MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Drew Alexander Osborne,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 30, 2021

Court of Appeals Case No. 21A-CR-1074

Appeal from the Boone Superior Court

The Honorable Matthew C. Kincaid, Judge

Trial Court Cause No. 06D01-1911-F6-2476

Brown, Judge.

[1] Drew Alexander Osborne appeals his convictions for unlawful possession of a syringe as a level 6 felony and possession of paraphernalia as a class C misdemeanor. He raises two issues which we revise and restate as:

I. Whether the trial court abused its discretion by admitting certain evidence; and

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

We affirm.

Facts and Procedural History

[2] In November 2019, Osborne, who was homeless and had never lived with his father, Darald Osborne ("Darald"), asked Darald if he could store some items at his house, and Darald agreed. About a week later on November 18th, 19th, or 20th, Osborne called Darald and asked if he could use Darald's Wi-Fi to video chat with his daughter.[1] When Darald picked him up, Osborne had a backpack with him which Darald had seen on numerous occasions because Osborne had used it "to switch clothes out." Transcript Volume II at 56. Darald brought Osborne back to his house, and they argued. Osborne "got ticked off," reached into his backpack, and pulled out what looked like a gun,

[1] When asked when Osborne went to his house, Darald answered: "[I]t was right around the eighteenth or the twentieth." Transcript Volume II at 49. He later testified that "I would guess that it was the eighteenth or nineteenth that he come over . . . ." *Id.* at 56.

and left.[2] *Id.* at 44. Darald locked the door and took the backpack downstairs where he "already had [Osborne's] clothes" in the basement and "put it down there with his clothes." *Id.* at 45.

[3] On November 22, 2019, Boone County Probation Officer Stephen Owens had a previously scheduled appointment with Osborne and collected a urine screen from him, and an instant drug screen revealed a preliminary positive result for methamphetamine and amphetamines. Officer Owens sent the sample to the Witham Health Services Toxicology Laboratory, which found methamphetamine and amphetamine in the sample.

[4] That same day, Darald attempted to place Osborne's clothes, which were in "torn up trash bags" in different bags, came across Osborne's backpack, hit the backpack, and heard a thud. *Id.* He thought it was Osborne's tattoo gun, opened the backpack, and found some mail addressed to Osborne, a receipt with Osborne's name, and a metal container. He unlocked the container with a key which was on top of the backpack and found a syringe, scales, a calibration weight, baggies, and "some little orange bud container." *Id.* Darald, who was living with his girlfriend Kathryn Elaine Hadley, wanted the backpack out of the house before his two younger children, who were twelve and fourteen years

[2] During Darald's testimony regarding the gun, Osborne's counsel objected and stated that the testimony was not relevant. The court construed the objection as a motion to strike, stated that it did not "see that it is irrelevant or unduly prejudicial," and denied the motion to strike. Transcript Volume II at 44.

old and stayed with him for part of the week, arrived home. He contacted the police.

[5] Lebanon Police Officers Graydon Robertson and Aaron Carlson responded to the call. Darald led the officers to the basement, showed them the backpack and items, and told them that they belonged to Osborne. Officer Carlson called the probation office and was advised that Osborne "had just violated his probation." *Id.* at 76. Officer Robertson took possession of the container and its contents. Osborne later called Darald, said he did not want his stuff at his house, and told him to take his backpack to his grandmother's house.

[6] On November 25, 2019, the State charged Osborne with Count I, unlawful possession of a syringe as a level 6 felony, and Count II, possession of paraphernalia as a class C misdemeanor. On November 10, 2020, Osborne filed a motion to suppress "all property seized, all observations made, and any statements taken as a direct result of an unlawful search." Appellant's Appendix Volume II at 85. On November 20, 2020, the State filed a Notice of Intent to Introduce Evidence Under 404(b) which asserted that Osborne tested positive on a drug screen for methamphetamine and amphetamine and that the prosecutor had previously told Osborne's counsel that the State intended to introduce testimony and/or the certified drug screen to show Osborne's intent related to the syringe.

[7] On January 21, 2021, the court held a hearing on Osborne's motion. The State presented testimony of Darald and Officer Robertson and argued that the

evidence need not be suppressed because law enforcement did not search the backpack and a search or seizure by a private party did not implicate the Fourth Amendment. The court found that Osborne had no property interest in the premises of his father's home and Darald searched the backpack as a private citizen, and it denied Osborne's motion.

