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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

June 8, 2021

To:

Hon. Michael J. Hanrahan
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

Hon. Frederick C. Rosa
Circuit Court Judge, Br. 35
901 N. 9th St., Rm. 632
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
821 W. State St.
Milwaukee, WI 53233

Nicholas DeSantis
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707

Jeffrey W. Jensen
111 E. Wisconsin Ave., Ste. 1925
Milwaukee, WI 53202-4825

John D. Flynn
Assistant District Attorney
District Attorney's Office
821 W. State. St., - Ste. 405
Milwaukee, WI 53233

You are hereby notified that the Court has entered the following opinion and order:

2020AP145-CR State of Wisconsin v. A.D. Lee (L.C. # 2018CF1028)

Before Brash, P.J., Dugan and Donald, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

A.D. Lee (Lee) appeals a judgment of conviction and an order denying postconviction relief. A jury found him guilty of three felonies as a party to a crime: possession with intent to deliver more than fifteen grams but not more than forty grams of cocaine, a controlled substance; possession with intent to deliver more than 200 grams but not more than 1,000 grams of marijuana, a controlled substance; and keeping a drug trafficking place. In postconviction proceedings, the circuit court rejected his claim that his trial counsel was ineffective for failing to

present certain witnesses at trial. On appeal, Lee renews that claim and further alleges that the evidence was insufficient to prove him guilty of either count of possession with intent to deliver a controlled substance as a party to a crime. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] We affirm.

We begin by reviewing the trial evidence pertinent to Lee's appellate claims. Officer Curtis Pelczynski testified that on March 1, 2018, he was one of several officers who executed a search warrant at a Milwaukee residence in the 2800 block of North 29th Street. He and the other participating officers were searching for Lee and for cocaine, cocaine base, and items associated with drug dealing.

Pelczynski testified that approximately ten people were in the 29th Street home when he entered, but only Lee and Balonda Jacobs were in the front bedroom. That bedroom contained a variety of personal items apparently linked to Lee. These included a prescription pill bottle with Lee's name on it in the nightstand by the bed; photographs of Lee that were in a dresser drawer; purchasing documents for a Cadillac in Lee's name and a license plate application for the Cadillac, all in the same dresser drawer; two night parking citations reflecting that on both the previous night and three weeks earlier the Cadillac was parked on the 2800 block of North 29th Street; an affidavit for a small claims case in which Lee was the named defendant; and a dental bill identifying Lee as the patient.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

Additionally, Pelczynski testified that police found controlled substances throughout the bedroom, specifically: three small baggies of cocaine on the bedroom floor near the foot of the bed; two baggies of cocaine inside a jewelry box on top of the dresser; two plastic bags of cocaine in the closet; two Tupperware containers containing marijuana that were also in the closet; and a packet of cocaine in Jacobs's pocket. The total weight of the cocaine found in the bedroom was 33.83 grams, and the total weight of the marijuana was 517.46 grams.

Pelczynski further testified about a variety of other items found in the bedroom. These included a digital scale with white powder residue on it that police found on top of the dresser, and two more digital scales found in a dresser drawer. Police also found a BB gun, three cellphones, a quantity of plastic bags, and approximately $2,000 in cash that was "stuffed inside a laundry basket with clothes."

Finally, Pelczynski testified about a notebook found on the bed in the front bedroom. One page included the notation: "Nov 16th 2017[.] See P.O[.] AD. Lee Appointment – Thursday at 10:30 a.m." Pelczysnki explained that "P.O." typically stands for "probation officer," and he told the jury that Lee was on probation as of November 16, 2017, while Jacobs was not. Pelczynski went on to testify that other pages in the notebook each contained a different name followed by dollar amounts and additional numbers.

