COURT OF APPEALS
DECISION
DATED AND FILED

January 27, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-0868-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TROY D. FORLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

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

¶1 VERGERONT, J. After a jury trial Troy Forler was convicted of possession with intent to deliver over forty grams of cocaine as a party to the crime in violation of WIS. STAT. §§ 961.41(1m)(cm)4 (1997-98)[1] and 939.05.[2] He

[1] All references to the Wisconsin Statutes are to the 1997-98 version.

appeals the judgment of conviction and order denying his motion for postconviction relief, contending the trial court erred in denying his request to submit to the jury the alternative, lesser-included offense of possession of cocaine.[3] Viewing the evidence and all reasonable inferences derived from the evidence most favorably to Forler, we conclude a reasonable jury could not have acquitted Forler on the greater charge and convicted him on the lesser charge. We therefore affirm the trial court's decision denying Fowler's request for a jury instruction on the lesser-included charge of possession.

BACKGROUND

¶2 At trial the State presented evidence relating to approximately forty-five grams of cocaine and various drug trafficking paraphernalia found at the apartment of Candace LaFave upon the execution of a search warrant. Based on this evidence, the jury concluded Forler was involved in the possession of cocaine

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[2] WISCONSIN STAT. § 961.41(1m)(cm)4 provides a penalty of a fine of up to $500,000 and imprisonment for not less than five years nor more than thirty years for possession of between forty and one hundred grams of cocaine with intent to deliver.

WISCONSIN STAT. § 939.05 provides that a person may be convicted of the commission of a crime although the person did not directly commit it if the person is concerned in the commission of the crime by (1) directly committing the crime, (2) intentionally aiding and abetting the commission of it, or (3) is a party to a conspiracy with another to commit it.

Forler's conviction also included a violation of WIS. STAT. § 961.49 for possession of cocaine within 1,000 feet of a public school, but this enhancer is not relevant to this appeal.

Forler was also charged with possession of THC, but the jury found him not guilty of that charge.

[3] *See* WIS. STAT. § 961.41(3g)(c), which provides:

> If a person possess or attempts to possess cocaine or cocaine base … the person shall be fined not more than $5,000 and may be imprisoned for not more than one year in the county jail.

with the intent to deliver as a party to the crime. The pertinent testimony was as follows.

¶3 City of Madison Police Officer George Chavez testified that he participated in a surveillance of LaFave's apartment before the search warrant was executed. After he saw LaFave leave the apartment, he observed Forler exit and re-enter the apartment building several times. Officer Chavez testified that it was a security-locked building and Forler did not have any problem with the security-locked doors.

¶4 During the search of LaFave's apartment, the officers found many items indicating that cocaine was packaged for sale at the apartment, including over forty grams of cocaine and packaging materials. City of Madison Police Officer Linda Kosovac testified that the following items were located in a dresser drawer in a bedroom of the apartment: a bottle of Inositol, a vitamin commonly used by cocaine dealers as a cutting agent that dilutes powder cocaine and adds more bulk to the product so the dealer can get more money for the cocaine; a scale with cocaine residue on it, commonly used in weighing and packaging cocaine for sale; two hundred dollars in cash; an open box of sandwich baggies, commonly used to package cocaine for sale; several torn "baggie corners" with cocaine residue on them; and a black tray and two playing cards, also with cocaine residue. Forler's fingerprint was found on the black tray. Officer Kosovac testified that because the black tray was flat and smooth with sides, it could be used to cut, weigh and package cocaine for sale. An item with a sharp edge, such as a playing card, is necessary to push the powder along to help in packaging. She also testified that these items (the black tray and the playing cards) could be used to "snort" lines of cocaine. In the same dresser drawer, Officer Kosovac found an oil change receipt with Forler's name on it.

¶5 There was also testimony that after cocaine dealers cut the cocaine (dilute it with Inositol) and weigh it, the powder is placed in the corner of a sandwich "baggie," which is then tied into a knot to seal the cocaine inside. When individuals prepare to use the cocaine, they generally tear or cut the knot off the baggie and are left with a "baggie corner" with cocaine. Fifteen knotted baggies filled with cocaine were found under various cosmetics in a makeup bag, which was located on the floor of the bedroom closet, under a pile of clothes.[4] Both Officer Kosovac and another officer involved in the search testified that, based on their training and experience, these fifteen baggies of cocaine were packaged for sale, not for personal use. Forler's thumbprint was found on the outside flap of one of these baggies. It was the only identifiable print found on the fifteen baggies of packaged cocaine.

¶6 In that same bedroom, but not in the dresser drawer or the closet, other evidence was collected, including Forler's driver's license and the title to his vehicle, and several items consistent with cocaine use: baggie corners with cocaine residue, a cut straw with cocaine residue (commonly used for "snorting lines" of cocaine) and a hanger that was apparently used as a "push rod," also with cocaine residue. Forler's Wisconsin ID was found in the kitchen.

¶7 At the close of the evidence Forler requested that the jury be instructed it could find Forler guilty of the lesser-included offense of possession of cocaine. The trial court denied the request explaining, "I don't see where a jury could be unable to reach a verdict on the possession with intent and then reach one

[4] Other items found in the makeup bag include a baggie of marijuana, $200 cash, a metal pipe with residue on it and four baggie corners with residue. Also found in the closet, in the pocket of a women's jacket, was $1,450 in cash.

on simple possession." At the postconviction hearing Forler argued that it would have been reasonable for a jury to infer that LaFave possessed the cocaine with intent to deliver and Forler was simply LaFave's boyfriend who had access to the apartment and used some of his girlfriend's cocaine. The trial court denied the motion and Forler renews his argument on appeal.

DISCUSSION

¶8 When a party asks the trial court to instruct the jury that it could alternatively find the defendant guilty of a lesser-included offense, the court must submit the lesser-included offense to the jury only if a reasonable view of the evidence provides grounds for both acquittal on the greater charge and conviction on the lesser. *See* ***State v. Wilson***, 149 Wis. 2d 878, 898, 440 N.W.2d 534 (1989). Whether the evidence at trial supports the submission of a lesser-included offense is a question of law, which we review de novo. *See* ***id.***

¶9 In determining whether the evidence supports submitting the lesser-included offense, we review the evidence, and all reasonable inferences derived from the evidence, in the light most favorable to Forler. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 662, 348 N.W.2d 527 (1984). We do not look to the totality of the evidence, but rather we consider whether a reasonable view of the evidence supports the defendant's theory. *See* ***id.*** However, "[t]he key word in the rule is 'reasonable.' The rule does not suggest some near automatic inclusion of all lesser but included offenses as additional options to a jury." ***State v. Bergenthal***, 47 Wis. 2d 668, 675, 178 N.W.2d 16 (1970). The evidence supporting the submission of the lesser-included offense must be relevant and appreciable. ***State v. Fleming***, 181 Wis. 2d 546, 560, 510 N.W.2d 837 (Ct. App. 1993).

¶10 Reasonable inferences must be supported by evidence. *See* ***State ex rel. Kanieski v. Gagnon***, 54 Wis. 2d 108, 117, 194 N.W.2d 808 (1972). As we explained in ***Belich v. Szymaszek***, 224 Wis. 2d 419, 425, 592 N.W.2d 254, 258 (Ct. App. 1999) (citations omitted), *review denied* 225 Wis. 2d 489, 594 N.W.2d 383 (1999):

> An elementary principle is that an inferred fact is a logical, factual conclusion drawn from basic facts or historical evidence. It is the probability that certain consequences can and do follow from basic events or conditions as dictated by logic and human experience. Building on this elementary principle is the principle that a reasonable inference is a conclusion arrived at by a process of reasoning. This conclusion must be a rational and logical deduction from facts admitted or established by the evidence when such facts are viewed in the light of common knowledge or common experience. Further, an inference is not supposition or conjecture; it is a logical deduction from facts proven and guesswork cannot serve as a substitute.

¶11 In this case, the jury was instructed on the four elements of possession of cocaine with intent to deliver: (1) the person possessed a substance, (2) the substance is cocaine, (3) the person knew or believed it was cocaine, and (4) the person possessed cocaine with the intent to deliver it (to transfer or attempt to transfer it from one person to another). *See* WIS. STAT. § 941.41(1m)(cm)4. The jury was told it could either find all four elements beyond a reasonable doubt, or find Forler not guilty. If the crime of possession of cocaine had been submitted to the jury, it could have found him guilty of the lesser charge if it found the first three elements, but did not find intent to deliver the cocaine beyond a reasonable doubt. *See* WIS. STAT. § 961.41(3g)(c). Since Forler was charged as a party to the crime, the jury was instructed that it needed to find only that Forler was concerned in the commission of the crime in one of the following ways: (1) he directly

committed the crime of possession with intent to deliver, (2) he aided and abetted the commission of the crime, or (3) he was a member of a conspiracy with another to commit it. *See* WIS. STAT. § 939.05.

¶12 Forler contends it is reasonable to infer, based on the evidence, that LaFave was a cocaine dealer and that Forler was not her business partner, but only her boyfriend who used her cocaine, but did not participate in packaging or selling it.

¶13 We agree with Forler that the evidence that he came and went from LaFave's apartment could support the inference that he was her boyfriend and not necessarily her business partner. We also agree there was testimony to support the inference that Forler's fingerprint on the black tray was consistent with either using cocaine or packaging it for sale. We therefore conclude the presence of Forler's oil change receipt in the same drawer as the black tray is also consistent with an inference that Forler placed items in the drawer while in the process of possessing cocaine for personal use. Given that Forler's prints were not found on any piece of evidence in that drawer that is used for packaging cocaine and not for using it, it would be reasonable to infer that he did not use those items, but simply put items he did use—the black tray and the oil change receipt—in the drawer.

¶14 However, there was also undisputed evidence that Forler's thumbprint was on one of the fifteen knotted baggies of cocaine located in the makeup bag in the closet. We are unable to discern any reasonable inference from this evidence that is consistent with cocaine use rather than the intent to deliver. All fifteen of the baggies were sealed and ready for sale, as opposed to being "baggie corners" with the knots cut off. The makeup bag was located under a pile of clothes in the closet, making incidental contact unlikely. Under these

circumstances, we conclude it is not reasonable to infer that Forler somehow placed his thumb on the outside flap of this baggie either before the cocaine was in the bag or when he was possessing the cocaine for personal use. There is no evidence to support such an inference and an inference based on mere suspicion or conjecture is not reasonable. *See* ***Belich***, 224 Wis. 2d at 425.

¶15 We therefore conclude the evidence does not provide any reasonable inferences based upon which a jury could find Forler guilty beyond a reasonable doubt of possession of cocaine and yet have reasonable doubt as to whether he was guilty of possession with intent to deliver.

By the Court.—Judgment and order affirmed.

Recommended for publication in the official reports.