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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DAVID LEE SANTY, JR., Appellant.	2 CA-CR 2010-0267 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20093028001

Honorable Deborah Bernini, Judge

REMANDED WITH DIRECTIONS

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E C K E R S T R O M, Judge.

¶1 After a jury trial, appellant David Santy was convicted of two counts of conspiracy to commit murder. He was sentenced to concurrent terms of imprisonment for life with no possibility of being released for twenty-five years. Santy argues on appeal that the two conspiracy charges were multiplicitous and that there was insufficient evidence he actually intended the victims be killed. Because Santy's convictions for conspiracy resulted from multiplicitous charges, we remand the case to the trial court to either vacate one of the convictions and its associated sentence or vacate one sentence and merge the two convictions to reflect Santy was convicted of one count of conspiracy to commit two murders.

¶2 We view the facts in the light most favorable to sustaining the convictions. *State v. Klokic*, 219 Ariz. 241, n.1, 196 P.3d 844, 845 n.1 (App. 2008). Michael Finck testified that he met Santy in early 2009 when the two were negotiating the sale of some vending machines. Finck, who was on parole at the time, learned almost immediately that Santy had been accused of child molestation and was facing a trial. Several months after they met, believing that Finck had contact with members of the Aryan Brotherhood, a criminal gang, Santy asked Finck if he could "get rid of" the witnesses against him in the molestation trial—his accuser Julia V. and her mother Jacqueline C.

¶3 At first, Finck was not certain Santy was serious or "if he was just blowing off steam," but after their second or third conversation about it, Finck believed Santy was very serious. The two men had about six or seven conversations in which Santy mentioned harming Julia and her mother. Finck repeatedly asked Santy if he was "sure [he] want[ed] to do this," and Santy replied that he did. Finck also testified that Santy

"press[ed] the matter" through telephone calls and impromptu visits to Finck asking if Finck had contacted his "brothers."

¶4 Shortly after Finck had decided that Santy was serious, he told his parole officer about Santy's threats. At the direction of the Tucson Police Department, Finck then arranged a meeting between Santy and undercover officer Terrence Hickey, whom Santy believed to be a "hit man" and member of the Aryan Brotherhood. Santy agreed to bring some "good faith money" as a down payment for the murders.

¶5 Santy, Finck, and Hickey met at a local restaurant where Finck introduced Santy and Hickey and then left. The entire interaction was recorded and played for the jury. During their conversation, Santy told Hickey he wanted Julia and her mother "to disappear" but did not want to know "how, when, or why," so that he would be able to state he knew nothing about it. Santy gave Hickey twenty dollars, and they agreed Santy would later give Hickey a vending machine worth one to two thousand dollars as well as five hundred dollars in cash for killing Julia and her mother. Then Santy showed Hickey where Julia and her mother lived. At the end of the meeting between Hickey and Santy, as part of the undercover operation, Hickey's vehicle was pulled over by a marked police vehicle, and Santy was arrested. As noted above, he was charged with two counts of conspiracy to commit first-degree murder, with one count naming Julia as the potential victim and the other count naming Jacqueline. After a jury trial, he was convicted of both counts and sentenced to concurrent terms of life imprisonment.[1] This appeal followed.

[1]We note the sentencing minute entry erroneously labels both the first and second counts of conspiracy as "count one." The verdict forms and sentencing transcript,

¶6 Santy argues there was insufficient evidence to support his convictions. We review the sufficiency of evidence de novo. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). Santy contends that although there was evidence he was concerned "the victims would later be able to implicate him," "there was no evidence that [he] actually intended the victims to be murdered." The relevant exchange between Hickey and Santy is as follows:

> Hickey: You want me to send them a message before . . . I put a bullet in them? I could do that for you.
>
> Santy: No, because I don't want them to come back and say—
>
> Hickey: Well they ain't coming back, Bro.
>
> Santy: —so and so did this. You know?
>
> Hickey: They ain't coming back. I'm not gonna let that happen. Okay, so if you want me to say something to them, that's up to you. . . .
>
> Santy: Just say, "You fucked with the wrong people."

¶7 Santy's first statement arguably could be characterized in isolation as an indication that he did not want the victims killed. But, Hickey's response—that the victims "ain't coming back"—left no ambiguity that the plan was to kill the victims. And Santy's instruction as to what Hickey should say before killing them demonstrates that Santy understood the victims would be killed at his behest. Thus, placed in its proper context, Santy's first statement simply communicated a tactical decision to avoid leaving

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however, make clear that Santy was convicted of and sentenced for two distinctly numbered counts.

evidence of his complicity. Even if this exchange was subject to two reasonable interpretations, it was the jury's role to assess any contradictory evidence. *See State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989) (appellate court does not reweigh evidence in reviewing its sufficiency); *State v. Reynolds*, 108 Ariz. 541, 543, 503 P.2d 369, 371 (1972) (jury, not court, weighs contradictory evidence).

