COURT OF APPEALS
DECISION
DATED AND FILED

September 16, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2624-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

THERMOND LARRY III,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: JACK F. AULIK, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

DYKMAN, P.J. Thermond Larry III appeals from a judgment convicting him of possessing cocaine with intent to deliver within 1000 feet of a park, as a party to a crime, contrary to §§ 961.41(1m)(cm)1, 961.49, and 939.05, STATS. Larry argues that the trial court erred by not suppressing evidence gathered pursuant to a search warrant obtained with an affidavit he asserts

contained a false statement and material omissions. He also contends that the trial court erred by admitting evidence of prior arrests for similar crimes. Larry also asserts that the trial court should have admitted his girlfriend's statement that the drugs belonged to her as a statement against interest. Finally, he argues that we should grant a discretionary reversal because the real controversy was not fully tried and a new trial would probably produce a different result. We disagree with each argument and affirm.

I. Background

At about midnight on February 17, 1996, Detective Timothy Hammond and several other members of the City of Madison Police Department entered Tameka Williams's apartment with a search warrant. As they searched the apartment, Thermond Larry, Williams's boyfriend, walked out of the back bedroom. In that bedroom, Hammond found thirteen baggie corners containing cocaine base underneath a portable stereo. Another officer searched Larry, finding a pager and $127 in cash in denominations of twenty dollars and lower. The police placed Larry under arrest and he was later charged with possessing cocaine with intent to deliver.

Detective Hammond applied for the search warrant, in the course of a homicide investigation, the day before the police searched Williams's apartment. He based his search warrant complaint in part on his interviews of DaJuan Seals and Debra Frazier-Hall. Seals told Hammond that he had seen the murder suspect with a dark handled handgun in his waistband in Frazier-Hall's apartment and that Frazier-Hall had also seen the gun. Hammond learned that Frazier-Hall was in the Dane County Jail from the police department's arrest log, which indicated that she had been arrested for obstructing and resisting a police officer. When he spoke

with her, Frazier-Hall said that she had seen a dark handled gun in the murder suspect's waistband, and had later seen a similar gun in Williams's apartment. She also said she had heard that the murder weapon was hidden in Williams's apartment. Hammond did not give Frazier-Hall any consideration in exchange for the information. In his search warrant complaint, Hammond stated that he believed "the information furnished by [DaJuan] Seals and Debra Frazier-Hall to be truthful and reliable inasmuch as they are citizen informants and witnessed the events described."

Before trial, Larry filed a motion to quash the search warrant and suppress all the evidence gathered from Williams's apartment. Larry argued that Hammond falsely described Frazier-Hall as a truthful and reliable citizen informant in his search warrant affidavit. Larry also asserted that Hammond intentionally omitted the fact that Frazier-Hall was in custody for obstructing and resisting an officer at the time he interviewed her, and that Frazier-Hall had a criminal record. The trial court held a motion hearing in which the officer who arrested Frazier-Hall testified that Frazier-Hall told her that she had used drugs the night before her arrest. That officer also testified that she had no contact with Hammond on the day he interviewed Frazier-Hall. At the close of the hearing, the trial court denied the motion, explaining that Larry produced no evidence that Hammond intentionally falsified his search warrant affidavit.

The State also filed a pretrial notice that it intended to introduce other acts evidence under § 904.04(2), STATS. At a pretrial hearing, the State explained that it intended to introduce evidence of two prior times when Larry had been arrested for possessing cocaine base with intent to sell. In both October 1994 and April 1995, Larry was found carrying cocaine rocks individually packaged in baggie corners, and cash in small bills. In 1994, he also had a pager. On both

occasions, Larry admitted that he was selling the cocaine. The trial court admitted the evidence, ruling that the other acts were near enough in time and sufficiently similar to the current charge to be probative of "motive, opportunity, and intent and plan." It also stated that "the probative value outweighs the prejudice to the defendant." At trial, the State presented the evidence through the testimony of the arresting officers. At the close of trial, the court issued the standard cautionary jury instruction for other acts evidence.

During trial, Larry called Williams as a defense witness. Larry intended to have Williams testify regarding a statement she gave to Larry's probation agent two days after Larry was arrested, in which she said the drugs found in the apartment belonged to her. After being advised by the court that making such a statement could subject her to prosecution, and after consulting with an attorney, Williams invoked her Fifth Amendment right not to testify. The court ruled that Larry could not then present Williams's statement under the statement against interest exception to the hearsay rule, § 908.045(4), STATS. The court explained that statements offered to exculpate the accused that expose the declarant to criminal liability are not admissible unless corroborated. Larry argued that the probation agent could corroborate the statement. However, the court pointed out that Williams's statement would be introduced through the probation agent, and stated that Larry would then need someone else to corroborate it. The court explained that corroboration was necessary to ensure that Williams did not fabricate the statement to protect her boyfriend.

The jury convicted Larry of possessing cocaine with intent to deliver, within 1000 feet of a park, as a party to a crime. Larry appeals.

II. Analysis

A. Search Warrant

Larry argues that the trial court erred by not quashing the search warrant and suppressing the evidence discovered in Williams's apartment. He asserts that Detective Hammond falsely stated that Debra Frazier-Hall was a citizen informant, as opposed to a police informant, in his search warrant affidavit. He also argues that Hammond's omission from the affidavit that Frazier-Hall was in jail for obstructing a police officer and had recently ingested illegal drugs amounted to a deliberate falsehood or reckless disregard for the truth. We disagree and affirm.

Under ***Franks v. Delaware***, 438 U.S. 154 (1978), a defendant challenging the veracity of a statement made in a search warrant affidavit "must first make a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included" in the affidavit, and that the false statement is "necessary to the finding of probable cause." ***State v. Anderson***, 138 Wis.2d 451, 462, 406 N.W.2d 398, 403-04 (1987). Upon such a showing, the defendant is entitled to a hearing regarding the truthfulness of the challenged statement. *See* ***id.*** at 463, 406 N.W.2d at 404. The affidavit is presumed valid, and the defendant must prove by a preponderance of the evidence that the statement is false and that the affiant made the false statement intentionally or with a reckless disregard for the truth. *See* ***id.*** Since "the defendant must show either intent or reckless disregard, a ***Franks*** hearing, by necessity, focuses on the state of mind of the affiant." ***Id.*** at 464, 406 N.W.2d at 404. If the defendant is successful at the hearing, the affidavit is examined without the challenged statement, and if it fails to state probable cause, "the warrant is voided and the evidence seized pursuant to the warrant must be suppressed." ***Id.*** The ***Franks*** methodology also applies to specific material facts

omitted from a search warrant affidavit. *See* ***State v. Fischer***, 147 Wis.2d 694, 700, 433 N.W.2d 647, 650 (Ct. App. 1988).

Whether the trial court correctly analyzed a challenge to a search warrant affidavit under ***Franks*** is a question of law that we review de novo. *See* ***State v. Mann***, 123 Wis.2d 375, 384, 367 N.W.2d 209, 212-13 (1985). In this case, the trial court granted Larry a hearing regarding the warrant affidavit. Thus, we must examine the hearing record to determine whether Larry proved his allegations by a preponderance of the evidence.

We conclude that Larry did not prove by a preponderance of the evidence that Hammond's description of Frazier-Hall as a citizen informant was an intentional or reckless false statement. Larry argues that Hammond "knew" Frazier-Hall was not a citizen informant because she was in jail at the time he interviewed her. At the ***Franks*** hearing, however, Hammond stated that he understood a citizen informant to be "a person that provides information. They're not looking to get any type of reward for the information." He testified that he gave no consideration to Frazier-Hall in exchange for the information. He further explained that he thought Frazier-Hall was a citizen informant because she was "not in jail on charges that [he had] against her."

