

Appeal No. 2025AP1539-CR

Cir. Ct. No. 2020CF556

**WISCONSIN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN JONES,

DEFENDANT-APPELLANT.

FILED

**SEPT 08,
2026**

Samuel A. Christensen
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Graham, P.J., Kloppenburg, and Nashold, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2023-24),¹ this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUES

This appeal is certified to address three primary issues. The first issue is the same as that presented in the recent certification in *State v. Bethke*, No. 2025AP1383-CR, Certification (WI App Aug. 4, 2026), namely: Following the legalization of hemp in Wisconsin, does the State need to prove, as an element of the offense, a delta-9 tetrahydrocannabinols (“THC”) concentration of greater than 0.3 percent on a dry weight basis—*i.e.*, that the substance is not “hemp” as

¹ All references to the Wisconsin Statutes are to the 2023-24 version.

defined in WIS. STAT. § 94.55(1)—in order to obtain a conviction for a THC-possession offense? In both this appeal and in **Bethke**, the defendants and amici curiae argue that the answer to this question is yes. The State argues that the answer is no, and that establishing the substance has a delta-9 THC concentration of 0.3 percent or less (*i.e.*, that the substance is hemp) is an affirmative defense that a defendant must prove in order to avoid a conviction for an offense involving possession of THC.²

The certification in **Bethke** thoroughly explains the arguments in favor and against requiring the State to prove a delta-9 THC concentration exceeding 0.3 percent and why a decision on this issue is necessary from our state’s highest court. We need not repeat those explanations here. The second and third issues that this case is being certified to address arise out of the fact that this case has a different procedural posture than **Bethke**.

As set forth in **Bethke**, following the legalization of hemp in Wisconsin, in 2024 the Wisconsin Criminal Jury Instructions Committee modified WIS JI—CRIMINAL 6030 (Possession of a Controlled Substance—WIS. STAT. § 961.41(3g)) to require the State to prove in THC-possession cases that the substance has a delta-9 THC concentration above 0.3 percent. In **Bethke**, the State filed a pretrial motion to modify this recently revised pattern jury instruction, the circuit court denied the State’s motion, and the State filed a petition for leave to appeal the court’s nonfinal order, which this court granted. In the instant case, by

² We are aware of one other appeal currently pending in this court that raises the same issue regarding whether the State is required to prove in a THC-possession case that the substance possessed by the defendant had a delta-9 THC concentration above 0.3 percent. See **State v. Lewis**, No. 2025AP862-CR. Thus, this is an emerging issue that, to date, has been presented in cases pending before at least three of the four districts.

contrast, the defendant Kevin Jones went to trial before the pattern jury instructions were modified, and he appeals his conviction following a jury trial for possession of THC and possession with intent to deliver THC.³ Renewing the argument he made in a postconviction motion, he argues that the circuit court erred in denying his pretrial motion requesting jury instructions that would have placed the burden on the State to prove a delta-9 THC concentration of more than 0.3 percent for the THC charges. He further argues that because the State did not prove the requisite THC concentration, there was insufficient evidence to support the jury's verdicts.

Because of the different procedural posture in this case, two additional issues are raised, issues that, although closely related to the first, were not addressed in *Bethke*. The second issue is as follows: Assuming that the jury instructions for the THC-related charges were incorrect and that the State has the burden of proving a delta-9 THC concentration exceeding 0.3 percent, can circumstantial evidence be relied on to satisfy that burden of proof? Specifically, here the State argues that any error in the jury instructions was harmless because the following circumstantial evidence established that the THC that Jones possessed and intended to deliver had a delta-9 THC concentration exceeding 0.3 percent: Jones's attempts to "evade" the officer when the officer began following Jones's vehicle; the odor of marijuana in Jones's vehicle when the officer approached and Jones's simultaneous denial of any knowledge of marijuana; "shake" and a grinder in a shoebox lid on the front passenger floorboard; "a big gallon bag" containing "a large amount of green leafy substance

³ Jones was also convicted for possession of drug paraphernalia but that charge is not relevant to our discussion in this certification.

that appeared to be marijuana” in the trunk of Jones’s vehicle, along with 19 potting plant bases, a pamphlet for successful “marijuana” growth, a 45-gallon “grow bag,” and a backpack with a beginner’s guide on how to grow “marijuana”; Jones’s admission that the backpack was his while denying any knowledge of the book inside; Jones’s denial of any knowledge about the items in the trunk, claiming that his friend “John”—last name, phone number, and residence unknown—last used his vehicle; Jones’s admission to smoking “marijuana” days earlier; and the crime lab analyst’s testimony that she has tested legal hemp in the past and that Jones’s sample was not consistent with hemp.

