IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00251 COA

RICKY LAMAR CARR **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	07/25/95
TRIAL JUDGE:	HON. EUGENE M. BOGEN
COURT FROM WHICH APPEALED:	WASHINGTON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	ROBERT E. BUCK
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: SCOTT STUART
DISTRICT ATTORNEY:	FELECIA LOCKHART
NATURE OF THE CASE:	CRIMINAL - FELONY - SALE OF COCAINE
TRIAL COURT DISPOSITION:	CONVICTION FOR SALE OF COCAINE (HABITUAL OFFENDER): SENTENCED TO A TERM OF 10 YEARS IN THE MDOC; SENTENCE TO BE SERVED WITHOUT ELIGIBILITY FOR PAROLE OR OTHER REDUCTION; DEFENDANT ORDERED TO PAY ALL COURT COSTS $192.50.
DISPOSITION:	AFFIRMED - 12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

BEFORE THOMAS, P.J., COLEMAN, AND HINKEBEIN, JJ.

HINKEBEIN, J., FOR THE COURT:

Ricky Lamar Carr was convicted in the Washington County Circuit Court for the sale of cocaine. For his offense, Carr was sentenced as a habitual offender to a term of ten years in the custody of the Mississippi Department of Corrections without the possibility of parole. Aggrieved by his conviction, Carr appeals to this court on the following grounds:

I. WHETHER THE EVIDENCE PRESENTED AND RECEIVED WAS LEGALLY INSUFFICIENT TO SUSTAIN A VERDICT OF GUILTY.

II. WHETHER THE VERDICT OF THE JURY IS CONTRARY TO AND AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Holding these assignments of error to be without merit, we affirm the judgment of the circuit court.

FACTS

On November 18, 1994 the Leland, Mississippi Police Department commenced an operation designed to apprehend participants in the local drug trade. Officer Gary Wyatt wired confidential informant Willie Neal, Jr. with an electronic body microphone and equipped his automobile with a video camera. Officer Wyatt then searched both Neal and his car to ensure against the presence of narcotics, provided Neal with marked currency, and instructed him to drive into the city's targeted area and attempt to buy from known dealers.

Shortly after being dispatched, Neal observed Carr standing along a nearby street. He approached and inquired as to where he might purchase cocaine. Carr responded by volunteering to direct Neal to the correct location and joining him in the car. Upon arriving at their destination, Carr asked for the "buy money." When Neal refused to hand over the funds, Carr exited the car and approached two men lingering on the home's porch. As the trio returned to the vehicle, Neal again inquired as to whether he might purchase a small quantity of crack cocaine. One of the men then exchanged a package containing the desired amount of the drug for Neal's marked twenty dollar bill. Meanwhile, Carr looked on, questioning Neal as to whether he was satisfied with the quality of the cocaine.

On those facts, Carr was subsequently indicted on two counts, conspiracy to sell as well as aiding and abetting the sale of cocaine. Following the trial court's grant of Carr's motion for directed verdict as to the conspiracy charge, he was convicted only of distributing cocaine.

ANALYSIS

I. WHETHER THE EVIDENCE PRESENTED AND RECEIVED WAS LEGALLY INSUFFICIENT TO SUSTAIN A VERDICT OF GUILTY.

On appeal, Carr claims that since the separate aiding and abetting and conspiracy charges on which he was indicted "necessarily require similar proof," the trial court must have erred in granting his motion for directed verdict with regard to only one of the two. More specifically, he argues that because the prosecution was required but failed in both instances to present evidence establishing "the existence of an agreement, a confederation and conscious joint action of the parties" this Court must reverse his distribution conviction. While failing to address Carr's contention directly, the State characterizes the evidence of Carr's guilt as substantial in light of case law wherein the Mississippi Supreme Court has affirmed convictions resulting from evidence at least as dubious as that

considered by this jury. Although we pause to note the important distinctions between the crime of conspiracy and that of aiding and abetting overlooked by Carr, we agree with the State's conclusion.