Milwaukee Police Sergeant Kenton Burtch testified as an expert on the subject of drug trafficking. He said that the amount of cocaine found in the bedroom of the 29th Street home could be sold for approximately $3,300, and the marijuana could be sold for more than $5,100. He opined that the quantity of cocaine and marijuana found in the bedroom indicated that both substances were "possessed for the purposes of sales" and "distribution." Additionally,

numerous items in the bedroom also indicated that the person or persons in possession of the controlled substances intended to sell them. Drug dealers, he said, typically use "some type of digital scale" to measure controlled substances and often possess "multiple different phones," "firearms, [and] facsimile firearms." Further indicators of drug dealing include "packaging material such as plastic baggies," "money," and "documents related to sales or purchases."

Burtch testified that he had reviewed the police reports in this case, and he knew that many people were present in the 29th Street home when police executed the search warrant there. He said that owners of cocaine and marijuana worth thousands of dollars would "absolutely not ... leave their supply alone when numerous other people were present." He went on to testify that if a room contains thousands of dollars of cocaine or marijuana and $2,000 in cash, "people that are going to have access to that room are going to have a large majority of the control over those drugs or over that money. That would not be in the hands of somebody else. That does not happen."

Lee testified on his own behalf. He said that he lived with the mother of his children at a residence on Finn Place, and he pointed out that some of the items with his name on them found in the 29th Street residence also included the Finn Place address. Lee said that he had visited the 29th Street residence "about six or seven times" and that he went there only to help a friend, Timothy Mitchell, who owns the house and has difficulty walking. Lee acknowledged that Jacobs was his "girlfriend on the side," that he had known her for twelve years, and that she lived at the 29th Street residence. He denied, however, that he ever spent the night in Jacobs's bedroom, although he admitted that on occasion he "spent the night at the house."

Lee testified that none of the cellphones that the police found in the bedroom were his. He also testified that none of the handwriting in the notebook that police found was his, and he said that the handwriting looked like Jacobs's. He said that Jacobs sometimes wrote down his appointments with his probation officer as a reminder for him to attend.

Lee testified that he had used both marijuana and cocaine in the past but that he had never sold drugs out of the 29th Street residence, that he had "no idea" that the front bedroom contained any drugs, and that he had no control over the drugs found there. He said that on the day that the police executed the search warrant, he was in Jacobs's bedroom for "maybe about five, ten seconds" before the police arrived.

The jury found Lee guilty of the three charges that he faced, and he moved for postconviction relief. As grounds, he alleged that his trial counsel was ineffective for failing to call two witnesses, namely, Lee's brother Jerry Lee, and Timothy Payne, both of whom were in the home when police executed the warrant.[2] As set forth in the motion, Jerry would have testified that he "was frequently in the home, it was a 'party house,' and he knew there were drugs there ... but to his knowledge [] Lee never sold drugs to anyone in the home nor did he sell drugs to anyone who came to the door of the house." Payne would have testified that "he was at the home on a number of occasions when Lee was also there." Further, Payne "knew [sic] saw Lee sell any drugs to anyone in the home, nor did he sell drugs to anyone who came to the

[2] We refer to Jerry Lee as Jerry throughout the remainder of this opinion to distinguish him from the appellant.

door."[3] Lee contended that the proposed testimony from Jerry and Payne would have been critical in establishing that he did not intend to deliver either cocaine or marijuana.

The circuit court rejected the claims without a hearing, concluding that Lee failed to establish any prejudice from the loss of the proposed testimony. Lee appeals, renewing his claim that trial counsel was ineffective in defending him against the charges of possessing controlled substances with intent to deliver them as a party to a crime, and further claiming that the evidence presented at trial was insufficient to sustain his convictions for those crimes.[4]

We first consider Lee's challenge to the sufficiency of the evidence. Whether evidence was sufficient to support a verdict is a question of law that we review *de novo*. *See* ***State v. Smith***, 2012 WI 91, ¶24, 342 Wis. 2d 710, 817 N.W.2d 410. In conducting that review, "we give deference to the jury's determination and view the evidence in the light most favorable to the State." ***State v. Long***, 2009 WI 36, ¶19, 317 Wis. 2d 92, 765 N.W.2d 557. We will reverse only if the evidence is so lacking in probative value and force that no reasonable jury could have concluded beyond a reasonable doubt that the defendant was guilty. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). "If more than one inference can be drawn from the evidence, we must adopt the inference that supports the conviction," *see* ***Long***, 317 Wis. 2d 92, ¶19, and we may not overturn a verdict if there is any possibility that the jury could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, *see*

[3] As do the parties, we treat Lee's postconviction motion as if it alleged that Payne "never saw" Lee sell drugs at the 29th Street residence. The actual allegation, however, was that Payne "knew saw" Lee sell drugs there, which we observe is subject to less favorable interpretations.

[4] Lee concedes that the evidence was sufficient to support his conviction for keeping a drug trafficking place, and he explicitly does not challenge that conviction on appeal.

Poellinger, 153 Wis. 2d at 507. Our standard of review is the same whether the evidence is direct or circumstantial. *See* ***id.*** at 501. Convictions may be supported solely by circumstantial evidence, and we recognize that circumstantial evidence may be as strong if not "stronger and more satisfactory than direct evidence." ***Id.***

Here, Lee contends that the evidence was not sufficient to prove him guilty of either count of possession with intent to deliver a controlled substance as a party to a crime. Although the State may prove that a person was a party to a crime in several alternative ways, in this case the State sought to prove that Lee either directly committed each crime or that he intentionally aided and abetted the person who directly committed it. *See* WIS. STAT. § 939.05(2)(a)-(b). "The elements of aiding and abetting are that a person: '(1) undertakes conduct (either verbal or overt action) which as a matter of objective fact aids another person in the execution of a crime, and further (2) he consciously desires or intends that his conduct will yield such assistance.'" ***Krueger v. State***, 84 Wis. 2d 272, 285, 267 N.W.2d 602 (1978) (citations omitted).

In light of the State's theory of the case, the circuit court instructed the jury that it could not convict Lee, as a party to a crime, of possessing a controlled substance with intent to deliver that substance unless the State proved beyond a reasonable doubt that: (1) Lee or the person that he aided and abetted possessed a substance; (2) as to the cocaine count, the substance was cocaine, and as to the marijuana count, the substance was marijuana; (3) as to the cocaine count, Lee or the person that he aided and abetted knew or believed that the substance was cocaine, and as to the marijuana count, Lee or the person that he aided and abetted knew or believed that the substance was marijuana; and (4) Lee or the person that he aided and abetted intended to deliver the substance. *See* WIS. JI—CRIMINAL 6035, 400; WIS. STAT. §§ 961.41(1m)(cm)3., (h)2.

Lee stipulated that the substances at issue were cocaine and marijuana. Accordingly, the State was required to offer evidence proving only the remaining three elements.

Possession was the first disputed element. The circuit court instructed the jury that a substance is in a person's possession if the person "knowingly had actual physical control of the substance," and that a person also possesses a substance "if it is in an area over which the person has control and th[e] person intends to exercise control over the substance. It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the substance." Additionally, the circuit court instructed that "[p]ossession may be shared with another person. If a person exercises control over a substance, the substance is in that person's possession, even though another person may also have similar control." These instructions comport with WIS JI—CRIMINAL 6035 & n.ii, and Lee does not dispute that the circuit court correctly instructed the jury.

The photographs of Lee, the pill bottle with his name on it, and the assorted legal documents linked to him all demonstrated Lee's dominion and control over the bedroom in which police found him. Indeed, Lee acknowledges on appeal that he "must concede that the evidence is sufficient, as a matter to law to permit the inference ... that he had a certain amount of dominion and control over the 29th Street apartment." Lee contends, however, that the evidence was insufficient to demonstrate his control over the cocaine and marijuana that were in the front bedroom. We cannot agree. The State's expert witness, Burtch, testified that anyone with access to the bedroom would have control over the drugs and money found there and that those items "would not be in the hands of somebody else. That does not happen." Lee and Jacobs were alone in the front bedroom where police found the cocaine, the marijuana, and the $2,000 in cash. The jury was free to accept the expert's testimony and find that Lee possessed

the controlled substances in that bedroom. *See* ***State v. Stephenson***, 2019 WI App 63, ¶51, 389 Wis. 2d 322, 935 N.W.2d 842.