[8] On February 9, 2021, the court held a bench trial. Darald testified to the foregoing. When asked if he could say with certainty that his other children did not touch the backpack, he answered "[a]bsolutely" and explained that the sounds in the basement "freak[] them out." Transcript Volume II at 47. He testified that he was home during the three or four days the backpack was in his house except for a time that he and Kathryn went to the grocery store while his children were at school and he locked the doors when he was not home. Kathryn testified that she did not touch the backpack.

[9] During the testimony of Officer Owens, the prosecutor asked if he knew whether Osborne was on probation for an unrelated matter. Osborne's counsel objected on the basis of relevancy. The prosecutor asserted that "[t]he relevance goes to whether or not he was on probation because he would have had to take drug screens for probation." *Id.* at 95. The court overruled the objection. Officer Owens testified that Osborne was on probation under three cause numbers and that most drug-related "cases are ordered to complete that Fourth Amendment waiver." *Id.* The prosecutor handed Officer Owens a document, and he identified it as a Fourth Amendment waiver signed by Osborne on April 15, 2019. Upon questioning by defense counsel, Officer

Owens indicated he was not present when the document was signed. Defense counsel objected to the admission of the document. Upon questioning by the prosecutor, Officer Owens indicated that he was Osborne's probation officer, they keep paper and electronic files, "[t]hose are signed initially by paper and then scanned into our electronic file," they are part of a probationer's file, he maintained and was the custodian of Osborne's file, and Fourth Amendment waivers "are always signed based on the Judge's order to probation as a term of probation." *Id.* at 97-98. Defense counsel objected to the admission of the document on the basis of relevancy and authentication. The court overruled the relevancy objection, found that authentication had been established, and admitted the document titled "4th Amendment Waiver of Rights as a Condition of Participation in Community Corrections." State's Exhibit 20.

[10] Without objection, Officer Owens testified that an instant drug screen had a preliminary positive result for methamphetamine and amphetamines. The prosecutor later stated: "So, you stated that the preliminary tests being positive for methamphetamine . . . ." Transcript Volume II at 101. Defense counsel objected and stated: "The test speaks for itself. He is not the expert here to testify as to that." *Id.* The prosecutor continued her questioning, and Officer Owens indicated that he sent the sample to Witham lab. On cross-examination, Officer Owens testified that Osborne came to his office voluntarily on November 22, 2019 for a scheduled drug screen, and that he received the call inquiring whether Osborne was on probation after Osborne

had left his office. He also testified that he had "multiple difficulties . . . getting [Osborne] in to the office to collect a drug screen." *Id.* at 104.

[11] Michael Wagner, the laboratory director of the Witham Health Services Toxicology Laboratory, indicated that methamphetamine and amphetamine were found in the sample. When asked if he could narrow down when Osborne would have used the drug, he answered: "[W]e have short windows that we note in our affidavit that might be within seventy-two hours, but it's also possible that with amphetamine, amphetamines can stay in your system up to nine days and methamphetamine up to . . . six days . . . ." *Id.* at 115. The prosecutor then moved to introduce "State's exhibit twenty-two." *Id.* Defense counsel objected and asserted that "it claims to be an affidavit" but it did not include a statement that it was based on personal knowledge. Defense counsel later objected regarding "any relevance here to what his test may have shown," argued that there was a "404(b)(1) problem," and stated that "if you're alleging here that he committed some other offense that is not relevant to this matter it is highly prejudicial." *Id.* at 116. The prosecutor asserted "it's necessary to prove his intent regarding the syringe." *Id.* at 116-117. The court stated that Osborne had interjected the issue of intent into the case, the evidence was not barred by Rule 404(b), it was relevant and not unduly prejudicial, and overruled the objection. The court admitted a document from Witham Health Services Toxicology Laboratory indicating a positive result for methamphetamine and amphetamine from Osborne's sample as State's Exhibit 27.

[12] The court found Osborne guilty as charged. It sentenced Osborne to concurrent sentences of 150 days at the Department of Correction for Count I and thirty days at the Boone County Jail for Count II.

Discussion

I.

[13] The first issue is whether the trial court abused its discretion by admitting evidence related to the drug screen and Osborne's probation status. Osborne argues that the drug screen results were inadmissible under Ind. Evidence Rule 404(b), he did not mention contrary intent when cross-examining the State's witnesses, and the State was barred from introducing the drug screen results under the intent exception to prove the intent element of the paraphernalia charge because it did not properly notify him under Rule 404(b)(2), as the State's notice made no reference to his intent regarding the scale. He contends that, even if the drug screen results met the intent exception, any probative value of a drug screen taken days after he could possibly have touched the backpack was substantially outweighed by the danger of unfair prejudice and confusion of the issues. He also argues that the admission of the drug screen results was not harmless because the State relied almost exclusively on the drug screen to satisfy the intent element of the charged offenses. He argues that all evidence pertaining to his status as a probationer in an unrelated matter should have been excluded under Ind. Evidence Rule 403. The State argues that Osborne waived his challenge to the admission of both his positive drug screen and probation status by failing to raise a timely objection when the relevant

testimony was first offered at trial and does not allege fundamental error on appeal.

[14] Initially, we note that this was a bench trial and we presume that the trial court knows the law. *See Emerson v. State*, 695 N.E.2d 912, 919 (Ind. 1998), *reh'g denied*. Further, failure to timely object to the erroneous admission of evidence at trial will procedurally foreclose the raising of such error on appeal unless the admission constitutes fundamental error. *Stephenson v. State*, 29 N.E.3d 111, 118 (Ind. 2015). The fundamental error exception to the contemporaneous objection requirement is "extremely narrow, and applies only when the error constitutes 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) (quoting *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006)), *reh'g denied*. To be considered fundamental, the claimed error must make a fair trial impossible. *Id.* (citing *Clark v. State*, 915 N.E.2d 126, 131 (Ind. 2009), *reh'g denied*). Thus, this exception is available only in "egregious circumstances." *Id.* (citing *Brown v. State*, 799 N.E.2d 1064, 1068 (Ind. 2003)).

[15] With respect to the drug screen results, Officer Owens testified without objection that the instant drug screen gave a preliminary result of positive for methamphetamine and amphetamines. When the prosecutor later asked if he had stated that the preliminary tests were positive for methamphetamine, Osborne's counsel stated: "Objection, Your Honor. *The test speaks for itself.* He is not the expert here to testify as to that." Transcript Volume II at 101

(emphasis added). Without objection, Wagner testified that methamphetamine and amphetamine were found in Osborne's sample. It was only after the prosecutor moved the court to admit an exhibit that Osborne's counsel objected. With respect to Osborne's probation status, Officer Robertson testified without objection that Officer Carlson contacted probation and "they advised us . . . [Osborne] had just violated his probation." *Id.* at 76. Without objection, Officer Carlson stated he called the probation office "[j]ust to see or verify if the subject in question was currently under probation or not under probation." *Id.* at 91. When asked if he knew whether or not Osborne was on probation, he answered without objection: "I believe he was." *Id.* During cross-examination, Officer Carlson testified that it was standard operating procedure for him to contact probation and answered affirmatively when asked by defense counsel if he called probation because he "had heard from [Darald] something about" Osborne. *Id.* at 92. Officer Owens testified that Officer Carlson called him to confirm that Osborne was on probation. It was only when the prosecutor asked if Officer Owens knew whether Osborne was on probation for an unrelated matter that Osborne's counsel objected on the basis of relevancy. Under these circumstances, we conclude that Osborne waived these issues by failing to timely object. *See Brown*, 929 N.E.2d at 207 ("A contemporaneous objection at the time the evidence is introduced at trial is required to preserve the issue for appeal, whether or not the appellant has filed a pretrial motion to suppress."). Further, we note that Osborne does not allege fundamental error on appeal. Accordingly, we cannot say that reversal is warranted.

II.

[16] The next issue is whether the evidence is sufficient to sustain Osborne's convictions. With respect to Count I, unlawful possession of a syringe as a level 6 felony, Osborne argues that a drug screen does not show the manner in which the detected drug was taken, the State presented no evidence that the syringe seized from the backpack was the specific instrument he used to inject himself with the methamphetamine detected by the test, and the window of time the drug screen could detect methamphetamine was too wide for the State to narrow his use of the drug to the specific date and time it alleged he possessed the syringe. He also asserts the evidence does not support his possession of the syringe. As for Count II, possession of paraphernalia as a class C misdemeanor, he argues that his positive drug screen for methamphetamine was "too loosely connected [to] the scale to prove that he intended to use the scale on a specific occasion days earlier to weigh methamphetamine to test its strength, effectiveness, or purity." Appellant's Brief at 29.

