COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP388-CR **Cir. Ct. No. 2008CF694**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS C. VAN CAMP,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed*.

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Dennis Van Camp appeals a judgment convicting him of possession with intent to deliver more than forty grams of cocaine, as party

to a crime, second or subsequent offense, and possession of cocaine, second or subsequent offense.[1] Van Camp argues the circuit court erred by denying his request for a jury instruction on chain of custody. He contends a chain of custody instruction was necessary because: (1) police provided a confidential informant with 252 grams of cocaine to sell to Van Camp, but the brick of cocaine seized from Van Camp and introduced into evidence at trial only weighed 249.09 grams; and (2) the weights of five smaller bags of cocaine police found on Van Camp following his arrest differed from the weights of five bags of cocaine introduced into evidence at trial. We reject Van Camp's arguments and affirm.

BACKGROUND

¶2 At Van Camp's trial, Juan Salinas testified that, in July 2008, he was a confidential informant working with officer Michael Wanta of the Brown County Drug Task Force. According to Salinas, on July 9, Van Camp called him and asked to purchase a quarter kilogram of cocaine. Salinas told Wanta about the call, and, at Wanta's instruction, Salinas agreed to meet Van Camp at a Walgreens in Green Bay on July 11 to complete the transaction.

¶3 On July 11, Wanta provided Salinas with about 252 grams, or nearly nine ounces, of cocaine and outfitted him with an audio recording device.[2] Salinas then drove alone in his car to the Walgreens and waited about ten minutes for Van Camp to arrive. When Van Camp arrived in a red Durango, Salinas exited his

[1] Van Camp was also convicted of possession of an electric weapon and possession of drug paraphernalia. He does not appear to challenge these convictions on appeal.

[2] At trial, the jury heard recordings of the phone calls between Salinas and Van Camp, as well as a recording of their conversation in the Walgreens parking lot on July 11. However, neither the recordings themselves nor transcripts of them are part of the record on appeal.

car and got into the Durango's passenger seat. Salinas testified he gave Van Camp the cocaine in exchange for $5,500 in cash. After Salinas exited the Durango, police immediately arrested Van Camp and placed Salinas in temporary custody.

¶4 Following Van Camp's arrest, police searched the Durango and recovered a Wendy's fast food bag containing a large plastic bag, inside of which was a smaller plastic bag containing cocaine. Officer Mark Hackett, who found and weighed the cocaine, testified that it weighed 249.09 grams. Hackett identified Trial Exhibit 1 as the cocaine he recovered from Van Camp's vehicle.

¶5 Officer Wanta testified that he had provided Salinas with a package containing about 252 grams of cocaine to sell to Van Camp. Wanta stated the cocaine had been seized during a prior case and he had obtained it from the evidence room, with the assistance of the evidence sergeant. Wanta testified he packaged the cocaine in a sandwich-sized plastic bag, which he placed in a larger plastic bag, which he then placed inside a Wendy's bag. He identified Trial Exhibit 1 as the cocaine he provided to Salinas. The evidence sergeant, David Poteat, confirmed that he helped Wanta put together a package containing 252 grams of cocaine that had been seized during a 2004 case. Poteat also testified he was positive that Exhibit 1 was the same cocaine that was seized in the 2004 case. He described Exhibit 1 as a brick or chunk of cocaine without much powder.

¶6 John Nied, a forensic scientist from the Wisconsin State Crime Laboratory, testified about the cocaine seized during the 2004 case. Nied testified that, in December 2004, he was asked to analyze substances he received from the Brown County Drug Task Force for the presence of cocaine. He received six heat-sealed plastic bags containing chunky white material and determined that each bag contained cocaine. The total weight of the cocaine, without the packaging, was

just shy of 252 grams. Nied testified the tests he performed would only have used up a small amount of the material—about forty or fifty milligrams. However, he also testified the weight of the material could change over time as any moisture evaporated. Additionally, some amount of the material would have adhered to the inside of the original containers whenever the material was transferred into new containers.

