COURT OF APPEALS
DECISION
DATED AND FILED

September 26, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1772-CR **Cir. Ct. No. 2009CF91**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

UZORMA C. IHEDIWA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Uzorma C. Ihediwa appeals from a judgment of conviction and an order denying his motion for postconviction relief. Ihediwa argues that the trial court erroneously denied his motion to dismiss at the close of the State's case, that the prosecutor's misconduct during closing argument merits reversal of the jury's verdict and dismissal of the charge with prejudice, and that

there was insufficient evidence to support his conviction for manufacturing THC as a party to the crime. Although comments in the prosecutor's closing argument were improper in light of the trial court's admonition, Ihediwa forfeited a claim to a new trial based on those comments. We reject Ihediwa's other claims and affirm the judgment and order.

¶2 On July 11, 2008, police officers executed a search warrant at a two-bedroom flat rented to a man named Joel Santiago in Kenosha. Inside each of the two living room closets, police discovered numerous marijuana plants and items associated with the cultivation of those plants. In one of the bedrooms, police found Santiago's personal items. In the second bedroom, police discovered various items belonging to Ihediwa, including two separate safes, each containing Ihediwa's personal effects.

¶3 Joel Santiago was charged and eventually convicted in connection with the marijuana plants. Ihediwa was charged with three counts, all as a party to the crime: (1) manufacturing THC, (2) possession of THC with the intent to deliver, and (3) maintaining a drug trafficking place.

¶4 At a jury trial, at the close of the State's case, the trial court denied Ihediwa's motion to dismiss. Ihediwa presented several witnesses and testified on his own behalf. The jury convicted Ihediwa of manufacturing THC as a party to the crime, but acquitted him on the other two charges. After sentencing, postconviction counsel filed a motion alleging that trial counsel provided ineffective assistance of counsel,[1] that the prosecutor's improper remarks during

[1] Ihediwa does not renew his claim of ineffective assistance of trial counsel in this appeal and we do not address it. *See* ***State v. Johnson***, 184 Wis. 2d 324, 344, 516 N.W.2d 463 (Ct. App. 1994) (issues not briefed or argued on appeal are deemed abandoned).

closing argument warranted a new trial, and that there was insufficient evidence to support the jury's verdict. The trial court denied the postconviction motion.

The Trial Court Properly Submitted the Case to the Jury.

¶5 Ihediwa first argues that the trial court erroneously denied his motion to dismiss at the close of the State's case. Because the trial continued and Ihediwa introduced evidence after the denial of his motion to dismiss, the issue on appeal becomes whether the entirety of the evidence at trial is sufficient to support the jury's verdict. *See* ***State v. Kelley***, 107 Wis. 2d 540, 544-45, 319 N.W.2d 869 (1982) (where a defendant chooses to present a defense after denial of his motion to dismiss at the close of the State's case, "the appellate court must review all the evidence in determining whether it is sufficient to sustain the conviction").

¶6 Ihediwa argues that because the State did not argue at the postconviction hearing that by presenting a defense Ihediwa abandoned his motion to dismiss, the argument is forfeited on appeal. We disagree. This court can affirm a trial court's ruling on grounds not presented to the trial court. *See* ***State v. Holt***, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985). This court will not ignore binding precedent concerning the appropriate method of review simply because the State did not mention ***Kelley*** and its progeny in the postconviction court.

¶7 Ihediwa also argues that we should review the denial of his motion to dismiss at the close of the State's case because the trial court applied the wrong standard.[2] Here, Ihediwa isolates the following statement by the trial court:

> The only real question, of course, is linking that [marijuana growing] operation and those items—all of those items to the defendant. The State doesn't have to have proof beyond a reasonable doubt on that issue.

¶8 Ihediwa construes this as an erroneous determination by the trial court that at the close of the State's case, there need not be sufficient evidence for a jury to find beyond a reasonable doubt that Ihediwa, himself, participated in the grow operation. The trial court's analysis in its entirety demonstrates that it applied the proper standard. In denying the motion to dismiss, the trial court explained that there was overwhelming evidence of a manufacturing operation within the apartment and that the State had presented evidence linking Ihediwa to that apartment. The court properly ruled that this was sufficient evidence on which a jury could convict Ihediwa, but that the ultimate question of whether the evidence was sufficiently persuasive would be decided by the jury.

