COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 03-0160-CR

Cir. Ct. No. 01CF000581

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VELDEE T. BANKS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Veldee Banks appeals a judgment convicting him of two counts of possession with intent to deliver cocaine—one count as party to a crime. Banks argues the trial court erred by failing to sever his trial from his co-defendants or to adequately instruct the jury to disregard the evidence against the co-defendants. We reject his arguments and affirm the judgment.

BACKGROUND

¶2 An amended Information charged Banks, Terrence Madison, Lawrence Northern and Tyeshawn Cohens with one count of possession with intent to deliver cocaine as party to a crime. The Information likewise charged Banks alone with one count of possession with intent to deliver cocaine. The other nine counts of the Information were spread among the three co-defendants.[1] Prior to trial, Banks's motions to sever defendants and charges were denied. Banks was subsequently convicted upon a jury's verdict and the court imposed concurrent sentences of twelve years' initial confinement followed by ten years' extended supervision. This appeal follows.

DISCUSSION

¶3 Banks argues the trial court erroneously exercised its discretion when it denied his motion to sever defendants.[2] Questions of consolidation or severance are within the discretion of the trial court. *See* ***State v. Doyle***, 40 Wis. 2d 461, 469, 162 N.W.2d 60 (1968). On review, the decision of the trial court will not be reversed unless there is an erroneous exercise of discretion. *See* ***id.***

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[1] Northern was charged with one count of possession with intent to deliver cocaine as party to a crime and Cohens was charged with one count of delivery of cocaine. Madison was charged with five counts of delivery of cocaine (one as party to a crime) and one count each of possession with intent to deliver cocaine and possession with intent to deliver THC, both as party to a crime.

[2] On appeal, Banks does not challenge the denial of his motion to sever charges. Banks has therefore abandoned any claim of error with respect to the denial of that motion. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not briefed deemed abandoned).

¶4 Joinder and severance of defendants in a criminal case are governed by WIS. STAT. § 971.12.[3] A trial court may try defendants together when they are charged with the same offenses, arising out of the same transaction, and provable by the same evidence. *See* ***State v. DiMaggio***, 49 Wis. 2d 565, 576, 182 N.W.2d 466 (1971); ***Jung v. State***, 32 Wis. 2d 541, 545, 145 N.W.2d 684 (1966). "Consolidation is a procedural mechanism that avoids repetitious litigation and facilitates the speedy administration of justice." ***Lampkins v. State***, 51 Wis. 2d 564, 572, 187 N.W.2d 164 (1971).

¶5 There may be circumstances, however, rendering a joint trial unduly prejudicial to the defendants' interests. In such instances, the interests of administrative efficiency must yield to the mandates of due process. Such circumstances are present where the defendants intend to advance conflicting or antagonistic defenses. *See* ***id.*** Severance may also be granted where the danger that an entire line of evidence relevant to the liability of only one defendant may be treated by the trier of fact as evidence against all defendants simply because they are tried jointly. *See* ***State v. Suits***, 73 Wis. 2d 352, 362, 243 N.W.2d 206 (1976). The entire line of evidence, however, must not only be prejudicial but must also be wholly irrelevant or otherwise inadmissible against the complaining defendant. ***Id.***

¶6 Here, Banks argues that because most of the evidence at trial pertained to the guilt of other defendants, he was prejudiced by the joint trial. We are not persuaded. The first count of the Information charged a conspiracy among

[3] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

Banks and the three co-defendants. Specifically, the count alleged that Madison, Northern, Cohens and Banks "did during January through September of 2001, as parties to the crime, possess, with intent to deliver, cocaine in an amount of more than 100 grams."

¶7 At trial, the jury heard evidence explicitly describing Banks's participation in this conspiracy. Sheri Mitchell testified that in January 2001, she saw Banks and Madison cooking between a quarter -and half-kilogram of cocaine powder into crack cocaine, then cutting it up and packaging it into individual baggies. Mitchell further testified that Banks and Madison took a portion of the crack to Minneapolis, leaving behind two packages with instructions to her for their delivery to two individuals. Mitchell also testified that she saw Banks and Madison cook cocaine powder into crack cocaine on numerous occasions from January through July 2001. Mitchell additionally testified that during that time period, she saw Banks and Madison deliver cocaine to various individuals at her home.

¶8 Jennifer Ellefsen testified that on four or five occasions from January through March 2001, she saw Banks and Madison cook cocaine powder into crack cocaine and package it into individual bags. Ellefsen also testified that Cohens joined Banks and Madison in cooking the cocaine powder on one or two occasions.

¶9 Finally, Hollie Peterson testified that every two or three days during the period from late 2000 through the end of September 2001, she purchased cocaine from Madison for distribution in Eau Claire County. Peterson also testified that in September 2001, Northern brought her 125 grams of cocaine which she gave to Banks and Madison, who then divided the cocaine in half.

Peterson further testified that Banks then gave some of his share to her and she distributed that portion in Eau Claire County.

¶10 To the extent Banks claims the evidence does not establish an explicit link between his activities and the activities charged against the co-defendants, the State need not establish an explicit link. Circumstantial evidence and reasonable inferences can suffice to establish a conspiracy's existence. *See* ***State v. Cavallari***, 214 Wis. 2d 42, 51, 571 N.W.2d 176 (Ct. App. 1997). The evidence about the extensive direct and indirect links among the co-defendants, their activities and the duration of those activities established a circumstantial basis for the existence of a cocaine distribution conspiracy. Further, the transactions Banks characterizes as irrelevant to the charges against him are, in fact, relevant to establish the overall conspiracy. Thus, evidence of the co-defendants' distribution activities in furtherance of the possession and distribution conspiracy would have been admissible on Banks's conspiracy charge in a separate trial, both to prove the existence of a conspiracy and to prove its activities. Because a jury in a separate trial would have heard the same evidence the jury heard in Banks's trial with his co-defendants, Banks was not prejudiced by the denial of his severance motion.[4]

[4] To the extent Banks claims the trial court erred by failing to adequately instruct the jury regarding which evidence was applicable to which defendant, Banks agreed to the proposed jury instruction. The failure to object to a jury instruction waives the issue on appeal. *See* ***State v. Booth***, 147 Wis. 2d 208, 211, 432 N.W.2d 681 (Ct. App. 1988). In any event, the error, if any was harmless. The evidence on the counts against Banks directly connected him to those crimes. There was therefore no reasonable danger that he was convicted because of "spillover" evidence regarding the co-defendants.

By the Court.—Judgment affirmed.

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