

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 23, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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Appeal No. 2010AP899-CR

Cir. Ct. No. 2008CF261

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHAM OKERY OMOT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dunn County: WILLIAM C. STEWART, JR., Judge. *Reversed and cause remanded with directions.*

Before Vergeront, P.J., Sherman and Blanchard, JJ.

¶1 VERGERONT, P.J. Cham Omot appeals the judgment of conviction entered upon a jury verdict finding him guilty of maintaining a drug trafficking place as party to the crime and possession with intent to deliver

tetrahydrocannabinols (THC or marijuana) as party to the crime. He also appeals the circuit court's order denying his motion for postconviction relief. Omot contends the evidence was insufficient to prove his guilt beyond a reasonable doubt for both crimes. In the alternative, he contends the circuit court erred in admitting certain evidence and this error was not harmless. We assume for purposes of our analysis on the sufficiency of the evidence that all the evidence was properly admitted. Even with this assumption, we conclude there is insufficient evidence to prove Omot's guilt for either crime beyond a reasonable doubt. We therefore reverse both convictions and remand with instructions to enter a judgment of acquittal on each charge.

BACKGROUND

¶2 In October 2008, Omot and Charles Schroedl began sharing a bedroom in an apartment in Menomonie. The apartment was leased by Britni Gregerson, who rented the room to Omot and Schroedl. Neither Omot nor Schroedl was listed on the lease. On November 5, 2008, the police executed a search warrant at the apartment. The police found Omot, Schroedl, and a woman in the bedroom Omot and Schroedl shared. Gregerson was also present in the apartment, though not in the same bedroom. The police found a pipe and marijuana in Gregerson's purse. In a dresser in Omot and Schroedl's bedroom, the police found several sandwich bags containing marijuana, empty sandwich bags, scales, plastic bags containing marijuana residue, two cell phones, and four drawings signed "Cham Omot." Each drawing depicts a person holding or shooting a gun or guns: two depict a man shooting a person labeled as either "snitch" or "informant" and one depicts a man holding guns in front of a building labeled "snitch shop." The police also found a gun in the basement of this

apartment. No fingerprints were found on the gun. The other items found were not tested for fingerprints.

¶3 The State charged Omot with maintaining a drug trafficking place in violation of WIS. STAT. § 961.42(1) (2007-08)¹ and possession with intent to distribute THC in violation of § 961.41(1m)(h)1., both as party to a crime. *See* § 939.05. The State also charged Omot with possession of a firearm by a felon in violation of § 941.29(2)(a).

¶4 Prior to trial, Omot filed a motion in limine to exclude the drawings on the ground that any probative value was outweighed by unfair prejudice. The court denied the motion. During trial Omot objected to the admission of a photograph of an object that a police officer testified looked like a brick of marijuana that was found on Schroedl's cell phone, and the court overruled this objection.

¶5 The jury found Omot guilty of the charges of maintaining a drug place and possession with intent to distribute and acquitted him on the firearm charge. Omot filed a post-conviction motion requesting that the two convictions be vacated due to insufficient evidence, or alternatively, a new trial be granted based on erroneously admitted evidence. The court denied this motion.

DISCUSSION

¶6 On appeal Omot contends that he is entitled to vacation of his convictions because there is insufficient evidence. In the alternative, he contends

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

he is entitled to a new trial because the four drawings and the photo of the purported marijuana brick were improperly admitted.

¶7 We first address the issue of the sufficiency of the evidence because, if we conclude the evidence is insufficient to support a conviction, we are precluded from remanding for a new trial under the double jeopardy clauses of the United States and Wisconsin Constitutions. *State v. Banks*, 2010 WI App 107, ¶43, ___ Wis. 2d ___, 790 N.W.2d 526 (citing *State v. Perkins*, 2001 WI 46, ¶47, 243 Wis. 2d 141, 626 N.W.2d 762). If the evidence is insufficient to support a conviction on a particular charge, we must reverse the judgment of conviction and direct the circuit court to enter a judgment of acquittal on that charge. *State v. Ivy*, 119 Wis. 2d 591, 609-10, 350 N.W.2d 622 (1984). We do this even though there may be another ground for reversing the conviction that would not preclude retrial. *Id.* In our analysis we will consider all the evidence presented to the jury, including the four drawings and the photo of the purported marijuana brick, which Omot contends were erroneously admitted. For the reasons we explain below, we conclude the evidence is insufficient to prove beyond a reasonable doubt that Omot committed either of the crimes of which he was convicted. Therefore, we do not address his claim that the drawings and the photo of the brick of marijuana were erroneously admitted.

