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**IN THE
COURT OF APPEALS OF INDIANA**

RICHARD BRUCE STRONG,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 45A04-0705-CR-270

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas P. Stefaniak, Jr., Judge
The Honorable Natalie Bokota, Magistrate
Cause No. 45G04-0701-FB-00008

February 21, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Richard Bruce Strong appeals his conviction for dealing in cocaine as an accomplice. Specifically, he maintains that the trial court's erroneous admission of testimonial evidence from a witness not available for cross-examination violated his state and federal right of confrontation, that insufficient evidence exists to convict him of dealing in cocaine as an accomplice, and that the jury's verdicts convicting him of one count and acquitting him of another are inconsistent. Concluding that Strong's right of confrontation was not violated, that sufficient evidence exists to convict him of dealing in cocaine as an accomplice, and that the jury's verdicts are not inconsistent, we affirm the judgment of the trial court.

Facts and Procedural History

On January 17, 2007, Detectives Mark Detterline and Chris Berdine of the Hammond Police Department were patrolling the streets in an undercover minivan and attempting to purchase narcotics. The minivan had two front seats, two seats behind the front seats, a bench seat, and then an open space behind the bench seat. Detective Detterline drove the vehicle, while Detective Berdine hid out of sight in the open space behind the bench seat.

While patrolling, Detective Detterline saw Strong walking down the fifty-five hundred block of State Line Road and invited him over to the vehicle. Strong walked over and entered the minivan through the passenger-side front door. Detective Detterline asked Strong if he knew where he "could get some work." Tr. p. 122. "Work" is a street slang term for cocaine. *Id.* at 120. Thereafter, Strong directed Detective Detterline to

drive to a nearby Marathon gas station where he would try to locate some “work.” After arriving at the gas station, Strong got out of the minivan, made a telephone call, and then returned to the minivan and instructed Detective Detterline to drive to a nearby Mobile gas station. At the Mobile station, Strong got out of the minivan, spoke to somebody inside the station, returned to the minivan, and instructed Detective Detterline to follow a sport utility vehicle (“SUV”) that was also parked at the station. Detective Detterline followed the SUV to an apartment complex where Strong got out of the vehicle to talk to one of the individuals from the SUV. When Strong returned to the minivan, he informed Detective Detterline that the individual refused to deal with him fearing that Detective Detterline was a police officer.

Strong then instructed Detective Detterline to drive him to a laundromat so that he could get Detective Detterline some “work.” Detective Detterline drove to the laundromat and parked in a parking lot across the street. Strong got out of the minivan and walked across the street to the laundromat parking lot to talk to some individuals who were inside of a brown Cadillac. Strong got into the Cadillac momentarily and then got out of it with another man, later identified as co-defendant Dorman Simmons. Strong and Simmons walked back to and entered Detective Detterline’s minivan. Detective Detterline asked Simmons if he had the “work,” to which Simmons responded that he did. Thereafter, Detective Detterline and Simmons concluded a transaction in which Simmons delivered .35 grams of cocaine to Detective Detterline in exchange for twenty dollars. Thereafter, Simmons offered to sell Detective Detterline an additional amount of cocaine. Detective Detterline then gave the takedown signal to Detective Berdine who

emerged from the back of the minivan and arrested Simmons and Strong. In addition to the buy money, the police recovered an additional .24 grams of cocaine, which Simmons had on his person.

The State charged Strong with Count I, possession with the intent to deliver cocaine as a Class B felony,¹ and Count II, dealing in cocaine as a Class B felony.² Three days before the trial began, the State amended its information to add a habitual offender charge. A jury trial ensued, and the State proceeded under an accomplice liability theory³ and specifically argued that the evidence of the actual exchange between Detective Detteline and Simmons supported the dealing charge and that the additional cocaine that was found on Simmons' person after his arrest supported the possession with intent to deliver charge.

During the trial, Strong's counsel engaged in the following dialogue while cross-examining Detective Berdine:

Q. Sir, with respect to a plan between this unknown individual, who we later learn his name is Mr. Simmons, right? Do you have any evidence to present to this jury about a discussion between Mr. Strong and Mr. Simmons? Do you have any evidence?

