DIVISION ONE
FILED: 02/24/2011
RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 10-0383
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
SEAN PAUL BLACKWELL,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Mohave County

Cause No. CR2008-0359

The Honorable Steven F. Conn, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capial Litigation Section
And Jeffrey L. Sparks, Assistant Attorney General
Attorneys for Appellee

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By Daniel J. DeRienzo
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O R O Z C O, Judge

¶1 Sean Paul Blackwell appeals following convictions for conspiracy to sell dangerous drugs, a class two felony; illegal

use of a wire or electronic communication, a class four felony; possession of dangerous drugs, a class three felony; two counts of possession of drug paraphernalia, each a class six felony; and possession of marijuana, a class six felony. Blackwell argues that there was insufficient evidence to support his conviction for conspiracy and that the trial court erred in instructing the jury and imposing sentence on this offense. Blackwell does not raise any challenge to his other convictions and sentences. For reasons that follow, we affirm.

FACTS AND PEROCEDURAL HISTORY

¶2 A multi-agency narcotics task force obtained court orders for wiretaps on telephones used by persons suspected of drug trafficking. The wiretaps were active from February 19 to April 9, 2008. Among the persons whose telephones were wiretapped were Jose Ochoa and Reynaldo and Consuelo Magana. During the seven-week period the wiretaps were active, task force personnel monitored thousands of telephone calls and made recordings of nearly two hundred of them evidencing involvement by Ochoa, the Maganas, and the other subjects of the wiretaps in a major methamphetamine trafficking operation with Ochoa as its "boss." In late February and again in early April 2008, Blackwell was recorded participating in a series of telephone calls to and from Ochoa and the Maganas that dealt with whether Blackwell was "ready." In both instances, a short time after

Blackwell stated he was “ready,” Reynaldo Magana delivered an ounce of methamphetamine to Blackwell.

¶3 Police executed a search warrant on Blackwell’s home the day after the delivery of methamphetamine in April and found a plastic baggie containing 23.6 grams of methamphetamine locked in a cabinet in his garage. Also found in his home were another plastic baggie containing .29 grams of methamphetamine, two plastic baggies containing marijuana, two scales, and a number of methamphetamine and marijuana pipes.

¶4 Blackwell was indicted on charges of conspiracy to sell dangerous drugs, illegal use of a wire or electronic communication, illegally conducting an enterprise, possession of dangerous drugs for sale, possession of drug paraphernalia (methamphetamine), possession of marijuana, and possession of drug paraphernalia (marijuana). At trial, the State’s theory was that Blackwell was a dealer for the Ochoa drug trafficking organization. There was no evidence presented of any actual sale of methamphetamine by Blackwell. The State instead relied on expert testimony that the large amounts delivered to and possessed by Blackwell were more than a mere user would consume and thus were indicative of possession for sale. In his defense, Blackwell testified that he was merely a user who purchased in bulk to get a better price and denied ever selling methamphetamine.

¶5 The jury found Blackwell guilty on the charges of conspiracy to sell dangerous drugs, illegal use of a wire or electronic communication, possession of drug paraphernalia and possession of marijuana. The jury also convicted Blackwell on a lesser-included charge of possession of dangerous drugs in regards to the charge of possession of dangerous drugs for sale and acquitted him on the charge of illegally conducting an enterprise.

¶6 The trial court sentenced Blackwell to mitigated, concurrent prison terms of three years for conspiracy to sell dangerous drugs, one year for illegal use of a wire or electronic communication, two years for possession of dangerous drugs, and nine months for possession of drug paraphernalia (methamphetamine). The court further suspended sentencing and placed Blackwell on probation on the convictions for possession of marijuana and possession of drug paraphernalia (marijuana) and additionally ordered that he pay fines totaling $3,230 with respect to the convictions for possession of dangerous drugs and possession of marijuana. Blackwell timely appealed. We have jurisdiction in accordance with Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1. (2003), 13-4031, and -4033.A. (2010).

DISCUSSION

Sufficiency of Evidence on Conspiracy Charge

¶7 Blackwell argues that the trial court erred in denying his motion for judgment of acquittal on the charge of conspiracy to sell dangerous drugs. Rule 20 requires a trial court to enter judgment of acquittal "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20.a. "Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). A claim of lack of substantial evidence to sustain a conviction is reviewed de novo. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993).