The evidence was also sufficient to support the jury's finding that Lee knew the substances were cocaine and marijuana. Some of the cocaine was out in the open at the foot of the bed. Large quantities of both drugs were in the closet. Digital scales and plastic baggies, which are commonly used to package and distribute controlled substances, were present in the bedroom, and a scale dusted with white powder residue was in plain view on the dresser. We have long recognized that when a defendant with joint occupancy of the premises has access to the area where drugs are found, when the drugs are in plain view, and when items used to manufacture or package the drugs are also present, the jury may infer the defendant's knowledge of the drugs. *See* ***State v. Allbaugh***, 148 Wis. 2d 807, 813, 436 N.W.2d 898 (Ct. App. 1989). Indeed, given the substantial quantity of drugs and paraphernalia in the room with Lee, and his familiarity with cocaine and marijuana as a past user of those drugs, the jury could "reject ... as not worthy of belief" any hypothesis that he knew nothing of the nature of the substances that surrounded him. *See* ***id.*** at 815.

The evidence was similarly sufficient to support the jury's findings that Lee intended to deliver the cocaine and marijuana. Burtch testified that the amount of drugs in the room exceeded the amount that a person would have for personal use and that the drugs were worth thousands of dollars. A jury is permitted to infer intent to deliver from the quantity and value of the drugs at issue, *see* WIS. STAT. § 961.41(1m)(cm)2., and the circuit court so instructed the jury. Moreover, the testimony established that police found numerous items that Burtch testified were indicative of drug trafficking, including a notebook that not only served as an appointment

book for Lee but also contained notations supporting an inference that it was a ledger documenting drug sales.

Finally, the evidence supported the jury's finding that Lee was either the primary actor in the crimes of possessing cocaine and marijuana with intent to deliver them, or that he aided and abetted Jacobs in committing those crimes. The evidence established that Lee and Jacobs were alone in the bedroom when police executed the search warrant. Burtch testified that a drug dealer would not leave large amounts of drugs and money unattended when other people were present in the residence and that only the people who possessed the substantial quantity of drugs in the bedroom would be alone with them. Further, he testified that items such as scales, cellphones, ledgers, and packaging materials indicate that the people in possession of drugs intend to sell them. The jury was entitled to rely on this circumstantial evidence to infer that Lee was a party to the crime of possessing with intent to deliver the controlled substances found with him. *See* ***State v. Hecht***, 116 Wis. 2d 605, 623, 342 N.W.2d 721 (1984) (explaining that the jury may infer from circumstantial evidence that the defendant intended to assist in committing a crime). Lee argues that the evidence did not establish his precise role in the commission of the crimes, but that is not the question that we review. To the contrary, the jury is not required to agree as to the manner of participation. *See* ***Holland v. State***, 91 Wis. 2d 134, 143, 280 N.W.2d 288 (1979).

In sum, the evidence overwhelmingly supported the guilty verdicts. Accordingly, we reject Lee's challenges to the sufficiency of the evidence.

We turn to the remaining issues that Lee raises on appeal. He claims that his trial counsel was ineffective for failing to present testimony from his brother Jerry and from Payne, and that the circuit court erred by not holding a postconviction hearing on this claim. We disagree.

