MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Kerry C. Connor
Highland, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Samuel J. Dayton
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Michael Henry Minix,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 15, 2022

Court of Appeals Case No. 22A-CR-1278

Appeal from the Marshall Superior Court

The Honorable Robert O. Bowen, Judge

Trial Court Cause No. 50D01-2003-F2-11

Foley, Judge.

[1] The State convicted Michael Henry Minix ("Minix") of delivery of a Schedule III substance. Minix appeals the conviction and raises a single issue: did the

trial court err in denying his motion to dismiss? In that motion—and now on appeal—Minix contends that the State erred by charging him under the general statute prohibiting dealing in Schedule III substances,[1] rather than the specific statute[2] pertaining to delivery of anabolic steroids. Finding that the State had the discretion to charge Minix under either statute, we affirm.

Facts and Procedural History

[2] Les Marcom, a longtime friend of Minix, agreed to help police with a "controlled buy," wherein—unbeknownst to Minix—Marcom would purchase steroids from Minix while police conducted surveillance. The buy went ahead, and Minix provided Marcom with $280 worth of anabolic steroids.[3] On March 16, 2020, the State charged Minix with two counts of dealing in a Schedule III controlled substance, both as a Level 2 felony.

[3] On March 23, 2022, Minix filed a motion to dismiss the charges, arguing that "[t]he State has erroneously charged Mr. Minix under IC 35-48-4-2 when the correct provision is IC 16-42-19-27." Appellant's App. Vol. II p. 116. The trial

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[1] Indiana Code Section 35-48-4-2.

[2] Indiana Code Section 16-42-19-25; -27.

[3] More specifically, Minix provided eighty-eight tablets of methandienone and a vial containing ten milliliters of testosterone propionate. Indiana Code Section 35-48-2-8(f) categorizes anabolic steroids as a Schedule III substance. The statute incorporates the definitions provided in federal law at 21 U.S.C. § 802(41)(A) which explicitly names methandienone. We note, though it is not probative of the disposition of this appeal, that "testosterone propionate" does not appear on the list, and that the State's expert below testified that the substance was structurally different from testosterone. It is possible that it appears on the list under another name, but the record does not appear to support such a conclusion. Regardless, Minix fails to raise the issue, and we address it no further.

court denied the motion. Minix renewed his motion to dismiss in open court prior to a bench trial, but the motion was again denied. The trial court found Minix guilty of both counts, as well as of lesser included offenses thereto. The trial court entered judgment on Count I as the lesser included Level 6 felony, and on Count II as the lesser included Level 3 felony.[4] The trial court sentenced Minix to 2,190 days (112 days in the Department of Correction, 1,097 days in community corrections, and 981 days suspended) as well as two years of probation for the Level 3 felony. The trial court sentenced Minix to one year suspended to probation, to be served concurrently, on the Level 6 felony. This appeal followed thereafter.

Discussion and Decision

[4] Minix argues that he was charged under the incorrect statute, and, thus, the trial court erred in denying his motion to dismiss the charges. "We review a trial court's denial of a motion to dismiss for an abuse of discretion." *Ceaser v. State*, 964 N.E.2d 911, 918 (Ind. Ct. App. 2012) (citing *State v. Durrett*, 923 N.E.2d 449, 453 (Ind. Ct. App. 2010)). "We therefore reverse only where the decision is clearly against the logic and effects of the facts and circumstances." *Id*.

[4] The State failed to prove that the offenses were committed in the presence of a child or that the testosterone propionate weighed between ten and twenty-eight grams, part of the State's burden in order to convict on the Level 2 felonies.

