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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-305

Filed: 4 February 2020

Wake County, Nos. 15 CRS 201561-62

STATE OF NORTH CAROLINA

v.

CARLOS ESPINOSA

and

STATE OF NORTH CAROLINA

v.

BARDOMIANO MARTINEZ

Appeal by Defendants from Judgments entered 12 October 2018 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 1 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorneys General Steven Armstrong and Scott K. Beaver, for the State.

Stephen G. Driggers for defendant-appellant Carlos Espinosa.

Mark L. Hayes for defendant-appellant Bardomiano Martinez.

HAMPSON, Judge.

Factual and Procedural Background

Carlos Espinosa (Espinosa) appeals from his conviction for Conspiracy to Traffic Heroin by Delivery, and Bardomiano Martinez (Martinez) appeals from his convictions for Trafficking in Heroin by Sale, Trafficking in Heroin by Delivery, Trafficking in Heroin by Possession, Trafficking in Heroin by Transportation, Conspiracy to Traffic Heroin by Delivery, and Possession of a Controlled Substance on Jail Premises. The Record before us, including evidence presented at trial, tends to show the following:

Sometime around 2007, the United States Drug Enforcement Administration (DEA) began investigating Miguel Duarte (Duarte), who allegedly had connections with Mexican drug cartels responsible for shipping large quantities of illegal drugs—such as heroin, cocaine, methamphetamine, and marijuana—to the United States, including North Carolina. After losing contact with Duarte, DEA rediscovered Duarte in 2013 at an apartment in Durham and began investigating him again. To facilitate this investigation, DEA partnered with the Raleigh Police Department’s Criminal Enterprise Unit and Drug Enforcement Task Force. Detective Mike Scully of the Raleigh Police Department (Detective Scully) was assigned to this Task Force and helped investigate Duarte and his associates. Over the next approximately two

years, Detective Scully and DEA obtained several wiretap orders allowing them to intercept and record calls made to and from Duarte's cell phone.

On 20 January 2015, Detective Scully and DEA intercepted a phone call between Duarte and Eriron Freeman (Freeman), showing Duarte intended to sell approximately four ounces of heroin to Freeman at a Dunkin' Donuts parking lot in Raleigh the following day. In this call, Duarte indicated he either would deliver the heroin himself or send an associate. Although Detective Scully did not know which Dunkin' Donuts the meeting would take place at, Detective Scully believed it would happen at a Dunkin' Donuts located on Capital Boulevard near Interstate 440 because this location had been used by Duarte in the past.

On the morning of 21 January 2015, Durham Police Narcotics Investigator Jonathan Butler (Officer Butler), who was assigned to Detective Scully's Task Force, set up surveillance in an unmarked vehicle at the Dunkin' Donuts on Capital Boulevard. Based on previous surveillance of Duarte, authorities knew of a white painter's van that "had been both at [Duarte's] residence as well as an apartment complex that was frequented by both [D]efendants in Durham." Shortly after arriving at the Dunkin' Donuts, Officer Butler observed the same white van with two Hispanic males in it pull into a parking spot next to a white SUV. Officer Butler repositioned his car so that he had an unobstructed view of the van and its occupants.

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Officer Butler testified he observed a black male, later identified as Freeman, get out of the white SUV and walk over to the passenger side of the white van. Officer Butler saw Freeman speak to the passenger in the van and saw hand movements inside the van. After a few seconds, Freeman left the side of the van and walked near a Best Western located by the parking lot. The white van then left the parking lot headed toward Capital Boulevard.

After the white van left the parking lot, Officer Butler got out of his vehicle and approached Freeman. Freeman fled after seeing another marked police car enter the parking lot and Officer Butler approaching. After a short foot chase, Officer Butler caught Freeman and placed him under arrest. Officer Butler also located four ounces of heroin Freeman had tossed in a nearby field during the pursuit.

During this chase, Deputy Henry Jenkins of the Wake County Sheriff's Office (Deputy Jenkins), another officer assisting the investigation, initiated a traffic stop of the white van. Deputy Jenkins testified Martinez was driving the van and that Espinosa was in the passenger seat. Both Espinosa and Martinez (collectively, Defendants) were cooperative with Deputy Jenkins and consented to a search of the van. While searching the van, Deputy Jenkins and his partner recovered two rolls of cash totaling \$2,000.00 from "the midst of [some] tools" in the back of the van. According to Deputy Jenkins, the money was located in a "place[] where you would not expect to find this amount of money."

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As part of a plea deal with the State, Freeman testified for the State at Defendants' trial. Freeman stated he began buying drugs from Duarte in approximately 2006. Freeman testified "sometimes [Duarte] would deliver the drugs himself, sometimes he would have other people deliver it." Freeman identified both Defendants as "runners" for Duarte and stated both Defendants had either delivered drugs to him or collected money from him "like over ten times" in the past.

