ATTORNEY FOR APPELLANT:

JULIE ANN SLAUGHTER
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ANN GOODWIN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ANTHONY JONES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0601-CR-71
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Israel Cruz, Judge Pro Tempore
Cause No. 49G20-0506-FA-98114

November 21, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Anthony Jones ("Jones") appeals his convictions of dealing in cocaine, a Class A felony,[1] possessing cocaine, a Class C felony,[2] and possessing marijuana, a Class A misdemeanor.[3] We affirm the convictions for dealing in cocaine and possessing marijuana, but remand with instructions to vacate the conviction for possessing cocaine.

Issues

Jones raises four issues which we restate as follows:

I. Whether the trial court abused its discretion in admitting evidence seized when police knocked on a residence door where a confidential informant had stated that cocaine was being offered for sale from the residence;

II. Whether the trial court abused its discretion in admitting a self-incriminating statement made by Jones;

III. Whether the trial court abused its discretion by denying a motion for a mistrial, motion to strike statement, and motion to admonish the jury that a witness had misstated the law; and

IV. Whether the evidence was sufficient to support the conviction of dealing in cocaine.

Facts and Procedural History

Officer Larry Jones ("Officer Jones") obtained a search warrant for a residence in Marion County based upon information from a confidential informant. According to the informant, someone in the residence had offered to sell cocaine to the informant less than

---

[1] Ind. Code § 35-48-4-1.

[2] I.C. § 35-48-4-6.

three days prior to issuance of the search warrant. The informant had assisted previously in three seizures of controlled substances and large sums of money.

Officer Jones and at least four other officers drove to the residence to execute the warrant, approaching the back of the residence from the south. Upon arrival, they could see a large glass patio door on the south side of the house. Officer Dean Wildauer ("Officer Wildauer") walked to the sliding glass door and observed Jones cutting up what appeared to be crack cocaine on a plate. After observing Jones for some time, one of the officers knocked, prompting Jones to walk to the door with the plate. Jones saw the officers, turned quickly and threw the plate against a wall. The officers entered, apprehended Jones, and searched the room. After Officer Wildauer Mirandized Jones, the defendant stated that he was using certain items "to make hard. Referring to turning powdered cocaine into crack cocaine." Transcript at 218, 230, 402.

The owners of the residence informed Officer Jones that Jones lived in the back part of the house. In their search of Jones and the area, the officers found more than fifty-one grams of cocaine, a total of more than twenty-eight grams of base cocaine in five different bags, more than eleven grams of marijuana, the broken plate, more than $3200, a written ledger of numbers, a knife, a spoon, baking soda, electronic scales, a cell phone, and plastic baggies.

On May 14, 2003, the State charged Jones with five counts: dealing in cocaine, a Class A felony, possessing cocaine, a Class C felony, possessing marijuana, a Class A

---

[3] I.C. § 35-48-4-11.

misdemeanor, possessing cocaine and a firearm, a Class C felony,[4] and unlawful possession of a firearm by a serious violent felon, a Class B felony.[5] On March 26, 2004, Jones moved to quash the charging information and to suppress all seized evidence, arguing that an essentially identical Marion County warrant had been invalidated by Merritt v. State.[6] The trial court found the search warrant inadequate, but found exigent circumstances, declining to suppress evidence in plain view from outside the residence, evidence in plain view while apprehending Jones, evidence discovered while searching Jones and his wingspan incident to his arrest, and evidence in plain view during the protective sweep.

On May 26, 2005, just prior to commencement of a jury trial, the State learned that a witness critical to establishing the chain of custody was unavailable. The State moved to dismiss the charges, filing a second charging information on June 8, 2005 and alleging the same five counts as contained in its original information. Prior to trial, however, the State dismissed the two counts in which it had alleged that Jones possessed a firearm.

During the trial, Officer Wildauer testified, based upon his experience in narcotics investigations, as to the difference in evidence typically found with a user of cocaine versus evidence typically found with a dealer of cocaine. Specifically, he said, dealers usually possess large amounts of money, large amounts of cocaine, both powdered and crack cocaine, and an inexpensive substance, like baking soda, to increase the bulk of the illicit

---

[4] I.C. § 35-48-4-6.

[5] I.C. § 35-47-4-5.

product. Also, dealers typically have normal health and hygiene. In contrast, he testified that users typically have very little if any money, small amounts of a consumable form of cocaine, items used in the consumption of cocaine, such as a smoking pipe, and extremely bad health and hygiene. Officer Wildauer noted that the officers did not find items normally associated with consumption of cocaine. He further testified that the ledger appeared to be the type of accounting kept regarding drug transactions. Ultimately, in Officer Wildauer's opinion, the evidence collected in the search suggested that Jones was dealing in cocaine.

