COURT OF APPEALS
DECISION
DATED AND FILED

April 25, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 00-0710-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MELVIN S. LEWIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Melvin S. Lewis appeals from a judgment of conviction and an order denying his motion for postconviction relief. We affirm.

¶2 In January 1998, Victoria Parham moved into the upper apartment unit at 1004 Villa Street, Racine, Wisconsin. Parham is Lewis's girlfriend and they have young children together. On April 1, 1998, police officers conducted a search of 1004 Villa Street. Three individuals were at the apartment during the search—Markeena Cole, Parham's brother, Francisco Rascon, and his friend, Anthony McClain. Neither Parham nor Lewis was present during the search. The officers recovered and confiscated twenty-nine corner cuts of crack cocaine estimated by police to have a value of $400 and a baggie containing 1.3 grams of marijuana. They also recovered fifty to sixty baggies with the corners cut out, a smoking pipe, a gun box, a 9-millimeter handgun, ammunition, brass knuckles and a police scanner. The police also seized two electronic pagers, one of which was worn by McClain. In addition, the police recovered Lewis's photo identification card from beneath the kitchen sink, as well as a Wisconsin Electric bill for the apartment in Lewis's name.

¶3 On April 16, 1998, the police executed a second search of the apartment at 1004 Villa Street. This time, Parham, her brother, Armando Barrios, and some small children were present. Again, Lewis was not at the apartment when the search was conducted. This time the officers recovered and confiscated fifteen knotted baggies containing a substance believed to be marijuana, eleven corner cuts of crack cocaine weighing a total of 2.6 grams, and baggies with the corners cut out. The police also seized an electronic pager, a portable rifle stock for a semi-automatic rifle, a rifle cleaning rod, a large metal bayonet knife, a sawed-off shotgun, a loaded six-shot .38 caliber Colt revolver and several types of ammunition. The police recovered a Norinco SKS .762 semi-automatic rifle and some additional ammunition from under a bedroom mattress. The police also found gas and electric bills for the residence in the name of Lewis, and a rental

agreement for the apartment in the name of Parham that had been mailed to a "Marielle Lewis" of 1004 Villa Street. They found items of clothing belonging to Lewis in a closet and in drawers.

¶4 On May 22, 1998, the State filed a six-count criminal complaint charging Lewis with one count of possession of cocaine with intent to deliver, as a party to the crime; one count of possession of THC with intent to deliver, as a party to the crime; two counts of maintaining a drug trafficking place; and two counts of misdemeanor bail jumping. The case proceeded to trial and, following a three-day trial, the jury convicted Lewis of all charges. He was sentenced to a total of eleven years in prison with consecutive probation.[1]

¶5 Lewis filed a motion for postconviction relief seeking a new trial. He argued that the trial court improperly impaneled an anonymous jury, and that his conviction for two counts of maintaining a drug trafficking place violated his right to be free from double jeopardy and was multiplicitous. He further argued that he had been denied effective assistance of counsel because his trial counsel failed to object to the admission of the numerous weapons and ammunition that were admitted at trial and failed to request a limiting instruction with respect to the same evidence. Lewis also asked the trial court to order a new trial in the interests

[1] Lewis was sentenced to seven years on count one to run concurrent with an existing sentence; three years, consecutive, on count two; and one year, consecutive, on count three. On counts four, five and six, the court imposed and stayed a consecutive three-year sentence and two concurrent three-year terms, respectively. On the three stayed sentences, the trial court imposed a three-year term of probation consecutive to the prison terms.

of justice.[2] Following a ***Machner***[3] hearing, the trial court denied the motions. This appeal followed.

¶6 We first address Lewis's claim that the State failed to establish the requisite nexus between the weapons evidence and the elements of the crimes charged, such that this evidence was inadmissible and his trial counsel was ineffective for failing to object to the introduction of this evidence at trial.

¶7 To establish a claim of ineffective assistance, an appellant must show that counsel's performance was deficient and that it prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, an appellant must show that his or her counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. ***Id.*** "Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The case is reviewed from counsel's perspective at the time of trial, and the burden is placed upon the appellant to overcome a strong presumption that counsel acted reasonably within professional norms. ***Id.*** The appropriate measure of attorney performance is reasonableness, considering all the circumstances. ***State v. Brooks***, 124 Wis. 2d 349, 352, 369 N.W.2d 183 (Ct. App. 1985).

[2] In his postconviction motion, Lewis objected to his trial counsel's failure to sever the bail jumping counts from the other charges and to trial counsel's decision to impeach a witness Lewis considered favorable to his defense. He also sought sentence modification. These arguments are not before this court on appeal.

[3] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶8 Even if deficient performance is found, a judgment will not be reversed unless the appellant proves that the deficiency prejudiced his or her defense. ***Johnson***, 153 Wis. 2d at 127. This requires showing that counsel's errors were so serious as to deprive the appellant of a fair trial, a trial whose result is reliable. ***Strickland***, 466 U.S. at 687. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶9 The question of whether there has been ineffective assistance of counsel is a mixed question of law and fact. ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 609, 516 N.W.2d 362 (1994). The trial court is the ultimate arbiter of witness credibility. ***State v. Marty***, 137 Wis. 2d 352, 359, 404 N.W.2d 120 (Ct. App. 1987). "An appellate court will not overturn a trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous." ***State v. Knight***, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). However, the final determinations of whether counsel's performance was deficient and prejudicial are questions of law, which this court decides without deference to the trial court. ***Id.***

¶10 At trial, weapons and ammunition that had been gathered in the two separate searches of 1004 Villa Street were admitted without objection from the defense.[4] The weapons evidence was not left in the presence of the jury throughout the trial, but State did refer to the guns and the ammunition in both its opening and closing statements.

[4] Investigator Koykkari and Investigator Warmington each testified, without objection, as to the identification and discovery of various weapons and ammunition found at the apartment.

¶11 Lewis correctly asserts that under Wisconsin law, the mere existence of guns or ammunition in a home is not routinely admissible in a drug prosecution. *See, e.g.,* ***Thompson v. State***, 83 Wis. 2d 134, 146, 265 N.W.2d 467 (1978). The State must demonstrate a specific connection or "nexus" between such evidence and the defendant's alleged criminal acts. *See* ***State v. Wedgeworth***, 100 Wis. 2d 514, 531, 302 N.W.2d 810 (1981); ***State v. Spraggin***, 77 Wis. 2d 89, 99, 252 N.W.2d 94 (1977). In ***Spraggin***, the court held inadmissible evidence of the presence of stolen property and weapons in the residence of the defendant in a prosecution for aiding and abetting the delivery of heroin, and explained the need for such a nexus as follows:

> [The] [e]vidence of the weapons and stolen goods here is not an individual manifestation of the crime charged; this evidence does not show a series of links in the specific chain which prove the guilt of the offense charged. This evidence indicates that the defendant's home was a den of iniquity and that she had a propensity and disposition toward criminal activity. The evidence was designed to convince the jury that the defendant's possession of weapons and stolen goods was indicative of her guilt of the act charged in this case—intentionally aiding and abetting in the delivery of heroin. No specific connection was shown between this evidence and the defendant's alleged criminal acts. Weapons and stolen goods may constitute the protection and currency necessary in the realm of heroin trafficking, but the State did not demonstrate in any manner that this particular evidence was so employed. The inference of such use must be supported by more than the mere introduction of these exhibits into evidence and the broad assertion that guns and stolen goods are commonly used by those in the heroin trade.

Id. at 99-100.

¶12 Here, the State contends that the evidence of multiple guns and ammunition on the premises, including a shotgun kept under a mattress, was relevant to the element of "maintaining" a drug trafficking place in violation of

WIS. STAT. § 961.42(1) (1999-2000).[5] The State elicited the following testimony from police investigators in this regard. The prosecutor asked Investigator Shortess if he had an opinion as to whether 1004 Villa Street was a drug house based on the items he inventoried from the searches. Shortess answered affirmatively, citing the packaging materials, the amount of controlled substances and the cash found on site. The State then asked, "Now, Investigator Shortess, do you associate the presence of weapons with drug trafficking at all?" Shortess stated: "Yes. Typically anyone that's involved with the sale of controlled substances they fear not only for their own personal safety, but the safety of their controlled substance and so it's typical for one to go armed for that reason."

