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IN THE
COURT OF APPEALS OF INDIANA

GERALD CLARK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 84A01-1010-CR-527
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable Michael J. Lewis, Judge
Cause No. 84D06-0609-FA-02772

September 8, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Gerald Clark appeals his convictions and twenty-four-year sentence for possession of cocaine with intent to deliver and possession of marijuana. We find that the trial court did not err by admitting into evidence (I) the subject contraband seized from Clark's home, (II) statements Clark made to police while in custody, and (III) testimony that a "snitch list" was found in Clark's possession. We find that the court erred by admitting (IV) a hearsay statement by Clark's wife accusing Clark of dealing cocaine, but we find the error harmless beyond a reasonable doubt. Finally, we are (V) not persuaded that Clark's sentence is inappropriate in light of the nature of his offenses or his character. We affirm his convictions and sentence.

Facts and Procedural History

Clark lived in Terre Haute with his wife Jamia, mother-in-law, six children, and five step-children.

In August 2006, police obtained and executed a warrant to search Clark's residence for, among other things, a 9mm handgun and 9mm ammunition. Only Clark and his mother-in-law were home when the warrant was executed.

Officers found no firearms or ammo, but in the master bedroom they spotted in plain view a bag of marijuana, marijuana paraphernalia, and a set of scales. On the kitchen counter they found a glass Pyrex dish that appeared to contain cocaine residue. And in the kitchen freezer, they discovered approximately forty-seven grams of rock cocaine inside a popsicle box. The box was large enough to accommodate a 9mm pistol or 9mm ammunition. At some point officers also found a "snitch list," which identified

known confidential informants, undercover drug task force members, and drug task force vehicles.

Jamia came home while the search was in progress. She was placed under arrest, and while being cuffed she told police, "That ain't my crack, it's Gerald's. I'll tell you where you found it. It was in the freezer, all the way in the back, behind some box and stuff. I ain't going to jail for him, he's the drug dealer," and/or "That crack isn't mine, that crack is Gerald Clark[']s! You found it in the freezer, behind some popsicles. That crack belongs to Gerald Clark!" Tr. p. 155-56, 190-91.

Clark and Jamia were brought to the police station for questioning. Clark was interrogated in one room by three officers. The interrogation lasted about thirty minutes. One officer advised him of his rights, and he signed a written waiver. The officers informed Clark that his wife was in handcuffs and that both he and his wife would be charged unless someone admitted responsibility. He was told that he was the only person who could keep his wife from going to jail. An officer noted that his wife had two jobs. At one point an officer said he was about to walk out and have Jamia taken to jail. One officer asked who would take care of the kids. Clark admitted ownership of the marijuana. He admitted to having previously used the scales to weigh crack. He also stated that whatever was found in the house was his, and he denied that what was found belonged to either his wife or mother-in-law.

The State charged Clark with Class A felony possession of cocaine with intent to deliver, Ind. Code § 35-48-4-1(a)(2)(C), and Class A misdemeanor possession of marijuana, *id.* § 35-48-4-11. The State alleged that "on or about August 30, 2006 in Vigo

County, State of Indiana, Gerald Clark did then and there knowingly possess cocaine in an amount of three (3) grams or more with the intent to deliver," and that he "did then and there knowingly possess marijuana in an amount less than thirty (30) grams." Appellant's App. p. 2.

Clark moved to suppress the drugs seized from his home as well as the statements he made to police while in custody. He argued that the drug evidence was the product of an unlawful search and that his statements were coerced and involuntary. The trial court denied both motions following a suppression hearing. The contraband and a videotape of Clark's interrogation both were admitted into evidence.

The State called Jamia to testify, but she asserted the spousal privilege and privilege against self-incrimination. The trial court declared her an unavailable witness. Two officers later testified to Jamia's post-arrest statements in which she accused Clark of dealing cocaine. Clark objected, arguing that Jamia's statements were inadmissible hearsay and that their admission violated his right to confrontation. The trial court admitted the statements over objection.

An officer also testified to finding the "snitch list" in Clark's home, though the State did not introduce the actual list into evidence. Clark objected, arguing that "[if the officer] recovered documents at the scene and those documents have mysteriously vanished, then the State has spoiled its[] evidence and it would be improper for him to try and characterize what was on the documents, that were solely in their [possession]." *Id.* at 163. The trial court overruled Clark's objection and allowed the officer to testify in regard to the list.

