NO. COA11-1277
NORTH CAROLINA COURT OF APPEALS

Filed: 21 August 2012

STATE OF NORTH CAROLINA

v. Pitt County
Nos. 07 CRS 51701-51706

KELVIN SMITH

Appeal by defendant from judgment entered 18 May 2009 by Judge W. Russell Duke, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 21 March 2012.

Attorney General Roy A. Cooper, by Assistant Attorney General Kathryn A. Murphy, for the State.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III and Kirby H. Smith, III, for defendant-appellant.

BRYANT, Judge.

Where the trial court did not err in its instructions to the jury or in denying defendant's motions to dismiss, but three conspiracy charges were unsupported by the evidence, we hold that the judgment should be affirmed in part and vacated in part.

Facts and Procedural History

Defendant Kelvin Smith was charged with offenses based on events that occurred on 14 December 2006, 18 January 2007, and 23 February 2007 as part of an undercover operation by the Greenville Police Department. Steve Ferebee ("Ferebee"), who had served as a confidential informant, testified that he met defendant through a friend. Ferebee asked defendant if he could get him "any cocaine" and defendant replied that "he could get whatever [Ferebee] wanted[.]"

Ferebee testified that on 14 December 2006, he contacted defendant about purchasing cocaine. Ferebee made an agreement with defendant to buy one and a half ounces of cocaine in exchange for $1,500.00, which Ferebee received from the Greenville Police Department. After leaving the police department, Ferebee went to defendant's apartment at River Bluff Apartments. Once in the apartment, Ferebee gave defendant the money, defendant counted it and gave it to Shawn Hardy. After waiting for approximately 30 minutes, a car pulled up and Shawn Hardy went outside to get the cocaine. Shawn Hardy returned after approximately ten minutes, gave the cocaine to defendant and defendant gave the cocaine to Ferebee to "weigh out." Shawn Hardy testified that he and defendant each received $200 for arranging the deal.

Based on the events of 14 December 2006, defendant was indicted on the following charges: (1) possession with intent to sell and deliver cocaine; (2) knowingly and intentionally keeping and maintaining a dwelling for the purpose of keeping and/or selling cocaine; (3) conspiracy to traffic cocaine by sale; (4) conspiracy to traffic cocaine by delivery; (5) trafficking cocaine by possession; (6) trafficking cocaine by transportation; (7) trafficking cocaine by sale; and (8) trafficking cocaine by delivery.

The second transaction occurred on 18 January 2007, when Ferebee again contacted defendant to purchase cocaine. This agreement was for three ounces of cocaine in exchange for $3,000. Ferebee met defendant and Shawn Hardy at the River Bluff Apartments and the three of them drove to the Cherry Court Apartments. Once at the Cherry Court Apartments, Ferebee gave the money to defendant, and defendant gave it to Shawn Hardy. Shawn Hardy then got out of the car, went through some surrounding bushes and returned with the cocaine. When Shawn Hardy returned with the cocaine, he handed it to defendant and defendant gave it to Ferebee to "weigh out." The substance that Ferebee gave to Officer Fisher upon his return to the Greenville

Police Department was sent to the SBI, which determined that it consisted of 83.8 grams of cocaine.

Based on the events of 18 January 2007, defendant was indicted on the following charges: (1) possession with intent to sell and deliver cocaine; (2) conspiracy to traffic cocaine by possession; (3) conspiracy to traffic cocaine by transportation; (4) trafficking cocaine by sale; and (5) trafficking cocaine by delivery.

The third transaction occurred on 23 February 2007, when Ferebee again contacted defendant to purchase three ounces of cocaine. Ferebee drove to defendant's new residence, which was a trailer off U.S. Highway 264 in Greenville, and he and defendant picked up Shawn Hardy from somewhere in Greenville. When the three of them returned to the trailer, Shawn Hardy called the supplier and Ferebee gave defendant the purchase money. Defendant counted the money, gave it to Shawn Hardy, and Shawn Hardy went down the street to the supplier. Shawn Hardy returned to the trailer claiming that the money was $100 short and defendant agreed to loan the $100 to him. After defendant gave Shawn Hardy the $100, Shawn Hardy went back out to the supplier and returned with the cocaine. As the parties were weighing the cocaine, the police surrounded the trailer.

Defendant ran to the bathroom to try to flush the cocaine down the toilet, but Ferebee took the cocaine from defendant and placed it on a shelf in the bathroom. Defendant, Shawn Hardy, and the supplier, Travis Carney, were all arrested, but no drugs or drug money was found on defendant. The substance recovered at the scene was sent to the SBI, which determined that it consisted of 84.2 grams of cocaine. Shawn Hardy testified that he and defendant each received $200 for arranging the deal.

Based on the events of 23 February 2007, defendant was indicted on the following charges: (1) trafficking cocaine by possession; (2) trafficking cocaine by transportation; (3) trafficking cocaine by sale; (4) trafficking cocaine by delivery; (5) possession with intent to sell and deliver cocaine; (6) knowingly and intentionally keeping and maintaining a dwelling for the purpose of keeping and/or selling cocaine; (7) conspiracy to traffic cocaine by sale; and (8) conspiracy to traffic cocaine by delivery. Defendant moved for dismissal of all charges at the end of the State's case and at the end of all evidence. Defendant's motions to dismiss were denied.

On 13 May 2009, a jury convicted defendant Kelvin Smith of the following offenses based on three different events: three counts of trafficking cocaine by sale; two counts of trafficking

cocaine by delivery; one count of trafficking cocaine by possession; two counts of conspiring to traffic cocaine by sale; two counts of conspiring to traffic cocaine by delivery; one count of conspiring to traffic cocaine by possession; one count of conspiring to traffic cocaine by transportation; one count of possession with intent to sell or deliver cocaine; and one count of felony possession of cocaine. On 18 May 2009, the trial court consolidated all of these charges into one judgment and sentenced defendant Kevin Smith to a minimum of 35 and a maximum of 42 months in the North Carolina Department of Correction. Defendant did not give timely notice of appeal. On 14 March 2011, this Court allowed defendant's writ of certiorari to review the 18 May 2009 judgment.

Defendant advances the following issues on appeal: whether the trial court erred (I) in its instructions to the jury and (II) by denying defendant's motion to dismiss the charges against him.

I

Defendant first argues that the trial court committed plain error when it failed to directly instruct the jury not to form an opinion about defendant's guilt or innocence ***until they began***

their deliberations. As a result of this omission, defendant claims he was denied a fair trial.

Where a defendant has failed to object to the jury instructions in a case, an argument regarding the jury instructions is analyzed under the plain error standard of review. *State v. Pate*, 187 N.C. App. 442, 445, 653 S.E.2d 212, 215 (2007) (citation omitted).

> Plain error with respect to jury instructions requires the error to be so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected. Further, 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. (citation omitted).

Defendant's first argument relies on the language of section 15A-1236(a)(3) of the North Carolina General Statutes which provides that "[t]he judge at appropriate times must admonish the jurors that it is their duty . . . [n]ot to form an opinion about the guilt or innocence of the defendant, or express any opinion about the case until they begin their deliberations[.]" N.C. Gen. Stat. § 15A-1236(a)(3) (2011).

Here, before each recess and after all the evidence was presented, the trial court instructed the jury that it should "not form or express any opinion about the case or about the guilt or innocence of the [d]efendant" but omitted the language – "until they began their deliberations" – found in N.C.G.S. § 15A-1236(a)(3). Because defendant failed to object to the trial court's instructions to the jury, but alleges plain error on appeal, we review this issue.