¶13 Investigator Koykkari also testified that drug traffickers typically "go armed" because they "fear not only for their personal safety, but the safety of their controlled substances." He further stated that it is "quite common to find firearms within a house where drugs are being held for resale for the sheer sake of protection, to protect the product and to protect the dealer."

¶14 The defense argues that even if this testimony establishes the requisite nexus (which it disputes), the evidence still should have been excluded

[5] WISCONSIN STAT. § 961.42(1) provides:

> It is unlawful for any person knowingly to keep or maintain any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft or other structure or place, which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, or which is used for manufacturing, keeping or delivering them in violation of this chapter.

All further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

because it was more prejudicial than probative in this case. Specifically, the defense notes that it never contested that 1004 Villa Street was a drug house. Indeed, the defense theory of the case was that 1004 Villa Street was "very definitely a drug house" but that Lewis was not involved in the drug activity exposed by police on April 1 and 16, 1998. According to the defense, Lewis's only contact with 1004 Villa Street was to visit and care for his children and girlfriend Parham and to occasionally assist Parham. For example, Parham testified that Lewis agreed to let her use his name to obtain utility service as she could not obtain such service in her own name because of past due bills. As such, the defense argues that even if the gun evidence were admissible, it should have been excluded because it was needlessly cumulative and thus more prejudicial than probative in this case because the fact that 1004 Villa Street was a drug house was not seriously in dispute.

¶15 If the weapons and ammunition admitted in this case were only relevant to demonstrate to the jury that the apartment at 1004 Villa Street was a drug house, we would have misgivings about the possibility of unfair prejudice. However, the weapons evidence in this case was also relevant to proving that Lewis was a participant in the drug trafficking activities at 1004 Villa Street.

¶16 The evidence linking Lewis with the drug trafficking at 1004 Villa Street was largely circumstantial. Therefore, evidence tending to link Lewis to the apartment and to the drug trafficking activity there was highly relevant. The weapons evidence provided such a link in this case. Further, the challenged weapons evidence corroborated certain testimony regarding the identity of Lewis as one of the participants in the drug trafficking operation. That testimony included comments about what types of guns Lewis owned or carried.

¶17 To link Lewis with 1004 Villa Street, the State introduced a Wisconsin identification card in his name and a utility bill for the apartment in his name, both of which were found at the apartment. The State also offered the testimony of several individuals who were arrested at the scene during the two searches. At least two of those witnesses' statements or testimony identified weapons that Lewis frequently carried. Some of those weapons were found at 1004 Villa Street, thus bolstering the connection between Lewis and the apartment.

¶18 McClain, who was present at the apartment during the police search on April 1, 1998, testified that both Armando Barrios and Lewis controlled 1004 Villa Street and maintained it as a drug house. Indeed, he testified that Lewis was present at the apartment shortly before the police arrived. He admitted that he was selling drugs for Barrios that particular day, and that he also sold drugs for Lewis, "mostly on the street." He further testified that Barrios and Lewis both kept weapons at 1004 Villa Street, and that he had seen Lewis with "a 9 millimeter and a Glock" as well as with an "SK" rifle. These were among the weapons admitted into evidence.

¶19 The State also called Barrios to the witness stand. Barrios, Parham's brother, had provided the police with an affidavit shortly after his arrest on April 16, 1998. That affidavit implicated Lewis in the drug trafficking activities at 1004 Villa Street. It stated that Lewis was involved in selling drugs at 1004 Villa Street and that he had left the apartment shortly before the police arrived on April 16. However, at trial, Barrios recanted many of his statements in that affidavit, asserting for the first time that he was "intoxicated" when he made the statements. He did admit that Lewis and his sister were "dating" and that Lewis sometimes stayed at the apartment, but he denied that Lewis was present immediately before

the police arrived. He also admitted that he was present when police found a rifle under a mattress that he acknowledged belonged to Lewis. After Barrios recanted the statements made in his affidavit, the State recalled Investigator Warmington, who testified that during the search it was Barrios who told him of the presence of the rifle under the mattress and told him that it belonged to Lewis.

