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IN THE
COURT OF APPEALS OF INDIANA

WILLIAM TYRONE THOMAS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

No. 18A04-0611-CR-648

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Robert L. Barnet, Judge
Cause No. 18C03-0602-FB-05

August 3, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

William Tyrone Thomas ("Thomas") appeals his convictions for conspiracy to commit dealing in cocaine as a Class B felony and obstruction of justice, a Class D felony. Thomas contends that the trial court erred by denying his Motion for Change of Judge, that the trial court abused its discretion by admitting into evidence a cell phone found on Thomas at the time of his arrest, that the trial court abused its discretion by admitting into evidence the description of a drug dealer that was provided by a confidential informant who did not testify at trial, and that the evidence is insufficient to sustain his convictions. Finding that the trial court's denial of Thomas's Motion for Change of Judge was not clearly erroneous, that the trial court's admission of the cell phone into evidence was not an abuse of discretion, that the trial court's admission of the confidential informant's statement was erroneous but harmless, and that the evidence is sufficient to sustain Thomas's convictions, we affirm.

Facts and Procedural History

On February 8, 2006, Muncie Police Department Officer Brent Brown ("Officer Brown") met with a confidential informant ("C.I."), who provided Officer Brown with a list of potential drug dealers in the area. The C.I. then placed a call to one of the potential drug dealers, known as "Fet," and positioned the phone as to allow Officer Brown to hear "Fet" speak. "Fet" agreed to sell cocaine to the C.I., but no transaction occurred that day. However, the following day, the C.I. again called "Fet" while Officer Brown listened in, and "Fet" agreed to deliver cocaine to the C.I.'s residence in fifteen minutes. Between ten and fifteen minutes later, Thomas pulled up to the C.I.'s home in a white vehicle and

honked the horn. Officer Brown approached the vehicle and ordered Thomas to get out, but Thomas placed his hands below the steering wheel column and out of Officer Brown's sight. Thomas then brought a white object up to his mouth with his right hand and tilted his head back. Officer Brown again ordered Thomas to show his hands and exit the vehicle, and when Thomas did not comply, Officer Brown attempted to open the driver's side door. The door was locked, so Officer Brown broke the window, opened the door from the inside, and abruptly handcuffed Thomas. Thomas was noticeably foaming at the mouth after being arrested. Officer Brown found a cell phone on Thomas and several small pieces of cocaine in the white vehicle.

The State charged Thomas with: Count I, Conspiracy to Commit Dealing in Cocaine as a Class B felony;[1] Count II, Possession of Cocaine as a Class D felony;[2] and Count III, Obstruction of Justice, a Class D felony.[3] Thomas filed a Motion for Change of Judge based on the fact that the trial court judge sentenced Thomas's brother to a sixty-eight-year prison sentence five-and-a-half years before these charges were filed against Thomas. The trial court denied the motion and held a trial on the three pending counts against Thomas. The jury was unable to reach a unanimous verdict on any of the counts, and the trial court declared a mistrial. On September 27, 2006, a new jury was selected, and another trial was held on the matter. At trial, the State questioned Officer Brown about Thomas's arrest:

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[1] Ind. Code § 35-48-4-1(a)(1); Ind. Code § 35-41-5-2.

[2] Ind. Code § 35-48-4-6(a).

[3] Ind. Code § 35-44-3-4(a)(3).

Q. Did the [C.I.] describe Fet to you?

A. Yes.

Q. And what did she tell you?

[DEFENSE]: Your Honor, I'm going to object again on the basis of hearsay.

[STATE]: Judge, on a conspiracy case[,] the co-conspirator's statements in furtherance of the conspiracy are not hearsay, it's an exception to the hearsay.

THE COURT: The objected is noted and overruled. You may answer.

A. She stated Fet was a black male with corn rows and would be driving a white vehicle.

Tr. p. 91-92. When the State then moved to admit the cell phone found on Thomas into evidence, the following colloquy ensued:

[STATE]: Move [for] the admission of [Exhibit #1, the cell phone], Judge.

[DEFENSE]: Your Honor, could I ask preliminary questions?

THE COURT: Go ahead.

Q. Since February 9th when you say you took this phone from the Defendant, has it been out of your sight?

A. Yes it has.

Q. How do you know it's the same phone?

A. It was at the office. I remember it because it's a relatively newer phone compared to our Nextel phones we use at the Drug Task Force, so it stood out.

