

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 19, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP990-CR

Cir. Ct. No. 2010CF73

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARIO R. KING,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Green Lake County: MARK T. SLATE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Mario King appeals a judgment of conviction for conspiracy to possess cocaine with intent to deliver. King contends that the evidence was insufficient to support the jury verdict and that the circuit court

lacked territorial jurisdiction over him. For the reasons set forth below, we reject both contentions. We affirm.

¶2 The State of Wisconsin charged King, an Illinois resident, with conspiracy to possess cocaine with intent to deliver. According to the complaint, King sold a large quantity of cocaine to a Wisconsin resident who travelled to Chicago to obtain the cocaine. King moved to dismiss for lack of personal jurisdiction. King argued that his only involvement in the alleged conspiracy occurred in Illinois. The court denied the motion, and King was bound over for trial.

¶3 At trial, the State presented evidence of the following. In the summer of 2009, police in Green Lake County, Wisconsin, received a tip that Emil Craig Burmeister was dealing cocaine in the area. As part of the investigation into Burmeister's activities, police received information that King was involved. King and Burmeister are friends, and have known each other since 2006. Burmeister travelled to Chicago approximately every two weeks and obtained cocaine.

¶4 On August 9, 2009, Burmeister and his wife drove from Green Lake County to Chicago to meet with King. In Chicago, King facilitated the sale of a large volume of cocaine to Burmeister. Burmeister was arrested after he returned to Green Lake County, and police recovered 615 grams of cocaine from Burmeister's car. There was testimony that such quantity is inconsistent with personal use. Additionally, Burmeister had in his car a calculator, four cell phones, and an envelope with abbreviations and numerical amounts, indicating orders for cocaine and amounts that had been paid. Burmeister admitted that he intended to distribute the cocaine to others, and pled guilty to drug charges.

¶5 At the close of the State’s evidence, King moved for a directed verdict. He argued that there was no evidence of an agreement between King and Burmeister as to Burmeister’s intent to deliver the cocaine to other parties. The circuit court denied the motion. The jury found King guilty and the circuit court entered a judgment of conviction. King appeals.

¶6 King argues that the evidence at trial was insufficient to establish either: (1) that King entered into a conspiracy with Burmeister; or (2) that Wisconsin has jurisdiction over King. We address those arguments in turn.

¶7 King argues that the State presented no evidence that King either intended that Burmeister deliver the cocaine to third parties or that King entered into an agreement with Burmeister for him to deliver the cocaine to third parties. *See* WIS. STAT. § 939.31 (charge of conspiracy requires proof of intent that a crime be committed; an agreement with another for the purpose of committing that crime; and an act toward committing the crime). King cites *State v. Cavallari*, 214 Wis. 2d 42, 50, 571 N.W.2d 176 (Ct. App. 1997), for the proposition that, to prove conspiracy in a drug dealing context, “the State must present evidence that an agreement existed between the seller and the buyer that the buyer will deliver at least some of the controlled substances to a third party.” King argues that, under *Cavallari*, evidence that King sold a large quantity of cocaine to Burmeister was insufficient to prove a conspiracy.

¶8 King acknowledges that the charge in *Cavallari* was conspiracy to deliver, and that King was charged with conspiracy to possess with intent to deliver. King argues, though, that to establish that a seller entered a conspiracy with a buyer—either to deliver or to possess with intent to deliver—the State must prove the same intent on the part of the seller; that is, intent that the buyer will

deliver to third parties. King argues that the only evidence at trial was of the single sale of cocaine, which *Cavallari* holds is insufficient to show a conspiracy.

¶9 The State asserts that *Cavallari* is not controlling because the charged crime was conspiracy to deliver rather than conspiracy to possess with intent to deliver. The State asserts that, here, it needed to prove only that King intended for Burmeister to possess the cocaine with intent to deliver, and the jury could infer that the cocaine was intended by Burmeister for delivery based on the quantity, under the possession with intent statute. *See* WIS. STAT. § 961.41(1m) (2013-14)¹ (in a charge of possession with intent to deliver, intent may be inferred from the quantity and value of drugs possessed). We agree with the State.

¶10 Whether King's sale of cocaine to Burmeister constituted a conspiracy under WIS. STAT. § 961.41(1x) is a question of law which this court reviews de novo. *See State v. Smith*, 189 Wis. 2d 496, 501, 525 N.W.2d 264 (1995). However, in our review of the sufficiency of the evidence to support a conviction, we “may not substitute [our] judgment for that of the trier of fact 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. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

¶11 In *Cavallari*, we addressed the sufficiency of the evidence to show a conspiracy to deliver a controlled substance. We held that “mere knowledge by the supplier of the purchaser's intent to further distribute the contraband is not

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

enough. Rather, the evidence must show an agreement between the parties.” *Cavallari*, 214 Wis. 2d at 52-53 (emphasis omitted). We followed the reasoning of the Seventh Circuit that:

A seller of narcotics in bulk surely knows that the purchasers will undertake to resell the goods over an uncertain period of time, and the circumstances may also warrant the inference that a supplier or a purchaser indicated a willingness to repeat. But a sale or a purchase scarcely constitutes a sufficient basis for inferring agreement to cooperate with the opposite parties for whatever period of time they continue to deal in this type of contraband, unless some such understanding is evidenced by other conduct which accompanies the transaction.

