COURT OF APPEALS
DECISION
DATED AND FILED

October 21, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1522-CR **Cir. Ct. No. 2011CF423**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SEAN T. PUGH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed*.

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

¶1 HOOVER, P.J. Sean Pugh appeals a judgment of conviction for multiple drug crimes. He argues the circuit court erred by admitting other acts evidence and by allowing the State to amend the Information to add party-to-a-crime modifiers to each of the charges. We reject Pugh's arguments and affirm.

BACKGROUND

¶2 Pugh was charged with six counts: possession with intent to deliver cocaine, second and subsequent offenses; possession with intent to deliver THC, second and subsequent offenses; maintaining a drug trafficking place, second and subsequent offenses; possession of cocaine, second and subsequent offenses; possession of a firearm by a felon; and possession of drug paraphernalia. All counts also included repeater enhancements.

¶3 The complaint alleged that on November 29, 2010, the Brown County drug task force received information from a person claiming to have known Pugh for about one and one-half years.[1] During the summer of 2010, the informant lived with Pugh for a period of weeks. The informant reported that during that time, Pugh was selling large amounts of THC, cocaine and pills. He also stated Pugh kept large amounts of drugs at his home and at his auto body shop in Green Bay.

¶4 On November 30, the task force executed a search warrant at the auto body shop, although nobody was located on the premises. Police recovered two baggies containing 27.62 grams and 28.15 grams of cocaine; one partially full and several empty bottles of the cocaine cutting agent Inositol; numerous baggies of different sizes, some containing marijuana or cocaine residue; packaging materials, and a drug pipe. In the trunk of a vehicle on the property, they found

[1] Pugh's statement of the case fails to relate any trial evidence. We also observe Pugh's brief refers to Pugh as defendant-appellant, in violation of WIS. STAT. RULE 809.19(1)(i) (requiring "[r]eference to the parties by name, rather than by party designation").

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

2230.5 grams of THC,[2] a baggie containing 22.23 grams of cocaine, a pistol, a drug pipe, and three aluminum pans containing cocaine residue and a strainer.

¶5 On the same day, police executed a warrant at Pugh's residence in Green Bay. Officers discovered indications that Pugh resided there, including a pharmacy label with his name on it in the master bedroom; a large baggie containing several smaller baggies with marijuana and cocaine residues; a checkbook and paperwork for the auto body shop; and what police believed to be a ledger of drug clients.

¶6 Prior to trial, the State successfully moved to admit evidence concerning Pugh's prior conviction for delivery of cocaine in 2001.[3] Additionally, the State moved to amend the Information at the final pretrial conference, seeking to add party-to-a-crime modifiers to the drug-related counts. The State acknowledged it was an oversight that it had not sought the amendment earlier. After the court stated it was prepared to grant the defense an adjournment, the State withdrew its request. However, the State also indicated it would renew its request at trial if the defense cross-examined witnesses regarding involvement of other individuals.

¶7 On the first day of trial, a crime lab analyst stated Pugh's fingerprints were found on certain items of evidence. On cross-examination, the witness

[2] There are approximately 454 grams in a pound. Thus, the 2230.5 grams of THC equaled roughly 4.9 pounds.

[3] Pugh only addresses a conviction for cocaine delivery. The State also refers repeatedly to only a cocaine conviction, but it once asserts he was also convicted of THC delivery in the prior case. Our review of online circuit court records indicates that in the prior case, Brown County case No. 2001CF1054, Pugh was convicted of THC delivery, second or subsequent offense, occurring in Winnebago County.

testified there were other fingerprints present that did not belong to Pugh. The State then renewed its request to add party-to-a-crime modifiers to the drug-related charges. The court granted the motion over Pugh's objection. Ultimately, the jury found Pugh guilty of all five drug charges, but not guilty of the firearms charge. Pugh appeals.

DISCUSSION

Other acts evidence

¶8 Pugh first argues the trial court erred by admitting other acts evidence. WISCONSIN STAT. § 904.02 provides:

> [E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Courts apply a three-step analytical framework to determine admissibility of other acts evidence, inquiring: (1) whether the evidence is offered for an acceptable purpose under WIS. STAT. § 904.04(2); (2) whether the evidence is relevant; and (3) whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. ***State v. Sullivan***, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998).

¶9 The probative value of other acts evidence "depends on the other incident's nearness in time, place and circumstances to the alleged crime or to the fact or proposition sought to be proved." ***Id.*** at 786. We review a trial court's

admission of other acts evidence under a discretionary standard. ***Id.*** at 780. We will sustain the ruling if the trial court "examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." ***Id.*** at 780-81.

