COURT OF APPEALS DECISION DATED AND FILED

June 28, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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

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

Appeal Nos. 2010AP2041-CR
2010AP2042-CR

Cir. Ct. Nos. 2007CF815
2007CF2439

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES THOMAS MORTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. James Thomas Morton appeals his judgment of conviction. Morton argues that the jury verdict finding him guilty of delivering cocaine to an undercover police officer should be vacated because the State failed

to provide sufficient evidence to support the verdict. Morton also argues that the trial court erred when it granted the State's motion to join two cases against Morton for trial. We affirm.

BACKGROUND

¶2 On February 9, 2007, City of Milwaukee Police Officer Jill Riley, along with a confidential informant, went to Morton's apartment to make a controlled drug purchase. Officer Riley testified that after entering Morton's apartment, she was assured by Morton that he had "what [she] came for," and was instructed to place the purchase money on Morton's kitchen table. After placing three $20 bills on Morton's kitchen table, Morton gestured towards a napkin on an ironing board. Officer Riley testified that the napkin contained three off-white chunks. After leaving Morton's apartment, Officer Riley gave the contents of the napkin to another officer who subsequently tested them. The test results identified the substances as cocaine.

¶3 Morton's apartment was under surveillance by Milwaukee police during the controlled purchase and the monitoring officers were notified upon the completion of the transaction. After the contents of the napkin were identified, Milwaukee police obtained a search warrant for Morton's apartment. While officers were attempting to secure a warrant, Morton left his apartment. Detective Britt Kohnert, one of the officers on surveillance, then instructed two uniformed officers to conduct a traffic stop and arrest Morton for delivery. Shortly thereafter, a search warrant was signed and Morton's apartment was searched. Additional controlled substances were recovered from Morton's apartment.

¶4 Morton was subsequently charged with one count of delivering one gram or less of cocaine, one count of keeping a drug house, one count of

possession of cocaine with intent to deliver, and two counts of possession of controlled substances in Milwaukee County Circuit Court Case No. 2007CF000815.[1] Morton was released on bail.

¶5 On May 18, 2007, while out on bail, Morton was stopped by City of Franklin police because the car he was driving had a suspended license plate. Officer Jason Bartol testified that a check of Morton's "driver's status" indicated that Morton's driver's license was suspended and that Morton was arrested three months prior to the stop for drug violations. Officer Bartol contacted the City of Franklin dispatch center and learned that Morton was out on bail. While Officer Bartol was writing a citation for operating with a suspended license, Officer Paul Turner arrived on the scene with his canine partner. The canine partner indicated that drugs were in the trunk and on the driver's side of the vehicle. The officers discovered stolen license plates in the trunk of Morton's car and subsequently arrested him for bail jumping because of his possession of stolen property. Drugs were also found in Morton's socks pursuant to a custodial search at the Milwaukee Police Department. Morton was subsequently charged with one count of cocaine possession as a second or subsequent offense, one count of marijuana possession as a second or subsequent offense, and one count of felony bail jumping in Milwaukee County Circuit Court Case No. 2007CF002439.

¶6 On January 22, 2008, the trial court consolidated the two cases for trial pursuant to a motion filed by the State. After a five-day jury trial, a jury convicted Morton of one count of cocaine delivery, one count of possession of cocaine, as a lesser included offense to the charge of possession with intent to

[1] Morton's possession charges involved different substances and were filed pursuant to WIS. STAT. §§ 961.41(3g)(c), (e) and (b) (2007-08). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

deliver, one count of marijuana possession and one count of possession of a controlled substance in Case No. 2007CF000815. Morton was found not guilty of keeping a drug house. In Case No. 2007CF002439, Morton was found guilty of cocaine possession, as a misdemeanor, possession of marijuana, as a misdemeanor, and felony bail jumping. Morton's sentence in Case No. 2007CF000815 amounted to a total of eight years and one month, with four years and seven months of initial confinement and three years and six months of extended supervision. In Case No. 2007CF002439, Morton's sentence amounted to a total of five years, with three years of initial confinement and two years of extended supervision.[2] Morton now appeals his judgment of conviction and sentence on the charge that he delivered cocaine to Officer Riley.

