COURT OF APPEALS
DECISION
DATED AND FILED

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Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

Nos. 98-3385-CR
98-3386-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES E. GRAY,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR., Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. James E. Gray appeals from the judgments of conviction for two counts of obtaining a controlled substance by fraud, and one count of attempting to obtain a controlled substance by misrepresentation, all as

party to a crime, following a bench trial. He argues that the evidence was insufficient for conviction on all three counts. We affirm.

I. BACKGROUND

¶2 The essential facts are undisputed. According to the trial testimony, for many years Gray had had a drug problem involving the abuse of controlled substances, one of which was hydrocodone. Gray had committed crimes to get drugs in the past. Prior to the offenses involved in this case, he had been caught attempting to obtain drugs at pharmacies by presenting fraudulent prescriptions, including at least one occasion in 1990 when he falsely claimed that he was getting the prescription filled for a friend of his girlfriend.

¶3 On or about July 17, 1994, someone presented a forged prescription for hydrocodone at the F&M Pharmacy in Brown Deer. On or about August 20, 1994, someone requested that the same pharmacy refill the prescription. The pharmacy filled the prescription each time. On September 26, 1994, Gray was apprehended at the same pharmacy after obtaining hydrocodone by having the pharmacy fill the same prescription a third time. Gray told police that he was picking up the prescription for a friend of his girlfriend.

¶4 The F&M Pharmacy, having retained the forged prescription after initially filling it on July 17, provided it to police on August 21, after filling it the second time. The evidence established that because the pharmacy had retained the prescription, Gray could not have touched it after it was first presented. Fingerprint analysis revealed Gray's right thumb print on the prescription.

¶5 On August 5, 1994, Gray presented a different forged prescription for hydrocodone at the Walgreens Pharmacy at the Grand Avenue Mall in

Milwaukee. Suspecting the prescription was forged, the pharmacist refused to fill it. Gray was arrested as he left the mall. Gray told police he had been at Walgreens to pick up the prescription for the sister of one of his friends.

¶6 Gray was not prosecuted for any offense in the September 26 incident when he was apprehended at the F&M Pharmacy. He was, however, convicted of two felonies–obtaining hydrocodone by fraud, party to a crime–for the July and August offenses at the F&M Pharmacy. Gray also was convicted of one misdemeanor–attempting to obtain hydrocodone by misrepresentation, party to a crime–for the offense at Walgreens.

II. ANALYSIS

¶7 Challenging the two felony convictions, Gray first argues that the evidence was insufficient to convict him of "attempting to obtain a controlled substance by fraud, as a party to a crime," because "the evidence did not establish that [he] intentionally set out to commit the crime and/or that he did not [sic] have any stake in the outcome of the crime." Although repeatedly referring to "attempting" to obtain hydrocodone, Gray apparently is directing his argument at the two felony convictions, contending:

> The only testimony offered at trial was that of the pharmacist, who was on duty on the two occasions, establishing that the people who came to pick up the prescriptions from the pharmacy were not the Defendant and that the pharmacist had never seen the Defendant until September 26, 1994.
>
> The only evidence offered at trial to identify the Defendant with allegedly attempting to obtain the fraudulent refills was that the prescription recovered by police on August 21, 1994 from the pharmacy, allegedly contained the Defendant's fingerprints. From the alleged identification of the Defendant's fingerprints, the State sought to prove that the Defendant committed the alleged offenses as a party to crime. However, … even assuming

> that the fingerprints collected from the prescription were those of the Defendant, the evidence adduced at trial cannot establish that the Defendant participated in the … attempts to obtain the prescriptions as a party to a crime.

(Record references omitted.) Gray emphasizes that "he was not present" at the F&M Pharmacy when the two offenses occurred, and contends that no evidence established that he "accompanied the accomplice to the pharmacist, offered advice regarding the method or opportunity for the commission of the crime, or even had anything to do with the prescription other than allegedly touching it." He adds that "[i]ntent cannot solely rest on fingerprints," and that "there is absolutely no evidence which suggest [sic] that [he] had any stake in the venture of an unknown actor."

¶8 We will not substitute our judgment for that of the trier of fact

> unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citation omitted). The standard is the same regardless of whether the evidence was direct or circumstantial, *see* ***id.*** at 503, and regardless of whether the case was tried to a jury or judge, *see* ***State v. Oppermann***, 156 Wis. 2d 241, 246-47, 456 N.W.2d 625 (Ct. App. 1990).