¶10 Pugh argues the trial court erroneously admitted evidence concerning his prior conviction of possession with intent to deliver cocaine, partly because that crime occurred over nine years before his new crimes. The trial court explained the nearness in time consideration was the most concerning, but the issue was attenuated by Pugh's incarceration for the majority of the intervening years.

¶11 The State argues the trial court properly admitted the other acts evidence, and that, regardless, any error in admitting the evidence was harmless. We agree that any error was harmless. We therefore do not address whether the court erred in the first instance. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).

¶12 The erroneous admission of testimony is subject to the harmless error rule. *See* WIS. STAT. § 901.03(1). An erroneous evidentiary ruling "is harmless if there is no reasonable possibility that the error contributed to the conviction." ***State v. Everett***, 231 Wis. 2d 616, 631, 605 N.W.2d 633 (Ct. App. 1999). A reasonable possibility is one sufficient to undermine confidence in the outcome of the proceedings. ***Id.*** The State has the burden of establishing, beyond a reasonable doubt, that the error was harmless. ***State v. Dyess***, 124 Wis. 2d 525, 545, 370 N.W.2d 222 (1985). Stated otherwise, an error is harmless if it is "'clear beyond a reasonable doubt that a rational jury would have found the defendant

guilty absent the error.'" ***State v. Harvey***, 2002 WI 93, ¶46, 254 Wis. 2d 442, 647 N.W.2d 189 (quoting ***Neder v. United States***, 527 U.S. 1, 18 (1999)).

¶13 Two officers testified at trial about Pugh's prior conviction. The first testified he had arrested Pugh and found cocaine and a digital scale on his person. The other testified as follows:

> [Q.] At the time that you met with Mr. Pugh, did he indicate or did he admit to you that he had regularly been purchasing and selling ounces of cocaine in the Brown County area?
>
> [A.] Yes.
>
> [Q.] Did he further indicate that he had purchased several pounds of marijuana?
>
> [A.] Yes.

Additionally, the State contended in closing argument that the other acts evidence was significant, and emphasized that police located pounds of marijuana in the current case.

¶14 Nonetheless, there was such overwhelming evidence of Pugh's guilt that admission of the other acts evidence could not have reasonably affected the outcome of the trial. Pugh did not dispute the identity or amount of drugs recovered from his residence and the auto body shop. He further did not dispute that whoever possessed the drugs intended to deliver them. Pugh's defense was that he did not exercise control over the drugs. As counsel stated in closing, "I'm conceding everything but possession and control."

¶15 The State presented overwhelming evidence that Pugh was dealing drugs from his residence and auto body shop. First, the State played a recording of a telephone call between Pugh and a police informant, Asa Lehrke. In that

recorded call, Pugh is heard arranging a sale of a half-pound of marijuana to Lehrke. It was apparent to the narcotics investigator, who recorded the call, that Pugh had a pattern of drug dealing with knowledge of appropriate "price points." The officer identified Pugh's voice as the person arranging the drug transaction with Lehrke.

¶16 Second, Lehrke also identified Pugh as the person on the telephone who attempted to arrange the sale of a half-pound of marijuana. Lehrke further testified he witnessed Pugh sell drugs out of Pugh's residence on numerous occasions. Lehrke knew that marijuana and cocaine were kept at both Pugh's residence and the auto body shop.

¶17 Third, Pugh's fingerprints were identified on items recovered in the search of his residence and the auto body shop. Pugh's fingerprints appeared on the three aluminum pans with cocaine residue and three empty bottles of the cutting agent Inositol powder.

¶18 Fourth, Pugh's girlfriend, Brookes Mann, testified that Pugh lived at the residence that had been searched, and that he worked at the auto body shop. Mann acknowledged she had seen Pugh distributing marijuana. She further admitted she had direct knowledge that Pugh was selling marijuana out of the auto body shop.

¶19 Fifth, Kristin Tubby testified Pugh "had obtained multiple pounds of marijuana on a monthly basis for distribution." She also stated she had been to Pugh's residence. Sixth, Heidi Smith testified she knew Pugh resided at the searched home. She further testified that Pugh owned the auto body business.

¶20 Finally, Bert Gagnon testified he owned the warehouse where the auto body business was located. He rented a 2000 square-foot warehouse section to Kevin Burton. Although Burton's name remained on the lease, Pugh paid the rent in cash for three months in the fall of 2010.

¶21 Thus, there was overwhelming evidence that Pugh was currently dealing drugs from his residence and the auto body shop. We are convinced beyond a reasonable doubt that the admission of evidence that Pugh previously dealt drugs did not affect the verdict. Moreover, Pugh does not meaningfully reply to the State's harmless error argument.[4] Therefore, the issue is deemed conceded in any event. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

Amended Information

¶22 Pugh also argues the trial court erroneously permitted the State to amend the Information on the second day of trial. A trial court may allow the State to amend the Information to conform to the evidence if that amendment is not prejudicial to the defendant. WIS. STAT. § 971.29(2). The decision whether to allow amendment is subject to the trial court's discretion. ***State v. Flakes***, 140 Wis. 2d 411, 416, 410 N.W.2d 614 (Ct. App. 1987). A court's decision to allow amendment will not be reversed absent an erroneous exercise of discretion. ***Id.***

[4] This is Pugh's reply to the harmless error argument: "[T]he other evidence adduced at trial that the [S]tate now argues clearly establishes guilt, may establish a nexus between [Pugh] and the properties. However it does not establish the required knowledge and intent."

¶23 The addition of new counts by an amendment does not, by itself, establish that a defendant has been prejudiced. *See* ***State v. Wickstrom***, 118 Wis. 2d 339, 348, 348 N.W.2d 183 (Ct. App. 1984). The purpose of a charging document is to inform the defendant of the acts allegedly committed and to allow him or her to understand the offense charged so that he or she can prepare a defense. ***Id.*** The key factor in determining whether an amended charging document prejudiced the defendant is whether the defendant had notice of the nature and cause of the accusations. ***Id.*** at 349. There is no prejudice when the defendant has such notice. ***Id.***

¶24 Here, the amended Information did not add any new charges; it merely added the WIS. STAT. § 939.05 party-to-a-crime modifier to existing charges.[5] A similar issue was addressed in ***Bethards v. State***, 45 Wis. 2d 606,

[5] The party-to-a-crime statute, WIS. STAT. § 939.05, provides:

> **(1)** Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it and although the person who directly committed it has not been convicted or has been convicted of some other degree of the crime or of some other crime based on the same act.
>
> **(2)** A person is concerned in the commission of the crime if the person:
>
> (a) Directly commits the crime; or
>
> (b) Intentionally aids and abets the commission of it; or
>
> (c) Is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it. Such a party is also concerned in the commission of any other crime which is committed in pursuance of the intended crime and which under the circumstances is a natural and probable consequence of the intended crime.

618, 173 N.W.2d 634 (1970), where the jury was instructed on party-to-a-crime liability despite the lack of any reference to it in the Information. Acknowledging it had previously recommended specific reference to § 939.05 in the Information, the court held, "We are satisfied that what we commended in ***La Vigne*** as good practice should not now be made mandatory." ***Id.*** (citing ***La Vigne v. State***, 32 Wis. 2d 190, 195, 145 N.W.2d 175 (1966)). The court determined any error was harmless because "[t]he defendant knew what he was charged with and there is nothing in the record to indicate that had this statute been specifically referred to in the [I]nformation, his trial strategy would have been any different." ***Id.***; *see also* ***Nicholas v. State***, 49 Wis. 2d 683, 693, 183 N.W.2d 11 (1971) (same).

¶25 We similarly conclude Pugh was not prejudiced by the trial court's discretionary decision permitting the State to add party-to-a-crime modifiers to the Information. First, we observe Pugh was not surprised by the State's request, as the State indicated at the pretrial conference that it would seek the amendment if Pugh introduced evidence suggesting someone else had committed the drug crimes. More importantly, Pugh fails to demonstrate he would have had to prepare differently to defend against party-to-a-crime liability.

¶26 Pugh contends he was prejudiced by the amendment because "it significantly alter[ed] defense strategy." However, Pugh argues mere generalities regarding how his strategy and preparedness were affected. He asserts that prior to the amendment, his defense was focused solely on the credibility of Lehrke, and that he would have investigated phone records, possible surveillance evidence, ownership of the auto body shop, and "other areas of discovery."

¶27 What Pugh fails to explain, however, is why that evidence became more critical to his defense once the Information was amended to include

party-to-a-crime liability. Even before the amendment, Pugh was not relieved from liability simply because others may have had possession or control of the drugs or drug trafficking place. As the court instructed the jury both at the beginning of the trial and after the amendment at the close of the trial:

> [A]n item is also in a person's possession if it is in an area over which the person has control and the person intends to exercise control over it. It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item. *Possession may be shared with another person. If a person exercises control over an item, the item is in that person's possession, even though another person may have similar control—may also have similar control.*

(Emphasis added.)

¶28 Thus, even prior to the amendment, a successful trial strategy had to include an attempt to dissociate Pugh from both the drugs and the places where the drugs and associated items were recovered—his residence and the auto body shop. It would not have been sufficient to elicit testimony that others may have also had access to the drugs and those premises. Both prior to and after the amendment, Pugh's defense had to be that he did not have knowledge or control of the large amount of drugs recovered from his place of employment or any drug dealing occurring there or at his home. Simply challenging Lehrke's credibility would not have been enough, even before party-to-a-crime liability was in play. Moreover, Pugh fails to explain what else he would have sought to learn about ownership of the auto body shop; the evidence at trial clearly indicated he did not own the property and his name was not on the lease.

¶29 It was never going to be adequate strategy to merely shift the blame to others. The fact that others might also have been possessing and dealing drugs did not relieve Pugh of criminal liability even without the addition of

party-to-a-crime modifiers. Because Pugh's defense was not prejudiced, the trial court did not erroneously exercise its discretion when granting the State's motion to amend. *See* WIS. STAT. § 971.29(2).

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

¶30 CANE, J. (*concurring*). I write separately with respect to the other acts evidence admitted at trial. The majority declines to address whether the circuit court erred by admitting evidence regarding Pugh's 2001 conviction at trial, preferring instead to apply the harmless error rule. *See supra*, ¶11. While I agree the error was harmless, I wish to make clear there was error in the first instance.

¶31 As we correctly observe, the State, as the proponent of the evidence, had the obligation to satisfy the test under ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). *See supra*, ¶8. This required the State to demonstrate that (1) the evidence was offered for an acceptable purpose; (2) the evidence was relevant; and (3) the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *See* ***Sullivan***, 216 Wis. 2d at 772.

¶32 The State fails to clear even the first hurdle. In attempting to show the evidence was offered for an acceptable purpose, the State simply parrots the statutory language governing that inquiry, WIS. STAT. § 904.04(2). Without any accompanying analysis, save two block quotations that are equally conclusory, the State asserts the evidence was offered to show intent, knowledge, absence of mistake, identity, and a common plan or scheme to commit the present offense.

¶33 This is clearly insufficient. *See* ***Riley v. Town of Hamilton***, 153 Wis. 2d 582, 588, 451 N.W.2d 454 (Ct. App. 1989) (court of appeals will not consider conclusory propositions); ***Sullivan***, 216 Wis. 2d at 784 (merely offering list of proper purposes potentially applicable to other acts evidence is too broad). The State has an obligation to clearly articulate its reasoning for seeking admission

of the other acts evidence and "must apply the facts of the case to the analytical framework." ***Sullivan***, 216 Wis. 2d at 774. It has not done so. I therefore conclude it has failed to demonstrate the other acts evidence was offered for an acceptable purpose.

¶34 It is true that, on appeal, we may look for reasons to sustain the circuit court's exercise of discretion. ***State v. LaCount***, 2008 WI 59, ¶15, 310 Wis. 2d 85, 750 N.W.2d 780. Below, the circuit court, without explanation, concluded "the other acts that are being identified here would provide a reasonable jury with an ability to understand the motive, a plan, certainly knowledge, opportunity, absence of mistake or accident[,] … so I think with respect to step one, I'm satisfied that the state would easily meet that burden here." That conclusory statement does not satisfy the circuit court's obligation to demonstrate its exercise of discretion on the record. *See* ***State v. Cherry***, 2008 WI App 80, ¶7, 312 Wis. 2d 203, 752 N.W.2d 393.

¶35 Moreover, it appears the court implicitly rejected the primary argument advanced by the State below that the evidence concerning Pugh's prior conviction was admissible to prove identity. The State believed that because Pugh was shown to have delivered narcotics in a previous case, it was likely he possessed the drugs in the present case. "To be admissible for the purpose of identity, the other-acts evidence should have such a concurrence of common features and so many points of similarity with the crime charged that it 'can reasonably be said that the other acts and the present act constitute the imprint of the defendant.'" ***State v. Kuntz***, 160 Wis. 2d 722, 746, 467 N.W.2d 531 (1991) (quoted source omitted).

¶36 I fail to see a compelling concurrence of common features between the cases. Pugh's 2001 conviction stemmed from cocaine and a digital scale found on his person at the conclusion of a high-speed chase with authorities. Pugh later admitted to dealing marijuana in Winnebago County. Here, Pugh was charged nearly a decade later with operating an elaborate and extensive drug operation out of his place of employment. At least a portion of the testimony in Pugh's present trial involved admitted prior acts in a different locale. In short, the circumstances surrounding Pugh's 2001 conviction are nothing like those in the present case.

¶37 It appears to me the State offered Pugh's prior conviction for no other reason than to show he is a drug dealer, and therefore acted like a drug dealer in the present case. This is impermissible. *See* WIS. STAT. § 904.04(2). But—as we correctly conclude—the error did not contribute to the outcome of the case, *see supra*, ¶¶12-21. For the foregoing reasons, I respectfully concur.