¶7 There was also testimony at trial regarding additional cocaine found on Van Camp during a search incident to his arrest. Officer Matthew Secor testified he searched Van Camp on July 11 and found in the side pocket of his shorts "a plastic-type bag with several smaller baggies containing a white powdery substance[.]" Secor took the baggies to the police department, where Hackett took custody of them. Hackett field tested the contents of one of the baggies, and it tested positive for the presence of cocaine. He also weighed the contents of each baggie, recording the weights as 1.8 grams, 3.38 grams, 1.07 grams, 1.29 grams, and 1.19 grams. Andrew Schleis of the Wisconsin State Crime Laboratory confirmed that each one of the baggies contained cocaine. However, Schleis testified that, when he received the baggies, their contents weighed .94 grams, 1.04 grams, 1.02 grams, 1.06 grams, and 1.18 grams. Officer Poteat, the evidence sergeant, admitted there was a two-gram discrepancy in the weight of one of the baggies. He believed the discrepancy was the result of a mistake or typographical error.

¶8 Van Camp testified in his own defense. He admitted knowing Salinas and knowing that Salinas might be a source for cocaine. He admitted meeting Salinas on July 11, but stated he did not know exactly why they were meeting. During the meeting, Salinas handed him a Wendy's bag, which Van Camp opened and saw what he believed was cocaine. Van Camp weighed

the cocaine on a scale he had in the vehicle. He believed it was "short," so he only gave Salinas $5,500 instead of $6,500. Van Camp also testified he looked on the floor of his vehicle and saw a bag containing four or five smaller baggies of what appeared to be cocaine. He testified he picked up the bag and put it in his pocket. Van Camp admitted to conducting a drug transaction with Salinas on July 11. However, he testified that Exhibit 1, the 249.09-gram brick of cocaine, was not the same cocaine he purchased from Salinas. He testified the cocaine he purchased from Salinas was a solid brick with "no shake."

¶9 At the jury instruction conference, Van Camp requested the following instruction on chain of custody:

> In this case, the State of Wisconsin alleges that the defendant, Dennis Van Camp, possessed a controlled substance, namely cocaine, with intent to deliver the alleged cocaine to another person. You have heard testimony that cocaine is a white powdery substance, and that one sample of cocaine is indistinguishable from another sample to the naked human eye. Unlike an original oil painting by a famous artist, which would have unique characteristics that make that painting different from every other painting in the world, cocaine by its nature lacks unique characteristics that visibly separate or distinguish it from other samples of cocaine, or from other white powders that are not controlled substances.
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> For this reason, the law places special emphasis on what is called "chain of custody." Chain of custody simply means testimony from those who participated in the series of events by which an item gets from the scene of original seizure by the police, through testing and storage, and to this courtroom. Proving chain of custody is the only way to establish that the substance actually seized by the police officers at the scene was not afterwards lost, destroyed in whole or in part, mislabeled, mistaken for something else, or tampered with in any way. Only by considering the reliability of the chain of custody can you be certain that the substance entered into evidence as an exhibit in this courtroom is the same substance that was taken from the defendant[] Dennis Van Camp's person and vehicle on July 11, 2008.

> In deciding what weight or importance to attach to the alleged cocaine that has been offered into evidence here, you must consider the chain of custody. In considering the chain of custody, you may consider the following factors: any variations in physical weight not attributable to the accuracy of the measuring instruments; the seeming identical appearance of one white powdery substance with another white powdery substance; the resemblance of many legal white powdery substances to cocaine; the size of the item and ease with which it might be lost or misplaced; the passage of time; the number and identity of the persons who handled the item; the care or lack of care which persons in the chain of custody exercised in handling the item; and the timing and reliability of tests that were done as part of the chain of custody.
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> If, after considering all of the evidence, there remains a possibility that the substance taken from Dennis Van Camp[’s] person and vehicle was materially altered, tampered with, lost, destroyed or misplaced, so that there is doubt whether Exhibit __ is the item taken from Dennis Van Camp’s person or vehicle, or whether that Exhibit is different in some material way, you must disregard those exhibit(s) entirely and find the defendant not guilty. Only if you find it improbable that the substance taken from defendant’s person and vehicle has been exchanged, contaminated or tampered with in any way may you consider that substance as evidence at all.
>
> If, on the other hand, you believe beyond a reasonable doubt on the basis of all of the evidence that the item marked as Exhibit __ is cocaine and is the same substance removed from Dennis Van Camp’s person or vehicle on July 11, 2008, you may consider it as evidence.