¶8 A person engages in conspiracy to commit the sale of dangerous drugs if: (1) with the intent to promote or aid the sale of dangerous drugs; (2) he agrees with one or more persons that at least one of them or another person will sell dangerous drugs; and (3) one of the parties commits an overt act in furtherance of the offense. *See* A.R.S. §§ 13-1003.A. (2010), -

3407.A.7. (2010).[1] Methamphetamine is a dangerous drug. A.R.S. § 13-3401.6.(b)(xiii) (2010).

¶9 Blackwell does not raise the typical challenge to the sufficiency of the evidence with respect to any specific element of the conspiracy charge. Such a claim would necessarily fail as the evidence at trial was more than sufficient to permit the jury to find each element of the offense of conspiracy to sell dangerous drugs. Instead, he asserts that his conviction for conspiracy is barred by the principle known as "Wharton's Rule." *See generally* 4 Charles E. Torcia, *Wharton's Criminal Law* § 684 at 551-53 (15th ed. 1996). This rule is "a doctrine of criminal law enunciating an exception to the general principle that a conspiracy and the substantive offense that is its immediate end are discrete crimes for which separate sanctions may be imposed." *State v. Barragan-Sierra*, 219 Ariz. 276, 284, ¶ 23, 196 P.3d 879, 887 (App. 2008) (quoting *Iannelli v. United States*, 420 U.S. 770, 771 (1975)).

¶10 Wharton's Rule provides "that where the agreement is to commit an offense which can only be committed by the concerted action of the two persons to the agreement, such

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[1] We apply the substantive law in effect when the offense was committed. *See* A.R.S. § 1-246 (2002); *State v. Newton*, 200 Ariz. 1, 2, ¶ 3, 21 P.3d 387, 388 (2001). Absent material revisions after the date of an offense, we cite the statute's current version.

agreement does not amount to a conspiracy," *Id.* (quoting *State v. Chitwood*, 73 Ariz. 161, 166, 239 P.2d 353, 356 (1951)). The classic offenses to which Wharton's Rule has been applied -- adultery, incest, bigamy, dueling -- are crimes "characterized by the general congruence of the agreement and the completed substantive offense." *Id.* at 284-85, ¶ 24, 196 P.3d at 887-88 (quoting *Iannelli*, 420 U.S. at 782). In these types of offenses, "[t]he parties to the agreement are the only persons who participate in commission of the substantive offense, and the immediate consequences of the crime rest on the parties themselves rather than on society at large." *Id.* at 285, ¶ 24, 196 P.3d at 888 (quoting *Iannelli*, 420 U.S. at 782-83).

¶11 Relying on *State v. Stevenson*, 171 Ariz. 348, 830 P.2d 869 (App. 1991), Blackwell argues that Wharton's Rule applies to preclude his conviction for conspiracy to sell dangerous drugs because his role in the conspiracy was limited to being a buyer for his own personal use. At issue in *Stevenson* was the sufficiency of the factual basis for a guilty plea to the offense of conspiracy to sell a narcotic drug. *Id.* at 349, 830 P.2d at 870. The factual basis provided in support of the plea was that the defendant sold rock cocaine to an undercover officer in a hand-to-hand sale. *Id.* On appeal, after quoting Wharton's Rule as adopted by our supreme court in *Chitwood*, this

court applied the rule to conclude that the factual basis was insufficient to establish conspiracy:

> [T]he law presupposes there must be an agreement between two or more persons to commit a crime, together with any act which naturally advances the intent of the conspiracy. This presupposes that the conspirators have agreed to commit a specific crime, i.e., conspiring to sell narcotic drugs. It does *not* encompass the situation where the defendant sells contraband on request without even any preliminary discussions.

Id. at 350, 830 P.2d at 871.

