COURT OF APPEALS
DECISION
DATED AND FILED

September 22, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1514-CR **Cir. Ct. No. 2013CF5568**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TELLY BERNARDO JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed*.

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. Telly Johnson appeals a judgment convicting him of two counts of first-degree reckless homicide by delivery of a controlled

substance[1] and one count of delivery of heroin as a repeater[2] following a jury trial. Johnson raises three issues related to the homicide counts. First, Johnson challenges the sufficiency of the evidence related to the causation element of the homicide offense. Second, Johnson challenges the circuit court's denial of his requested modification of the reckless homicide jury instruction. And third, Johnson challenges the circuit court's denial of his joinder/severance motion. For the reasons discussed below, we conclude that sufficient evidence supports the verdict, and that the circuit court's rulings with regard to the jury instruction and joinder/severance are correct. Accordingly, we affirm the judgment of conviction.

BACKGROUND

¶2 Johnson was convicted of first-degree reckless homicide in the heroin related deaths of T.S. and V.D. By its verdict, the jury found that Johnson delivered the heroin to T.S. and V.D., that T.S. and V.D. used that heroin, and that that heroin was a substantial factor in causing their deaths. T.S.'s death occurred on December 3, 2012, and V.D.'s death occurred sometime between December 21 and December 28, 2012.[3]

¶3 At trial, Tyler Schmidt testified that T.S. had come to visit Schmidt at his dormitory room on the University of Wisconsin-Milwaukee campus. Schmidt testified that he purchased heroin from Johnson on two occasions during

[1] WIS. STAT. § 940.02(2)(a) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] WIS. STAT. §§ 961.41(1)(d)1.; 961.48(1)(b).

[3] V.D.'s body was discovered in her home on December 28, 2012; however, at the time of discovery, she had been dead for some period of time, and her death was estimated to have occurred on December 21, 2012.

the evening of December 3, 2012, and that T.S. used heroin obtained from the second purchase. Schmidt testified that he had purchased heroin from Johnson some one hundred to two hundred times prior to December 3, 2012. Schmidt's friend Kyle Binter was also present on December 3, used some of the heroin purchased from Johnson, and accompanied Schmidt to make the two heroin purchases that evening. Following ingestion of the heroin, T.S. began to exhibit signs of distress. In an effort to counteract the effects of the heroin, Schmidt obtained Suboxone[4] and administered it to T.S. After it became apparent that the Suboxone was not reversing the threatening effects of the heroin, Schmidt called 911. Binter advised the police officers who arrived that T.S. had ingested heroin. Despite emergency personnel's efforts, T.S. died.

¶4 V.D.'s roommate and landlord David Oyockey testified that his other roommate discovered V.D.'s body in her bedroom on December 28, 2012, and that he (Oyockey) had not seen V.D. for several days. V.D.'s friend Amanda Balistrieri testified that she accompanied V.D. to purchase heroin from Johnson on December 21, 2012, and that V.D. purchased two packets of heroin from Johnson on that occasion, but did not use the heroin in Balistrieri's presence. Balistrieri explained that she was one of Johnson's ongoing heroin customers and that she had met with and purchased heroin from him on some fifty occasions prior to December 21, 2012.

¶5 City of West Allis Police Officer Adam Schweitzer testified that he was dispatched to V.D.'s home and participated in the investigation of her death.

[4] Suboxone, which is used to treat heroin addiction, is a combination of buprenorphine and naloxone. Naloxone is also known as Narcan, which is used to reverse the effects of heroin overdose.

At the scene, the investigators discovered one opened and one unopened packet of heroin and drug paraphernalia. In addition, Officer Schweitzer testified that there was a belt tied around V.D.'s arm and a small red dot on her arm consistent with an injection site.

¶6 Milwaukee County Chief Medical Examiner Brian Peterson testified that he performed autopsies on both T.S. and V.D., and had performed just under 9,000 autopsies during the course of his career. Peterson explained that heroin, once ingested, quickly metabolizes and leaves morphine in the body. Thus, as a general matter, toxicological testing generally reveals morphine or other heroin metabolites, rather than heroin itself, following the ingestion of heroin. Peterson relied upon his own examination and toxicological testing in assessing the cause of death of both T.S. and V.D.

