COURT OF APPEALS
DECISION
DATED AND RELEASED

JULY 5, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-3207-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

QUINN JOHNSON,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Quinn Johnson appeals a judgment of conviction of possession of cocaine with intent to deliver in violation of § 161.41(1m)(c)3, STATS. Johnson contends that the trial court erred by: (1) permitting the introduction of evidence demonstrating Johnson's sale of cocaine at a time other than that charged; (2) failing to instruct the jury as to the limited purposes to which other crimes evidence may be used; and (3) refusing to instruct the jury on the lesser-included offense of simple possession of cocaine. Johnson further contends that these errors violated his due process right under the state and federal constitutions. Because we conclude that the trial court did not err in the

admission of the evidence of Johnson's other drug sale, that the limiting instruction was never requested and therefore waived, and because there was no rational basis upon which a jury could acquit Johnson of the crime charged but convict him of the lesser-included offense, the judgment of conviction is affirmed.

Johnson was arrested in the City of Green Bay at a Subway Sandwich shop located at the intersection of Military and Shawano Avenues. The police searched Johnson's vehicle and found a plastic bag containing 29.7 grams of white powder containing 31% cocaine hydrochlorate. Sergeant Thomas Bennie, an undercover officer with the Brown County Drug Unit, led the arrest. Bennie testified that he had previously purchased a quarter-ounce of cocaine from Lisa Watson. As Bennie entered Watson's house she told him that her "man" had just left and would be back in a few minutes. A few minutes later Johnson entered the home. Watson asked Bennie for the money for the drug sale and Bennie gave her $425. Bennie observed Watson and Johnson climb a set of stairs and stop at the upper landing. Bennie then observed as Watson gave the money to Johnson and Johnson apparently gave something to Watson in return. When Watson came downstairs, she handed Bennie two tied off plastic bags containing white powder.

Bennie scheduled another buy at 5 p.m. on May 29 at Watson's Howard Street home with the intention of arresting Johnson at that time. For safety reasons, Bennie decided to effect the arrest on the street prior to the deal rather than waiting until after the purchase was completed at Watson's home. Johnson did not show up on time, so Bennie called Watson and told her that his car had broken down in the Perkin's Restaurant parking lot on the corner of Military and Shawano Avenues. Watson agreed to bring Johnson there to complete the deal. Bennie parked in the Subway Sandwich shop parking lot across the street from Perkin's Restaurant and observed Watson arrive with Johnson and his fiance. Shortly thereafter, Watson left and Johnson and his fiance went to the Subway Sandwich shop. Bennie radioed other drug unit agents and they arrested Johnson as he emerged from the shop. After his arrest, Johnson confessed that he placed the cocaine in the vehicle and brought it to Green Bay to give to Watson.[1] It is the evidence of the initial transaction

[1] Johnson later moved to have the statement suppressed. However, it was admitted into evidence at trial.

between Watson and Johnson, which Bennie observed, that Johnson now contends was erroneously admitted into evidence.

The trial court's admission of what is alleged to be other crimes evidence is reviewed under an erroneous exercise of discretion standard. ***Franz v. Brennan,*** 150 Wis.2d 1, 6, 440 N.W.2d 562, 564 (1989). As long as the court's decision was reasonable and properly applied the law, the court's determination of admissibility will be affirmed on appeal. ***Id.*** The basis of the exercise of discretion should be set forth in the record. ***State v. Petrone,*** 161 Wis.2d 530, 563, 468 N.W.2d 676, 689 (1991). "Where the trial court fails to set forth its reasoning in exercising its discretion to admit evidence, the appellate court should independently review the record to determine whether it provides a basis for the trial court's exercise of discretion." ***State v. Pharr,*** 115 Wis.2d 334, 343, 340 N.W.2d 498, 502 (1983).

Johnson characterizes evidence of the initial transaction between Bennie, Watson and Johnson as "other crimes" evidence. While the State does not take issue with this, we question such a characterization. Evidence which demonstrates the circumstances in which the charged crime occurred is admissible, not as other crimes evidence, but as direct evidence as to the crime charged. Section 901.01 et seq., STATS.

In this case, the previous drug transaction demonstrated Johnson's presence in the City of Green Bay, explained his presence at the location of Shawano and Military Avenues where Bennie had reported his car had stalled and probable cause to believe that Johnson had cocaine in his possession. As such, it appears that this evidence was admissible not as other crimes evidence under ***Whitty v. State,*** 34 Wis.2d 278, 149 N.W.2d 557 (1967), but rather as direct evidence relevant to the offense charged. However, because both parties have addressed this as ***Whitty***-type evidence, we will review it as other crimes evidence.

Other crimes evidence is admissible as long as its probative value outweighs its prejudice and the evidence is relevant to show elements of the specific crime charged, intent, identity, system of criminal activity, to impeach credibility or to show character when character is put in issue by the defendant. *See* § 904.04(2), STATS.; *see also* ***Whitty***, 34 Wis.2d at 292, 149 N.W.2d at 563.

Here, the transaction admitted into evidence was between Johnson, Watson and Bennie. This evidence relates to the fact that: (1) Bennie arranged for the purchase of the cocaine at the date of the instant offense, (2) Johnson arrived at the location where Bennie indicated he was with his disabled vehicle, (3) Johnson had cocaine in his possession, (4) Johnson was in the company of an intermediary from whom cocaine had been purchased during the incident in question and (5) Johnson's modus operdi in using Watson as an intermediary. We conclude that this is all relevant to Johnson's intent to sell the cocaine in his possession at the time of his arrest.

Because this evidence is of such high relevance, the trial court did not err by implicitly finding that the probative value of the evidence exceeded its prejudice to Johnson. We do not agree with Johnson's assertion that the admission of the circumstances surrounding the earlier sale to Bennie, involving both Watson and Johnson, was introduced only to show Johnson's propensity to sell, which would be impermissible under § 904.04(1), STATS. Rather, it is substantive evidence of Johnson's intent to sell the cocaine discovered in his possession at the time of his arrest and was, therefore, properly admissible. Because the evidence was properly admitted, the trial court did not violate Johnson's due process rights under the state or federal constitutions.

Next, Johnson challenges the court's failure to instruct both as to the limited purpose of other crimes evidence and as to the lesser-included offense of possession. Whether the trial court was required to give these instructions to the jury is a question of law, which is reviewed without deference to the trial court's determination. ***State v. Kramar,*** 149 Wis.2d 767, 791, 440 N.W.2d 317, 327 (1989).

Johnson argues that the trial court erred by not instructing the jury as to the limited use to which prior crimes evidence may be put. While we agree that the limitation on the use of such evidence is established by law, ***In re Michael R. B.,*** 175 Wis.2d 713, 725, 499 N.W.2d 641, 646 (1993), Johnson made no request for such an instruction. *See* § 901.06, STATS.[2] Because he did not request the instruction, he has waived the trial court's instruction as to the

[2] Section 901.06, STATS., reads: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the judge, *upon request,* shall restrict the evidence to its proper scope and instruct the jury accordingly." (Emphasis added.)

limited use of this evidence. ***Bergeron v. State,*** 85 Wis.2d 595, 604, 271 N.W.2d 386, 389 (1978). "This court will not find error in the failure of a trial court to give a particular instruction in the absence of a timely and specific request." ***Id.*** Because the instruction was waived by Johnson's failure to request it, he may not now assert error on appeal. ***State v. Schumacher,*** 144 Wis.2d 388, 406-09, 424 N.W.2d 672, 679-80 (1988).

Finally, Johnson contends that the trial court erred by failing to instruct the jury on the existence of a lesser-included offense of simple possession. There is no question that simple possession is a lesser-included offense of possession with the intent to sell. *See* § 939.66, STATS. However, a court is not required to instruct upon a lesser-included offense unless there is a basis upon which a reasonable jury could acquit the defendant of the principle offense charged, but still find the defendant guilty of a lesser-included offense. ***State v. Borrell,*** 167 Wis.2d 749, 779, 482 N.W.2d 883, 894 (1992).

In this case, we conclude that no reasonable jury could find that the cocaine found in Johnson's possession at the time of his arrest was not held with the intent to sell. The quantity of cocaine in Johnson's possession, the fact that he was in Green Bay at the specific location in response to an arrangement for sale made by Bennie and Johnson's own confession that he intended to sell the cocaine in question render the lesser-included offense of simple possession irrelevant. Johnson argues that a jury could disbelieve Bennie's testimony. However, even were the jury to disregard this testimony, Johnson's own confession and the quantity of cocaine are sufficient to conclusively demonstrate Johnson's intent to sell the cocaine. We conclude that under the facts of this case, that no reasonable jury could acquit Johnson of the principle charge but find him guilty of the lesser-included offense of simple possession of cocaine. Because the trial court did not err by refusing to provide the lesser-included offense instruction, Johnson's due process rights under the United States Constitution have not been violated.

In sum, we conclude that the trial court did not err by admitting evidence of the previous transaction, that Johnson waived his right to a limiting instruction and that the trial court did not err by refusing to instruct the lesser-included offense of simple possession. Accordingly, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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