COURT OF APPEALS
DECISION
DATED AND FILED

October 27, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP3056-CR **Cir. Ct. No. 2003CF79**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL NEWAGO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Bayfield County: JOHN P. ANDERSON, Judge. *Affirmed.*

Before Dykman, Deininger and Higginbotham, JJ.

¶1 DEININGER, J. Michael Newago appeals a judgment convicting him of several controlled substance offenses, intimidating a witness and bail jumping. He also appeals an order denying his motion for postconviction relief. Newago claims: (1) the trial court erred by allowing the State to introduce "other

acts" evidence; (2) his trial counsel was ineffective for failing to request a curative instruction regarding the other acts evidence; (3) the prosecutor's allegedly prejudicial statements during closing argument merit a new trial; (4) the introduction of a statement given to police by a woman who had died prior to trial violated his constitutional right to be confronted with his accusers; and (5) the State presented insufficient evidence to convict him of possession of cocaine with intent to deliver. We conclude that none of the asserted errors merit reversal of any of Newago's convictions; accordingly, we affirm the appealed judgment and order.

BACKGROUND

¶2 Following a two-day trial, a jury found Newago guilty of all but one of the seven offenses for which the State prosecuted him.[1] The trial court, in both a pre-trial ruling and over Newago's objection at trial, permitted the State to introduce a statement to police made by an occupant of the car in which Newago was riding prior to his arrest. The declarant, who was Newago's girlfriend at the time of his arrest, died prior to the trial. She gave an account to police similar to those of two other occupants of the car who testified at trial for the State. The now-deceased girlfriend told police that, while the four were in Minneapolis, Newago arranged for the purchases of the cocaine and marijuana found in the car at the time of Newago's arrest, and further that he "packages the drugs and gets rid of them to a few people." A deputy read the statement to the jury during his

[1] The jury found Newago guilty and the court convicted him of four felony offenses (possession of cocaine with intent to deliver, possession of marijuana with intent to deliver, intimidating a witness, and bail jumping) and two misdemeanors (possession of marijuana and of drug paraphernalia). The jury acquitted him of delivery of methadone, a heroin analog.

testimony, as did a defense witness during her cross-examination. The written statement was also sent to the jury room with other exhibits during jury deliberations.

¶3 Prior to the trial, the State also sought and was granted permission to introduce evidence that Newago had previously been convicted in Minnesota of two controlled substance offenses. At the close of the State's case, the State, over Newago's continuing objection, introduced two "Criminal Courts Case Histories" from Hennepin County, Minnesota. In moving their admission in the jury's presence, the prosecutor said, "These are the defendant's prior criminal convictions for possession of controlled substances." Neither exhibit was shown or read to the jury, however, and the documents were not sent to the jury room during its deliberations. In a similar vein, a defense witness testified on cross-examination, without objection from Newago, that she was "aware [Newago] had been convicted of criminal possession of drugs."

¶4 During Newago's closing argument, defense counsel commented that "it's very, very strange that the two little lily white people [who were also occupants of the car when Newago was arrested] weren't charged but the Native American person [Newago] was charged." Later in her argument, counsel told jurors that "[f]airness [is] for everyone, no matter what their race is, no matter if they're Native American or lily white like [the two occupants who testified for the State]." The prosecutor began his rebuttal argument as follows:

> I do want you to give Mr. Newago the benefit of every reasonable doubt, not because I'm a racist as the defense apparently would have you believe, not because I prosecute poor people, I don't know whether Mr. Newago is rich or poor and nor do I care. I prosecuted him because he's been convicted twice before of drug offenses, and this time I want you to convict him again.

Defense counsel objected, and the court conducted an unreported side-bar with the attorneys, following which, the prosecutor continued as follows:

> I don't want you to convict him because I'm a racist …. I'm not prosecuting that man because he's poor. I don't know and I don't care. I'm prosecuting him because I believe and I want you to believe … that he brought drugs into this county to poison our people, our children. I don't care whether they are red, white, green, black, yellow. You don't bring drugs into this county.

¶5 After the jury departed to deliberate, the court made a record of its side-bar ruling. The court indicated that it had previously ruled the State could use the prior-conviction evidence for certain, limited purposes, but "the evidence did not come in quite the way that [the prosecutor] was intending on using the evidence." The court also noted, however, that one of the defense witnesses had testified, without objection, "about knowledge of the defendant's prior record." In any event, the court had instructed the prosecutor during the sidebar "not to mention the prior record again." The court gave the attorneys the opportunity to add to its summary of the side-bar, and Newago's counsel said that she did not recall a witness referring to Newago's prior drug convictions, but if that had been the testimony, "my point is moot." Counsel did not move for a mistrial.

¶6 Following his conviction and sentencing, Newago moved for postconviction relief, which the court denied. He appeals the judgment of conviction and the order denying postconviction relief.

ANALYSIS

¶7 We first dispose of three of Newago's claims of error that plainly lack merit. The first is his claim that his trial counsel was ineffective for failing to request a curative or limiting instruction regarding the State's introduction of

evidence of his two prior convictions for drug offenses. The instruction in question would have informed jurors that they should use the "other conduct of the defendant for which the defendant is not on trial" for only certain, described purposes, and not to use it "to conclude that the defendant is a bad person and for that reason is guilty of the offense charged." *See* WIS JI—CRIMINAL 275. Counsel testified at the postconviction hearing that she had "no particular reason" for not requesting the instruction and that, "in retrospect," requesting the instruction "would have been the right thing to do."

¶8 To prevail on a claim of ineffective assistance of counsel, a defendant must establish that his trial counsel's performance was deficient and that this performance prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether trial counsel's performance was deficient and whether that behavior prejudiced the defense, however, are questions of law which we review de novo. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). In analyzing an ineffective assistance claim, we may choose to first address either the "deficient performance" component or the "prejudice" component. *See* ***Strickland***, 466 U.S. at 697. If we determine that the defendant has made an inadequate showing on either component, we need not address the other. *See* ***id***.

¶9 We agree with the State that, despite trial counsel's postconviction testimony, Newago has not established that his counsel performed deficiently in not requesting the court to give WIS JI—CRIMINAL 275. In determining whether counsel's performance was "objectively reasonable," a court "may rely on reasoning which trial counsel overlooked or even disavowed." ***State v. Koller***, 2001 WI App 253, ¶8, 248 Wis. 2d 259, 635 N.W.2d 838. We note that a defense attorney may purposely refuse to request, or decline a court's offer to give, WIS

JI—CRIMINAL 275 on the reasonable belief that the instruction does more harm than good by drawing jurors' attention to adverse evidence. *See* ***Hough v. State***, 70 Wis. 2d 807, 817, 235 N.W.2d 534 (1975). This rationale for eschewing a limiting instruction would be especially appropriate in this case, given that the evidence in question was never directly provided to the jury and it played, at best, an insignificant role in the State's case.

¶10 Thus, if counsel had chosen for strategic or tactical reasons to avoid the instruction, that decision would have been "objectively reasonable under all the circumstances." *See* ***State v. Kimbrough***, 2001 WI App 138, ¶35, 246 Wis. 2d 648, 630 N.W.2d 752. Accordingly, Newago's trial counsel did not perform deficiently notwithstanding the fact that she claims to have lacked the subjective intent to decline WIS JI—CRIMINAL 275 for strategic reasons. *See* ***id***., ¶¶31-35.

¶11 By the same token, Newago's claim that he should have been given a new trial because the prosecutor referred to the two prior convictions in his closing rebuttal is not well-founded. We first note that Newago did not move for a mistrial following the objectionable comment, which is required "to preserve the alleged error for appeal." ***State v. Goodrum***, 152 Wis. 2d 540, 549, 449 N.W.2d 41 (Ct. App. 1989). Newago does not argue that his trial counsel was ineffective for failing to move for a mistrial, but such a claim would lack merit in any event.