¶10 Van Camp argued this jury instruction was necessary because “there are vast discrepancies in the purported cocaine weights[,]” making it “probable some of the purported cocaine was lost, misplaced, altered, exchanged, tampered with and/or contaminated.” The circuit court denied Van Camp’s request. The court conceded that the various weights given for the different packages of cocaine “don’t jive,” but it concluded that a special instruction on chain of custody was unnecessary. The court noted the defense would be permitted to argue that the jury should draw certain inferences from the weight discrepancies.

DISCUSSION

¶11 "'The decision to give or not to give a requested jury instruction lies within the trial court's discretion' and will not be reversed absent an erroneous exercise of discretion." ***Arents v. ANR Pipeline Co.***, 2005 WI App 61, ¶42, 281 Wis. 2d 173, 696 N.W.2d 194 (quoting ***State v. Miller***, 231 Wis. 2d 447, 464, 605 N.W.2d 567 (Ct. App. 1999)). A court properly exercises its discretion when it "fully and fairly inform[s] the jury of the rules of law applicable to the case … to assist the jury in making a reasonable analysis of the evidence." ***State v. Dix***, 86 Wis. 2d 474, 486, 273 N.W.2d 250 (1979). If the instructions given by the court adequately cover the law applicable to the facts, we will not find an error in the refusal of a requested instruction, even if the refused instruction itself would not have been erroneous. ***State v. Roubik***, 137 Wis. 2d 301, 308-09, 404 N.W.2d 105 (Ct. App. 1987).

¶12 Here, the circuit court properly exercised its discretion by denying Van Camp's request for a chain of custody instruction because the other instructions fully and fairly informed the jury of the applicable law.[3] Van Camp argues a chain of custody instruction was necessary because, due to the discrepancies in the weights of the various packages of cocaine, "we cannot know at all whether the cocaine presented in court was the substance seized from Van Camp at his arrest." Van Camp essentially contends that the State failed to

[3] Van Camp argues we must reverse under the erroneous exercise of discretion standard because the circuit court "did not in fact exercise its discretion[.]" Van Camp is incorrect. Although the erroneous exercise of discretion standard contemplates that circuit courts explain their reasoning, when a court does not do so, we may search the record to determine if it supports the court's discretionary decision. *See* ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983).

prove beyond a reasonable doubt that the substances found in his possession were cocaine. The jury instructions given by the court adequately addressed this defense.

¶13 The court instructed the jury on the elements of possession with intent to deliver cocaine and on the elements of simple cocaine possession. The court instructed the jury that each of these charges required the State to prove beyond a reasonable doubt that the substance Van Camp possessed was cocaine. The court also gave the standard instructions on the State's burden of proving each element of the charges beyond a reasonable doubt, the presumption of the defendant's innocence, the jury's duty to acquit if it did not find each element of the charges beyond a reasonable doubt, and the jury's duty to assess the credibility and weight of the evidence and testimony. These instructions adequately addressed Van Camp's defense that the State failed to prove beyond a reasonable doubt that the cocaine introduced into evidence at trial was the same substance found in his possession.

¶14 Moreover, the circuit court expressly stated that it would permit Van Camp's attorney to argue the chain of custody issue to the jury, and Van Camp's attorney did so. During his closing argument, Van Camp's attorney emphasized that the State needed to prove beyond a reasonable doubt that Van Camp possessed cocaine. He argued that the State had not done so because it had not offered a believable explanation for the discrepancies in the weights of the different packages of cocaine. He argued that the weight discrepancies could not be explained by evaporation, by residue left inside previous containers, or by typographical error. He concluded, "[W]e can't be certain that these are the same drugs that were sold in that other case." The chain of custody issue was clearly before the jury, and the instructions given adequately explained that the jury could

only convict if it concluded beyond a reasonable doubt that the substances Van Camp possessed were cocaine.