Both motions for directed verdict and motions for JNOV challenge the legal sufficiency of the evidence. ***Noe v. State,* 616 So. 2d 298, 301 (Miss. 1993)** (stating that a motion for directed verdict tests legal sufficiency of the evidence); ***McClain v. State,* 625 So. 2d 774, 778 (Miss. 1993)** (stating the same test for motion for judgment of acquittal notwithstanding). Since each requires consideration of the evidence before the court when made, this Court properly reviews the ruling only on the last occasion that the challenge was made in the trial court. ***McClain,* 625 So. 2d at 778**. In this instance, despite Carr's focus on the circuit court's denial of his motion for directed verdict, that final challenge occurred when the court denied his motion for JNOV. ***See e.g., Wetz v. State,* 503 So. 2d 803, 807-8 (Miss. 1987).**

Where a defendant moves for JNOV, the trial court considers all of the credible evidence consistent with the defendant's guilt, giving the prosecution the benefit of all favorable inferences that may be reasonably drawn from this evidence. ***McClain,* 625 So. 2d at 778.** This Court will reverse only where "reasonable and fair-minded jurors could only find the accused not guilty." ***McClain,* 625 So.2d at 778** (citing *Wetz,* 503 So. 2d at 808 n.3.); ***Harveston v. State,* 493 So.2d 365, 370 (Miss. 1986); *Fisher v. State,* 481 So.2d 203, 212 (Miss. 1985).**

With his argument, Carr fails to recognize that conspiracy is a complete offense in itself, distinct from the commission of the crime contemplated. ***State v. Thomas,* 645 So. 2d 931, 933 (1994).**Section 97-1-1 of the Mississippi Code explains that the conspiracy is complete when two or more persons agree to commit a crime. Successful achievement of the goal is unnecessary. ***See Davis v. State,* 485 So. 2d 1055, 1058 (Miss. 1986)**(stating that no overt act in furtherance of the objection is required for conviction); ***Norman v. State,* 381 So.2d 1024 (Miss. 1980); *Moore v. State,* 290 So.2d 603 (Miss.1974); *Pickett v. State,* 139 Miss. 529, 104 So. 358 (1925)**. However, each alleged conspirator must recognize that he is joining the other in a shared agenda and "[m]ust intend to further a common and unlawful purpose." ***Taylor v. State,* 536 So.2d 1326, 1328 (Miss. 1988). *See also Watson v. State,* 521 So.2d 1290, 1293 (Miss. 1988).** In contrast, "substantial knowing participation in the consummation of a sale or in arranging for the sale" is necessary to support a conviction for sale of a controlled substance pursuant to Miss. Code Ann. § 41-29-139 (Rev. 1993). ***Minor v. State,* 482 So.2d 1107, 1112 (Miss. 1986)** (quoting *Williams v. State,* 463 So.2d 1064, 1066 (Miss.1985)). One who counsels or encourages another in the commission of such a crime has aided and abetted its completion and is deemed a principal, subject to the same indictment and punishment as if he had actually completed the crime. ***Sayles v. State,* 552 So. 2d 1383, 1389 (Miss. 1989); *See also Minor,* 482 So.2d at 1111-12** (specifically holding such in the case of cocaine distribution despite the absence of personal profit from the sale); **Miss. Code Ann. § 97-1-1 (Rev. 1994).**

As these oft-cited maxims demonstrate, the essence of a conspiracy is mutual assent while aiding and abetting connotes cooperation. Our supreme court's recent decision in ***Johnson v. State,* 642 So. 2d 924 (Miss. 1994),** written with this in mind, addresses Carr's contention more directly. The case clearly, albeit impliedly, holds that prosecutorial failure to present sufficient evidence as to conspiracy is not necessarily indicative of such with aiding and abetting. ***Johnson,* 642 So. 2d at 928-9**. Like Carr, Johnson was indicted for conspiracy to sell cocaine as well as for the sale itself. ***Id.* at 926.** The