¶8 The scope of our review on a claim of insufficient evidence is very narrow. We do not reverse for insufficient evidence “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.” *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). We give great deference to the jury’s determination and examine the record to find facts that support the jury’s decision to convict. *State v. Hayes*,

2004 WI 80, ¶57, 273 Wis. 2d 1, 681 N.W.2d 203. In reviewing the evidence, we adopt all reasonable inferences that support the jury’s verdict. *See Poellinger*, 153 Wis. 2d at 507. We also bear in mind that jurors are allowed to “draw logical inferences from the evidence, connecting its dots into a coherent pattern.” *State v. Sarnowski*, 2005 WI App 48, ¶12, 280 Wis. 2d 243, 694 N.W.2d 498 (citation omitted). However, “[a] jury cannot base its findings on conjecture and speculation.” *Foseid v. State Bank of Cross Plains*, 197 Wis. 2d 772, 791, 541 N.W.2d 203 (Ct. App. 1995) (quoting *Herbst v. Wuennenberg*, 83 Wis. 2d 768, 774, 266 N.W.2d 391 (1978)).

¶9 Whether the evidence is sufficient to support a conviction beyond a reasonable doubt is a question of law, which we review de novo. *See State v. Booker*, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676.

¶10 We first examine the evidence with respect to the charge of maintaining a drug trafficking place as a party to the crime. As the jury was instructed, the elements of this crime are (1) keeping or maintaining a structure or place (2) that was used for keeping or delivering THC, and (3) keeping or maintaining the place knowing that it was used for keeping or delivering THC. *See WIS JI—CRIMINAL 6037B*. The jury was instructed that to “keep or maintain” a structure or place is to exercise management or control over that place and does not require ownership. *See id.* The jury was also instructed that it must find either that Omot directly committed the crime of maintaining a drug trafficking place or that he was a member of a conspiracy to commit this crime or that he intentionally aided and abetted the commission of this crime. *See WIS JI—CRIMINAL 402*.

¶11 The State does not contend that Omot directly committed this crime or was involved in a conspiracy to commit this crime. The State’s theory, as we

understand it, is that Omot aided and abetted Schroedl's commission of this crime. The parties agree that a person 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 or she either assists the person who commits the crime, or is ready and willing to assist and the person who commits the crime knows of this willingness. WIS JI—CRIMINAL 405; *see also State v. Rundle*, 176 Wis. 2d 985, 1000 n.18, 500 N.W.2d 916 (1993). A bystander or spectator who does nothing to assist in the commission of the crime is not liable for aiding and abetting. WIS JI—CRIMINAL 405. Similarly, a person who is merely present while a crime is being committed and fails to stop or to report the criminal activity is not a party to the crime. *See Rundle*, 176 Wis. 2d at 1008 (parent who was present during physical abuse of his child and failed to intervene, report the abuse, or tell medical personnel how the child sustained her injuries, did not aid and abet the abuser).

¶12 The evidence at trial showed the following. Omot and Schroedl were friends and shared a bedroom. When the police searched the apartment, Omot, Schroedl, and another person were in the bedroom. The smell of marijuana emanated from the bedroom. Marijuana and paraphernalia were found in drawers in a dresser in the room, and the paraphernalia suggested that marijuana in a larger quantity than was found had been processed and packaged in the bedroom. There was no evidence that personal belongings of Omot were found in the drawers that held the marijuana and paraphernalia. In a different drawer of the same dresser, police found the four drawings, which were signed "Cham Omot" and dated April 2008.

