COURT OF APPEALS
DECISION
DATED AND FILED

January 20, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP299-CR **Cir. Ct. No. 2013CF1259**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY STEVENSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: CHARLES H. CONSTANTINE, Judge. *Affirmed.*

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Gregory Stevenson and Sunshine Ketchum supplied heroin to Joshua Molnar. Molnar suffered a near-fatal overdose after Stevenson or Ketchum injected him. A jury found Stevenson guilty of first-degree

recklessly endangering safety, manufacture/delivery of heroin (less than 3 grams), both as party to a crime (PTAC), and of two counts of bail jumping as a repeater. We reject Stevenson's appellate arguments and affirm the judgment and the order denying his motion for postconviction relief.

¶2 Stevenson first contends the evidence was insufficient to support the jury verdict on the charge of PTAC first-degree recklessly endangering safety. This court must affirm a verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶3 The State had to prove that, by either acting directly or intentionally aiding and abetting one who acted directly, Stevenson endangered the safety of another by criminally reckless conduct under circumstances that showed utter disregard for human life. *See* WIS. STAT. §§ 939.05, 941.30(1) (2013-14)[1]; WIS JI—CRIMINAL 400, 1345. Utter disregard for human life may "be established by evidence of heightened risk ... or evidence of a particularly obvious, potentially lethal danger," or by the defendant's actions and statements before, during, and after the crime. ***State v. Jensen***, 2000 WI 84, ¶17, 236 Wis. 2d 521, 613 N.W.2d 170.

¶4 The jury heard the following testimony. Stevenson, Ketchum, and Molnar are heroin addicts. Stevenson's and Ketchum's on-and-off boyfriend-girlfriend relationship had an apparent pimp-prostitute component as a means to

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

get heroin money. The trio got together as they had done on numerous other occasions to purchase and use heroin. Molnar showed up drunk, having had ten to fifteen drinks before arriving. Ketchum performed a sex act on him and put the $40 toward the drug purchase. Stevenson arranged the drug deal after numerous text messages to four of his usual suppliers. Stevenson and Ketchum knew Molnar's habit was escalating. Molnar does not inject his own heroin. Molnar testified that Ketchum usually did it for him and did on this occasion as well. Ketchum testified that Stevenson injected it this time because her hands were unsteady as she had not slept in three days.

¶5 Molnar lost consciousness after being injected as had happened twice before. While Ketchum tried to rouse him by putting bottles of ice water beneath his genitals, turning a water hose on him, and performing CPR, Stevenson was "standing there," "[p]acing back and forth … like he didn't really know what to do." Ketchum summoned her mother, who called 911.

¶6 While the mother continued CPR and waited for the ambulance, Ketchum and Stevenson "snuck" into the mother's house. The pair "rehearsed" a story for police that Ketchum injected Molnar because "with [Ketchum's] record [she] would get off easier than [Stevenson]." Ketchum agreed to lie because she loved Stevenson.

¶7 When police interviewed Molnar at the hospital, he told them Ketchum injected him. His recollection of some details seemed "fuzzy," as he was still a bit intoxicated and was "literally just short of actually dying on the street."

¶8 Stevenson was reluctant to reveal the identities or whereabouts of his drug suppliers or to turn his phone over to police. An investigating officer

"[a]bsolutely" believed that Stevenson "was not being truthful" and was "trying to throw [up] a smoke screen … to steer [them] in a wrong direction." Stevenson later wrote Ketchum a letter from jail asking her to "help him with this case."

¶9 Stevenson posits that the evidence is not sufficient to establish his guilt on this charge because "[i]t beggars belief to think that Josh Molnar would not know who injected heroin into his arm." Stevenson also urges that Ketchum's "self-serving testimony to the contrary" is suspect as it was given pursuant to a grant of immunity.

¶10 We disagree. The jury was not required to credit Molnar's testimony that Ketchum injected him. It is the function of the trier of fact, not this court, to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the basic facts to ultimate facts. ***Poellinger***, 153 Wis. 2d at 506. The jury reasonably could have concluded that Molnar's inebriation when injected and his post-overdose condition impaired his recall. Ketchum's testimony was not inherently or patently incredible; we thus may not substitute our judgment for the jury's. *See* ***State v. Saunders***, 196 Wis. 2d 45, 54, 538 N.W.2d 546 (Ct. App. 1995).

¶11 Viewing the evidence most favorably to the State and the conviction, we conclude that a jury reasonably could have inferred that Stevenson, who orchestrated the heroin deal, knew of Molnar's two prior adverse reactions. It reasonably could have found that he either injected Molnar, an intoxicated, known addict, when Ketchum could not or was willing to help her do so, and then failed to render aid when Molnar overdosed. The evidence was sufficient to find Stevenson guilty of PTAC first-degree recklessly endangering safety.