¶20 As a general matter, we have recognized that criminal convictions may be supported by circumstantial evidence. *See* ***Clark v. State***, 62 Wis. 2d 194, 197, 214 N.W.2d 450 (1974). Like other evidence, circumstantial evidence must be relevant to be admissible. WIS. STAT. § 904.02. In ***Oseman v. State***, 32 Wis. 2d 523, 527, 145 N.W.2d 766 (1966), the defendant's identity was established by circumstantial evidence which was objected to as irrelevant. In upholding the admissibility of this evidence, we stated, "The trial court usually has considerable discretion as to the latitude of [the admissibility of] circumstantial evidence, and great latitude generally is allowed in admitting it, and this is especially true where the circumstances are such that direct evidence is lacking." ***Id.*** (citations omitted.)

¶21 We conclude that the weapons evidence here was relevant and that the State established the requisite nexus between the evidence and the charged crimes. The testimony and other evidence relating to the weapons found at 1004 Villa Street had some tendency to make it more probable than it would have been absent such evidence that Lewis maintained and controlled the drug trafficking activities at 1004 Villa Street.

¶22 We reject Lewis's contention that the evidence in this case was more prejudicial than probative. Certainly, extensive gun evidence of this sort is prejudicial, as defense counsel readily acknowledged in the ***Machner*** hearing on

this issue. We conclude, however, that it was not unfairly prejudicial. It did not create a definite risk that Lewis's convictions might be based on prejudicial error. We therefore conclude that trial counsel was not ineffective for failing to object to the weapons evidence because the gun evidence was both relevant and admissible.[6]

¶23 Lewis next argues that trial counsel was ineffective for failing to request a limiting instruction with respect to the weapons evidence. Specifically, Lewis contends that the jury should have been instructed that the gun evidence could not be used as character evidence. Absent such a limiting instruction, Lewis argues that weapons evidence of this sort creates an inherent risk that the jury will make a determination on an impermissible basis, concluding that because the defendant has guns, he must be a bad person. Thus, the defense argues that a "***Whitty***-type" instruction should have been requested and that by failing to make such a request, trial counsel was ineffective. *See* ***Whitty v. State***, 34 Wis. 2d 278, 294-95, 149 N.W.2d 557 (1967).

¶24 At the ***Machner*** hearing, trial counsel testified that he did not object to the admission of the evidence or seek a limiting instruction because he did not believe he had a valid legal basis for doing so. Specifically, he did not believe the weapons evidence was "other acts" evidence under WIS. STAT. § 904.04(2). The trial court agreed.

[6] Indeed, at the postconviction hearing the trial court ruled that it would have denied a motion to exclude the gun evidence in this case. It is not ineffective assistance to fail to bring a motion that would have failed. *See* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994).

¶25 WISCONSIN STAT. § 904.04(2) provides, in relevant part, that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." The general rule is thus to exclude use of other misdeeds to prove character in order to prove guilt. The reason for the exclusion of such evidence was explained by our court in ***Whitty***:

> The character rule excluding prior-crimes evidence as it relates to the guilt issue rests on four bases: (1) The overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated; and (4) the confusion of issues which might result from bringing in evidence of other crimes.

Whitty, 34 Wis. 2d at 292.

¶26 The statute does provide exceptions to the general rule prohibiting "other acts" evidence. WIS. STAT. § 904.04(2). Such evidence is allowed to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.[7] ***Id.***

¶27 In support of his argument that a limiting instruction was required, such that the failure to seek one amounts to ineffective assistance of counsel, Lewis again points to ***Spraggin***, 77 Wis. 2d at 89. In ***Spraggin***, our supreme court did express concern that the trial court had not admonished or instructed the jury that the evidence of weapons and stolen property admitted in that case could only

[7] Thus, even if the weapons evidence was construed as "other acts" evidence, it would be admissible under the exception pertaining to identity because the weapons evidence was utilized to link Lewis with 1004 Villa Street.

