

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 0271

STATE OF LOUISIANA

VERSUS

MICHAEL CUMMINGS

Judgment rendered September 10, 2010.



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Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court Nos. 04-99-0168 & 07-01-0017
Honorable Don Johnson, Judge

* * * * *

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MICHAEL CUMMINGS

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BEFORE: KUHN, PETTIGREW, JJ., and KLINE, J. *pro tempore*.¹

¹ Judge William F. Kline, Jr., retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

PETTIGREW, J.

The defendant, Michael Cummings, was charged by bill of information with possession of cocaine in an amount greater than two hundred (200) grams but less than four hundred (400) grams in violation of La. R.S. 40:967F(1)(b) (count one), possession with intent to distribute cocaine in violation of La. R.S. 40:967A(1) (count two), and distribution of cocaine in violation of La. R.S. 40:967A(1) (count three).² The defendant pled not guilty and, after trial by jury, was found guilty as charged on each count. The State filed an Information to Establish Habitual Offender Status, seeking to enhance the defendant's sentence with respect to his count one conviction for violation of La. R.S. 40:967F(1)(b). After a hearing, the defendant was adjudicated a third-felony habitual offender with respect to count one and was sentenced to life imprisonment at hard labor without parole, probation, or suspension of sentence. The trial judge declined to impose sentences as to counts two and three. In a prior appeal this court affirmed the conviction on count one, the habitual offender adjudication, and the enhanced sentence, and remanded for sentencing on counts two and three. **State v. Cummings**, 2003-0008 (La. App. 1 Cir. 9/26/03), 855 So.2d 435 (unpublished), writ denied, 2003-2975 (La. 5/14/04), 872 So.2d 511.

Upon remand, the trial court vacated the defendant's conviction on count two based on double jeopardy issues raised in the defendant's application for post-conviction relief and ultimately imposed a sentence of five years imprisonment at hard labor without parole, probation, or suspension of sentence on count three. The defendant now appeals, seeking review and assigning error only as to count three regarding the sufficiency of the evidence and the trial court's denial of his motion for mistrial. For the following reasons, we affirm the conviction and sentence.

² The defendant was originally charged with two additional counts, in violation of La. R.S. 40:967, which were dismissed. At trial, the jurors were only apprised of the last three counts of the original bill of information, designated for ease of reference herein as counts one, two, and three, corresponding to the original counts three, four, and five.

STATEMENT OF FACTS

After his 1997 arrest in St. Martin Parish on drug charges unrelated to this case, Gerard Thomas began working undercover with officers in the Baton Rouge area, including Detective Page Devall, then a Baton Rouge police officer assigned to work with the federal Drug Enforcement Agency (DEA). Detective Devall acted as a case agent supervising Thomas. It was his understanding that he would be provided, in advance, all information about any drug contacts Thomas was making.

On June 10, 1998, Detective Devall received information from Thomas that led to the initiation of a drug investigation. Thomas indicated that he was in the process of negotiating a deal for the purchase of cocaine from the defendant. Detective Devall was present when Thomas, at his direction, placed a call to the defendant. The call was tape recorded and introduced into evidence at trial. Thomas told the defendant he wished to arrange for the purchase of 504 grams of cocaine, one-half to be purchased by Thomas, and the rest by a second party. In reality, there was no second party purchaser. The fictitious second buyer was part of a sting set-up.

The defendant agreed to supply the cocaine. Contemplating an arrest of the defendant after he supplied the drugs, Detective Devall formulated a plan to prevent the defendant from suspecting that Thomas had set him up for the arrest. The plan was that Thomas would meet with the defendant at Thomas's home and buy one-half of the drugs being delivered. Detective Devall supplied Thomas with \$5,500.00 to make his part of the controlled buy. The fictitious second buyer would not show up, leaving the defendant in possession of the other half of the drugs for the anticipated sale. At Detective Devall's direction, uniformed agents would then make what would appear to be a routine traffic stop of the defendant's car after he left Thomas's house, find the drugs, and place the defendant under arrest.

In furtherance of the sting operation, two agents were placed in Thomas's apartment, hidden in a bedroom, for Thomas's protection and the security of the government's money. The apartment was wired for sound and video monitoring to allow the two on-site agents to observe the drug transaction as it progressed. Thomas did not

indicate in any way that the defendant was working with him as an agent for law enforcement. Rather, Detective Devall considered the defendant to be the target of this particular set-up, although the overall drug investigation was aimed at capturing another large drug dealer and supplier.

