COURT OF APPEALS
DECISION
DATED AND FILED

January 21, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0617-CR **Cir. Ct. No. 01CF000579**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRENCE MADISON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Terrence Madison appeals from a judgment entered on jury verdicts convicting him of seven drug-trafficking-related offenses. He argues there was insufficient evidence to convict him for one of the offenses, possession with intent to deliver more than 100 grams of cocaine. He further claims the trial

court erroneously exercised its discretion by (1) admitting "other crimes" evidence, (2) admitting the State's summarizing chart and sending it to the jury room, and (3) failing to account for the proportionate differences between the truth-in-sentencing statutes and the indeterminate sentences imposed under the old laws when it imposed sentence. We affirm the judgment.

BACKGROUND

¶2 On September 24, 2001, a criminal complaint was filed charging fifteen defendants, including Madison, with fifty counts involving drug trafficking in Eau Claire. The charges were brought as a result of a multi-jurisdictional collaborative law enforcement investigation into drug trafficking in Eau Claire. The investigation began in 2000 and focused on a period from January 2001 to September 2001. Through a series of controlled drug buys and automobile stops, the police seized drug money and a total of just less than 100 grams of cocaine from various defendants.

¶3 Eventually, Madison was formally charged with eight counts of drug-trafficking-related offenses. After a trial with three co-defendants, a jury returned guilty verdicts on seven counts. The count relevant to this appeal is possession with intent to deliver more than 100 grams of cocaine, party to a crime,

from January through September 2001, contrary to WIS. STAT. § 961.41(1m)(cm)5 (1999-2000).[1]

¶4 The trial court sentenced Madison to varying terms of imprisonment on all counts, but made the terms concurrent with each other. This resulted in a term of imprisonment of thirty years, comprised of twenty years' initial confinement followed by ten years' extended supervision. Madison appeals.

DISCUSSION

¶5 Madison first claims there was insufficient evidence to convict him beyond a reasonable doubt for possession with intent to deliver more than 100 grams of cocaine, as a party to the crime, during January through September 2001. We will not reverse a conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force 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). Where evidence supports more than one reasonable inference we must accept the inference that supports the conviction, unless the evidence is incredible. ***Id.*** at 507.

¶6 Madison and the State agree that the actual weight of cocaine seized by the police amounts to 95.566 grams. From this fact alone, Madison claims the

[1] As a technical matter, although Madison was charged with a crime he committed in 2001 and tried for during 2002, we reference the 1999-2000 statutes because the relevant offense on this appeal, WIS. STAT. § 961.41(1m)(cm)5, possession with intent to deliver more than 100 grams of cocaine, was eliminated by 2001 Wis. Act 109, effective 2-1-03, and is no longer contained in the text of the 2001-02 statutes as a crime. Because the crime was not eliminated until 2-1-03, we also note that Madison was properly charged with violating WIS. STAT. § 961.41(1m)(cm)5 (1999-2000). *See* Note, WIS. STAT. § 961.41(1m)(cm) (2001-2002).

State failed to prove that he possessed more than 100 grams of cocaine with intent to deliver. Furthermore, Madison claims 35.295 grams of the 95.566 grams of cocaine cannot be attributed to him because it was seized when he was probably already arrested and still in custody.[2] In either case, and without considering any other evidence presented at trial, Madison claims the State failed to meet its burden. We disagree. Even if the 35.295 grams of cocaine is not imputable to him given that he was in custody, and assuming that this terminated his part in the drug conspiracy, the record is replete with evidence of Madison's drug trafficking, so much so that we easily conclude a reasonable jury could have found Madison guilty beyond a reasonable doubt.

¶7 First, Jennifer Ellefson testified she saw Madison, along with other co-defendants, "cooking" crack cocaine four to five times between January and March 2001. She observed Madison cook the cocaine into softball sizes and then cut it up with razor blades.

¶8 Second, Sheri Mitchell testified Madison received anywhere from a quarter kilogram to a kilogram of cocaine five to ten times from January through July of 2001.