court affirmed Johnson's conviction for the completed sale. However, the accompanying conspiracy issue required a different result. While conceding that an agreement to sell cocaine could possibly be inferred by the combined acts of Johnson and his cohort, the court noticed no evidence suggesting that the other individual expected Johnson to arrive with potential cocaine purchasers. Finding insufficient evidence of the actors' recognition that they were entering into a common plan and knowingly intended to further its common purpose, the court reversed. ***Id.* at 928;**(citing *Griffin v. State*, 480 So.2d 1124, 1126 (Miss. 1985); ***McDonald v. State,* 454 So.2d 488 (Miss. 1984)).** With this conclusion, Carr's contention falls. While the prosecutorial proof necessary to support a conspiracy conviction closely resembles that required for aiding and abetting, the two are logically and legally separable.

With regard to the sufficiency of the evidence, *Johnson* is factually identical to the case sub judice with the exception of one detail. Johnson, too, got into an informant's car and directed him to an address at which he might purchase cocaine. Upon their arrival, Johnson accompanied the informant to the door and then remained present while the sale was consummated. ***Johnson,* 642 So. 2d at 928.** But while Johnson personally communicated the visit's purpose to those who answered the door, Carr did not. Nonetheless, a second case, ***Turner v. State,* 573 So. 2d 1340 (Miss. 1990),** makes the immaterial nature of this variance clear. Turner approached a vehicle in a similar fashion and instructed the informants inside to proceed up the street for a short distance. ***Turner,* 573 So. 2d at 1342.** Having moved up the street, Turner re-approached the vehicle, asked the informants to wait and someone would "take care" of them, and departed again. Shortly thereafter, someone else approached the vehicle, verified their purpose, and consummated the cocaine sale without assistance from Turner. The Mississippi Supreme Court's decision, finding sufficient evidence to support Turner's resultant aiding and abetting conviction, eliminates any remaining uncertainty as to the proper outcome of Carr's appeal. ***Id.*** If Turner's instructions to proceed and wait for assistance are "more than legally sufficient" to support an aiding and abetting conviction, then surely the same may be said for Carr's presence and expressed concerns regarding the sale. ***Id.* at 1342.** This assignment of error is therefore without merit.

II. WHETHER THE VERDICT OF THE JURY IS CONTRARY TO AND AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

As distinguished from the motion for JNOV (as well as a motion for directed verdict), a motion for new trial requests that the jury's verdict be vacated on grounds related to the weight of the evidence, not its sufficiency. ***May v. State,* 460 So. 2d 778, 781 (Miss. 1985).** The jury bears sole responsibility for determining the weight and credibility of evidence. ***Id.*** Therefore, a new trial is appropriate only where a verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand, would be to sanction unconscionable injustice. ***Wetz,* 503 So. 2d at 812.** Such a determination lies within the trial court's sound discretion. ***McClain,* 625 So. 2d at 778**. We will reverse and order a new trial only if accepting as true all evidence favorable to the prosecution, we determine that the trial court abused that discretion. ***Id.*** Any factual disputes are properly resolved by the jury and do not mandate a new trial. ***McNeal v. State,* 617 So.2d 999, 1009 (Miss. 1993); *Burrell v. State,* 613 So.2d 1186, 1192 (Miss. 1993).**

Again, Carr's situation closely resembles that described in *Johnson,* which also included a similar

"weight of the evidence" claim. ***Johnson v. State,*** **642 So. 2d 924, 928-9 (Miss. 1994)**(observing no potential for unconscionable injustice in leaving the guilty verdict undisturbed). Because the proof establishing a sale of cocaine is far more compelling than that supporting a conspiracy conviction, we hold the trial court's action to have been warranted by the evidence. This assignment of error is also without merit.

THE JUDGMENT OF THE WASHINGTON COUNTY CIRCUIT COURT OF CONVICTION OF THE SALE OF COCAINE AND SENTENCE OF TEN YEARS WITHOUT ELIGIBILITY FOR PAROLE OR OTHER REDUCTION IS AFFIRMED. ALL COSTS ARE ASSESSED TO WASHINGTON COUNTY.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.