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IN THE COURT OF APPEALS OF INDIANA

SIMON WILLS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

No. 49A02-0701-CR-57

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patrick Murphy, Master Commissioner
Cause No. 49G20-0606-FB-117923

October 29, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Simon Wills appeals his convictions of conspiracy to commit dealing in cocaine, a Class B felony,[1] and dealing in cocaine, a Class B felony.[2] Wills argues the trial court erroneously admitted statements made by co-defendant James Travis and the remaining evidence was insufficient to support his convictions. Finding the statements properly admitted, we affirm.

FACTS AND PROCEDURAL HISTORY

On June 5, 2006, Indianapolis Police Detective Craig McElfresh and two other undercover detectives went to Travis' house to purchase cocaine. Detective McElfresh asked Travis if he was "good," which is the common way of asking if someone has cocaine. (Tr. at 8.) Travis said, "Yeah, do you have your cell phone on you?" (*Id*. at 11.) Detective McElfresh gave Travis his phone, and Travis dialed a telephone number. Travis told the person who answered, "I got a C note for you," meaning someone wanted to purchase $100 worth of cocaine. (*Id*. at 12.)

Travis went with the detectives to a Hardee's parking lot. A few minutes later a truck pulled up next to their car, and Travis said, "There he is." (*Id*. at 13-14.) Wills was driving the truck, and the only passengers were children. Detective McElfresh gave Travis $100, which Travis took to the driver's door of Wills' truck. Detective McElfresh observed hand movements between Travis and Wills. Within a few seconds, Travis returned with a substance that appeared to be cocaine.[3]

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[1] Ind. Code § 35-41-5-2.
[2] I.C. § 35-48-4-1(a).
[3] The State did not verify the substance was cocaine.

On June 27, 2006, Detective McElfresh and two other officers were driving down 10th Street in an unmarked police car when Travis flagged them down. The detectives stopped, and Travis got into their car. Detective McElfresh asked Travis if he was "good." (*Id*. at 17.) Travis said he was, asked for Detective McElfresh's phone, and dialed the same telephone number. Travis again told the person on the phone he had a "C note" for him. (*Id*. at 18.)

After this conversation, Travis directed the officers to a Burger King. About five minutes later, a car with three or four occupants pulled up next to them. Wills was in the front passenger seat. Travis said, "There he is," and went over to Wills' door. (*Id*. at 19.) Detective McElfresh observed hand movements between Travis and Wills, but did not see any of the other occupants moving their hands. After a few seconds, Travis returned with cocaine.

When the detectives signaled the deal was complete, uniformed officers initiated a traffic stop of the car in which Wills was riding. Wills was found with $100.

Wills was charged with conspiracy to deal cocaine, dealing cocaine, and possession of cocaine based on the June 5 events and with the same set of charges arising out of the June 27 incident. At the bench trial on December 1, 2006, a continuing objection was made, on hearsay grounds, to Detective McElfresh's testimony regarding statements Travis made. The trial court admitted them conditionally, pending the State's proof of a conspiracy. The trial court found Wills guilty of conspiracy and dealing

cocaine based on the events of June 27 and imposed two concurrent ten-year sentences.[4]

DISCUSSION AND DECISION

Wills asserts the trial court erred in admitting Detective McElfresh's testimony about Travis' statements because it was hearsay. "The decision to admit evidence is within the sound discretion of the trial court and is afforded a great deal of deference on appeal." *Bacher v. State*, 686 N.E.2d 791, 793 (Ind. 1997). We will reverse a ruling on hearsay evidence only if the court has abused its discretion. *Vehorn v. State*, 717 N.E.2d 869, 873 (Ind. 1999).

A statement made by a co-conspirator during the course and in furtherance of a conspiracy is not hearsay. Ind. Evidence Rule 801(d)(2)(E); *Wright v. State*, 690 N.E.2d 1098, 1105 (Ind. 1997). For the statement to be admissible, "the trial court must determine, by a preponderance of the evidence, that the declarant and the defendant were involved in a conspiracy, and that the statement was made during and in furtherance of that conspiracy." *Wright*, 690 N.E.2d at 1105.

> There must be independent evidence of a conspiracy, i.e., evidence other than the statement itself . . . . The existence of the conspiracy for purposes of Rule 801(d)(2)(E) may be demonstrated by direct or circumstantial evidence.
>
> To prove a conspiracy, the State need not prove the existence of a formal express agreement. "It is sufficient if the minds of the parties meet understandingly to bring about an intelligent and deliberate agreement to commit the offense."

Cockrell v. State, 743 N.E.2d 799, 804 (Ind. Ct. App. 2001) (citations omitted).

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[4] The trial court found possession merged with the other offenses and did not enter a conviction.

The State offered sufficient credible evidence Wills and Travis were engaged in a conspiracy. On two occasions, the detectives sought to buy cocaine from Travis. Both times Travis called the same telephone number and met with Wills shortly thereafter. Detective McElfresh observed hand movements between Wills and Travis, and Travis immediately returned with cocaine. These facts give rise to a reasonable inference that Wills arrived in response to Travis' calls and provided the cocaine to Travis -- in short, that the men were engaged in a conspiracy to deal cocaine.

Wills contends Travis' statements to the detectives could not have been in furtherance of a conspiracy. However, the detectives were undercover, and Travis believed he was making a sale. In other words, he was attempting to further the business of the conspiracy. Wills cites no authority for his proposition that such statements to a police officer cannot be in furtherance of a conspiracy.

Travis' statements were admissible against Wills under Evid. R. 801(d)(2)(E). Those statements, in combination with the other evidence favorable to the judgment, were sufficient to support Wills' convictions. *See Dinger v. State*, 540 N.E.2d 39, 39-40 (Ind. 1989) (We look to evidence favorable to the judgment, along with reasonable inferences therefrom, and affirm "if there is evidence of probative value from which a reasonable trier of fact could infer guilt beyond a reasonable doubt.").

Affirmed.

DARDEN, J., and BAILEY, J., concur.