[17] When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the fact-finder's role to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. *Id.* When confronted with conflicting evidence, we must consider it most favorably to the trial court's ruling. *Id.* We will affirm the conviction unless no

reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id.* The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. *Id.* at 147.

[18] Ind. Code § 16-42-19-18 provides:

> (a) A person may not possess with intent to:
>
> (1) violate this chapter; or
>
> (2) commit an offense described in IC 35-48-4;
>
> a hypodermic syringe or needle or an instrument adapted for the use of a controlled substance or legend drug by injection in a human being.
>
> (b) A person who violates subsection (a) commits a Level 6 felony.[3]

[19] Ind. Code § 35-48-4-8.3(b)(2) provides that "[a] person who knowingly or intentionally possesses an instrument, a device, or another object that the person intends to use for . . . testing the strength, effectiveness, or purity of a controlled substance . . . commits a Class C misdemeanor."[4] A person engages

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[3] In Count I, the State alleged that Osborne, "with intent to violate the Indiana Legend Drug Act (I.C. 16-42-19) or an offense described in I.C. 35-48-4, did knowingly possess or have under his control a hypodermic syringe or needle or an instrument adapted for the use of a legend drug or a controlled substance by injection in a human being contrary to the form of the statutes in such cases made and provided by I.C. 16-42-19-18(a) . . . ." Appellant's Appendix Volume II at 19.

[4] In Count II, the State alleged that Osborne "did knowingly or intentionally possess a(n) instrument, device, or object, to-wit: digital scale; that [Osborne] intended to use for testing the strength, effectiveness or purity of a controlled substance contrary to the form of the statutes in such cases made and provided by I.C. 35-48-4-8.3(b)(2) . . . ." Appellant's Appendix Volume II at 19.

in conduct "intentionally" if, when he engages in the conduct, it is his conscious objective to do so. Ind. Code § 35-41-2-2(a). A person engages in conduct "knowingly" if, when he engages in the conduct, he is aware of a high probability that he is doing so. Ind. Code § 35-41-2-2(b). The Indiana Supreme Court has noted that intent is a mental function and it is well-established that a defendant's intent can be proved by circumstantial evidence. *Phipps v. State*, 90 N.E.3d 1190, 1195 (Ind. 2018). "For example, intent can be inferred from a defendant's conduct and the natural and usual sequence to which such conduct logically and reasonably points." *Id.* at 1195-1196 (citation and quotations omitted).

[20] The record reveals that Darald testified that he picked up Osborne who had a backpack with him that he had seen on numerous occasions. Osborne left the backpack at his father's house. When Darald opened the backpack, he found mail addressed to Osborne, a receipt with Osborne's name, and a metal container. He unlocked the metal container with a key which was on top of the backpack and found a syringe, scales, a calibration weight, baggies, and "some little orange bud container." Transcript Volume II at 45. When asked if he could say with certainty that his other children did not touch the backpack, Darald answered "[a]bsolutely." *Id.* at 47. He further testified that he was home during the three or four days the backpack was in his house except for a time that he and Kathryn went to the grocery store while his children were at school and that he locked the doors when he was not home. Darald also testified that Osborne later called and told him to take his backpack to his

grandmother's house. Further, Kathryn testified that she did not touch the backpack. Officer Owens testified without objection that an instant drug screen on November 22, 2019, revealed a preliminary positive result for methamphetamine and amphetamines, and Wagner indicated without objection that methamphetamine and amphetamine were found in Osborne's sample.

[21] Based upon our review of the evidence as set forth above and in the record, we conclude the State presented evidence of a probative nature from which the trier of fact could find beyond a reasonable doubt that Osborne committed unlawful possession of a syringe as a level 6 felony and possession of paraphernalia as a class C misdemeanor.

[22] For the foregoing reasons, we affirm Osborne's convictions.

[23] Affirmed.

May, J., and Pyle, J., concur.