At the appointed time, the officers surveilling Thomas's apartment saw the defendant arrive. Unexpectedly, he arrived as a passenger in a car owned and driven by another man, later identified as Courtland Davis. Detective Devall observed Davis hand the package containing cocaine to the defendant before the two entered Thomas's apartment. The sale from the defendant to Thomas was completed inside the apartment and captured on video and audiotape. The tape shows the defendant measuring out the cocaine and accepting payment from Thomas. When the defendant and Davis left Thomas's apartment, DEA agents followed and radioed uniformed officers to make a traffic stop. A Baton Rouge police officer then made an investigatory stop and observed drugs in plain view when Davis opened the glove compartment to retrieve registration papers. He placed the defendant and Davis under arrest. The remaining cocaine not purchased by Thomas was found in the vehicle in a cigar box. After his arrest, the defendant was transported to the police station and advised of his **Miranda** rights. The defendant confessed to obtaining cocaine from Davis and going to Thomas's apartment to deliver it.

ASSIGNMENT OF ERROR NO. 1 - SUFFICIENCY OF THE EVIDENCE

In this assignment of error, the defendant contends that the evidence adduced by the State was insufficient to support his conviction on count three, reiterating the entrapment argument raised for the first time in his prior appeal. At trial, the defendant claimed that he was working with Thomas in setting up an undercover drug transaction. Now the defendant argues that the State failed to prove that he was predisposed to commit the crime of distribution of cocaine.

At the outset, we note that this court's opinion in the original appeal addressed this issue as to the conviction on count one only, as the other counts were not properly

before this court for want of sentencing below. We now address the issue as to count three.

The standard of review for sufficiency of the evidence to support a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that the State proved the essential elements of the crime and defendant's identity as perpetrator of that crime beyond a reasonable doubt. See La. Code Crim. P. art. 821; **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); **State v. Johnson**, 461 So.2d 673, 674 (La. App. 1 Cir. 1984). When analyzing circumstantial evidence, La. R.S. 15:438 provides that the trier of fact must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Graham**, 2002-1492, p. 5 (La. App. 1 Cir. 2/14/03), 845 So.2d 416, 420. When a case involves circumstantial evidence and the trier of fact reasonably rejects a hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1 Cir.), writ denied, 514 So.2d 126 (La. 1987).

The defendant was convicted on count three of distribution of cocaine in violation of La. R.S. 40:967A(1). To convict a defendant of distribution of cocaine, the State had to prove that the defendant knowingly or intentionally distributed or dispensed a controlled dangerous substance classified in Schedule II, namely cocaine. By statute, the term "distribute," in pertinent part, means to deliver a controlled dangerous substance by physical delivery. La. R.S. 40:961(14). "Delivery" is also statutorily defined as "the transfer of a controlled dangerous substance whether or not there exists an agency relationship." La. R.S. 40:961(10). "Delivery" has been jurisprudentially defined as transferring possession or control. **State v. Martin**, 310 So.2d 544, 546 (La. 1975); **State v. Simon**, 607 So.2d 793, 801 (La. App. 1 Cir. 1992), writ denied, 612 So.2d 77 (La. 1993).

Detective Herbert Anny, an expert witness for the State in the field of street and mid-level drug transactions, testified that he had been contacted by Detective Devall to

assist with the drug sting. Detective Devall told him the plan was to protect Thomas's cover by having the defendant arrive and only sell half of the drugs in his possession. Later, a marked vehicle would stop the defendant and arrest him in possession of the other half of the cocaine order. Detective Anny and Trooper Collins were hiding in the front bedroom of the Thomas apartment while the transaction was ongoing. With the surveillance equipment they had set up, they could see and hear the entire transaction. Detective Anny had advised Thomas to act in a normal fashion so as not to alarm the defendant. At no time did Thomas advise Detective Anny that the defendant was assisting him in an effort to help law enforcement.

For the benefit of the jury, Detective Anny interpreted the street language used by the defendant, Davis, and Thomas as captured in the surveillance tapes. When the correct amount of cocaine was weighed, the remainder was handed back to Davis. The defendant told Thomas to contact the other buyer (the fictitious buyer who did not show up), and Thomas told him he would call him later. The defendant directed the transaction and took the money. Detective Anny indicated that if Davis had been the supplier and the defendant only a middleman, it would have been uncommon for Davis to accompany the middleman to a transaction and risk apprehension.

Corporal Don Stone, of the Baton Rouge City Police Department, was apprised of the details of the operation and was instructed to execute the traffic stop in a marked police car. Corporal Stone placed the defendant and Davis under arrest before conducting the search of the automobile. Based on Corporal Stone's testimony, upon his arrest, the defendant did not claim that he was an agent working with Thomas.

Defense witness Richard Chaffin, an attorney, testified that in 1997, the defendant arranged a meeting between himself, Thomas, and Chaffin so that Thomas could get advice on how to best handle charges against him. Chaffin advised Thomas to get local counsel and to offer to cooperate with law enforcement in making other arrests, all in an effort to reduce the jail time he might otherwise be required to serve. The defendant was present at the meeting and privy to the conversation.

Thomas, a convicted felon, also testified on behalf of the defendant during the trial. He claimed that when he came to Baton Rouge to assist law enforcement, he called the defendant for help but did not tell the police about the call. He also testified that he did not tell the defendant to bring anyone with him to the house on the date of the transaction at issue, yet he insisted that the defendant knew that he was working with the police to capture criminals.

