COURT OF APPEALS
DECISION
DATED AND FILED

January 21, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2328-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

NAPOLEON J. VIAU,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH D. MC CORMACK, Judge. *Affirmed.*

BROWN, J. A jury convicted Napoleon J. Viau of one count of possession of cocaine contrary to § 961.16(2)(b)1, STATS., and four counts of possession of drug paraphernalia contrary to § 961.573(1), STATS. The trial court then sentenced Viau to a total of 240 days in jail and three years' probation. On appeal, Viau raises several issues attacking the validity of his conviction and subsequent sentencing. We reject his arguments and affirm.

On September 3, 1996, a trial court sentenced Viau to nine months in jail with Huber privileges and three years' probation following his conviction for delivery of cocaine. Afterwards, Viau and his girlfriend, Brenda Molkentine, got into an argument after he asked her to move out of his apartment. She refused, and he took some of his clothing and went to stay at the home of one of his employees until Molkentine left the apartment. Later that evening, Molkentine called the police and informed them that Viau kept drugs and drug paraphernalia in their apartment.

The police obtained a search warrant and searched the apartment that same night. During their search, the police found a minuscule amount of cocaine along with various items they suspected to be drug paraphernalia, namely, a white cartridge pen body, a hard plastic tube, a small strainer and paper folds.[1] A white powdery substance found in the pen body also tested positive for cocaine. The police arrested Viau the next day. Following his arrest, the police obtained a second search warrant to draw a sample of Viau's blood. The blood sample tested positive for cocaine. The State then filed a criminal complaint charging Viau with one count of felony possession of cocaine as a repeat offender contrary to §§ 961.16(2)(b)1 and 961.48(2), STATS., and four counts of possession of drug paraphernalia as a repeat offender contrary to §§ 961.573(1), STATS., and 961.48(2).[2] At his jury trial, Viau argued that Molkentine possessed the drugs and drug paraphernalia found in the apartment.

[1] The cartridge pen body and white plastic tube were used to ingest cocaine, while the strainer was used to prepare the cocaine for use. Paper folds are pieces of paper folded in a certain way to store small amounts of cocaine.

[2] The State subsequently amended the complaint to change the felony possession to a charge of misdemeanor possession of cocaine.

The jury found Viau guilty of all five counts. The trial court then sentenced Viau to four consecutive sixty-day terms in the county jail, one for each conviction for possession of drug paraphernalia, and withheld sentencing and placed him on three years' probation for the conviction of possession of cocaine. On appeal, Viau raises several issues, which we address *seriatim*.

First, Viau challenges the validity of the search warrants and argues that the evidence gained from these searches should have been excluded at trial. However, prior to trial, Viau never filed a motion challenging the search warrants or asking to suppress the evidence. Although Viau did attempt to attack the search warrants during trial, the trial court prevented him from doing so. Under § 971.31(2), STATS., "defenses and objections based on ... the use of illegal means to secure evidence shall be raised before trial by motion or be deemed waived." A failure to raise evidentiary challenges prior to trial constitutes waiver. *See* ***Day v. State,*** 52 Wis.2d 122, 123, 187 N.W.2d 790, 791 (1971). Therefore, because Viau failed to timely raise these issues prior to trial, they are waived and we decline to address the merits of his arguments.

Second, Viau attacks the evidentiary rulings of the trial court. The admissibility of evidence lies within the sound discretion of the trial court. *See* ***State v. Pepin,*** 110 Wis.2d 431, 435, 328 N.W.2d 898, 900 (Ct. App. 1982). When we review a discretionary decision, we examine the record to determine if the trial court logically interpreted the facts and applied the proper legal standard. *See* ***State v. Rogers,*** 196 Wis.2d 817, 829, 539 N.W.2d 897, 902 (Ct. App. 1995).

Viau contends that the trial court erred when it permitted the officer who searched his apartment to testify that he lived at that address. Viau argues that the officer's knowledge was based solely on hearsay evidence; therefore, the

trial court erred when it allowed the State to use the officer's testimony to prove that he lived in the apartment. We reject this argument. The officer testified that he found two voter registration cards in the apartment belonging to Viau, both of which listed the apartment as his current address. One of the cards was still valid. Also, the officer found a large amount of paperwork in the apartment relating to the business Viau owned. Therefore, during the course of his search, the officer made sufficient firsthand observations from which to base his conclusion that the apartment was Viau's current address.

Viau also claims that the trial court erred when it excluded alleged statements Molkentine made to Viau shortly before she called the police that "I'll get you" and "[y]ou're going to be in more trouble than you'll ever be again." He contends that the trial court should have allowed him to introduce these statements to show how Molkentine framed him by calling the police.

The trial court ruled that Molkentine's alleged threats to get Viau into trouble were irrelevant and therefore inadmissible. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Section 904.01, STATS. Evidence which is not relevant is not admissible. *See* § 904.02, STATS.

We hold that the trial court did not misuse its discretion in finding the statements to be irrelevant and therefore inadmissible. The focus of the trial was whether Viau possessed the drugs and drug paraphernalia found in his apartment. Viau's defense was that Molkentine possessed the drugs and related drug paraphernalia. Evidence of Molkentine's intention to call the police out of revenge, however, does not make it any more or less probable that either Viau or

Molkentine possessed the drugs and drug paraphernalia. It would only show her state of mind when she called the police. Accordingly, we reject Viau's argument on this issue.