be used for a limited purpose. ***Id.*** at 100-01. ***Spraggin***, however, dealt specifically with an objection under WIS. STAT. § 904.04(2) because the stolen property itself was evidence of another crime, and the weapons included two sawed-off shotguns, the possession of which was unlawful. ***Spraggin***, 77 Wis. 2d at 98. Therefore, although instructive, ***Spraggin*** is distinguishable from the present case. Unlike the stolen property in ***Spraggin***, with the exception of one sawed-off shotgun, the many weapons and assorted ammunition found at 1004 Villa Street and admitted at trial were not evidence of "other crimes or wrongs." We conclude that here the presence of the guns and ammunition at trial was not classic "other acts" evidence.

¶28 Our supreme court has directed that ***Spraggin*** should be confined to its facts and not extended to cover circumstances not clearly within the scope of WIS. STAT. § 904.04(2), and we are bound to follow that direction. *See* ***Wedgeworth***, 100 Wis. 2d at 529-30 (holding that the gun evidence admitted in a prosecution for intent to distribute heroin "did not deal with a crime, wrong, or act of the defendant except insofar as the presence of any item, not in itself unlawful, may suggest the act which caused it to be there."). Thus, we agree with the trial court's conclusion that trial counsel was not ineffective for failing to request a limiting instruction in this particular case.[8]

[8] Even if the weapons evidence were construed as "other acts" evidence by virtue of the single sawed-off shotgun or in light of its unquestionably prejudicial nature, this construction would not change our result. While such a finding might require a limiting instruction such that the failure to request one might amount to deficient performance, even if deficient performance is found, a judgment will not be reversed unless the appellant proves that the deficiency prejudiced his or her defense. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). In light of the other evidence implicating Lewis, including the testimony of McClain and the Barrios affidavit, we conclude that Lewis has failed to demonstrate that he was prejudiced by the lack of a limiting instruction in this case.

¶29 We turn to Lewis's next claim—that he is entitled to a new trial because the trial court improperly impaneled an anonymous jury as part of the court's "general practice."

¶30 Anonymous juries have been used in criminal trials, most often in cases involving organized crime, drug-related activity or gang activity. *See* ***State v. Britt***, 203 Wis. 2d 25, 34, 553 N.W.2d 528 (Ct. App. 1996). The use of an anonymous jury has been approved if it is necessary to protect potential jurors and their families from harassment, intimidation, bribery, publicity and other potential interferences that might make an individual fearful or otherwise apprehensive about participating in such trials. *See* ***id.*** The decision whether to impanel an anonymous jury is within the discretion of the trial court. ***Id.*** To properly exercise its discretion, the trial court must first conclude that a strong reason exists to believe that the jury needs protection. *See* ***id***. Further, the trial court must take reasonable precautions to minimize any prejudicial effects on the defendant and ensure that fundamental rights are protected. *See* ***id.*** at 36.

¶31 At the commencement of this trial, the trial court informed the parties that it was the court's practice to refer to jurors by number. Neither party objected. The court thus directed that the jurors were to be addressed by number only and that no specific identifying information be elicited on the record.[9] The reason recited by the trial court was as follows:

[9] We reject the State's contention that this was not an anonymous jury. As we stated in ***State v. Britt***, 203 Wis. 2d 25, 31, 553 N.W.2d 528 (Ct. App. 1996), "[a] jury is 'anonymous' when the trial court withholds, or bars the revelation of, information which would identify the jurors." ***Id.*** (citing ***United States v. Crockett***, 979 F.2d 1204, 1215 n.10 (7th Cir. 1992)). Such information may include the jurors' names, addresses, places of employment, ethnic backgrounds and religions. ***Id.***

> And to make the record, under ***State v. Britt***, I don't know that there is an allegation that this is a gang case. I have talked now to enough jurors in felony cases, however, to understand that they are more comfortable with the use of numbers, and since this is a case involving drugs, involving serious charges, I would intend to inform jurors that we'll refer to them by numbers as that is the general practice so that it doesn't create any [sort] of exception here.

¶32 At the close of the case, after the jury returned its guilty verdicts, the jury sent the trial court a note requesting that the names from the jury list be sealed. The trial court granted the request without objection from either party.