On cross examination, Officer Wildauer testified that "state law says that anything over three grams is dealing. No matter how it was packaged." Tr. at 450. Jones' attorney objected, asking that the testimony be struck as an inaccurate statement of the law. Outside the hearing of the jury, the judge allowed Jones to cross-examine Officer Wildauer on his statement. Jones argued that cross-examination would worsen the problem and moved for mistrial. In the alternative, Jones asked that the trial court admonish the witness. The trial court overruled Jones' objection. Later, in closing argument, the State summarized the allegations of its three counts, arguing that the "[e]vidence unequivocally established that the defendant in this case, Anthony Jones, possessed cocaine in an amount greater than three grams. The evidence unequivocally shows that Anthony Jones possessed cocaine with the intent to deliver that cocaine. And that he possessed marijuana." Tr. at 552.

The jury found Jones guilty and the trial court entered judgments of conviction on all

---

[6] See Merritt v. State, 803 N.E.2d 257 (Ind. Ct. App. 2004) (holding that warrant was not supported by probable cause as it lacked an assertion that the identified person frequented, resided, or concealed contraband at the location to be searched or that numerous drug transactions had taken place at the residence).

three counts. The trial court sentenced Jones to 40 years imprisonment for dealing cocaine, "merge[d]" the conviction for possessing cocaine,[7] and imposed one year imprisonment for possessing marijuana, with the sentences to run concurrently. Tr. at 631. Jones now appeals.

Discussion and Decision

I. Unreasonable Search and Seizure

Jones argues that the search violated the Fourth Amendment prohibition against unreasonable search and seizure because the police had no basis for approaching or entering the residence. Accordingly, Jones challenges the trial court's admission of evidence found pursuant to the search. Our standard of review is well settled.

> A trial court has broad discretion in ruling on the admissibility of evidence. Accordingly, we will reverse a trial court's ruling on the admissibility of evidence only when the trial court abused its discretion. An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court.

Abran v. State, 825 N.E.2d 384, 389 (Ind. Ct. App. 2005) (citing Washington v. State, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003)), reh'g denied, trans. denied.

Here, the officers drove to the residence to execute a search warrant, later determined to lack probable cause. The officers nonetheless had some basis for approaching the residence to communicate with the occupants. "An anonymous tip is not a basis for either reasonable suspicion or probable cause, but it is sufficient to make inquiries which the

---

[7] Neither the State nor Jones contests the appropriateness of the merger. However, the trial court's act of merging, without also vacating, the conviction of possessing cocaine is not sufficient. Prior to "merger," the trial court had entered judgments of conviction upon each of the jury's verdicts. A double jeopardy violation occurs when judgments of conviction are entered and cannot be remedied by the "practical effect" of concurrent sentences or by merger after conviction has been entered. See Jones v. State, 807 N.E.2d 58, 67-

occupants are free to decline to answer if they so choose." Hardister v. State, 849 N.E.2d 563, 570 (Ind. 2006). The Hardister Court upheld law enforcement's approaching and knocking on the front door of a residence based upon "an anonymous tip that persons with guns were 'cooking drugs'" at a particular residence. Id. at 568. Here, Officer Jones' information was more reliable than an anonymous tip. A reliable, confidential informant had been in the residence and was offered cocaine within the preceding three days. Furthermore, while the officers here approached a back door, rather than the front door, their actions did not invoke Fourth Amendment protection. See VanWinkle v. State, 764 N.E.2d 258, 264 (Ind. Ct. App. 2002) ("Because the front and rear entrances to VanWinkle's residence were not places where VanWinkle had a constitutionally protected reasonable expectation of privacy, we conclude that the initial entry onto the land, approach, and knock on the door of VanWinkle's residence did not violate the Fourth Amendment."), trans. denied.[8] The officers drove to the residence, approached a sliding glass door patio entrance, and looked inside. These actions do not invoke Fourth Amendment protection.

Once at the sliding glass door, the officers saw Jones who appeared to be working with a controlled substance on a plate. The officers knocked and identified themselves. Seeing that police were at the door, Jones turned and ran, throwing the plate against a wall. The officers entered, arrested Jones, and conducted their search. Upon observing Jones

---

68 (Ind. Ct. App. 2004), trans. denied. Therefore, we remand this cause to the trial court with instructions to vacate Jones' conviction for Count II, possession of cocaine.

[8] See also Traylor v. State, 817 N.E.2d 611, 616 (Ind. Ct. App. 2004) ("In approaching a mobile home's front and rear doors, the officers stayed in places where visitors would be expected to go."), reh'g denied, trans. denied.

working with what appeared to be a controlled substance, fleeing and destroying evidence, the officers had probable cause to enter the home without a warrant. See Hardister, 849 N.E.2d at 571. The trial court did not abuse its discretion in admitting the evidence found in the search.