¶8 Santy also maintains that "no reasonable person would believe [twenty dollars] would be a sufficient amount to hire a hit man." But Hickey testified it was not "unusual" that Santy was offering him twenty dollars because, "[i]n [his] experience[,] people will offer up what's valuable to them. It can be $20. It can be jewelry, property, a stolen vehicle, whatever they have they will offer up for a service or a trade." And although Finck agreed during cross-examination that "[t]wenty dollars in payment is an incredibly silly amount for a contract killing," he further explained, "That's where my word to the so called brotherhood comes in." Again, it was for the jury to assess Finck's credibility and the weight to give his testimony. *See Reynolds*, 108 Ariz. at 543, 503 P.2d at 371.

¶9 Moreover, there was other substantial evidence from which a reasonable jury could have found Santy intended and agreed to have Julia and her mother murdered, as required for a conviction under A.R.S. § 13-1003(A). *See Evanchyk v. Stewart*, 202 Ariz. 476, ¶ 16, 47 P.3d 1114, 1118-19 (2002). Santy persisted in asking Finck to connect him with someone who could make Julia and her mother "disappear," he met with Hickey to arrange the murders, and he gave Hickey a down payment. He then showed Hickey where the victims lived in order to assist Hickey in carrying out the

murders. Hickey testified that, throughout their interaction, Santy never showed any hesitation about the murders or gave Hickey any indication that he did not want them carried out. This was substantial evidence from which a reasonable jury could have found Santy intended and agreed to have the victims murdered and, thus, sufficient evidence supports Santy's conviction for conspiracy to commit murder.[2]

¶10 Santy also argues "the trial court abused its discretion in denying [his] motion to dismiss the indictment based on multiplicity." The state concedes that the charges were multiplicitous because there was only one conspiracy to commit two murders. "Charges are multiplicitous if they charge a single offense in multiple counts." *Merlina v. Jejna*, 208 Ariz. 1, ¶ 12, 90 P.3d 202, 205 (App. 2004). Multiplicitous charges violate double jeopardy principles when a defendant is convicted and multiple punishments are imposed. *Id.* ¶ 14; *see also State v. Powers*, 200 Ariz. 123, ¶ 5, 23 P.3d 668, 670 (App.) ("The Double Jeopardy Clause bars a second prosecution for the same offense after conviction or acquittal and bars multiple punishments for the same offense."), *approved*, 200 Ariz. 363, 26 P.3d 1134 (2001). Generally, we review for an abuse of discretion a trial court's denial of a motion to dismiss the indictment. *See State v. Pecard*, 196 Ariz. 371, ¶ 24, 998 P.2d 453, 458 (App. 1999). However, "[w]e review de novo whether double jeopardy applies." *Powers*, 200 Ariz. 123, ¶ 5, 23 P.3d at 670.

¶11 Here, by being convicted of two counts of conspiracy based on the same agreement, Santy was subjected to multiple punishments for the same offense. *See* § 13-

[2]Because Santy was subjected to double punishment from multiplicitous charges, we clarify that our finding of sufficient evidence applies to only one conviction for conspiracy.

1003(C) ("A person who conspires to commit a number of offenses is guilty of only one conspiracy if the multiple offenses are the object of the same agreement or relationship . . . ."); *cf. State v. Gaydas*, 159 Ariz. 277, 278-79, 766 P.2d 629, 630-31 (App. 1988) (three separate agreements to sell narcotics established factual bases for multiple conspiracies).

¶12 Santy contends this court should vacate one of his convictions and life sentences as a remedy for his unlawful double punishment. *See State v. Medina*, 172 Ariz. 287, 289, 836 P.2d 997, 999 (App. 1992). The state responds that we should merge the two convictions into one and vacate one of the sentences. Either remedy appears to be legally appropriate. *See United States v. Tann*, 577 F.3d 533, 538, 543 (3d Cir. 2009) (remanding case to district court to vacate sentence on one of two convictions resulting from multiplicitous charge and merge convictions into one); *State v. Brown*, 217 Ariz. 617, ¶ 16, 177 P.3d 878, 883 (App. 2008) (remanding case to trial court to vacate series of convictions resulting from multiplicitous charges); *see also Merlina*, 208 Ariz. 1, n.4, 90 P.3d at 205 n.4 ("'The principal danger in multiplicity—that the defendant will be given multiple sentences for the same offense—can be remedied at any time by merging the convictions and permitting only a single sentence.'"), *quoting United States v. Reed*, 639 F.2d 896, 905 n.6 (2d Cir. 1981). Accordingly, we remand the case to the trial court to vacate one life sentence and exercise its discretion either to vacate one of the two convictions or merge them into a single conviction.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge