

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 15, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2015AP819-CR

Cir. Ct. No. 2012CF4974

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERMAINE HEART,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. Judgment affirmed.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Germaine Heart appeals a judgment convicting him of possession of THC with intent to deliver, as a party to a crime, and resisting an officer. He argues that there was insufficient evidence to convict him. We affirm.

¶2 We will not overturn a jury’s 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. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citations omitted). “We must examine the record to find facts that support upholding the jury’s decision to convict.” *State v. Hayes*, 2004 WI 80, ¶57, 273 Wis. 2d 1, 681 N.W.2d 203. “[T]he trier of fact is the sole arbiter of the credibility of witnesses and alone is charged with the duty of weighing the evidence.” *State v. Below*, 2011 WI App 64, ¶4, 333 Wis. 2d 690, 799 N.W.2d 95. “If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict.” *Id.*, ¶2. We employ the same standard “whether the verdict is based on direct or circumstantial evidence.” *Id.*, ¶4.

¶3 Heart challenges the sufficiency of the evidence as to his conviction of possession of THC with intent to deliver. A defendant is guilty of that crime if the State proves: (1) the defendant possessed a substance; (2) the substance was THC; (3) the defendant knew the substance was THC; and (4) the defendant intended to deliver the THC. *See* WIS JI—CRIMINAL 6035 (2010); *see also* WIS. STAT. § 961.41(1m)(h)1. Heart does not dispute that there is sufficient evidence that he possessed a substance, that the substance was THC, and that he knew it was THC. Heart contends, however, that there was insufficient evidence to support the jury’s conclusion that he *intended to deliver*, or sell, the THC.

¶4 At trial, Milwaukee Police Officer Troy Johnson testified that he responded to a call for investigation made by Police Officer Zebdee Wilson, who was working undercover. Johnson testified that he pulled into a Walgreen’s parking lot, directly behind the suspect’s car. As he approached the driver’s side

window, he noticed that the driver had a black and silver object in his right hand that looked like a weapon, but turned out to be a scale. Johnson testified that the driver was moving around and fidgeting, acting like he was trying to tuck something up under the seat. Johnson said that he saw a female passenger in the front seat open the glove compartment and put a plastic bag inside that contained a green leafy substance that looked like marijuana. Johnson testified that when the driver saw him, he put his car in reverse and looked around frantically, but realized that he was blocked in by the police car and unable to move. Johnson testified that the driver then attempted to get out of the car and shove past him, but was subdued.

¶5 Officer Wilson testified that he has been a Milwaukee Police Officer for twenty-two years and investigates mid-level and high-level drug traffickers. He explained what a typical parking-lot drug deal looks like based on his professional observations and personal experience. He testified that the seller waits in a parked car until another car comes up. The buyer then approaches the seller's car, the drug sale takes place, and then the buyer leaves the seller's car and returns to his or her own car.

¶6 Wilson testified that on the day Heart was arrested, Wilson was in an unmarked police car when he observed what he believed to be a drug sale. A woman pulled into the Walgreen's parking lot, went over to Heart's car, and got into the back seat. She appeared to hide something. Heart then turned around and handed her something. She stayed in Heart's car for less than a minute. She then returned to her car and drove away. Wilson testified that she came within five feet of him when she walked back to her car, and he noticed that she had a plastic bag in her hand. Wilson then radioed for a marked squad car to investigate.

¶7 Wilson remained undercover at first, but stepped in to assist Johnson when Heart began to struggle with Johnson in an attempt to flee. Wilson testified that they found green leafy material in a large purple bag in the driver's door and in the glove compartment, which tested positive for THC. Wilson testified that they found a silver and black scale disguised as a cell phone, three cell phones, and extra plastic bags. Wilson also testified that Heart was carrying cash in many different denominations.

¶8 In short, the jury heard that Wilson saw a probable drug deal involving Heart, that Johnson responded to investigate, and that Heart attempted to flee when he saw Johnson. The jury also heard that Heart had in his possession THC, a scale, plastic baggies, multiple cell phones, and money in amounts appropriate to make change. This evidence was sufficient to support the jury's conclusion that Heart intended to deliver drugs.

¶9 Heart argues that the prosecutor needed to present expert testimony to show intent. Heart is mistaken. A jury may infer that a defendant has the requisite intent to commit a crime from the facts presented at trial. *See Below*, 333 Wis. 2d 690, ¶4.

¶10 Heart also attacks the sufficiency of the evidence by pointing to purported weaknesses in separate components of the evidence. For example, he contends that no evidence was presented to show what was in the plastic bag Wilson observed in the buyer's hand prior to calling for the marked squad car, and he argues that there was no evidence directly linking Heart to the scales, plastic baggies, and other items indicative of drug dealing in his car.

¶11 When we review the sufficiency of the evidence, we consider the totality of the evidence, rather than each piece of evidence individually and in

isolation from the others. *See State v. Smith*, 2012 WI 91, ¶36, 342 Wis. 2d 710, 817 N.W.2d 410. The *Smith* court explained:

The rational juror would take into account the entire picture presented by the evidence in ascertaining guilt or innocence. Such a juror would not find any single piece of evidence determinative, but would rather consider the evidence in the aggregate. The aggregate is, of course, composed of the individual pieces of evidence; nevertheless, that does not mean ... that the juror must ignore the larger picture so as to focus on each piece in a vacuum and ask whether that piece standing alone supports a finding of guilt. That is not how people seek to determine the truth, whether in a jury room or anywhere else. And that is not how they can most reasonably make the grave determination as to a defendant's guilt.

Id. We reject Heart's argument that the evidence was insufficient to support his conviction based on purported weaknesses in individual components of the evidence.

¶12 Finally, Heart argues that the evidence did not show that he acted as a party to a crime. He contends that no testimony was presented showing a relationship or agreement between him and his female passenger to deliver marijuana. A defendant is guilty of being party to a crime if the defendant is concerned in the commission of the crime by: (1) directly committing it; (2) intentionally aiding and abetting the person who directly committed it; or (3) being a member of a conspiracy to commit the crime. *See WIS JI—CRIMINAL 402* (2005).

¶13 The prosecutor did not need to establish through direct evidence that there was an agreement between Heart and the passenger. A jury's decision that a defendant is guilty as a party to the crime because he aided and abetted the person who directly committed the crime may rest on evidence that is entirely

circumstantial. *See Poellinger*, 153 Wis. 2d at 501-02. The jury may not have been certain whether Heart or his passenger was in charge of the drug sale, but there was evidence presented that they were both there when the sale occurred and both were attempting to conceal the drugs from the police. Moreover, the State did not need to establish that Heart and his passenger were working together because there was sufficient evidence to find Heart guilty of *directly* committing the crime. *See* WIS JI—CRIMINAL 400 (2005) (a person is guilty of a crime charged as a party to a crime if he directly commits it).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