¶12 A prosecutor's comment during argument does not merit a new trial unless it "'so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process.'" ***State v. Wolff***, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992) (citation omitted). The prosecutor's reference to Newago's prior convictions was brief, and it was made in direct response to defense counsel's inflammatory suggestion that the State was prompted by racism to selectively

prosecute Newago. *See* ***id.*** at 168-69 (Where a defense argument "'clearly invited and provoked the remark of the prosecutor … the appellant cannot complain because his argument backfired.'" (citation omitted)).

¶13 Thus, even if Newago had moved for a mistrial, we conclude the trial court could properly have denied the motion. In denying Newago's postconviction motion for a new trial based on the prosecutor's statement, the court gave the following assessment of the claimed error: "I don't think that making the reference to the prior bad acts … so stretches the bounds of a fair proceeding that he would be entitled to a new trial, so I'm going to deny … that part of the motion." We agree with the trial court that the comment in question does not rise to the level of reversible error. The trial court's admonition to the prosecutor to not refer to the prior convictions again, with which the prosecutor complied, was an appropriate response to the defense objection.

¶14 Finally, we reject Newago's claim that the State presented insufficient evidence to convict him of possession of cocaine with intent to deliver. His entire argument on this point is as follows:

> Not a single witness testified that Michael Newago purchased cocaine in Minneapolis. It was not found in his possession in the car when it was stopped in Bayfield County. It was found in the car of another person, who merely claimed that it was not his, even though he later testified that he was in the car when Newago's girlfriend bought it. There is simply no evidence that Mr. Newago ever possessed this cocaine. His conviction for this offense should be reversed.

Newago is correct that, according to the testimony of the State's witnesses, Newago's girlfriend picked up the cocaine while Newago waited at a friend's residence in Minneapolis, and the car that Newago was riding in belonged to its driver, Scott Maki, not to Newago. His summary is very selective, however, and it

omits substantial evidence adduced at trial regarding who directed the acquisition and transport of the cocaine and where it was located when the car was stopped. We reject Newago's assertion that there was "no evidence" he "ever possessed this cocaine."

¶15 We will not set aside a conviction for insufficiency of the evidence "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." *See* ***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. With these standards in mind, we review the evidence at trial tending to show that Newago possessed cocaine with intent to deliver it.

¶16 A Bayfield County sheriff's deputy testified that he stopped a car being driven by Scott Maki for speeding. In addition to the driver, occupants of the car included Maki's girlfriend in the front passenger seat and Newago, his girlfriend and their five-year-old daughter in the rear seats. Maki told the deputy that "there was a large amount of cocaine and marijuana in the vehicle," and he consented to a search of his vehicle.

¶17 The deputy found a "brick of marijuana" in the trunk. Inside a Rice Krispies box from which the child had been eating at the time of the stop, now situated on the floor of the car near where Newago's legs had been, the deputy found "two bindles of cocaine," each weighing "approximately 28 grams." Upon

patting Newago down, the deputy found the following on his person: "$1130 in cash"; "some marijuana joints"; and a suspected marijuana pipe. The deputy subsequently obtained a search warrant and he and other officers searched Newago's residence, where they found "a small portable digital scale," "zigzag" cigarette papers for rolling marijuana cigarettes, and "little ziploc bags about an inch by an inch which is commonly used to hold drugs." A Bayfield County sheriff's investigator testified that the "street value" of the marijuana seized from the trunk of the car was $3800 and the value of the fifty-six grams of cocaine found in the cereal box was $5600.

¶18 Maki, the driver of the car, testified as follows: He had driven Newago, who had no drivers license, to Minnesota "to purchase some drugs." The two men were accompanied by their girlfriends and Newago's daughter. They went to "a lady's house" where Newago or the lady made phone calls looking for drugs for Newago to purchase. Maki witnessed Newago purchase the pound of marijuana that was found in the trunk. Newago made more phone calls and Maki and the two women went to pick up two ounces of cocaine, which Newago's girlfriend initially put in her pocket. This cocaine was eventually secreted in the cereal box where it was discovered by the deputy. Newago was "calling the shots" on the drug-buying excursion to Minneapolis, where Maki had never previously been. Maki had only about thirty dollars on him on the trip to Minneapolis, and he testified on re-direct that Newago told him to "go get the cocaine."

