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NO. COA05-260

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

STATE OF NORTH CAROLINA

v.

DAVID EUGENE MITCHELL, JR.

Forsyth County
Nos. 03 CRS 61810
03 CRS 61811

Appeal by defendant from judgments entered 15 September 2004 by Judge Judson D. DeRamus, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 20 October 2005.

Attorney General Roy Cooper, by Assistant Attorney General David N. Kirkman, for the State.

Stubbs, Cole, Breedlove, Prentis & Biggs, PLLC, by C. Scott Holmes, for defendant appellant.

McCULLOUGH, Judge.

Defendant (David Eugene Mitchell, Jr.) appeals from convictions and judgments for possession with intent to sell and deliver cocaine, attempt to traffic in cocaine by possession, and conspiracy to traffic in cocaine by possession. We hold that defendant received a fair trial, free from prejudicial error.

Facts

The evidence tended to show that defendant acted as a middleman between a cocaine supplier named Algernon Cash ("Cash") and individual drug buyers. As part of a drug-related

investigation, an informant with the narcotics division of the Forsyth County Sheriff's Office arranged a meeting between defendant and an undercover police officer. The informant told defendant that she had a friend coming down from Virginia who wanted to purchase two ounces of powder cocaine for \$900 per ounce.

The meeting between defendant and the undercover officer took place on the evening of 3 September 2003 in a Wal-Mart parking lot in Kernersville, North Carolina. When the officer arrived, defendant was talking to someone on a cellular phone. Defendant told the other party to the phone conversation that the buyer had just arrived and that he (defendant) would "be there in just a moment." Once defendant was off the phone, the officer told defendant that he wanted two ounces of cocaine and asked if the price was still \$900 per ounce. Defendant confirmed this price, at which point the officer arranged to pay for one ounce at a time via two exchanges and passed \$900 in cash to defendant. Defendant then left the Wal-Mart parking lot alone, drove to the parking lot of a nearby Blockbuster Video, and parked his vehicle next to a green Mitsubishi Montero registered to Cash. Defendant met with Cash for approximately two minutes, after which defendant drove back to the Wal-Mart parking lot and gave the officer a plastic bag containing a white substance. Defendant told the officer that the bag contained "an ounce of cocaine." The substance and plastic bag had a weight of 28.7 grams. The substance in the bag was later identified as 27.7 grams of cocaine.

After consummating this transaction, the officer told defendant that he was ready to obtain the second ounce. Defendant replied that Cash had left because defendant and the officer had arrived late, and Cash needed to get back to his girlfriend, who was angry with him. Defendant told the officer that they could get the second ounce in the morning. Defendant, the officer, and the informant then left the parking lot.

Based on the foregoing incident, defendant was charged with, and arrested for, *inter alia*, possession with intent to sell and deliver cocaine, attempt to traffic in cocaine by possession, and conspiracy to traffic in cocaine by possession, transportation, and sale and delivery. Defendant provided the following written statement to police:

I've been the middleman [between Cash and a buyer] about three or four different times between three to six months ago. . . . I met Cash and [the officer] at Wal-Mart in K'ville and was running late. He had already left by the time the guy with the money [the officer] got there. So, I called Cash and he had already came and gone. Usually the money man and me ride in different cars and they do the trading there. When I called Cash, he told me to get the money and meet him at Blockbuster Video. So, I got the money to meet him. I got the one ounce [of] cocaine and took it back to the buyer next door.

On two prior occasions in August of 2003, defendant had been involved in drug sale transactions with a person named Daniel Brown. In each of those transactions, Brown called defendant, who then called his contact. Then Brown and defendant drove together to an Arby's restaurant in Kernersville. In both transactions, defendant received \$700 from Brown, got out of the car and walked over to a green Mitsubishi Montero. Each time, defendant returned

with a bag containing what defendant described as being an ounce of cocaine, which defendant then gave to Brown. Brown measured each delivery with calibrated scales that he kept in his car, and each delivery weighed 29.4 grams.

