NO. COA08-1045

NORTH CAROLINA COURT OF APPEALS

Filed: 5 May 2009

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 07 CRS 232295
07 CRS 232296

CARMEN C. TAYLOR

Appeal by Defendant from judgments and commitments entered 5 March 2008 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 February 2009.

Attorney General Roy Cooper, by Assistant Attorney General Rufus C. Allen, for the State.

Haral E. Carlin for Defendant.

STEPHENS, Judge.

Procedure and Facts

On 23 July 2007, Defendant Carmen C. Taylor was indicted by a grand jury for (1) conspiracy to sell a controlled substance and (2) delivery of a controlled substance. The matter came on for trial on 4 March 2008 before the Honorable Richard D. Boner in the Superior Court of Mecklenburg County. Defendant was found guilty of both offenses. Defendant was sentenced to 12 to 15 months for delivery of cocaine, the sentence was suspended, and Defendant was placed on 36 months supervised probation. Defendant was also given a concurrent sentence of six to eight months in prison for

conspiracy to sell cocaine, the sentence was suspended, and Defendant was placed on 36 months supervised probation. From these judgments and commitments, Defendant appeals.

The State's evidence tended to show that on 14 July 2007, Officer Brad Tisdale of the Charlotte-Mecklenburg Police Department was assigned to investigate drug sales in Charlotte, North Carolina. Tisdale was driving undercover in an area of Charlotte where a number of drug arrests had been made in the past. At approximately 9:00 p.m. that evening, Tisdale made contact with Danette Massey at the corner of Lucena and Moretz Streets. Massey asked Tisdale what he needed and Tisdale responded that he needed "'hard[,]'" meaning crack cocaine. Although Massey replied that she did not have any crack cocaine, she got into Tisdale's unmarked police car and gave him directions to 2516 Rachel Street.

Tisdale drove with Massey to the Rachel Street address. While Tisdale and Massey were in the car in front of the address, Massey asked Tisdale what he was looking for, to which he replied, "a dime[,]" indicating 10 dollar's worth of cocaine. Tisdale then gave Massey a $10 bill, which had been marked for later identification, and Massey got out of the car.

At that point, Tisdale observed a person, later identified as Defendant, on the porch in front of the Rachel Street address. Massey approached Defendant and made contact with Defendant. Massey gave the $10 bill to Defendant and Defendant gave Massey an object. Massey then returned to Tisdale's car and gave Tisdale the object, which was later identified as .06 grams of cocaine.

During the course of these events, Tisdale had been in telephone contact with other officers of the Charlotte-Mecklenburg Police Department. Tisdale notified the officers working with him when he received the cocaine from Massey.

Officer Brett Riggs of the Charlotte-Mecklenburg Police Department was assigned to work with Tisdale on 14 July 2008. Riggs had been in telephone communication with Tisdale during Tisdale's encounter with Massey and was within two blocks of the Rachel Street address. When he received the predetermined signal from Tisdale that a drug transaction had taken place, Riggs stopped Tisdale's unmarked police car. Riggs took Massey into custody by placing her in a second unmarked police car. Riggs then went to 2516 Rachel Street where, based on Tisdale's description, he located Defendant and took custody of her. Riggs discovered the marked $10 bill in Defendant's purse.

I. Sentencing

Defendant first argues that the trial court committed reversible error by sentencing Defendant for a Class G felony for delivery of cocaine where N.C. Gen. Stat. § 90-95(b)(1) classifies the punishment for delivery of cocaine as a Class H felony.

"'A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.'" *State v. Davis*, 58 N.C. App. 330, 335, 293 S.E.2d 658, 662 (quoting *State v. Pope*, 257 N.C.

326, 334-35, 126 S.E.2d 126, 132-33 (1962)), *disc. rev. denied*, 306 N.C. 745, 295 S.E.2d 482 (1982).

Defendant was convicted of conspiracy to sell cocaine pursuant to N.C. Gen. Stat. § 90-98. Defendant was determined to be a prior record level II for sentencing purposes. Conspiracy to sell cocaine is classified as a class G felony for sentencing purposes. N.C. Gen. Stat. § 90-95(b)(1)(i) (2007). At Defendant's prior record level, class G felonies carry a presumptive prison sentence of 12 to 15 months. N.C. Gen. Stat. § 15A-1340.17(c) (2007).

Defendant was also convicted of delivery of cocaine pursuant to N.C. Gen. Stat. § 90-95(a)(1) (2007). Delivery of cocaine is classified as a class H felony for sentencing purposes. N.C. Gen. Stat. § 90-95(b)(1) (2007). At Defendant's prior record level, class H felonies carry a presumptive prison sentence of six to eight months. N.C. Gen. Stat. § 15A-1340.17(c).

The judgment on the jury's verdict finding Defendant guilty of conspiracy to sell cocaine indicates that "the prison term imposed is within the presumptive range of sentences authorized under [N.C. Gen. Stat. §] 15A-1340.17(c)." However, while conspiracy to sell cocaine is classified as a class G felony, carrying a presumptive prison sentence of 12 to 15 months, the judgment imposes a prison sentence of 6 to 8 months.

Similarly, the judgment on the jury's verdict finding Defendant guilty of delivery of cocaine indicates that "the prison term imposed is within the presumptive range of sentences authorized under [N.C. Gen. Stat. §] 15A-1340.17(c)." However,

while delivery of cocaine is classified as a class H felony, carrying a presumptive prison sentence of six to eight months, the judgment imposes a prison sentence of 12 to 15 months.

It is clear from the record that the trial court inadvertently reversed the classification levels, and the accompanying sentences, of the two felonies for which Defendant was convicted. As the court has the inherent power to amend its records to correct clerical mistakes, *State v. Jarman*, 140 N.C. App. 198, 203, 535 S.E.2d 875, 879 (2000), this case is remanded to the Superior Court of Mecklenburg County with instructions to correct the clerical mistakes upon which this assignment of error is based.

II. Lesser-Included Offense

By Defendant's next argument, Defendant asserts that the trial court erred by not submitting the offense of possession of cocaine, a lesser-included offense of delivery of cocaine, for the jury's consideration.

"Because [D]efendant failed to object to the jury instruction at trial, [her] challenge is subject to plain error review." *State v. Maready*, 362 N.C. 614, 621, 669 S.E.2d 564, 568 (2008). Plain error has been defined as "'*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]'" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). "In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record

and determine if the instructional error had a probable impact on the jury's finding of guilt." *Id.* at 661, 300 S.E.2d at 378-79.

The judge has a duty to declare and explain the law arising on all of the evidence. N.C. Gen. Stat. § 15A-1232 (2007). "This duty necessarily requires the judge to charge upon a lesser included offense, even absent a special request, when there is some evidence to support it." *State v. Little*, 51 N.C. App. 64, 67, 275 S.E.2d 249, 251 (1981).

> The general rule of practice is, that when it is permissible under the indictment . . . to convict the defendant of "a less degree of the same crime," and there is evidence to support the milder verdict, the defendant is entitled to have the different views arising on the evidence presented to the jury under proper instructions, and an error in this respect is not cured by a verdict finding the defendant guilty of a higher degree of the same crime, for in such case, it cannot be known whether the jury would have convicted of the lesser degree if the different views, arising on the evidence, had been correctly presented in the court's charge.

State v. Childress, 228 N.C. 208, 210, 45 S.E.2d 42, 44 (1947).

Defendant argues that the State presented insufficient evidence that Defendant "delivered" the cocaine, and, thus, the lesser-included offence of possession of cocaine should have been submitted to the jury for its consideration. "'Deliver' or 'delivery' means the actual constructive . . . transfer from one person to another of a controlled substance . . . ." N.C. Gen. Stat. § 90-87(7) (2007).

Here, the State's evidence tended to show the following: Tisdale made contact with Massey and Massey got inside Tisdale's

car. Tisdale gave Massey a marked $10 bill with instructions to get him $10 worth of crack cocaine. Massey exited Tisdale's vehicle and walked into an open area where she made contact with Defendant. Tisdale observed Massey give the $10 bill to Defendant and Defendant place an object in Massey's hand. Tisdale watched Massey's hand as she returned directly to Tisdale's vehicle and Massey immediately gave the object that was in her hand to Tisdale. The object was .06 grams of cocaine.

This is sufficient evidence that Defendant physically transferred the cocaine from herself to Massey, thus "delivering" the cocaine. Accordingly, we find no error, much less plain error, in the trial court's failure to submit the offense of possession of cocaine, a lesser-included offense of delivery of cocaine, to the jury. Defendant's assignment of error is overruled.

III. Motion to Dismiss

By Defendant's final assignment of error, Defendant contends the trial court erred in not dismissing the charge of conspiracy to sell cocaine as the evidence was insufficient to show that Defendant conspired with Massey to sell cocaine to Tisdale.

To survive a motion to dismiss, the State must present substantial evidence of each essential element of the charged offense. *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997), *writ of mandamus denied*, __ N.C. __, __ S.E.2d __ (2009). "'Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.'" *Id.* at 717, 483 S.E.2d at 434 (quoting *State v. Olson*, 330 N.C. 557, 564, 411

S.E.2d 592, 595 (1992)). When reviewing the sufficiency of the evidence, "[t]he trial court must consider such evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *State v. Patterson*, 335 N.C. 437, 450, 439 S.E.2d 578, 585 (1994).

> "A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. To constitute a conspiracy it is not necessary that the parties should have come together and agreed in *express* terms to unite for a common object: A mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense."

State v. Johnson, 164 N.C. App. 1, 17, 595 S.E.2d 176, 185 (quoting *State v. Bindyke*, 288 N.C. 608, 615-16, 220 S.E.2d 521, 526 (1975)), *appeal dismissed and disc. review denied*, 359 N.C. 194, 607 S.E.2d 658 (2004), *cert. denied*, __ N.C. __, 651 S.E.2d 369 (2007).

> Direct proof of conspiracy is rarely available, so the crime must generally be proved by circumstantial evidence. A conspiracy may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy.

State v. Clark, 137 N.C. App. 90, 95, 527 S.E.2d 319, 322 (2000)(internal quotation marks and citations omitted).

Here, the State's evidence tended to show the following: Tisdale made contact with Massey. Massey asked Tisdale what he needed and Tisdale responded that he needed "'hard[,]'" meaning crack cocaine. Massey replied, "I don't have any, but I can take

you to a spot to get some." Massey got into Tisdale's vehicle and gave him directions to 2516 Rachel Street, a single-story apartment duplex built in the shape of a horseshoe. Tisdale pulled into the parking lot and Massey asked Tisdale what he needed. He told her he needed "a dime[,]" and gave Massey a marked $10 bill. Massey exited the vehicle and walked into the open area in the middle of the apartment duplex. Defendant, who was sitting on a chair on the front porch of the apartment, walked down from the porch and met Massey in the open area. Tisdale observed Massey give the money to Defendant and then observed Defendant place an object in Massey's hand. Tisdale watched Massey's hand as she returned directly to Tisdale's vehicle. Massey then gave the object, a rock of cocaine, to Tisdale. Subsequently, Defendant was found to have Tisdale's $10 bill in her purse.

A reasonable juror could have inferred that Massey directed Tisdale to 2516 Rachel Street because Massey knew Defendant would be there with the cocaine that Massey could then supply to Tisdale. The State, therefore, presented sufficient evidence to show a mutual understanding between Defendant and Massey to sell cocaine to Tisdale. *See State v. Sams*, 148 N.C. App. 141, 144, 557 S.E.2d 638, 641 (2001) (finding sufficient evidence to withstand defendant's motion to dismiss the charge of conspiracy to sell cocaine where evidence showed that defendant "'flagged down'" the officer and directed him to a room at the motel, defendant offered to purchase the cocaine for the officer, and when defendant and the officer went to the hotel room, the people inside talked only to

the officer, indicating that they knew defendant and that she had brought them customers in the past), *appeal dismissed and disc. review denied*, 355 N.C. 352, 562 S.E.2d 429 (2002).

Defendant argues further that the State's evidence failed to show an agreement between Massey and Defendant to sell cocaine specifically to Tisdale, as stated in the indictment. However, "an indictment for *conspiracy* to sell or deliver a controlled substance need not name the person to whom the defendant conspired to sell or deliver." *State v. Lorenzo*, 147 N.C. App. 728, 734, 556 S.E.2d 625, 628 (2001) (citing *State v. McLamb*, 71 N.C. App. 220, 222, 321 S.E.2d 465, 466 (1984), *rev'd on other grounds*, 313 N.C. 572, 330 S.E.2d 476 (1985)). Furthermore, "[t]he use of superfluous words in a bill of indictment should be disregarded." *State v. Muskelly*, 6 N.C. App. 174, 176, 169 S.E.2d 530, 532 (1969).

Here, although the indictment alleges that Defendant conspired with Massey to sell cocaine "to B. Tisdale[,]" as the indictment need not have named Tisdale, such allegation was superfluous and the State need not have presented evidence to support the allegation. The assignment of error upon which Defendant's arguments are based is overruled.

NO ERROR IN PART, REMANDED WITH INSTRUCTIONS IN PART.

Judges JACKSON and STROUD concur.

Report per Rule 30(e).