DISCUSSION

¶7 Morton contends that the jury verdict finding that he delivered cocaine to Officer Riley should be vacated because the State failed to provide sufficient evidence to support the verdict beyond a reasonable doubt. He also contends that the trial court erred in joining Case Nos. 2007CF000815 and 2007CF002439 for trial. We disagree.

I. *Sufficiency of the Evidence.*

¶8 Morton argues that the State failed to prove beyond a reasonable doubt that Morton delivered cocaine to Officer Riley because Officer Riley's testimony does not indicate that Morton had any contact with the cocaine, nor did

[2] The sentences in Milwaukee County Circuit Court Case No. 2007CF000815 were to run consecutive to the sentences in Milwaukee County Circuit Court Case No. 2007CF002439.

the State offer any evidence or testimony regarding possible contact the confidential informant may have had with the cocaine. We disagree.

¶9 "We will not reverse a conviction for insufficient evidence unless the evidence, viewed most favorably to the [S]tate 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. Schutte***, 2006 WI App 135, ¶14, 295 Wis. 2d 256, 720 N.W.2d 469 (quotation marks and citation omitted). "The test is not whether this court or any of the members ... are convinced [of the defendant's guilt] beyond reasonable doubt, but whether this court can conclude the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true." ***Id.*** (quotation marks and citation omitted; ellipses and brackets in ***Schutte***).

¶10 Morton's challenge to the sufficiency of the State's evidence requires that we first determine what the State was required to prove and then, applying the standard of review above, whether it did so. *See* ***id.***, ¶15. The State had the burden of proving beyond a reasonable doubt that Morton delivered cocaine to Officer Riley, knowing or believing that it was cocaine. *See* WIS JI—CRIMINAL 6020. The record supports the jury's finding that the State met its burden.

¶11 Officer Riley testified at the jury trial that after she entered Morton's apartment, Morton stood by an ironing board, told her to put her money on the kitchen table and while looking directly at her said, "what you came for is right here." Officer Riley testified that after she placed $60 on the kitchen table, Morton "told [her] what [she] came for, and he pointed to the ironing board," but

that the "only thing that was on the ironing board was a napkin." She further testified:

> [Prosecutor]: How far away from the ironing board was Mr. Morton when he actually pointed at the ironing board?
>
> [Officer Riley]: He was very close. Within a couple of feet.
>
> [Prosecutor]: He gestured at the ironing board. Did he point to anything specifically?
>
> [Officer Riley]: He pointed at the napkin on the ironing board, and before I picked it up I pointed at it – specifically to the napkin on the board. I took a few steps closer and pointed. He said yeah. It's right there.
>
> [Prosecutor]: What did you do after Mr. Morton said yeah, it's right there?
>
> [Officer Riley]: I picked it up and opened it. I observed three, off-white chunky substances of suspected crack cocaine inside the napkin.

The substance was later tested and identified as cocaine.

¶12 Morton argues that Officer Riley's testimony does not indicate that he actually delivered the cocaine because it does not state that he had any direct contact with the napkin. He also argues that no evidence counters the possibility that the informant may have had contact with the cocaine. We disagree.

¶13 "[A] constructive transfer need not be hand to hand. Instead, the defendant's intent to transfer and the effectuation of that transfer are the determinative factors." ***State v. Wilson***, 180 Wis. 2d 414, 422, 509 N.W.2d 128 (Ct. App. 1993). "A direct actor can use another person, a place or an object to indirectly transfer a substance. The essence is the intent to transfer and the ability to cause that transfer." ***Id.*** at 422-23. Morton's argument that he did not deliver the cocaine because he did not have direct contact with the napkin, therefore, is

not supported by case law. Morton directed Officer Riley to place the buy money on the kitchen table, told her that "what [she] came for" was in his apartment, and pointed to a napkin containing cocaine. The jury acted reasonably in accepting Officer Riley's testimony to support its finding that Morton delivered cocaine. *See* ***State v. Banks***, 2010 WI App 107, ¶46, 328 Wis. 2d 766, 790 N.W.2d 526 ("[T]he credibility of the witnesses and the weight of the evidence is for the fact finder, and we must adopt all reasonable inferences which support the jury's verdict."). Further, Morton's implication that the confidential informant may have had some direct contact with the cocaine is purely speculative and will not be addressed.