¶19 Maki's girlfriend also testified, largely corroborating Maki's account. She said the purpose of the trip to Minneapolis was for Newago "to pick up some drugs."

¶20 We are satisfied that, if jurors found the testimony of the State's witnesses to be credible, they could reasonably conclude that the cocaine seized in the search of the vehicle was acquired at Newago's direction and that it was subject to his control thereafter. Jurors could reasonably infer that the trip to Minnesota was undertaken at Newago's request for the purpose of his acquisition of the controlled substances, including the cocaine in question; that Newago made the arrangements for purchasing the cocaine; and that, at the time of its seizure, the cocaine was in his possession, given his proximity to the cereal box in which it was found. As for Newago's intent to deliver the cocaine, such an intent was readily inferable from its street value ($5600), the amount of cash on Newago's person at the time of his arrest, and the items seized in the search of his residence that were consistent with the division and repackaging of cocaine for resale (scale, small "Ziploc" baggies).

¶21 We conclude the State presented sufficient evidence to permit reasonable jurors to conclude beyond a reasonable doubt that Newago possessed cocaine with the intent to deliver it.

¶22 We turn next to Newago's remaining two claims—that the trial court erred in admitting evidence of his prior convictions for drug offenses and in admitting the statement Newago's former girlfriend gave to police before her death. As to the "other acts" evidence, we agree with Newago that the court was not entirely clear in its pre-trial ruling as to the specific permissible purpose under WIS. STAT. § 904.04(2) (2003-04) for which it deemed the prior convictions

admissible.[2] The State offers no argument on appeal as to why admission of the evidence of the two prior convictions was proper, asserting only that any error in so doing was harmless. Accordingly, for purposes of our analysis, we will assume without deciding that it was error to admit evidence of the prior convictions.[3]

¶23 We also will assume without deciding that the admission of the statement that Newago's deceased former girlfriend gave to police violated Newago's constitutional right "to be confronted with the witnesses against him." U.S. CONST. amend. VI. The U.S. Supreme Court recently announced a new rule for the admission of "testimonial" hearsay statements: "the testimonial statement of a person absent from trial may only be admitted in conformity with the confrontation clause if the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant regarding the statement." *See* ***State v. Manuel***, 2004 WI App 111, ¶20, 275 Wis. 2d 146, 685 N.W.2d 525 (citing ***Crawford v. Washington,*** 541 U.S. 36 (2004)), *aff'd*, 2005 WI 75, 281

[2] The court said this: "And the purpose which appears to be behind the state's intent is on the element of intent, and the issue of absence or lack of absence of mistake. And because intent and absence of mistake are somewhat tied together, the issue of criminal intent is actually—it's actually a state of mind that would negate the possibility of an accident or absence of mistake or a mistake. So I'm satisfied this is—it's an acceptable reason and purpose."

[3] Newago did not testify at trial, so the prior convictions did not bear on his credibility as a witness. In arguing its pretrial motion to admit the two prior convictions, which dated from 1997 and 2002, the State asserted that they were "appropriate and probative" for establishing Newago's "motive, opportunity, intent" because they showed "a continuing course of conduct that the defendant has engaged in, specifically being a drug dealer." Later, when opposing Newago's postconviction motion, the State cited the following as its purposes in admitting the evidence of prior convictions: "opportunity, motive, lack of mistake, and intent." The court concluded in its postconviction ruling, without further elaboration, that "the purpose for which it was offered did fit within the ***Sullivan*** analysis." We accept the State's tacit confession of error in admitting this evidence, both because neither the State nor the trial court persuasively articulated a proper purpose for admitting the convictions, and because it appears the convictions had no connection to the present offenses other than establishing that Newago had a propensity for dealing in drugs, a prohibited purpose for admitting the evidence.