¶15 Van Camp argues that a circuit court must give a chain of custody instruction "as a matter of law where the facts indicate the possibility that the evidence has been exchanged, contaminated, or tampered with." He contends the law regarding issuance of a chain of custody instruction "should be similar to the law regarding issuance of a lesser-included [offense] instruction." Van Camp provides no reasoning or legal authority in support of this argument, and we therefore decline to address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not address undeveloped arguments).

¶16 Van Camp also cites ***State v. Davidson***, 44 Wis. 2d 177, 192, 170 N.W.2d 755 (1969), for the proposition that "[i]t can be prejudicial error for a trial judge to fail to instruct on a special defense if the evidence raises that issue." He contends that, because the evidence raised issues with the chain of custody, the circuit court was required to instruct the jury on his chain of custody defense.

¶17 We disagree for two reasons. First, while a criminal defendant is entitled to a requested jury instruction on a legal theory of defense when the evidence raises that theory, the defendant is not entitled to an instruction that recites facts upon which he or she relies, interprets the evidence, or outlines inferences he or she believes can be drawn from the evidence. *See* ***State v. Coleman***, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996); ***Davidson***, 44 Wis. 2d at 191-92. Van Camp's proffered jury instruction on chain of custody emphasized the facts and inferences he viewed as potentially favorable to him, rather than

focusing on a legal theory of defense.[4] Second, a defendant is only entitled to an instruction on a legal theory of defense if the other jury instructions do not adequately cover that defense. ***Coleman***, 206 Wis. 2d at 212-13. As we explained above, the jury instructions adequately addressed Van Camp's theory that, because of problems with the chain of custody, the State failed to prove beyond a reasonable doubt that the cocaine introduced into evidence at trial was the same substance Van Camp possessed. *See supra*, ¶¶12-14.

¶18 Furthermore, we note that Van Camp's requested jury instruction on chain of custody contained several misstatements of law. First, the instruction stated that "the law places special emphasis on what is called 'chain of custody.'" Van Camp provides no legal authority for this proposition. Instead, the law provides that proving a chain of custody is one means of authenticating evidence, which is a prerequisite to admissibility. *See* ***B.A.C. v. T.L.G.***, 135 Wis. 2d 280, 289, 400 N.W.2d 48 (Ct. App. 1986). Here, Van Camp concedes that the cocaine was admissible.

¶19 Second, Van Camp's proffered jury instruction stated that the jury must disregard certain exhibits entirely and find Van Camp not guilty if "there remains a possibility that the substance taken from Dennis Van Camp[']s] person and vehicle was materially altered, tampered with, lost, destroyed or misplaced[,]" such that there is a "doubt" as to whether the exhibits are the items taken from

[4] Additionally, Van Camp's proffered jury instruction contained several misstatements of fact. For instance, the instruction told the jury that it had heard testimony "that one sample of cocaine is indistinguishable from another sample to the naked human eye" and that "cocaine by its nature lacks unique characteristics that visibly separate or distinguish it from other samples of cocaine, or from other white powders that are not controlled substances." Based on our review of the record, no witness at Van Camp's trial testified to these facts or offered these opinions, and Van Camp provides no record citations for this testimony.

Van Camp. The instruction misstated the law by implying that the jury could acquit based on something less than a reasonable doubt about Van Camp's guilt. The terms "possibility" and "doubt" are not equivalent to the "beyond a reasonable doubt" standard.

¶20 Third, Van Camp's requested instruction misstated the law when it stated, "Only if you find it improbable that the substance taken from defendant's person and vehicle has been exchanged, contaminated or tampered with in any way may you consider that substance as evidence at all." Van Camp argues this statement is correct because it tracks language found in ***B.A.C.***, 135 Wis. 2d at 291-92. However, ***B.A.C.*** dealt with the admissibility of evidence and concluded that certain evidence was admissible where it was "improbable" that the evidence was "exchanged, contaminated or tampered with." ***Id.*** Here, Van Camp has conceded that the cocaine was admissible. ***B.A.C.*** does not state that a jury is required to disregard admissible evidence entirely because of problems with the chain of custody.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).