When specifically asked if he told the defendant that the police would be present on the date in question and involved in the transaction in question, Thomas stated, "He already knew from prior [sic] that I was already working with the police, so I knew that he had to know that the -- they was going to be there." Thomas did not tell the defendant about the audio and video monitoring. Thomas further testified that he informed Detective Devall that it was really Davis's drugs and only his lack of communication with officers had resulted in the defendant's problem. Yet, he also admitted that he gave the police the defendant's name as a drug supplier because he had to furnish a name to them and he had to produce something in order to meet his end of the cooperation agreement relative to his 1997 arrest in St. Martin Parish. His story at trial was that he knew the defendant would have to bring someone with him to do the drug transaction and that he intended to try to straighten it out as to the defendant later. On cross-examination, however, he admitted that the transaction was primarily with the defendant.

According to Thomas's testimony, he did not apprise the defendant of details about the set-up because it was a rush deal and the police had indicated that if he did not produce something, the cooperation agreement would be terminated. Thomas testified that he had previously told Sergeant Kevin Devall that the defendant could set up some deals, although he did not advise Sergeant Devall that the defendant was cooperating in this sting. Thomas tried to get the defendant exonerated several days after the defendant's arrest. He thought he would be able to get the police to let the defendant go.

Detective Page Devall and Sergeant Kevin Devall testified in rebuttal. They denied that Thomas had ever reported that the defendant was working with him to set up cases for the State. Further, after his arrest, the defendant indicated that there were people he wanted to set up to try to get himself out of trouble. Rather than advising that he was working with Thomas, the defendant told officers of Thomas's location in an apparent effort to assist in getting Thomas arrested. Not until four or five days *after* the defendant's arrest was Detective Devall contacted by an attorney representing Thomas, who indicated that Thomas had signed an affidavit to the effect that the defendant was innocent. Upon interviewing Thomas, Thomas recanted and admitted that the defendant did not know this was supposed to be a drug sting.

In the instant appeal, the defendant reiterates Thomas's trial testimony that the defendant was working with Thomas as a State agent. Nonetheless, as noted in this court's prior opinion, the jury obviously rejected the defendant's claim at trial that he participated in the drug transaction in an effort to assist law enforcement. Thomas's testimony, the only testimony offered to support that defense, was contradicted by the testimony of the law enforcement officers involved in the sting operation. As the trier of fact, a jury is free to accept or reject, in whole or in part, the testimony of any witness. **State v. Richardson**, 459 So.2d 31, 38 (La. App. 1 Cir. 1984). Moreover, where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. **Richardson**, 459 So.2d at 38. The transaction at Thomas's apartment, wherein the defendant physically transferred cocaine, was captured on surveillance tapes. The defendant placed the narcotics in Thomas's hands and received money in exchange. A rational juror could have concluded that all of this evidence together, viewed most favorably to the State, proved beyond a reasonable doubt that the defendant knowingly and intentionally distributed or dispensed cocaine. In rejecting the entrapment argument as to count one, this court found in the previous opinion that the defendant could not raise this defense on appeal as he failed to make any objection during trial regarding his alleged entrapment, nor was entrapment argued at trial or

presented to the jurors through jury charges (citing **State v. Richardson**, 35,450, p. 16 (La. App. 2 Cir. 2/27/02), 811 So.2d 154, 164). Moreover, this court found that a rational trier of fact clearly could have concluded that the defendant failed to establish entrapment by a preponderance of the evidence. See **State v. Brand**, 520 So.2d 114, 117-118 (La. 1988). These findings equally apply to the entrapment argument raised herein as to count three. Thus, in the instant case, assignment of error number one lacks merit.

ASSIGNMENT OF ERROR NO. 2 – DENIAL OF MOTION FOR MISTRIAL

In the second assignment of error, the defendant contends the trial judge should have granted a mistrial when State witness, Detective Page Devall, used the phrase "long record" in response to a question posed by the prosecution. This issue was raised in the defendant's prior appeal and rejected by this court.³ Based on a thorough review of the record, this court could not conclude that the trial judge abused his discretion in denying the defendant's motion for a mistrial in this case. This court noted that the testimony did not clearly refer to a criminal record. This court further found that in the absence of a request for an admonition by defense counsel, the trial judge did not err in failing to admonish the jury to disregard the ambiguous remarks of the witness (citing **State v. McPherson**, 98-1207, p. 11 (La. App. 5 Cir. 3/30/99), 733 So.2d 634, 640). As to count three at issue in the instant appeal, we hereby adopt this court's prior findings regarding this issue. Accordingly, the second assignment of error herein lacks merit.

CONVICTION AND SENTENCE ON COUNT THREE AFFIRMED.

³ See the opinion in the prior appeal for a thorough discussion of the mistrial law and application thereof to the trial in the instant case.