There Is Sufficient Evidence to Support the Jury's Finding that Ihediwa Was a Party to the Crime of Manufacturing THC.

¶9 Ihediwa's second claim is that there was insufficient evidence at trial to support the jury's guilty verdict on the manufacturing charge. We review the sufficiency of the evidence de novo, but in the light most favorable to sustaining

[2] We reject the assertion in Ihediwa's reply brief that the State has conceded error by not addressing the trial court's alleged misstatement of the law in its respondent's brief. The State did not address the statements made by the trial court in denying Ihediwa's motion to dismiss because it relied on well-settled case law holding that because Ihediwa presented a defense at trial, an appellate court examines the sufficiency of all the evidence.

the conviction. ***State v. Hanson***, 2012 WI 4, ¶15, 338 Wis. 2d 243, 808 N.W.2d 390. We will sustain a conviction unless the evidence is so insufficient "that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." ***Id***. at 507.

¶10 In order to convict Ihediwa, the jury had to find that: (1) Ihediwa manufactured a substance, (2) the substance was THC, and (3) Ihediwa knew or believed that the substance was THC. Because Ihediwa was charged as a party to the crime, the State had to prove either that he directly committed the crime or that he intentionally aided and abetted another in committing the crime. A person is guilty of aiding and abetting if he knowingly either assisted the person committing the crime or was ready and willing to assist and the other person knew of his willingness.

¶11 At trial, Ihediwa stipulated to the existence of the marijuana plants. He disputed that he manufactured or aided and abetted the manufacture of the plants. The theory of defense was that though Ihediwa may have stayed overnight as a guest several times, he did not reside at the apartment, and that his personal items were basically being stored at Santiago's apartment. He now argues that no reasonable juror could have found that he was involved in the grow operation, either as a direct actor or as a party to the crime. We disagree.

¶12 Viewing the evidence in the light most favorable to the State, the jury was informed that the apartment contained two bedrooms. While Santiago's items were found in one of the bedrooms, the other bedroom contained Ihediwa's personal items, including a state-issued identification card, his social security card, a pay stub from April 2008, a letter addressed to Ihediwa, sports trading cards, assorted business cards and name tags, a pendant containing a picture of Ihediwa and Santiago together, some watches, a lighter, and a hood ornament. The room also contained a bed with sheets and ashtrays containing cigarette butts. The jury also heard that there was clothing in the closet that was consistent with Ihediwa's large size, and Ihediwa testified that the clothing "could possibly be" his. While Ihediwa offered explanations for the presence of these items consistent with his not actually living in the apartment, the jury was not required to believe these explanations.

¶13 The jury heard testimony from the landlord that Santiago said he was taking a roommate named "Charles" to help with the rent. Ihediwa confirmed that his middle name is "Charles" and that he frequently uses that name instead of his first name. Ihediwa also testified that he moved some of his possessions into the residence in March 2008 and that he visited the residence throughout April, May and "the first couple weeks of June." Ihediwa testified that at times he had spent the night at the apartment "probably in April and May" when he was fighting with his girlfriend.

¶14 The jury was informed that one living room closet contained twelve marijuana plants between one and one and one-half feet tall and that the other closet contained eight plants that were about three feet tall. The jury learned that police also discovered large items of manufacturing paraphernalia, such as a water pump, a fan, a high-intensity sodium light, and reflective wall coverings. An

officer testified that it would have taken more than one person to install the large light. Officers also located two books pertaining to the cultivation of marijuana, one in the living room and one in the bathroom.