A defendant who alleges ineffective assistance of counsel must prove both that trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show that counsel's actions or omissions "fell below an objective standard of reasonableness." ***Id.*** at 688. To demonstrate prejudice, "[t]he 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." ***Id.*** at 694. Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

The circuit court must hold a hearing on a defendant's claim of ineffective assistance of counsel only if the defendant's motion includes allegations of material fact that, if true, would entitle the defendant to relief. *See* ***State v. Allen***, 2004 WI 106, ¶¶9, 13, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the motion is sufficient to earn an evidentiary hearing is another question of law for our independent review. *See* ***id.***, ¶9. If, however, the defendant does not allege sufficient material facts that, if true, entitle him or her to relief, if the allegations are merely conclusory, or if the record conclusively shows that the defendant is not entitled to relief, the circuit court has discretion to deny the claim without a hearing. *See* ***id.*** We review a circuit court's discretionary decisions with deference. *See* ***id.***

The allegations in the postconviction motion show that trial counsel's actions were not deficient as a matter of law. Testimony from Jerry that the 29th Street home was a "party house," and testimony from Payne that he saw Lee at the home "on a number of occasions," would have undermined Lee's testimony that he went to the home only infrequently to help a disabled friend and had "no idea there were drugs in the home." When the record reveals a strategic basis for trial counsel's actions, we will conclude that those actions are objectively reasonable. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶¶31-32, 246 Wis. 2d 648, 630 N.W.2d 752. We reach that conclusion here.

As to testimony from Jerry and Payne that when they visited the 29th Street home they did not see Lee selling drugs, this would have constituted evidence of noncriminal conduct offered to negate the inference that Lee's conduct in the home was criminal, but "[e]vidence of noncriminal conduct to negate the inference of criminal conduct is generally irrelevant." ***State v. Tabor***, 191 Wis. 2d 482, 497, 529 N.W.2d 915 (Ct. App. 1995) (citation omitted). The evidence would have been irrelevant in this case. The State was not required to prove that Lee sold drugs. *See* WIS JI—CRIMINAL 6035, 400. Moreover, evidence that two people did not see Lee sell drugs on some occasions is not probative of whether he sold drugs on other occasions, let alone whether he possessed drugs with the intent to sell them. Irrelevant evidence is inadmissible. *See* WIS. STAT. § 904.02. Lee's trial counsel acted reasonably by not seeking to present inadmissible evidence. *See* ***State v. Sandoval***, 2009 WI App 61, ¶34, 318 Wis. 2d 126, 767 N.W.2d 291 (counsel does not perform ineffectively by forgoing a meritless argument). The proposed evidence thus failed to satisfy the deficient performance prong of the ***Strickland*** analysis.

The proposed evidence also failed to satisfy ***Strickland's*** prejudice prong. Because the proposed evidence identifying the 29th Street home as a "party house" and establishing Lee's

frequent presence there would have undermined his defense, Lee necessarily was not prejudiced by the omission of that evidence. Similarly, because the proposed testimony about Lee's noncriminal conduct was irrelevant, Lee was not prejudiced when trial counsel failed to offer the evidence. *See* ***Rogers v. State***, 93 Wis. 2d 682, 688, 287 N.W.2d 774 (1980) (reflecting that irrelevant evidence does not shed any light on the subject of inquiry).

Moreover, as we have explained, the State presented overwhelming evidence that Lee was a party to the crimes of possessing cocaine and marijuana with intent to deliver those substances. Police executed a search warrant at the 29th Street home, where they were looking for Lee and for cocaine. Police found Lee with Jacobs in a bedroom that contained his photographs, his legal documents, and a bottle for his medication. Also in the bedroom were cocaine and marijuana worth thousands of dollars, drug packaging materials, a BB gun, multiple cell phones, an apparent drug ledger that also served as Lee's appointment book, and a large amount of cash. An expert witness explained why the circumstances showed that the people in the bedroom possessed the drugs found there with the intent to sell them. Additionally, Lee admitted that Jacobs was his girlfriend of many years and that he was familiar with both cocaine and marijuana as a past user of both substances. Accordingly, the circuit court correctly concluded that the proposed testimony from Jerry and Payne that they never saw Lee sell drugs at the residence had no reasonable probability of changing the outcome of the trial. *See* ***Strickland***, 466 U.S. at 694. For all the foregoing reasons, we affirm.

IT IS ORDERED that the judgment and postconviction order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals