COURT OF APPEALS
DECISION
DATED AND FILED

April 2, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1475-CR **Cir. Ct. No. 2011CF1011**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JORGE ARENAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: TIMOTHY D. BOYLE, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Jorge Arenas appeals from a judgment, entered upon a jury verdict, convicting him of being party to a crime (PTAC) of delivering cocaine. He contends that the matter should have been dismissed in the first

instance for lack of venue and then that there was insufficient evidence to establish his participation in the crime. Both his arguments fail. We affirm.

¶2 Arenas was charged in Racine County with a June 28, 2011 PTAC delivery of cocaine (>15 – 40 grams).[1] According to the complaint, Arenas supplied the drug to Eberto Rodriguez who delivered it to Vicky Gomez. The transaction began when Gomez, a confidential police informant working with City of Racine police, telephoned Rodriguez from Racine. An interim meeting between Gomez and Rodriguez as well as the completion of the deal occurred in Kenosha county. Arenas's only alleged individual involvement took place at his Kenosha auto body shop, where he allegedly gave Rodriguez the cocaine for Gomez and accepted the money from Rodriguez that Gomez paid.

¶3 Arenas moved to dismiss, asserting that the complaint failed to sufficiently allege venue in Racine county. The motion was denied. The case proceeded to a jury trial. Neither Gomez nor Arenas testified. The jury found Arenas guilty. He appeals. Additional facts will be supplied as necessary.

¶4 Arenas first contends the evidence was insufficient to establish venue in Racine county. "Venue is not an element of a charged crime, but merely refers to the place of trial." ***State v. Cavallari***, 214 Wis. 2d 42, 54, 571 N.W.2d 176 (Ct. App. 1997). Where two or more acts are required to commit an offense, the trial may be in any county in which any of the acts occurred. WIS. STAT. § 971.19(2) (2011-12)[2]; *see also* ***State v. Swinson***, 2003 WI App 45, ¶20, 261

[1] The complaint also charged Arenas with PTAC delivery of over forty grams on July 20, 2011. The jury acquitted Arenas on that charge so we address it no further.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

Wis. 2d 633, 660 N.W.2d 12. The State must prove venue beyond a reasonable doubt, but it "may be established by proof of facts and circumstances from which it may be inferred." ***Cavallari***, 214 Wis. 2d at 54 (citation omitted).

¶5 One way a person can be a party to the crime of delivering a controlled substance is by conspiring with another to deliver it. *See* ***May v. State***, 97 Wis. 2d 175, 189-92, 293 N.W.2d 478 (1980); *see also* WIS. STAT. § 939.05(2)(c). A conspiracy to deliver cocaine is shown when one who "with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime," "one or more of the parties to the conspiracy does an act to effect its object," and the agreement is to deliver at least some of the contraband to a third party. *See* WIS. STAT. § 939.31; *see also* ***Cavallari***, 214 Wis. 2d at 55. A conspiratorial agreement may be demonstrated by circumstantial evidence, and "a mere tacit understanding of a shared goal is sufficient." ***State v. Seibert***, 141 Wis. 2d 753, 762, 416 N.W.2d 900 (Ct. App. 1987).

¶6 Rodriguez's trial testimony strongly implied this was not the first time Arenas supplied drugs to him to sell to others. He testified he would tell Arenas someone wanted to buy cocaine and ask Arenas the price, Arenas would "contact other persons" then give him the drugs, he would give them to the buyer, who would give him money, and he would give the money to Arenas.

¶7 Rodriguez testified that in this instance, Gomez called him several times from Racine county to "tell my friend if he could sell her [a] certain quantity of cocaine. And for me to ask him what price was he asking…. She … asked me … to ask for a kilo." Rodriguez told her he did not know if his friend could get that amount or what the price would be. Gomez asked about a "sample." They arranged a June 17 meeting at a restaurant in Kenosha county and then a June 28

meeting in the parking lot of a Kenosha county Shopko. As police video- and audiotaped, Gomez paid Rodriguez $1200 for an ounce of cocaine Rodriguez had just obtained from Arenas at his nearby repair shop. Rodriguez then walked back to Arenas' business and gave Arenas the money from Gomez.

¶8 Arenas asserts that Racine county phone calls do not satisfy the "act" element. ***Cavallari*** persuades us otherwise. Cavallari was tried in Manitowoc county for conspiracy to deliver the marijuana he sold to a Manitowoc county resident who then resold it in the Manitowoc area. ***Cavallari***, 214 Wis. 2d at 44-46. The actual transactions occurred outside of Manitowoc county. ***Id.*** at 46. Arenas reads ***Cavallari*** to say that the State was permitted to charge Cavallari in Manitowoc county only because that is where the third-party deliveries occurred. This court plainly held, however, that venue was proper because one of the conspirators performed *acts* in Manitowoc county that promoted the object of the conspiracy—the buyer both arranged the transactions by phone from his home in Manitowoc county and sold the marijuana to other buyers in Manitowoc county. ***Id.*** at 55. We did not say that more than one act or a certain type of act is required.

