COURT OF APPEALS
DECISION
DATED AND FILED

December 19, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1618-CR **Cir. Ct. No. 2014CF1862**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEWON EDWARD BRANCH,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Kewon Edward Branch appeals from a judgment of conviction, entered upon a jury's verdict, on one count of maintaining a drug trafficking place as a party to a crime and as a repeater. Branch asserts that there was insufficient evidence to support his conviction. We reject Branch's argument and affirm the judgment.

BACKGROUND

¶2 On April 29, 2014, Milwaukee police executed a search warrant on a house in Milwaukee. The warrant had been obtained after confidential informants conducted multiple controlled buys at the house. Officers found four people in the house: Branch; Frederick Martin, Jr.; Sierra Linder; and Andrea Spencer. Police recovered an array of drugs and related paraphernalia, including empty corner-cut baggies, hypodermic needles, multiple bags of cocaine, a digital scale and a razor blade coated in drug residue, unbagged cocaine, a spoon with heroin residue, bags of heroin, and two prescription pill bottles with several pills and tablets. Additionally, there was a stolen, fully loaded 9mm semiautomatic pistol and a 12-gauge shotgun on the living room floor. Branch had $339 in twenty-dollar bills and lower denominations on him, which was the only money recovered from the house.

¶3 Investigators took statements from all four subjects. Linder said she was at the house to get "weed," which she gets from Branch. Spencer said she was at the house to talk to Branch. Martin said he was at the house to smoke crack and explained that he and other users often monitored the door of the house in exchange for a hit of crack. Branch said the place was a "get-high" house that he had been frequenting for the last two to three weeks to use drugs and "chill with the bitches."

¶4 Branch and Martin were arrested. Each was charged with keeping a drug house as a party to a crime and as a repeater.[1] *See* WIS. STAT. §§ 961.42, 939.05, 939.62(1)(b). Branch pled not guilty; Martin pled guilty and later gave testimony against Branch.[2]

¶5 Branch's trial began in February 2015. Because Branch was charged as a party to a crime, the trial court instructed the jury that it could convict Branch if it believed him to have directly committed the crime of keeping a drug house, or aided and abetted in its commission, or engaged in a conspiracy to commit the crime.

¶6 Police officer Ryan Bergemann, who is assigned to the Wisconsin High Intensity Drug Trafficking Area Task Force, testified about the investigation and execution of the warrant. He explained that police conducted three controlled buys of narcotics from the residence in the week before the warrant was executed, including one buy the morning of the raid. Bergemann testified about a photo of "an open-ended bracket, like an L bracket," installed on both sides of the entry door, "where the two-by-four was placed to fortify the house," which Bergemann explained was part of the overall picture suggesting the house was a drug house.

[1] The complaint describes the offense as "keeping a drug house" while the judgment of conviction uses the phrase "maintain drug trafficking place." The distinction is irrelevant; the discrepancy in description arises because WIS. STAT. § 961.42 (2015-16) has no formal title.

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

[2] Linder and Spencer were not charged. Based on the investigation at the time, the women appeared not to be involved in the sale of drugs.

¶7 Bergemann discussed where each of the four individuals was when police entered. Martin, who tried to flee, was originally in the kitchen but was taken into custody in a bedroom off the living room; Linder was in a bedroom off the kitchen; Spencer and Branch were in the living room. Bergemann described what police found in the living room while the State presented photos:

> [T]he first thing I observed was right in the middle of the floor, which would have been just in front of that mattress, there was a shotgun, a single-shot shotgun on the floor in plain view. And then in the corner on that table you could observe what appeared to be narcotics, both heroin and cocaine. And there was also, I think, that was over on that table, too, a black nine millimeter handgun.
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> ….
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> … So underneath the table is the nine millimeter handgun. On top of the table you have a digital scale. And then you have a couple baggies that contained suspected heroin and cocaine. At the time that's what we thought, it was heroin and cocaine. And then I believe there's a razor blade on there, too, but it's hard to see on the picture.