¶9 We conclude that the evidence was sufficient. Circumstantially, the evidence established that Gray had touched the fraudulent prescription before it was presented at the F&M Pharmacy. Gray's testimony established his history of

hydrocodone abuse and his history of similar drug offenses. During the period of the felony offenses at F&M, Gray was apprehended for the misdemeanor offense at Walgreens. And most significantly, approximately one month after the second offense at the F&M Pharmacy, Gray was apprehended at F&M after having the same prescription filled again. Thus, as the State correctly argues, "[t]he fact that Gray was involved at both ends of a scheme to obtain the same drug several times at the same place using the same prescription suggests that he was also involved in the middle when different persons used the prescription to get the drugs." We conclude, therefore, that the trial court reasonably "could have drawn the appropriate inferences" that Gray was a party to the crimes by engaging in a continuing scheme to obtain hydrocodone by using forged prescriptions. *See* ***Poellinger***, 153 Wis. 2d at 507.

¶10 Gray next challenges the two felony convictions by arguing that the evidence was insufficient because State witnesses testified that hydrocodone was a Schedule III controlled substance, not a Schedule II controlled substance "as alleged in the complaint." He contends, "If the State is relieved of proving that a controlled substance objectively qualifies under a particular Schedule and therefore the specific chemical make-up of the drug, then the State is reli[e]ved from proving the crime beyond a reasonable doubt." We conclude that Gray's argument has no merit.

¶11 Denying Gray's motion for a verdict of acquittal, the trial court concluded that whether hydrocodone was a schedule II or III controlled substance did not matter as long as the evidence proved it was a controlled substance. The court correctly explained that Gray could not have been prejudiced, particularly

because hydrocodone "happens to be a substance that's listed under both schedules" and "qualifies [as a controlled substance] under either schedule."

¶12 The trial court was correct. Under WIS. STAT. § 961.16(2)(a)7 (1997-98),[1] hydrocodone can be a Schedule II controlled substance. Under WIS. STAT. § 961.18(5)(c)&(d), hydrocodone also can be a Schedule III controlled substance. A court may take judicial notice of adjudicative facts "not subject to reasonable dispute," *see* WIS. STAT. § 902.01(2), and shall take judicial notice of state statutes, *see* WIS. STAT. § 902.02(1). In this case, the trial court did so, implicitly, in finding Gray guilty of crimes involving a controlled substance, and explicitly, in denying his motion to dismiss the felonies.

¶13 In ***State v. Sartin***, 200 Wis. 2d 47, 546 N.W.2d 449 (1996), the supreme court concluded that, in a possession of controlled substance case: "[T]he only knowledge that the State must prove beyond a reasonable doubt … is the defendant's knowledge or belief that the substance was a controlled or prohibited substance. The State is *not* required to prove the defendant knew the exact nature or precise chemical name of the substance." ***Id.*** at 61. Further, to the extent that "the nature of the controlled substance" may be material at all, it is "only material to the determination of the penalty to be applied upon conviction." ***Id.***

¶14 The fact that the information referred to hydrocodone as a Schedule II controlled substance while the witnesses referred to it as a Schedule III controlled substance made no difference. Hydrocodone can be a controlled substance under either schedule. Gray does not contend that his penalty was

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

affected in any way by whether hydrocodone was Schedule II or III. Indeed, the penalty is the same, regardless of the schedule. *See* WIS. STAT. §§ 961.43(2) and 450.11(9)(a). Moreover, neither at trial nor on appeal has Gray ever disputed that hydrocodone was involved in the offenses or that hydrocodone is a controlled substance. Gray has failed to offer any argument or authority to establish that the varying references to the schedules denied him any right in any way. The State proved beyond a reasonable doubt that Gray knew that hydrocodone was a controlled substance. *See* ***id.***

¶15 Gray also challenges the misdemeanor conviction, arguing that the evidence was insufficient because the State "failed to prove the specific chemical content of hydrocodone," and failed to establish that the *amount* of hydrocodone he obtained at Walgreens qualified the substance as a Schedule III narcotic. Other than quoting the statutory definition of a Schedule III controlled substance, Gray provides no authority for this argument. Essentially, he seems merely to be re-wrapping his challenge to the felony offenses. For the same reasons we have rejected his related challenge to the felony convictions, we reject this argument as well.

By the Court.—Judgments affirmed.

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