COURT OF APPEALS
DECISION
DATED AND RELEASED

July 31, 1996

No. 95-1688-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JONATHON L. MC INTOSH,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Kenosha County: MICHAEL FISHER, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. Jonathon L. McIntosh appeals from a judgment convicting him of first-degree reckless homicide contrary to § 940.02(2), STATS., in the death of Jason Ostman. On appeal, McIntosh challenges the jury instructions, the sufficiency of the evidence to convict him and the failure of the trial court to properly redact a codefendant's statement implicating him. We reject these claims and affirm.

McIntosh was charged in the death of Ostman, who used a controlled substance provided by McIntosh. The substance was lysergic acid diethylamide (LSD). Ostman ingested the LSD on New Year's Eve in 1993, had seizures, suffered brain injury and died four days later.

The elements of § 940.02(2)(a), STATS., are: (1) the defendant delivered a substance; (2) the substance was a controlled substance; (3) the defendant knew or believed that the substance was a particular controlled substance; and (4) the victim used the substance alleged to have been delivered by the defendant and died as a result of that use. With regard to the causation requirement in the fourth element, McIntosh's jury was instructed that "before the relation of cause and effect can be found to exist, it must appear that use of the controlled substance was a substantial factor in producing the death." *See* WIS J I—CRIMINAL 1021 at 2.

McIntosh did not object to the use of the substantial factor test in the jury instructions. Nevertheless, he claims on appeal that because the jurors were not instructed that Ostman's death was a natural and probable consequence of McIntosh's delivery of LSD to codefendant Jeremy Gomaz, the real controversy was not tried. Therefore, notwithstanding the waiver of the objection to the jury instruction, this court should review the defective jury instruction.

We conclude that the real controversy was tried because the appropriate instruction was given to the jury. In support of his argument that the jury should have been instructed that Ostman's death had to have been a natural and probable consequence of his conduct, McIntosh refers to footnote eleven of WIS J I—CRIMINAL 1021 for the proposition that the natural and probable consequence of the accused's conduct is the appropriate expression of the substantial factor test. We disagree that the court was required to instruct the jury regarding "natural and probable consequences" rather than "substantial factor."

We are satisfied that the jury was properly instructed that McIntosh's conduct had to have been a substantial factor in Ostman's death—not that Ostman's death was a natural and probable consequence of McIntosh's conduct. Instructing the jury that the conduct had to be a substantial factor in

Ostman's death is not contrary to Wisconsin law. *See* ***State v. Bartlett***, 149 Wis.2d 557, 565-66, 439 N.W.2d 595, 599 (Ct. App. 1989).

McIntosh next argues that the evidence was insufficient to convict him under a natural and probable consequences standard. However, we have already held that the applicable standard was that McIntosh's conduct had to have been a substantial factor in Ostman's death. Nevertheless, we will briefly address the sufficiency of the evidence to convict McIntosh.

Upon a challenge to the sufficiency of the evidence to support a jury's guilty verdict, we may not substitute our judgment for that of the jury "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force" that no reasonable jury "could have found guilt beyond a reasonable doubt." ***State v. Poellinger,*** 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). We will uphold the verdict if any possibility exists that the jury could have drawn the inference of guilt from the evidence. *See* ***id.*** at 507, 451 N.W.2d at 758. It is within the jury's province to fairly resolve conflicts in the testimony, weigh the evidence and draw reasonable inferences from the facts. *See* ***id.*** at 506, 451 N.W.2d at 757. If more than one inference can be drawn from the evidence, the inference which supports the jury's finding must be followed. ***State v. Witkowski,*** 143 Wis.2d 216, 223, 420 N.W.2d 420, 423 (Ct. App. 1988).

Here, there was evidence at trial that McIntosh sold the LSD to Gomaz using funds supplied by Ostman. Gomaz gave the LSD to Ostman. Ostman ingested it and had seizures resulting in significant brain damage. Ostman died after he was removed from life support systems. The State's experts testified that to a reasonable degree of medical certainty, the LSD was a substantial factor in Ostman's death. McIntosh's experts testified that LSD did not play a role in Ostman's death. The conflict in the expert testimony upon which McIntosh bases his claim that the evidence was insufficient to convict him was a conflict for the jury to resolve. ***Poellinger,*** 153 Wis.2d at 506, 451 N.W.2d at 757.

Finally, McIntosh argues that the trial court did not properly redact a statement given to the police by codefendant Gomaz which implicated him in the delivery of LSD to Ostman. McIntosh and Gomaz were tried

together and neither intended to testify. Accordingly, the parties and the court redacted the statements given by each defendant to delete incriminating references to the other defendant. However, after being redacted, Gomaz's statement still mentioned the address of McIntosh's trailer where Gomaz and Ostman purchased the LSD.[1] McIntosh contends that the inadequately redacted statement deprived him of the ability to cross-examine Gomaz regarding his statement that the LSD was purchased at McIntosh's trailer. He also argues that the error was not harmless.

The Confrontation Clause of the Sixth Amendment is violated when a nontestifying codefendant's confession incriminating another codefendant in the crime is introduced at their joint trial. ***State v. Mayhall***, 195 Wis.2d 53, 58, 535 N.W.2d 473, 475-76 (Ct. App. 1995) (citing ***Bruton v. United States***, 391 U.S. 123, 135-36 (1968)). However, it is not a violation of the Confrontation Clause to admit a nontestifying codefendant's confession with a proper limiting instruction when the confession is redacted to eliminate any reference to the other defendant. ***Mayhall,*** 195 Wis.2d at 59, 535 N.W.2d at 476 (citing ***Richardson v. Marsh***, 481 U.S. 200, 211 (1987)).[2]

Assuming arguendo that the redacted statement's reference to McIntosh's residence was incriminating, we conclude that the error was harmless beyond a reasonable doubt. Constitutional violations are subject to a harmless error analysis. ***Mayhall***, 195 Wis.2d at 62, 535 N.W.2d at 477. "A conviction will be upheld if it can be shown beyond a reasonable doubt that the error did not contribute to the guilty verdict. We must determine what effect the error had upon the guilty verdict in the present case." ***Id***. at 62-63, 535 N.W.2d at 477 (citations omitted).

We conclude that the reference in Gomaz's statement to McIntosh's address and the prosecutor's reliance upon it in closing argument was harmless beyond a reasonable doubt because other evidence was properly

[1] McIntosh objected to this, but the court overruled his objection. In his testimony, Detective Strash read Gomaz's statement to the jury.

[2] The limiting instruction in this case advised the jury that the statement of each defendant could only be used in considering whether that defendant was guilty and could not be used or considered in any way against the other defendant.

admitted indicating McIntosh's involvement in the crime. Detective Strash testified regarding McIntosh's statement. In that statement, McIntosh gave his address and admitted selling LSD on December 31, 1993, under circumstances similar to those described by Jamie Holewinski, who also participated in the drug purchase. Strash testified that Holewinski directed him to the location where he purchased the LSD and that this was McIntosh's trailer. Holewinski testified that he and Ostman went to the trailer court to locate some LSD and he identified the trailer occupied by McIntosh.

The fact that Gomaz's statement referred to McIntosh's address does not permit us to conclude that the information had an effect upon the guilty verdict in the present case. There was sufficient other evidence from other sources that the LSD Ostman ingested was purchased from McIntosh. There is no reasonable doubt that the error contributed to the guilty verdict.

By the Court.—Judgment affirmed.

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