II. Admission of Defendant's Statement

On appeal, Jones argues that the trial court abused its discretion in admitting testimony that Jones stated he was turning powdered cocaine into hard or crack cocaine. Essentially, he claims that he made the statement prior to being advised of his Fifth Amendment Miranda rights, if at all. As above, we review the trial court's admission of evidence for an abuse of discretion. The State has the burden of proving that Jones "knowingly, intelligently, and voluntarily waived his rights under Miranda." Haviland v. State, 677 N.E.2d 509, 513 (Ind. 1997). Waiver can be proved by Jones' actions and words. Id. "In reviewing a motion to suppress, we do not reweigh the evidence." Id.

The trial court heard evidence on this issue outside the presence of the jury. Officer Wildauer, who advised Jones of his Miranda rights, was unavailable at the time. Officer Jones, however, testified that he observed Officer Wildauer advise Jones of his Miranda rights, that fifteen minutes passed before Jones invoked his right to remain silent, and that at some point in those fifteen minutes, Jones made the admission. Meanwhile, Jones offered no evidence on the Miranda issue. On this basis, the trial court allowed the State to proceed with questioning regarding Jones' statement.

With the jury back in the courtroom, Officer Jones testified,

> Okay, after about fifteen minutes of Mr. Jones sitting on the recliner, he made a few statements. A few statements was – one of them was that was talked about some articles that was found in the residence there, at the left side of the couch. Those articles would have been a cup that contained some residue in it, a spoon, a knife and some baking powder. We talked about that. Mr. Jones made a statement that those what he was using to make hard. Referring to turning powdered cocaine into crack cocaine.

Tr. at 230. Later in the trial and on the record, Officer Wildauer testified that Jones invoked his right to remain silent as soon as he was advised of his Miranda rights. Jones cites Officer Wildauer's testimony to argue that the trial court abused its discretion in denying his motion to suppress Officer Jones' testimony. Officer Wildauer's testimony, however, occurred later in the trial, not within the context of the trial court's ruling on Jones' motion to suppress Officer Jones' statement. Therefore, Officer Wildauer's testimony does not reflect on the trial court's admission of Officer Jones' testimony.

The trial court heard evidence on the Miranda issue, without the benefit of any evidence offered by Jones. Officer Jones testified that Jones heard and understood his rights, made the incriminating statement, and later invoked his right to remain silent. We do not reweigh this evidence. The trial court did not abuse its discretion in finding that Jones had knowingly waived his right to remain silent.

Even if Jones' self-incriminating statement should have been suppressed, the error was harmless. If taken as true, the statement establishes only that Jones was turning powdered cocaine into hard cocaine. While incriminating, the statement adds little given that Jones was found in possession of significant amounts of both powdered and hard cocaine. Based upon the evidence presented on the Miranda issue, the trial court did not abuse its

discretion in admitting testimony of Officer Jones regarding Jones' statement.

III. Misstatement of Law

Jones argues that the trial court abused its discretion in refusing to grant a mistrial, strike the statement, or admonish the jury when one of the State's witnesses misstated the law and the State's closing argument aggravated the misstatement, contrary to Jones' rights to due process and a fair trial. Consideration of a motion for mistrial is within the sound discretion of the trial court and will be reversed only for an abuse of that discretion. Brown v. State, 848 N.E.2d 699, 705 (Ind. Ct. App. 2006) (citing Alvies v. State, 795 N.E.2d 493, 506 (Ind. Ct. App. 2003), trans. denied). Jones "must demonstrate the statement or conduct in question was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected." Id. The trial court has discretion to consider motions for admonishing the jury and motions to strike. Gibson v. State, 702 N.E.2d 707, 710 (Ind. 1998), cert. denied. See also Drummond v. State, 831 N.E.2d 781, 784 (Ind. Ct. App. 2005).

Here, Officer Wildauer testified, "bottom line, state law says that anything over three grams is dealing. No matter how it was packaged." Tr. at 450. Jones' attorney objected, stating, "No, that's wrong. I would ask to strike that. That's an incorrect statement of the law. That's not the law." Id. Officer Wildauer's statement of the statute was inaccurate as it failed to account for the element of intent to deliver. See I.C. § 35-48-4-1(a). It is true that the crime is elevated from a Class B felony to a Class A felony if the amount of the drug is greater than three grams. I.C. § 35-48-4-1(b). Nonetheless, intent to deliver is a required

element of the crime, regardless of the amount of the drug possessed.[9]

The trial court, outside the hearing of the jury, initially indicated that it would strike the statement. In response to argument, however, the trial court reconsidered. The trial court ultimately overruled Jones' objection, not suggesting that the statement was an accurate description of the charge, but rather ruling that the witness could be cross-examined on the issue. Jones argued that cross-examination on the subject would "make it worse," moving for mistrial, and in the alternative, moving for the jury to be admonished. Tr. at 452. The trial court denied Jones' motions. Jones neither cross-examined Officer Wildauer regarding the statement nor addressed the issue during closing argument.

As to his motion for mistrial, Jones fails to demonstrate that Officer Wildauer's testimony was so prejudicial and inflammatory that Jones was placed in a position of grave peril. Jones' attorney decided not to cross-examine the witness as to the inaccurate statement, despite the trial court's ruling that he was entitled to do so. Meanwhile, Jones does not argue that the jury instructions were flawed. Indeed, the instruction noted accurately the required element of intent to deliver.

In reviewing the denial of Jones' motions to strike and to admonish the jury, we first are not persuaded that cross-examination would have made the problem worse. The State had presented Officer Wildauer as an expert in narcotics investigation. Jones could have established that the State's expert in narcotics misstated a statute fundamental to enforcement

---

[9] Officer Wildauer may have confused the statute with case law holding that "intent to deliver . . . can be inferred from the amount and packaging of the cocaine seized." Lampkins v. State, 682 N.E.2d 1268, 1276

of drug laws in Indiana. In so doing, Jones could have emphasized that the State must prove intent to deliver. Instead, Jones chose not to address the issue during the presentation of evidence or in closing argument. Second, the preliminary jury instruction correctly reflected that possession with intent to deliver is a required element of dealing in cocaine. "[W]hen the jury is properly instructed, it may be presumed on appeal that they followed such instruction." Chandler v. State, 581 N.E.2d 1233, 1237 (Ind. 1991). Jones does not argue that the jury instruction was flawed. Finally, in objecting to the statement, Jones' attorney stated three times in front of the jury that the witness had misstated the law. For these reasons, we do not find that the trial court abused its discretion in overruling Jones' objection.

Jones further argues that the State amplified the misstatement of law in closing argument. To the contrary, the State summarized, one sentence per charge, that the evidence supported the required elements. The State argued:

> Evidence unequivocally established that the defendant in this case, Anthony Jones, possessed cocaine in an amount greater than three grams. The evidence unequivocally shows that Anthony Jones possessed cocaine with the intent to deliver that cocaine. And that he possessed marijuana.

Tr. at 552 (emphasis added). In contrast to Jones' suggestion that the State's closing argument misrepresented the law, the State in fact emphasized the very element that Officer Wildauer's inaccurate testimony overlooked, intent to deliver. Regardless, Jones waived any challenge to the State's closing argument by failing to object. Cox v. State, 696 N.E.2d 853,

---

(Ind. 1997) (where evidence included 4.28 grams of cocaine), modified on other grounds 685 N.E.2d 698 (Ind. 1997).

859 (Ind. 1998) (citing Heavrin v. State, 675 N.E.2d 1075, 1082 (Ind. 1996)). We do not find that the trial court abused its discretion in declining to declare a mistrial, strike the statement, or admonish the jury regarding Officer Wildauer's misstatement of the law.

IV. Insufficient Evidence

Jones argues that there was insufficient evidence to support his conviction for dealing in cocaine. Our standard of review when considering the sufficiency of the evidence is well settled. We will not reweigh the evidence or assess the credibility of witnesses. Robinson v. State, 699 N.E.2d 1146, 1148 (Ind. 1998). Rather, we consider only the evidence that supports the verdict and draw all reasonable inferences from that evidence. Id. We will uphold a conviction if there is substantial evidence of probative value from which a jury could have found the defendant guilty beyond a reasonable doubt. Id. Further, "intent to deliver . . . can be inferred from the amount and packaging of the cocaine seized." Lampkins v. State, 682 N.E.2d 1268, 1276 (Ind. 1997) (where evidence included 4.28 grams of cocaine), modified on other grounds, 685 N.E.2d 698 (Ind. 1997).

The officers watched Jones working with cocaine. Jones was in possession of more than seventy-nine grams of cocaine, $3200, a ledger of numbers, electronic scales, baking soda, plastic baggies, and a cell phone, but not the type of items normally associated with use of cocaine. His health and hygiene appeared normal. Officer Wildauer testified that, based upon his experience in narcotics investigations, the evidence suggested that Jones was dealing in cocaine. The evidence was sufficient for a jury to find that Jones possessed and intended to deliver more than three grams of cocaine.

Conclusion

For the reasons described above, we find that the trial court did not abuse its discretion in the admission of evidence, and that sufficient evidence was admitted to support the convictions. We affirm Jones' convictions of dealing in cocaine and possessing marijuana, but reverse and remand for the trial court to vacate Jones' conviction of possessing cocaine.

Affirmed in part, reversed in part and remanded.

RILEY, J., and MAY, J., concur.