Wis. 2d 554, 697 N.W.2d 811.[4] Again, the State does not try to convince us that the deceased woman's statement was properly admitted, arguing only that its admission was harmless.[5]

¶24 We accept the State's invitation to consider whether these two evidentiary errors, individually or collectively, require that we reverse one or more of Newago's convictions.[6] A Confrontation Clause violation "'does not result in automatic reversal, but rather is subject to harmless error analysis.'" ***State v. Weed***, 2003 WI 85, ¶28, 263 Wis. 2d 434, 666 N.W.2d 485 (citation omitted). The same is true regarding wrongly admitted evidence of "other acts." *See* ***State v. Gary M.B.,*** 2003 WI App 72, ¶28, 261 Wis. 2d 811, 661 N.W.2d 435, *aff'd*, 2004 WI 33, 270 Wis. 2d 62, 676 N.W.2d 475.

¶25 The Wisconsin Supreme Court has recently explained that "[a]n error is harmless if the beneficiary of the error proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" ***State v.***

---

[4] The Supreme Court decided ***Crawford v. Washington,*** 541 U.S. 36 (2004), after Newago's trial.

[5] There can be no dispute that the deceased was unavailable to testify and that Newago did not have a prior opportunity to cross-examine her regarding her statements to police. It also seems clear that the statement in question was "testimonial" in that it was made to police in response to their interrogation of the declarant as part of an investigation that led to Newago's prosecution. *See* ***Crawford v. Washington,*** 541 U.S. 36, 68 (2004) (Noting that testimonial statements include "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and ... police interrogations").

[6] We note that Newago did not file a reply brief, a fact that we could deem a tacit concession that the State's assertion of harmless error is correct. *See* ***State v. Thomas***, 2004 WI App 115, ¶12 n.4, 274 Wis. 2d 513, 683 N.W.2d 497, *review denied* (WI Sept. 20, 2004) (No. 03-1369-CR). We do not, however, rely on the absence of a reply to the State's argument. We have reviewed the record to ascertain whether the State has met its burden to show that the cited errors were indeed harmless.

Hale, 2005 WI 7, ¶60, 277 Wis. 2d 593, 691 N.W.2d 637 (citation omitted).[7] In determining whether an error is harmless, we may consider some or all of the following factors: "the frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence, the nature of the defense, the nature of the State's case, and the overall strength of the State's case." ***Id***., ¶61. After reviewing the present record with these factors in mind, we conclude the two cited evidentiary errors were harmless.

¶26 We first lay to rest any concern that the other acts evidence or the deceased girlfriend's hearsay statement had any impact on the jury's verdicts on four of the six offenses for which it found Newago guilty. The misdemeanor charges for possessing marijuana and paraphernalia were based on items found on Newago's person at the time of his arrest, and Newago's guilt on these charges was all but conceded.[8] The bail-jumping and witness intimidation charges both stemmed from post-arrest threats made by Newago to Maki that he would have Maki shot if Maki or his girlfriend testified that the cocaine and marijuana found

[7] The Wisconsin Supreme Court has also stated the harmless error test as follows: "A constitutional or other error is harmless if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189 (citation omitted). The court has, on occasion, reconciled the two formulations as follows: "[I]f it is 'clear beyond a reasonable doubt that a rational jury would have convicted absent the error,' then the error did not 'contribute to the verdict.'" ***State v. Weed***, 2003 WI 85, ¶29, 263 Wis. 2d 434, 666 N.W.2d 485 (citation omitted).

[8] Defense counsel acknowledged during closing that "a few joints for personal use" were found on Newago's person, and that "there isn't anything to say about that." As for the drug paraphernalia, "zigzag papers," counsel's only argument was that they "are primarily designed for rolling tobacco cigarettes" and were thus not drug paraphernalia as defined in the relevant jury instruction.

in the car belonged to Newago. Maki's testimony regarding the threats was not contradicted by any other witness, and the defense's only successful point on cross-examination directed to these charges was Maki's acknowledgement that neither Newago nor anyone on his behalf had actually harmed him after the threats were made.

¶27 In short, neither the prior drug conviction evidence nor the hearsay account of the trip to Minneapolis, nor both of them together, bolstered the State's case on these four offenses in any way, and Newago's defenses against these charges were not impaired by the improperly admitted evidence. We are thus satisfied that the erroneous admission of the challenged evidence did not contribute to the guilty verdicts for the two misdemeanors and the bail jumping and witness intimidation charges. It is clear "beyond a reasonable doubt that a rational jury would have found the defendant guilty" of these four offenses even if the prior drug convictions and the hearsay statement had not been admitted. *See* ***Weed***, 263 Wis. 2d 434, ¶29.

