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DISTRICT IV

February 5, 2013

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

2011AP2928-CR State of Wisconsin v. Amy M. Nack (L.C. # 2010CF1081)

Before Lundsten, P.J., Sherman and Kloppenburg, JJ.

Amy Nack appeals a judgment convicting her of delivery of a controlled substance. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We affirm.

The first issue on appeal is whether evidence that Nack gave her boyfriend permission to take some of her methadone from the refrigerator was sufficient to satisfy the delivery element of

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

the offense. 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).

Under WIS. STAT. § 961.01(6) (2007-08), delivery is defined as “the actual, constructive or attempted transfer from one person to another of a controlled substance.” As the circuit court properly instructed the jury, “[a] person can deliver a substance by means other than a physical hand-to-hand transfer.” A person can “use another person, a place or an object to indirectly transfer a substance. The essence is the intent to transfer and the ability to cause that transfer.” *State v. Wilson*, 180 Wis. 2d 414, 422-23, 509 N.W.2d 128 (Ct. App. 1993).

Nack argues that giving someone permission to take an item is a “passive” act that shows only acquiescence, rather than intent to transfer possession of the item. We disagree. Nack had possession of the methadone which she kept in a refrigerator. By affirmatively answering her boyfriend’s request to use her methadone for his back pain, and then telling him that the methadone was located in the refrigerator, Nack directly enabled the boyfriend to find and take the methadone, thereby transferring it to his possession. It is irrelevant whether Nack’s transfer of the methadone to her boyfriend was at his request or was her own idea.

The second issue on appeal is whether the circuit court properly excluded proposed testimony from three separate witnesses to bolster Nack’s trial testimony that, contrary to what Nack said in her statement to police, Nack’s boyfriend actually took the methadone without her permission. Nack appears to concede that the circuit court’s ruling was correct inasmuch as her

statements to the witnesses failed to satisfy the requirements of the statutory hearsay exception for prior consistent statements. She contends that the ruling nonetheless denied her the constitutional right to present a defense.

The right to present a defense through the testimony of favorable witnesses is grounded in the confrontation and compulsory process clauses of the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. See *State v. Pulizzano*, 155 Wis. 2d 633, 645-46, 456 N.W.2d 325 (1990). A defendant's right to present a defense may in some cases require the admission of testimony which would otherwise be excluded under applicable evidentiary rules. See *id.* at 648; see also *State v. Jackson*, 216 Wis. 2d 646, 663, 575 N.W.2d 475 (1998). In order to warrant a new trial, a defendant must show that a violation of the confrontation clause or compulsory due process clause "completely" prohibited him or her from exposing a witness's bias or motive for testifying falsely, or deprived him or her of material evidence so favorable to the defendant's defense as to "necessarily" prevent him or her from having a fair trial. See *United States v. Manske*, 186 F.3d 770, 778 (7th Cir. 1999); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 860-63, 866-71, 872-74 (1982).

The State contends that Nack forfeited her right to appellate review of her constitutional right to present a defense by not raising the issue in the circuit court. We agree that the issue has been forfeited, and reject it on that basis. In addition, we note that Nack was not "completely" prohibited from presenting her defense that her boyfriend took the methadone without her permission because she herself testified to that effect.

IT IS ORDERED that the judgment of conviction is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals