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IN THE COURT OF APPEALS OF INDIANA

GARY W. STUDER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 46A04-0607-CR-375
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAPORTE CIRCUIT COURT
The Honorable Robert W. Gilmore, Jr., Judge
Cause No. 46C01-0301-FA-12

November 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, Gary Studer appeals his convictions of dealing cocaine, a Class B felony, and possession of cocaine, a Class C felony. Studer argues that both convictions are precluded because the jury found Studer not guilty of a third count, dealing cocaine as a Class A felony, and that these verdicts are impermissibly inconsistent. Concluding that the jury's finding Studer not guilty of one count does not preclude convictions on the other two counts, we affirm.

Facts and Procedural History

In December 2002, a confidential informant ("C.I.") for the LaPorte County Metro Operations Unit (the "Unit") informed the police that she could purchase cocaine from Studer. On December 18, 2002, the Unit conducted a controlled buy using the C.I. as the buyer. Members of the Unit searched the C.I. and her vehicle, wired her, provided her with $150 of buy money, maintained surveillance, and recorded her conversation with Studer. The C.I. purchased what later testing determined to be 2.56 grams of cocaine. On January 22, 2003, the Unit conducted a "buy/bust," under which they followed substantially the same procedure as for the controlled buy, except that they arrested Studer immediately following the sale. Officers searched Studer and found what later testing determined to be 3.74 grams of cocaine. Testing determined the substance Studer sold to the C.I. on January 22 to be 3.27 grams of cocaine.

On January 24, 2003, the State charged Studer with dealing cocaine, a Class B felony,

regarding the December 18 incident, and dealing cocaine, a Class A felony,[1] and possession of cocaine regarding the January 22 incident. At trial, Studer testified and admitted to selling cocaine to the C.I. on both occasions, but raised the defense of entrapment. Studer testified that the C.I. called him repeatedly over a period of several weeks, offering sex in exchange for Studer supplying her with drugs. Studer testified that after rejecting the C.I.'s requests, he finally relented, obtained some cocaine, and met with her on December 18. He further testified that after this sale, the C.I. called him daily offering sex and requesting cocaine and prescription medication. Studer testified that after he rejected her requests several times, the C.I. changed her tone and began threatening to tell Studer's wife about their conversations and the December 18 transaction. Studer testified that in light of these threats, he again relented, obtained two eightballs of cocaine, and arranged to meet with the C.I. He explained his possession of cocaine after the sale by stating that the C.I. originally told him that she wanted two eightballs, but after Studer had obtained the cocaine, the C.I. told him she could afford only one.

The jury found Studer guilty of dealing cocaine as a Class B felony and possession of cocaine, but not guilty of dealing cocaine as a Class A felony. On May 5, 2006, the trial court sentenced Studer to ten years for dealing cocaine, with three years suspended to probation, and four years for possession of cocaine, to run concurrently. Studer now appeals his convictions.

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[1] Dealing cocaine is a Class A felony if the amount involved weighs three grams or more. Ind. Code § 35-48-4-1(b)(1).

Discussion and Decision

Under federal law, "consistency in the verdict is not necessary." Dunn v. United States, 284 U.S. 390, 393-94 (1932) (recognizing that verdicts "cannot be upset by speculation or inquiry" into whether the verdict is the result of compromise or mistake). However, our supreme court has rejected Dunn's approach, indicating that the court "has looked and will continue to look at verdicts to determine if they are inconsistent." Marsh v. State, 271 Ind. 454, 460, 393 N.E.2d 757, 761 (1979).

In addressing claims of inconsistent jury verdicts "we will take corrective action only when the verdicts are extremely contradictory and irreconcilable." Powell v. State, 769 N.E.2d 1128, 1131 (Ind. 2002). To uphold inconsistent or illogical jury verdicts, the guilty verdicts must be supported by sufficient evidence. Baber v. State, 870 N.E.2d 486, 490 (Ind. Ct. App. 2007). We will conclude that jury verdicts are inconsistent "only where they cannot be explained by weight and credibility assigned to the evidence." Neuhausel v. State, 530 N.E.2d 121, 123 n.2 (Ind. Ct. App. 1988). We recognize jury verdicts that seem inconsistent at first blush may be explained by the jury's province to accept, reject, and weigh various pieces of evidence. See Carmona v. State, 827 N.E.2d 588, 592-93 (Ind. Ct. App. 2005). If we conclude that jury verdicts are impermissibly inconsistent, the remedy is to remand for a new trial on the charge or charges of which the defendant was convicted, and to bar retrial on the charges of which he was found not guilty. See Owsley v. State, 769 N.E.2d 181, 187 (Ind. Ct. App. 2002), trans. denied (adopting the view taken in DeSacia v. State, 469 P.2d 369, 381 (Alaska 1970), and rejecting that of People v. Hoffman, 655 P.2d 393, 396 (Colo.

1982), in which the court directed that the conviction be vacated and a judgment of acquittal be entered).

In Owsley, the principal case relied on by Studer, a panel of this court reversed the defendant's conviction for conspiracy to deal cocaine based on inconsistent verdicts where the jury found the defendant not guilty of possession of cocaine and dealing cocaine.[2] Id. at 182. The court noted that these verdicts indicated that the State failed to prove that the defendant possessed the cocaine, but proved that the defendant provided a third party with the cocaine. Id. at 186. Under these circumstances, the court held the defendant's conviction for conspiracy to deal cocaine "cannot be rationally reconciled with the acquittal for possession of cocaine." Id. at 185.[3]

With these principles in mind, we now turn to the circumstances surrounding Studer's convictions.

I. Studer's Conviction of Possession of Cocaine

Studer argues that his acquittal of dealing cocaine regarding the January 22 incident is inconsistent with his conviction of possession of cocaine regarding the same incident. He

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[2] Owsley is apparently the only Indiana case in which an appellate court has reversed a conviction based on inconsistent jury verdicts. See id. at 183.

[3] The court recognized that the verdicts were likely the result of leniency on the part of the jury, and noted that in systems that permit inconsistent verdicts, such room for leniency is seen as beneficial. Id. at 186 n.4. We also wish to point out that disallowing such lenient verdicts seems to contravene Article I, section 19 of the Indiana Constitution, which provides: "In all criminal cases whatever, the jury shall have the right to determine the law and the facts." Our supreme court has held that pursuant to this article, "a jury is not bound to convict even in the face of proof beyond a reasonable doubt." Bivins v. State, 642 N.E.2d 928, 946 (Ind. 1994) (citing Peck v. State, 563 N.E.2d 554, 560 (Ind. 1990)), cert. denied, 516 U.S. 1077 (1996)). Nonetheless, as we recognized in Owsley, our supreme court has made clear that we are to review jury verdicts for consistency. 769 N.E.2d at 186 n.4, 188.

argues that "[t]he charging informations contain no factual distinction between the cocaine Studer is accused of dealing and the cocaine Studer is accused of possessing." Appellant's Brief at 7. However, as the State points out in its brief, the State introduced evidence at trial that when officers arrested Studer, he was found to be in possession of cocaine. See Transcript at 111 (officer testifying that Studer was in possession of a coin purse containing cocaine). Indeed, Studer himself testified that after selling the C.I. cocaine, he still possessed an eightball of cocaine. Id. at 1042. We also note that the amount of cocaine Studer retained, 3.74 grams, was sufficient to support his conviction of possession of cocaine as a Class D felony. See Ind. Code § 35-48-4-6(b)(1). Therefore, we disagree that the cocaine upon which the jury based its guilty verdict was necessarily the cocaine that Studer sold to the C.I.

The count of dealing cocaine of which Studer was acquitted requires an element in addition to those required to support his conviction for possession of cocaine, namely, the act of delivery.[4] See Ind. Code §§ 35-48-4-1, -6. Therefore, the different verdicts can be explained on the simple grounds that the jury found the State had failed to introduce evidence of the additional element necessary to support a conviction for dealing. Cf. McCovens v. State, 539 N.E.2d 26, 30 (Ind. 1989) (concluding conviction of burglary was not inconsistent with acquittal of theft, as crimes have different elements); Jackson v. State, 576 N.E.2d 607,

[4] To support a conviction of dealing cocaine, the State may also allege and prove that a defendant manufactured, financed the manufacture of, or financed the delivery of; or possessed with the intent to manufacture, finance the manufacture of, deliver, or finance the delivery of cocaine. Ind. Code § 35-48-4-1(a). In this case, the charging information indicates that the State proceeded under a theory that Studer actually delivered cocaine. See Appellant's Appendix at 8.

611 (Ind. Ct. App. 1991) (concluding jury verdicts were not inconsistent where offenses required proof of different elements). That is, the jury could have found that Studer possessed cocaine, but did not actually deliver the cocaine to the C.I. Cf. United States v. Spitz, 678 F.2d 878, 881-82 (10th Cir. 1982) (recognizing that a jury could have concluded that the defendant participated in the manufacture of methamphetamine but did not have the intent to distribute the drugs); United States v. Dubea, 612 F.2d 950, 951 (5th Cir. 1980) (guilty verdict for possession of cocaine was not necessarily inconsistent with not guilty verdict for possession with intent to distribute).