¶12 Stevenson next argues that he is entitled to a new trial because a reference made to the particular felony underlying his bail-jumping charge was prejudicial. The trial court properly denied his motion for a mistrial.

¶13 Whether to grant a motion for a mistrial lies within the sound discretion of the trial court. ***State v. Ross***, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 659 N.W.2d 122 That court must determine whether, in light of the whole proceeding, "the claimed error was sufficiently prejudicial to warrant a new trial." ***Id.*** We will reverse the denial of a motion for mistrial "only on a clear showing of an erroneous exercise of discretion." ***Id.***

¶14 The parties had agreed that the jury would hear no reference to a Walgreens robbery Stevenson committed. At trial, when the court began playing the videotape of Stevenson's statement to police, the jurors indicated they could not hear what was being said. The prosecutor said she thought it was "the way [Stevenson] is talking [on the video]." She asked the police officer to summarize Stevenson's statements when the video was over, and asked for a recess.

¶15 During the recess, defense counsel said she thought she heard Stevenson say "since the Walgreens robbery" on the tape. As she was "not sure [the jurors] picked it up," she said she "would rather not draw more attention to it" by asking the court to instruct them to disregard it if they had heard. Counsel nonetheless moved for a mistrial.

¶16 The court denied the motion. It reasoned that it had not heard the Walgreens robbery reference and did not think the jury had either and, further, with the bail-jumping charges, the jury already was aware of an underlying felony. These findings are not clearly erroneous. The court then forbade any further mention of the robbery, a proper less-drastic alternative to a mistrial. *See* ***State v.***

Bunch, 191 Wis. 2d 501, 512, 529 N.W.2d 923 (Ct. App. 1995). In light of the whole proceeding, the single, likely unnoticed, mention of the Walgreens robbery was not sufficiently prejudicial to warrant a new trial.

¶17 Stevenson also complains that the trial court erroneously instructed the jury as to PTAC. The court read the WIS JI—CRIMINAL 400 definition to the jury but inadvertently omitted the italicized language:

> This is the definition of aiding and abetting. A person intentionally aids and abets the commission of a crime when acting with knowledge or belief that another person is committing or intends to commit a crime, he knowingly either assists the person who commits the crime or is ready and willing to assist the person who commits the crime *and the person who commits the crime* knows of the willingness to assist.

Stevenson contends that, as read, he was denied due process and a fair trial.

¶18 As Stevenson did not object when the oral instruction was given, he has forfeited his right to have this issue reviewed as one of trial court error. *See* ***State v. Marcum***, 166 Wis. 2d 908, 916, 480 N.W.2d 545 (Ct. App. 1992). Review is proper only under the rubric of ineffective assistance of counsel. *See* ***id.***

¶19 Even if trial counsel should have objected, however, the claim fails. The instructions viewed as a whole did not misstate the law or misdirect the jury, *see* ***State v. Pettit***, 171 Wis. 2d 627, 638, 492 N.W.2d 633 (Ct. App. 1992), as the State's closing argument and the written instructions submitted for the jury's use during deliberations correctly stated the law. Stevenson has not shown the prejudice necessary to prevail on an ineffectiveness claim. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶20 We also reject the predicate claim. Whether a jury instruction violated a defendant's right to due process is a question of law subject to our de novo review. ***Pettit***, 171 Wis. 2d at 639. Relief is not warranted unless we are "persuaded that the instructions, when viewed as a whole, misstated the law or misdirected the jury." ***Id.*** at 638.

¶21 Stevenson contends the oral instruction did not inform the jury that the State had to prove that he communicated to Ketchum a willingness to assist her, thus allowing the jury to find him guilty simply because he was present. Taking the last point first, the jury was correctly instructed that PTAC liability does not lie if one was only a bystander or spectator and did nothing to assist the commission of a crime. *See* WIS JI—CRIMINAL 400. We presume the jury complied. ***State v. Marinez***, 2011 WI 12, ¶41, 331 Wis. 2d 568, 797 N.W.2d 399.

¶22 The law requires proof that Ketchum knew of Stevenson's willingness to assist but not that he specifically communicated it to her. *See* WIS JI—CRIMINAL 400. The court correctly instructed the jury that PTAC liability meant Stevenson could be convicted *either* by directly committing the crime, or by intentionally aiding and abetting the direct actor. There was credible evidence that Ketchum knew of Stevenson's willingness to assist because he organized the entire heroin deal and was aware that Molnar—who never self-injected—wanted to be injected, and she, his girlfriend, was unable on that occasion to do it. Consistent with the State's main theory that Stevenson was the direct actor, there was credible evidence that it was he who injected Molnar.

By the Court.—Judgment and order affirmed.

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