A. A discussion between those two?

Q. Yes.

A. No.

Q. Do you have any evidence of a plan between the two of them to present to this jury?

¹ Ind. Code § 35-48-4-1.

² I.C. § 35-48-4-1.

³ Ind. Code § 35-41-5-4.

A. No.

* * * * *

Q. So, what you're saying is that my client is guilty because he walked across the street and talked to somebody you don't know about you don't know what and you don't know anything about any plan, right?

A. I'm saying he led Detective Detterline to three different locations, and then he went and met up with another black male who he then had bring cocaine to Detective Detterline.

Q. He had - - so he made him do that?

A. He must have talked him into doing it, because the guy did it.

Tr. p. 74, 75, 78, 79. Following this cross-examination, the State asked for permission to elicit testimony from Officer Berdine on the basis that Strong's counsel had left a misleading impression and thereby opened the door for Detective Berdine to testify regarding a statement from Simmons that would otherwise be inadmissible hearsay. The trial court agreed that Strong's counsel left a misleading impression by asking Detective Berdine if he had any evidence of a plan because Strong's counsel knew that the officer was precluded from revealing what he knew through Simmons' statement. The trial court overruled Strong's objection and allowed Detective Berdine to "indicate that he knows of a confession by [Simmons], but the specifics of what he would have said, detailed specifics, he can't get into." *Id.* at 81-82. After this ruling, the State further questioned Detective Berdine as follows:

Q. Did you read the complete file before today?

A. Yes, sir, I reviewed it.

Q. Did you read about a conversation that occurred between [Simmons] and the defendant in State Line?

A. What are you referring to?

Q. Did you read about their conversation?

A. There was a statement taken. Is that what you're referring to?

Q. Did you know - - in that file do you know about a conversation taking place between the defendant, [Strong], and [Simmons]? Do you know about that conversation?

A. No, not that I recall.

* * * * *

Q. Did the Hammond police file contain references to conversations between [Simmons] and [Strong] across State Line?

A. There was a statement taken.

Q. Just say yes or no.

A. Yes.

Q. So, there was conversation between [Strong] and [Simmons] across State Line?

A. Yes.

Q. So, you are aware of them discussing a proposed sale?

BY [DEFENSE COUNSEL]:

Objection, Judge, leading.

BY THE COURT:

Sustained as to that form of question.

Q. Part of that conversation did it discuss a proposed sale?

A. Yes.

Q. Thank you.

Id. at 85, 87, 88. At the conclusion of the trial, the jury found Strong guilty of dealing in cocaine as an accomplice and not guilty of possession with the intent to deliver cocaine as an accomplice. Strong moved for a judgment notwithstanding the verdict on the basis that the verdicts were inconsistent. The trial court subsequently denied Strong's motion and entered a judgment of conviction against Strong for dealing in cocaine as an accomplice. At sentencing, the trial court imposed an eight-year sentence. Strong now appeals.

Discussion and Decision

Strong argues the following three issues on appeal: (1) whether the trial court's erroneous admission of testimonial evidence from a witness not available for cross-examination violates his state and federal right of confrontation; (2) whether sufficient evidence exists to convict him of dealing in cocaine as an accomplice; and (3) whether the jury's verdicts are inconsistent. We address each issue in turn.

I. Admission of Hearsay Evidence

First, Strong maintains that his right of confrontation under Article I, § 13 of the Indiana Constitution and the Sixth and Fourteenth Amendments to the United States Constitution was violated when the trial court admitted hearsay "from a non-testifying witness who was not made available for face-to-face cross-examination." Appellant's Br. p. 7. He maintains that because Simmons did not testify at trial, the introduction of his statement through Detective Berdine's testimony constitutes hearsay and violates the state and federal Confrontation Clauses because he did not have an opportunity to cross-examine him. The State responds that the introduction of Simmons' statement is not

hearsay and does not implicate the Confrontation Clause because Strong's counsel opened the door for the testimony to be admitted, and further, any error in the admission of the statement constitutes harmless error in light of the other evidence establishing Strong's guilt. We agree with the State that any error was harmless.