¶13 Gregerson testified that Schroedl had given her marijuana and that she knew Schroedl sold marijuana to others. However, she testified she was not aware he sold marijuana in the apartment. She never saw Omot use the scale,

sandwich bags, or marijuana and never saw either Schroedl or Omot sell marijuana. She rented the bedroom of the apartment she leased to Omot and Schroedl and they paid her; they split the rent three ways.

¶14 In addition to this testimony, there were the four drawings and the photo of the purported marijuana brick from Schroedl's phone. The State also introduced a photo from Omot's phone showing him holding a gun, which a State's witness testified was not the gun found in the apartment,² and photos of Omot and Schroedl together.

¶15 There is no question that the evidence is sufficient to prove beyond a reasonable doubt that the apartment was used by Schroedl for keeping THC. The State argues that it is reasonable to infer from the evidence that Omot knew that marijuana was being used and distributed in the apartment and that Omot "had to know if Gregerson was using marijuana given to her by Schroedl." Bearing in mind that "a finding of guilt may rest upon evidence that is entirely circumstantial," *Poellinger*, 153 Wis. 2d at 501, we agree with the State that a reasonable jury could have inferred that Omot was aware there were drugs in the apartment and, specifically, in the bedroom. A reasonable jury could have inferred this from the presence of the drugs and paraphernalia in the bedroom and from Omot's friendship with Schroedl. Omot concedes this.

¶16 However, Omot disagrees that it is reasonable to infer that he knew Schroedl gave Gregerson marijuana. He points to the fact that there was no

² The State's theory on the firearm charge, of which Omot was acquitted, was that Omot possessed the gun found in the basement. Apparently, the State originally believed the gun in the photo was the same as the gun found in the basement, and it was not until after opening statements that the State learned otherwise.

evidence that Gregerson ever used marijuana in Omot's presence or in the apartment, or that, even if Omot knew Gregerson used marijuana, he knew Schroedl had given her the marijuana she used. But even if we agree with the State and conclude it is reasonable to infer that Omot knew Schroedl gave Gregerson marijuana, this is simply alternative evidence that Omot knew Schroedl was engaging in conduct satisfying the second element of the crime of maintaining a drug trafficking place: using the apartment for delivering as well as for keeping THC. *See* WIS JI—CRIMINAL 6037B.

¶17 As for the first element of the crime—which requires exercising management or control of the place—we are uncertain from the State's brief what evidence the State believes establishes this element. *See* WIS JI—CRIMINAL 6037B. Omot contends there is no evidence and no reasonable inferences from the evidence that he exercised management or control over either the apartment or the bedroom, and the State does not appear to refute this in its responsive brief. This is in keeping with the State's position, as we understand it, that Schroedl committed this crime and Omot aided and abetted him. But the State does not explain what evidence there is that Schroedl had management or control over either the apartment or the bedroom. However, even if we assume there were reasonable inferences from the evidence that satisfy this element beyond a reasonable doubt, we disagree with the State that there are reasonable inferences from the evidence that prove beyond a reasonable doubt that Omot aided and abetted Schroedl in this crime.

¶18 As proof of Omot's aiding and abetting Schroedl, the State relies on the photograph of Omot holding a gun and on the four drawings. The State contends that the photo showing Omot holding a gun conveys a "mentality [that makes] it more likely that Omot would have been ready and willing to assist his

drug dealer roommate.” The four drawings, according to the State, “necessarily conveyed to [Schroedl] Omot’s willingness to assist, even if he was not already the official ‘enforcer.’” The State asserts this message is a reasonable inference from the drawings whether or not they were self-portraits.³

¶19 We agree with Omot that it is not reasonable to infer from his photo and the four drawings that he conveyed to Schroedl that he was ready and willing to assist Schroedl in keeping or distributing marijuana in the apartment. With respect to the photo, there is nothing to connect Omot’s display of the gun in the photo with a drug trafficking operation run by Schroedl. Beyond the fact that the photo was found on Omot’s phone, the only testimony placing it in context was that the photo was taken on November 4, 2008, the day before the police search; there was no evidence of who took the photo or for what purpose. It is nothing more than speculation to conclude that, because Omot is holding a gun, he is ready and willing to act as an “enforcer” for Schroedl in a drug trafficking operation. In addition, there is no evidence, or reasonable inferences from the evidence, that Schroedl knew of this photo. If the State is relying on Omot’s readiness and willingness to assist, there must be evidence both that Omot was ready and willing to assist *and* that Schroedl knew of this willingness. *See* WIS JI—CRIMINAL 402. However, the evidence was that the photograph was found only on Omot’s phone.

³ The parties debate how closely the facts of this case align with *State v. Rundle*, 176 Wis. 2d 985, 500 N.W.2d 916 (1993). In *Rundle*, the defendant watched his wife abuse their young child and he did not stop her or report the abuse. *Id.* at 992-93. The court concluded that his actions did not support a finding beyond a reasonable doubt that he had either aided or intended to aid his wife in the commission of the crime. *Id.* at 1008. In *Rundle* there were no photos or drawings presented to attempt to prove aiding and abetting. Therefore, the facts of *Rundle* do not provide guidance for analyzing the State’s argument in this case—that the photo and drawings give rise to reasonable inferences of aiding and abetting.

The State presented no evidence that Schroedl ever saw the photo, and it is not reasonable to infer from the evidence presented that Schroedl saw the photo.⁴

¶20 With respect to the drawings, it is reasonable to infer that Omot drew them. However, it is nothing more than speculation to infer that Omot's depictions of a person shooting "snitches" or "informants" show that Omot was ready and willing to assist Schroedl as an "enforcer" in a drug trafficking operation at the apartment leased by Gregerson. These drawings are dated six months before Omot and Schroedl moved into the bedroom where the marijuana and paraphernalia were found. There is no evidence that Omot and Schroedl even knew one another in April 2008. While it is reasonable to infer that Schroedl saw these drawings (because they were in the same dresser that Schroedl evidently used), it is not reasonable to infer that the drawings had anything to do with Schroedl or a drug trafficking operation run by him in that apartment. The State contends it is simply "connecting the dots" to view these drawings as conveying to Schroedl Omot's willingness to act as his "enforcer." However, "connecting ... dots into a coherent pattern" depends upon "drawing logical inferences from the evidence." *Sarnowski*, 280 Wis. 2d 243, ¶12 (citation omitted). It is not logical to infer from the drawings that Omot was expressing a willingness to act as Schroedl's "enforcer"; nor is it logical to infer that, assuming Schroedl saw the drawings, they would convey Omot's willingness to assist him in that manner in connection with a drug trafficking operation based in the apartment. *Cf. Rundle*, 176 Wis. 2d at 990 (State must prove verbal or overt conduct that objectively

⁴ It may be that the State does not mean that Omot's photo conveyed to Schroedl Omot's willingness to act as an enforcer for Schroedl. It may be that the State means that the photo is simply evidence of Omot's readiness and willingness to do that, and the drawings, not the photo, conveyed that to Schroedl. We address the drawings in the next paragraph.

aided in execution of the crime and defendant's conscious desire or intent that this conduct would yield such assistance). We emphasize that the State does not point to any evidence besides this photo and the drawings as a basis for inferring that Omot conveyed to Schroedl a willingness to act as his "enforcer" for a drug trafficking operation in the apartment.⁵

¶21 In support of the State's argument that the evidence is sufficient to show aiding and abetting by Omot, the State relies on the doctrine of legal intent. Under this doctrine, legal intent to aid and abet the commission of a crime may be inferred from the defendant's conduct even though the defendant did not intend to commit the specific crime charged. *State v. Grady*, 93 Wis. 2d 1, 7, 286 N.W.2d 607 (Ct. App. 1979) (citing *State v. Cydzik*, 60 Wis. 2d 683, 697, 211 N.W.2d 421 (1973)). This rule addresses the intent that may be inferred from the foreseeable results of voluntary actions taken by a person. The rationale is that a person is presumed to intend the natural and probable consequences of his or her knowing and voluntary acts. *Cydzik*, 60 Wis. 2d at 697. The State apparently means that Omot's conduct in making the drawings, when considered together with a photo of Omot holding a gun, is conduct from which the jury could reasonably infer an intent to act as the person in the drawings is acting with respect to the drug trafficking operation in the apartment.