¶33 We first consider whether the trial court properly exercised its discretion in ordering an anonymous jury to be impaneled. We afford great deference to the trial court's conclusion based on the climate surrounding the trial. *See* ***United States v. Childress***, 58 F.3d 693, 702-03 (D.C. Cir. 1995). Here, Lewis and several of the witnesses had criminal histories and possible involvement with gang activity, as well as involvement with the drug trade. The trial court could conclude that not only Lewis but several of the witnesses posed a threat to the jury. It is permissible that the impetus for an anonymous jury comes from witnesses as well as from the defendant. *See* ***Britt***, 203 Wis. 2d at 35. Thus, in articulating the reasons for impaneling an anonymous jury, the trial court stated that it was inclined to do so because "this is a case involving drugs, involving serious charges." While the trial court's comments in this regard were somewhat perfunctory, we conclude that the court did exercise its discretion in determining that the jury needed protection, and the record here amply supports the trial court's decision. *See, e.g.,* ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 471, 326 N.W.2d 727 (1982) (holding that when a trial court fails to set forth reasons for a discretionary decision, this court may examine the record to determine whether facts exist which support the trial court's decision). However, we reiterate that

anonymous juries should not be routine or standard practice. In the absence of compelling circumstances, articulated on the record, the defendant's and the public's right to an open and public proceeding is paramount. *Cf.* ***State ex rel. La Crosse Tribune v. Circuit Court for La Crosse County***, 115 Wis. 2d 220, 242, 340 N.W.2d 460 (1983).

¶34 We turn to the question of whether the trial court took "reasonable precautions to minimize any prejudicial effects" of the anonymous jury on Lewis. Here, potential prejudice to Lewis was minimized by discussing the use of an anonymous jury outside the presence of the prospective jurors. The trial court informed the prospective jurors, "It's my practice in this court to use numbers, the juror numbers that have been assigned to you, so I hope you all remember them." This explanation to the jurors contrasts sharply with Lewis's perception that the court "added to the atmosphere of fear surrounding the trial in this case, and it gave the jurors the impression they had something to fear." The trial court's advisement that the use of numbers was routine avoided the very inference Lewis suggests.[10] *Cf.* ***United States v. Edmond***, 52 F.3d 1080, 1093 (D.C. Cir. 1995). Moreover, the names of the prospective jurors and the jury questionnaires were available to the parties and Lewis has not identified any juror whose fairness he challenges. Because the record supports the court's conclusion that the jury needed the protection of anonymity in this case, and because the court took reasonable precautions to otherwise protect Lewis's right to a fair and impartial jury, we affirm the court's decision.

[10] Although the trial court told the jury that practice was "routine," we have already held that the trial court satisfactorily explained why it impaneled an anonymous jury in this case.

¶35 Next, Lewis contends that he was improperly convicted of two counts of maintaining a drug trafficking place in violation of WIS. STAT. § 961.42(1) because the two counts were multiplicitous. Applying well-settled general principles from Wisconsin cases on multiplicity, we conclude that the charged offenses are not multiplicitous in this case.

¶36 WISCONSIN STAT. § 961.42(1) provides:

> It is unlawful for any person knowingly to keep or maintain any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft or other structure or place, which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, or which is used for manufacturing, keeping or delivering them in violation of this chapter.

¶37 The two charges filed against Lewis stemmed from the two separate police searches that occurred at 1004 Villa Street on April 1, 1998, and on April 16, 1998. Each time police seized drugs, drug-related materials and weapons from the premises.

¶38 The defense contends that the crime of keeping or maintaining a drug house constitutes a "general transaction or episode" such that Lewis's right against multiplicitous charges was violated. *See* ***State v. Eisch***, 96 Wis. 2d 25, 34, 291 N.W.2d 800 (1980). This is a question of law which we decide de novo. *See* ***State v. Sauceda***, 168 Wis. 2d 486, 492, 485 N.W.2d 1 (1992).