The admission of evidence is within the sound discretion of the trial court, and we will not reverse a decision to admit evidence absent a manifest abuse of that discretion. *Goldsberry v. State*, 821 N.E.2d 447, 453-54 (Ind. Ct. App. 2005). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id.* at 454. In reviewing the trial court's decision, we will consider only the evidence in favor of the ruling and any unrefuted evidence in the defendant's favor. *Id.*

Hearsay is a statement, other than one made by the declarant while testifying at trial, offered in to evidence to prove the truth of the matter asserted. Ind. Evidence Rule 801(c). Hearsay is generally inadmissible. *See* Ind. Evidence Rule 802. However, "otherwise inadmissible evidence may become admissible where the defendant 'opens the door' to questioning on that evidence." *Jackson v. State*, 728 N.E.2d 147, 152 (Ind. 2000). Nonetheless, "the Confrontation Clause of the Sixth Amendment to the Federal Constitution prohibits admission in a criminal trial of testimonial statements by a person who is absent from trial, unless the person is unavailable and the defendant had a prior opportunity to cross-examine the person." *Fowler v. State*, 829 N.E.2d 459, 463 (Ind. 2005). The Sixth Amendment to the United States Constitution states, in pertinent part: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with

the witnesses against him[.] U.S. Const. amend. VI. Article I, § 13 of the Indiana Constitution also provides a criminal defendant the right of confrontation: “[i]n all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face[.]”

Here, we need not determine whether Strong’s right of confrontation was violated because even assuming that it was, Strong’s argument is still unavailing. “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.” *Cohen v. State*, 714 N.E.2d 1168, 1175 (Ind. Ct. App. 1999), *trans. denied*; *see also Garner v. State*, 777 N.E.2d 721, 725 (Ind. 2002) (“a denial of the right of confrontation is harmless error where the evidence supporting the conviction is so convincing that a jury could not have found otherwise.”).

Here, the admission of Detective Berdine’s testimony regarding Simmons’ statement is harmless because there is ample evidence that Strong assisted or aided Simmons in dealing cocaine. Strong directed Detective Detterline to several individuals with the intent of providing the detective with cocaine. Strong located Simmons, brought him across the street and into Detective Detterline’s minivan, and sat there quietly as Simmons sold cocaine to the detective. Therefore, considering all these facts, even if the admission of Detective Berdine’s testimony into evidence was improper, the admission of this testimony was harmless error because there was sufficient independent evidence to support Strong’s conviction.

II. Sufficiency of the Evidence

Strong also contends that the evidence is insufficient to support his conviction for dealing in cocaine as an accomplice. When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. *Jones v. State*, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the judgment and the reasonable inferences from that evidence to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. *Id.* “A conviction may be supported by circumstantial evidence alone.” *Schnitz v. State*, 650 N.E.2d 717, 721 (Ind. Ct. App. 1995).

In order to prove that Strong was guilty of dealing in cocaine as an accomplice, the State was required to prove that he knowingly or intentionally aided, induced, or caused Simmons to deliver cocaine. Ind. Code §§ 35-48-4-1(a)(1)(C), 35-41-2-4. Strong argues “that the State failed to prove beyond a reasonable doubt that [he] aided, induced, or caused Simmons to deliver cocaine to Detective Detterline.” Appellant’s Br. p. 14. We disagree.

Where evidence shows that an accomplice acted in concert with those who physically committed the elements of the crime, the evidence is sufficient to support a conviction on an accessory theory. *Taylor v. State*, 578 N.E.2d 664, 666 (Ind. 1991). The State is not required to show that the accomplice personally participated in the commission of each element of the offense. *Hopkins v. State*, 759 N.E.2d 633, 637 (Ind. 2001). Mere presence at the scene of a crime is not sufficient to support a conviction based on an accessory theory, but such presence may be considered in determining guilt. *Weyls v. State*, 598 N.E.2d 610, 614-15 (Ind. Ct. App. 1992), *trans. denied*. “Other

factors from which the trier of fact may infer the defendant participated in the crime include 1) failure to oppose a crime, 2) companionship with one engaged in criminal activity, and 3) course of conduct before, during and after the occurrence of the crime.” *Id.* at 615. Moreover, a fact-finder may consider affirmative conduct from which reasonable inferences of a common design or purpose to effect the commission of a crime may be drawn in determining whether a person aids another to commit an offense. *Rivera v. State*, 575 N.E.2d 1072, 1074 (Ind. Ct. App. 1991), *trans. denied*.