Regarding the incident on 21 January 2015, Freeman testified he and Duarte agreed to meet at the Dunkin' Donuts on Capital Boulevard so Freeman could buy four ounces of heroin from Duarte for \$2,000.00. When the white van pulled into the parking lot that morning, Freeman stated Martinez was driving, Espinosa was in the passenger seat, and he was not surprised to see either Defendant "[b]ecause normally they was the delivery guy that brang it [sic]." Martinez handed Freeman the four ounces of heroin, and Freeman gave Martinez \$2,000.00 in cash. When asked whether Espinosa seemed confused by this transaction, Freeman testified, "No. He always knew, so he knew what was up. I deal with him a lot of times, so he knew exactly what was going on."

On 24 February 2015, Defendants were indicted on one count each of Conspiracy to Traffic Heroin by Delivery, Conspiracy to Traffic Heroin by Possession, and Conspiracy to Traffic Heroin by Transportation with the alleged coconspirators

being the other Defendant and Freeman.¹ On 23 May 2016, the State filed a motion to join the trials of Espinosa, Martinez, and Duarte, arguing each Defendant was “charged with accountability for each offense.” On 18 September 2017, the State filed a second motion to join the trials of the same three Defendants, adding that the offenses were “based on a series of acts or transactions connected together or constituting parts of a single scheme or plan committed by the defendants acting together.” Martinez was subsequently indicted through a superseding indictment on 3 July 2018 with one count each of Trafficking in Heroin by Sale, Trafficking in Heroin by Delivery, Trafficking in Heroin by Possession, Trafficking in Heroin by Transportation, Conspiracy to Traffic Heroin by Delivery, and Possession of a Controlled Substance on Jail Premises. Martinez’s Conspiracy charge alleged he conspired with Duarte only.

On 9 July 2018, the trial court heard the State’s motion for joinder of Martinez’s and Espinosa’s trial.² Both Defendants objected to joinder, claiming a likelihood of antagonistic defenses. The trial court, however, granted the State’s motion for joinder. After the close of all evidence at Defendants’ trial, Espinosa renewed his objection to joinder and argued joinder was improper because Espinosa and Martinez were charged with different conspiracies—specifically, Espinosa

¹ Martinez was also indicted on one count of Possessing a Controlled Substance in Prison or Jail.

² The State did not request joinder of Duarte’s trial.

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conspiring with Martinez and Freeman, and Martinez conspiring with Duarte. The trial court noted Espinosa's objection for the record but denied his motion to sever the trial. Martinez failed to renew his objection to joinder. Thereafter, both Defendants were found guilty of all charges, and the trial court entered Judgments against Defendants, sentencing both Defendants to 225 months to 282 months' imprisonment. Both Defendants gave Notice of Appeal in open court.

Issues

The issues on appeal are whether: (I) the trial court erred in denying Espinosa's Motion to Dismiss the Conspiracy charges; and (II) as to both Defendants, whether the trial court abused its discretion in joining Defendants' cases for trial.

Analysis

I. Espinosa's Motion to Dismiss

A. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "Upon defendant's motion for dismissal, the question for the Court is 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. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (emphasis added) (citation and quotation marks omitted);

State v. Brown, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984) (“Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” (citation omitted)). “If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion [to dismiss] should be allowed.” *Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455 (citation and quotation marks omitted). “In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted). However, “[w]hether the State has offered such substantial evidence is a question of law for the trial court.” *State v. McKinney*, 288 N.C. 113, 119, 215 S.E.2d 578, 583 (1975) (citations omitted).

B. Analysis

“In order to prove a criminal conspiracy, the State must show an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way.” *State v. Gray*, 56 N.C. App. 667, 672, 289 S.E.2d 894, 897 (1982) (citation omitted). However, “the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice.” *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (citation omitted). A conspiracy may be

shown by circumstantial evidence or a defendant's behavior. *State v Harris*, 145 N.C. App. 570, 579, 551 S.E.2d 499, 505 (2001) (citation omitted). "Conspiracy may also be inferred from the conduct of the other parties to the conspiracy." *State v. Jenkins*, 167 N.C. App. 696, 700, 606 S.E.2d 430, 432, *aff'd per curiam*, 359 N.C. 423, 611 S.E.2d 833 (2005) (citation omitted). "Proof of a conspiracy is generally 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." *Id.* at 700, 606 S.E.2d at 433 (alterations, citation, and quotation marks omitted).