Id. at 52 (quoting *United States v. Townsend*, 924 F.2d 1385, 1392 (7th Cir. 1991)).

¶12 Applying that standard, we determined that there was sufficient evidence at trial to support Cavallari’s conviction for conspiracy to deliver a controlled substance. *Id.* at 53-54. We explained that “the conduct surrounding the transactions constitutes a sufficient basis for inferring an agreement between Cavallari and [the buyer] to deliver drugs to third parties.” *Id.* at 53. We cited evidence of the following: (1) the buyer and Cavallari engaged in a series of monthly sales of marijuana in quantities of a pound or more at a time; (2) the arrest of the buyer interrupted a contemplated sale of at least four pounds of marijuana, which a trier of fact could infer was inconsistent with personal use; and, “most importantly,” (3) Cavallari “fronted” the marijuana to the buyer, and the buyer would pay Cavallari from the proceeds. *Id.* at 53-54.

¶13 We conclude that *Cavallari* does not apply to this case. In *Cavallari*, we addressed the evidence necessary to establish an agreement between the seller and buyer that the buyer *would deliver* the purchased drugs to third

parties. Here, we must determine the evidence necessary to establish an agreement between the seller and buyer that the buyer would *possess with intent to deliver* the purchased drugs to third parties. While *Cavallari* holds that more than a single sale of a large quantity of a controlled substance is necessary to show a conspiracy to deliver, the same does not hold true for a conspiracy to possess with intent to deliver. While a delivery conviction requires evidence of the act of delivering the drugs, a conviction for possession with intent requires only the act of possessing with the requisite intent, and intent may be inferred from the quantity of the drugs possessed. WIS. STAT. §§ 961.41(1) and (1m). Thus, the sale of a large quantity of drugs supports the inference that the seller intended that the buyer possess the drugs with intent to deliver, and that the seller entered into an agreement with the buyer for the buyer to commit that crime.

¶14 Here, the evidence at trial supported the finding that King sold a large quantity of cocaine to Burmeister.² This supported the inference that King intended that Burmeister would possess the cocaine with intent to deliver it, and that King entered into an agreement with Burmeister that Burmeister would possess the cocaine with intent to deliver it. Therefore, Burmeister committed the

² The State also argues that, if *Cavallari* does apply, there was sufficient evidence of the type of ongoing drug-dealing relationship between King and Burmeister that *Cavallari* contemplated. See *State v. Cavallari*, 214 Wis. 2d 42, 53-54, 571 N.W.2d 176 (Ct. App. 1997). The State asserts that there was trial evidence that King referred to Burmeister as “his guy” and that Burmeister had wired money to the mother of King’s child. However, the testimony the State cites actually shows the following. The State asked King’s cousin, Jesse Montesdeoca, whether Montesdeoca recalled telling police that King referred to Burmeister as “his guy”; Montesdeoca answered “No, I don’t remember anything like that.” The State asked Montesdeoca whether he remembered telling police that he would wire money for Burmeister to the mother of King’s child, and Montesdeoca answered “No, I do not remember.” The court interrupted and asked Montesdeoca whether he remembered talking to the police, and Montesdeoca said “No, no. I have a real bad memory, sir, and—” The court then cut off the questioning as to what Montesdeoca told police. The State does not argue that it introduced that evidence in any other manner, in the form of impeachment evidence or otherwise.

crime of possession with intent to deliver, and the evidence was sufficient to support the conspiracy conviction.

¶15 King also argues that Wisconsin lacked jurisdiction over him because King's only action was to sell the cocaine to Burmeister in Chicago. King argues that there was no evidence that King intended for Burmeister to distribute the cocaine in Wisconsin. *See* WIS. STAT. § 939.03(1)(b) ("A person is subject to prosecution and punishment under the law of this state if ... [w]hile out of this state, the person ... conspires with ... another to commit a crime in this state."). As we explain above, the evidence was sufficient to show a conspiracy between King and Burmeister for Burmeister to commit the crime of possession with intent to deliver. Additionally, there was evidence at trial that King and Burmeister had known each other since 2006, and that King had visited Burmeister in the Green Lake County area. The evidence of the conspiracy to commit possession with intent to deliver, together with evidence that King knew that Burmeister resided in Green Lake County, Wisconsin, was sufficient to establish that King conspired with Burmeister to commit the crime in Wisconsin. We affirm.

By the Court.—Judgment affirmed.

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

