the State's evidence was unreliable, he failed to cross-examine Long regarding her calculation of weight of the cocaine. We see no serious evidentiary dispute over whether White dealt less than three grams of cocaine, and we conclude that the trial court did not abuse its discretion by failing to read White's proposed instruction.

We are similarly unpersuaded by White's assertion that he was deprived of his right to a jury trial because he fails to direct us to any authority supporting the assertion he sets forth. See Ind. Appellate Rule 46(A)(8)(a). White seems to rely on our supreme court's holding in Baird v. State, 688 N.E.2d 911, 917 (Ind. 1997) when he argues, "The trial court's ruling prevented Defendant from allowing the jury to determine whether there was reasonable doubt as to an essential element of the offense . . . . The error denied the Defendant his fundamental right to a jury trial on that issue." Appellant's Br. pp. 13-14. The portion of Baird to which White cites, however, addresses Baird's contention

that he was denied the right to a jury trial because four members of his jury were familiar with media accounts related to Baird's plea negotiations and is not relevant to White's argument. Furthermore, we have already concluded that the trial court acted within its discretion by refusing to instruct the jury regarding the lesser-included Class B felony, and this decision could not and did not impact White's right to a jury trial.

II. Mistrial

White next argues that the trial court erred by denying the mistrial he requested following the State's comment during closing arguments that "the Defense attorney's job is to confuse the evidence . . . ." Tr. p. 265. White contends that this statement rises to the level of prosecutorial misconduct. We conclude that White has waived this argument.

Our supreme court recently reiterated the procedure a party must follow when alleging misconduct and arguing for a mistrial:

> When an improper argument is alleged to have been made, the correct procedure is to request the trial court to admonish the jury. If the party is not satisfied with the admonishment, then he or she should move for mistrial. Failure to request an admonishment or to move for a mistrial results in waiver.

Cooper v. State, No. 49S00-0407-CR-324, slip op. at 3 (Ind. Oct. 5, 2006).

White attempted to object to the State's comment but was cut short by the trial court, and the State continued its closing arguments. Following the conclusion of the State's argument, the trial court dismissed the jury and White made a motion for a mistrial. The trial court denied White's motion. White failed, however, to request that the trial court admonish the jury. He has thus waived this argument. Furthermore, White

does not argue on appeal that the State's perceived misconduct rises to the level of fundamental error, and we need not further address this issue. See Cooper, slip op. at 3-4.

III. Cross-Examination

White's final contention is that the trial court erred by limiting his cross-examination of Officer Ellison related to his testimony about the chain of custody of the cocaine. The Fourteenth Amendment to the United States Constitution secures for defendants in state criminal proceedings the right to confront witnesses that is guaranteed by the Sixth Amendment to the United States Constitution. Seketa v. State, 817 N.E.2d 690, 693 (Ind. Ct. App. 2004). However, it is the trial court's task to determine the scope of cross-examination. Id. "Trial judges retain wide latitude to impose reasonable limits based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Nelson v. State, 792 N.E.2d 588, 594 (Ind. Ct. App. 2003), trans. denied. A trial court's decision to limit the scope of cross-examination will be reversed only for an abuse of discretion. Seketa, 817 N.E.2d at 693. We will find an abuse of discretion when the trial court's ruling substantially affects the defendant's rights. Kirk v. State, 797 N.E.2d 837, 840 (Ind. Ct. App. 2003), trans. denied.

During his testimony, Officer Ellison identified himself as a supervisor for the Muncie-Delaware County Drug Task Force and as the person who "take[s] care" of evidence collected during task force investigations. Tr. p. 170. Officer Ellison described the procedure he follows when securing evidence, stating that the collected evidence is

bagged and stored in a safe at the task force's office to which a limited number of people have access. With regard to the cocaine recovered in White's case, Officer Ellison testified that, the next day, he removed the evidence from the safe, double checked various markings on the evidence, and placed it in the task force property room. Officer Ellison was the only person who had access to that room.

Officer Ellison testified that the cocaine was kept in the property room until he himself transported it to the state police lab. He further testified that the cocaine was in his control the entire time he was transporting it. When Officer Ellison picked up the cocaine from the lab following testing, it was sealed and in the same or similar condition as that in which he had previously seen it and that it was in on the day of White's trial. Officer Ellison then returned the cocaine to the task force property room where it remained until he removed it for the trial.

On cross-examination, White questioned Officer Ellison about some of the forms and records that are maintained related to evidence collected by the task force. He next asked questions about the specific location of the task force property room:

> Q Okay, so it's your – you're with the County Sheriff's Department?
> A Correct.
> Q The items that you keep, are they in the basement here or they at the Muncie property room?
> A It could be Muncie property room, it could be the property room here, it could be the property room at the Drug Task Force. We have three that we use.
> Q Three different property rooms.
> A Correct.
> Q Okay. And where was this item stored?
> A It was at the Drug Task Force. It never left my possession.

Q It was never in the property room here?
A No, it was not.
Q And it was never in the property room at the City . . .
A City Hall?
Q Yeah.
A No, it was not.
Q Where is the Drug Task Force property room?
A It's at our office.
Q And where is the office?

Tr. pp. 178-79. At this point in the cross-examination, the State objected to White's question, arguing that the location of the task force office was irrelevant. White responded by contending that his question was relevant to the chain of custody of the cocaine. The trial court sustained the State's objection.

The thrust of White's argument on appeal is the bare assertion that the trial court wrongly limited the scope of his cross-examination of Officer Ellison. He does not, however, explain how information regarding the location of the task force's office could have been helpful to his case or the harm he suffered from the exclusion of that information. As such, White has wholly failed to demonstrate that he was prejudiced by the trial court's decision. See Kirk, 797 N.E.2d at 841. We therefore conclude that there is no reversible error here.

Conclusion

The trial court did not abuse its discretion by refusing to instruct the jury regarding the lesser-included Class B felony offense, and White has not shown how that refusal infringed on his right to a jury trial. White's failure to request an admonishment following the State's comment during closing arguments resulted in waiver of that issue.

White failed to demonstrate that the trial court made a reversible error by limiting the scope of his cross-examination. We affirm.

Affirmed.

ROBB, J., concurs.

SULLIVAN, J., concurs in result.