¶12 *Stevenson* is readily distinguishable from the present case. As this court specifically noted in *Stevenson*, the only two persons involved in the transaction were the defendant and the officer and there was no evidence of any advanced agreement. *Id.* Thus, the agreement and the actual sale were essentially the same transaction, which would bring the facts within the framework of Wharton's Rule. Unlike the situation in *Stevenson*, there was not only undisputed evidence in the present case of advanced agreements in which Blackwell participated concerning the sales, there was also undisputed evidence that more than two persons were parties to the transactions and that the extent of the conspiracy extended beyond the sales to Blackwell. Where the conspiracy goes beyond the immediate participants to the substantive offense, "the theory of the rule would render it inapplicable, even though the substantive offense is one which

requires concerted action." *Chitwood*, 73 Ariz. at 166, 239 P.2d at 356; *see also Barragan-Sierra*, 219 Ariz. at 285, ¶ 25, 196 P.3d at 888 (holding presence of multiple co-conspirators and co-participants removes conspiracy to commit human smuggling from Wharton's Rule); 4 Charles E. Torcia, *Wharton's Criminal Law* § 684 at 553 ("Nor does the Rule apply when the essential participants conspire with a third person, as where a third person conspires with a man and woman for the commission of adultery by the latter two.").

¶13 Blackwell's reliance on *State v. Cota*, 191 Ariz. 380, 956 P.2d 507 (1998), is equally misplaced. In *Cota*, our supreme court held that a purchaser of marijuana cannot be found criminally liable either as a principal or accomplice to an unlawful transfer to himself. *Id.* at 383, ¶ 13, 956 P.2d at 510. In concluding that *Cota* had no application to the charge of conspiracy to commit human smuggling at issue in *Barragan-Sierra*, we summarized the supreme court's rationale for its holding as follows:

> In reaching this holding, the court relied on the plain language of the statute prohibiting transfer, which defines the term "transfer" in such a manner that it cannot apply to the recipient; the legislature's distinction between the statutory offenses of "transfer" and "possession," with a lesser penalty for the latter offense; and the principles of accomplice liability, which require that the principle and the accomplice "stand in the same relation to

> the crime . . . approach it from the same angle, [and] touch it at the same point."

219 Ariz. at 285, ¶ 26, 196 P.3d at 888.

¶14 No indication of similar legislative intent to limit liability exists in the statutory definition of conspiracy. *See* A.R.S. § 13-1003.A. Moreover, a charge of conspiracy to sell dangerous drugs does not merge the liability of the purchaser into that of a seller. That is, by purchasing dangerous drugs, the purchaser does not become an accomplice to the sale of dangerous drugs. Unlike accomplice liability, conviction for conspiracy requires proof of a completely separate offense with different elements. The primary focus of the crime of conspiracy is the unlawful agreement itself and the threat to society that such collusion represents. *State v. Denman*, 186 Ariz. 390, 392, 923 P.2d 856, 858 (App. 1996). Where the agreement involved in the sale of drugs is limited to the essential participants, the purchaser is protected from liability for conspiracy by Wharton's Rule. In contrast, when the conspiracy goes beyond the essential participants of the substantive offense, the policy reasons behind the offense of conspiracy apply with full force to all of the conspirators regardless of their particular role in the conspiracy.

¶15 Nor does the jury's verdict finding him guilty of the lesser-included offense of possession of dangerous drugs rather

than possession of dangerous drugs for sale provide a basis for concluding that there was no substantial evidence that Blackwell conspired to sell dangerous drugs. As the trial court observed at sentencing, the jury may have simply found the State failed to adequately establish his intent as to the methamphetamine found in his possession in April, but also concluded that he did conspire to sell methamphetamine on other occasions.

¶16 In any event, even if the jury's verdicts on the possession and conspiracy charges are inconsistent, Arizona follows the majority rule that consistency in verdicts is not required. *State v. Zakhar*, 105 Ariz. 31, 32, 459 P.2d 83, 84 (1969); *see also State v. Eastlack*, 180 Ariz. 243, 258, 883 P.2d 999, 1014 (1994) ("[D]efendant argues that he cannot be convicted of first degree murder unless all jurors agree on a single theory of first degree murder. We have often rejected that argument."). This rule is based on the idea that inconsistency by jurors in their verdicts "does not show that they were not convinced of the defendant's guilt." *Dunn v. United States*, 284 U.S. 390, 393 (1932). Rather, the inconsistent verdicts are viewed as the result of possible "leniency or compromise" on the part of the jury. *Zakhar*, 105 Ariz. at 32, 459 P.2d at 84.