¶22 However, the drawings and the photo are not analogous to the conduct from which courts have inferred intent to aid and abet a crime. *See*

⁵ The State asserts without elaboration that, from the absence of evidence that either Omot or Schroedl was employed, "there was a strong inference that ... selling drugs paid the rent." The only evidence offered for this proposition is the testimony of Gregerson that she did not know if either Schroedl or Omot had employment. It is, at best, a weak inference from her testimony that drug money paid Omot's rent.

Grady, 93 Wis. 2d at 5-7 (pointing a gun to assist another in stealing a radio shows intent to participate in the robbery); *Cydzik*, 60 Wis. 2d at 696-97 (participating in an armed robbery shows intent to assist the other participant in a shooting or killing that occurs during that robbery); *Ivy*, 119 Wis. 2d at 593 (participating in a robbery may, depending on the facts and circumstances, show intent to participate in an armed robbery); *State v. Asfoor*, 75 Wis. 2d 411, 428-29, 249 N.W.2d 529 (1977) (participating as the driver in a plan to injure the victim shows intent to assist in causing the injury). Nor are the drawings and photo analogous to the conduct in an attempt case on which the State also relies: *State v. Stewart*, 143 Wis. 2d 28, 420 N.W.2d 44 (1988) (repeatedly requesting that a person give up his change, while blocking that person's exit, shows intent to commit a robbery). According to the State, drawings depicting violent conduct can reasonably be viewed as "pictorial admissions" that the drawer has participated in or is willing to participate in that violent conduct. Whether or not this proposition may be true in some circumstances—for example, where someone creates an image of a particular violent crime that he or she is planning or has participated in—in this case there is no nexus between the particular images and the charged conduct, even when all of the evidence is considered together. The most that can be said of the drawings is that a reasonable jury could infer that Omot has an interest in, and perhaps supports the idea of, violence against people who cooperate with police. At most, the photo adds only the inference that Omot possessed or had access to a gun during a time when he had the interest in violence against persons who cooperated with police.

¶23 We conclude that the evidence and reasonable inferences from the evidence, viewed most favorably to the verdict, do not prove beyond a reasonable

doubt that Omot aided and abetted Schroedl in the commission of the crime of maintaining a drug trafficking place.

¶24 We now turn to the crime of possessing a controlled substance (THC) with intent to deliver, as party to the crime. The elements of this crime are: (1) knowingly having actual physical control of THC; (2) knowing or believing the substance is THC; and (3) intending to transfer or attempt to transfer THC to another. *See* WIS JI—CRIMINAL 6035. The State’s theory is that Omot also aided and abetted Schroedl in committing this crime. The applicable definition of aiding and abetting is the same as we have set forth in paragraph 11 above.

¶25 Based on the evidence we have already discussed, a reasonable jury could decide that Schroedl committed the crime of possessing THC with intent to deliver. The State’s argument on the evidence proving that Omot aided and abetted in the commission of this crime is the same as for the drug house crime. For the reasons we have already discussed, we conclude the photo and the drawings do not permit a reasonable inference that Omot was ready and willing to assist Schroedl in possessing THC with intent to deliver and do not permit a reasonable inference that Schroedl knew of any such willingness on Omot’s part. In addition, as we have already explained, the doctrine of legal intent does not support a different result.

CONCLUSION

¶26 We conclude the evidence is insufficient to prove beyond a reasonable doubt that Omot was guilty of maintaining a drug trafficking place as party to the crime and insufficient to prove beyond a reasonable doubt that Omot was guilty of possession with intent to deliver THC as party to the crime. We

therefore reverse the judgment of conviction on both charges and remand with directions to enter a judgment of acquittal on both charges.

By the Court.—Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

