COURT OF APPEALS
DECISION
DATED AND RELEASED

November 27, 1996

No. 96-1644-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES KELNHOFER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Reversed and cause remanded with directions*.

BROWN, J. The jury found James Kelnhofer guilty on misdemeanor charges of marijuana and drug paraphernalia possession. The State found the contraband while executing a search warrant at his home in March 1995.

In this appeal, Kelnhofer raises a series of challenges to the proceedings leading to his conviction. Kelnhofer alleges that the 1995 warrant

and a warrant executed in January 1993 were each issued without probable cause and that the 1995 warrant was further flawed because it was premised on false information. Kelnhofer also claims that the trial court erred when it admitted statements he made to Walworth County drug agents during the 1993 search as "other acts" evidence. He further claims that the trial court erred when it did not submit his requested instructions which would have provided details to the jury about how the State must prove the element of possession. Finally, Kelnhofer claims that the trial court erred when it failed to hold a ***Goodchild*** hearing[1] to determine the admissibility of the statement he made to the drug agents during the 1993 search.

We resolve the issues involving the two warrants, the "other acts" evidence and the jury instructions in favor of the trial court. The State concedes, however, that the trial court erred when it failed to conduct the ***Goodchild*** hearing. We thus conditionally reverse Kelnhofer's conviction and remand this case with a narrow set of instructions to resolve this single issue. Our seriatim discussion is set out below.

I. SEARCH WARRANTS

A. Background

On March 15, 1995, Walworth County drug agents applied for a warrant to search the Kelnhofer residence. The affidavit alleged that a search would uncover "marijuana and paraphernalia related to the possession of

[1] *See* ***State ex rel. Goodchild v. Burke***, 27 Wis.2d 244, 264, 133 N.W.2d 753, 763 (1965), *cert. denied*, 384 U.S. 1017 (1966).

marijuana." The applicant-agent supported this claim with the following facts. First, the agent stated that his department had previously discovered over 425 grams of marijuana at this residence during their 1993 search. Second, the agent explained that he had obtained garbage from the Kelnhofer residence the previous month and had discovered "marijuana roaches" together with discarded mail addressed to the Kelnhofer residence. Third, the agent informed the court that he had conducted another garbage search on March 14, 1995, and again discovered a marijuana roach, as well as a Ziploc baggie that was tainted with THC. In addition, he again found mail addressed to the Kelnhofer home. On the basis of this information, the circuit court judge issued the warrant.

B. Probable Cause to Issue 1995 Warrant

Kelnhofer first contends that the 1995 warrant was not supported by probable cause. His argument narrows to a claim that the drug agent's identification of trace amounts of marijuana within curbside garbage does not provide a reasonable basis to believe that marijuana currently exists in the home. Moreover, Kelnhofer is particularly concerned that the marijuana could have been placed by "someone seeking to frame the Kelnhofers."

When this court gauges whether there was sufficient evidence to support a warrant, we give substantial deference to the issuing judge's determination. *See* ***State v. Ehnert***, 160 Wis.2d 464, 468, 466 N.W.2d 237, 238 (Ct. App. 1991). We only gauge whether the facts offered in support of the warrant established a "fair probability" that the desired evidence would be

found at the targeted location. *See* ***State v. Anderson***, 138 Wis.2d 451, 468, 406 N.W.2d 398, 406 (1987) (quoted source omitted).

The trial court determined that the warrant met the ***Anderson*** standard. It turned to "common sense" and reasoned that trash placed outside a home can be confidently assumed to have originated in that home. *Cf.* ***id.*** ("The task of the issuing magistrate is simply to make a practical common sense decision ....") (quoted source omitted). The court likewise rejected Kelnhofer's concerns about what it termed a "tiptoeing marijuana infiltrator," reasoning that it would be highly improbable that somebody could have framed the Kelnhofers by placing marijuana remnants in the Kelnhofers' trash just in time for the drug agents to find it during their search.

The above reasoning reveals that the trial court understood Kelnhofer's concerns with the warrant. Nonetheless, the trial court rejected those concerns and we cannot say that its conclusions were not based on a reasonable and practical interpretation of the facts. *See* ***id.*** We affirm its ruling.