¶9 Arenas also contends there was no evidence that he knew about Gomez's phone calls to Rodriguez and that, in any event, the phone calls "had nothing to do with" any agreement between him and Rodriguez. We disagree. Arenas and Rodriguez formed an agreement to sell cocaine to an unnamed third party, here, Gomez. Through the phone calls, Rodriguez and Gomez formed an agreement that Rodriguez would obtain cocaine for Gomez from his supply source, the unnamed Arenas. Regardless of whether Arenas knew the buyer's identity or was aware of specific phone calls, a jury reasonably could have inferred that a tacit agreement existed among all three players. Venue was proper in

Racine county where one of the conspirators performed acts that furthered the object of the conspiracy. *See* ***id.*** at 54-55.

¶10 Arenas next challenges the sufficiency of the evidence supporting the jury verdict. He contends there was no evidence that he instructed Rodriguez to actively seek out potential buyers, that Rodriguez actively did so, that Rodriguez informed him of the plan to meet Gomez, or that he was the unnamed supplier referred to on the recorded phone calls. He also contends there was no evidence citing specific dates or time frames to show that he and Rodriguez had prior similar dealings. Arenas particularly argues that Rodriguez's trial testimony was unreliable because it contradicted his testimony at the preliminary hearing. Arenas points to his acquittal on the second count as proof that the jury, too, disbelieved Rodriguez's testimony.

¶11 On review of a challenge to the sufficiency of the evidence, the test is not whether this court is convinced of the defendant's guilt beyond a reasonable doubt, but whether the jury, acting reasonably, could be so convinced by evidence it had a right to believe and accept as true. ***State v. Poellinger***, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990). Witness credibility and the weight of the evidence is for the jury. ***Id.*** at 504. We must accept and follow the inferences drawn by the trier of fact unless the evidence on which they are based is "incredible as a matter of law." ***Id.*** at 506-07.

¶12 We already have recounted the evidence reasonably suggesting that Arenas and Rodriguez had made similar prior arrangements to deliver drugs to others and establishing the plan to complete the transaction with Gomez. In addition, police officers involved in surveilling the Gomez transaction testified that Rodriguez drove around the Shopko parking lot and parked at the rear of

Arenas's auto repair shop, that Gomez arrived and parked in the Shopko parking lot, that Rodriguez approached Gomez's vehicle on foot, spent about nine minutes in her vehicle, then walked back to Arenas' shop, where he appeared to be waiting for someone. They could see Rodriguez using his cell phone. When Arenas arrived shortly thereafter, Rodriguez followed him into his shop and, in less than a minute, emerged and walked back to the Shopko parking lot. Rodriguez testified that he gave Gomez the cocaine he obtained from Arenas, that Gomez gave him the money for the cocaine, that he counted it and went right back to Arenas's shop and gave him the money from Gomez.

¶13 Juries may draw reasonable inferences based on the evidence. *See* ***id.*** at 506. The fact that events played out without a hitch reasonably suggests that the transaction occurred pursuant to a prearranged plan and followed the pattern of previous similar transactions between Rodriguez and Arenas. This evidence is not incredible as a matter of law. We therefore are bound to accept and follow the inferences the jury drew. ***Id.*** at 506-07.

¶14 It is undisputed that Rodriguez's trial testimony contradicted his earlier sworn denials of participation in drug transactions. But discrepancies between a witness's trial testimony and previous statements do not force the conclusion that he or she is wholly incredible. ***Ruiz v. State***, 75 Wis. 2d 230, 232, 249 N.W.2d 277 (1977). Even "wilfully false testimony on one point does not require the jury to reject all of the witness' evidence." ***Penister v. State***, 74 Wis. 2d 94, 103, 246 N.W.2d 115 (1976) (citation omitted). Rather, inconsistencies factor into the credibility determination. ***Kohlhoff v. State***, 85 Wis. 2d 148, 154, 270 N.W.2d 63 (1978). The jury must determine credibility based upon the witness's trial testimony, demeanor on the witness stand, and his or her stake in the outcome of the trial, ***State v. Hines***, 173 Wis. 2d 850, 861, 496

N.W.2d 720 (Ct. App. 1993), and may factor in a witness's motive to testify inconsistently, ***Kohlhoff***, 85 Wis. 2d at 154. The jury may choose to believe some, all, or none of the witness's testimony. ***Penister***, 74 Wis. 2d at 103.

¶15 In his preliminary hearing testimony, Rodriguez denied ever getting drugs from Arenas before July 20, 2011, and stated that on June 28 he was at Arenas' garage only for a car repair. Besides his previously described trial testimony, Rodriguez also testified that he is married with four children, he is not a United States citizen, and he understood a criminal charge meant he faced possible deportation. Even with his contrary preliminary hearing testimony, Rodriguez's trial testimony was not incredible as a matter of law.

¶16 Arenas lastly contends that the denial of his pretrial motion to dismiss based on venue was error. If it was, it was harmless.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.