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IN THE
COURT OF APPEALS OF INDIANA

BEVERLY FUSSNER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 19A05-1012-CR-812
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DUBOIS SUPERIOR COURT
The Honorable Mark R. McConnell, Judge
Cause No. 19D01-1002-CM-155

August 9, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Beverly Fussner was convicted after a bench trial of the purchase of more than three grams of a precursor in a week[1] as a Class A misdemeanor. She appeals, raising the following restated issue: whether the trial court abused its discretion when it allowed the State to reopen its case after the State had rested.

We affirm.

FACTS AND PROCEDURAL HISTORY

On November 28, 2009, at 3:15 p.m., Fussner purchased a box of twelve-hour decongestant from the K-Mart pharmacy. The box contained twenty pills and a total of 2.4 grams of pseudoephedrine. In order to purchase the pills, Fussner had to present identification and sign a logbook. Later the same day at 4:32 p.m., Fussner purchased a box of twelve-hour decongestant, a generic form of Sudafed, from the Wal-Mart pharmacy. The box contained twenty pills and a total of 2.4 grams of pseudoephedrine. Again, in order to purchase the pills, Fussner was required to present identification and to sign for the purchase.

The State charged Fussner with the purchase of more than three grams of a precursor in a week as a Class C misdemeanor and filed a notice of intent to seek enhanced penalty of a Class A misdemeanor for the charge based upon a prior conviction under the same statute. A bench trial was held on August 20, 2010. After the State rested its case, Fussner moved for a directed verdict on the grounds that the State had only proved that the pills purchased by Fussner were pseudoephedrine hydrochloride, while the statute at issue prohibits the purchase of ephedrine and/or pseudoephedrine.

[1] *See* Ind. Code § 35-48-4-14.7(d), (i) (West 2004 & Supp. 2008).

The State moved to reopen its case in order to clarify how much actual pseudoephedrine was purchased. The trial court granted the State's motion over Fussner's objection. The State then recalled the pharmacists from both stores. After this testimony, Fussner again objected to the State reopening its case. The trial court overruled the objection and denied Fussner's motion for directed verdict.

The trial court found Fussner guilty of Class A misdemeanor purchase of more than three grams of a precursor in a week. At the sentencing hearing, she was sentenced to one year, with 120 days executed and the remainder suspended. Fussner now appeals.

DISCUSSION AND DECISION

A party should generally be afforded the opportunity to reopen its case to submit evidence that could have been part of its case in chief. *Saunders v. State*, 807 N.E.2d 122, 126 (Ind. Ct. App. 2004) (citing *Ford v. State*, 523 N.E.2d 742, 746 (Ind. 1988)). Whether to grant a party's motion to reopen its case after having rested is a matter committed to the sound discretion of the trial judge. *Id*. (citing *Jones v. State*, 472 N.E.2d 1255, 1259-60 (Ind. 1985)). The factors that weigh in the exercise of discretion include whether there is prejudice to the opposing party, whether the party seeking to reopen appears to have rested inadvertently or purposely, the stage of the proceedings at which the request is made, and whether any real confusion or inconvenience would result from granting the request. *Id*. (citing *Flynn v. State*, 497 N.E.2d 912, 914 (Ind. 1986)). When a defendant claims insufficient evidence, "'the State should have had an opportunity to supply such insufficiency or reopen the case for that purpose, even after it had rested, since a trial is not a game of technicalities, but one in which the facts and truth are

sought.'" *Ford*, 523 N.E.2d at 746 (quoting *Eskridge v. State*, 258 Ind. 363, 369, 281 N.E.2d 490, 493 (1972)).

Fussner argues that the trial court abused its discretion when it denied her motion for directed verdict and allowed the State to reopen its case to present further evidence after it had rested its case in chief. She contends that allowing the State to do so prejudiced her because the State had failed to prove an essential element of the crime, the actual weight of pseudoephedrine contained in the pills purchased by Fussner, and the reopening of the case caused her to be convicted. Fussner also claims that the State purposefully rested its case, and the State's request for reopening the case was made after she had moved for a directed verdict, which was at the conclusion of all of the evidence since she did not call any witnesses. Lastly, Fussner argues that the State's request to reopen the case caused confusion and inconvenience to her. She therefore contends that, in light of all of the factors, especially the prejudice caused to her, the trial court abused its discretion in allowing the State to reopen its case.

In order to convict Fussner of the purchase of more than three grams of a precursor in a week, the State was required to prove that Fussner purchased drugs containing more than three grams of ephedrine or pseudoephedrine, or both in one week under the statute in effect at the time of her offense. Ind. Code § 35-48-4-14.7(d) (West 2004 & Supp. 2008).[2] Ephedrine means pure or adulterated ephedrine, and

[2] The statute in effect when Fussner committed the present offense prohibited a person from purchasing more than three grams of either ephedrine, pseudoephedrine, or both in one week. The statute currently in effect prohibits a person from purchasing more than 3.6 grams of ephedrine or pseudoephedrine or both on one day, or more than 7.2 grams in a thirty-day period. I.C. § 35-48-4-14.7(d) (effective July 1, 2011).

pseudoephedrine means pure or adulterated pseudoephedrine. Ind. Code § 35-48-4-14.7(b)(3), (4).

Here, after the State rested its case, Fussner moved for a directed verdict, arguing that the State had failed to present evidence that the pills purchased from Wal-Mart contained pseudoephedrine because the pharmacist stated that the pills contained "pseudoephedrine hydrochloride." *Tr*. at 23. The trial court then commented that it had not heard "any testimony that would indicate how much actual [pseudoephedrine] was in a package of tablets containing pseudoephedrine . . . how much [was] pseudoephedrine versus how much [was] hydrochloride." *Id*. at 38. The State then requested to reopen its case to clarify this point. The State then elicited testimony from both of the pharmacists that, although the pills contained pseudoephedrine hydrochloride, the hydrochloride was an inert ingredient and the boxes of pills purchased each contained 2.4 grams of pseudoephedrine. *Id*. at 39, 41.

We conclude that Fussner was not prejudiced by the reopening of the case. In the State's case in chief, both of the pharmacists had testified that the packages of pills purchased by Fussner each contained 2.4 grams of pseudoephedrine, for a total of 4.8 grams purchased. *Id*. at 12, 13, 23. Although one of the pharmacists had testified that the pills purchased contained pseudoephedrine hydrochloride, reopening of the case was not necessary because, under Indiana Code section 35-48-4-14.7(b)(4), the pseudoephedrine could be either pure or adulterated. Therefore, the evidence presented after the reopening of the State's case was cumulative of evidence previously presented before the State rested its case. Fussner was not prejudiced by the granting of the State's request to

reopen its case, and the trial court did not abuse its discretion in allowing it to do so. Further, because the evidence presented after the State reopened its case was cumulative and the pseudoephedrine could be pure or adulterated, the denial of Fussner's motion for a directed verdict was proper.

Affirmed.

VAIDIK, J., and MATHIAS, J., concur.