The jury found Clark guilty as charged, and the trial court sentenced him to concurrent terms of twenty-four years for possession of cocaine and one year for possession of marijuana. The court found as follows:

> I've gone over the Pre-Sentence Report. Although you haven't been convicted of any felony convictions, you have quite a bit of history. I mean before the 2006, this other charge that's pending, 06 FA 2688, misdemeanor driving while suspendeds, and I know those are minor in City Court type cases. You also have some alcohol related issues. But since August of 2006, you've had multiple Felony arrest[s] and were convicted of this charge. You know, with the children present in the house, and over forty grams of cocaine found in the freezer, or your refrigerator, I think the aggravators outweigh the mitigators. However, the sentencing range is twenty to fifty years. We start at thirty years, we go down or we go up. So thirty years is, is the starting point. As Mr. Roberts said, he thinks they balance out, in a way I think they're more aggravated by the amount of, amount of drugs. But, my sentence is going to be as follows. I'm going to sentence you to the Indiana Department of Corrections for an executed term of imprisonment of twenty-four years.

Sent. Tr. p. 16-18. Clark appeals.

Discussion and Decision

Clark raises several issues which we reorder and restate as: (I) whether the trial court erred by admitting the subject contraband, (II) whether the court erred by admitting Clark's statement to police made while custody, (III) whether the court erred by admitting testimony about the "snitch list" discovered in Clark's home, (IV) whether the court erred by admitting Jamia's out-of-court statements to police, and (V) whether Clark's sentence is inappropriate in light of the nature of the offenses and his character.

I. Admission of Drug Evidence

Clark argues that the trial court erred in admitting the drugs seized from his home. He claims the evidence was the product of an unconstitutional search. Clark does not

challenge the validity of the original search warrant, but he maintains that the warrant was pretextual and that police exceeded its scope by seizing the subject contraband.

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Fourth Amendment is made applicable to the States via the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961). Article 1, Section 11 of the Indiana Constitution also guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." Evidence obtained in violation of a defendant's Fourth Amendment or Article 1, Section 11 rights may not be introduced against him at trial. *Mapp*, 367 U.S. at 648-60; *Callender v. State*, 193 Ind. 91, 138 N.E. 817, 818-19 (1923).

A warrant to search premises for a specific item authorizes the officers to search any area within those premises where the item reasonably may be found. *Allen v. State*, 798 N.E.2d 490, 500 (Ind. Ct. App. 2003); *Green v. State*, 676 N.E.2d 755, 758 (Ind. Ct. App. 1996), *trans. denied*. This includes any receptacles or "plausible repositories" that might contain the item. 2 Wayne R. LaFave, *Search & Seizure* § 4.10(b) (4th ed. 2004) (quoting *State v. Davenport*, 516 P.2d 65, 72 (Haw. 1973)).

The "plain view doctrine" further allows police to seize incriminating evidence not specified in a warrant, provided that: (1) police have a legal right to be at the place from which the evidence can be plainly viewed; (2) the incriminating character of the evidence is immediately apparent; and (3) police have a lawful right of access to the object itself. *Houser v. State*, 678 N.E.2d 95, 101 (Ind. 1997) (citing *Horton v. California*, 496 U.S. 128, 136-37 (1990)).

Moreover, where a search warrant is valid and supported by probable cause, and where its execution results in lawful discovery of incriminating evidence not specified in the warrant, any claim that the warrant was a "pretext" for gathering the unspecified evidence is non-cognizable. *See United States v. Van Dreel*, 155 F.3d 902, 904-05 (7th Cir. 1998); *United States v. LaMorie*, 100 F.3d 547, 552 (8th Cir. 1996); *cf. Whren v. United States*, 517 U.S. 806, 116 (1996). "[O]nce probable cause exists, and a valid warrant has been issued, the officer's subjective intent in conducting the search is irrelevant." *Van Dreel*, 155 F.3d at 905.