The guns were consistent with information from the informant's buy that morning.

¶8 Bergemann explained how "corner cuts" of drugs are made, the purpose of the scale relative to drug sales, and the significance of the spoon, which is typically used to heat up heroin and water before drawing it into a syringe. Bergemann also testified that four cell phones were recovered; one was the phone with the number called by the informant that morning.

¶9 Bergemann told the jury that Branch had $339 in small bills on him, and that no other money was recovered from the house. Bergemann opined that "the small denominations that were recovered are indicative of street-level drug sales" because "the quantities [of drugs] bagged up, the way they were inside this house, those are ten- to twenty-dollar quantities …. Most people when they go to

a drug house are not asking for change …. [T]hey're purchasing what they need with the money they have."

¶10 Bergemann additionally testified that in his experience, a customer would not be next to a loaded handgun; the people running the house are the ones with the fire power. Further, the seller would be the one who makes the corner cuts, who uses the razor blade to "chunk up" the drugs, and who operates the scale. All of these objects, plus the narcotics themselves, were recovered in the same room as Branch.

¶11 Co-defendant Martin also testified. He said he had been brought to the house by one of the women and did not know Branch before the day of the raid. Martin explained:

> [T]he process was that if somebody knocked on the door, whoever went to the door to open the door and let somebody in, you would be able to go and stick your hand behind the curtain and a drug would be placed in your hand and you go sit down at the table in the kitchen and use drugs.

Martin explained that anyone who was at the house to use drugs could handle the door-opening function. He also explained that the curtain separated the kitchen from the living room. Martin further told the jury that none of the bagged drugs were his, he had not brought any drugs with him, and he did not have any money when he came to the house.

¶12 The jury convicted Branch. The trial court imposed three years' initial confinement and two years' extended supervision. Branch appeals, asserting that the evidence presented to the jury was insufficient to establish, beyond a reasonable doubt, that he kept or otherwise exercised management or control over the house or that he was an aider and abettor or conspirator.

DISCUSSION

¶13 "When a defendant challenges a verdict based on sufficiency of the evidence, we give deference to the jury's determination and view the evidence in the light most favorable to the State." ***State v. Long***, 2009 WI 36, ¶19, 317 Wis. 2d 92, 765 N.W.2d 557. Whether the evidence is direct or circumstantial, this court "may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 507, 451 N.W.2d 752 (1990). "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." ***Id.*** at 507.

¶14 "It is unlawful for any person knowingly to keep or maintain any … place which is resorted to by persons using controlled substances in violation of [WIS. STAT. ch. 961] for the purpose of using these substances, or which is used for manufacturing, keeping or delivering them in violation of [ch. 961]." WIS. STAT. § 961.42(1). To prove a violation of § 961.42(1), the State must prove three elements: (1) the defendant kept or maintained a structure or a place, which means the defendant "exercise[d] management or control over the place"; (2) the place was resorted to by persons using controlled substances contrary to ch. 961 for the purpose of using controlled substances; and (3) the defendant kept or maintained the place knowingly. WIS JI—CRIMINAL 6037A.

¶15 On appeal, Branch does not dispute the sufficiency of the evidence on the second and third elements. Rather, "[t]he issue on this appeal focuses on the lack of evidence supporting the first element of the offense, i.e., that the Defendant [Branch] 'kept' or 'maintained' or exercised 'management or control' over the premises."

¶16 But Branch was charged as a party to a crime. "Charging a person as a party to a crime is a way of establishing criminal liability separate from providing the elements of the offense to which the defendant is charged as a party." ***State v. Zelenka***, 130 Wis. 2d 34, 47, 387 N.W.2d 55 (1986). Under the party-to-a-crime statute, "[a] person is concerned in the commission of the crime if the person: (a) Directly commits the crime; or (b) Intentionally aids and abets the commission of it; or (c) Is a party to a conspiracy with another to commit it[.]" WIS. STAT. § 939.05(2). "Proof of the acts which can support liability as a party to a crime is separate from proof of the underlying criminal act." ***Zelenka***, 130 Wis. 2d at 47.