¶39 Multiplicity arises when the State charges a defendant in more than one count for a single offense. *See* ***State v. Rabe***, 96 Wis. 2d 48, 61, 291 N.W.2d 809 (1980). The Double Jeopardy Clauses of both the federal and state constitutions protect against multiplicitous punishments for the same offense. ***State v. Derango***, 2000 WI 89, ¶¶ 26-28, 236 Wis. 2d 721, 613 N.W.2d 833. To

determine whether charges are multiplicitous, we apply a two-part test.[11] *See* ***State v. Lechner***, 217 Wis. 2d 392, 402-03, 576 N.W.2d 912 (1998). First, we consider whether the charged offenses are identical in law and in fact. ***Id.*** at 403. If the charged offenses are identical in law and fact, they are multiplicitous and thus impermissible. *See* ***State v. Warren***, 229 Wis. 2d 172, 178-79, 599 N.W.2d 431 (Ct. App. 1999). If the charged offenses are different in law or fact, under the second part of the test, we decide if the legislature intended to allow multiple convictions for the offenses charged. ***Id.***

¶40 This appeal presents a continuous offense challenge, one in which multiple charges are brought under the same statutory section, WIS. STAT. § 961.42(1).[12] *See* ***Warren***, 229 Wis. 2d at 179. When we apply the first part of the multiplicity test to a continuous offense challenge, we focus on the facts giving rise to the charged offenses and ask if the offenses are either separated in time or significantly different in nature. ***Id***. at 180. To determine if the charged offenses are separated in time, we consider whether there is a sufficient break in the conduct to constitute more than one offense. *See* ***Lechner***, 217 Wis. 2d at 414-16. The test for whether the offenses are significantly different in nature is whether a conviction for each offense requires proof of an additional fact that a conviction for the other offense does not. *See* ***Warren***, 229 Wis. 2d at 180. Offenses are also significantly different in nature if each requires a "'new volitional departure in the defendant's course of conduct.'" ***State v. Anderson***, 219 Wis. 2d 739, 753, 580

[11] Only the first prong of the multiplicity analysis triggers double jeopardy concerns. *See* ***State v. Warren***, 229 Wis. 2d 172, 179 n.2, 599 N.W.2d 431 (Ct. App. 1999) (citing ***State v. Anderson***, 219 Wis. 2d 739, 753, 580 N.W.2d 329 (1998)).

[12] Lewis's offenses are identical in law because they constitute multiple violations of the same statute, WIS. STAT. § 946.31(1)(c). *See* ***State v. Carol M.D.***, 198 Wis. 2d 162, 170, 542 N.W.2d 476 (Ct. App. 1995).

N.W.2d 329 (1998) (quoting ***Eisch***, 96 Wis. 2d at 36). A defendant's "successive intentions make him [or her] subject to cumulative punishment, and he [or she] must be treated as accepting that risk ...." ***Id.*** at 750 (citation omitted).

¶41 We conclude that the searches are both separate in time and different in nature. Lewis made a conscious decision to maintain a drug house on or before April 1, 1998, and he kept certain drugs and weapons at the apartment, notably a supply of cocaine packaged for resale. He subsequently made a separate conscious decision to re-establish 1004 Villa Street as a drug house after the initial police search; notably, fifteen baggies of marijuana were seized during the second search more than two weeks later on April 16, 1998. Indeed, testimony elicited at trial reflected that Lewis was moving guns and drugs between apartments to stay ahead of police. Similarly, in his affidavit which he later recanted at trial, Barrios stated that Lewis said that he thought the police would not return to search the apartment again and that belief influenced his decision to move drugs back to 1004 Villa Street on or before April 16. Lewis also kept different amounts and types of drugs at the apartment. For these reasons, while the charges are identical in law, they are indeed different in fact and therefore not multiplicitous in violation of the Double Jeopardy Clause. *See, e.g.,* ***Sauceda***, 168 Wis. 2d at 495.

¶42 When the charged offenses are different in fact, as here, we presume that the legislature intended to permit cumulative punishments. ***Id.*** at 496. Only a clear indication of legislative intent to the contrary will overcome this presumption. ***State v. Kuntz***, 160 Wis. 2d 722, 756, 467 N.W.2d 531 (1991). Lewis has not directed this court to any authority suggesting any legislative intent to the contrary; indeed, he has not even asserted that the legislature intended anything to the contrary. Accordingly, this court concludes that, in this case, the charges of maintaining a drug house are not multiplicitous, and, therefore, the

convictions do not violate Lewis's constitutional protection against double jeopardy.

¶43 We also reject Lewis's claim that there was insufficient evidence to support his conviction for one count of possession of tetrahydrocannabinols (THC) with intent to deliver, as a party to the crime, in violation of WIS. STAT. § 961.41(1m)(h)1.[13] The standard for reviewing the sufficiency of the evidence to support a conviction is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Under this standard, we conclude that there was sufficient evidence to convict Lewis of possession of THC with intent to deliver.

¶44 Possession of THC with intent to deliver required the State to establish, beyond a reasonable doubt, four elements: (1) that Lewis possessed a substance; (2) that the substance was THC; (3) that Lewis knew or believed the substance was THC; and (4) that Lewis intended to deliver the THC. *See* WIS JI—CRIMINAL 6035. Trial evidence was sufficient to establish each of these elements.

¶45 Testimony at trial indicated that the police seized fifteen small knotted baggies of marijuana weighing 37.5 grams during the search that occurred on April 16, 1998. These were found along with numerous baggies with the corners cut in such a way as to suggest that they were being packaged for resale.

[13] 1004 Villa Street is located within 1000 feet of a school. Therefore, WIS. STAT. § 961.49(1)(a)6, which increases the maximum penalty, also applied.

McClain testified that he sold "drugs" for Lewis, and Barrios had told police that the "drugs" found at 1004 Villa Street on April 16, 1998, which included marijuana, belonged to Lewis. Parham also testified that at one time Lewis showed her a bag of marijuana at the apartment. Although her testimony was intended to persuade the jury that Lewis disapproved of the drug trafficking activity occurring at 1004 Villa Street, the jury was not required to construe her testimony in that way. We conclude that the evidence was sufficient to support a finding beyond a reasonable doubt that Lewis was involved with the drug operation at 1004 Villa Street, had constructive possession of the drugs found on the premises and was involved with the plan to distribute them. We therefore affirm.

¶46 Lastly, we reject Lewis's claim that he should be granted a new trial in the interest of justice. This court may grant a new trial in the interest of justice if it concludes that the "real controversy was not fully tried" or that it is probable that justice has otherwise miscarried. *See* WIS. STAT. § 752.35; ***Vollmer v. Luety***, 156 Wis. 2d 1, 19-20, 456 N.W.2d 797 (1990). We review a trial court's order denying a postconviction motion for a new trial in the interest of justice for an erroneous exercise of discretion. *See* ***State v. Harp***, 150 Wis. 2d 861, 873, 443 N.W.2d 38 (Ct. App. 1989) (***Harp I***), *overruled on other grounds by* ***State v. Camacho***, 176 Wis. 2d 860, 501 N.W.2d 380 (1993). Here, however, Lewis asks this court to independently exercise its discretion under § 752.35. We exercise our discretionary power to grant a new trial infrequently and judiciously. *See* ***State v. Ray***, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992). A new trial may be ordered where the jury had before it evidence improperly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried. *See* ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996).

The authority to grant a new trial in the interest of justice extends to situations where the right to review is waived by failing to make a proper objection. *See* ***State v. Harp***, 161 Wis. 2d 773, 776, 469 N.W.2d 210 (Ct. App. 1991) (***Harp II***). We need not find a substantial likelihood of a different result on retrial when considering whether a new trial should be granted because the real controversy was not fully tried. *See* ***id***. at 775.

¶47 Lewis asserts that the real controversy was not tried in this case because the anonymous jury and the admission of weapons evidence caused the trial to be conducted in an "atmosphere of fear." For the reasons previously discussed in this opinion, we conclude that the admission of the weapons evidence was not unfairly prejudicial and that Lewis was not prejudiced by the use of an anonymous jury in this case. Therefore, the trial court did not erroneously exercise its discretion in denying a new trial in the interest of justice, and we likewise deny the request.

By the Court.—Judgment and order affirmed.

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