COURT OF APPEALS
DECISION
DATED AND FILED

March 8, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2530-CR **Cir. Ct. No. 2013CF1292**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NATHANIEL ODEL ALEXANDER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Nathaniel Odel Alexander appeals from his judgment of conviction for intent to deliver heroin as party to the crime and from an order denying his motion for new trial.[1] He claims that the evidence was

[1] Alexander was also charged with marijuana possession. He does not challenge his conviction on this count.

insufficient to convict him, and the circuit court should have granted his motion for a new trial based on newly-discovered evidence. We disagree and affirm.

BACKGROUND

¶2 At trial, the following testimony was introduced. A confidential informant (CI) agreed to help the West Allis Police Department with a drug investigation. As part of her cooperation, she sent a text message to a heroin supplier—a person she identified as "Big Guy"—in Chicago to set up a buy/bust. A buy/bust involves an informant ordering an amount of drugs (the buy) and police arresting whomever delivers the drugs (the bust). After the message was sent, the CI waited in a residence with police for the delivery. The CI received a call informing her that delivery would be made by a person she identified as Big Guy's "brother." She also identified Alexander in court as "Big [Guy's] little brother." The CI informed police that the drugs were being brought in a black Nissan or Kia with tinted windows. The CI also received a text message that read "[l]ike twoty min, trooper ruff." Multiple officers testified that they interpreted this message as stating a time frame for arrival and advising the CI that law enforcement was present along the way.

¶3 A car matching the CI's description arrived near the residence. One of the SWAT officers testified that he approached the vehicle dressed in a black uniform with "Police" written in large letters on it, and the other members of the SWAT team were wearing similar gear. As they approached, the officer observed that the brake lights were on, indicating that the vehicle was still in gear. The SWAT officers ordered the occupants to stop the vehicle and show their hands. In response, the driver attempted to move forward but was blocked by a SWAT vehicle. After being blocked, the driver then attempted to move the vehicle

backwards, but it was blocked by another police vehicle. At this point, SWAT removed two people from the vehicle: Alexander from the driver's seat and a passenger, Lamont Alexander (Lamont).[2]

¶4 As Alexander was removed from the vehicle, a cell phone fell to the ground. An officer testified that he thought the phone was probably sitting on Alexander's lap when he was removed. Another cell phone was found under the driver's seat. Later, it was discovered that the text message regarding the time of arrival was sent from the phone that fell from the car.[3] No heroin was found in the vehicle, on Alexander's person, or on Lamont. However, Lamont was transported in a police vehicle that was searched beforehand. Afterwards, police found heroin stuffed under the seat cushion where Lamont had been riding.

¶5 After trial, the jury found Alexander guilty of heroin possession with intent to deliver as party to a crime. But before he was sentenced, Alexander moved for a new trial based on newly-discovered evidence. He proffered a written statement by Lamont—made after Lamont was separately convicted and sentenced for his role in the attempted drug transaction—claiming that Alexander had no knowledge of the sale. The circuit court denied the motion, finding that Lamont's statement was not credible. The court noted that Lamont had maintained his innocence throughout his trial and sentencing and then abruptly performed an about face.

> Lamont Alexander was quite adamant of his innocence when I sentenced him, so now for this individual, Lamont

[2] Lamont is Alexander's cousin.

[3] Alexander's counsel stated during closing arguments there was no dispute that the phone that fell to the pavement sent the incriminating text message.

> Alexander to assert by sworn statement that Nathaniel Alexander knew nothing about the drugs, that Nathaniel Alexander had no knowledge about what he had on his person, such statements do not appear to this court to be credible.
>
> Was Lamont Alexander truthful or untruthful when he talked to the PSI writer? He told her he did not commit the crime. Was he truthful or untruthful to this court at the time of his sentencing when he stated that he was being railroaded? This court questions whether it is just a coincidence that Lamont Alexander's appeal in this case has been denied.

Thus, the court concluded that Lamont's belated admission did not create a reasonable probability of a different outcome and denied the motion. Alexander now appeals from the judgment of conviction, and the court's order denying his motion for a new trial.

DISCUSSION

¶6 Alexander contends that we should reverse his conviction because it was not based upon sufficient evidence. He also maintains that the circuit court should have granted a new trial based on Lamont's statement exonerating him. We address and reject each argument below.

A. Sufficiency of the Evidence

¶7 Alexander does not contest whether the evidence was sufficient for the jury to conclude that *Lamont* attempted to sell heroin to the CI. Rather, he insists that there was no evidence from which the jury could infer that *he* knew about the drugs or the attempted sale—a necessary element for him to be convicted as party to the crime. He emphasizes that no heroin was found on his person, and no physical evidence connected him to the heroin the police recovered. Further, he points out that the heroin was found in the police vehicle

used to transport Lamont. He also proffers that nothing in evidence established that the phone recovered from the vehicle and used to contact the CI belonged to him or was ever used by him.

¶8 When reviewing a challenge to the sufficiency of the evidence, we must view the evidence in the light most favorable to sustaining the verdict. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The question is not whether we are convinced of Alexander's guilt beyond a reasonable doubt. ***Id.*** at 503-04. Rather, the question is whether a reasonable jury—considering the evidence before it—could find guilt beyond a reasonable doubt. ***Id.*** We "will uphold the conviction if there is any reasonable hypothesis that supports it." ***State v. Smith***, 2012 WI 91, ¶24, 342 Wis. 2d 710, 817 N.W.2d 410. It is up to the jury to resolve any conflicts or inconsistencies in the evidence. *See* ***Thomas v. State***, 92 Wis. 2d 372, 381-82, 284 N.W.2d 917 (1979). Thus, "when faced with a record of historical facts which supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law." ***Poellinger***, 153 Wis. 2d at 506-07. Absent extraordinary circumstances, we will not upset the jury's determination of the weight and credibility to be given to a particular witness's testimony. ***Thomas***, 92 Wis. 2d at 381-82. Whether the verdict was supported by sufficient evidence is a question of law we review de novo. ***Smith***, 342 Wis. 2d 710, ¶24.

¶9 In order to convict a person of possession with intent to deliver heroin, the State must prove that he or she (1) possessed heroin, (2) knew that he or she possessed heroin, and (3) intended to "manufacture, distribute or deliver"

the heroin. WIS. STAT. § 961.41(1m) (2015-16)[4]; *see also* WIS JI—CRIMINAL 6035. In addition to the person who directly commits this crime, Wisconsin law provides that a person who "intentionally aids and abets" in the commission of a crime may also be convicted of that crime. WIS. STAT. § 939.05(1), (2)(a)-(b). Thus, the jury could convict Alexander as party to the crime of possessing heroin with intent to deliver if he acted with knowledge or belief that Lamont was committing the crime and assisted Lamont in committing the crime or was ready and willing to assist. *See* WIS JI—CRIMINAL 400 (describing aiding and abetting).

¶10 Alexander's contention that no evidence indicated he knew of the transaction lacks merit. On the contrary, the evidence supported an inference that Alexander knew of, and assisted with, the attempted drug sale. The text message sent to the CI indicates that the sender participated in the drug sale. Alexander does not contest the incriminating nature of the text, but insists there was no evidence linking him to the phone used to send it. Respectfully, we disagree. As Alexander concedes, the evidence showed that the message was sent from a phone that dropped out of the car when he was arrested. A reasonable jury could infer that the phone had been on Alexander's lap—as one of the officers opined—and Alexander had been using it. Use of the phone connected Alexander to the transaction and showed he knew what was going on.

¶11 The trial testimony also supported the inference that Alexander attempted to flee when confronted by SWAT. The vehicle was driven forward and backwards in an apparent attempt to escape, and Alexander was established as the

[4] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

driver. This evidence was proffered by the State during its closing argument as evidence of Alexander's guilt, and the State makes the same argument before us. Flight from law enforcement is evidence of consciousness of guilt. *See* ***State v. Quiroz***, 2009 WI App 120, ¶18, 320 Wis. 2d 706, 772 N.W.2d 710 ("The fact of an accused's flight is generally admissible against the accused as circumstantial evidence of consciousness of guilt and thus of guilt itself."). Alexander does not even mention the evidence of flight in his brief, nor does he address the State's argument.[5]

¶12 Finally, the CI's testimony further indicated that Alexander was more than a passive participant. The CI requested heroin from a supplier known as Big Guy and was told that Big Guy's brother would be delivering the heroin. As the CI predicted, a car showed up with Alexander, whom the CI identified as Big Guy's brother. A jury could reasonably infer that Alexander—identified as the delivery person—showing up at the drug delivery was more than mere happenstance.

¶13 The evidence surely at least supports an inference that he participated in the transaction. Thus, we conclude that the evidence was sufficient for the jury to convict Alexander.

B. Newly-Discovered Evidence

¶14 Even if sufficient evidence connected him to the crime, Alexander argues that the circuit court should have granted his motion for a new trial.

[5] Alexander elected not to file a reply brief and thus does not respond to the State's argument.

Alexander contends that Lamont "took full responsibility for the possession and attempted delivery," and "exonerated" Alexander. The circuit court found Lamont's statement incredible and denied the motion. Resting on our deference to the court's credibility determination, we affirm.

¶15 Whether to grant a new trial based upon newly-discovered evidence is committed to the circuit court's discretion. ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42. We will affirm the court's denial of such a motion if "it has a reasonable basis and is made in accordance with accepted legal standards and facts of record." ***State v. Morse***, 2005 WI App 223, ¶14, 287 Wis. 2d 369, 706 N.W.2d 152. In order to obtain a new trial on the grounds of newly-discovered evidence, the defendant must prove by clear and convincing evidence that (1) the evidence was discovered after the conviction, (2) he or she was not negligent, (3) the evidence is material, and (4) the evidence is not merely cumulative. ***State v. Armstrong***, 2005 WI 119, ¶161, 283 Wis. 2d 639, 700 N.W.2d 98. Assuming the defendant meets this burden, the court "must determine whether a reasonable probability exists that a different result would be reached in a [new] trial." ***State v. Love***, 2005 WI 116, ¶44, 284 Wis. 2d 111, 700 N.W.2d 62. A "reasonable probability" exists when a jury, looking at both the old evidence and the new, would have reasonable doubt as to the defendant's guilt. ***Id.***

¶16 The circuit court had the opportunity to view all of the facts. It rested its decision on its finding that Lamont's belated statement was incredible. It specifically noted the convenient timing of the confession: after Lamont's appeal had been denied and he had no further incentive to shift blame to someone else. We defer to credibility determinations such as these because the circuit court "is in the best position to evaluate … credibility." ***State v. Carnemolla***, 229 Wis. 2d 648, 661, 600 N.W.2d 236 (Ct. App. 1999). Finding that newly-discovered

evidence is incredible—as the court did here—"necessarily leads to the conclusion that [the evidence] would not lead to a reasonable doubt in the minds of the jury." ***Id.*** at 660 (quoting ***State v. McCallum***, 208 Wis. 2d 463, 475, 561 N.W.2d 707 (1997)). Accordingly, we conclude that the statement does not create a reasonable probability of a different outcome.

¶17 Alexander alternatively requests that we order a new trial in the interests of justice. We may order a new trial in the interests of justice "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." WIS. STAT. § 752.35.[6] However, such power is reserved for exceptional cases. ***State v. McKellips***, 2016 WI 51, ¶30, 369 Wis. 2d 437, 881 N.W.2d 258. Alexander's arguments on this point are substantively indistinguishable from his newly-discovered evidence argument, which we reject. As he brings nothing new to our attention, we conclude that this is not the sort of exceptional case that warrants reversal. Thus, we decline to exercise our discretionary powers to order a new trial in the interests of justice.

By the Court.—Judgment and order affirmed.

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

[6] Alexander cites to WIS. STAT. § 805.15(1) to support his request, but our supreme court has clarified that § 805.15 is not the proper vehicle for a criminal defendant to seek a new trial. ***State v. Henley***, 2010 WI 97, ¶¶39, 65, 328 Wis. 2d 544, 787 N.W.2d 350. The court further elaborated that "defendants may … appeal to the discretionary power of the court of appeals to order a new trial in the interest of justice under [WIS. STAT.] § 752.35" or raise the issue during a WIS. STAT. § 974.02 appeal. ***Henley***, 328 Wis. 2d 544, ¶63.