

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 22, 1996

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

NOTICE

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

No. 95-3247-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

State of Wisconsin,

Plaintiff-Respondent,

v.

Robert E. Bickham,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Robert E. Bickham appeals from a judgment of conviction entered after a jury found him guilty of possession with intent to deliver a controlled substance (cocaine), second or subsequent offense, as party to a crime, and failure to pay the controlled substance tax as party to a crime, contrary to §§ 161.16(2)(b)(1), 161.41(1m)(cm)(3), 161.48, 939.05, 139.87(1)&(2), 139.88(2), 139.89, and 139.95, STATS.

Bickham claims that: (1) the trial court erroneously exercised its discretion when it limited the use of certain photographs which were admitted into evidence; (2) the trial court erroneously exercised its discretion when it excluded certain cross-examination of Detective Dennis Gardner; (3) the trial court erroneously exercised its discretion when it precluded Bickham from eliciting testimony that a third person (Anthony Bean) committed the crimes attributed to Bickham; (4) the drug stamp law violates his constitutional right against self-incrimination; and (5) the drug stamp law subjects him to double jeopardy in violation of his constitutional rights. Because the trial court's limitation on the photographic evidence was harmless error; because the exclusion of the cross-examination questioning was harmless error; because the trial court did not erroneously exercise its discretion in excluding the third party evidence; and because Bickham waived his right to raise the constitutional violations, we affirm.

I. BACKGROUND

On the night of January 30, 1995, a large group of police officers proceeded to a Milwaukee home to execute a no-knock search warrant for suspected narcotics at a suspected drug house. The house was a two-story, single-family building with a porch on the second-story in the back of the home.

Detective Edwin Bonilla was positioned at the rear of the home. Bonilla testified that he was approximately twenty-five feet to the east of the house with a view of the second-story porch. Bonilla said that after the officers entered the front door of the home, Bonilla heard a lot of running and commands being given for the occupants to get down on the ground. At this point, Bonilla indicated that he saw a man come out onto the second-story porch and toss multiple objects off the porch. Bonilla shined his flashlight on the man and ordered him not to move. The man complied.

Bonilla said no one else was on the porch and that he continued to shine his flashlight on the man until Officer Willie Brantley stepped onto the porch and arrested the man. Bonilla testified that the man was wearing dark clothing, including a black leather jacket and something that reflected light around his neck. Bonilla indicated that he observed the man's profile, including hair style, stature and weight.

Subsequently, Bonilla entered the home and identified the man being held by Brantley as the person observed on the porch. This man, later identified as Bickham, was wearing a black leather jacket and a gold chain around his neck. The tossed items were recovered from the ground. These items included three bags containing rock cocaine and two envelopes containing marijuana. As a result, Bickham was charged with possession with intent to deliver and violation of the drug stamp law.¹

Bickham's defense at trial was mistaken identity. He admitted being at the house during the search. He admitted going out onto the porch, but he denied that he tossed anything off of the porch. He introduced into evidence photographs depicting the backside of the house from different vantage points. He attempted to elicit testimony from Detective Bonilla that Bonilla was located at the same position as shown in one of the photos, which was taken twenty-five feet from the home. This photo showed that very little of the doorway to the porch could be observed from this distance. The trial court excluded this cross-examination and admitted the photos for the limited purpose of showing the relative locations of the buildings.

Bickham also attempted to elicit from Detective Gardner that two months after the incident, he had asked witness Latrice Braggs if she knew who owned the drugs. Bickham wanted to use this information to demonstrate that at least one detective was not convinced that Bickham was the perpetrator of the January 30 incident. The trial court excluded this questioning on hearsay grounds.

Bickham also tried to introduce evidence that another individual, Anthony Bean, who was present in the drug house on January 30, was arrested five weeks later at a drug house near the one involved in this case. This information was intended to show that Bean, rather than Bickham, should have been charged with the drug offenses arising out of the January 30 incident. The trial court excluded this testimony.

¹ Bickham was charged with possession (with intent to deliver) of both cocaine *and* marijuana. The jury acquitted him of the marijuana charge.

The jury convicted Bickham of possession with intent to deliver cocaine and the drug stamp violations. Judgment was entered. Bickham now appeals.

II. DISCUSSION

A. Evidentiary Issues.

In reviewing a trial court's decision concerning the admission or exclusion of evidence, we apply the discretionary standard of review. *State v. Oberlander*, 149 Wis.2d 132, 140-41, 438 N.W.2d 580, 583 (1989). That is, we will uphold the trial court's ruling unless it erroneously exercised its discretion. *Id.* A trial court properly exercises its discretion if it applied the proper law to the relevant facts and reached a rational conclusion. *Id.* Moreover, even if the trial court erroneously exercised its discretion, we will not reverse if the error was harmless. *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985).

Bickham first claims the trial court erred in limiting the purpose for which the photos were introduced. The trial court limited the admission to the purpose of showing the location of the buildings. Bickham wanted to use the photos to impeach Bonilla's testimony regarding what Bonilla could actually see from the position where he claimed he was standing. We agree that the trial court should have allowed Bickham to use the photos to impeach the detective's testimony. Nonetheless, we conclude that the trial court's error was harmless. *See Dyess*, 124 Wis.2d at 543, 370 N.W.2d at 231-32.

Our conclusion is based on the following facts, which demonstrate that there is no reasonable possibility that the trial court's limitation contributed to Bickham's conviction. Bonilla testified that he kept his flashlight shined on the man on the porch until another officer arrested the man. Bonilla indicated that he then went into the house, where the arresting officer was holding this man, who was identified as Bickham. The arresting officer identified Bickham as the man he arrested on the porch. Given this chain of events, Bonilla's precise location and/or view of the porch is at best marginally relevant. Moreover, the photos were admitted and available to the jury. The jurors were

not instructed as to how to use the photos. Accordingly, the trial court's limitation on the use of the photos was harmless beyond a reasonable doubt.

Bickham next claims the trial court erred in excluding certain cross-examination of Detective Gardner. Bickham attempted to examine Gardner regarding a conversation he had in March of 1990 with Latrice Braggs, who was one of Bickham's companions at the house when the search warrant was executed. Bickham intended to show that Gardner was still investigating the crimes with which Bickham was charged because Gardner was uncertain as to whether the right man had been arrested. The trial court sustained an objection, on hearsay grounds, to the following question posed to Gardner: "And did you ask [Braggs] who owned the items in question, the items and drugs that were found outside the location?"

We agree that Gardner should have been allowed to answer this question. It does not call for hearsay because it merely asks Gardner whether he asked Braggs a question, rather than asking Gardner what Braggs's response was. Nevertheless, we conclude that this error was harmless. See *Dyess*, 124 Wis.2d at 543, 370 N.W.2d at 231-32.

The trial court's error was harmless because Bickham was able to elicit this same information from Braggs, who also testified at trial. Therefore, Bickham was allowed to introduce into evidence the fact that Gardner was still investigating the January 30 incident as late as March. Accordingly, precluding Gardner from answering this question was harmless error beyond a reasonable doubt.

Finally, Bickham claims that the trial court erred in precluding him from asking a detective about Anthony Bean. Bickham intended to show that Bean, who was also present in the house on January 30, was arrested five weeks later for possessing 110 grams of cocaine, two loaded weapons and more than \$4,300 in cash at a home two houses away from the home involved in the instant case.

This evidence would be admissible only to the extent that it would suggest that Bean, not Bickham, committed the crimes with which Bickham was

charged. Accordingly, in order to be admissible, this evidence must first satisfy the “legitimate tendency” test set forth in *State v. Denny*, 120 Wis.2d 614, 625, 357 N.W.2d 12, 17 (Ct. App. 1984), which governs evidence of third-party culpability. This test requires the defendant to show that the proffered evidence satisfies three factors linking the third party to the charged criminal act. These factors include: (1) that the third party possessed motive to commit the act; (2) that the third party had the opportunity to commit the act; and (3) that there was a direct connection between the third party and the charged criminal act. *Id.*

We conclude that Bickham failed to show that the evidence regarding Bean satisfied this test. There was no evidence that Bean was ever on the second-story porch or that Bean was in possession of an illegal substance on January 30. Accordingly, Bickham has failed to show any “direct connection” between Bean and the crimes with which Bickham was charged. We conclude, therefore, that the trial court did not err in excluding this evidence.

B. Drug Stamp/Constitutional Violations.

Bickham also claims that his constitutional rights against self-incrimination and double jeopardy are violated by the drug stamp law. Bickham presents these arguments for the first time on appeal. We conclude, therefore, that he has waived his right to raise these issues, and we decline to address them. See *Wirth v. Ehly*, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980).

By the Court. – Judgment affirmed.

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