COURT OF APPEALS
DECISION
DATED AND FILED

July 20, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP936-CR **Cir. Ct. No. 2014CF2123**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MILTON EUGENE WARREN,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed*.

Before Lundsten, Sherman, and Blanchard, JJ.

¶1 PER CURIAM. Milton Warren appeals two related judgments[1] convicting him of being party to the crime of possession with intent to deliver more than 50 grams of heroin, a second or subsequent offense of possession of THC, and contributing to the delinquency of a minor. Warren challenges the sufficiency of the evidence to support his convictions on two of the charges and an evidentiary ruling excluding prior bad act evidence that Warren had sought to introduce to impeach one of the State's primary witnesses. For the reasons discussed below, we affirm the judgments of conviction.

BACKGROUND

¶2 A key witness for the State, Zachary Schmidlkofer, testified at trial under a grant of full use immunity that he had bought heroin from Warren, whom Schmidlkofer knew by the nickname "Pillow," between five and seven times a week over a period of three to five months. In October 2014, Schmidlkofer expressed dissatisfaction to Warren about the quality of some of the heroin he had bought. In response, Warren suggested that Schmidlkofer accompany Warren to Chicago to test the heroin before Warren purchased it from his suppliers.

¶3 Schmidlkofer subsequently drove to Chicago on three occasions with Warren, Ty Takaoka, and two different teenagers who Schmidlkofer thought were relatives of Warren's, in a white conversion van that Schmidlkofer identified by a bullet hole in the back of the van and the letters on the license plate. On the trips, Warren and Schmidlkofer would meet in Chicago with a friend of Warren's

[1] Although the matters were charged in a single information and tried together, the convictions were separated into two judgments: one judgment for the prison sentences and another for the probation count.

in the vicinity of 71st Street and Normal and go with the friend to a house where Schmidlkofer would cook a sample of heroin to test it before Warren would buy the bundle from the supplier. Schmidlkofer estimated that Warren was buying between fifty and one hundred grams of heroin on each occasion, using a "substantial stack of cash" in large bills. After returning to the van, they would drop off whichever of the teenagers had accompanied them on that particular trip at a bus depot in downtown Chicago with some cash and a backpack with the heroin in it. They would then meet with the teenager again at the bus depot in Madison.

¶4 Not long after the third trip to Chicago, a Janesville police officer arrested Schmidlkofer for an unrelated theft. Schmidlkofer admitted to the theft, and spontaneously told officers about other crimes he had committed in Dane County, including his involvement in drug activity with Warren.

¶5 The officer who arrested Schmidlkofer testified that, based upon the information Schmidlkofer provided, the police located Warren's white van and obtained a warrant to place a GPS tracking device on it.

¶6 When GPS data indicated that Warren's van was parked at the same bus depot in Chicago where Schmidlkofer said that he and Warren had dropped off teenaged drug couriers, Janesville police officers conducted an interdiction of a Van Galder bus from Chicago to Madison, and observed an individual with a black bag matching the general description that Schmidlkofer had provided for one of the drug couriers. The officers approached the individual, who was a minor named L.J., obtained his consent to search his bag, and recovered what appeared to be—and was later confirmed to be by the State Crime lab—a brick of heroin.

¶7 L.J. gave multiple accounts of who had given him the heroin to transport. After L.J. testified that someone named "Terro," had given him the heroin and that L.J. did not know Warren or anyone who went by the nickname of "Pillow," a police officer testified that L.J. had stated during his second police interview that Pillow had given him the heroin.

STANDARD OF REVIEW

¶8 We review the sufficiency of the evidence to support a criminal conviction by comparison to the instructions given to the jury, so long as those instructions conform to the statutory requirements of the charged offense. ***State v. Beamon***, 2013 WI 47, ¶22, 347 Wis. 2d 559, 830 N.W.2d 681. In doing so, "we give great deference to the trier-of-fact and do not substitute our judgment unless the evidence, viewed most favorably to the verdict, is so lacking in probative value and force that no reasonable fact-finder could have found guilt beyond a reasonable doubt." ***State v. Routon***, 2007 WI App 178, ¶17, 304 Wis. 2d 480, 736 N.W.2d 530. In this context, "we consider all of the evidence produced at trial, including evidence that the defendant challenges as being improperly admitted." ***State v. LaCount***, 2007 WI App 116, ¶22, 301 Wis. 2d 472, 732 N.W.2d 29 (citation omitted).