¶9 Third, Flentora Adams testified she purchased two ounces of cocaine from Madison in the summer of 2001. One ounce is equivalent to 28.349 grams. WEBSTER'S THIRD NEW INT'L DICTIONARY 1399 (unabr. 1993). Thus, Madison delivered 56.698 grams of cocaine to her.

[2] The police seized the 35.295 grams of cocaine on September 21, 2001. Madison admits the record does not clearly provide his precise arrest date. He works backwards based upon sentence credit he received to arrive at an arrest date of no later than September 18, 2001.

¶10 Finally, Hollie Peterson testified she purchased one-half ounce to two ounces of crack cocaine from Madison every two to three days from late 2000 through September 2001. Viewing Peterson's testimony only from the standpoint of January 2001 to September 2001, she purchased anywhere from 45.5 ounces (approximately 1,290 grams) to 273 ounces of cocaine (approximately 7,739 grams) from Madison.[3]

¶11 The preceding is just some of the evidence produced at trial. Viewing any of it in the light most favorable towards the conviction overwhelmingly establishes that Madison possessed more than 100 grams of cocaine with intent to deliver during January through September of 2001.

¶12 Madison's second argument is that the trial court erroneously exercised its discretion by admitting testimony regarding Madison's drug trafficking in Minneapolis. A trial court has broad discretion in determining the admissibility of evidence. ***State v. Oberlander***, 149 Wis. 2d 132, 140, 438 N.W.2d 580 (1989). Our review is limited to determining whether the trial court erroneously exercised its discretion. ***State v. Larsen***, 165 Wis. 2d 316, 320 n.1, 477 N.W.2d 87 (Ct. App. 1991). We will not reverse the trial court's decision to admit evidence unless there is no reasonable basis for the decision. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983).

[3] These numbers are arrived at by taking the total number of days from January through September in 2001 (273 days), then dividing this number by the frequency of purchasing the cocaine (every two or three days), and then multiplying this number by the amount of cocaine purchased each time (one-half to two ounces). This calculation results in a minimum purchase of 45.5 ounces of cocaine (273/3 = 91, 91 x .5 = 45.5) and a maximum purchase of 273 ounces of cocaine (273/2 = 136.5, 136.5 x 2 = 273). Because an ounce equals 28.349 grams of cocaine, Peterson purchased at a bare minimum anywhere from 1,290 through 7,739 grams of cocaine.

¶13 Ellefson and Mitchell testified they observed Madison and other co-defendants make crack cocaine from January through March 2001 in Mitchell's house and take it to Minneapolis. Another reference to Minneapolis was made by Eau Claire County Sheriff's Deputy Jeffrey Wilson. In explaining the background of the West Central Drug Task Force and its surveillance of Mitchell's home, he testified that one of the contributing causes for crack cocaine distribution in Eau Claire County is its location between Chicago and Minneapolis. The trial court concluded any evidence regarding the transporting of drugs to Minneapolis was admissible for the limited purpose of providing context for the charges Madison was on trial for in Eau Claire County, but it did not conduct a ***Sullivan*** analysis.[4]

¶14 Madison claims any testimony regarding drug trafficking in Minneapolis was improper "other crimes" evidence. *See* WIS. STAT. § 904.04(2). He reasons that because the trial court did not conduct a ***Sullivan*** analysis before admitting this evidence, and because the probative value of this evidence does not outweigh its prejudice, it was error to admit the evidence.

¶15 Contrary to Madison's suggestion, the trial court did not need to undergo a ***Sullivan*** analysis because the Minneapolis evidence is not "other crimes" evidence. Instead, it is nothing more than a "part of a chain of facts" by which the State sought to have the jury infer that Madison possessed cocaine with the intent to deliver it during this time period. *See* ***State v. Wedgeworth***, 100 Wis. 2d 514, 532, 302 N.W.2d 810 (1981). *See also* WIS. STAT. § 961.41(1m) (intent can be proved by the activities of the person possessing the controlled substance). Here, the State charged Madison with possession with intent to deliver

[4] ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

more than 100 grams of cocaine during the period of January through September 2001. As a factual occurrence during this relevant time period, the Minneapolis evidence was simply circumstantial evidence of Madison's intent for the charged crime. Thus, a ***Sullivan*** analysis is not required.[5]

¶16 Madison's third argument is that the trial court erroneously exercised its discretion by admitting the State's summarizing chart and by sending it to the jury room. The chart contained photographs of all the co-defendants as well as some of the witnesses and included the following language:

> Distributes kilograms of powder cocaine from Chicago to Eau Claire.
>
> Manufacture kilograms of powder cocaine into crack cocaine and distribute it in the Eau Claire and Minneapolis/St. Paul areas.
>
> Carry out countless street-level deliveries of crack cocaine.

