COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2673-CR **Cir. Ct. No. 2010CM194**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK E. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Barron County: TIMOTHY M. DOYLE, Judge. *Reversed and cause remanded with directions*.

¶1 PETERSON, J.[1] Mark Johnson appeals a judgment of conviction for possession of marijuana and bail jumping. He also appeals an order denying

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

postconviction relief. Johnson argues the circuit court erred by admitting evidence that he possessed cocaine and marijuana on a previous occasion. He asserts the error is not harmless and he is entitled to a new trial.

¶2 We conclude the court erroneously admitted this evidence and the error is not harmless. We reverse Johnson's conviction for possession of marijuana and remand for a new trial. Because the State concedes that a reversal on the marijuana possession conviction necessitates a reversal of the bail jumping conviction, we also reverse the bail jumping conviction and remand for a new trial.

BACKGROUND

¶3 At trial, detective Jason Hagen testified that on May 3, 2010, he and five other officers executed a search warrant on Johnson's and Krystal Finnigan's residence. During the search, the officers found marijuana and drug paraphernalia.

¶4 On direct examination, Johnson testified that he does not smoke marijuana. The State cross-examined Johnson, in part, as follows:

> [State]: You don't smoke marijuana?
>
> [Johnson]: Nope.
>
> [State]: So you'd be the last person in the world that would have marijuana at your residence, in your pocket, on your person?
>
> [Johnson]: That's right.
>
> [State]: Not counting these items that we claimed were partly yours that were a part of this case, in the year prior to May 3rd, going backwards from May 3rd, when is the last time you possessed marijuana?
>
> [Johnson]: I didn't possess marijuana ever.
>
> [State]: How about cocaine?

¶5 Johnson's counsel objected. The court held a sidebar and overruled the objection.[2] Johnson admitted he possessed cocaine within the year prior to the current offense. The following exchange then occurred:

> [State]: You did possess marijuana as well, didn't you?
>
> [Johnson]: No, sir.
>
> [State]: Did you tell Detective [Jason] Hagen on May 4, 2010 when he interviewed you at the jail that you were holding marijuana and THC for someone else?
>
> [Johnson]: No, I didn't.

¶6 The State called Hagen as a rebuttal witness. Hagen testified he interviewed Johnson on May 4, 2010, after police executed the search warrant on Johnson's residence. At that time, Hagen knew about a Columbia County case pending against Johnson. The State asked Hagen what Johnson told him about the Columbia County case. Hagen replied, "I asked him about the drugs that he was, I guess, charged with or being in possession of in that case, and he said that he was holding onto those drugs for his brother."

¶7 The jury found Johnson guilty of possession of marijuana and bail jumping. He was acquitted of possession of drug paraphernalia. Johnson filed a postconviction motion. At the postconviction hearing, Johnson argued the court erroneously exercised its discretion by allowing the State to question him about whether he previously possessed cocaine, and by allowing the State to recall Hagen to testify that Johnson admitted he possessed marijuana on the earlier occasion.

[2] The sidebar was not memorialized in the record.

¶8 The circuit court denied Johnson's motion, reasoning Johnson opened the door by testifying he never possessed marijuana. The court determined that once Johnson made that assertion, the State was free to cross-examine Johnson about the "pending charges for possession of marijuana and cocaine." It reasoned that, because Johnson did not admit to possessing marijuana on a previous occasion, it was appropriate for the State to recall Hagen to testify that Johnson admitted to him that he had possessed marijuana in the Columbia County case.

DISCUSSION

¶9 On appeal, Johnson renews his argument that the cocaine questions were improper and that the State should not have been permitted to recall Hagen to testify Johnson admitted to previously possessing marijuana. Circuit courts have discretion to admit or exclude evidence. ***State v. Ringer***, 2010 WI 69, ¶24, 326 Wis. 2d 351, 785 N.W.2d 448. We will only disturb a circuit court's discretionary determination if the court erroneously exercises its discretion. ***Id.*** A circuit court erroneously exercises its discretion if it applies the wrong legal standard or the facts of record fail to support the court's decision. ***Id.***

Cocaine possession

¶10 Johnson concedes that, after he testified he never possessed marijuana, the State was permitted to cross-examine him about a previous instance where he possessed marijuana. *See* WIS. STAT. § 906.08(2). However, he argues the questions related to cocaine were improper because he "never claimed he never possessed cocaine."

¶11 We agree. WISCONSIN STAT. § 906.08(2) permits specific instances of conduct to be inquired into on cross-examination if probative of the witness's truthfulness or untruthfulness. Consequently, after Johnson testified he never possessed marijuana, the State's cross-examination about a previous marijuana possession incident was proper. However, Johnson's testimony did not "open the door" for the State to also introduce evidence that Johnson previously possessed cocaine. The circuit court erred when it determined Johnson's testimony that he never possessed marijuana allowed the State to question him about cocaine. As such, the cocaine evidence was erroneously admitted.

¶12 The State appears to assert the cocaine question was proper because it impeached Johnson's inconsistent statement. *See* WIS. STAT. § 906.13. The State offers no record citation to where Johnson denied possessing cocaine. Instead, it contends Johnson's testimony that he never possessed marijuana was inconsistent with the police interview where he admitted possessing marijuana and cocaine.

¶13 We reject the State's argument. Johnson's testimony that he never possessed marijuana is not inconsistent with his admission that he previously possessed cocaine.

Extrinsic evidence of prior marijuana possession

¶14 Johnson next argues that, although the State was permitted to cross-examine him about whether he possessed marijuana on a previous occasion, it was not permitted to recall Hagen to prove Johnson previously possessed marijuana. In support, Johnson cites WIS. STAT. § 906.08(2), which provides, in relevant part, "specific instances of the conduct of a witness, for the purpose of attacking or

supporting the witness's credibility … *may not be proved by extrinsic evidence*." (Emphasis added.)

¶15 The State responds WIS. STAT. § 906.08(2) does not apply because it relates to conduct, not statements. It asserts it was permitted to use Hagen's testimony to establish that Johnson's testimony was inconsistent with his admission to Hagen that he possessed marijuana in an unrelated case. It contends WIS. STAT. § 906.13(2) permits the use of extrinsic evidence to prove prior inconsistent statements.

¶16 We do not need to resolve the parties' dispute between the application of WIS. STAT. §§ 906.08(2) and 906.13(2). Instead, we conclude Hagen's testimony was improper because it violated the general rule prohibiting impeachment on collateral matters.

¶17 In Wisconsin, "a rule has evolved that prohibits contradiction … of fact testimony that is collateral to issues of the particular case." ***State v. Spraggin***, 71 Wis. 2d 604, 622, 239 N.W.2d 297 (1976). Stated another way, "Impeachment of a witness on the basis of collateral facts introduced by extrinsic testimony *is forbidden*." ***McClelland v. State***, 84 Wis. 2d 145, 159, 267 N.W.2d 843 (1978) (emphasis added). "Cross examination on [collateral] matters is to be limited, and it has been said that the examiner must abide by the answers to his questions on immaterial subjects." ***Spraggin***, 71 Wis. 2d at 622.

¶18 Evidence is collateral if it does not meet the following test: "Could the fact, as to which error is predicated, have been shown in evidence for any purpose independently of the contradiction?" ***Id.*** at 623 (citation omitted). Here, the testimony that Johnson admitted possessing marijuana on a previous, unrelated occasion would have only been admissible to contradict his trial testimony.

Consequently, the evidence was collateral, and the State could not impeach Johnson with extrinsic evidence. Hagen's rebuttal testimony was improper.

Harmless error

¶19 The erroneous admission of evidence "does not necessarily lead to a new trial." ***Martindale v. Ripp***, 2001 WI 113, ¶30, 246 Wis. 2d 67, 629 N.W.2d 698. The evidence is subject to the harmless error rule. ***State v. Harris***, 2008 WI 15, ¶85, 307 Wis. 2d 555, 745 N.W.2d 397. An 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.'" ***Id.***, ¶42 (quoting ***Chapman v. California***, 386 U.S. 18, 24 (1967)). Our supreme court has also held that an error is harmless when "it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***Id.***, ¶43 (quoting ***State v. Harvey***, 2002 WI 93, ¶46, 254 Wis. 2d 442, 647 N.W.2d 189).

¶20 Johnson argues the error is not harmless because his admission that he previously possessed cocaine and Hagen's testimony that Johnson admitted previously possessing marijuana were prejudicial and "poisoned" the jury. Specifically, he asserts this improper evidence allowed the jury to infer that he was acting in conformity with his previous conduct.

¶21 The State does not respond to Johnson's harmless error argument. Therefore, it concedes any error was not harmless. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶22 However, even on the merits, we agree with Johnson that the error is not harmless. At trial, Johnson's theory of the case was that the items found

during the search warrant execution did not belong to him. The jury acquitted Johnson of possession of drug paraphernalia, but it found him guilty of possession of marijuana. We cannot conclude beyond a reasonable doubt that the improper evidence did not contribute to the jury's guilty verdict on the possession of marijuana charge. We therefore reverse the possession of marijuana conviction and remand for a new trial.

¶23 The State concedes that if we reverse the possession of marijuana conviction, we must also reverse and remand the bail jumping conviction because it is based on Johnson's possession of marijuana conviction. Accordingly, we reverse the bail jumping conviction and remand for a new trial.

By the Court.—Judgment and order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.