Here, Strong took several affirmative steps that show he knowingly or intentionally aided Simmons to commit the offense of dealing in cocaine. When asked by Detective Detterline if he could procure cocaine, Strong said that he could. Strong found Simmons, brought Simmons to Detective Detterline, and was present during the delivery of the cocaine from Simmons to the detective. Furthermore, Strong failed to oppose the execution of the transaction between Detective Detterline and Simmons. Strong acted in concert with Detective Detterline and Simmons and took affirmative steps to both initiate and consummate the deal. Sufficient evidence exists to support Strong’s conviction.

III. Inconsistent Verdicts

Finally, Strong argues that his conviction for dealing in cocaine and acquittal on possession with intent to deliver cocaine are fatally inconsistent and asks us to vacate his dealing conviction. We review verdicts for consistency and will take corrective action if necessary. *Owsley v. State*, 769 N.E.2d 181, 183 (Ind. Ct. App. 2002), *reh’g denied*, *trans. denied*. While perfectly logical verdicts are not required, “extremely contradictory

and irreconcilable verdicts warrant corrective action by this Court.” *Id.* (quotation omitted). Verdicts that initially may seem inconsistent on some level are not legally inconsistent if they can be explained by the fact-finder’s exercise of its power to assign the proper weight to and either accept or reject certain pieces of evidence. *Id.* For example, in *Jackson v. State*, the Indiana Supreme Court held that the defendant’s conviction for one count of rape was not inconsistent with his acquittal on a second count of rape that allegedly occurred at another time and place, although both counts were allegedly perpetrated against the same victim, because the jury was free to believe some portions of the victim’s testimony but reject other portions. 540 N.E.2d 1232, 1234 (Ind. 1989). Additionally, verdicts are inconsistent

only where they cannot be explained by weight and credibility assigned to the evidence. Thus, an acquittal on one count will not result in reversal of a conviction on a similar or related count, because the former will generally have at least one element (legal or factual) not required for the latter. In such an instance, the finder of fact will be presumed to have doubted the weight or credibility of the evidence presented in support of this distinguishing element.

Owsley, 769 N.E.2d at 183 (quotation omitted).

To convict Strong of dealing in cocaine as an accomplice as charged in this case, the State was required to prove that he knowingly or intentionally aided, induced, or caused Simmons to deliver cocaine. I.C. §§ 35-48-4-1(a)(1)(C), 35-41-2-4. To convict Strong of possession with intent to deliver cocaine as an accomplice as charged in this case, the State was required to prove that he knowingly aided, induced, or caused Simmons to possess cocaine with the intent to deliver. I.C. §§ 35-48-4-1(a)(2)(C), 35-41-2-4. That is, dealing cocaine as an accomplice required Strong to aid Simmons in the

delivery of cocaine, while possession with the intent to deliver as an accomplice required Strong to aid Simmons in the possession of cocaine.

Here, the jury could have found that Strong knowingly or intentionally aided Simmons in the delivery of cocaine but did not knowingly or intentionally aid him in the possession of cocaine. The facts establish that in his attempt to provide cocaine for Detective Detterline, Strong approached and entered a brown Cadillac from which Simmons and Strong both exited shortly thereafter. After exiting the Cadillac, Simmons and Strong walked over to and entered Detective Detterline's minivan and completed a transaction for the sale of cocaine. Simmons then asked Detective Detterline if he was interested in purchasing an additional amount of cocaine that Simmons had on his person. Based on this evidence, the jury could have concluded that Strong aided Simmons in delivering the cocaine but did not aid him in possessing the cocaine. Because dealing in cocaine as an accomplice only requires knowingly or intentionally aiding in the delivery of cocaine and not knowingly or intentionally aiding in the possession of cocaine, and because it was within the jury's province to find that Strong did not aid in Simmons' possession of the cocaine, we conclude that the verdicts are not fatally inconsistent.

Affirmed.

SHARPNACK, J., and BARNES, J., concur.