C. Falsehoods Supporting 1995 Warrant

During pretrial investigation, Kelnhofer began to suspect that some of the drug agent's statements made in support of the 1995 warrant were false. He thus filed a motion for an evidentiary hearing to test how those misstatements affected the warrant. *See generally* ***Franks v. Delaware***, 438 U.S. 154, 155-56 (1978).

Kelnhofer's claim focused on how the agent twice stated in his affidavit that he "obtained garbage" from the Kelnhofer residence, even though the agent subsequently admitted that he did not take it directly from the curbside. Instead, he or a fellow officer picked it up from the disposal company. Kelnhofer also claimed that the agent omitted pertinent facts in his affidavit because he did not inform the issuing magistrate that three other garbage searches between February and March had failed to turn up any contraband.

At a ***Franks*** hearing, the defendant must first prove that law enforcement made false statements to obtain the warrant. *See* ***Anderson***, 138 Wis.2d at 463, 406 N.W.2d at 404. Next, he or she must prove that law enforcement intended to make those false statements or made those statements with a reckless disregard for the truth. *See* ***id.*** If the court finds that the defendant meets these two hurdles, then the flawed portions of the affidavit are excised and the court determines if the reformed affidavit nonetheless supports the warrant. *See* ***id.*** at 464, 406 N.W.2d at 404.

Here, the agent explained that he did not think the word "obtained" was a misstatement because it correctly described how he eventually came into possession of the Kelnhofers' garbage. He also testified that his goal in constructing the warrant was to convey the "basic important facts" to the judge which were that he searched the Kelnhofers' garbage and that he found contraband and discarded mail to identify where the contraband came from.

To counter this testimony, Kelnhofer elicited from the agent that he used the word "obtained" because his supervising officer told him to. The agent also admitted that he and other agents had "got into a habit of doing so many of these and using the same terminology."

Kelnhofer thus argues that by mechanically following department policy, the agent purposely (or at least recklessly) used the word "obtained" to deemphasize the fact that he did not actually take the garbage from the curbside. He adds that the agent's testimony further established that "the drug unit as a whole had become careless in drafting affidavits ...."

Nonetheless, when we review a trial court's ruling on a ***Franks*** motion, we must defer to its findings of fact, such as the intent of the law enforcement officers. *See* ***State v. Callaway,*** 106 Wis.2d 503, 511, 317 N.W.2d 428, 433, *cert. denied*, 459 U.S. 967 (1982). The trial court rejected Kelnhofer's arguments because it was "convinced that the officer did not make a false statement, certainly not knowingly and intentionally make one."

The testimony that Kelnhofer elicited from the agent arguably pointed towards a conclusion that the agent knowingly tried to deceive the judge into issuing a warrant. But it also could be viewed as support for a conclusion that the agent was simply trying to accurately convey why he believed that a search of the Kelnhofer residence would reveal contraband. In light of the trial court's superior ability to evaluate the credibility of this agent, we have no basis on which to set aside its finding. *See* § 805.17(2), STATS. ("[f]indings of fact shall not be set aside unless clearly erroneous ....").

We also have similar confidence in the trial court's conclusion regarding the agent's alleged failure to disclose that he did not discover contraband during his three other garbage searches. On this point, the trial court determined that informing the issuing judge that contraband was found on only two out of five searches was not infrequent enough to be probative. It distinguished this scenario from a hypothetical situation in which an officer found contraband during only one of twenty-five or fifty searches. We join in the trial court's reasoning.

D. Validity of 1993 Search Warrant

As noted above, the warrant which led to the successful search of the Kelnhofer residence in 1993 served as part of the evidentiary basis to the 1995 warrant. Because Kelnhofer was acquitted on the drug charges which followed the 1993 search, he never appealed the trial court's determination that the 1993 warrant was valid.

The 1993 warrant was premised on similar evidence of used "roaches" discovered during garbage searches. Kelnhofer supports his claim that such evidence did not support the 1993 warrant by referring us to the arguments he raised against the 1995 warrant. Since we have rejected those claims, we will likewise reject his claims against the 1993 warrant.

