COURT OF APPEALS
DECISION
DATED AND FILED

October 21, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2252-CR **Cir. Ct. No. 01CF002073**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CASHONDA R. POUEWELLS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: DANIEL T. DILLON, Judge. *Reversed.*

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Cashonda R. Pouewells challenges the sufficiency of the evidence to support her conviction for maintaining a drug trafficking place. We agree that evidence that Pouewells was one of several people living in a house was insufficient to establish that Pouewells "kept or maintained" that house as a

drug trafficking place for another resident of the house and his friend. Accordingly, we reverse the judgment of conviction.

BACKGROUND

¶2 Police obtained a warrant to search a two-story house for evidence of drug activity. The affidavit portion of the warrant related that a confidential informant had told police Ashley Washington lived in the house and was selling cocaine from there. It further noted that utilities for the house were under the name of Marie Fisher, but that police records showed that Washington had listed the address as his residence on numerous occasions.

¶3 When officers executed the warrant, Washington attempted to bar the door to them. After forcing entry, the officers found three people inside — Washington, Pouewells and Klemon Brown — and they discovered both marijuana and cocaine. Pouewells told police that she lived in the house with Washington and her three children and that she was aware that Washington sometimes smoked marijuana with his friends there. She denied any knowledge of the cocaine.

DISCUSSION

¶4 When reviewing the sufficiency of the evidence to support a conviction, this court will sustain the verdict "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. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (citation omitted), *review denied*, 2004 WI 20, 269 Wis. 2d 199, 675 N.W.2d 805 (Jan. 23, 2004) (No. 02-3097-CR). In order to evaluate the

sufficiency of the evidence, we must first consider the elements of the charged crime that the State was required to prove.

¶5 WISCONSIN STAT. § 961.42(1) (2001-02)[1] provides in relevant part that "[i]t is unlawful for any person knowingly to keep or maintain any … dwelling … which is resorted to by persons using controlled substances … for the purpose of using these substances …." Pouewells does not dispute that there was sufficient evidence presented to show that the house in which she was living was being "resorted to" by persons using controlled substances. She asserts, however, that evidence that she was living in the house and was aware that another resident was using drugs there was insufficient to establish that she "kept or maintained" the dwelling.

¶6 The parties agree that the phrase "keep or maintain" is not defined by the statute or current Wisconsin case law. Because WIS. STAT. § 961.42(1) is based upon a uniform act, they both urge this court to examine cases from other jurisdictions for assistance in interpreting the language. Having done so, we are persuaded that in order to prove the "keep or maintain" element of § 961.42(1), the State must show that a defendant exercised a sufficient degree of control over the premises to be able to permit or forbid the illegal drug activity at issue. *See* ***State v. Westeen***, 591 N.W.2d 203, 209 (Iowa 1999); ***Dawson v. State***, 894 P.2d 672, 676 (Ala. Ct. App. 1995) ("for a person to 'keep' or 'maintain' a structure in violation of the crack-house statute, the person must control or have authority to control the use or occupancy of the structure"); ***State v. Pyritz***, 752 P.2d 1310,

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

1313 (Or. App. 1988) ("Before one can be said to 'permit' something, one must have authority to forbid it."); ***Meeks v. State***, 872 P.2d 936, 939 (Okla. Crim. App. 1994) (requiring the defendant to "have control, ownership, or management of the residence, structure, or vehicle, as distinguished from other persons resorting to it …."); ***United States v. Clavis***, 956 F.2d 1079, 1090-91 (11th Cir. 1992) ("the term [maintain] does contemplate that a defendant exercise some degree of control over the premises and knowingly made such place available for the use alleged in the indictment"), *modified on other grounds by* 977 F.2d 538 (11th Cir. 1992).

¶7 Here, there was no evidence from which it could be inferred beyond a reasonable doubt that Pouewells had the ability to forbid Washington or his guest from smoking marijuana in the house. It was undisputed that both Pouewells and Washington lived in the house. There was no indication as to which, if either of them, owned or leased the premises. Police records showed that Washington had been living at the address for some time and that he attempted to bar the door from the officers executing the search warrant. What is missing is evidence that Pouewells had the authority or ability to prevent Washington or his guests from using illegal drugs in the residence.

¶8 Because we conclude the evidence was insufficient to support Pouewells' conviction, retrial is not an option. *See* ***State v. Lettice***, 221 Wis. 2d 69, 80, 585 N.W.2d 171 (Ct. App. 1998). We therefore conclude that the judgment must be reversed.

By the Court.—Judgment reversed.

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