COURT OF APPEALS
DECISION
DATED AND FILED

February 6, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2447-CR **Cir. Ct. No. 2010CF409**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MITCHELL A. PERNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: ELLIOTT M. LEVINE, Judge. *Affirmed*.

Before Lundsten, Higginbotham and Kloppenburg, JJ.

¶1 PER CURIAM. Mitchell Perner appeals a judgment of conviction for first-degree reckless homicide, as a repeater, for delivery of a fatal dose of heroin to his girlfriend, Shelby Perkins. Perner also appeals the denial of a postconviction motion. He argues that the evidence was insufficient to establish a

"delivery" because he and Perkins "simultaneously acquired possession" of the heroin for their joint use. He also requests a new trial in the interest of justice because the jury was not instructed "that there is no transfer or delivery between joint possessors of heroin." Finally, Perner argues that his trial counsel was ineffective for failing to cross-examine the heroin dealer about the fact that he had been granted immunity for his testimony, and failing to request a jury instruction to that effect. We reject Perner's arguments and affirm the judgment of conviction and the order denying postconviction relief.

¶2 During the early morning hours on May 21, 2010, Perner called 911 and stated that his girlfriend had overdosed on drugs. When asked what she overdosed on, Perner responded, "I don't know, some sort of painkillers. Some fuckin' something [that] someone gave her." Police and first responders appeared five minutes later while Perner was attempting to resuscitate Perkins. Perner maintained to police that he was unaware of any illegal drugs other than oxycontin and marijuana. When police advised Perkins' family of the overdose death, they repeatedly stated that Perner "got[] Perkins hooked" on heroin.

¶3 Police subsequently obtained a statement from Perner, admitting he had bought heroin from Cory Koopman. In the statement, Perner said that after using some of the heroin, he determined it was extremely strong but nevertheless gave some of the heroin to Perkins while she was at work. Later that evening, Perkins told Perner that she wanted more heroin. Perner called Koopman and obtained more heroin. When he returned home, Perner put half of the heroin in a nightstand and gave Perkins the other half. Perner also stated, "she probably a little later did the other half."

¶4 At trial, Perner testified that Perkins called Koopman to purchase the heroin, Perkins gave the money to Koopman, and Perkins received the heroin. Koopman testified at trial that he gave the heroin to Perner. Koopman further testified that he did not know Perkins and would not have sold heroin to a person he did not know.

¶5 The jury found Perner guilty of first-degree reckless homicide by delivery of a controlled substance, as a repeater. The circuit court denied a motion for postconviction relief, and Perner now appeals.

¶6 Perner first argues that the evidence was insufficient to convict him because his actions "did not constitute a delivery." Rather, he insists that he was a "joint possessor" of the heroin with Perkins.

¶7 At the outset, we note that although Perner's appeal challenges the sufficiency of the evidence, Perner's argument on that point does not contain a single citation to the evidence presented at trial. Regardless, there was ample evidence that Perner delivered the fatal heroin to Perkins. When reviewing the sufficiency of the evidence, we consider the evidence in the light most favorable to the State and will reverse the conviction only where the evidence is so lacking in probative value that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *See* ***State v. Smith***, 2012 WI 91, ¶24, 342 Wis. 2d 710, 817 N.W.2d 410.

¶8 Here, Perner's statement to police admitted that he bought the heroin from Koopman and provided it to Perkins. Moreover, Koopman testified at trial that he sold the heroin to Perner and did not know Perkins. The jury was entitled to believe these facts, which were sufficient to establish that Perner obtained heroin and delivered it to Perkins.

¶9 We reject Perner's contention that a "delivery" must be "construed ... in a commercial sense" and that the reckless homicide statute thus applies only to "those who sell drugs." The statutory definition of "[d]eliver" or "delivery" under WIS. STAT. § 961.01(6) (2011-12)[1] is unambiguous. "[D]elivery" requires "transfer from one person to another." ***Id.*** Nothing in the statutory scheme adds an element of sale or commercial delivery to that definition.