In this case, the State had the burden to present substantial evidence tending to show Espinosa, Martinez, and Freeman agreed to commit each element of Trafficking Heroin by either delivery, possession, or transportation. Thus, the State was required to show Espinosa conspired to "(1) knowingly possess[, deliver,] or transport[heroin], and (2) that the amount possessed was greater than 28 grams." *State v. Shelman*, 159 N.C. App. 300, 305, 584 S.E.2d 88, 93 (2003) (citations omitted); *see also* N.C. Gen. Stat. § 90-95(h)(4)(c) (2017). Espinosa argues there was insufficient evidence to support the element of agreement. We disagree.

Here, the State presented evidence tending to show Duarte, or one of his associates, would provide delivery of four ounces of heroin for sale to Freeman on 21 January 2015. On that day, Espinosa and Martinez arrived at the Dunkin' Donuts on Capital Boulevard—a location Detective Scully knew Duarte had used for drug

deals in the past. Freeman approached their van, and Martinez and Freeman exchanged the heroin and cash. Freeman identified both Defendants as “runners” for Duarte and stated that both Defendants had either delivered drugs to him or collected money from him “like over ten times” in the past. Freeman also testified he was not surprised to see either Defendant “[b]ecause normally they was the delivery guy that brang it [sic].” Further, when asked whether Espinosa seemed confused by this transaction, Freeman testified, “No. He always knew, so he knew what was up. I deal with him a lot of times, so he knew exactly what was going on.”

We hold this evidence was sufficient to submit Conspiracy to Traffic Heroin to the jury. “A reasonable juror could infer that [two] grown men riding around in a [van] had a relationship and were conversing with one another.” *Jenkins*, 167 N.C. App. at 701, 606 S.E.2d at 433. When coupled with the fact Freeman identified Espinosa as a “runner” who had delivered drugs or collected cash “like over ten times” in the past and that Espinosa did not seem confused when Martinez handed Freeman four ounces of heroin, “there is also a reasonable inference that the subject of their conversation was a drug deal and not something more innocuous.” *Id.* A jury could reasonably infer Martinez would not provide Freeman with four ounces of heroin in exchange for \$2,000.00 if Espinosa was not involved in the drug deal. Further, the fact Freeman saw Espinosa in the van yet went through with the transaction supports an inference that Espinosa was a party to the conspiracy. *See id.* at 700,

606 S.E.2d at 432 (“Conspiracy may also be inferred from the conduct of the other parties to the conspiracy.” (citation omitted)). “In ‘borderline’ or close cases, our courts have consistently expressed a preference for submitting issues to the jury[.]” *State v. Jackson*, 103 N.C. App. 239, 244, 405 S.E.2d 354, 357 (1991) (citations and quotation marks omitted), *aff’d per curiam*, 331 N.C. 113, 413 S.E.2d 798-99 (1992). Viewed in the light most favorable to the State, there was sufficient evidence of a mutual, implied understanding between Espinosa, Martinez, and Freeman to support the elements of Conspiracy to Traffic Heroin by Delivery.

II. Joinder of Defendants’ Cases

Both Defendants contend the trial court abused its discretion by allowing the State’s motion to join Defendants’ trials. According to Defendants, joinder was fundamentally unfair because Defendants were not charged with the same conspiracies—specifically, Espinosa conspiring to traffic heroin with Martinez and Freeman, and Martinez conspiring to traffic heroin with Duarte. Defendants argue joinder was improper and prejudicial because of the potentially conflicting nature of their differing Conspiracy charges.

A. Standard of Review

“Whether defendants should be tried jointly or separately . . . is a matter addressed to the sound discretion of the trial judge.” *State v. Rasor*, 319 N.C. 577, 581, 356 S.E.2d 328, 331 (1987) (citation omitted). “A trial court’s ruling on . . .

questions of joinder or severance . . . is discretionary and will not be disturbed absent a showing of abuse of discretion.” *State v. Carson*, 320 N.C. 328, 335, 357 S.E.2d 662, 666-67 (1987) (citation omitted). “The trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.” *Id.* at 335, 357 S.E.2d at 667 (citation and quotation marks omitted).

B. Analysis

Upon written motion of the State, a trial court may join the trials for two or more defendants when the several offenses charged were “part of a common scheme or plan; . . . part of the same act or transaction; or . . . so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.” N.C. Gen. Stat. § 15A-926(b)(2) (2017). Here, the State moved to join Defendants’ trials because the evidence tended to show that Defendants were engaged in a common scheme or plan to traffic heroin and that their charges were part of the same act or transaction. Defendants argue the “paucity” of evidence against each Defendant and their conflicting respective positions required the trial court to deny joinder.

