NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JUAN BENJAMIN VALERA-RODRIGUEZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D18-1794

Opinion filed April 17, 2020.

Appeal from the Circuit Court for Lee County; Bruce E. Kyle, Judge.

Terry McCreary of The McCreary Law Firm, Ft. Myers; and Patrick N. Bailey of The Law Office of Patrick N. Bailey, P.A., Ft. Myers, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Allison C. Heim, Assistant Attorney General, Tampa, for Appellee.

LaROSE, Judge.

A jury found Juan Valera-Rodriguez guilty of conspiracy to commit trafficking in cocaine (count 1) and trafficking in cocaine (count 2). The trial court sentenced him to concurrent mandatory minimum terms of fifteen years' imprisonment. We have jurisdiction over this appeal. See Fla. R. App. P. 9.030(b)(1)(A);

9.140(b)(1)(A), (F). We affirm, without further comment, the judgment and sentence on count 2. The parties urge us to reverse and remand for the trial court to strike the mandatory minimum sentence on count 1. Mr. Valera-Rodriguez is entitled to relief on count 1. Yet, we do not agree with the parties' suggested remedy.

Background

Count 1 of the amended information alleged:

> Between and including October 5, 2015 through October 9, 2015, in the Seventeenth and Twentieth Judicial Circuits, to wit: Broward and Lee Counties, Florida, the Defendant, Juan Benjamin Valera-Rodriguez, did unlawfully and knowingly agree, conspire, combine or confederate with another person, to wit: Amaury Matias aka Jose Angel De Jesus-Cruz, and with other persons known or unknown, to commit the act of trafficking in cocaine . . . contrary to Florida Statute 893.135(5).

Section 893.135(5), Florida Statutes (2015), provides, in relevant part, that "[a]ny person who agrees, conspires, combines, or confederates with another person to commit any act prohibited by subsection (1)[1] commits a felony of the first degree and is punishable as if he or she had actually committed such prohibited act." See also § 775.082(3)(b)(1), Fla. Stat. (2015) (authorizing a term of up to thirty years' imprisonment upon conviction for a first-degree felony).

Importantly, subsections (1)(b)(1)(a)-(c) set out different mandatory minimum prison terms tied to the various trafficking amounts for which a defendant is convicted. See § 893.135(1)(b)(1)(a) (requiring that a defendant convicted of trafficking in cocaine "28 grams or more, but less than 200 grams . . . shall be sentenced to a mandatory minimum term of imprisonment of 3 years, and the defendant shall be

[1]Section 893.135(1)(b)(1) outlaws trafficking in cocaine.

ordered to pay a fine of $50,000"); (1)(b)(1)(b) (stating that a defendant convicted of trafficking in cocaine "200 grams or more, but less than 400 grams . . . shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of $100,000"); (1)(b)(1)(c) (providing that a defendant convicted of trafficking in cocaine "400 grams or more, but less than 150 kilograms . . . shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of $250,000"). Consequently, the felony offense of trafficking in cocaine requires a minimum quantity of 28 grams of cocaine. As the statute provides, an individual who "knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine . . . but less than 150 kilograms of cocaine . . . commits a felony of the first degree, which . . . shall be known as 'trafficking in cocaine.' " § 893.135(1)(b)(1).

Critically, count 1 of the amended information neither charged an amount of cocaine nor referenced the subsection under which it charged Mr. Valera-Rodriguez. In contrast, count 2 of the charging document stated that Mr. Valera-Rodriguez "did unlawfully and knowingly sell or deliver 400 grams or more but less than 150 kilograms of cocaine . . . contrary to Florida Statute 893.135(1)(b)(1)(c)."

At trial, the State established that Mr. Valera-Rodriguez brokered a drug deal between a confidential informant working for the Drug Enforcement Administration and a buyer; Mr. Matias would supply the contraband. Ultimately, law enforcement stopped Mr. Matias's vehicle while traveling to the arranged sale location and seized 991 grams of cocaine.

The trial court provided the jury with a verdict form which, for count 1, permitted the jury to find Mr. Valera-Rodriguez either guilty or not guilty of conspiracy to

traffic in cocaine. If the jury found him guilty, the form required the jury to make a finding as to the amount of cocaine involved. The possible choices included the largest quantity carrying the most onerous mandatory minimum penalty under section 893.135(1)(b)(1)(c), all the way to the lowest quantity requiring the least punitive mandatory minimum term under section 893.135(1)(b)(1)(a). The jury found that Mr. Valera-Rodriguez conspired to traffic in "cocaine weigh[ing] 400 grams or more but less than 150 kilograms." The trial court imposed the mandatory minimum fifteen-year sentences, as well as fines totaling $525,513. See § 893.135(1)(b)(1)(c), (5). At no point during the trial did Mr. Valera-Rodriguez raise the apparent deficiency in the amended information for count 1.

Analysis

Mr. Valera-Rodriguez argues that the fifteen-year mandatory minimum sentence for count 1 constitutes fundamental error because the amended information failed to allege any amount of cocaine qualifying him for a mandatory minimum sentence. The State concedes error, reasoning that "the charging document did not put [Mr. Valera-Rodriguez] on notice of the mandatory minimum sentence."

To prove conspiracy to traffic in cocaine, the State must prove beyond a reasonable doubt an express or implied agreement or understanding between two or more persons to deliver or sell cocaine in the proscribed quantity. Fla. Std. Jury Instr. (Crim.) 5.3; 25.7(a); Spera v. State, 656 So. 2d 550, 551 (Fla. 2d DCA 1995); see also Mosley v. State, 100 So. 3d 1214, 1215 (Fla. 2d DCA 2012) ("[T]o support a conviction for trafficking, the State is required to prove that the . . . cocaine . . . meets the statutory trafficking weight."). Quantity is an "essential element" of trafficking. Greenwade v. State, 124 So. 3d 215, 220, 221 (Fla. 2013) ("To support a conviction for trafficking in

cocaine in an amount greater than 200 but less than 400 grams, the State must prove three essential elements beyond a reasonable doubt: (1) the defendant knowingly sold, purchased, manufactured, brought into the state, or actively or constructively possessed a certain substance; (2) the substance was cocaine; and (3) the quantity of the substance met the statutory weight threshold."). It is beyond cavil that "[a]n information must allege each of the essential elements of a crime to be valid." State v. Dye, 346 So. 2d 538, 541 (Fla. 1977). An element of count 1, therefore, is an amount of trafficked cocaine, as set out in section 893.135(1)(b)(1).

"For an information to sufficiently charge a crime it must follow the statute, clearly charge each of the essential elements, and sufficiently advise the accused of the specific crime with which he is charged." Price v. State, 995 So. 2d 401, 404 (Fla. 2008). Due process demands no less. Id. ("Due process of law requires the State to allege every essential element when charging a violation of law to provide the accused with sufficient notice of the allegations against him." (citing art. I, § 9, Fla. Const.; M.F. v. State, 583 So. 2d 1383, 1386-87 (Fla. 1991))). A jury's factual findings do not cure the omission of an essential element. Denegal v. State, 263 So. 3d 842, 843 (Fla. 5th DCA 2019) ("An information's failure to cite to the specific statutory subsection[of section 775.087(2)], while simultaneously failing to precisely charge the elements, 'cannot be cured by a jury's factual findings.' " (quoting Bienaime v. State, 213 So. 3d 927, 929 (Fla. 4th DCA 2017))). Moreover, the State "cannot rely on grounds alleged in [count 2] to support a[] . . . mandatory sentence on [count 1]." See Bienaime, 213 So. 3d at 929. Quite simply, count 1, as charged, failed to support the trial court's imposition of a fifteen-year mandatory minimum sentence.

However, it does not follow that we must direct the trial court, on remand, to simply strike the mandatory minimum sentence for count 1. Both parties rely on cases demonstrating that the imposition of a mandatory minimum sentence under section 775.087, known as the 10/20/Life statute, requires the State to allege in the information, and the jury to specifically find, the grounds for the sentence. "To pursue an enhanced mandatory minimum sentence under the 10/20/life statute, 'the [S]tate must allege the grounds for enhancement in the charging document, and the jury must make factual findings regarding those grounds.' " Agenor v. State, 268 So. 3d 868, 870 (Fla. 2d DCA 2019) (alteration in original) (quoting Bienaime, 213 So. 3d at 929). This conclusion is rooted in the courts' discernment of legislative intent. See Rogers v. State, 963 So. 2d 328, 336 n.3 (Fla. 2d DCA 2007) ("To the extent that the Florida case law requires that the factual basis for imposition of a mandatory minimum term under section 775.087(2) always be charged and found by the jury, it reflects a judicial conclusion that the legislature intended the factors requiring imposition of a mandatory minimum under section 775.087(2) to be essential elements."). To that end, "[t]he factors relevant to sentencing under various versions of section 775.087(2) have been treated as 'essential elements.' " Id. at 335 (quoting Jackson v. State, 852 So. 2d 941, 943 (Fla. 4th DCA 2003)); see, e.g., Adams v. State, 916 So. 2d 36, 37 (Fla. 2d DCA 2005) ("The information failed to allege that Adams discharged a firearm. The information alleged only that Adams 'used and actually possessed a firearm during the commission of the offense.' The trial court improperly enhanced Adams' sentence for discharging a firearm under section 775.087(2)(a)(3), because the grounds for enhancement of a sentence must be charged in the information."); Davis v. State, 884 So. 2d 1058, 1060 (Fla. 2d DCA 2004) ("[T]he minimum terms mandated by the '10–20

–Life' Statute, section 775.087(2), cannot be legally imposed unless the statutory elements are precisely charged in the information."); Rogers v. State, 875 So. 2d 769, 771 (Fla. 2d DCA 2004) ("An allegation of 'use' of a firearm will not sustain an enhanced sentence under section 775.087(2)(a)(3), because a firearm may be used to inflict serious bodily injury without being discharged, and the statute requires that the weapon be discharged for the enhancement to apply.").

The parties' reliance on these cases is misplaced. Section 775.087 does not define any substantive offense; rather, it "permits reclassification and the consequential enhancement of penalties," Lareau v. State, 573 So. 2d 813, 815 (Fla. 1991), for certain enumerated offenses. Cf. Freudenberger v. State, 940 So. 2d 551, 554-55 (Fla. 2d DCA 2006) (discussing the need for precision in the charging document in cases involving section 775.087).

Section 893.135 is not a reclassification statute. Instead, it creates two distinct offenses, trafficking and conspiracy to commit trafficking, for a variety of drugs. Additionally, the statute creates three possible mandatory minimum penalties, each dependent upon the amount of drugs involved. See § 893.135(1)(b)(1)(a)-(c). The jury found Mr. Valera-Rodriguez guilty of conspiracy to traffic in cocaine, a felony requiring at least twenty-eight grams of the contraband. As section 893.135 is drafted, the omission of the amount of drugs from an information charging an offense under section 893.135(1)(b)(1), (5) still leaves a defendant on notice that he faces some mandatory minimum penalty. Cf. United States v. Cotton, 535 U.S. 625, 633-34 (2002) (rejecting the defendant's contention that his sentence was illegal due to the indictment's failure to charge the precise weight of the drugs in his possession at the time of arrest where the

amount of drugs was only relevant to the sentencing enhancement, but not the underlying offense).

We have stated that "an information is fundamentally defective where it fails to cite a specific section and totally omits an essential element of the crime." Figueroa v. State, 84 So. 3d 1158, 1161 (Fla. 2d DCA 2012) (emphasis added). The copulative conjunction "and" suggests that both conditions must be present for the information to be fundamentally defective. Although count 1 failed to specify an amount of cocaine, it did cite to section 893.135(5), the relevant conspiracy statute. Section 893.135(5) then directs the reader to subsection (1), within the same statute which, in turn, enumerates the various sentencing options in section 893.135(1)(b)(1)(a)-(c). Although we agree that Mr. Valera-Rodriguez was not on "notice he was subject to this [fifteen-year mandatory minimum] enhanced sentence," he was informed that for the crime of conspiracy to commit trafficking in cocaine, he faced the possibility of at least a three-year mandatory minimum. After all, the charged offense required at least twenty-eight grams of cocaine.

We also observe that "[g]enerally the test for granting relief based on a defect in the information is actual prejudice to the fairness of the trial." Richards v. State, 237 So. 3d 426, 431 (Fla. 2d DCA 2018) (alteration in original) (quoting Weatherspoon v. State, 214 So. 3d 578, 584 (Fla. 2017)) (holding that the information, which failed to allege any essential elements and merely cited section 775.21(10)(a) as opposed to a violation of the registration requirement on which the State proceeded at trial, prejudiced Richards because defense counsel clearly demonstrated that he had been misled regarding which registration requirement the State was intending to prove that Richards had violated).

Our careful review of the record, here, reveals no prejudice. As noted earlier, Mr. Valera-Rodriguez raised no objections or arguments addressing the claimed deficiency in count 1. Apparently, Mr. Valera-Rodriguez proceeded to trial believing that he faced a mandatory minimum fifteen-year term, which, in light of the evidence presented, seemingly was the State's intent in charging him. The record reveals that the trial court and the State were operating under this premise as well.

Conclusion

We affirm Mr. Valera-Rodriguez's judgment on each count. We further affirm his sentence on count 2. However, we vacate the sentence on count 1 and remand for resentencing on that count, with the subsequent sentence containing a mandatory-minimum three-year term. Further, the trial court shall strike the $250,000 fine for that count and instead impose the amount prescribed by section 893.135(1)(b)(1)(a).

Affirmed, in part, reversed, in part, and remanded with instructions.

SALARIO, J., and CASE, JAMES R., Associate Judge, Concur.