¶15 On review, "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. Based on the totality of the evidence at trial, a reasonable juror could have inferred that Ihediwa either manufactured or assisted in the manufacture of the marijuana plants. The evidence demonstrated a substantial connection between Ihediwa and the apartment. It is undisputed that a number of Ihediwa's personal items were discovered at the apartment, and the jury could reasonably have inferred that the clothes in the closet belonged to Ihediwa. See ***United State v. Starks***, 309 F.3d 1017, 1025 (7th Cir. 2002) (in the context of reviewing whether sufficient evidence supports a jury verdict, "the recovery of items belonging to the defendant can establish the appropriate nexus between the defendant and the illicit conduct and refute the claim of mere presence.") It is also undisputed that Ihediwa was physically present in the apartment on a number of occasions and sometimes overnight. The landlord's testimony connected Ihediwa to the apartment and allowed for an inference that Ihediwa actually resided at the apartment with Santiago. Based on Ihediwa's connections to the apartment, the size of the plants, and the complexity of the operation, a juror could reasonably infer that Ihediwa was involved in manufacturing the THC, either as a direct actor or as an aider and abettor.

The Prosecutor's Misconduct Does Not Entitle Ihediwa to a Dismissal of the Case.

¶16 In her rebuttal closing argument, the prosecutor began by calling Ihediwa a "salesman" and argued "[s]ometimes he's selling cell phones, sometimes he's selling boatloads of marijuana …." Trial counsel objected and the court sustained the objection. The prosecutor immediately restated the comment to the jury: "Sometimes he's selling cell phones, sometimes he's selling marijuana …." In sustaining trial counsel's second objection, the trial court told the prosecutor that her argument was "very improper" and ordered that the comment be stricken. Though the prosecutor apologized, she concluded her rebuttal with the following:

> What kind of a world would we live in if you could only convict someone who was caught watering their marijuana plants? What kind of a world would we live in if you could only convict a drug dealer caught dealing drugs out on the street?

Trial counsel did not object to this third characterization of Ihediwa as a drug dealer and Ihediwa never moved for a mistrial.

¶17 We are troubled by the prosecutor's repeated reference to Ihediwa as a "drug dealer" in the face of the trial court's explicit instruction that she should refrain from making these improper remarks. "A prosecutor's interest as a representative of the state is 'not [to] win a case, but [to see] that justice shall be done.'" ***State v. Smith***, 2003 WI App 234, ¶24, 268 Wis. 2d 138, 671 N.W.2d 854 (cited source omitted) (alterations in original). However, the prosecutor's improper argument, though disrespectful, does not entitle Ihediwa to a new trial. By failing to move for a mistrial, Ihediwa forfeited his objection to the prosecutor's inappropriate remarks. *See* ***State v. Guzman***, 2001 WI App 54, ¶25, 241 Wis. 2d 310, 624 N.W.2d 717.

¶18 Ihediwa asks us to vacate the conviction and dismiss the case despite trial counsel's failure to request a mistrial on the theory that the comments were so prejudicial that they deprived Ihediwa of his right to a fair trial. Ihediwa also asks that we dismiss the case simply to discipline the prosecutor. We decline to do so.

¶19 At the postconviction hearing, trial counsel explained that he was aware he needed to move for a mistrial in order to preserve the issue, and stated that he did not move for a mistrial because he "didn't believe there was anything in evidence that could possibly convict Mr. Ihediwa beyond a reasonable doubt."[3] Trial counsel specifically considered but decided against a mistrial motion because he believed the case was going well for the defense. In fact, the jury acquitted Ihediwa of two of the three charges, including the charge of possession with intent to deliver. A deliberate choice of strategy is binding on the defendant. *See* ***State v. McDonald***, 50 Wis. 2d 534, 538, 184 N.W.2d 886 (1971). We cannot conclude that Ihediwa was deprived of his right to a fair trial.

¶20 Further, we are not persuaded by Ihediwa's argument that the prosecutor's behavior merits disciplinary reversal based on the "Kenosha District Attorney's history of prosecutorial misconduct." *See* ***In re Disciplinary Proceedings Against Zapf***, 126 Wis. 2d 123, 375 N.W.2d 654 (1985); ***State v. Ruiz***, 118 Wis. 2d 177, 347 N.W.2d 352 (1984); ***State v. Copening***, 100 Wis. 2d 700, 303 N.W.2d 821 (1981). We are hard-pressed to see a connection between the decades-old conduct of a particular district attorney and the conduct of a

[3] Though litigated at his postconviction hearing, Ihediwa does not raise ineffective assistance of trial counsel as a claim on appeal.

different prosecutor at a single trial that, as we have explained, did not prejudice Ihediwa.

By the Court.—Judgment and order affirmed.

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