N.C. Gen. Stat. § 15A-927(c)(2) dictates a trial court must deny joinder of the defendants for trial whenever it is necessary to promote or achieve a fair determination of guilt or innocence. N.C. Gen. Stat. § 15A-927(c)(2) (2017). “The test

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is whether the conflict in defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial." *State v. Lowery*, 318 N.C. 54, 59, 347 S.E.2d 729, 734 (1986) (citation and quotation marks omitted). "Thus, the focus is not on whether the defendants contradict one another but on whether they have suffered prejudice." *Rasor*, 319 N.C. at 583, 356 S.E.2d at 332. "Prejudice would ordinarily result where codefendants' defenses are so irreconcilable that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." *State v. Nelson*, 298 N.C. 573, 587, 260 S.E.2d 629, 640 (1979) (citation and quotation marks omitted). North Carolina, however, "has a strong policy favoring consolidated trials of defendants accused of collective criminal behavior." *State v. Roope*, 130 N.C. App. 356, 364, 503 S.E.2d 118, 124 (1998) (citation and quotation marks omitted).

In the present case, both Defendants have failed to show that they were deprived of a fair trial. As detailed above, the State presented sufficient evidence to convict Espinosa of Conspiracy to Traffic Heroin by Delivery, Possession, or Transportation with Martinez and Freeman. *See State v. Barnes*, 345 N.C. 184, 220, 481 S.E.2d 44, 64 (1997) ("However, substantial evidence of the defendants' guilt may override any harm resulting from the contradictory evidence offered by them individually." (citation omitted)); *see also State v. Harrington*, 171 N.C. App. 17, 23, 614 S.E.2d 337, 344 (2005) (concluding where the State presented "ample evidence to

convict both defendants[,]" defendants could not show they were deprived of a fair trial).

Further, ample evidence existed to support Martinez's conviction for Conspiracy to Traffic Heroin with Duarte. Freeman testified that he had interacted with Martinez previously because Martinez was a "runner" for Duarte. The State also played several intercepted phone conversations between Martinez and Freeman, in which Martinez discussed various drug transactions, including prices and amounts, on behalf of Duarte. Specifically, in one conversation on 16 January 2015, Freeman and Duarte begin the conversation by discussing money Duarte is owed by Freeman from a previous marijuana transaction, and Duarte asks why Freeman has not talked to Martinez about this transaction yet. Later in the conversation, Martinez gets on the phone with Freeman and begins discussing the cost of heroin with Freeman. Lastly, on the phone call from Duarte to Freeman on 20 January 2015 discussing the planned heroin purchase for the next day, Duarte tells Freeman, "My guy was calling you[,]" which Freeman testified was a reference to Martinez. These conversations support a jury inference that Martinez worked for Duarte and intended to deliver heroin to Freeman on 20 January 2015. This inference is further supported by Freeman's testimony that it was Martinez who handed him the four ounces of heroin and took the \$2,000.00 in cash. Accordingly, substantial evidence supported Martinez's guilty verdict such that no reasonable probability existed that the jury

would have reached a different result had the Defendants' trial been severed. *See Barnes*, 345 N.C. at 220, 481 S.E.2d at 64 (citation omitted).

Although both Defendants assert joinder of their trial on separate conspiracy charges had resulted in confusing the jury, we also note that during deliberations the jury asked the following questions—"Can we get a definition of transportation" and "If the drug is picked up at a location but the passenger is unaware of the drug in the vehicle until part way to the stop, are they still considered conspiracy for transporting the drug[.]" These questions illustrate the jury understood the different theories of the State because only Espinosa was charged with a conspiracy to commit trafficking by *transportation*. Further, the jury's questions suggest they differentiated between the two different conspiracies because the second question implies the jury thought Espinosa might have only become aware of the heroin while en route to the Dunkin' Donuts yet was still guilty of conspiracy; whereas, the theory for Martinez was he conspired with Duarte long before getting in the van.

Further, besides briefly recalling Officer Scully during Martinez's case in chief, "neither [D]efendant put on a defense, and there is nothing in the record to suggest that this course of action was forced on either [D]efendant as a result of a position or strategy taken by the other [D]efendant." *State v. Lundy*, 135 N.C. App. 13, 17, 519 S.E.2d 73, 78 (1999). As in *Lundy*, "[w]e note that this is not a case where the State simply stood by and relied on the testimony of the respective defendants to convict

them.” *Id.* (alteration, citation, and quotation marks omitted). Rather, as detailed above, the State “came forward with the evidence necessary to establish the guilt of both [D]efendants.” *Id.* Accordingly, we conclude the joint trial of Defendants did not deprive either of a fair trial. *See id.*

Conclusion

Accordingly, for the foregoing reasons, we conclude the trial court did not err by denying Espinosa’s Motion to Dismiss for insufficient evidence and did not abuse its discretion by joining Defendants’ trial.

NO ERROR.

Chief Judge McGEE and Judge COLLINS concur.

Report per Rule 30(e).