COURT OF APPEALS
DECISION
DATED AND FILED

November 12, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1141-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADRIAN E. STODOLA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Crawford County: MICHAEL KIRCHMAN, Judge. *Affirmed.*

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

PER CURIAM. Adrian Stodola appeals a judgment convicting him of being party to the crime of possession of methamphetamine with intent to deliver and an order denying his motions for postconviction relief. He claims there was insufficient evidence for the jury to convict him, or, alternatively, that he

is entitled to a new trial in the interests of justice. For the reasons discussed below, we disagree and affirm.

BACKGROUND

On January 3, 1997, confidential informant Charlie Zink made arrangements to buy some crack cocaine and some methamphetamine, commonly known as "crank," from Kevin Crowley. After obtaining the cocaine in Chicago, Zink and Crowley drove to Crowley's sister's house in Steuben, where Zink understood that Stodola was to meet them to provide the crank. Stodola arrived at the residence with Patrick Tesar and another man whom Zink did not know. Stodola refused to sell Zink any crank at that time, because he did not have a scale with him. However, he offered to make up an "eight ball of crank" later and have it delivered to Zink. Later on, Tesar heated up some of the crank in a light bulb casing and the light bulb was passed around for everyone to smoke from.

These activities were recorded by authorities through electronic surveillance, but the tape was lost prior to trial. A transcript of the tape was available, but it was inaccurate and incomplete in many respects. Stodola's trial counsel did not move to suppress the transcript and declined the trial court's offer to do so. Counsel apparently wished to, and did, use the transcript to impeach the testimony of state witnesses and to show that the transcript yielded nothing to indicate Stodola had possessed the controlled substance.

Kevin Crowley, Peggy Crowley and Terry Lee all testified at trial that they had not actually seen Stodola smoking from the light bulb or passing it around. Zink testified that he had seen Stodola with the light bulb. When defense counsel cross-examined Zink about his prior statement to police (given the day after the incident) that he had not seen Stodola do a hit, and about his preliminary

hearing testimony that he did not know whether he had seen Stodola with the light bulb, he replied, "My memory has been getting clearer everyday."

STANDARD OF REVIEW

When reviewing the sufficiency of the evidence we will not substitute our judgment for that of the jury. Rather, we will sustain a conviction unless we determine that the evidence is so lacking in probative value that no reasonable fact-finder could have found guilt beyond a reasonable doubt. *See* ***State v. Holtz***, 173 Wis.2d 515, 518, 496 N.W.2d 668, 669 (Ct. App. 1992).

A trial court's decision whether to set aside a conviction in the interest of justice is a discretionary determination. *See* § 805.15(1), STATS.; ***State v. Harp***, 161 Wis.2d 773, 775, 469 N.W.2d 210, 211 (Ct. App. 1991). The trial court properly exercises its discretion when it makes a reasonable decision in accordance with accepted legal standards and the facts of record. *See* ***State v. Hereford***, 195 Wis.2d 1054, 1065, 537 N.W.2d 62, 66 (Ct. App. 1995). We may also independently consider the record to determine whether to exercise our own discretionary reversal power under § 752.35, STATS.

ANALYSIS

Sufficiency of the Evidence

Stodola claims Zink's testimony that his memory had been getting clearer every day was inherently incredible and provided an insufficient basis on which to convict him. We note first that the statement Stodola attacks is not one which inculpates him, but a statement made by Zink when his credibility was attacked during cross-examination. The inculpatory testimony—that Zink had

observed Stodola possess and pass the controlled substance—is not inherently incredible.

Evidence is incredible only when it is in conflict with the uniform course of nature or with fully established or conceded facts. *See* ***State v. King***, 187 Wis.2d 548, 562, 523 N.W.2d 159, 163 (Ct. App. 1994). While Zink's explanation of his improved memory does leave something to be desired, we cannot say that it is incredible as a matter of law. *See* ***State v. Givens***, 217 Wis.2d 180, 196, 580 N.W.2d 340, 347 (Ct. App. 1998). First of all, courts routinely acknowledge that the memory of one event may be triggered or enhanced by another memory when they allow attorneys to refresh the recollection of witnesses. *See*, *e.g.,* § 906.12, STATS. Moreover, the jury could reasonably decide to place more weight on later testimony given while Zink was off drugs than his earlier testimony given during a period of heavy drug use. Additionally, several other witnesses placed Stodola in the room where the light bulb was being passed around and stated their beliefs that everyone in the room had participated in smoking the methamphetamine. In sum, the jury was in the best position to judge Zink's credibility and had sufficient evidence before it upon which to convict Stodola of the offense charged.

Discretionary Reversal

Stodola moved for a new trial based upon the State's loss of the surveillance tape of the crank smoking incident. A trial court may order a new trial in a criminal case in the interest of justice under § 805.15(1), STATS. Section 752.35, STATS., also allows this court to reverse a conviction "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."

In ***State v. Martinez***, 166 Wis.2d 250, 479 N.W.2d 224 (Ct. App. 1991), we granted a new trial to a defendant whose suppression motion had been denied following the State's misplacement of recorded evidence. However, in this case, we agree with the trial court that the defendant's own choice to use the transcript of the surveillance tape, despite his knowledge of the State's loss of the tape and the trial court's offer to suppress the transcript, precludes reversal under § 752.35, STATS. The fact that the transcript contradicted Zink's account of who said what could have worked to the defendant's advantage. Stodola is not entitled to retry his case merely because a reasonable defense strategy was ultimately unsuccessful. We therefore decline to exercise our discretionary reversal authority and find no error in the trial court's refusal to grant a new trial.

By the Court.—Judgment and order affirmed.

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