In ***Loveday v. State***, the supreme court explained that the key distinction between a citizen informant and a police informant is that a citizen informant does not expect anything in return for the information. ***Loveday v. State***, 74 Wis.2d 503, 524-25, 247 N.W.2d 116, 128 (1976). Whether Hammond's understanding is consistent with the legal definition of a citizen informant is not dispositive of whether he intentionally or recklessly made a false statement in the warrant affidavit. However, it does show Hammond's explanation of why he

described Frazier-Hall as a citizen informant to be reasonable. Considering that explanation, Larry has not demonstrated that Hammond intentionally or recklessly misrepresented Frazier-Hall as a citizen-informant in his affidavit.

Larry also argues that Hammond knowingly or recklessly omitted that Frazier-Hall was in jail on a charge of obstructing. He asserts that such an omission should invalidate the search warrant because it created the false impression that Frazier-Hall was a reliable source of information.

In ***Mann***, the supreme court held that for an omission to be equivalent to "'a deliberate falsehood or a reckless disregard for the truth,' it must be an undisputed fact that is critical to an impartial judge's fair determination of probable cause." ***Mann***, 123 Wis.2d at 388, 367 N.W.2d at 214 (footnote omitted) (quoting ***Franks***, 438 U.S. at 155-56). At the ***Franks*** hearing, Larry established only that Hammond knew Frazier-Hall was in jail and that she had been arrested on a charge of obstructing. Frazier-Hall had provided a false name to a police officer, but Hammond testified that, "All I knew is that she had been charged with obstruct/resisting. I didn't know what the facts were to that case." He explained that he was not concerned with the underlying facts of her arrest because they were not related to his homicide investigation. He also stated that he understood an arrest for obstructing or resisting to mean that "either the person gave false information, or … physically resisted the police officer's efforts to place him under arrest."

We conclude that Hammond's omission of the fact that Frazier-Hall was in jail on an obstructing charge does not amount to a deliberate falsehood or reckless disregard for the truth. The fact that Frazier-Hall was in jail at the time she provided the information was not critical to a probable cause determination.

Frazier-Hall's account of what she had seen at her own apartment matched the account given by the other informant, DaJuan Seals. The fact that she was in jail does not render the other details she provided improbable. In addition, when Hammond omitted that Frazier-Hall had been arrested for obstructing, he did not know the facts that led to that arrest. As he explained at the ***Franks*** hearing, he knew only that such a charge could have meant that Frazier-Hall gave false information to a police officer or it could have meant that she physically resisted arrest. Only one of these possibilities reflects on Frazier-Hall's truthfulness. Since Hammond did not know why she had been arrested for obstructing, he did not intentionally or recklessly omit information material to a probable cause determination.

Finally, Larry argues that Hammond intentionally or recklessly left out the fact that Frazier-Hall had ingested drugs the day before he interviewed her. We conclude that Hammond could not have intentionally or recklessly omitted that fact because he was not aware of it. Larry argues that other police officers did know and that their knowledge can be imputed to Hammond under ***State v. Middleton***, 135 Wis.2d 297, 399 N.W.2d 917 (Ct. App. 1986). In ***Middleton***, we held that a sheriff's deputy's knowledge that a suspect had asked his wife to call his attorney could be imputed to other members of the sheriff's department for purposes of determining whether the suspect knowingly and voluntarily waived his ***Miranda*** rights. ***Id.*** at 312-313, 399 N.W.2d at 924. Central to our determination in ***Middleton*** was whether the suspect knowingly waived his rights. ***Id.*** at 313-14, 399 N.W.2d at 924-25. In contrast, central to a ***Franks*** hearing is the specific officer's state of mind when he or she prepared the warrant affidavit. An officer cannot intentionally or recklessly omit facts of which he or she is not aware.