¶10 Our supreme court also recently discussed the underlying policy of the statute in ***State v. Patterson***, 2010 WI 130, ¶37, 329 Wis. 2d 599, 790 N.W.2d 909:

> First-degree reckless homicide by delivery of a controlled substance was created as a specific type of criminal homicide to prosecute anyone who provides a fatal dose of a controlled substance…. The legislature developed this law, often referred to as the Len Bias law, in the wake of the tragic death of a University of Maryland basketball star by the same name from a cocaine overdose.

(Citations omitted.)

¶11 Accordingly, when Perner gave the fatal dose of heroin to Perkins, he "delivered" it to her in violation of the statute.

¶12 Perner also requests a new trial in the interest of justice because "the jury was not instructed that there is no transfer or delivery between joint possessors of heroin."[2] However, Perner's argument proceeds from an invalid

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

[2] Perner acknowledges that he forfeited any objection to the jury instructions by not objecting, but asks this court to grant him a new trial in the interest of justice. We may exercise our power of discretionary reversal under WIS. STAT. § 752.35 where the real controversy has not been fully tried. *See* ***State v. Hubanks***, 173 Wis. 2d 1, 28-29, 496 N.W.2d 96 (Ct. App. 1992).

premise. Perner's starting point on appeal is joint possession but, as previously discussed, there was ample evidence that Perner provided the heroin to Perkins. Moreover, Perner's defense at trial was that he played no role in Perkins' acquisition of the fatal dose. Thus, there was no evidence that the heroin was, initially, jointly possessed by Perner and Perkins. Perner is not entitled to a new trial in the interest of justice. The real controversy was fully tried. *See* ***State v. Hubanks***, 173 Wis. 2d 1, 28-29, 496 N.W.2d 96 (Ct. App. 1992).

¶13 Finally, Perner argues that his lawyer was ineffective for not eliciting on cross-examination the fact that Koopman "testified under a grant of immunity."[3] He also argues that trial counsel was ineffective for failing to request a jury instruction relating to testimony of a witness granted immunity. However, even assuming counsel performed deficiently in those respects, Perner's claims fail because he has not demonstrated that he was prejudiced. *See* ***Strickland v. Washington*** 466 U.S. 668, 697 (1984).

¶14 Had the jury instruction been given, the jury would have been told that it should consider whether Koopman's receipt of immunity affected his testimony, and also that the jury should give his testimony the weight it believed the testimony was entitled to receive. *See* WIS JI—CRIMINAL 246. However, the instruction would also have informed the jury that, notwithstanding the grant of

[3] Perner's brief does not make it clear that the immunity Koopman received was "use immunity." The statutory grant of use immunity "means that [the witness's] testimony and evidence derived from that testimony cannot be used in a later criminal prosecution against [the witness]." *See* WIS JI—CRIMINAL 246. However, the witness in the only case cited by Perner in support of his argument was granted transactional immunity. *See* ***State v. Nerison***, 136 Wis. 2d 37, 44, 401 N.W.2d 1 (1987). In the present case, the circuit court granted Koopman use immunity after he invoked his Fifth Amendment privilege against self-incrimination, and the court ordered him to testify. Koopman received no concessions from the State that induced his testimony, as was the case in ***Nerison***. *See* ***id.***

immunity, Koopman, like any other witness, could be prosecuted for testifying falsely. ***Id.***

¶15 Perner's argument ignores the fact that the jury learned that Koopman was facing the same charge as Perner, and that Koopman understood he was potentially liable for Perkins' death regardless of whether the person to whom he sold the heroin was Perner or Perkins. Through cross-examination, defense counsel was also able to elicit an admission from Koopman that he believed his testimony could have a "big effect" on the outcome of his own case. In light of this information, Perner cannot show that he was prejudiced by the failure to cross-examine Koopman about the grant of immunity, or to instruct the jury to consider the effect of the grant of immunity on Koopman's credibility.

¶16 The lack of prejudice is further demonstrated by the fact that Koopman told police six months before trial, long before he received immunity, that he sold the heroin to Perner. Any suggestion that Koopman's testimony was influenced by the grant of immunity would therefore have been critically undercut by Koopman's prior statement.

¶17 Accordingly, Perner has failed to show prejudice from any deficiency that could somehow be assumed by counsel's failure to cross-examine Koopman about the grant of immunity or to request a jury instruction about that immunity. Perner is not entitled to relief on his claim of ineffective assistance of trial counsel.

By the Court.—Judgment and order affirmed.

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