¶17 To establish that a defendant was an aider and abettor, the State must show: "(1) that the defendant undertook some conduct (either verbal or overt) that as a matter of objective fact aided another person in the execution of the crime; and (2) that the defendant had a conscious desire or intent that the conduct would in fact yield such assistance." ***State v. Rundle***, 176 Wis. 2d 985, 990, 500 N.W.2d 916 (1993). It is not necessary for an aider and abettor to "share the intent required for direct commission of the offense." *See* ***State v. Sharlow***, 110 Wis. 2d 226, 238, 327 N.W.2d 692 (1983). Intent can be inferred from an aider and abettor's conduct. *See* ***State v. Hecht***, 116 Wis. 2d 605, 623, 342 N.W.2d 721 (1984). To establish that a defendant was culpable as a party to a crime as a conspirator, the State must show that "there was an agreement among two or more

persons to direct their conduct toward the realization of a criminal objective … [and] each member of the conspiracy individually and consciously intended the realization of the particular criminal objective." *See* ***State v. Smith***, 2012 WI 91, ¶38, 342 Wis. 2d 710, 817 N.W.2d 410.

¶18 The State asserts that there was sufficient evidence presented at trial to sustain Branch's conviction on any of the three party-to-a-crime theories: principal, aider and abettor, or conspirator, particularly since the jury need not unanimously agree on the manner in which the defendant was concerned in the commission of the underlying offense. *See* ***Zelenka***, 130 Wis. 2d at 47. We agree.

¶19 The jury could logically infer that the only person in the house with the money—Branch—was the one managing the house, as he likely would have participated in all sales in the house. Branch's proximity to the firearms, drugs, and packaging materials supports that inference. Notably, Branch was also on the side of the curtain from which drugs were provided to anyone who opened the door, further suggesting he played a management role at the house.

¶20 Even if Branch was not the principal, the same evidence suffices to convict him as an aider and abettor or conspirator. Martin had testified that one of the women—Spencer—"kind of runs things when nobody is there for us that use drugs" and she "makes sure that everything gets run correctly." If the jury believed that Spencer was the principal,[3] they could have concluded that Branch

[3] The same evidence suffices to convict Branch if the jury believed that *Martin* was the principal, but the State was not required to prove the identity of the principal actor in order to convict Branch as a party to a crime. *See* ***State v. Zelenka***, 130 Wis. 2d 34, 47, 387 N.W.2d 55 (1986).

was ready and willing to assist her, *see* ***Rundle***, 176 Wis. 2d at 990, given that he was in the same room with her and that he was holding all the cash in the house. The jury alternatively could have concluded that Branch, with all of the money, had an agreement with Spencer to work toward the realization of their criminal objective. *See* ***Smith***, 342 Wis. 2d 710, ¶38.

¶21 Branch complains about a lack of proof of certain factors, such as whether Branch owned the premises, how frequently he was there, or whether he kept personal property at the location. However, the State only had to show, if Branch was the principal actor, that he "exercise[d] management or control over the place." WIS JI—CRIMINAL 6037A. None of the factors Branch complains were unproven are required for such a finding.

¶22 Branch also points out several things that Martin's testimony did not prove—Martin did not indicate whether Branch had ever been a doorman, nor did Martin claim to have seen Branch actively selling drugs. Branch also points out competing inferences, like the possibility that his money was for groceries. However, this line of argument utterly disregards our standard of review. There is sufficient evidence in the record from which a jury could draw appropriate inferences to convict Branch on any or all of the State's three theories of liability. Accordingly, we do not disturb its verdict.

By the Court.—Judgment affirmed.

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