Q. Are you testifying that that's the only phone made like that?

A. No. At the time it stood out because ours were the older model so that's why I remembered this type of phone.

[DEFENSE]: Your, Your Honor, I'm going to object to the admission of this exhibit on the basis that he has not identified any chain how he knows it's, or why he knows it's the same phone as was taken, as he said was taken from [Thomas] on February 9th.

THE COURT: I think right now you're correct. I'll sustain your objection. One (#1) will not be admitted at this point.

Id. at 109-10. The State continued its direct examination of Officer Brown:

Q. How is it that you're able to recognize that phone as the same phone you took off of the Defendant?

A. If I could refer back to the property sheet . . . it's a Motorola Nextel phone. It wasn't put into the property room. Generally we give phones back to people. It was left on [an investigator's] desk until we needed it for trial on the last occasion.

Q. Okay. Does that phone look like the phone that you took off of the Defendant?

A. That's correct.

Q. Do you have any reason to believe that's not the phone you took off of the Defendant?

A. No.

Q. It's the same brand?

A. That's correct.

[STATE]: Move [for] the admission of [Exhibit] #1, Judge.

[DEFENSE]: Your Honor, I object on the same basis, improper identification.

[STATE]:	May I respond, Judge?
THE COURT:	Go ahead.
[STATE]:	It's not a fungible item, Judge. If it was fungible, I'd think that's a proper objection. I don't have to show a chain with it not being fungible. He said that it's, it's similar to or the same phone. I think it goes to the weight and not the admissibility at this point.
THE COURT:	I think the objection at this point does go to the weight, Counselor. One (#1) will be admitted. (Whereupon, State's Exhibit #1, a Motorola Nextel cell phone, admitted into evidence.)

Q. What did you do with that phone, if anything then, when you took it from [Thomas]?

A. Before he was transported to . . . [j]ail[,] I dialed the number with my phone that I had written down from the [C.I.] . . . and the phone I took off [Thomas] rang.

Id. at 110-12.

Officer Brown and two other police officers, who were also at the scene of Thomas's arrest, testified that Thomas's foaming at the mouth was consistent with someone who had just swallowed crack cocaine. Officer Brown testified that people often swallow cocaine when they are trying to hide or destroy evidence during a drug bust. Thomas testified as to his arrest at the location of the scheduled drug deal, as well. The jury found Thomas guilty on all three counts, and the trial court sentenced Thomas to six years on Count I and one year on Count III, the sentences to be served concurrently.[4] Thomas now appeals.

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[4] Upon motion by the State, and by agreement of Thomas, the trial court merged Count II into Count I for sentencing purposes, and no judgment of conviction was entered on Count II. *See* Appellant's App. p. 99.

Discussion and Decision

Thomas raises four issues on appeal: (1) whether the trial court erred by denying Thomas's Motion for Change of Judge; (2) whether the trial court abused its discretion by admitting into evidence a cell phone found on Thomas at the time of his arrest; (3) whether the trial court abused its discretion by admitting into evidence the description of a drug dealer that was provided by a C.I. who did not testify at trial; and (4) whether the evidence is sufficient to sustain Thomas's convictions for conspiracy to commit dealing in cocaine and obstruction of justice.

I. Change of Judge

Thomas first contends that the trial court erred by denying his Motion for Change of Judge. Specifically, Thomas argues that because the trial court judge previously sentenced Thomas's brother to a sixty-eight-year prison sentence, there is a reasonable basis to doubt the trial court's impartiality.

Indiana Criminal Rule 12(B) affords a criminal defendant the opportunity to request a change of judge for perceived bias or prejudice, and such a motion "shall be granted if the historical facts recited in the affidavit support a rational inference of bias or prejudice." We review the trial court's ruling on a motion for change of judge under the clearly erroneous standard. *Buggs v. State*, 844 N.E.2d 195, 205 (Ind. Ct. App. 2006), *reh'g denied, trans. denied*. The law presumes that a judge is unbiased and unprejudiced. *Id*. Prior judicial rulings generally do not support a rational inference of prejudice. *Voss v. State*, 856 N.E.2d 1211, 1217 (Ind. 2006). The mere assertion that certain adverse rulings by a judge constitute bias and prejudice does not establish the requisite showing.

Id.