Put differently, this second question asks whether the State must prove the delta-9 THC concentration through chemical testing or whether the State may prove this element through circumstantial evidence of the type the State relies on here. Significantly, this issue will likely implicate the body of case law establishing that expert testimony and chemical testing are not always necessary to identify a controlled substance for purposes of the possession statutes. *See, e.g., State v. Wind*, 60 Wis. 2d 267, 272, 208 N.W.2d 357 (1973) (affirming a marijuana conviction in the absence of testing specific for marijuana based on “circumstantial” evidence, namely, expert opinion that the substance was “probably marijuana” and evidence that a police officer “asked [the defendant] for marijuana, and [the defendant] agreed to sell marijuana and charged a price which would indicate it was marijuana”); *State v. Johnson*, 54 Wis. 2d 561, 567, 196 N.W.2d 717 (1972) (“While a chemical analysis may be a more scientific test to determine the nature of a drug, nevertheless as a practical matter in this type of case where the substance has been ingested, no such test is available.... When a chemical analysis is impossible, it need not be shown and if the circumstantial evidence is sufficiently strong, it may support a verdict”); *State v. Anderson*,

176 Wis. 2d 196, 202-03, 500 N.W.2d 328 (Ct. App. 1993) (affirming a marijuana conviction in the absence of chemical testing, noting that “[i]dentification of a controlled substance can be established by such circumstantial evidence as lay experience based on familiarity through prior use, trading, or law enforcement; a high sales price; on-the-scene remarks by a conspirator identifying the substance as a drug; and behavior characteristics of sales and use” (internal quotation marks and quoted sources omitted)).

Assuming that the State has the burden of proving the requisite delta-9 THC concentration, a decision from our highest court will ensure that proper consideration is given to the interplay between that conclusion and the body of case law referenced above. See WIS. STAT. RULE 809.62(1r)(c) (stating that a decision by the supreme court is warranted when it will “help develop, clarify or harmonize the law”).

The third issue is the following: Assuming that a defendant bears the burden of showing as an affirmative defense that the substance is hemp, what quantum of proof must the defendant produce? Jones’s position is that, similar to a claim of self-defense, any such burden would be to show “some evidence” that the substance is hemp, at which point the burden would shift to the State to prove that the substance is not hemp. See *State v. Steinz*, 2017 WI 58, ¶16, 375 Wis. 2d 572, 895 N.W.2d 796. Accordingly, Jones argues that even if THC concentration is an affirmative defense, he satisfied the “some evidence” standard, and the burden therefore shifted to the State to show that the substances found in his vehicle were not hemp.

In contrast, the State argues that the affirmative defense at issue here (“the hemp affirmative defense”) is not like those in which the defendant carries

the burden of production to place the defense at issue, after which the State must disprove the defense. Instead, relying on WIS. STAT. § 961.56(1), which provides that “[t]he burden of proof of any exemption or exception is upon the person claiming it,” the State argues that the hemp affirmative defense operates like those set forth in *State v. McGee*, 2005 WI App 97, ¶16, 281 Wis. 2d 756, 698 N.W.2d 850, or in the mental disease or defect context under WIS. STAT. § 971.15(3). Quoting § 971.15(3), the State argues that the hemp affirmative defense is a defense that “the defendant must establish to a reasonable certainty by the greater weight of the credible evidence.” Resolution of this issue by our supreme court will help develop and clarify the law.

CONCLUSION

As stated in this court’s certification in *Bethke*, “this appeal raises a novel and present legal question as to which party should bear the burden of proving the THC concentration of a substance that is alleged to contain an illegal amount of THC, following the legalization of hemp in Wisconsin.” In addition, this appeal addresses two significant questions not addressed in *Bethke*: If the State has the burden of proving a delta-9 THC concentration exceeding 0.3 percent, may it do so through circumstantial evidence rather than through chemical testing? And if the defendant has the burden of proving a delta-9 THC concentration of 0.3 percent or less as an affirmative defense, what quantum of evidence must the defendant produce?

The three primary issues presented in this certification are significant and unsettled; of statewide importance; and likely to recur in future cases.⁴ *See* WIS. STAT. RULE 809.62(1r)(c). We therefore respectfully certify this appeal to the Wisconsin Supreme Court to provide much-needed guidance to Wisconsin litigants, attorneys, circuit courts, and this court.

⁴ This appeal also includes several additional issues that would benefit from consideration by our supreme court, assuming a decision is still necessary on these topics after deciding the three primary issues. These issues include: whether there was sufficient evidence for the simple THC possession conviction given that the marijuana “shake” found in the vehicle was not tested or shown to the jury; whether Jones’s double-jeopardy rights were violated because the jury could have based its conviction for simple possession on the same marijuana found in the vehicle’s trunk that formed the basis for the intent to deliver charge rather than basing its conviction on the marijuana shake found on the vehicle’s front floorboard; whether a new trial should be ordered in the interest of justice on grounds that Jones’s right to a unanimous verdict was violated because some of the jurors could have convicted him of simple possession based on the marijuana found in the trunk while other jurors could have based their conviction on the marijuana shake; whether the evidence was insufficient to show an intent to deliver; and whether Jones forfeited any of these arguments.