II. *Joinder.*

¶14 Morton also argues that the trial court erred by joining Case Nos. 2007CF000815 and 2007CF002439 over his objection because the two cases were of a different nature and involved different geographical areas, different witnesses and different evidence. The State argues that joinder was harmless error without addressing the propriety of the joinder issue. Thus, we consider whether the State has met its burden of establishing that the defendant has not been prejudiced.

¶15 "Whether the initial joinder was proper is a question of law that we review without deference to the trial court, and the joinder statute is to be construed broadly in favor of the initial joinder." ***State v. Locke***, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993). "[I]f the offenses do not meet the criteria for joinder, it is presumed that the defendant will be prejudiced by a joint trial. The [S]tate may rebut the presumption on appeal by demonstrating the defendant has not been prejudiced by a joint trial." ***State v. Leach***, 124 Wis. 2d 648, 669, 370 N.W.2d 240 (1985). "The purpose of the joinder provisions is to promote

economy and efficiency [in judicial administration] and to avoid a multiplicity of trials, where these objectives can be achieved without substantial prejudice to the right of the defendants to a fair trial." ***Id.*** at 671 (quotation marks and citation omitted; brackets in ***Leach***). "This purpose would be substantially defeated if a defendant were entitled to separate new trials on all previously misjoined offenses, even when the defendant actually suffered no prejudice from the misjoinder." ***Id.*** Consequently, "misjoinder of offenses in some circumstances may be harmless." ***Id***; *see also* ***State v. Davis***, 2006 WI App 23, ¶21, 289 Wis. 2d 398, 710 N.W.2d 514.

¶16 WISCONSIN STAT. § 971.12(1) provides:

> Two or more crimes may be charged in the same complaint, information or indictment in a separate count for each crime if the crimes charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan. When a misdemeanor is joined with a felony, the trial shall be in the court with jurisdiction to try the felony.

¶17 "To be of the 'same or similar character' under sec. 971.12(1), Stats., crimes must be the same type of offenses occurring over a relatively short period of time and the evidence as to each must overlap." ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988) (citation omitted).

¶18 Case No. 2007CF000815 involved one count of delivery of cocaine, one count of keeping a drug house, one count of possession of cocaine with intent to deliver and two counts of possession of a controlled substance. Morton was acquitted of keeping a drug house, but was convicted of one count of delivery of cocaine, one count of possession of cocaine as a lesser included offense to the charge of possession with intent to deliver, and two counts of possession of a

controlled substance. Morton admitted to all of the possession counts during the trial.

¶19 In Case No. 2007CF002439, Morton was charged with one count of possession of cocaine, as a second or subsequent offense, one count of possession of marijuana, as a second or subsequent offense, and one count of felony bail jumping for failing to comply with the terms of his bond. Morton admitted to all of the possession counts and stipulated that he was out on bail in Case No. 2007CF000815 at the time of his arrest in Franklin. Not surprisingly, Morton was convicted of cocaine possession, marijuana possession, and bail jumping.

¶20 Essentially, Morton disputed only the charges of delivery of cocaine and keeping a drug house. The jury was instructed to consider each charge separately and to not allow its verdict on any one count to affect its verdict on any other count. We presume that the jury followed this instruction. *See* ***State v. Deer***, 125 Wis. 2d 357, 364, 372 N.W.2d 176 (Ct. App. 1985). Morton was acquitted of keeping a drug house, although convicted of delivery of cocaine. Morton was also not convicted of possession with intent to deliver, but of the lesser charge of mere possession. Had the jury not considered the charges separately, as they were instructed, the outcome might well have been different. Based on the combination of Morton's admissions, his stipulation, and the jury's acquittal on one charge and conviction of a lesser offense on another, we are satisfied that the State has met its burden of showing that Morton was not prejudiced by the joinder.

¶21 For all the foregoing reasons, we affirm the trial court.

By the Court.—Judgment affirmed.

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