In *State v. Turner*, the trial court did not admonish the jury, as required by N.C.G.S. § 15A-1236, prior to ordering an overnight recess. 48 N.C. App. 606, 608, 269 S.E.2d 270, 271 (1980). This Court concluded that "[t]he failure of the trial judge to admonish the jury at an appropriate time in violation of G.S. 15A-1236 does not involve the violation of a constitutional right." *Id.* at 610, 269 S.E.2d at 271. "Extending the reversible error *per se* rule to all violations of Chapter 15A of the General Statutes would result in many new trials for mere technical error, a result not intended by the legislature in light of the provisions of G.S. 15A-1443." *Id.* at 610, 269 S.E.2d 272; *see also State v. Chambers*, 52 N.C. App. 713, 719, 280 S.E.2d 175, 179 (1981) (holding that there was no reversible error where the trial court omitted portions of

N.C.G.S. § 15-1236 in its instructions to the jury and defendant failed to object to such instructions at trial).

Further, in *State v. Daniels*, this Court addressed the issue of whether the trial court's failure to give complete and proper jury instructions before various recesses during trial, pursuant to N.C.G.S. § 15A-1236, constituted plain error when defendant had an opportunity to object to those instructions. 59 N.C. App. 442, 445, 297 S.E.2d 150, 152 (1982). The defendant in *Daniels* neither objected to the jury instructions nor requested further instructions at the times he contended the instructions were incomplete. *Id.* Thus, we held, based on *Turner*, that the trial court did not commit plain error. *Id.*

Similar to the facts in *Daniels*, in the present case, defendant neither objected to the jury instructions nor requested further instructions at the times these instructions were given. Defendant had an opportunity to request that the trial judge properly admonish the jury prior to each recess, but failed to do so. Therefore, based on the reasoning in *Turner* and *Daniels*, we find no prejudicial error in the trial court's failure to give complete jury instructions. Defendant's argument is overruled.

II

Defendant next argues that the trial court erred by denying his motion to dismiss the charges against him. Specifically, defendant contends that (1) there was insufficient evidence that he was involved in the February 2007 transaction; (2) the substantive offenses for which he was convicted were inconsistent; and (3) the State failed to differentiate between the two conspiracies charged on each offense date.

Sufficiency of the Evidence

Defendant first argues that his motion to dismiss should have been granted because there was insufficient evidence to support the convictions of each transaction date. However, defendant only presented an argument regarding the February 2007 transaction, thus waiving this issue with respect to the December 2006 and January 2007 transactions. N.C. R. App. P. 28(a) (2012). Nevertheless, we find defendant's argument regarding the February 2007 transaction to be without merit.

Appellate review of a motion to dismiss in a criminal trial is limited to "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State*

v. Littlejohn, 158 N.C. App. 628, 634, 582 S.E.2d 301, 306 (2003) (internal quotations and citation omitted).

> Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion. In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. When ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence.

Id. at 634-35, 582 S.E.2d at 306 (citations omitted).

As a result of the events of 23 February 2007, defendant was convicted of (1) trafficking in cocaine by sale; (2) conspiracy to traffic in cocaine by sale; and (3) conspiracy to traffic in cocaine by delivery. The State's evidence in support of each offense is based on testimony from Steve Ferebee, Shawn Hardy, and Officer Brian Fisher. Defendant argues that Ferebee's testimony is insufficient because it is contradicted by the other evidence presented by the State. However, whether Ferebee's testimony was contradictory was properly resolved by the jury. *See State v. Campbell*, 316 N.C. 168, 172, 340 S.E.2d 474, 477 (1986) (holding that contradictions and discrepancies

within the testimony of a witness are to be resolved by the jury).

Ferebee testified that he contacted defendant directly to arrange the deal, gave defendant the purchase money to count, weighed the drugs with defendant, and took the drugs away from defendant at some point during the police raid. Moreover, Ferebee's debriefing by Officer Fisher following defendant's arrest corroborates Ferebee's testimony. Other evidence of defendant's involvement is Shawn Hardy's testimony that defendant received $200 for arranging the deal. Thus, viewing the evidence in the light most favorable to the State, we conclude that there was substantial evidence of defendant's trafficking conviction and one of the conspiracy convictions. For reasons discussed later, the State did not present substantial evidence of both conspiracy convictions.

