COURT OF APPEALS
DECISION
DATED AND FILED

May 9, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2617-CR **Cir. Ct. No. 01-CF-32**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ONTARIO D. LOWERY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Reversed and cause remanded with directions*.

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

¶1 DYKMAN, J. Ontario Lowery appeals from a judgment of conviction for one count of delivering cocaine and two counts of bail jumping. He argues that it was plain error to admit testimony that Lowery had sold cocaine in

the past. Because we conclude that the real controversy was not fully tried, we reverse and remand for a new trial.[1]

Background

¶2 On January 9, 2001, Ontario Lowery and Jamus Reed were driving in La Crosse. Lowery was in the driver's seat and Reed was in the front passenger seat. Lowery stopped the car and Joseph Shelly got inside. In the car, Shelly purchased $100 of cocaine. Later that evening, Lowery was driving alone and he was stopped by the police and arrested for cocaine delivery. Lowery was carrying the five twenty-dollar bills that Shelly had used to buy the cocaine, but had no cocaine in his possession.

¶3 In an amended information, the State charged Ontario Lowery with one count of cocaine delivery, with an enhancement as a repeater, and two counts of bail jumping as a habitual criminal. Lowery pleaded not guilty.

¶4 At Lowery's jury trial, the State's primary witness was Joseph Shelly. He testified that he had been working as a confidential informant for the La Crosse police and had told police he could obtain cocaine from someone named "Boo." Shelly went to a bar and called what he testified was Lowery's pager number. Lowery called him back and they agreed to meet outside a nearby

[1] Because we are remanding for a new trial under WIS. STAT. § 752.35 (1999-2000), it is unnecessary to decide whether receiving into evidence the other acts testimony constituted plain error, as Lowery argues.

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

bar. Shelly waited and Lowery drove up and told him to get in the backseat of his car. Another man was sitting in the front passenger seat.

¶5 According to Shelly's testimony, Lowery drove about seventy-five feet and stopped the car. He pulled out a bag of cocaine after Shelly told him he had $100. Lowery broke off a rock and exchanged it with Shelly for the $100. Shelly got out of the car, and went to meet the La Crosse police. Shelly later identified Lowery as the person from whom he purchased the cocaine.

¶6 On cross-examination, Shelly admitted that he was facing charges for delivering cocaine and that he became an informant for the police with the hope that these charges would be reduced. He also admitted that he was angry when Lowry began dating Shelly's ex-girlfriend.

¶7 Lowery also testified. He stated that it was Reed, not him, who sold Shelly the cocaine. Lowery testified that when he was driving with Reed, he was driving where Reed told him to and was unaware that they were on their way to meet Shelly for the purpose of selling cocaine. He claimed that he did not know this until Reed actually gave Shelly the rock of cocaine and that he could not have sold the drugs because he was still driving at the time the sale took place. Lowery explained that he had the $100 when the police stopped him because he won it while he was gambling with Reed shortly after the transaction took place. Lowery believed that Shelly was accusing him instead of Reed because of the relationship that he had with Shelly's ex-girlfriend.

¶8 During direct examination, Lowery's attorney asked him, "Did you physically deliver these drugs to Joe Shelly?" Lowery answered:

> No, I did not and would not deliver drugs to Joe or anybody else, you know, because I know the outcome of

> things like that. You know, I'm not stupid like that. I make enough money gambling, you know, and it's far more better than trying to sell drugs, you know.

After Lowery made this statement, the State argued to the court that it opened the door for calling witnesses who would rebut Lowery's assertion that he would never deliver drugs "to Joe or anybody else." Lowery's counsel objected, arguing, "I think what he meant was I didn't sell drugs to Joe or anyone else, we were talking about January 9th, the day of that deal." The court disagreed and allowed the State to rebut Lowery's testimony.

¶9 On cross-examination, Lowery admitted that he previously had been convicted of cocaine possession. The State then called Shelly again and another witness, Karri McGlasson. Shelly testified that he had purchased cocaine from Lowery on three separate occasions, but he did not say when specifically any of these transactions occurred. On recross-examination, Shelly also testified that Reed had given him cocaine on at least one occasion in the past.

¶10 McGlasson testified that she was a cocaine addict and had obtained cocaine from Lowery "roughly twenty times" between September 2000 and December 2000. She also testified that she had spent $40,000 on cocaine, a large part of which was money she had gotten from her mother. On cross-examination, McGlasson also admitted that she had purchased cocaine from Reed "probably over 100" times. Although he was listed as a codefendant, apparently Reed could not be located by the police and did not testify.

¶11 The jury convicted Lowery on all three counts. Lowery appeals.

DECISION

¶12 Lowery contends that the circuit court erred when it allowed Shelly and McGlasson to testify about past instances they had bought cocaine from Lowery. We review a circuit court's decision to admit evidence under an erroneous exercise of discretion of standard. ***State v. Guzman***, 2001 WI App 54, ¶19, 241 Wis. 2d 310, 624 N.W.2d 717. We will therefore uphold the ruling if there is a reasonable basis for it. ***Id.***

¶13 In support of his argument, Lowery points to WIS. STAT. § 906.08(2), which provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than a conviction of a crime or an adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11(2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

Lowery concedes that, after he testified on direct examination that he "would not deliver drugs to Joe or anybody else," § 906.08(2) permitted the State to cross-examine him for impeachment purposes about prior instances he was involved in selling drugs. However, he asserts that the other acts testimony that Shelly and McGlasson had purchased cocaine from him in the past was extrinsic evidence and therefore prohibited by § 906.08(2).

¶14 The State agrees that this testimony was extrinsic evidence, but it contends that it was admissible under WIS. STAT. § 904.04(2). That statute provides:

> 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.

Id. The State argues that the testimonies of Shelly and McGlasson were properly admitted in order to establish both Lowery's identity as the person who sold the cocaine base to Shelly on January 9, 2001, and his intent to sell it. Lowery disagrees, and argues that to the extent the testimony could be admitted to show intent or identity, its probative value was substantially outweighed by unfair prejudice to Lowery. The circuit court did not consider WIS. STAT. § 904.04, or provide other reasoning for why it was permitting Shelly and McGlasson to testify about their previous drug transactions with Lowery. However, we are required to independently consider whether there is a reasonable basis to uphold the court's decision. *See* ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983).

¶15 The supreme court established a three-part test for admitting other acts evidence in ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). First, the court considers whether the evidence is offered for an acceptable purpose under WIS. STAT. § 904.04(2). ***Id.*** at 772. Second, the court asks whether the evidence is relevant. ***Id.*** Third, the court determines whether the probative value of the other acts evidence 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. ***Id.*** at 772-73.

¶16 The State argues that the evidence could have been proffered to show identity and intent. Although WIS. STAT. § 904.04(2) recognizes both of

these as acceptable purposes, the disputed evidence was not offered or argued for any proper purpose. To the contrary, the State used the evidence for the purpose that character evidence is generally banned: to persuade the jury that Lowery acted in conformity with past behavior. *See* ***id.*** at 782.

¶17 When the State first requested that it be allowed to examine Shelly and McGlasson regarding the cocaine they had allegedly purchased from Lowery in the past, it stated that its purpose in doing so was "to rebut what Mr. Lowery is stating on the stand [that he never sold drugs to anyone]." Further, the jurors did not receive an instruction informing them that they were to consider the other acts testimony to determine intent or identity. They were not told that they could not use the evidence to show propensity. Instead, during closing arguments, the State emphasized that Lowery's statement that he did not sell drugs should not be believed because it was contradicted by Shelly and McGlasson. The State argued:

> Now, I don't doubt that the defendant in this case gambles, cheats others with his dice tricks and preys on people that gamble with him. I don't doubt that. But the defendant's statements are totally contrary to everybody else that testified. He denied delivering drugs, yet we heard from two different people that have repeatedly bought from him that he has in fact delivered drugs to them.
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> ….
>
> Now, the defendant claimed that he did not and would not deliver drugs to Joe or anyone else. And these others disagree with that.

And again during rebuttal the State said:

> Now, the January 9th transaction, the delivery is not something that you look at in a vacuum because if you do, that means you're going to disregard everything else in the trial and focus only on Mr. Shelly's testimony, and that's not the purpose of a case …. [Y]ou look at the fact that others, Ms. McGlasson and Mr. Shelly himself admitted buying crack cocaine from this defendant in the past.

¶18 These statements expressly invited the jury to consider Shelly's and McGlasson's testimonies to support an inference that because Lowery had sold drugs in the past, he was likely to do so again. WISCONSIN STAT. § 904.04(2) prohibits using other acts evidence in this way.

¶19 The State argues that Lowery failed to properly object when the evidence was admitted, and therefore he waived his right to challenge it on appeal. However, even when a defendant has waived an issue, we may still exercise our discretionary authority under WIS. STAT. § 752.35 to remand for a new trial when the real controversy has not been fully tried. The real controversy may not be fully tried when, among other things, improperly admitted evidence clouds a crucial issue. ***State v. Cleveland***, 2000 WI App 142, ¶21, 237 Wis. 2d 558, 614 N.W.2d 543. It is unnecessary for Lowery to show that the outcome will be different on retrial. *See* ***Stauss v. Oconomowoc Residential Programs, Inc.***, 2000 WI App 269, ¶12, 240 Wis. 2d 265, 621 N.W.2d 917.

¶20 We conclude that Shelly's and McGlasson's testimonies regarding past drug sales by Lowery clouded the crucial issue of whether Lowery sold cocaine to Shelly on January 9, 2001. The State's evidence of Lowery's guilt consisted primarily of testimony by Shelly, which Lowery contradicted. By introducing the other acts testimony and telling the jury to consider it during closing arguments as an indication that Lowery was guilty, the State improperly shifted the focus of the trial from the present charge to past acts of alleged criminal activity. As Wisconsin courts have often noted, there is an "overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts." ***Whitty v. State***, 34 Wis. 2d 278, 292, 149 N.W.2d 557 (1967). Even a "bad man" should be convicted on the evidence of the alleged crime and not on past behavior. *See* ***Sullivan***, 216 Wis. 2d at 790. We conclude

that the real controversy was not fully tried. We therefore reverse and remand for a new trial.

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.

¶21 LUNDSTEN, J. (*concurring*). I agree in all respects with the majority opinion. I write separately to briefly address the State's harmless error argument and explain why, despite the arguable merit of that argument, we reverse.

¶22 The State argues that the erroneous admission of propensity evidence was harmless because there "was no reason whatsoever for the jury to discredit [the informant's] testimony that [the informant] initiated the transaction with a call to Lowery." The State says this assertion was "confirmed by Sergeant Joholski" and that it follows that the jury "unavoidably" would have concluded that Lowery was lying when Lowery testified he had no idea the informant entered Lowery's car to purchase drugs. Although I find no evidence that the police "confirmed" that the informant actually called and spoke with Lowery, there is merit to the State's argument. Moreover, the State points to the additional incriminating evidence that Lowery was later apprehended with the marked drug buy money and the pager used to initiate the drug deal.

¶23 Taking points from the State's harmless error argument, and adding a few more, I agree that, quite apart from the erroneously admitted propensity evidence, the evidence of guilt was strong. In order for the jury to have found reasonable doubt with respect to the informant's testimony, it would have been necessary for the jury to have found at least plausible Lowery's assertion that the informant set him up. To find this general assertion plausible, the jury would have also needed to find plausible most or all of the following:

(1) That, based solely on Lowery's testimony, the informant was so jealous of the fact that Lowery *previously* dated the informant's *ex*-girlfriend that the informant was willing to falsely accuse Lowery of a crime—a risky proposition because the informant had no guarantee his plan would succeed and people can generally be expected to respond unkindly to such false accusations, not to mention the legal ramifications.

(2) That the informant knew when he contacted Reed to set up the drug buy that Lowery would accompany Reed to the actual buy.

(3) That, despite the fact that the informant had good reason to believe he would be wired for sound before he contacted Reed, the informant anticipated that either the sound quality would be poor or that neither Reed nor Lowery would make a comment during the drug buy indicating it was Reed, and not Lowery, who was making the sale. The informant had reason to believe he would be wearing a wire because he signed a general consent form for a wire four days before the drug buy.

(4) That when the informant gave the police "Lowery's" pager number before the drug transaction, which was the same number the informant said he used to contact Lowery, the informant correctly anticipated that the police would not eventually trace the pager to Reed, who, according to Lowery, owned the pager.

(5) That, despite the fact that Lowery testified he did not know the informant dealt in cocaine and did not know that Reed was meeting the informant to sell cocaine, Lowery just happened to think to ask

the informant, when the informant entered Lowery's car, if he was wired. Lowery's own explanation at trial as to why he asked about the wire explained nothing:

> [T]his town is so small … and it's publicized a lot as far as when people get in trouble or whatever, you know. I heard that from being around here you can go in a bar and hear somebody's conversation, so-and-so is this, this and that, you know. I had heard a lot of things like that.

(6) That the pager the police found in Lowery's car after the drug buy belonged to Reed, who just happened to forget the pager in Lowery's car.

(7) That of the $140 found on Lowery the night of the drug buy after his arrest, $40 came from his girlfriend after the drug deal and the remaining $100, the exact amount composed of the very same bills used in the drug deal, came from his gambling winnings with Reed. That is, Lowery just happened to win exactly $100 from Reed, no more, no less, and it was all in the same bills used in the drug transaction, even though Lowery testified that he and Reed started gambling prior to the drug buy.

¶24 This is not to say that Lowery did not have evidence or arguments in his favor. Nonetheless, apart from the erroneously admitted propensity testimony, the evidence of guilt was exceedingly strong, and Lowery's explanation was highly suspect to say the least.

¶25 While I do not think the facts in this case compel us to reverse in the interest of justice, I do believe reversal is an appropriate use of our power. Ordinarily, there is no reason to reverse a criminal conviction when the result of a

new trial conducted under optimum circumstances would be no different. *See* ***State v. Cuyler***, 110 Wis. 2d 133, 142, 327 N.W.2d 662 (1983); ***Garcia v. State***, 73 Wis. 2d 651, 654, 245 N.W.2d 654 (1976). However, when the real controversy is not fully tried the first time, a court may exercise its power of discretionary reversal even though it is not probable that the result would be any different at a new trial in which the case is tried differently. *See* WIS. STAT. § 752.35; ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990).

¶26 In this case, the chance that the jury failed to focus on the real controversy is too great. This danger is evidenced by the closing arguments. The first argument made by the prosecutor directed at Lowery's guilt was that two people testified that Lowery repeatedly sold them drugs and that, therefore, Lowery lied during trial when he denied he would deliver drugs. The prosecutor repeated this propensity argument later during his relatively short closing argument. Not surprisingly, the first topic Lowery's counsel felt compelled to address in closing argument was the propensity evidence. And, finally, nearly the last thing the prosecutor said during rebuttal closing was that two witnesses testified they had purchased cocaine from Lowery in the past.

¶27 Accordingly, I join the majority because the record before us indicates the danger is great that the improper admission of propensity evidence prevented the jury from fairly considering the real issues in this case. *See* ***Vollmer***, 156 Wis. 2d at 21.