In line with the foregoing, we conclude that the officers' search and seizure in this case were not unconstitutional. There is no dispute that the original warrant to search for a 9mm handgun and ammunition was valid and supported by probable cause. Police were thus allowed to enter Clark's home and search any spaces or containers that could secrete a 9mm pistol or 9mm ammo. In the course of their search, the officers spotted in plain view marijuana, drug paraphernalia, and cocaine residue. They also discovered rock cocaine inside a popsicle box in the kitchen freezer. Their examination of the freezer and popsicle box was not impermissible, as both were large enough to house a

9mm handgun or 9mm ammunition. Moreover, the criminality of the contraband was readily apparent from a cursory inspection. For these reasons we find the officers' plain-view search did not offend Clark's Fourth Amendment or Article 1, Section 11 rights, and the trial court did not err by admitting the seized drugs into evidence.

II. Admission of Clark's Statement to Police

Clark argues that the trial court erred in admitting the statements he made to police while in custody. Clark maintains that his statements were coerced and involuntary. Clark references a number of constitutional rights in support of his claim, including his right to due process, his right to counsel, and his privilege against self-incrimination. However, we find only his due process arguments adequately raised. We find the remaining claims waived for failure to present any cogent argument in support thereof.

The Due Process Clause of the Fourteenth Amendment prohibits prosecutorial use of an involuntary confession. *See Brooks v. Florida*, 389 U.S. 413, 415 (1967); *Chambers v. Florida*, 309 U.S. 227, 238 (1940); *Brown v. Mississippi*, 297 U.S. 278, 286 (1936). In evaluating a claim that a confession was not given voluntarily, the trial court is to consider the "totality of the circumstances," including any element of police coercion; the length, location, and continuity of the interrogation; and the maturity, education, physical condition, and mental health of the defendant. *Wilkes v. State*, 917 N.E.2d 675, 680 (Ind. 2009), *reh'g denied*. The federal constitution requires proof only by a preponderance of the evidence that a defendant's statement was voluntarily given, *see Lego v. Twomey*, 404 U.S. 477, 488-89 (1972), but in Indiana we require the State to prove voluntariness beyond a reasonable doubt, *Henry v. State*, 738 N.E.2d 663, 664 n.1

(Ind. 2000). The question of voluntariness is one for the trial court. *Collins v. State*, 509 N.E.2d 827, 830 (Ind. 1987). We review the question on appeal as we do other sufficiency matters. *Id.* We do not weigh the evidence but rather determine whether there was substantial evidence of probative value to support the trial court's finding. *Id.*

"[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Bailey v. State*, 763 N.E.2d 998, 1003 (Ind. 2002) (citing *Colorado v. Connelly*, 479 U.S. 157, 167 (1986)). A defendant's statements are not voluntary when induced by violence, threats, promises or other improper influences. *Crain v. State*, 736 N.E.2d 1223, 1231 (Ind. 2000).

Our Supreme Court has held that threats to prosecute a suspect's wife may produce a coerced and involuntary confession. *See Hall v. State*, 255 Ind. 606, 266 N.E.2d 16, 19 (1971). In *Hall*, the defendant was arrested in connection with a suspected burglary. *Id.* at 607, 266 N.E.2d at 17. Police also considered his wife a "prime suspect," though after being questioned she was released and allowed to remain at large with her children. *Id.* at 607-08, 266 N.E.2d at 17. During the defendant's interrogation, police implied that his wife would be charged for the burglary if he did not confess. *Id.* at 610, 266 N.E.2d at 19. The defendant confessed and was convicted, but our Supreme Court found his confession involuntary and reversed. *Id.* at 611, 266 N.E.2d at 19. The Court found that "even though appellant's wife was a suspect and might well have been charged and convicted, when the threat to so charge and attempt to convict is made by police officers to 'encourage' the appellant to make a full confession, we cannot say as a matter

of law that that confession is given freely and voluntarily by the appellant." *Id.*; *see also Storey v. State*, 830 N.E.2d 1011, 1020 (Ind. Ct. App. 2005) ("In *Hall*, our supreme court recognized the voluntariness of a defendant's confession may be attacked when the State makes threats against the family of the accused, even when the threats may not be carried out.").