¶7 With regard to T.S., Peterson testified "to a reasonable degree of medical certainty in the field of forensic pathology" that the cause of death was "acute mixed drug intoxication," the drugs being morphine and buprenorphine, a component of Suboxone. Peterson also testified that although the buprenorphine was a substantial factor in T.S.'s death, the morphine, which came from the heroin, alone would have been fatal, and that it was the morphine that killed T.S. Peterson testified that he also considered facts external to the autopsy, such as the presence of heroin at the scene.

¶8 Peterson testified that V.D.'s body was decomposing when it arrived for autopsy. He also testified that the cause of V.D.'s death "to a reasonable degree of medical certainty in the field of forensic pathology" was "acute morphine intoxication." Peterson observed that aside from the toxicological findings, there were other facts supporting his cause of death conclusion, namely

that there was a belt used as a tourniquet on V.D.'s arm when she arrived and an injection mark. Peterson was unable to pinpoint the date of V.D.'s death, but agreed that the state of decomposition of V.D.'s body was consistent with her having died five or six days before her body was found, but not one day before.

¶9 At the conclusion of his testimony, Peterson reiterated that morphine, a heroin metabolite, was a substantial factor in T.S.'s and V.D.'s deaths. We will discuss additional facts as necessary to our analysis of the issues raised.

SUFFICIENCY OF THE EVIDENCE

¶10 Johnson challenges the sufficiency of the evidence with respect to the causation element of the charged crimes. As pertinent here, the circuit court instructed the jury, without objection, as follows: "The fourth element [is whether the victims] used the substance alleged to have been delivered by the defendant and died as a result of that use. This requires that the use of the controlled substance was a substantial factor in causing the death of each individual." Johnson argues that the evidence supporting this element was insufficient.

¶11 We review the sufficiency of the evidence in the light most favorable to sustaining the conviction, ***State v. Hanson***, 2012 WI 4, ¶15, 338 Wis. 2d 243, 808 N.W.2d 390, and will sustain the conviction unless "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. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). If more than one inference can be drawn from the evidence, we adopt the inference that supports the conviction. ***State v. Long***, 2009 WI 36, ¶19, 317 Wis. 2d 92, 765 N.W.2d 557.

¶12 Johnson's more specific insufficiency of the evidence argument is that Chief Medical Examiner Peterson's testimony was insufficient to support a finding that T.S. and V.D. died as a result of having used heroin. Johnson points to Peterson's testimony stating that he held his opinion—about heroin being the cause of the victims' deaths—to a "reasonable degree of medical certainty," and that "a doctor would say" the phrase "reasonable degree of medical certainty" means "more likely than not." According to Johnson, the net result is that the jury was left to understand that Peterson's opinion about the deaths in this case was that heroin was merely "more likely than not" the cause. It follows, Johnson contends, that the causation evidence fell short of the beyond a reasonable doubt standard. We disagree.

¶13 The flaw in Johnson's argument is his assumption that Peterson effectively communicated to the jury that Peterson believed that it was merely "more likely than not" that heroin caused the deaths *in this case*. That is not a reasonable interpretation of Peterson's testimony.

¶14 Peterson provided substantial testimony explaining why he "determined" that heroin was the cause of both victims' deaths. This testimony included Peterson's review of the toxicology reports and his reliance on such external factors as the presence of heroin at the scenes of death, and V.D.'s use of a tourniquet and a fresh injection mark on her arm. Moreover, when Peterson was asked about possible sources of the heroin metabolite morphine in the victims' blood samples, Peterson effectively explained that when heroin is ingested, then morphine will be in the blood "all the time," and that while there are a few other alternatives as to how that metabolite would be in the blood, none of the

alternatives have any apparent application here.[5] Nothing in Peterson's causation testimony suggested that he had any doubt about his opinion in this case.

¶15 The thin reed on which Johnson relies is a single question and answer in which Peterson offered what he seemingly thought that doctors generally mean when they use the phrase "reasonable degree of medical certainty." That is, that doctors may use the phrase when they think that something is true "more likely than not." But there was no follow-up to tie that opinion about the phrase to the facts in this case. Nothing Peterson said suggested that his opinion about heroin as the cause of the deaths was so slight here.

¶16 To the contrary, Peterson testified in several different ways that he determined that heroin was the cause of each victim's death. As to T.S., he testified that the morphine in T.S.'s blood was fatal and was what killed T.S., and that heroin was "the" substantial factor in T.S.'s death. As to V.D., Peterson testified that the presence of two heroin metabolites in V.D.'s blood, morphine and codeine, indicated that heroin was the drug that caused V.D.'s death.

¶17 Moreover, Peterson's testimony was not the sole source of causation evidence. For example, as to victim T.S., witnesses testified that they saw T.S. use heroin, some of which they also consumed, shortly before his death. As to victim V.D., witnesses testified that V.D. had a tourniquet around her arm and a fresh injection mark on her arm, and that heroin was found "a couple inches from the body." Indeed, the causation evidence was so strong that Johnson's trial counsel reasonably opted to concede the issue in closing arguments.

[5] For example, Peterson explained that morphine administered as medicine may be in the blood of hospice patients.

¶18 Johnson's citation in his reply brief to ***State v. Wind***, 60 Wis. 2d 267, 272, 208 N.W.2d 357 (1973), a marijuana delivery case, in support of his insufficient evidence argument is not persuasive. The ***Wind*** court considered early marijuana testing procedures in which the tests performed "were not specific for marijuana." ***Id.*** at 270. The court stated:

> The prosecution has the burden of proving beyond a reasonable doubt the substance is marijuana. However, we do not believe that the test need be specific for marijuana in order to be probative. An expert opinion that the substance is probably marijuana even if the test used is not exclusive is probative and admissible, but standing alone is not sufficient to meet the burden of proving the identity of the substance beyond a reasonable doubt. If this were a possession case, the tests would be insufficient. But here, we have other facts which particularize and support the opinion of the expert …. These facts are sufficient with the expert opinion to meet the standard of sufficiency under the "beyond a reasonable doubt" test.

Id. at 272. Here, unlike in ***Wind*** and as we have explained above, Peterson's testimony can only reasonably be interpreted as a determination that heroin was a substantial factor in the victims' deaths. Moreover, to the extent that ***Wind*** has any precedential value related to this case, the jury here had many corroborating facts before it, as we have also explained above.

¶19 In sum, we are satisfied that the causation element is supported by sufficient evidence, taking into consideration Peterson's testimony as well as the evidence offered by various witnesses to the events preceding and surrounding the victims' deaths.

THE JURY INSTRUCTION

¶20 Johnson sought modification of the pattern jury instruction[6] for the first-degree reckless homicide charges to add a requirement that, in addition to the statutory elements, the jury must find that Johnson's conduct was criminally reckless or that the victims' deaths were a foreseeable consequence of Johnson's delivery of heroin. The circuit court denied Johnson's request, stating in part that WIS. STAT. § 940.02(2)(a) is a "strict liability statute." We need not address Johnson's complaint that the court erred in describing the crime as a "strict liability" crime. Rather, all that matters is whether the jury instruction for the crime that the circuit court provided fully informed the jury of the applicable law.[7] ***Dakter v. Cavallino***, 2015 WI 67, ¶31, 363 Wis. 2d 738, 866 N.W.2d 656. We conclude that it does.

¶21 We begin our analysis by noting that the Supreme Court, reviewing a claim of error different from that raised here, has approved instruction language that is nearly identical to that used in this case, the pattern instruction. *See* ***State v. Patterson***, 2010 WI 130, ¶¶53-55, 329 Wis. 2d 599, 790 N.W.2d 909 ("We agree that, considering the jury instruction as a whole, it is not reasonably likely that the jury misunderstood the burden of proof.").

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[6] WISCONSIN JI—CRIMINAL 1021: FIRST DEGREE RECKLESS HOMICIDE—940.02(2).

[7] Johnson cites ***State v. Luedtke***, 2015 WI 42, 362 Wis. 2d 1, 863 N.W.2d 592, as a basis for his challenge to the jury instruction. The discussion of the propriety of a "strict liability" offense in ***Luedtke***, however, arose in the context of a constitutional challenge to WIS. STAT. § 346.63(1)(am). Johnson did not raise a constitutional challenge to WIS. STAT. § 940.02(2). Thus, our discussion is limited to the propriety of the challenge to the jury instruction that he did raise, which does not require us to apply the due process analysis he suggests.

¶22 Further, we agree with the State that the plain language of WIS. STAT. § 940.02(2)(a) plainly sets forth four elements, not five as Johnson suggests. The elements of the offense are: (1) Johnson delivered a controlled substance; (2) the substance Johnson delivered was a prohibited controlled substance; (3) Johnson knew or believed that the substance he delivered was a prohibited controlled substance; and (4) the victims used the controlled substance and died as a result of that use. "[A]s a result of that use" is defined to mean that the "use of the controlled substance was a substantial factor in causing the death[s]." WIS JI—CRIMINAL 1021. WISCONSIN STAT. § 940.02(2)(a) contains no language supporting the view that there is a "reckless conduct" or "foreseeability" element. Had the legislature intended one or both of the elements to be included, it would have drafted the provision to include them. *See* ***State v. Maxey***, 2003 WI App 94, ¶17, 264 Wis. 2d 878, 663 N.W.2d 811. We do not read words into a statute when its meaning is clear on its face. ***State v. Forster***, 2003 WI App 29, ¶14, 260 Wis. 2d 149, 659 N.W.2d 144.

¶23 We conclude that the circuit court properly instructed the jury with regard to the elements of the offense of first-degree reckless homicide and properly exercised its discretion to deny Johnson's requested modification of the pattern instruction.

JOINDER/SEVERANCE

¶24 Johnson objected to the State's joinder of the two first-degree reckless homicide counts and moved the circuit court for severance pursuant to WIS. STAT. § 971.12(1) and (3). The circuit court concluded that the counts were properly joined and declined to sever the counts, concluding that Johnson was not unduly prejudiced by the joinder.

¶25 Whether the homicide counts were properly joined is a question of law which we review de novo. ***State v. Salinas***, 2016 WI 44, ¶30, 369 Wis. 2d 9, 879 N.W.2d 609. The circuit court's decision to decline to sever the counts falls within its discretionary authority, and our review of its decision is confined to whether it properly exercised its discretion. ***Id.*** We broadly construe WIS. STAT. § 971.12(1) in favor of joinder. ***State v. Locke***, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993). If the record supports joinder of the counts, Johnson must not only overcome a presumption that no prejudice exists as a result of the joinder, but also must show the existence of *substantial* prejudice. *See* ***State v. Leach***, 124 Wis. 2d 648, 669, 370 N.W.2d 240 (1985); ***State v. Hoffman***, 106 Wis. 2d 185, 209, 316 N.W.2d 143 (Ct. App. 1982). We conclude that the counts were properly joined, and also that the circuit court properly exercised its discretion in declining to sever the counts for trial.

¶26 WISCONSIN STAT. § 971.12(1) authorizes the joinder of two or more crimes under the following circumstances: (1) the crimes are of the same or similar character; (2) the crimes are based on the same act or transaction; or (3) the crimes are based on two or more connected acts or transactions or constitute part of a common scheme or plan. We conclude that the two first-degree reckless homicide counts were properly joined because they are of the same or similar character. The two counts are of the same type, namely the sale of heroin that ultimately ended in the victims' deaths; occurred within a short period of time, within weeks of one another; and are supported by overlapping evidence that includes the testimony of Peterson and the witnesses who participated in the heroin purchases with V.D. and T.S. and described the location, method, and quantity of Johnson's sales operation. *See* ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988).

¶27 With regard to the severance prong of our analysis, Johnson argues: "The nature of the charges is what requires severance in this case. It is the claim that delivery of heroin by the defendant caused the death of both victims that makes joinder unduly prejudicial." Johnson effectively argues that, whenever two or more homicide counts are joined, they must be severed because of the severity of the crimes. Johnson offers no argument by which we could consider any ensuing prejudice "substantial" based only on the nature of the crimes. We conclude that Johnson fails to establish that the failure to sever the counts would result in "substantial prejudice" to him, or that the circuit court did not properly exercise its discretion in denying the motion for severance.

By the Court.—Judgment affirmed.

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