

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 4, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 99-0072-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JEFFREY L. WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
STEVEN D. EBERT, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

¶1 PER CURIAM. Jeffrey Williams appeals from a judgment convicting him of possessing cocaine with intent to deliver it, and obstructing an officer. The issue is whether the trial court erred by refusing his request for a jury

instruction on simple possession, a lesser-included offense of possession with intent to deliver. We affirm.

¶2 The trial court should instruct the jury on a lesser-included offense only when there are reasonable grounds in the evidence, both for acquittal on the greater charge and for conviction on the lesser offense. See *State v. Kramar*, 149 Wis.2d 767, 792, 440 N.W.2d 317, 327 (1989). Reasonableness is the key and there must be relevant and appreciable evidence to support submission of the lesser-included offense. See *State v. Fleming*, 181 Wis.2d 546, 560-61, 510 N.W.2d 837, 842 (Ct. App. 1993). Whether the evidence permits instructing on a lesser-included offense is a question of law, that we decide without deference to the trial court. See *Kramar*, 149 Wis.2d at 791, 440 N.W.2d at 327.

¶3 Here, the State showed that a police officer observed Williams riding his bike around a Madison neighborhood known for drug and gang activity, briefly meeting and speaking with several people over an hour and twenty-minute period. At least one of the meetings involved a transaction of some sort, in the officer's opinion. The officer then alerted two colleagues to possible drug dealing by Williams. When they began walking toward his location, they heard warning whistles, similar to those customarily given by lookouts to warn dealers of approaching police. Williams reacted to the whistles by riding his bike to a different location. The two officers nevertheless located him, and when they attempted to detain him, he fled. The officers caught, arrested and searched him, and found \$65 in a pocket of his pants, and fourteen individually bagged "rocks" of cocaine hidden in his groin area. Each rock weighed slightly more than .1 gram, with a total weight of 1.68 grams and a total street value approaching \$280. Officers found no drug paraphernalia on Williams, not even matches, and no

physical signs of frequent crack cocaine use, such as burned or blackened areas around the mouth.

¶4 Williams testified, and he admitted to possessing the cocaine. He asserted, however, that he was in the area merely to socialize and to buy drugs, not to sell them. He stated that he was an addict and consumed twelve to twenty rocks of crack cocaine per day. He added that he paid \$80 for the fourteen rocks found on him, plus one he had already consumed, from money given him in advance for his birthday nine days later. He further testified that the remaining fourteen rocks were for his use that night, and that he spent as much as \$120 per day for his drug habit. He denied dealing drugs. However, he did not identify any source of income that allowed him to spend more than \$100 a day on drugs.

¶5 Testifying from training and experience, the officer who observed Williams that night stated that drug dealers in that area frequently used bicycles and tended to linger in the neighborhood, while purchasers quickly entered and left the area. She also testified that dealers did not always carry large amounts of money and kept their product individually bagged, whereas buyers had no need nor motive to do so. Another officer testified from experience that crack cocaine users rarely had the money to buy as much as 1.68 grams of cocaine at one time.

¶6 In short, the State presented overwhelming and largely uncontested eye-witness, physical and expert evidence that Williams possessed 1.68 grams of crack cocaine for the purpose of selling it. His implausible assertion to the contrary, that he was an addict, lingering in the area to socialize, who purchased large quantities of cocaine every day with no identifiable source of income, and never sold any, provided neither a reasonable nor appreciable basis to instruct the jury on simple possession.

By the Court.—Judgment affirmed.

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