II. "OTHER ACTS" EVIDENCE

A. Background

The State moved before trial to admit information it gathered during the 1993 search of Kelnhofer's home as "other acts" evidence. *See*

§ 904.04(2), STATS. Specifically, the State found 425 grams of marijuana in the bottom right-hand drawer of a desk that was located in Kelnhofer's home office. As important, Kelnhofer admitted during the 1993 search that the marijuana was his. The State wanted to use this evidence to prove that the marijuana it found in its 1995 search, in the same desk drawer in Kelnhofer's home, also belonged to Kelnhofer. The trial court agreed that this "other acts" evidence was admissible for this purpose. Kelnhofer now challenges this ruling.

B. Discussion

On appeal, a trial court's evidentiary ruling is examined to determine if the court misused its discretion. *See* ***State v. Rogers***, 196 Wis.2d 817, 829, 539 N.W.2d 897, 902 (Ct. App. 1995). Under this deferential standard, we only determine if the trial court applied the correct legal standard and if its conclusion was grounded on a logical interpretation of the facts. *See* ***id.***

Kelnhofer first contends that the trial court did not logically examine the facts. He argues that "there was nothing so distinctive about the circumstances of Kelnhofer's alleged possession of marijuana on these two occasions" to make the evidence concerning the 1993 search probative on the issue of whether he possessed the drugs that were found in his home during the 1995 search. He also tries to weaken the inference that the State draws from this "other acts" evidence by illustrating that both he and his wife used the home office—a fact established by evidence that correspondence addressed to each of them was on the desk when the agents conducted their search.

However, we agree with the State (and the trial court) that the placement of marijuana in the bottom right-hand drawer of the desk bears Kelnhofer's "imprint." We conclude that there were enough factual similarities between the 1993 incident and the present charge to support the inference that Kelnhofer, even though he denies it, similarly possessed the marijuana found during the 1995 search because he previously admitted that drugs found in the same location were his. Thus, the evidence goes to his knowledge of where illegal drugs can be found and goes to his identity as the perpetrator. The trial court properly concluded that this "other acts" evidence was relevant "other acts" evidence under § 904.04(2), STATS.

However, Kelnhofer alternatively argues that this "other acts" evidence was nonetheless unfairly prejudicial and should have been excluded. On this issue, Kelnhofer seemingly concedes that this evidence had "minimal legitimate probative value." But in light of the theory of defense—that the marijuana belonged to his wife—Kelnhofer argues that this "other acts" evidence was unfairly prejudicial because it inferentially informed the jury that he used marijuana before. Kelnhofer concludes that "the value of this evidence to the [S]tate lies purely in its tendency to show that Mr. Kelnhofer is a bad person with a propensity for marijuana activity—he did it before, so it must be him again."

We acknowledge that this "other acts" evidence was prejudicial to Kelnhofer because of the inference it passed to the jury regarding his prior involvement with illegal drugs. But the rules do not demand that a trial court

exclude all prejudicial evidence. The trial court is only required to exclude prejudicial evidence when its prejudicial character substantially outweighs its probative value. *See* § 904.03, STATS. When the trial court considers whether to exclude evidence because it is "unfairly prejudicial," it is simply balancing probative value against prejudicial character. *See* ***id.*** Accordingly, even extremely prejudicial evidence, such as a statement that the defendant was on parole when he or she allegedly committed the crime, could nonetheless remain admissible if it was *very* probative to an issue in the case. *See* ***State v. Ingram***, No. 95-2964-CR, slip op. at 6 (Wis. Ct. App. Aug. 21, 1996, ordered published Sept. 24, 1996).

In this case, the trial court likewise recognized that this "other acts" evidence was very valuable to the State; it observed:

> Without it, the [S]tate may have great difficulty satisfying the jury that the defendant possessed the marijuana in the present case, versus the defendant's wife or someone unknown to the defendant or some other person having access to the area.

Accordingly, for this evidence to be deemed inadmissible because of its prejudicial character, it would have to be overwhelmingly prejudicial. But the trial court did not believe that an inference of prior marijuana use was exceedingly prejudicial and we see no reason to upset its determination.[2]

[2] Kelnhofer also argues that the State's witness who testified about this "other acts" evidence violated the trial court's in limine order when he stated that Kelnhofer told him during the 1993 search that he had been smoking marijuana while baby-sitting his two-year-old child. He argues that this statement was prejudicial because it tended to show that he was a "bad person because he smoked marijuana while baby-sitting." However, Kelnhofer did not raise an objection to this portion of the testimony and thus has waived his right to pursue this specific charge on appeal.