We believe that the present case is distinguishable from *Hall* and that the trial court justifiably found Clark's statements voluntary. Here, police discovered illegal narcotics in the home where both Clark and his wife Jamia lived. Jamia was not a mere suspect in the subject drug offenses. Law enforcement had probable cause to arrest and charge her for possession, as she resided where the subject contraband was found, and officers in fact had taken her into custody at the time of Clark's interrogation. As a result, any purported threats to prosecute her were sustainable and thus unobjectionable for purposes of interrogation. *See United States v. Miller*, 450 F.3d 270, 272 (7th Cir. 2006) ("An objectively unwarranted threat to arrest or hold a suspect's paramour, spouse, or relative without probable cause could be the sort of overbearing conduct that society discourages by excluding the resultant statements. . . . But a factually accurate statement that the police will act on probable cause to arrest a third party unless the suspect cooperates differs from taking hostages."), *abrogated on other grounds by Kimbrough v. United States*, 552 U.S. 85, 110 (2007); *United States v. Johnson*, 351 F.3d 254, 263 (6th Cir. 2003) ("[T]he question whether the threat to prosecute [half-sister] Tracy was coercive turns on the issue of whether the threat could have been lawfully executed. Whether the police could have lawfully arrested Tracy in turn depends on whether the

investigating officers had probable cause to suspect Tracy of criminal involvement. . . . [H]ere there existed a sufficient factual basis for the police officers to have probable cause to arrest Tracy. . . . Therefore, the police would not have acted wrongfully had they arrested Tracy and were not coercive in threatening to do so."); *see also* 2 Wayne R. LaFave et al., *Criminal Procedure* § 6.2(c) n.96 (3d ed. 2007). Furthermore, we can identify no other facts or circumstances suggesting that Clark's confession was involuntary. Noteworthy is that Clark was advised of his rights before speaking with police and that his interrogation lasted only thirty minutes. Clark is also an adult, and there is no evidence that he suffers mental illness or disability.

For the foregoing reasons, we conclude that the trial court was warranted in finding Clark's statements voluntary beyond a reasonable doubt. The court thus did not err by admitting his statements into evidence at trial.

III. Admission of Testimony Regarding "Snitch List"

Clark argues that the trial court erred in admitting testimony about the "snitch list" recovered from his home. Clark claims that the testimony describing the list's contents violated his Sixth Amendment right to confrontation. Clark does not raise the "best-evidence"/spoliation argument made at trial.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The right to confrontation guaranteed by the Sixth Amendment is made applicable to the states by the Due Process Clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

In *Crawford v. Washington*, the United States Supreme Court held that the Sixth Amendment Confrontation Clause prohibits admission of testimonial hearsay in criminal trials unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. 541 U.S. 36, 68 (2004).

A critical aspect of the *Crawford* holding is its application only to statements qualifying as hearsay—i.e., out-of-court statements offered for their truth. *See id.* at 59 n.9. The Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Id.*

Here we find no error in the admission of testimony describing the "snitch list" discovered in Clark's home. The list identified confidential informants, undercover drug task force detectives, and drug task force vehicles. Testimony regarding the list was offered as circumstantial evidence that Clark was knowingly engaged in illegal drug activity. The list was not offered for the truth of its contents. Accordingly, the list was not hearsay—let alone testimonial—and the Sixth Amendment posed no bar to its admission.

IV. Admission of Jamia's Statements

Clark argues that the trial court erred in admitting Jamia's statements to police that Clark was the drug dealer. Clark claims that (a) Jamia's statements constituted inadmissible hearsay and (b) their admission at trial violated his confrontation rights under *Crawford* and the Sixth Amendment. We find the latter claim dispositive and therefore do not reach the first.

To reiterate, *Crawford* established that the Confrontation Clause bars admission of testimonial hearsay in criminal prosecutions unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. 541 U.S. at 68.

Crawford declined to set forth a comprehensive definition of "testimonial," but it identified "various formulations" of the "core class of 'testimonial' statements": (1) ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; (2) extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and (3) statements made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial. *Id.* at 51-52.

In *Davis v. Washington*, the Supreme Court refined the meaning of "testimonial" in the context of police interrogation. 547 U.S. 813, 822 (2006). The Court concluded that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.* On the other hand, "[s]tatements are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* Determining the primary purpose of an interrogation requires an objective evaluation of the

circumstances in which the encounter occurs and the statements and actions of the parties. *Michigan v. Bryant*, 131 S. Ct. 1143, 1156 (2011).

Here we conclude that the admission of Jamia's statements violated Clark's confrontation rights. First, Jamia's statements were plainly testimonial under *Crawford*, *Davis*, and *Bryant*. Jamia was under arrest and handcuffed when she told police, "That ain't my crack, it's Gerald's. I'll tell you where you found it. It was in the freezer, all the way in the back, behind some box and stuff. I ain't going to jail for him, he's the drug dealer," and/or "That crack isn't mine, that crack is Gerald Clark[']s! You found it in the freezer, behind some popsicles. That crack belongs to Gerald Clark!" Jamia's remarks and the attendant circumstances, viewed objectively, indicate that the purpose of Jamia's statements was to defer suspicion from herself and inculpate Clark for the suspected drug offenses. Moreover, Clark was unable to cross-examine Jamia, as she asserted various privileges and was declared unavailable to testify. Without a prior opportunity for cross-examination, the admission of Jamia's testimonial statements resulted in a denial of Clark's Sixth Amendment confrontation right.

Nonetheless, confrontation violations are subject to harmless error analysis. *McGaha v. State*, 926 N.E.2d 1050, 1056 (Ind. Ct. App. 2010). "[A] denial of the right of confrontation is harmless error where the evidence supporting the conviction is so convincing that a jury could not have found otherwise." *D.G.B. v. State*, 833 N.E.2d 519, 528 (Ind. Ct. App. 2005).

We conclude that any error in the admission of Jamia's statements was harmless, as we find the remaining evidence of Clark's guilt sufficient and convincing. Clark

admitted to police that whatever was found during the search belonged to him. He denied that what was found belonged to either his wife or mother-in-law. He also stated specifically that the marijuana was his and that he had used the scales to weigh crack. Police discovered marijuana and scales in Clark's master bedroom, crack paraphernalia and residue in the kitchen, and cocaine in the freezer. Moreover, the rock cocaine totaled almost forty-seven grams, sustaining an inference that Clark intended to deliver it. *See Adamov v. State*, 536 N.E.2d 281, 283 (Ind. 1989) ("The possession of a large amount of narcotics is circumstantial evidence of intent to deliver."); *Davis v. State*, 791 N.E.2d 266, 270 (Ind. Ct. App. 2003) (possession of 5.6225 grams of cocaine sustained finding of intent to deliver), *trans. denied*. In light of the foregoing, we find sufficient and ample independent evidence sustaining Clark's convictions, and we therefore find the erroneous admission of Jamia's hearsay statements harmless beyond a reasonable doubt.

V. Inappropriateness of Sentence

Clark finally argues that his twenty-four-year sentence is inappropriate in light of the nature of his offenses and his character.

Although a trial court may have acted within its lawful discretion in imposing a sentence, Article 7, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer v. State*, 868 N.E.2d 482,

491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007)). The defendant has the burden of persuading us that his or her sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)). In assessing whether a sentence is inappropriate, appellate courts may take into account whether a portion of the sentence is ordered suspended or is otherwise crafted using any of the variety of sentencing tools available to the trial judge. *Davidson v. State*, 926 N.E.2d 1023, 1025 (Ind. 2010).

The sentencing range for a Class A felony is twenty to fifty years, with thirty years being the advisory term. Ind. Code § 35-50-2-4.

As for the nature of the offenses, Clark argues that his crimes neither caused nor threatened serious harm to persons or property. We disagree. Clark lived in a single home with his wife, mother-in-law, and eleven children/step-children. The contraband found by police was either in plain view or easily accessible throughout the residence. Clark was therefore exposing his family to extremely dangerous narcotics and drug paraphernalia. Nor can we overlook the sheer amount of drugs found in Clark's possession. For these reasons we cannot say the nature of the offenses merits a downward sentence revision.

As for the character of the offender, Clark stresses that he has no prior felony convictions. But Clark's criminal record reveals a litany of misdemeanor convictions for false informing, driving while suspended, public intoxication, and operating while intoxicated. The latter offenses are particularly troublesome in this case, as they indicate ongoing issues with substance abuse. Clark further claims that extended incarceration would place undue hardship on his dependents. However, we note that Clark's wife

maintains multiple jobs in order to generate income for the family. And the reality is that Clark was creating a patently unsafe environment for his children. In any event, even if we resolved this argument in Clark's favor, we cannot say it alone compels a departure from the twenty-four-year term imposed.

For the reasons stated, we are not persuaded that Clark's sentence is inappropriate.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.