¶17 There was no error by the trial court in denying Blackwell's motion for judgment of acquittal on the conspiracy charge based on Wharton's Rule.

Adequacy of Instructions on Conspiracy Charge

¶18 Blackwell further argues that the trial court erred by failing to give his proposed instruction regarding the offense of conspiracy. The proposed instruction reads:

> If there is an agreement to commit a crime which can only be committed by the action of 2 persons to the agreement, such agreement does not amount to a conspiracy. This would include an agreement to buy or sell Methamphetamine, under which circumstances the agreement to buy or sell Methamphetamine would merge in the completed act. In other words, no defendant in this case can be convicted of Conspiracy to Sell Dangerous Drugs (Methamphetamine) based solely on his having agreed to buy Methamphetamine from another person.

The trial court refused to give the instruction, finding it inappropriate.

¶19 A defendant is entitled to an instruction on any theory of the case reasonably supported by the evidence. *State v. Shumway*, 137 Ariz. 585, 588, 672 P.2d 929, 932 (1983). Conversely, refusal to give an instruction that does not fit the facts of the case is not error. *State v. Lambright*, 138 Ariz. 63, 74, 673 P.2d 1, 12 (1983), *overruled on other grounds by Hedlund v. Sheldon*, 173 Ariz. 143, 145, 840 P.2d 1008, 1010 (1992); *see also State v. Vandever*, 211 Ariz. 206, 208, ¶ 7, 119

P.3d 473, 475 (App. 2005) (holding "a trial court's refusal to give an instruction for a lack of factual basis is within its discretion"). We review the trial court's decision to refuse the proffered instruction for clear abuse of discretion. *State v. Petrak*, 198 Ariz. 260, 264, ¶ 9, 8 P.3d 1174, 1178 (App. 2000).

¶20 The instruction requested by Blackwell was essentially a restatement of Wharton's Rule. The evidence in the present case, however, was undisputed that the drug transactions Blackwell acknowledged participating in were not akin to the limited one-on-one transactions described in *Stevenson*, where the Court found no conspiracy under Wharton's Rule. Given the undisputed facts that the drug sales engaged in by Blackwell included multiple participants, any conspiracy involved in the transactions would fall outside the scope of Wharton's Rule. Thus, there was no error by the trial court in refusing to give the proposed instruction.

¶21 The jury instructions given by the trial court taken as a whole were adequate to fully inform the jury on the law of conspiracy as applicable to the evidence at trial. The trial court properly instructed the jury on all of the elements of conspiracy. In addition, the jury was instructed that Blackwell could be found guilty of the crime of conspiracy only if the jury found beyond a reasonable doubt that he committed the

offense charged. Blackwell has not shown that the trial court omitted any element of the offense or that the jury instructions misled the jury or otherwise rendered his trial fundamentally unfair. There was no error in the conspiracy instructions.

Jury Question

¶22 Blackwell further contends the trial court erred in failing to answer a question from the jury regarding the offense of conspiracy. During deliberations, the jury submitted the following question to the court: "Person A buys drugs from Person B, knowing B is a drug dealer. Person A does not sell drugs, but uses. Is A part of conspiracy to sell drugs?" Blackwell requested that the trial court answer "No." After noting that "anything that I say to really address this question is going to be a comment on the evidence" and that the jury's question left out the actual elements of the offense, the trial court told the jury:

> I cannot answer your question. This is a determination that you must make based upon a review of the instructions regarding the applicable law and based upon your factual findings.

¶23 The decision whether to further instruct a jury is within a trial court's sound discretion. *State v. Ramirez*, 178 Ariz. 116, 126, 871 P.2d 237, 247 (1994). Contrary to Blackwell's contention, the jury's question was not susceptible to a "yes" or "no" response. To properly answer the question,

the trial court would need to explain the various different factual circumstances under which Wharton's Rule would and would not be applicable, inviting the possibility of an impermissible comment on the evidence. *See* Ariz. Const. art. 6, § 27 (prohibiting judicial comment on evidence). As discussed above, the jury was adequately instructed on the law regarding conspiracy as it applied to this case. When a jury asks about a matter on which it has received adequate instruction, the trial court may in its discretion refuse to answer the question, or may refer the jury to the earlier instruction. *Ramirez*, 178 Ariz. at 126, 871 P.2d at 247. Accordingly, there was no abuse of discretion by the trial court in declining to answer the question and referring the jury to the instructions previously given.