Substantive Offenses

Next, defendant argues that his motion to dismiss should have been granted because the jury returned inconsistent verdicts when it found defendant guilty of the greater offenses for the December 2006 and February 2007 transactions, but not guilty of the lesser offenses on those dates. Defendant presented no argument as to the January 2007 transaction, thus

waiving this issue with respect to the January 2007 convictions. N.C. R. App. P. 28(a). Nevertheless, we also find defendant's argument regarding the December 2006 and February 2007 verdicts to be without merit.

As the Supreme Court of North Carolina stated in *State v. Mumford*, "a distinction is drawn between verdicts that are merely inconsistent and those which are legally inconsistent *and* contradictory." 364 N.C. 394, 398, 699 S.E.2d 911, 914 (2010) (emphasis in original). Mere inconsistency does not invalidate a verdict where there is sufficient evidence to support the verdict. *Id.* at 398, 699 S.E.2d at 914. "However, when a verdict is inconsistent and contradictory, a defendant is entitled to relief." *Id.*

A verdict is legally inconsistent and contradictory, when the jury returns verdicts that are "mutually exclusive." *Id.* at 400, 699 S.E.2d at 915. "Verdicts are mutually exclusive when a verdict 'purports to establish that the [defendant] is guilty of two separate and distinct criminal offenses, the nature of which is such that guilt of one necessarily excludes guilt of the other.'" *Id.* (citation omitted); *see State v. Speckman*, 326 N.C. 576, 580, 391 S.E.2d 165, 168 (1990) (holding that defendant was entitled to a new trial when the jury returned

mutually exclusive verdicts of both embezzlement and obtaining property by false pretenses).

In *Mumford*, the defendant was convicted on five counts of felony serious injury by vehicle, in violation of N.C.G.S. § 20-141.4(a3), but was acquitted of the lesser offense of driving while impaired, in violation of N.C.G.S. § 20-138.1. 364 N.C. at 397, 699 S.E.2d at 914. The Court concluded that the defendant was not entitled to relief because the verdicts were merely inconsistent. *Id.* at 401, 699 S.E.2d at 916. The Court explained that "[N.C.G.S. §] 20-141.4(a3) does not require a conviction of driving while impaired under N.C.G.S. § 20-138.1 or N.C.G.S. § 20-138.2, but only requires a finding that the defendant was engaged in the conduct described under either of these offenses." *Id.*

In the present case, defendant was found guilty of trafficking in cocaine by possession, sale, and delivery, but acquitted of possession with intent to sell or deliver cocaine as a result of the December 2006 transaction. While these verdicts are inconsistent, they are not mutually exclusive. The State presented sufficient evidence as to each element of "trafficking in cocaine by possession," "trafficking in cocaine by sale," and "trafficking in cocaine by delivery." It is

entirely reasonable that a juror could have found that defendant was guilty of trafficking by possession under a common purpose theory but did not have the actual or constructive possession of cocaine necessary to commit the "possession with intent" offense. Similar to *Mumford*, trafficking in cocaine by possession, sale, or delivery, in violation of N.C.G.S. § 90-95(h)(3), does not require a conviction of possession with intent to sell or deliver cocaine, in violation of N.C.G.S. § 90-95(a). Thus, the verdicts regarding the December 2006 transaction are not legally inconsistent and contradictory.

As a result of the February 2007 transaction, defendant was found guilty of trafficking cocaine by sale but acquitted of trafficking cocaine by possession and possession with intent to sell or deliver cocaine. Similar to the December 2006 convictions, these verdicts were not mutually exclusive because the State presented sufficient evidence to support each element of the charged offenses. "It is firmly established that when there is sufficient evidence to support a verdict, 'mere inconsistency will not invalidate the verdict.'" *Id.* at 398, 699 S.E.2d at 914 (citation omitted). Thus, the trial court did not err in denying defendant's motion to dismiss.

Conspiracy Charges

Finally, defendant argues that his motion to dismiss should have been granted because the State failed to offer any evidence that the two conspiracies charged on each date were in any way separate and apart from each other. We agree with defendant on this issue and vacate one of the two conspiracy convictions for each transaction date.

"A criminal conspiracy is an agreement by two or more persons to perform an unlawful act or to perform a lawful act in an unlawful manner." *State v. Rozier*, 69 N.C. App. 38, 49, 316 S.E.2d 893, 900 (1984) (citation omitted). "[T]he gist of the crime of conspiracy is the agreement itself, not the commission of the substantive crime." *Id.* at 52, 316 S.E.2d at 902. "[W]here a series of agreements or acts constitutes a ***single*** conspiracy, a defendant cannot be subjected to multiple indictments consistently with the constitutional guarantee against double jeopardy." *Id.* (citation omitted) (emphasis in original). "To determine whether single or multiple conspiracies are involved, the 'essential question is the nature of the agreement or agreements, . . . but factors such as time intervals, participants, objectives, and number of meetings all must be considered.'" *State v. Wilson*, 106 N.C. App. 342, 345,

416 S.E.2d 603, 605 (1992) (quoting *Rozier*, 69 N.C. App. at 52, 316 S.E.2d at 902).

Defendant's conspiracy convictions for the December 2006 transaction were: (1) conspiracy to traffic cocaine by sale and (2) conspiracy to traffic cocaine by delivery. In order to charge defendant with both conspiracies, the State was required to show that, at or around 14 December 2006, defendant made one agreement with his co-conspirator to traffic cocaine by sale and another separate agreement with his co-conspirator to traffic cocaine by delivery.

The State's evidence for the 14 December 2006 transaction was that defendant arranged the cocaine sale over the telephone with Ferebee, counted the purchase money, and gave the cocaine to Ferebee to "weigh out." Additionally, based on his testimony that he and defendant received $200 for arranging the deal, Shawn Hardy was defendant's co-conspirator. Defendant's series of acts on this date were close in time, involved the same participants, were for the purpose of selling cocaine, and took place during a single meeting. Therefore, the evidence supports the conclusion that defendant made a single agreement to traffic cocaine by sale but does not support the conclusion that he made an additional agreement to traffic cocaine by delivery.

Similarly, the State would be required to show two separate agreements for both the January 2007 and February 2007 transactions. Defendant's conspiracy convictions for the January 2007 transaction were: (1) conspiracy to traffic cocaine by possession and (2) conspiracy to traffic cocaine by transportation. Defendant's conspiracy convictions for the February 2007 transaction were: (1) conspiracy to traffic cocaine by sale and (2) conspiracy to traffic cocaine by delivery.

The State's evidence for both transaction dates involved similar facts. Defendant arranged the deal, counted the money, and split $400 with Shawn Hardy during each transaction. The fact that defendant's acts were close in time on each date, involved the same participants, were for the purpose of a single objective, and were performed during a single meeting suggests that they constituted a single conspiracy. The evidence supports the conclusion that defendant made one agreement to traffic cocaine by transportation on 18 January 2007 and made one agreement to traffic cocaine by sale on 23 February 2007. We also note that the State concedes that one conspiracy conviction for each of the three transaction dates should be vacated. Thus, we conclude that there is evidence of only one

conspiracy on each transaction date and vacate three of the conspiracy convictions.

We hold that the trial court did not err in its instructions to the jury or in denying defendant's motions to dismiss. However, three of the six conspiracy convictions should be vacated. The judgment, therefore, is:

VACATED in part and remanded for resentencing; No error as to the remaining convictions.

Judges HUNTER, JR., Robert N. and BEASLEY concur.

Report per Rule 30(e).