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IN THE
COURT OF APPEALS OF INDIANA

DAMON SINKOVICS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-1001-CR-26
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Peggy Ryan Hart, Commissioner
Cause No. 49G23-0802-FB-41228

April 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Damon Sinkovics appeals his conviction for Dealing in Cocaine,[1] a class B felony, challenging the sufficiency of the evidence. Specifically, Sinkovics argues that his conviction must be set aside because he was merely present during a cocaine sale and the evidence established that he was "a crack purchaser and not a crack dealer." Appellant's Br. p. 5. Sinkovics also maintains that his conviction cannot stand because a not guilty finding on a charge of conspiracy to commit dealing in cocaine is irreconcilable and inconsistent with a conviction for dealing in cocaine.

Finding the evidence sufficient and concluding that Sinkovics is not entitled to reversal on his claim that the verdicts were inconsistent, we affirm the judgment of the trial court.

FACTS

On February 15, 2008, Indianapolis Metropolitan Police Department Officer Joshua Harpe and Detective Ron Trimble received a tip that they could purchase narcotics at Russell Hicks's house in Indianapolis. As a result, Detective Trimble and Officer Harpe proceeded to the residence. When they arrived, Detective Trimble received a call from Latasha Hawkins, who was in the house. Hawkins told the officers that she was "handling" Hicks's business. Tr. p. 45.

When the officers approached the front of the house, Sinkovics opened the door and permitted them to enter. Sinkovics then sat down at the kitchen table next to Hawkins.

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[1] Ind. Code § 35-48-4-1.

Hawkins had a plate in front of her that contained various rocks of cocaine. Sinkovics was moving cocaine on the plate and directed Hawkins to "give them these two, that way we don't have to package up any more." Id. at 23, 31, 33. Thereafter, Detective Trimble handed Hawkins $100 in exchange for several bags of a substance that was later identified as crack cocaine. Detective Trimble then radioed other officers to enter the residence. When Sinkovics was handcuffed and secured, the officers noticed a rock of cocaine on the floor between his legs.

As a result of the incident, Sinkovics was charged with conspiracy to commit dealing in cocaine, a class B felony, dealing in cocaine, a class B felony, and possession of cocaine, a class D felony. The charging information alleging that Sinkovics dealt in cocaine provided that "[He] and Latasha Hawkins, . . . did knowingly deliver to R. Trimble a controlled substance, that is: cocaine." Appellant's App. p. 23.

At a bench trial that commenced on April 27, 2009, Sinkovics testified that he had been to the residence on a number of occasions to buy cocaine and was familiar with Hawkins. However, Sinkovics also testified that he had not spoken with her until February 15.

Although Officer Harpe testified at trial that Sinkovics had "touched" the cocaine and was moving rocks of cocaine from one side of a plate to another, tr. p. 31, 50, Officer Harpe had previously stated in a deposition that he did not see Sinkovics "touch the dope." Def. Ex. B. Following the presentation of the evidence, the trial court acquitted Sinkovics of the

conspiracy charge. However, Sinkovics was found guilty of both the possession and dealing charges.

At the sentencing hearing on September 9, 2009, the trial court merged the convictions and sentenced Sinkovics to ten years, with four years suspended, for dealing in cocaine. Sinkovics now appeals.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

When addressing a challenge to the sufficiency of the evidence, we respect the fact-finder's exclusive province to weigh conflicting evidence and therefore neither reweigh the evidence nor judge witness credibility. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the verdict, and "must affirm 'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" Id. at 126 (quoting Tobar v. State, 740 N.E.2d 109, 111-12 (Ind. 2000)).

We also note that circumstantial evidence will support a conviction if inferences may reasonably be drawn that allowed the jury to find the defendant guilty beyond a reasonable doubt. Pelley v. State, 901 N.E.2d 494, 500 (Ind. 2009). Moreover, while a defendant's mere presence at the scene of a crime cannot sustain a conviction, presence, when combined with other facts and circumstances, such as the defendant's course of conduct before, during, and after the offense, may raise a reasonable inference of guilt. Maul v. State, 731 N.E.2d 438, 439 (Ind. 2000).

We also recognize that a witness's testimony need not be entirely consistent. Davenport v. State, 749 N.E.2d 1144, 1152 (Ind. 2001). The fact-finder must determine whom to believe and what portions of conflicting testimony to believe. In re J.L.T., 712 N.E.2d 7, 11 (Ind. Ct. App. 1999). Moreover, the fact finder is free to believe or disbelieve witnesses as it sees fit. McClendon v. State, 671 N.E.2d 486, 488 (Ind. Ct. App. 1996); see also Wash v. State, 456 N.E.2d 1009, 1011 (Ind. 1983) (recognizing that a trier of fact is entitled to entirely reject a defendant's version of the events).

To convict Sinkovics under an accomplice theory, the State had to prove that he knowingly or intentionally aided, induced, or caused Hawkins to deliver cocaine. Ind. Code § 35-41-2-4. Any evidence that the accomplice acted in concert with other persons who actually committed the elements of the offense is sufficient to support a conviction on the accessory theory. Hopper v. State, 539 N.E.2d 944, 947 (Ind. 1989). Moreover, it is not necessary for the defendant to participate in every element of the crime. Ransom v. State, 850 N.E.2d 491, 496 (Ind. Ct. App. 2006). Rather, there must be evidence of a defendant's conduct either in acts or words, from which an inference may be drawn of a common design or purpose to effect the commission of a crime. Berry v. State, 819 N.E.2d 443, 450 (Ind. Ct. App. 2004). In determining whether an individual aided or was an accomplice to another in the commission of a crime, we consider the following: 1) presence at the scene of the crime; 2) companionship with another engaged in criminal activity; 3) failure to oppose the crime; and 4) the defendant's conduct before, during, and after the occurrence of the crime. Garland v. State, 788 N.E.2d 425, 431 (Ind. 2003).

In this case, the uncontroverted evidence establishes that Sinkovics was at the scene of the crime and did not oppose it. Although these factors alone would not be sufficient to establish accomplice liability, the other circumstances show that he participated in the offense. More particularly, although Sinkovics testified that he had never "seen" Hawkins before the transaction, he had spoken to her prior to the date of the offense. Tr. p. 84. Thus, it was reasonable for the trial court, as the fact finder, to infer that Sinkovics had developed a relationship with Hawkins. Moreover, Hawkins permitted Sinkovics to open the door and allow the officers inside the residence. Id. at 20-21. Sinkovics sat down at the table, touched the cocaine,[2] and directed Hawkins to give the officers specific samples of cocaine so "we don't have to package up anymore." Tr. p. 22-23, 31, 33 (emphasis added).

In our view, these factors, along with Sinkovics's presence at the scene, his failure to oppose the crime, and his companionship with Hawkins, were sufficient to find that he aided Hawkins in delivering the drugs to Detective Trimble. Thus, we conclude that the evidence was sufficient to support Sinkovics' conviction for dealing in cocaine.

II. Inconsistent Verdicts

Sinkovics next argues that his conviction cannot stand because the verdicts were inconsistent. As noted above, Sinkovics maintains that the acquittal on the conspiracy charge

[2] As noted above, Officer Harpe testified at a pre-trial deposition that Sinkovics did not handle the cocaine. However, while this testimony differed from the trial testimony, the trial court observed that it was a matter of credibility for the fact finder to decide. Tr. p. 80. See Logan v. State, 693 N.E.2d 1331, 1333 (Ind. Ct. App. 1998) (holding that the jury must reconcile any inconsistencies in arriving at a verdict).

and being found guilty of dealing in cocaine while acting as an accomplice with Hawkins is "extremely contradictory" and irreconcilable. Appellant's Br. p. 11.

In resolving this issue, our Supreme Court has recently determined that logically inconsistent verdicts "are not subject to appellate review." Beattie v. State, No 82S01-0907-CR-307, slip op. at 1 (Ind. Apr. 8, 2010). Although Sinkovics directs us to Marsh v. State, 271 Ind. 454, 393 N.E.2d 757 (1979), and Owsley v. State, 769 N.E.2d 181 (Ind. Ct. App. 2002), where it was determined that a logically contradictory verdict qualifies for appellate reversal, the Beattie court expressly rejected that rule and observed that because

> the contrasting "extremely contradictory and irreconcilable" standard devised in Marsh has proven in practice to be unhelpful and inconsistent with Indiana's strong respect for the conscientiousness, wisdom, and common sense of juries, we overrule the standard advanced in Marsh and disapprove of Owsley. Jury verdicts in criminal cases are not subject to appellate review on grounds that they are inconsistent, contradictory, or irreconcilable.

Slip op. at 8 (emphasis added).

Here, because the trial court served as the fact finder at trial, we follow the lead of Beattie and decline to review Sinkovics's claim that the verdicts were inconsistent.[3] See Vela v. State, 832 N.E.2d 610, 614 (Ind. Ct. App. 2005) (recognizing that the analysis of inconsistent verdicts is the same whether the trial was to a jury or to the bench).

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[3] As an aside, we note that Sinkovics's claim that the verdicts were inconsistent may not have prevailed under the former standard. Indeed, one can aid in the commission of an offense without having previously agreed to do so, and conspiracy to commit a crime is not a statutorily included offense of aiding, inducing, or causing the same crime. Guffey v. State, 717 N.E.2d 103, 105 (Ind. 1999). A conspiracy charge of dealing cocaine requires proof of an agreement to commit dealing, which is not required to prove aiding in the commission of the dealing. I.C. § 35-41-5-1; I.C. § 35-41-2-4. Finally, Beattie recognized that even an illogical or inconsistent verdict may be permissible if there is sufficient evidence to support the conviction, and "a criminal

The judgment of the trial court is affirmed.

DARDEN, J., and CRONE, J., concur.

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defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence." Slip op. at 7-8 (quoting U.S. v. Powell, 469 U.S. 57, 67 (1984)).