While in jail awaiting trial, defendant wrote the following letter to Brown:

What's up prison bitch? Not shit here. Today's my Bday & I ain't even drunk. That sucks. We've been locked down all day any ways. . . . My lawyer came to see me today. He said that they are chargeing [sic] me with selling & delivering & conspiracy. They can prove that. The most time I'm facing is 35 to 42 months for the conspiracy & 10 to 12 months for the selling. It could be worst [sic]. He said I have a 50-50 chance, if I go to trial. I could get probation if I testify against Cash but I turned that down. I don't think he'd do it to me. I guess I'll be lifting alot [sic] of weight for the next 3 years.

In the letter, defendant also informed Brown that he was taking some GED classes, advised Brown to do the same so that they could be on the same floor of the jail, and indicated common acquaintances of Brown and defendant who were also being housed on the same floor of the jail as defendant.

Based on the foregoing evidence, a Forsyth County jury convicted defendant of attempted trafficking in cocaine by possession, conspiracy to traffic in cocaine by possession, and possession with the intent to sell and deliver cocaine. The trial court imposed consecutive prison sentences of fifteen to eighteen months and thirty-five to forty-two months for the attempted trafficking and conspiracy convictions, and a suspended sentence

and probation for the possession conviction. Defendant now appeals.

I.

In his first argument on appeal, defendant contends that the trial court lacked jurisdiction to try him for conspiracy to traffic in cocaine because the indictment charging him with this offense was fatally defective. This contention lacks merit.

The challenged indictment alleged the following:

The jurors for the State upon their oath present that on or about [3 September 2003] and in Forsyth County the defendant . . . unlawfully, willfully and feloniously did along with Algernon Lashalle Cash agree, plan, combine, conspire and confederate . . . to unite for the common object and purpose of committing and perpetrating the felony of trafficking in cocaine by possession, transportation, and sale and delivery of more than 28 grams but less than 200 grams of cocaine, which is included in Schedule II of the North Carolina Controlled Substances Act.

Defendant contends that the indictment was fatally defective because it alleged a conspiracy to traffic in cocaine by sale but failed to aver either the name of the person to whom defendant conspired to sell cocaine or that the name of such person was unknown. Significantly, however, conspiracy to traffic in cocaine by sale was never submitted to the jury. Rather, the trial court permitted the jury to consider only one of the alternative theories of conspiracy alleged in the indictment: conspiracy to traffic in cocaine by possession. Defendant does not allege that the indictment improperly alleged conspiracy to traffic in cocaine by possession.

The State is restricted at trial to proving the offenses alleged in an indictment; however, if an indictment sets forth alternative theories which would support a conviction of the offense charged, "the State has to prove only one of the alleged [theories] in order to sustain a conviction" *State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986) (addressing an indictment which alleged alternative purposes for a kidnapping). Moreover, an overly broad indictment often may be cured by "proper jury instructions that inform the jury of the conduct for which defendant may be convicted." *State v. Trejo*, 163 N.C. App. 512, 516, 594 S.E.2d 125, 128 (2004).

In the instant case, the trial court properly limited the State to proceeding on the conspiracy charge under a theory which had been properly set forth in the indictment. The corresponding assignment of error is overruled.

II.

In his second argument on appeal, defendant contends that there was a "fatal variance" between the evidence presented at trial and the indictments for attempted trafficking in cocaine by possession and conspiracy to traffic in cocaine by possession. This contention lacks merit.

The substantive offense of trafficking in cocaine is committed when a person "sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine" ¹ N.C. Gen. Stat. §

¹Curiously, the State chose to deviate from the statutory language and allege that "more than 28 grams of cocaine" was

90-95(h)(3) (2003). Attempt may be charged where there is "an intent to commit the substantive offense and an overt act which goes beyond mere preparation but falls short of the completed offense." *State v. Squires*, 357 N.C. 529, 535, 591 S.E.2d 837, 841 (2003), *cert. denied*, 541 U.S. 1088, 159 L. Ed 2d 252 (2004). Conspiracy may be charged where there is "an agreement, express or implied, between two or more persons, to do an unlawful act[.]" *State v. Gell*, 351 N.C. 192, 209, 524 S.E.2d 332, 343, *cert. denied*, 531 U.S. 867, 148 L. Ed. 2d 110 (2000).

