COURT OF APPEALS
DECISION
DATED AND FILED

April 12, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3235-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ARTHUR J. MCCOY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Arthur McCoy appeals from a judgment of conviction and an order denying his postconviction motion. We affirm.

¶2 McCoy first argues that his right to a fair trial was prejudiced because, at the conclusion of jury selection, one of the jurors saw an officer putting McCoy in leg shackles for transport back to jail. At the postconviction hearing, McCoy and his trial attorney testified about the incident. McCoy, in particular, testified he was seen by one of the jurors who was to sit on his case. According to McCoy, the juror was standing in the doorway of the courtroom while McCoy was near counsel tables with a sheriff's deputy in the act of putting shackles on him.[1]

¶3 The trial court denied the motion because it concluded McCoy failed to meet his burden of proof to show that the juror observed the deputy putting the shackles on or attempting to put them on. The court stated: "The court takes judicial notice because the counsel tables have front and side panels that extend within approximately 6 inches of the floor. It would have been very difficult if not impossible for a juror to see what the defendant alleges from the alleged point of observation of the jurors."

¶4 On appeal, McCoy argues this finding was clearly erroneous because it was contrary to the testimony at the postconviction hearing. However, the trial court is obviously in a better position than this court to determine whether that testimony was credible in light of the courtroom layout. Furthermore, on cross-examination McCoy conceded that maybe the juror could not see his feet.

¶5 McCoy also appears to argue there were other moments before or after jury selection when jurors may have seen him in shackles. However, there is

[1] Although McCoy testified two jurors saw him while that incident took place, he said that only one of those jurors was on the panel that decided his case.

no specific evidence that any particular juror saw him at those times, other than speculation based on the circumstances.

¶6 McCoy's second argument is that the trial court erroneously admitted other acts evidence. McCoy was on trial for alleged delivery of cocaine on May 27, 1998. Shawn Martin testified that on May 27 he obtained crack cocaine from McCoy three times, all without paying. Martin testified that at their last meeting they agreed he would pay $400 the next day. Martin then went to the police and agreed to meet with McCoy the next day to pay him, and also to attempt a new "controlled buy" of more cocaine, while wearing a microphone. Martin met with McCoy on May 28, but the meeting ended prematurely when McCoy inadvertently gave police the prearranged signal that the transaction was done. However, a tape recording was made of the meeting and officers testified as to what they observed during and after that meeting when they attempted to arrest McCoy. It could be inferred from the evidence that McCoy was willing to sell additional cocaine on May 28, though none was found on his person when he was apprehended.

¶7 Before trial, McCoy filed a motion in limine to bar all evidence of the new attempted controlled buy. The trial court denied the motion on the ground that the evidence was other acts evidence admissible for intent, preparation, and plan under WIS. STAT. § 904.04(2) (1999-2000).[2] On appeal, McCoy argues the evidence was not admissible under that statute, while the State argues that it was. However, we conclude the evidence was not evidence of other acts. The evidence

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

was essentially part of the same transaction rather than evidence of McCoy's character.

¶8 McCoy next makes two arguments that there was insufficient evidence that the substance he delivered to Martin on May 27 was cocaine. Martin testified he smoked the substances, and as a result they were not preserved or tested.

¶9 McCoy's first argument is that the State failed to prove whether the substance was cocaine, or was instead an analog of cocaine. He argues that delivery of a cocaine analog is "a separate crime" from delivery of cocaine. In the statute McCoy was charged with violating, it is a crime to deliver "a controlled substance or controlled substance analog." WIS. STAT. § 961.41(1) (1995-96). The term "controlled substance analog" is defined in WIS. STAT. § 961.01(4m) (1995-96). McCoy also notes that there is a separate jury instruction for possession of an analog based on that definition. However, the instruction given in this case was only for cocaine, not for analogs. McCoy does not argue that he presented any evidence to the jury about the possibility that the substance in this case was an analog rather than cocaine. Nor does McCoy cite any authority for the proposition that it was the State's burden to affirmatively eliminate the possibility that the substance was an analog in order to obtain a conviction under the current statute. Therefore, we conclude that if the State introduced testimony sufficient to establish that the substance was cocaine, the jury's verdict is founded on sufficient evidence.

¶10 McCoy also argues the evidence was insufficient to establish the substance was cocaine. In response, the State relies on Martin's testimony about the transactions and the substance. Martin said he had a cocaine "problem" for

about twenty years, that he bought "rock" cocaine from McCoy three times on May 27, and that he smoked it after each purchase. He said it was common for him to smoke these amounts "when I get going." Although Martin did not specifically describe the appearance of the substance or its effect on him, it was implied within his testimony that he recognized the substance as cocaine. In addition, the fact that Martin made three separate purchases from McCoy on the same day suggests the substance Martin obtained was indeed the one that he was intending to purchase, namely, cocaine.

By the Court.—Judgment and order affirmed.

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