B. Other Acts Evidence

Larry argues that the trial court erred by admitting the evidence of Larry's 1994 and 1995 arrests for possessing cocaine with intent to sell under § 904.04(2), STATS. He asserts that the trial court did not fully analyze the admissibility of the evidence and that a thorough analysis demonstrates that the prior drug-sale arrests were not probative of his motive, opportunity, intent or plan for the current charge. He also argues that the probative value of the evidence was outweighed by the danger of unfair prejudice.

In ***State v. Sullivan***, 216 Wis.2d 768, 576 N.W.2d 30 (1998), the supreme court spelled out a three-step framework for analyzing the admissibility of other acts evidence under §§ 904.04(2) and 904.03, STATS.[1] The framework is as follows:

> (1) Is the other acts evidence offered for an acceptable purpose under Wis. Stat. § (Rule) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?

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[1] Section 904.04(2), STATS., provides:

> OTHER CRIMES, WRONGS, OR ACTS. Evidence 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.

Section 904.03, STATS., provides:

> Although relevant, evidence may be excluded if its 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.

> (2) Is the other acts evidence relevant, considering the two facets of relevance set forth in Wis. Stat. § (Rule) 904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.
>
> (3) Is the probative value of the other acts evidence 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?

Id. at 772-73, 576 N.W.2d at 32-33 (footnote and citation omitted).

Whether to admit other acts evidence is within the trial court's discretion. *See* ***State v. Murphy***, 188 Wis.2d 508, 516, 524 N.W.2d 924, 927 (Ct. App. 1994). We will uphold a trial court's decision to admit other acts evidence unless it erroneously exercised its discretion. *See* ***id.*** In this case, however, the trial court did not fully set forth its reasoning for admitting the evidence, so we will independently review the record to determine whether it provides a basis for the court's exercise of discretion. *See* ***Sullivan***, 216 Wis.2d at 781, 576 N.W.2d at 36.

1. Step One: Acceptable Purpose

We conclude that the evidence of the prior arrests was admitted for an acceptable purpose. The trial court stated that the evidence was probative of motive, opportunity, intent or plan. Each of these purposes is acceptable under § 904.04(2), STATS.

2. Step Two: Relevance

The State concedes that the evidence was not relevant for each of the purposes that the trial court listed. However, to be admissible, other acts evidence need only be relevant to one of the purposes listed in § 904.04(2), STATS. *See* ***Murphy***, 188 Wis.2d at 518, 524 N.W.2d at 927. We conclude that the evidence was relevant to the issue of intent—whether Larry possessed the cocaine with intent to deliver.

Larry contends that the evidence fails the first part of the relevance inquiry. He argues that it did not relate to a proposition of consequence because he implicitly conceded the issue of intent. His theory of defense was that the drugs did not belong to him. He asserts that he conceded that whoever owned the drugs intended to sell them so that intent was not at issue in the trial. We disagree.

The element of intent to deliver was at issue at trial. In ***State v. Wallerman***, we set out a specific procedure to follow when the defendant wants to concede an element of a crime in order to avoid introduction of other acts evidence. ***State v. Wallerman***, 203 Wis.2d 158, 167-68, 552 N.W.2d 128, 132-33 (Ct. App. 1996). This did not happen in Larry's trial, so Larry did not concede the element of intent. In addition, Larry cross-examined Detective Hammond about his conclusion that the amount of cocaine found in Williams's apartment demonstrated that it was for sale and not personal use. Larry's attorney asked, "But, isn't it true that you don't know if someone was possessing that to use it at their leisure, do you?" Hammond explained that, in his experience, "when they have that amount of crack cocaine, it's for possession with intent to deliver." Larry's attorney replied, "But, you've also said that you've seen baggies in possession of people who were not selling it, correct?" Such questioning places intent at issue.

Larry also argues that the evidence fails the second part of the relevance inquiry. He argues that his prior arrests were not sufficiently similar to his current arrest to make the evidence probative of whether he had intent to deliver the cocaine. Specifically, he points out that, in the prior arrests, he was carrying the drugs and he admitted that he was selling them, neither of which was true in this case.[2]

Whether other acts evidence is probative of intent "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." ***Sullivan***, 216 Wis.2d at 786, 576 N.W.2d at 38. The intent exception to the preclusion of other acts evidence is based on the "doctrine of chances." ***State v. Evers***, 139 Wis.2d 424, 443, 407 N.W.2d 256, 264 (1987). "If a like occurrence takes place enough times, it can no longer be attributed to mere coincidence. Innocent intent will become improbable." ***Id.*** The greater "the similarity between the other acts and the charged offense, the greater will be the probability that the like result was not repeated by mere chance or coincidence." ***Sullivan***, 216 Wis.2d at 786-87, 576 N.W.2d at 38.

In this case, the two prior arrests were sufficiently similar to the current charge to be probative of whether Larry possessed the cocaine with intent to deliver. The prior arrests make it more probable that Larry intended to sell the cocaine found in Williams's apartment. The three arrests were relatively close in time, occurring within a sixteen month period. On the prior occasions, Larry was

[2] Larry also argues that the size of the crack rocks found in one of the prior arrests was half that of the rocks found in this case. Actually, in the October 1994 arrest, the rocks each weighed about 0.3 grams with their plastic packaging. In this case, the rocks ranged in size from 0.15 grams to 0.24 grams without any packaging. We conclude that the difference is negligible.

found with cocaine rocks individually packaged in baggie corners and with cash in small denominations. On one occasion he also had a pager. In this case, the cocaine was also individually packaged in baggie corners, and Larry was found with cash in small bills and a pager. Larry may not have been carrying the drugs, and he did not admit to selling them, but the similarities between the three arrests are sufficient to make it more likely that when he was arrested at William's apartment, he again possessed the cocaine in order to sell it.

3. Step Three: Probative Value and Danger of Unfair Prejudice

Larry argues that the danger of unfair prejudice caused by the other acts evidence outweighed its probative value. He asserts that the evidence of his prior arrests suggested to the jury that he had a propensity to sell drugs, and they may have convicted him on the basis that he simply acted in conformity with his "bad character."

Unfair prejudice can result when other acts evidence tends "to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case." ***Sullivan***, 216 Wis.2d at 789-90, 576 N.W.2d at 40. In this case, the danger of unfair prejudice arises from the possibility that a jury might conclude that "because an actor committed one bad act, he necessarily committed the crime with which he is now charged." ***State v. Fishnick***, 127 Wis.2d 247, 261-62, 378 N.W.2d 272, 280 (1985). A cautionary instruction can alleviate the danger of unfair prejudice. *See* ***State v. Gray***, 225 Wis.2d 39, 65, 590 N.W.2d 918, 931 (1999).

We conclude that the probative value of the evidence of Larry's other arrests outweighed the danger of unfair prejudice. We have already determined that the evidence was probative of whether Larry intended to sell the cocaine found in Williams's apartment. This was not because the evidence demonstrated that Larry acted in conformity with a "bad character," but because it was unlikely that Larry possessed the drugs for personal use on this occasion when on two prior similar occasions he had drugs packaged in the same way because he intended to sell them. In addition, the trial court alleviated the possibility of unfair prejudice by issuing the standard cautionary instruction for other acts evidence. The court warned the jury that they were to consider the evidence only for the permissible purposes, and not to conclude that Larry acted in conformity with a bad character. Based on our review of the record, we conclude that the trial court properly exercised its discretion in admitting the evidence of Larry's arrests in 1994 and 1995.

C. Statement Against Interest

Larry contends that the trial court erred when it declined to admit Williams's statement that the drugs belonged to her as a statement against interest. At trial he argued that the statement should have been admitted because it could be corroborated by the probation agent to whom Williams gave the statement. On appeal, Larry asserts that the statement is corroborated by his own testimony at trial, and by the circumstances surrounding the discovery of the drugs.

Under the statement against interest hearsay exception, a "statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated." Section 908.045(4), STATS. The corroboration must be "sufficient to permit a reasonable person to conclude, in

light of all the facts and circumstances, that the statement could be true." ***State v. Anderson***, 141 Wis.2d 653, 660, 416 N.W.2d 276, 279 (1987). The supreme court explained that this standard balances the defendant's potential need for the evidence with the risk that the statement may have been fabricated. *See* ***id.*** at 663-64, 416 N.W.2d at 280-81.

The decision to admit or exclude evidence is within the trial court's discretion, and we will not reverse as long as the trial court made a reasonable decision based on an accepted legal standard and the facts of record. *See* ***State v. Whitaker***, 167 Wis.2d 247, 252, 481 N.W.2d 649, 651 (Ct. App. 1992). Generally, we will look for reasons to uphold a discretionary decision. *See* ***Steinbach v. Gustafson***, 177 Wis.2d 178, 185, 502 N.W.2d 156, 159 (Ct. App. 1993). We will not "blindside trial courts with reversals based on theories which did not originate in their forum." ***State v. Rogers***, 196 Wis.2d 817, 827, 539 N.W.2d 897, 901 (Ct. App. 1995).

We conclude that the trial court appropriately exercised its discretion in declining to admit evidence of Williams's statement. Larry presented nothing to the trial court that could corroborate the statement. The probation agent could testify only that Williams made the statement, he could not provide testimony that would allow a reasonable person to conclude the statement could be true. Larry did not argue to the trial court that the circumstances could corroborate the statement. In addition, at the time when the trial court issued its ruling excluding Williams's statement, Larry had not yet decided to testify. Based on the record before it, the trial court's decision to exclude the statement was reasonable. Therefore, we affirm.

D. Discretionary Reversal

Larry argues that we should grant a discretionary reversal under § 752.35, STATS., and remand for a new trial in the interests of justice. He argues that the real controversy was not fully tried when the trial court admitted the evidence of Larry's prior arrests, but excluded Williams's exculpatory statement. He also suggests that we reverse on the basis that justice miscarried because a new trial in "optimum circumstances" would probably produce a different result.

Under § 752.35, STATS., we may grant a discretionary reversal if the real controversy has not been fully tried or if it is likely for any reason that justice has miscarried. *See* ***State v. Wyss***, 124 Wis.2d 681, 735, 370 N.W.2d 745, 770 (1985), *overruled on other grounds by* ***State v. Poellinger***, 153 Wis.2d 493, 451 N.W.2d 752 (1990). We may conclude the real controversy was not fully tried when, for example, important evidence bearing on an important issue was erroneously excluded, or when evidence was admitted that should have been excluded. *See* ***Vollmer v. Luety***, 156 Wis.2d 1, 19-20, 456 N.W.2d 797, 805-806 (1990). We may conclude that justice has miscarried if the defendant convinces us that there is substantial probability that a new trial would produce a different result. *See* ***State v. Darcy N.K.***, 218 Wis.2d 640, 667, 581 N.W.2d 567, 579 (Ct. App. 1998), *review denied*, 219 Wis.2d 923, 584 N.W.2d 123 (1998). We will exercise the power to grant discretionary reversal only in exceptional cases. *See* ***State v. Cuyler***, 110 Wis.2d 133, 141, 327 N.W.2d 662, 667 (1983); ***State v. Drusch***, 139 Wis.2d 312, 330, 407 N.W.2d 328, 336 (Ct. App. 1987).

We decline to exercise our power of discretionary reversal in this case. The real controversy was fully tried. We have already concluded that Williams's statement was not erroneously excluded. Her statement may have been exculpatory, but only if it was true. The trial court reasonably determined that Larry provided no support for its truthfulness. We have also determined that the

trial court's decision to admit the other acts evidence was reasonable and we will not remake that decision here. Finally, other than repeating his arguments, Larry has provided no basis on which to conclude that he would probably be acquitted in a new trial. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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