[5] The statutes to which Minix points read in pertinent part that: "a person who is not a practitioner or lawful manufacturer of anabolic steroids may not do any of the following: (1) Knowingly or intentionally manufacture or deliver an anabolic steroid, pure or adulterated. (2) Possess, with intent to manufacture or deliver, an anabolic steroid." Ind. Code § 16-42-19-25 (b). "Unless otherwise specified, a person who knowingly violates this chapter, except sections 25(b) and 30(c) of this chapter, commits a Level 6 felony. However, the offense is a Level 5 felony if the person has a prior conviction under this subsection or IC 16-6-8-10(a) before its repeal." I.C. § 16-42-19-27. These are provisions from the Indiana Legend Drug Act ("LDA") which generally pertains to prescription medications and the like. But we long ago recognized that "[t]here exists duplicity in the provisions of the Legend Drug Act and the crimes dealing with controlled substances." *Copeland v. State*, 430 N.E.2d 393, 398 (Ind. Ct. App. 1982). Though the LDA and the general statute under which Minix was convicted "prohibit similar conduct, the duplication allows prosecutors discretion. It is well settled that where a defendant commits an act which is in violation of more than one criminal statute, absolute discretion is vested in the State to decide which statute(s) the defendant will be charged with violating." *Id*. (citing *Adams v. State*, (1974) 262 Ind. 220, 314 N.E.2d 53).

[6] Minix's argument has two prongs, both of which rely on tenets of statutory construction.[5] First he argues that "[p]ermitting the State to simply ignore I.C. 16-42-19-25 and I.C. 16-42-19-27 and opt for a harsher more generalized I.C. 35-48-4-2, would render the anabolic steroid provisions meaningless." Appellant's Br. p. 12. Of course, we are bound to read every word of a statute as having meaning where possible. Second, he argues that if the two statutes "cannot be harmonized, the specific statute must prevail over the general." *Id.* at 13.

[7] As to the first prong, we see no reason why the selection of one legislatively-provided tool should render the existence of an unselected tool meaningless, and Minix provides no further explanation. The argument is therefore waived as it is not supported by cogent reasoning. Ind. App. R. 46(A)(8)(a). The mere fact that the LDA and general statute are applicable to the facts of this case does not mean that the statutes become devoid of meaning when they are not applied. At bottom, Minix is not actually arguing that the *words* of these statutes have been made meaningless, but rather that the prosecutor's decision not to utilize the LDA statutes has rendered that statute meaningless under these circumstances. That tautology is no basis for concluding that the trial court abused its discretion in denying Minix's motion to dismiss.

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[5] To the extent that Minix argues in his reply brief that legislative history evince that its intent was to exclusively limit anabolic steroid prosecutions to those provisions found in the LDA, we find the argument facially unavailing. If, indeed, that was the legislature's intent, it makes little sense to leave anabolic steroids as a Schedule III substance. Minix offers no reply for this obvious observation.

[8] As to the second prong of Minix's argument, he is correct that we strive to apply the canon of construction that the specific statute should control where it conflicts with a general statute broaching the same subject. *See, e.g.*, *BP Prods. N. Am., Inc. v. Ind. Off. of Util. Consumer Couns.*, 964 N.E.2d 234, 238 (Ind. Ct. App. 2011). But Minix does not explicitly contend that the statutes conflict, as we must conclude in order for the canon to be salient. Again, by failing to make the necessary allegations supported by cogent reasoning, Minix waives his argument on this score. Waiver notwithstanding, we see no reason to infer that overlap between the subject matter of two statutes necessarily means that they conflict. To the contrary, all the statutes here pertain to the substances delivered by Minix, and all of them make that delivery a crime: redundant, perhaps, but consistent.

[9] At best, Minix appears to suggest the following contradiction: Minix's conduct constitutes a Level 3 felony under one set of statutes and a Level 5 felony under the other set, and both cannot be simultaneously true. But, of course, whether conduct constitutes a crime is not an objective matter, but a definitional one that is left to legislative judgment. Delivery of anabolic steroids is legislatively defined as a crime, it is not conduct that is objectively, inherently criminal. The criminality of the act, in other words, is not innate to the act itself. Therefore "delivery of anabolic steroids is a Level 3 felony *when charged* under one set of statutes and a Level 5 felony *when charged* under the other set of statutes" is the more accurate statement of law. Accordingly, the trial court did not abuse its discretion when it denied Minix's motion to dismiss.

[10] Affirmed.

Robb, J., and Mathias, J., concur.