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[5] In any event, even if the Minneapolis evidence is "other crimes" evidence, it would pass ***Sullivan***'s three-part test. *See* ***Sullivan***, 216 Wis. 2d at 772-73. First, it has an acceptable purpose under WIS. STAT. § 904.04(2) as proof of either "intent," *see* ***id.***, or contextual proof that completes the story of why a conspiracy to deliver so much crack cocaine would occur in a relatively small city like Eau Claire, *see* ***State v. Shillcutt***, 116 Wis. 2d 227, 236-37, 341 N.W.2d 716 (Ct. App. 1983).

Second, it is relevant proof of either acceptable purpose; that is, it has a tendency to make the existence of either purpose more likely than not. *See* WIS. STAT. § 904.01.

Third, its probative value substantially outweighs the danger of unfair prejudice. *See* ***Sullivan***, 216 Wis. 2d at 772-73. We cannot conclude the jury would lose sight of the real controversy at issue when confronted with this "separate" incident, mostly because it is integral to proving Madison's intent regarding the charged offense. Nor can we conclude the jury would draw unfair propensity inferences from this evidence because the key fact supporting this evidence, and the only foundational fact elicited by the State, was that Madison had a significant quantity of drugs on these occasions. This, in turn, provides circumstantial evidence that Madison intended to deliver the cocaine. *See* WIS. STAT. § 961.41(1m) (intent to deliver may also be proven by the quantity of drugs possessed). The Minneapolis evidence would pass the ***Sullivan*** test.

¶17 We conclude it was reasonable to admit the chart and send it to the jury room. As the State points out, this case involved eleven charges against four defendants who had nicknames that were used occasionally by various witnesses. Additionally, the chart identified several witnesses and other people mentioned during trial who either distributed, purchased, or consumed cocaine received from Madison or the other co-defendants. In short, the chart served to simplify the complex factual bases of who did what. *See* ***State v. Olson***, 217 Wis. 2d 730, 739, 579 N.W.2d 802 (Ct. App. 1998).

¶18 Madison claims the chart's language supported a theory that the conspiracy to deliver cocaine was extensive and reached beyond the borders of Eau Claire County. This, he argues, created an improper inference that the amount of cocaine handled by the conspiracy was significantly greater than the 95.566 grams of cocaine seized by the police. Madison contends the State did not meet its burden of proof that he possessed with intent to deliver more than 100 grams of cocaine, and, therefore, the inference created by the chart was highly prejudicial and error. However, as discussed in response to Madison's first argument, we have already concluded the State clearly met its burden; therefore, we reject Madison's argument here as well.[6]

¶19 Lastly, and in the alternative, Madison argues the trial court erroneously exercised its discretion when it sentenced him because it failed to account for the proportionate differences between the length of confinement under the truth-in-sentencing statutes and the indeterminate sentences imposed under the

[6] Even if it was error to admit the chart and send it to the jury room, the error was harmless. It is quite clear beyond a reasonable doubt that the jury would have convicted Madison regardless of the chart's reference to Minneapolis as an outlet for drug distribution.

old laws. We disagree. The advent of truth-in-sentencing has not altered the requirements a trial court must follow to properly exercise its discretion. *See* ***State v. Gallion***, 2002 WI App 265, ¶¶6-16, 258 Wis. 2d 473, 654 N.W.2d 446, *review granted*, 2003 WI 16, 259 Wis. 2d 100, 657 N.W.2d 706 (No. 01-0051-CR).

By the Court.—Judgment affirmed.

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