¶28 That leaves Newago's convictions for possessing, with intent to deliver, the cocaine and the marijuana found in the car. Both the evidence that Newago had two prior controlled substance convictions and his deceased girlfriend's hearsay account of the Minneapolis trip could conceivably have contributed to the jury's guilty verdicts on these two charges. However, in view of the minor role both items of evidence played in the prosecution of these two offenses, and given the State's other, largely unrefuted evidence supporting the two possession-with-intent-to-deliver charges, we conclude that the admission of neither item, nor both together, contributed to Newago's convictions. That is, we are satisfied beyond a reasonable doubt that a rational jury would have found

Newago guilty of both offenses even if neither his prior offenses nor the hearsay statement had been admitted into evidence.

¶29 The evidence of Newago's prior convictions introduced by the State consisted of two "Hennepin County Criminal Courts Case Histories." The documents appear to be computer-generated and they are largely indecipherable to anyone unfamiliar with their format. Moreover, jurors never learned what information the documents may have provided because the documents were neither read nor given to the jury. Jurors did hear the prosecutor say, however, that he was introducing "the defendant's prior criminal convictions for possession of controlled substances." Also, during the defense case, a witness acknowledged that she was "aware [Newago] had been convicted of criminal possession of drugs." Except for the prosecutor's rebuttal comment, which we have discussed above, these were the only two mentions of Newago's prior convictions during the trial. Thus, regardless of what use the State may have originally intended to make of the prior conviction evidence, it essentially made *no* use of them during the trial or during its closing argument.[9]

¶30 Turning to the deceased former girlfriend's written statement to police, which was both read and provided to the jury, the statement read as follows:

[9] In his closing, the prosecutor cited the largely unrefuted testimony of Maki and his girlfriend as establishing that the cocaine and marijuana found in the car belonged to Newago. As for the intent to deliver, the prosecutor pointed to the quantities and street value of the two controlled substances, the scales and baggies found at Newago's residence and the fact that he was carrying over $1000 in cash at the time of his arrest. The fact that Newago had two prior convictions for controlled substance offenses was mentioned once in the prosecutor's rebuttal, but, as we have described, that was in the context of the prosecutor's response to the defense claim of racism and selective prosecution, not as support for any of the elements of the two possession with intent to deliver charges.

> We left to Mpls. We made a stop at Mike's friends' house. He talked talked (sic) to our friend. She made a call we (myself, [Maki], & [Maki's girlfriend]) went to pick up the coke. While Mike stayed at the friends' house to make more calls. Then we drove down by D.Q. where Mike had picked up the marijuana. There [Maki] & Mike were wondering and debating were (sic) they could hide the drugs. We left D.Q. parking lot. Stopped at the last stop were (sic) Mike went in to purchase the methadone. Then we came back up north (Here). Mike packages the drugs and gets rid of them to a few people.

The girlfriend had given police an earlier statement to the effect that the four had gone to Minneapolis to visit Newago's daughter and to pick up a cat, making no mention of the drugs or their acquisition. This statement was also read to the jury during defense cross-examination of the arresting deputy, and it, too, was provided to jurors during deliberations. Defense counsel also established during her cross-examination of the arresting deputy that the deceased woman had also originally told police that "she will take responsibility for" the drugs found in the car "if no one else will."

¶31 In addition to the girlfriend's first and second statements to police, jurors heard two defense witnesses testify that the deceased woman had told them that the drugs were hers, that she had confessed this to police but the police would not accept her confession.[10] The other two defense witnesses testified by phone from Minneapolis. One gave testimony suggesting that Newago's deceased girlfriend had taken two bottles of methadone from her purse. The second testified that when Newago, Maki and their respective girlfriends visited her in

[10] It was during the cross-examination of one of these witnesses that the prosecutor had one of them read the deceased girlfriend's second statement to police and acknowledge that the deceased woman had not told her that she had given a statement to police implicating Newago as the owner of the drugs found in the car.