¶9 Evidentiary determinations lie within the discretion of the circuit court. ***State v. James***, 2005 WI App 188, ¶8, 285 Wis. 2d 783, 703 N.W.2d 727. Even if the trial court has relied upon an incorrect or invalid rationale, we may affirm a discretionary decision if we can determine for ourselves that the facts of record provide a basis for the trial court's decision. *See* ***State v. Gray***, 225 Wis. 2d 39, 51, 590 N.W.2d 918 (1999).

DISCUSSION

Sufficiency of the Evidence

¶10 Warren argues that "[t]he prosecution was unable to present a witness who could *reliably* connect Warren to the heroin that L.J. was carrying," because L.J. changed his story multiple times. (Emphasis added). In essence, Warren is asking this court to make a credibility determination, which is not our function and utterly ignores our standard of review. In short, the jury was entitled to believe and rely upon whichever version of L.J.'s story that it wished, including his prior inconsistent statement to police that Pillow had given him the heroin. In turn, L.J.'s statement to police—in conjunction with: (1) the testimony of other witnesses who corroborated portions of it, such as that Pillow drove a van and hung out near 71st Street and Normal in Chicago; (2) the GPS evidence placing Warren's van at the bus station from which L.J. had left Chicago with the brick of heroin; and (3) Schmidlkofer's testimony about Warren's past drug activity (which was admitted to show motive, plan, and intent)—was sufficient to support the convictions.

Impeachment Evidence

¶11 Prior to trial, Warren sought permission to impeach Schmidlkofer with evidence that Schmidlkofer had, on several prior occasions, used deception to steal items from victims that Schmidlkofer contacted through Craigslist. The circuit court excluded the evidence on the grounds that it would be unduly prejudicial. Assuming for the sake of argument that the impeachment evidence should have been admitted, we conclude that its exclusion was harmless error. *See*

WIS. STAT. § 901.03(1) (2015-16);[2] ***State v. Hunt***, 2014 WI 102, ¶26, 360 Wis. 2d 576, 851 N.W.2d 434 (an error in a criminal trial is harmless if it is "'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error'") (quoted source omitted).

¶12 First, Schmidlkofer himself testified that he had committed crimes to obtain money to feed his heroin habit, and that he had three prior criminal convictions as well as pending charges in Rock and Dane counties for multiple counts of misdemeanor theft, felony robbery with threat of force, possession of heroin, and two counts of bail jumping. Since the jury was provided with information about Schmidlkofer's criminal history, including a pending theft case, additional evidence on the details of a scheme to steal would likely have had marginal impeachment value. *See* ***State v. Carnemolla***, 229 Wis. 2d 648, 654-55, 600 N.W.2d 236 (Ct. App. 1999) (exclusion of impeachment evidence is harmless when jury already had ample reason to question a witness's credibility).

¶13 Second, Schmidlkofer did not provide any testimony about the events on the day upon which the criminal charges were based. As we have described above, L.J.'s statement to police was the primary direct evidence supporting the convictions, and Warren could have been convicted without any testimony from Schmidlkofer. Thus, although Schmidlkofer's testimony was certainly probative and made conviction more likely, it was not essential for the State's case.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶14 Third, to the extent that Schmidlkofer's testimony bolstered L.J.'s statement to police, the reverse is also true. That is to say, Schmidlkofer's testimony that he and Warren had in the past dropped off teenagers at a Chicago bus station with heroin that they were to transport to Madison was corroborated by L.J.'s statement that Pillow had dropped him off at the bus station with heroin to take to Madison.

¶15 In this context, we are persuaded beyond a reasonable doubt that more specific detailed information about Schmidlkofer's prior bad acts would not have led to a different outcome at trial.

By the Court.—Judgments affirmed.

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