Viau also argues that the trial court erred when it prevented him from introducing testimony of Molkentine's prior history of drug and alcohol abuse. This, Viau contends, hampered his defense because it prevented him from proving that Molkentine possessed the drugs and drug paraphernalia found in the apartment.

However, we note that Viau was able to introduce a significant amount of evidence that Molkentine possessed the drugs and drug paraphernalia. Viau testified that Molkentine had lived with him in the apartment for the past three years. He further testified that while he was at the apartment on the third of September, he had personally seen her use cocaine. Also, he testified that Molkentine possessed the cocaine and drug paraphernalia. Further evidence of Molkentine's past history of drug and alcohol abuse would be cumulative as Viau had already testified that Molkentine had used cocaine in the apartment *on the day of the search*. Moreover, we agree with the trial court that further evidence of Molkentine's history of drug and alcohol abuse would be irrelevant to the issue of possession and would only serve to attack the character of an individual whom the defense had decided not to call as a witness.

Third, Viau contends that the evidence presented at trial was insufficient to support his convictions. "We review the sufficiency of the evidence to determine whether the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt

beyond a reasonable doubt." ***State v. Ray,*** 166 Wis.2d 855, 861, 481 N.W.2d 288, 291 (Ct. App. 1992). This standard of review is the same whether it is a direct or circumstantial evidence case. *See* ***State v. Poellinger,*** 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). Thus, in reviewing the sufficiency of the evidence, a reviewing court need not concern itself in any way with evidence which might support other theories of the crime. *See* ***id.*** at 507-08, 451 N.W.2d at 758. We need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence. *See* ***id.*** at 508, 451 N.W.2d at 758.

Essentially, Viau claims that the evidence is insufficient to prove he had possession of the drugs and drug paraphernalia found in the apartment. "Possession" is defined to mean the defendant knowingly had actual, physical control over the substance or item. *See* WIS J I—CRIMINAL 6030, cmt. n.3, 6050, cmt. n.2. However, a person need not physically possess or own the item in order to find possession. It is enough that the person exercises control over it. *See* ***id.***

Here, the owner of the building identified Viau as the renter of the apartment where the police found the drugs and drug paraphernalia. When the police searched the apartment, they found a large amount of paperwork relating to the business Viau owned along with Viau's voter registration cards listing the apartment as his residence. Also, Viau listed the apartment as his current address when the police booked him after his arrest. Moreover, the police found traces of cocaine in the apartment, along with a white cartridge pen body, a hard plastic tube, a small strainer and paper folds, items commonly associated with drug usage. A white residue found in the pen body also tested positive for cocaine. Also, tests revealed the presence of cocaine in Viau's blood. Thus, there is sufficient evidence to support the jury's conclusion that Viau exercised control over the

cocaine and drug paraphernalia found in the apartment. We therefore reject Viau's argument and affirm the jury's judgment.

Finally, Viau argues that the "sentence was under all the circumstances unreasonably severe and should be reduced by this court." A trial court is required to exercise discretion in sentencing and must consider "the gravity of the offense, the character of the offender, and the need for protection of the public." ***State v. Wickstrom,*** 118 Wis.2d 339, 355, 348 N.W.2d 183, 192 (Ct. App. 1984). The trial court may also consider: the defendant's record; the defendant's history of undesirable conduct; the defendant's personality, character and social traits; the presentence investigation reports; the viciousness or aggravated nature of the crime; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance or cooperativeness; the defendant's rehabilitative needs; and the defendant's pretrial detention. *See* ***State v. Jones,*** 151 Wis.2d 488, 495, 444 N.W.2d 760, 763 (Ct. App. 1989). The weight to be given each factor is within the discretion of the trial court. *See* ***Wickstrom,*** 118 Wis.2d at 355, 348 N.W.2d at 192. We will affirm a sentence if the record shows it to have been a proper discretionary decision emanating from "a process of reasoning based on legally relevant factors." *See* ***id.*** at 355, 348 N.W.2d at 191.

Viau does not attack the trial court's decision to withhold sentencing and impose a three-year period of probation for the conviction of possession of cocaine. Instead, he contends that the four consecutive sixty-day sentences in the county jail are excessive given the fact that he has spent nine months in jail as a result of his prior conviction for delivery of cocaine.

Prior to imposing sentence, the trial court stressed that although the crimes were nonviolent in nature, they nonetheless had a serious and detrimental impact on society. Moreover, the trial court noted that Viau had a lengthy record of minor criminal convictions, was a repeat offender and demonstrated no motive to rehabilitate himself since he had been arrested and tested positive for cocaine only one day after being sentenced for a drug-related offense. The trial court then imposed the maximum sentence for each of the convictions of possession of drug paraphernalia. Based on our review of the record, we hold that the trial court properly considered the primary sentencing factors—the severity of the offense, the defendant's character and the need to protect the public—and adequately explained its reasoning for the sentence imposed based on those factors. We refuse to disturb its decision.

By the Court.—Judgment affirmed.

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