Minneapolis, Newago's girlfriend made the only phone call, after which Maki gave her some money and the three visitors other than Newago left in their car while Newago remained at the witness's house. Newago did not testify.

¶32 As we have noted (footnote 9), the prosecutor emphasized the testimony of Maki and Maki's girlfriend in tying the cocaine and marijuana to Newago. Several times when citing their testimony, he also cited the deceased girlfriend's second police statement as corroborating the live witnesses' accounts. The prosecutor did not, however, cite the deceased woman's statement to support any facts not testified to by Maki and his girlfriend.

¶33 In the defense closing argument, counsel attempted to cast doubt on the testimony of Maki and his girlfriend, suggesting they implicated Newago out of fear of the consequences to them resulting from the discovery of the cocaine and marijuana in Maki's car. Defense counsel told jurors they should believe the accounts of the allegedly disinterested witnesses from Minneapolis instead of the self-interested testimony of Maki and his girlfriend. She also suggested that Newago's girlfriend, in her second statement, told police what they wanted to hear so that she could be released to care for her five-year-old daughter.

¶34 In his rebuttal argument, the prosecutor cited the girlfriend's second police statement one time, noting only that it was given after the search warrant had been executed at her and Newago's residence, suggesting that the woman then knew that the police had evidence tying Newago to drug dealing. Most of the State's rebuttal was devoted to emphasizing the credibility of Maki and his girlfriend, noting, for example, that they testified against Newago despite his threats, suggesting that if the pair were lying, the safer lie would have been to implicate Newago's deceased girlfriend instead of Newago, which they did not do.

¶35 Again, given the nature of the evidence adduced at trial and the parties' treatment of that evidence in their closing arguments, we are satisfied beyond a reasonable doubt that a rational jury would have found Newago guilty even if his deceased girlfriend's hearsay statement had not been admitted into evidence. Presumably, if the State had not been allowed to introduce her second statement to police, implicating Newago, the defense would also not have been allowed to admit her first statement and those she made to others, implicating herself. The fact that the deceased woman had given several conflicting accounts diminished the impact of the one statement in which she implicated Newago. Even so, had that statement been the only evidence tying Newago to the cocaine and marijuana found in the car, its admission would have been far from harmless. The deceased woman's account, however, was merely cumulative of the live testimony provided by the other two adult occupants of the car.

¶36 Jurors plainly found Maki to be a credible witness, otherwise, they could not have found Newago guilty of bail jumping and witness intimidation. Those verdicts rested entirely on Maki's testimony, and as we have discussed above, the verdicts on those charges were not affected by the erroneously admitted hearsay statement. Once jurors concluded Maki was a credible witness, his testimony, as corroborated by his girlfriend, together with the circumstantial evidence tending to show that Newago dealt in drugs (the scales, cigarette papers, and packaging materials at his residence, and the large amount of cash on his person), was more than sufficient to allow a rational jury to conclude beyond a reasonable doubt that Newago possessed both the cocaine and marijuana with the intent to deliver them. The deceased woman's testimony added little to the State's case, and its absence would not have prevented a rational jury from reaching the verdicts that the jury in this case did.

¶37 In summary, the State's use of the prior conviction evidence and the deceased woman's statement were "minor piece[s] of evidence in the State's case against" Newago. *See* ***Weed***, 263 Wis. 2d 434, ¶31. The State's case against Newago for possessing cocaine and marijuana with intent to deliver rose or fell with the strength of the testimony it presented from Maki and his girlfriend, as well as the physical evidence it retrieved from Newago's person and his residence. That testimony and evidence was the overwhelming focus of the State's closing arguments. The erroneously admitted evidence did not contribute to the guilty verdicts on any of the six charges for which Newago was convicted, and it is thus clear beyond a reasonable doubt that a rational jury would have reached those same six verdicts had the items not been admitted. *See* ***Hale***, 277 Wis. 2d 593, ¶78; ***Harvey***, 254 Wis. 2d 442, ¶49.

CONCLUSION

¶38 For the reasons discussed above, we affirm the appealed judgment and order.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.