Here, Thomas's contention is without merit. The facts recited in the affidavit show only that the trial court judge sentenced Thomas's brother to a sixty-eight-year prison sentence five-and-a-half years before these charges were filed against Thomas. The mere fact that the judge sentenced a sibling to prison does not create a rational inference of bias. *See id*. Thomas has failed to show how this fact could support a rational inference of bias on the part of the trial court judge and has, therefore, failed to overcome our presumption that a judge is unbiased and unprejudiced. As such, the trial court's denial of this motion was not clearly erroneous.

II. Admission of the Cell Phone

Thomas next argues that the trial court abused its discretion by admitting into evidence the cell phone found on him at the time of his arrest. Specifically, Thomas argues that there was not sufficient evidence connecting the cell phone to him and that the jury was left to speculate as to whether the phone was actually taken from him.

A trial court has broad discretion in ruling on the admissibility of evidence. *Barrett v. State*, 837 N.E.2d 1022, 1026 (Ind. Ct. App. 2005), *trans. denied*. We will reverse a trial court's decision on the admissibility of evidence only upon an abuse of discretion. *Id*. An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and the circumstances before the court. *Id*. A foundation for physical evidence is established where: (1) a witness can testify that the exhibit is "like" an item associated with the crime and (2) there is a showing that the exhibit is connected to the defendant and the commission of the crime. *Winbush v. State*, 776 N.E.2d 1219,

1223 (Ind. Ct. App. 2002), *trans. denied*. Non-fungible physical evidence, such as the cell phone here, requires a less stringent foundation, because any tampering with the evidence is more likely to be noticed due to the unique character of the evidence. *See Wrinkles v. State*, 690 N.E.2d 1156, 1160 (Ind. 1997).

Officer Brown testified that the cell phone proffered as evidence looked like the phone he confiscated from Thomas, that the phone was kept at the desk of an investigator, and that he recognized it because it was newer than the police officers' cell phones. This testimony was sufficient to establish the necessary foundation for the phone. As such, we cannot find that the trial court abused its discretion in admitting the cell phone into evidence.

III. Admission of Hearsay

Thomas further argues that the trial court abused its discretion by admitting into evidence the description of a drug dealer that was provided by a C.I. who did not testify at trial. Thomas contends that the evidence was inadmissible hearsay. Hearsay is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. Ind. Evidence Rule 801(c). Hearsay is generally inadmissible. *See* Ind. Evidence Rule 802. However, a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy is not hearsay. Evid. R. 801(d)(2)(E). Thomas argues that the C.I.'s description of "Fet," a black male with corn rows driving a white vehicle, was a statement regarding the identify of a co-conspirator, not a statement made in the course of and in furtherance of a conspiracy, and was therefore inadmissible hearsay. The State concedes as much.

However, the erroneous admission of evidence is considered harmless unless the substantial rights of the parties were affected. *Cohen v. State*, 714 N.E.2d 1168, 1175 (Ind. Ct. App. 1999), *trans. denied*. To determine whether reversal is mandated, we must address the probable impact of the improper evidence on the jury. *Id*. The erroneous admission of evidence is harmless when there is substantial independent evidence of guilt such that it is unlikely that the erroneously admitted evidence played a role in the conviction. *Id*.

Here, the admission of the C.I.'s description of "Fet" was harmless. Thomas's presence at the scene is undisputed, as three police officers, along with Thomas, testified to Thomas's arrest at the location of the scheduled drug deal. Thomas was at the scene during the small window of time in which the drug deal was to occur. Further, Officer Brown testified that he heard the C.I. and the potential drug dealer schedule a drug deal and that when he called the phone number of the potential drug dealer, the call went to Thomas's cell phone. Officer Brown also testified that he saw Thomas put a white object to his mouth and tilt his head back, and three police officers testified that Thomas's foaming at the mouth was consistent with someone who had just swallowed crack cocaine. Further, Officer Brown found cocaine in the vehicle Thomas was driving. Therefore, the admission of the C.I.'s description of "Fet" was harmless because there is substantial independent evidence to place Thomas at the scene of the scheduled drug deal, and there is substantial independent evidence of guilt such that it is unlikely that the erroneously admitted evidence played a role in Thomas's conviction. *See id*.

IV. Sufficiency of the Evidence

Thomas contends that there is insufficient evidence to sustain his convictions for conspiracy to commit dealing in cocaine and obstruction of justice. Our standard for reviewing questions of sufficiency of evidence is well settled. *Buckner v. State*, 857 N.E.2d 1011, 1017 (Ind. Ct. App. 2006). Upon a challenge to the sufficiency of the evidence supporting a conviction, this Court will not reweigh the evidence or judge the credibility of the witnesses, and we will respect the jury's exclusive province to weigh conflicting evidence. *Id.* While considering only the evidence and reasonable inferences that support the verdict, we must decide whether there is evidence of probative value from which a reasonable trier of fact could infer guilt beyond a reasonable doubt. *Id.* A mere reasonable inference from the evidence supporting a verdict is enough for us to find evidence to be sufficient. *Id.*

A. Conspiracy to Commit Dealing in Cocaine

Thomas argues that because no cocaine was found on his person, the evidence is insufficient to sustain his conviction for conspiracy to commit dealing in cocaine. We disagree. The crime of dealing in cocaine is committed when a person knowingly or intentionally delivers cocaine. Ind. Code § 35-48-4-1(a)(1)(c). The three elements needed to prove conspiracy are: (1) the defendant intended to commit the felony; (2) the defendant agreed with another person to commit the felony; and (3) either the defendant or the other person performed an overt act in furtherance of the conspiracy. Ind. Code § 35-41-5-2. When establishing proof of a conspiracy, the State is not required to establish the existence of a formal express agreement. *Dickenson v. State*, 835 N.E. 2d 542, 552 (Ind. Ct. App. 2005), *trans. denied*. It is enough if the minds of the parties come together

understandingly to bring about an intended and intelligent agreement to commit the offense. *Id*. An agreement can be inferred from circumstantial evidence, which may include the overt acts of the parties in furtherance of the criminal act. *Id*. The jury is usually required to resort to circumstantial evidence or reasonable inferences drawn from the examination of the circumstances surrounding the crime. *Id*.

Although no cocaine was found on Thomas, Officer Brown found cocaine in the vehicle Thomas was driving. Officer Brown also testified that he saw Thomas put a white object into his mouth before being arrested, and three police officers testified that Thomas's foaming at the mouth was consistent with someone who had just swallowed crack cocaine. Furthermore, Officer Brown listened in on a phone conversation in which the C.I. and a potential drug dealer scheduled a drug deal, and when Officer Brown called the phone number of the potential drug dealer from whom the C.I. was scheduled to purchase cocaine, the call went to Thomas's cell phone. Thomas also showed up at the scene of the scheduled drug deal and honked his horn at the time the drug deal was to occur. Thus, it was not unreasonable for the jury to find that Thomas intended to commit the crime of dealing cocaine, agreed to sell cocaine to the C.I., and drove to the C.I.'s home to complete the drug deal. As such, there is sufficient evidence to sustain Thomas's conviction for conspiracy to commit dealing in cocaine.

B. Obstruction of Justice

Thomas further contends that there was no evidence to support the charge of obstruction of justice. This claim is also without merit. The crime of obstruction of justice is committed when a person alters, damages, or removes any record, document, or

thing, with intent to prevent it from being produced or used as evidence in any official proceeding or investigation. Ind. Code § 35-44-3-4(a)(3). Here, Officer Brown testified that he saw Thomas swallow something white, and three police officers testified that Thomas's foaming at the mouth was consistent with someone who had just swallowed crack cocaine. Combined with the evidence that police officers were expecting a cocaine deal at the exact time and location of Thomas's arrest and that Officer Brown found cocaine in the vehicle Thomas was driving, it was reasonable for the jury to infer that Thomas altered, damaged, or removed evidence from the vehicle when he put the white object to his mouth and tilted his head back in an attempt to prevent such evidence from being used in an investigation.

Thomas finally argues that "there was no evidence that the [thing he] allegedly placed in his mouth was in a bag or was cocaine." Appellant's Br. p. 13-14. Essentially, Thomas contends that there is insufficient evidence to sustain his conviction for obstruction of justice because there is no evidence that the thing he allegedly altered, damaged, or removed was illegal. However, we note that the language of the obstruction of justice statute does not require the State to prove that the thing altered, damaged, or removed was illegal. *See* I.C. § 35-44-3-4(a)(3). The evidence is sufficient to sustain Thomas's conviction for obstruction of justice.

Affirmed.

SULLIVAN, SR. J., and ROBB, J., concur.