COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1928-CR **Cir. Ct. No. 2011CF338**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY DEAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: TIMOTHY D. BOYLE, Judge. *Affirmed*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Timothy Dean appeals a judgment of conviction for possession of cocaine with intent to deliver, contrary to WIS. STAT.

§ 961.41(1m)(cm)3.[1] Dean was also convicted of two counts of bail jumping, and he argues the trial court erroneously informed the jury of the charges for which he was on bail. We conclude that Dean forfeited an expanded argument first presented on appeal, and that any error was harmless. Accordingly, we affirm.

BACKGROUND

¶2 Police were attempting to locate a person—not Dean—who was wanted on a felony warrant. In a phone conversation, the person directed an undercover officer to a particular intersection. Four officers responded to the intersection and observed three people near the end of a driveway. It was dark, so the officers were unable to differentiate the physically similar individuals. When the officers approached and identified themselves, the three individuals walked away in different directions. Two of the officers followed the person later identified as Dean.

¶3 Dean entered a vehicle parked in a different driveway. The officer on one side of the vehicle saw Dean reaching into an inside coat pocket. The officer on the other side, with the aid of a flashlight, observed a digital scale that appeared to fall from Dean's pocket. Following a pat-down search, the officers discovered a twenty-nine-gram baggie of cocaine, $220 cash, and a cell phone.[2] At the time of his arrest, Dean was on bond for disorderly conduct and attempted battery, both of which were misdemeanors.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] The weight of the baggie was included in the twenty-nine grams.

¶4 The case ultimately proceeded to trial on two charges of misdemeanor bail jumping and one charge each of possession of drug paraphernalia and possession with intent to deliver cocaine. At the beginning of the trial, Dean objected to part of a factual stipulation proffered by the prosecutor. The stipulation, which was intended to inform the jury about the misdemeanors underlying the two bail jumping charges, stated Dean had previously been charged with attempted battery and disorderly conduct. Dean objected to the reference to the attempted battery, arguing it was unduly prejudicial because a violent offense might cause the jury to infer he was more likely to be a drug dealer. He requested the jury be informed only of the disorderly conduct charge. Alternatively, Dean offered to stipulate to the bail-jumping element that he had been charged for a prior misdemeanor.

¶5 The State did not accept Dean's offer to stipulate to an element, and the court denied Dean's objection. The court determined that, because the pattern jury instruction for bail jumping required the State to prove a specific offense for the bail jumping charge, the stipulation should inform the jury about all underlying charges.[3]

¶6 Dean's counsel conceded in the opening statement that Dean was on bond and possessed the cocaine and scale. The only disputed issue during trial was whether Dean intended to deliver the cocaine.

¶7 Officer Hans Freidel testified regarding controlled-substance use and sale. He indicated cocaine users often ingest cocaine by snorting through a straw

[3] Although there were two underlying misdemeanor charges, Dean was subject to a single bond on those charges.

or rolled dollar bill. When identifying sellers of controlled substances, Freidel considers factors such as the amount of drug; the packaging; presence of seller paraphernalia such as scales; presence of a cell phone and whether it contains messages dealing with sales; and the number of baggies.[4] Users typically possess only small quantities of cocaine, do not have large amounts of cash, and commonly have user paraphernalia. While multiple packages may indicate dealing, some sellers know not to prepackage drugs for sale to avoid being charged with intent to deliver. Freidel testified that no user paraphernalia was found in this case and it was his opinion that the cocaine was possessed for resale. The primary basis of his opinion was the quantity of cocaine; he explained that users would typically purchase .1 gram up to 3.5 grams. Dean did not testify or call any witnesses.

¶8 The jury convicted Dean on all four charges. He now appeals, but only as to the possession-with-intent-to-deliver charge.

DISCUSSION

¶9 Dean renews his argument that the trial court erroneously informed the jury of the misdemeanor attempted battery charge underlying his bail-jumping charges. However, he now expands his argument. Relying on the ***Old Chief*/*McAllister*** rule, Dean contends the court erred by informing the jury of

[4] Freidel testified that, in his experience, drug purchasers did not bring scales to a sale transaction.

either specific charge for which he was on bond.[5] *See* ***Old Chief v. United States***, 519 U.S. 172 (1997); ***State v. McAllister***, 153 Wis. 2d 523, 451 N.W.2d 764 (Ct. App. 1989). Dean seeks to extend the ***Old Chief***/***McAllister*** rule to his situation, which would have required the trial court to exclude specific mention of *both* of the charges underlying the bail-jumping charges.

¶10 We need not, however, discuss the ***Old Chief***/***McAllister*** rule or address whether it should be extended to apply in the context of bail-jumping charges. Dean did not invoke that rule or cite any cases in support of it when arguing before the trial court. We therefore conclude he forfeited his right to now make the argument, which is broader than the argument asserted below. *See* ***State v. Conway***, 34 Wis. 2d 76, 82-83, 148 N.W.2d 721 (1967). We therefore consider only Dean's argument that it was prejudicial error to inform the jury of his attempted battery charge.

¶11 Dean asserts—with little analysis of the evidence or potential for prejudice—that, "Tarnishing him by revealing the specific offenses on which he was on bond, particularly when one of those offenses was violent in nature, could only cast Mr. Dean in the light of a criminal more amenable to dealing drugs."

¶12 We agree with the State that, if it was error to inform the jury of Dean's attempted battery charge, the error was harmless. To conclude an error

[5] The ***Old Chief***/***McAllister*** rule provides that, in felon-in-possession-of-a-firearm cases, the State is required to accept a sanitized stipulation that the defendant has previously been convicted of a felony, without any reference to the nature of the underlying conviction. *See* ***Old Chief v. United States***, 519 U.S. 172, 174 (1997); ***State v. McAllister***, 153 Wis. 2d 523, 529, 451 N.W.2d 764 (Ct. App. 1989). In Wisconsin, the rule was expanded to require the State to accept stipulations regarding prior operating while intoxicated convictions, suspensions, and revocations. *See* ***State v. Warbelton***, 2009 WI 6, ¶¶41-48, 315 Wis. 2d 253, 759 N.W.2d 557 (discussing ***State v. Alexander***, 214 Wis. 2d 628, 571 N.W.2d 662 (1997)).

was harmless, i.e., that the error "'did not contribute to the verdict' within the meaning of [***Chapman v. California***, 386 U.S. 18 (1967)], a court must be able to conclude 'beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***State v. Harvey***, 2002 WI 93, ¶48 n.14, 254 Wis. 2d 442, 647 N.W.2d 189 (quoting ***Neder v. United States***, 527 U.S. 1, 18 (1999)). "The defendant has the initial burden of proving an error occurred, after which the State must prove the error was harmless." ***State v. Sherman***, 2008 WI App 57, ¶8, 310 Wis. 2d 248, 750 N.W.2d 500 (citing ***State v. Tiepelman***, 2006 WI 66, ¶3, 291 Wis. 2d 179, 717 N.W.2d 1).

¶13 Further, when the error complained of consists of improperly admitted evidence, "reversal is not warranted 'unless an examination of the entire proceeding reveals that the admission of the evidence has affected the substantial rights of the party seeking the reversal.'" ***State v. Jackson***, 2014 WI 4, ¶87, 352 Wis. 2d 249, 841 N.W.2d 791 (quoting ***State v. Armstrong***, 223 Wis. 2d 331, 368, 588 N.W.2d 606 (1999)) (internal quotation marks omitted); *see also* WIS. STAT. § 901.03(1). Accordingly, for a defendant to be entitled to a new trial, there must be a "'reasonable probability that, but for … [the] errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Jackson***, 352 Wis. 2d 249, ¶87 (quoting ***Armstrong***, 223 Wis. 2d at 369).

¶14 It was undisputed that Dean possessed twenty-nine grams of cocaine. The only issue for the jury to decide was whether he possessed the drug for personal use or with intent to deliver. While not overwhelming, the State had a strong case on intent to deliver. Dean was found with a substantial amount of cocaine and a digital scale, immediately after meeting with two individuals near a dark street corner. He had $220 cash when arrested. That relatively large amount

of cash is inconsistent with someone who had just disbursed cash to obtain a large quantity of cocaine. Further, Dean did not possess any user paraphernalia, such as a straw, rolled dollar bill, or pipe. Although the cocaine was not prepackaged into individual baggies, with the digital scale, Dean had the means to apportion the cocaine at the point of sale. Accordingly, while there was no direct evidence of a sale, there was substantial circumstantial evidence that Dean intended to sell the cocaine in his possession.[6]

¶15 In addition to the strong evidence of intent to deliver, there is little to no suggestion of prejudice from the jury's knowledge that Dean was previously charged with attempted battery. First, the jury was not informed that Dean was ever *convicted* of the charge. Evidence of a prior charge is inherently less prejudicial than evidence of a proven crime. Second, the charge was only an ordinary—and merely, attempted—battery, as opposed to a completed battery or an aggravated felony battery. Thus, there was no suggestion of extreme levels of violence, risk of harm, or injury. Third, the nature of the charge was just as likely to have assisted, as opposed to hurt, the defense theory. It is common knowledge that cocaine is a stimulant. Thus, jurors might be just as likely to speculate that Dean was a *user* who was high on cocaine at the time of the attempted battery, as they would be to speculate that he was a violent drug dealer. Fourth, there was no indication to the jury that the charge involved firearms or other weapons, which

[6] Although we agree with the State that any error was harmless, we do so without proper assistance by the State. The State elected not to set forth its own statement of facts, and in its discussion of the evidence it cited and discussed only the defense's opening statement and the prosecutor's closing argument—not actual evidence from the record. We expect the State's appellate counsel to know the elementary principle that argument is not evidence. *See* ***Merco Distrib. Corp. v. O & R Engines, Inc.***, 71 Wis. 2d 792, 795-96, 239 N.W.2d 97 (1976) ("Arguments or statements made by counsel during argument are not to be considered or given weight as evidence.") (citing ***Mullen v. Reinig***, 72 Wis. 388, 392, 393, 39 N.W. 861 (1888)).

are more commonly associated with drug dealers. Finally, the underlying charge did not involve delivery or manufacture of drugs. Considering these factors together, there was very little risk of prejudice.[7]

¶16 We have determined that the State had a strong circumstantial case of intent to deliver cocaine and that, under the existing facts, there was little to no risk of prejudice in informing the jury of the misdemeanor attempted battery charge underlying the bail-jumping charge. We therefore conclude it is not reasonably probable that the jury would have found Dean not guilty of possession with intent to deliver, had the jury not known the nature of Dean's previous charge. Accordingly, any error in informing the jury of the attempted battery charge was harmless.

By the Court.—Judgment affirmed.

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

[7] The State informs us: "The jury was instructed to consider [the] underlying charges solely as support for the bail jumping charges." (Record citations omitted.) The State misrepresents the record; there is no such instruction at, or near, the record citations provided. Ironically, however, at the second such citation, we did observe the following jury instruction: "Remarks of the attorneys are not evidence. … Consider carefully the closing arguments of attorneys but their arguments and conclusions and opinions are not evidence." *See*, *supra*, note 4. Our nonexhaustive review of the record did not reveal any cautionary instruction regarding the charges underlying the bail-jumping charges.