Imposition of Prison Term on Conspiracy Conviction

¶24 Finally, Blackwell challenges the sentence imposed on his conviction for conspiracy to sell dangerous drugs, arguing that the trial court erred in not placing him on probation when a more culpable co-defendant was placed on probation after pleading guilty to the same offense. The trial court has broad discretion in sentencing, and a sentence within statutory limits will be upheld on appeal unless the trial court acts arbitrarily or capriciously or fails to adequately investigate the facts relevant to sentencing. *State v. Cazares*, 205 Ariz. 425, 427, ¶

6, 72 P.3d 355, 357 (App. 2003). Where the factors relevant to sentencing are fully considered by the trial court, we will generally find no abuse of discretion. *Id.*

¶25 In his pre-sentencing memorandum, Blackwell noted that a co-defendant who pled guilty to conspiracy to sell dangerous drugs received probation and argued that his conviction for this offense should result in the same disposition. Blackwell asserted this co-defendant was far more culpable in the drug trafficking conspiracy and maintained that equity demanded he likewise be placed on probation. On appeal, Blackwell argues that it was error for the trial court to sentence him to prison when the co-defendant received probation, suggesting that the only reason for the disparity in sentencing was because he exercised his right to trial.

¶26 Our supreme court has held that an unexplained disparity in sentences of co-defendants may be a mitigating factor to be considered in deciding whether the death penalty should be imposed. *State v. Schurz*, 176 Ariz. 46, 57, 859 P.2d 156, 167 (1993). Blackwell has not cited to any authority and we have found none applying a similar rule in non-capital cases. *See State v. Schlarp*, 25 Ariz. App. 85, 87, 541 P.2d 411, 413 (1997) ("It is well settled in Arizona that there is no requirement that a court impose an identical sentence upon a co-defendant."); *State v. Massey*, 2 Ariz. App. 551, 552-53, 410

P.2d 669, 670-71 (1966) (holding "fact that one defendant jointly charged and found guilty received a lesser sentence than is imposed on the other, does not invalidate the sentence that is the more severe"). Even if such a rule were applicable to non-capital cases, a disparity in sentences between co-defendants is significant only if it is unexplained. *State v. Ellison*, 213 Ariz. 116, 140, ¶ 105, 140 P.3d 899, 923 (2006); *see also Schurz*, 176 Ariz. at 57, 859 P.2d at 167 ("[I]t is not mere disparity between the two sentences that is significant, but, rather, unexplained disparity.").

¶27 At sentencing in the instant case, the trial court commented on the fact that the co-defendant was placed on probation and stated it was not punishing Blackwell for going to trial in deciding against the same disposition for him. The court explained that having heard the evidence at trial, it was now more aware of the facts regarding the drug trafficking conspiracy, including the amount of methamphetamine involved, and that this additional information, which it did not have at the time of the previous sentencing, convinced it that a term of imprisonment was appropriate for the conspiracy conviction. Indeed, the court observed that with this additional information it now seriously questioned whether it made the right decision in placing the co-defendant on probation.

¶28 The consideration of mitigating circumstances is solely within the discretion of the trial court. *State v. Long*, 207 Ariz. 140, 148, ¶ 41, 83 P.3d 618, 626 (App. 2004). In imposing sentence, the trial court "need only consider evidence offered in mitigation; it need not find the evidence mitigating." *Id.* Here, the trial court considered the fact that the co-defendant was placed on probation in deciding the punishment for Blackwell's conviction, but decided that a term of imprisonment was the appropriate sentence. There was no abuse of discretion by the trial court in sentencing Blackwell to prison on his conviction for conspiracy to sell dangerous drugs.

CONCLUSION

¶29 For the foregoing reasons, we affirm Blackwell's convictions and sentences.

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PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

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PATRICIA K. NORRIS, Presiding Judge

/S/

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JOHN C. GEMMILL, Judge