NO. COA01-772
NO. COA01-830

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

STATE OF NORTH CAROLINA

v. Wake County
No. 99CRS73408-12, 99CRS 73414-16, 99CRS103647, 99CRS26960, 99CRS103650-51, 99CRS26956-26958

BENANCIO CARAVAJAL

Appeal by defendant from judgments entered 31 March 2000 and order entered 30 April 2001 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 18 April 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Kimberly W. Duffley, for the State.

Law Offices of Robert J. Willis, by Robert J. Willis, for defendant-appellant.

MARTIN, Judge.

Defendant, Benancio Caravajal, appeals from judgments sentencing him to consecutive terms of imprisonment totaling a minimum of 397 months and a maximum of 477 months and imposing fines totaling $600,000, which were entered upon jury verdicts finding him guilty of four counts of trafficking in more than 28 grams, but less than 200 grams, of cocaine by possession; guilty of three counts of trafficking in more than 28 grams, but less than

200 grams, of cocaine by delivery; guilty of four counts of conspiracy to traffic in cocaine by sale and delivery; guilty of three counts of sale of a controlled substance within 300 feet of a school; and guilty of one count of conspiracy to sell and deliver cocaine. He also appeals from the denial of his motion for appropriate relief, filed within ten days after entry of judgment.

Evidence

The State's evidence at trial tended to show that in 1999, Terry Clarita (hereinafter "Clarita") was working as a foreman for Cisco Construction Company. Clarita suspected that several men under his supervision were selling cocaine at the construction site to his brother, Keith Clarita, who was addicted to the substance and also working for Cisco at the time. Clarita eventually contacted Detective Cullifer with the Wake County Sheriff's Department and agreed to set up purchases of cocaine from defendant and Abel Zenon, who were working for Cisco. While working for the sheriff's department, Clarita made four purchases of cocaine on the following dates: 19 February 1999, 24 February 1999, 2 March 1999, and 19 March 1999. In each of the four transactions, Clarita dealt with Zenon. After each purchase, Clarita immediately turned the substance which he had purchased over to law enforcement officers and he was interviewed by Special Agent Lacy Pittman of the North Carolina State Bureau of Investigation.

Zenon testified for the State. Zenon testified that he lived on Maywood Avenue and that defendant had rented a room from him. Prior to living with Zenon, defendant had lived in a house on Weeks

Drive with several people including his brother and cousin Virqilio, who had sold drugs to Keith Clarita, Terry Clarita's brother. Zenon had acted as a translator for Virqilio in those transactions. Defendant began working for Cisco in December of 1998. Defendant does not speak English.

The day before Clarita's first purchase of cocaine, he called Zenon and told him that he wanted "two balls," meaning two ounces of cocaine. Zenon told Clarita that he would have it for him the next morning, 19 February 1999. Clarita, Zenon, and defendant were working at Lufkin Middle School. Zenon testified that on the morning of 19 February 1999, defendant gave Zenon a ride to work and on the way, he stopped at the Weeks Drive address and picked up some of his family members. According to Zenon, defendant got out of his vehicle at the Weeks Drive address, went inside the house wearing his jean jacket, and then returned still wearing the jean jacket.

Agent Pittman and Detective Cullifer gave Clarita $1,800 for the purchase of the cocaine and placed a body wire on his person so that they could listen to Clarita's conversation. Additionally, Clarita and his vehicle were searched for drugs. Detective Herring drove ahead of Clarita and set up surveillance in the parking lot at the school; Agent Pittman and Detective Cullifer followed Clarita.

After arriving at the school, Clarita went into the building and found defendant and Zenon working together hanging sheetrock. Clarita advised Zenon that he was ready to do the deal. Zenon then

spoke to defendant in Spanish, which conversation Clarita did not understand, and picked up a jean jacket with different colored sleeves that was lying on a T-square. Zenon testified that defendant asked him to take his jean jacket and go with Clarita outside to do the drug transaction. Zenon put on the jean jacket and he and Clarita walked outside to Clarita's van. The two men sat in the van which was approximately 100 feet from the school; Clarita gave Zenon $1,800 in exchange for which he received the cocaine from Zenon. Clarita testified that during this transaction, Zenon mentioned that Clarita might be able to get a discount if he bought a larger quantity of cocaine. Zenon also told Clarita that he could get Clarita more cocaine the following Monday or whenever Clarita wanted more. Zenon did not refer to defendant at any time during the transaction; however, Zenon testified that after the transaction was completed, he gave the money and the jacket to defendant. At lunchtime, defendant gave Zenon $200 for his assistance in the transaction. The substance which Clarita received from Zenon was analyzed by the SBI laboratory and was found to be cocaine base weighing 56 grams.

Clarita's second purchase of cocaine occurred on 24 February 1999 at Lufkin Middle School. Clarita called Zenon the night before to arrange the purchase of two ounces of cocaine. As with the previous purchase, the officers searched Clarita's vehicle and person and then gave him $1,800. Zenon testified that on the morning of 24 February 1999, defendant again drove him to work and they stopped by the house on Weeks Drive. Defendant entered and

exited the house wearing his jean jacket. Clarita testified that when he arrived at the school, Zenon was exiting from a portable toilet and came directly over to Clarita's truck. Zenon got into the truck, which was parked on school grounds. Clarita testified that during this transaction, Zenon was wearing the same blue jean jacket that he was wearing during the first transaction. Zenon took the cocaine from the pocket of the jacket and exchanged it for the money. Clarita testified that he had seen defendant wearing the jean jacket and knew that it belonged to defendant. Zenon testified that defendant gave him $200 for his assistance in the transaction. The substance which Clarita received from Zenon was analyzed by the SBI laboratory and found to be cocaine base weighing 57.6 grams.

Clarita's third purchase of cocaine occurred on 2 March 1999 at Lufkin Middle School. The day before, Clarita approached defendant and told him that he needed four ounces of cocaine. Defendant grinned and told Clarita to talk to Zenon. The next morning, the officers searched Clarita's vehicle and person and gave him $3,600. Zenon testified that defendant, who was wearing the jean jacket, drove him to work and stopped at the house on Weeks Drive on the way. Clarita parked approximately 200 yards from the school; he was wearing the body wire and officers were videotaping the transaction. Clarita went into the school and found defendant and Zenon working together. Zenon testified that when Clarita entered the building, Zenon told defendant that Clarita was ready to do the deal and defendant then took off his

jacket and gave it to Zenon. Clarita and Zenon went outside and got into Clarita's truck where Clarita gave Zenon $3,600 and Zenon took cocaine from the jacket and gave it to Clarita. This was the same jean jacket Zenon had worn in the previous transactions. After completing the transaction, Zenon gave defendant the money and returned the jacket to him. Later the same day, defendant gave Zenon some money. The substance which Clarita received from Zenon was analyzed by the SBI laboratory and found to be cocaine weighing 110.6 grams.

Clarita's fourth and final purchase of cocaine from Zenon occurred at North Carolina State University on 19 March 1999. On that morning, Clarita met with Detective Cullifer and Agent Pittman, who gave him $1,800 and placed the body wire on him. On that morning, defendant did not go to the Weeks Drive address prior to going to work. Clarita went into the building where defendant and Zenon were working. Defendant gave Zenon his jean jacket and Zenon left the building with Clarita. The two men got into Clarita's truck and Zenon took cocaine out of a pocket of the jean jacket and gave it to Clarita in exchange for $1,800. Zenon then returned to the building and gave defendant the jean jacket and money. Later that day, defendant gave Zenon an unknown amount of money. Clarita testified that other than the four times that he purchased the cocaine from Zenon, he had not seen Zenon wearing the blue jean jacket. The substance which Clarita received from Zenon was analyzed by the SBI laboratory and found to be cocaine weighing 54.7 grams.

Clarita testified that at some point after the four drug transactions, he told defendant and Zenon that he wanted to buy fifteen ounces of cocaine. Thereafter, defendant, with Zenon translating, was "bugging" him about when the fifteen ounce buy was going to occur. Zenon testified that on 31 March 1999, he told defendant that Clarita wanted to purchase fifteen ounces of cocaine. Later the same day, Zenon and defendant drove to Weeks Drive and defendant went into Virqilio's house. Defendant returned to the truck and, about ten minutes later, Virqilio came out to the truck and gave defendant two balls of cocaine wrapped in aluminum foil. Defendant then put the two balls into a white carton in his truck and drove to Zenon's house. Later that evening, Zenon saw defendant weighing the cocaine. Defendant placed the cocaine on the kitchen table; Zenon put it into a kitchen cabinet so that his wife would not see it. Zenon told defendant that he did not want to be involved in any more drug deals and that defendant would need to do future exchanges himself. Defendant and Zenon were arrested on 1 April 1999. At the time of his arrest, no cocaine was located in defendant's truck or on his person. Police did, however, locate 412.1 grams of cocaine in a kitchen cabinet in Zenon's residence.

Zenon testified that on none of the four occasions when he delivered the cocaine to Terry Clarita did defendant ever show him the cocaine while they were riding in the truck together to go to work. In fact, Zenon testified that he did not see the cocaine until he gave it to Clarita on any of the four occasions. Defendant did not testify at trial and offered no evidence.

Verdicts

With regard to the transaction alleged to have occurred on 19 February 1999, the jury found defendant guilty of trafficking in 28 grams or more, but less than 200 grams, of cocaine by possession; trafficking in 28 grams or more, but less than 200 grams, of cocaine by delivery; conspiracy to traffic in cocaine by delivery; and selling a controlled substance within 300 feet of a school. The jury found defendant not guilty of trafficking in 28 grams or more, but less than 200 grams, of cocaine by transportation.

With regard to the transaction alleged to have occurred on 24 February 1999, the jury found defendant guilty of trafficking in 28 grams or more, but less than 200 grams, of cocaine by possession; conspiracy to traffic in cocaine by sale and delivery; and selling a controlled substance within 300 feet of a school. He was found not guilty of trafficking in cocaine by transportation, and not guilty of trafficking in cocaine by delivery on that date.

With regard to the transaction alleged to have occurred on 2 March 1999, the jury found defendant guilty of trafficking in 28 grams or more, but less than 200 grams, of cocaine by possession; trafficking in 28 grams or more, but less than 200 grams, of cocaine by delivery; conspiracy to traffic in cocaine by sale and delivery; and selling a controlled substance within 300 feet of a school. Defendant was found not guilty of trafficking in cocaine by transportation on that date.

With regard to the transaction alleged to have occurred on 19 March 1999, defendant was found guilty of trafficking in 28 grams

or more, but less than 200 grams, of cocaine by possession; trafficking in 28 grams or more, but less than 200 grams, of cocaine by delivery; and conspiracy to traffic in cocaine by sale and delivery. The jury found defendant not guilty of trafficking in cocaine by transportation on that date, and the trial court dismissed the charge of selling a controlled substance within 300 feet of a school.

Finally, with regard to the charge of conspiracy to sell and deliver cocaine alleged to have occurred on 1 April 1999, the jury found defendant guilty.

Appeal From Judgments Entered Upon The Verdicts

Defendant first contends the evidence was insufficient to support his convictions and the trial court erred by failing to dismiss all of the charges. At trial, however, defendant moved to dismiss only the four charges of sale of a controlled substance within 300 feet of a school; his motion to dismiss the charge concerning the transaction occurring on 19 March 1999 at North Carolina State University was allowed since the sale did not take place within 300 feet of an elementary or secondary school. N.C. Gen. Stat. § 90-95(e)(8). By his failure to move for dismissal of the remaining charges, defendant has preserved for review, on appeal from the judgments entered upon the verdicts in this case, only the denial of his motions to dismiss the charges of sale of a controlled substance within 300 feet of a school on 19 February 1999, 24 February 1999, and 2 March 1999. N.C.R. App. P. 10(b)(1).

In reviewing a motion to dismiss, this Court must determine

"whether there is substantial evidence of each essential element of the offense charged, or of a lesser offense included therein, and of the defendant's being the perpetrator of such offense." *State v. Bates*, 313 N.C. 580, 581, 330 S.E.2d 200, 201 (1985). Substantial evidence has been defined as "that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981). Further, the evidence should be considered in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn therefrom. *Bates*, 313 N.C. at 581, 330 S.E.2d at 201. Any contradictions or discrepancies in the evidence are for resolution by the jury and do not warrant dismissal. *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980).

The evidence in the present case, considered in the light most favorable to the State, was sufficient to show that on each of the dates recited above, defendant was on property used for a secondary school and that he delivered cocaine to Zenon, knowing that Zenon would, in turn, deliver the cocaine to Clarita while on the school property. Thus, the evidence was substantial as to each element required to prove defendant's guilt and his motions to dismiss the charges were properly denied.

Defendant also contends that the imposition of consecutive sentences by the trial court in this case was grossly disproportionate to the offenses committed by defendant and constituted cruel and unusual punishment under both the Eighth and Fourteenth Amendments to the Constitution of the United States and

Article I, Section 27, of the North Carolina Constitution. We are unpersuaded.

Historically, our Supreme Court "has analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state Constitutions." *State v. Green*, 348 N.C. 588, 603, 502 S.E.2d 819, 828 (1998), *cert. denied*, 525 U.S. 1111, 142 L. Ed. 2d 783 (1999). "The imposition of consecutive . . . sentences, standing alone, does not constitute cruel or unusual punishment." *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983). Additionally, we note that "[o]nly in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment." *Id.*

In the present case, the sentences imposed do not exceed statutory limits. See N.C. Gen. Stat. § 90-95(h)(3)a (2001) (trafficking in cocaine in amount of "28 grams or more, but less than 200 grams," punishable by "minimum term of 35 months and a maximum term of 42 months"). Our Supreme Court has held "that sentences that are within the statutory limits and impose consecutive sentences do not constitute cruel and unusual punishment." *State v. Handsome*, 300 N.C. 313, 317, 266 S.E.2d 670, 674 (1980) (citations omitted). Therefore, we find no merit in defendant's contention that the sentences imposed upon him constitute cruel or unusual punishment. In summary, we find no error in defendant's trial or in the judgments from which he appeals.

Appeal From Order Denying Motion For Appropriate Relief

In his motion for appropriate relief, defendant asserted that the verdicts were contrary to the weight of the evidence, entitling him to relief pursuant to G.S. § 15A-1414(b)(2) and (b)(3). Specifically, defendant contends the jury's verdicts of not guilty with respect to some of the charges are irreconcilable with its verdicts of guilty of other offenses which are alleged to have occurred at the same time.

A motion to set aside the verdict as being contrary to the weight of the evidence is addressed to the sound discretion of the trial court, and its ruling will not be overturned absent a showing that the ruling was a manifest abuse of that discretion. *Bates*, 313 N.C. 580, 330 S.E.2d 200; *State v. Witherspoon*, 293 N.C. 321, 237 S.E.2d 822 (1977). We have carefully considered the evidence in this case and find it substantial to warrant the submission of each of the charges to the jury and to support the jury's verdicts with respect thereto. Thus, we find no abuse of the trial court's discretion in the denial of defendant's motion for appropriate relief.

COA01-772 - No error.

COA01-830 - Affirmed.

Judges TYSON and THOMAS concur.

Report per Rule 30(e).