III. JURY INSTRUCTIONS

A. Background

As we explained above, Kelnhofer's defense theory was that the State could not prove that he, rather than his wife, possessed the marijuana that the drug agents discovered in their home. In pursuit of this defense, Kelnhofer offered two instructions designed to "dissuade the jury from maintaining any preconceived beliefs it may have had that a person is criminally responsible for contraband found in his home."

The first instruction generally explained that a person's proximity to illegal drugs does not itself support a conclusion that the person "possessed" the drug. The second instruction explained that a person's awareness that drugs are within his or her home does not necessarily prove that the individual "possessed" the drug. The two instructions are fully reproduced at the margin.[3]

(..continued)
Macherey v. Home Ins. Co., 184 Wis.2d 1, 13, 516 N.W.2d 434, 438-39 (Ct. App. 1994).

[3] The first proposed instruction provided:

> An individual's mere proximity to a drug, or mere presence on or ownership of the property where it is located, or mere association with the person who does control the drug or property, will not alone support a finding that the individual possessed the drug. It is well established that the mere presence or proximity of an individual to a drug does not, in itself, establish possession of the drug.

The second of Kelnhofer's proposed instructions provided:

> A resident of a home does not possess marijuana that is owned by others merely because he is fully aware of the existence and location of the marijuana within the home. In addition to proving that the defendant knew of the marijuana's existence, the state also must prove beyond a reasonable doubt that the defendant in some manner actually exercised dominion and control over the

B. Discussion

The trial court rejected these two instructions reasoning that they were redundant to other instructions. The jury was given WIS J I—CRIMINAL 6030, which defines the term "possessed" to mean that a person "knowingly had actual physical control of a substance." The court was satisfied that the standard instruction correctly and adequately described what the State had to establish to prove that Kelnhofer "possessed" the marijuana discovered in his home.

Kelnhofer argues, however, that his supplemental instructions were a necessary precaution against jury confusion because a lay person would have difficulty discerning between possession of something because it is found in one's home and legal possession of something because the person actually has "control" over the item. *See* ***id.***

A trial court has discretion concerning how to instruct a jury. We only test whether the instructions properly state the law and are reasonably supported by the evidence. *See* ***State v. Turner***, 114 Wis.2d 544, 551, 339 N.W.2d 134, 138 (Ct. App. 1983). Because the instructions that the trial court gave properly state the law and are supported by the evidence, whether

(..continued)

> marijuana or had the power and intention to exercise dominion and control over the marijuana. If all the state has shown is that the defendant knew about the marijuana, then you must find the defendant not guilty.

supplemental instructions were necessary to alleviate possible jury confusion was a matter for the trial court. We see no reason to upset its conclusion that additional instructions were not necessary.

IV. ADMISSIBILITY OF KELNHOFER'S STATEMENTS

A. Background

As explained above, part of the State's evidence consisted of statements Kelnhofer made to county drug agents during the 1993 search of his home. Accordingly, pursuant to § 971.31(3), STATS., Kelnhofer requested a ***Goodchild*** hearing on the admissibility of his statement. The trial court, the Honorable John R. Race presiding, declined to hold the hearing, mistakenly believing that the admissibility of the statement was encompassed in a prior pretrial order issued by the Honorable Robert J. Kennedy. Kelnhofer now argues that the trial court erred by refusing to hold the ***Goodchild*** hearing.

B. Discussion and Directions

In its brief to this court, the State concedes that the trial court erred by failing to hold the required ***Goodchild*** hearing. We agree.

We will model the remedy on the one that the supreme court implemented in ***Upchurch v. State***, 64 Wis.2d 553, 564, 219 N.W.2d 363, 368-69 (1974). We reverse the trial court's ruling that denied Kelnhofer the opportunity to test the admissibility of his 1993 statement. We also conditionally reverse the judgment of conviction, including both the count of marijuana possession and the count of drug paraphernalia possession. We remand this matter and direct

the trial court to conduct an evidentiary hearing to assess the admissibility of this statement. If the statement meets the standards of admissibility, the trial court shall reinstate the judgment. If the statement fails to meet the standards, then the trial court shall determine if a new trial is warranted.

By the Court. – Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.