

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA10-141

NORTH CAROLINA COURT OF APPEALS

Filed: 5 October 2010

STATE OF NORTH CAROLINA

v. Guilford County
Nos. 09 CRS 71091
MELSAR DUARTE-GOMEZ, 09 CRS 71092
Defendant.

Appeal by defendant from judgments entered 18 September 2009 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 31 August 2010.

Attorney General Roy Cooper, by Assistant Attorney General Judith Tillman, for the State.

Reita P. Pendry for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Melsar Duarte-Gomez appeals from his convictions of trafficking cocaine by transporting 400 grams or more and trafficking cocaine by possessing 400 grams or more. After careful review, we find no error.

Facts

The State's evidence at trial tended to establish the following facts: In February 2009, Detective Richard Alston with the Greensboro Police Department's vice and narcotics division was working undercover posing as a drug purchaser. Through a confidential informant, Detective Alston was introduced to Oscar

Gonzalez, who sold Detective Alston roughly a pound of marijuana. Shortly after the marijuana purchase, Detective Alston and Gonzalez discussed Detective Alston purchasing a "kilo" of cocaine. Gonzalez told Detective Alston that the kilo would cost \$30,000.00 and Detective Alston "flash[ed] the money," showing that he could pay for the cocaine.

On 23 February 2009, Gonzalez called Detective Alston and told him that he had the cocaine. Detective Alston, according to a pre-arranged plan, drove to Gonzalez's house on Lindsay Street to purchase the cocaine. When Detective Alston pulled into the driveway, Gonzalez got into Detective Alston's car, told him that the drugs were nearby, and then got out of the car and walked down the street. About 10 minutes later, Gonzalez returned in a blue minivan with two unidentified Hispanic men. The three men got out of the minivan and got inside Detective Alston's car. A man later identified as Jesus Urbieta sat next to Detective Alston in the front passenger seat; another man later identified as Pedro Penaloza sat directly behind Detective Alston; and Gonzalez sat in the back, diagonal to Detective Alston. After talking with Detective Alston for several minutes, Penaloza and Gonzalez got out of the car and left in the minivan to go get the cocaine. Urbieta stayed with Detective Alston.

Penaloza and Gonzalez returned in about 10 minutes, followed by a burgundy Jeep Cherokee. The minivan pulled into the driveway behind Detective Alston's car, with the Cherokee pulling in behind the minivan. Penaloza, who had been driving the minivan, got out,

walked back to the rear driver's side door of the Cherokee, and got inside. Defendant, who was in the backseat of the Cherokee, gave Penalzoza the cocaine and "told him to give it to the guy in the car." Penalzoza returned to Detective Alston's car, got in the backseat, and handed Detective Alston a tightly wrapped rectangular package containing 990.1 grams of cocaine hydrochloride. After Detective Alston received the package, he signaled the surveillance team, which then arrested everyone involved in the drug deal, including Detective Alston. Defendant was searched after he was arrested and officers found a 9mm handgun with six rounds in the magazine, \$1,051 in cash, and four cell phones.

Defendant was charged with conspiracy to traffic in cocaine, trafficking in cocaine by transporting 400 grams or more, and trafficking in cocaine by possessing 400 grams or more. Defendant pled not guilty and the case proceeded to trial, where the jury acquitted defendant of the conspiracy charge but convicted defendant of the two trafficking charges. The trial court sentenced defendant to two concurrent terms of 175 to 219 months imprisonment on the trafficking convictions and imposed a \$250,000.00 fine for each offense. Defendant gave notice of appeal in open court.

I

Defendant first argues that the trial court erred in admitting the following testimony by Penalzoza concerning statements made by his aunt, Josephina Mondragon, on the day of the drug deal:

[PROSECUTOR:] Now, I want to talk to you about the day that you were arrested. Are you the

individual that brought the kilogram back to the officer?

[PENALOZA:] Yes.

[PROSECUTOR:] Let me ask how that afternoon began. How did you wind up at this Lindsay Street address?

[PENALOZA:] I took a refrigerator to my aunt. When I arrived at the store my aunt said that her boyfriend was coming to the store and asked me to give him a ride to the auto parts store -

[DEFENSE COUNSEL]: Your Honor, I'm going to object to anything that the aunt says.

THE COURT: Well, it's not offered for the truth, ladies and gentlemen, but he can say what she said to explain why he did what he did. So, for that limited purpose go ahead. She said her boyfriend was coming to the store.

[PENALOZA:] To give him a ride to the auto parts store because he was going to meet there somebody and told me that if I would take him, uh, she let me understand that they were going to do something and I was going to receive something and then to bring him back to the store. I'm sorry, to leave him at the store and to come back by myself to the store. And that's how I got there to the house.

[PROSECUTOR:] This something that you were going to do for something, for payment, was a drug deal; correct?

[PENALOZA:] She didn't say why [sic] kind of drugs, what kind of deal but she said that they were going to meet there. They were going to do something -

[DEFENSE COUNSEL]: Your Honor, I'm going to object again. This is hearsay.

THE COURT: Well, overruled. Go ahead. It's offered to explain why he did what he did. Go ahead.

[PENALOZA:] That they were going to do something and I was in need. I needed money. She offered that she was going to give me \$300.

Defendant contends that Penaloza's testimony regarding his aunt's statements is impermissible hearsay and thus the evidence should have been excluded under Rule 802 of the Rules of Evidence.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. R. Evid. 801(c). However, "[o]ut-of-court statements that are offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002). Thus "[t]he statements of one person to another are admissible to explain the subsequent conduct of the person to whom the statement was made." *State v. White*, 298 N.C. 430, 437-38, 259 S.E.2d 281, 286 (1979); *accord State v. Lesane*, 137 N.C. App. 234, 238, 528 S.E.2d 37, 40-41 (2000) ("[A] statement introduced for the purpose of explaining the subsequent conduct of the testifying witness is not hearsay."). The trial court's determination as to whether an out-of-court statement is offered for the truth of the matter asserted is reviewed de novo on appeal. *State v. Miller*, ___ N.C. App. ___, ___, 676 S.E.2d 546, 552, *disc. review denied*, 363 N.C. 586, 683 S.E.2d 216 (2009).

Here, as noted by the trial court in denying defendant's objections, Penaloza's statements about what his aunt told him on 23 February 2009 were "not offered for the truth" of any of these

statements, but, rather, were offered to explain Penalzoza's subsequent conduct – that is, "[h]ow . . . [he] w[ound] up" participating in the drug deal. See *State v. Call*, 349 N.C. 382, 410, 508 S.E.2d 496, 513 (1998) (concluding that witness' testimony that his mother called to tell him that a man was at her house was offered to explain why witness drove to his mother's house, not to prove the matter asserted); *State v. Leyva*, 181 N.C. App. 491, 500, 640 S.E.2d 394, 399 (holding, in drug trafficking case, that trial court properly admitted detective's testimony that he was watching defendant's apartment based on confidential informant's tip to explain detective's presence, not to prove that defendant was trafficking drugs), *appeal dismissed and disc. review denied*, 361 N.C. 573, 651 S.E.2d 370 (2007). As Penalzoza's testimony was not offered to prove the truth of the matters asserted, it did not constitute hearsay, and the trial court properly admitted the evidence over defendant's objections.

Defendant also argues that Penalzoza's testimony should have been excluded under Rule 403. Review of the transcript, however, indicates that defendant did not object to Penalzoza's testimony on this basis at trial. By not specifically objecting on Rule 403 grounds and by not obtaining a ruling by the trial court, defendant failed to preserve this issue for appellate review. N.C. R. App. P. 10(a)(1); *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 194-196, 657 S.E.2d 361, 363-64 (2008). Nor has defendant argued that admission of this evidence under Rule

403 amounted to plain error. N.C. R. App. P. 10(a)(4). We have, nonetheless, reviewed defendant's argument and found no error.

II

Defendant next argues that the trial court erred in denying his motion to dismiss both trafficking charges for insufficient evidence. Contrary to defendant's contention, review of the transcript indicates that he never moved to dismiss the trafficking charges – only the conspiracy charge. N.C. R. App. P. 10(a)(3) provides that, "[i]n a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action . . . is made at trial." As defendant failed to move to dismiss either of the trafficking charges for insufficient evidence at the close of the State's evidence or at the close of all the evidence, defendant failed to preserve this contention for appellate review. *See State v. Armstrong*, __ N.C. App. __, __, 691 S.E.2d 433, 440 (2010) (holding, where defendant moved to dismiss murder and assault charges, but did not move to dismiss DWLR charge, defendant waived review of sufficiency of evidence with respect to DWLR charge). Nevertheless, we have reviewed the evidence and found it sufficient to support the trial court's submitting the trafficking charges to the jury.

III

Defendant's final argument on appeal is that the trial court erroneously denied his motion to set aside his trafficking convictions as they are inconsistent with his being acquitted of

conspiracy to traffic in cocaine. In *State v. Reid*, 335 N.C. 647, 440 S.E.2d 776 (1994), our Supreme Court adopted the United States Supreme Court's "long-standing rule that allows inconsistent jury verdicts from the same trial to stand":

"Consistency in the verdict is not necessary. . . . The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the [jurors] did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity."

Id. at 658-59, 440 S.E.2d at 782 (quoting *United States v. Powell*, 469 U.S. 57, 62-63, 83 L. Ed. 2d 461, 467 (1984)). Recognizing that inconsistent verdicts may be the result of mistake, compromise, or lenity by the jury, "coupled with the Government's inability to invoke review" under the double jeopardy clause, the *Reid* Court echoed *Powell's* conclusion that "'inconsistent verdicts should not be reviewable.'" *Id.* at 659, 440 S.E.2d at 783 (quoting *Powell*, 469 U.S. at 66, 83 L. Ed. 2d at 469).

Based on *Reid* and *Powell*, we conclude that the trial court did not err in denying defendant's motion to set aside his trafficking convictions.¹ See *Powell*, 469 U.S. at 69, 83 L. Ed. 2d at 471 (upholding defendant's conviction for using telephone to facilitate

¹Defendant also argues that the trafficking convictions must be set aside as "they are not supported by the evidence" The record indicates, however, that sufficiency of the evidence was not asserted as a basis for defendant's motion to set aside the verdicts. In any event, as we have already held, the evidence in this case is sufficient to support defendant's trafficking convictions.

"conspiracy to possess cocaine and possession of cocaine" despite defendant's being acquitted of underlying conspiracy and possession charges).

No Error.

Judges HUNTER, Robert N., Jr. and LEWIS concur.

Report per Rule 30(e).