Also, the jury could have believed Studer's entrapment defense with regard to the dealing count, but found the defense inapplicable to his mere possession. Cf. Haralson v. State, 479 S.E.2d 115, 119 (Ga. Ct. App. 1996) (recognizing that the jury could have accepted the defendant's entrapment defense with regard to dealing marijuana, but not accepted the defense with regard to his illegal possession of a firearm), cert. denied. Entrapment is a question of fact for the jury. Dockery v. State, 644 N.E.2d 573, 577 (Ind. 1994). Here, the jury could reasonably have found that Studer was predisposed to possess cocaine,[5] but was entrapped into selling the cocaine to the C.I. See Strong v. State, 591 N.E.2d 1048, 1050 (Ind. Ct. App. 1992) ("The efficacy of the entrapment defense depends on whether the defendant was induced to commit the crime by police activity or whether he was

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[5] Studer does not argue on appeal that his convictions are improper based on insufficiency of the evidence to prove Studer's predisposition to deal or possess cocaine. See Huff v. State, 443 N.E.2d 1234, 1237 (Ind. Ct. App. 1983) (recognizing that once a defendant raises the entrapment defense, the burden is on the State to prove beyond a reasonable doubt the defendant's predisposition to commit the crime).

already predisposed to do so."), trans. denied. Although Studer testified that he obtained the cocaine solely because he planned to sell it to the C.I., the jury was free to disbelieve this part of his testimony, but believe that he was not predisposed to sell the cocaine. Cf. May v. State, 810 N.E.2d 741, 744 (Ind. Ct. App. 2004) (jury is free to believe part of a witness's testimony and disbelieve other portions).

We conclude that the jury's verdicts regarding Studer's possession and delivery of cocaine on January 22 are not impermissibly inconsistent.

II. Studer's Conviction for Dealing Cocaine

We also conclude that Studer's conviction for dealing cocaine regarding the transaction on December 18 is not inconsistent with his acquittal for dealing cocaine on January 22. We initially note the problematic nature of arguing inconsistent verdicts regarding incidents that occurred at separate times: in many cases, such a verdict merely indicates the jury could have concluded that the defendant committed a crime during one incident, but did not during another. See Baber, 870 N.E.2d at 491 (acquittal on one count of child molesting was not inconsistent with conviction for separate count alleging conduct occurring on a separate date, as jury could have believed evidence regarding one incident, and disbelieved evidence regarding separate incident); Jackson v. State, 540 N.E.2d 1232, 1234 (Ind. 1989) ("Here there can be no necessary inconsistency, as the two counts referred to separate acts which occurred in different places and at different times.").

In regard to these separate incidents, the jury could have accepted Studer's entrapment defense regarding the January 22 encounter, but rejected it regarding the December 18

encounter. See Haralson, 479 S.E.2d at 119. The fact that he used the same general defense theory for both incidents is immaterial. See Jackson, 540 N.E.2d at 1234 (where jury found defendant guilty of one count of rape and not guilty of a separate count of rape involving the same victim, "the jury would be well within its prerogative in fully and sufficiently crediting only that part of the victim's testimony that related to the first attack"); Lewis v. State, 726 N.E.2d 836, 846 (Ind. Ct. App. 2000) (guilty verdict for incident occurring on one date was not inconsistent with acquittal regarding incident occurring on a different date, even where the defendant's defenses regarding the incidents were equally compelling), trans. denied. Moreover, Studer's explanation differed for the two incidents, as he testified that he was motivated to sell the C.I. cocaine on December 18 because of the C.I.'s offer of sex, and that his motivation on January 22 was "[t]o get rid of her once and for all." Tr. at 976. The State introduced transcripts of the recordings made via the wire worn by the C.I. during both sales. In the first conversation, Studer expressed a willingness to meet with the C.I. to "have a party one of these days . . . . see what happens, get some coke, get some booze," and told the C.I. to "[c]all me if you need anything." State's Exhibit 4. The second transcript is much shorter and does not as clearly indicate Studer's desire to meet with the C.I. again. Based on this evidence, the jury could have found Studer was predisposed to sell cocaine to the C.I. on December 18, but also found that in regard to the January 22 sale, the State had failed to "prove that he was not innocently lured and enticed into the criminal activity." Williams v. State, 409 N.E.2d 571, 574 (Ind. 1980) (describing the State's burden in rebutting defendant's entrapment defense).

Conclusion

We conclude the jury's verdicts are not impermissibly inconsistent.

Affirmed.

KIRSCH, J., and BARNES, J., concur.