In the instant case, the indictment for attempting to traffic in cocaine by possession alleged that defendant "did attempt to possess more than 28 grams of cocaine but less than 200 grams of cocaine." The indictment for conspiracy to traffic in cocaine by possession alleged that defendant "did . . . agree, plan, combine, conspire and confederate . . . to unite for the common object and purpose of committing and perpetrating the felony of trafficking in cocaine by possession . . . of more than 28 grams but less than 200 grams of cocaine." In his brief to this Court, defendant concedes that "[i]n the present case, all of the State's evidence showed that the defendant and the undercover officer agreed to an [exchange of] an ounce and not more than an ounce."

Defendant insists that the language in the indictments which refers to "more than 28 grams" is inconsistent with the evidence because "all of the evidence only supports an inference that

involved in each offense.

defendant attempted to produce exactly 28 grams (one ounce).” Regrettably for defendant, his conversion is erroneous, as an ounce is equivalent to 28.349 grams. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 1399 (1971). Therefore, given that the evidence showed that defendant believed himself to have been in possession of, and to have given to the officer, “an ounce” of cocaine, the evidence did not conflict with the indictments which alleged that defendant conspired and attempted to traffic in cocaine by possessing “more than 28 grams” of the drug.

The corresponding assignments of error are overruled.

III.

In his third argument on appeal, defendant contends that the trial court erred by admitting evidence concerning cocaine sales by defendant to Daniel Brown. This contention lacks merit.

Rule 404(b) of the North Carolina Rules of Civil Procedure provides that

[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003). Although admissible under Rule 404(b), evidence may be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless

presentation of cumulative evidence.” N.C. Gen. Stat. § 8C-1, Rule 403 (2003).

In the instant case, defendant was charged with attempt to traffic in cocaine and conspiracy to traffic in cocaine. These charges put defendant’s intent at issue with respect to the amount of cocaine involved. The evidence concerning defendant’s involvement in drug sales to Brown was probative of defendant’s intent while committing the offenses at issue in the instant case in that Brown twice sought to purchase “an ounce of cocaine” and defendant twice delivered 29.4 grams of cocaine to Brown. Therefore, the evidence concerning defendant’s cocaine sales to Brown were properly admissible under Rule 404(b). Further, we discern no abuse of discretion in the trial court’s refusal to exclude the evidence of defendant’s sales to Brown pursuant to Rule 403.

The corresponding assignment of error is overruled.

IV.

In his final argument on appeal, defendant contends that the trial court erred by permitting the jurors to take copies of defendant’s letter to Brown into the jury room during their deliberations without defendant’s knowledge or consent. During the trial, the letter was read into evidence and copies of the letter were published to the individual jurors. Unbeknownst to the judge or the parties, some of the jurors took their copies of the letter into the jury room during deliberations. Once the problem was discovered, the letter was immediately collected, and the trial

court instructed the jury as follows: "[T]he Court cannot at this point allow you to have the copy of the letter that was in your seat and there has been no authorization for having it, the copy of the letter."

It is error for a trial court to permit a jury to take evidence into the jury room without a defendant's consent. N.C. Gen. Stat. § 15A-1233(b) (2003); *State v. Taylor*, 56 N.C. App. 113, 115, 287 S.E.2d 129, 130-31 (1982). However, given the facts and circumstances of the instant case, we are unpersuaded that the trial court's error amounted to prejudicial error. See N.C. Gen. Stat. § 15A-1443(a) (2003) ("A defendant is prejudiced by [non-constitutional] errors . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice . . . is upon the defendant.").

The corresponding assignment of error is overruled.

No prejudicial error.

Judges ELMORE and LEVINSON concur.

Report per Rule 30(e).