COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3462-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT F. MIDTHUN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County: PATRICK J. TAGGART, Judge. *Affirmed.*

Before Eich, Roggensack and Deininger, JJ.

PER CURIAM. Robert Midthun appeals his conviction for possession of cocaine with intent to deliver, after trial by jury. The police stopped along the road to help Midthun and two others who were changing a tire. The police asked for identification and found an outstanding arrest warrant for one of Midthun's companions. The police then saw Midthun drop two, one-eighth-ounce

cocaine packets to the ground, each valued at $230 to $270. On appeal, Midthun attacks the trial court's admission of expert testimony by a police detective used to prove Midthun's intent to deliver. The detective testified that Midthun possessed a quantity of cocaine typically carried for resale rather than for use. Midthun argues that this testimony was not admissible expert testimony on the issue of intent to deliver. Midthun also argues by implication that such testimony, as inadmissible evidence, was likewise insufficient to prove his intent to deliver the cocaine beyond a reasonable doubt. We reject these arguments and affirm his conviction.

Trial courts have the discretion to admit expert testimony if it is relevant and given by a qualified expert. *See* ***State v. Walstad***, 119 Wis.2d 483, 516, 351 N.W.2d 469, 487 (1984); ***State v. Morgan***, 195 Wis.2d 388, 416-17, 536 N.W.2d 425, 435 (Ct. App. 1995). Here, the detective's testimony met both the relevance and qualifications tests. First, the detective explained how most cocaine users would not carry such a large amount of cocaine, except for resale. He said the typical user dosage was one-tenth of a gram. Midthun's divergence from typical cocaine-user behavior had direct relevance to his intent to deliver. Second, the detective had enough law enforcement experience to know the typical cocaine-carrying habits of cocaine users and dealers, in terms of the varying quantity of drugs they normally carried. The detective had personally bought, in an undercover capacity, large and small amounts of cocaine, and he knew firsthand who usually carried what amounts. He testified to have posed as a dealer by buying eighth-ounce packets; he stated that the one-eighth-ounce quantity was a common dealer purchase quantity. We see no erroneous exercise of discretion in the admission of the detective's testimony.

We also conclude that the detective's testimony was sufficient to permit the jury to infer Midthun's intent to deliver. The prosecution had a duty to prove all elements of the crime beyond a reasonable doubt. *See* ***State v. Zanelli***, 212 Wis.2d 358, 374, 569 N.W.2d 301, 308 (Ct. App. 1997). Here, the detective explained that most cocaine users have limited purchasing power and seldom have such large amounts of cocaine in their possession. They usually buy and then consume smaller dosages, one-tenth of a gram being the typical dosage. On the other hand, cocaine sellers usually have the financial means to carry larger amounts of the drug. This was enough evidence for the jury to infer intent to deliver beyond a reasonable doubt. The quantity of a drug in the possession of a defendant is an indicator of intent to deliver. *See* ***State v. Trimbell***, 64 Wis.2d 379, 386, 219 N.W.2d 369, 372 (1974). Although a jury was free to reject this evidence and not infer intent to deliver, they did not do so. The jury had the duty of judging the credibility of witnesses and the weight to be given to their testimony. It could reasonably find, without a reasonable doubt, that the quantity Midthun possessed proved that he intended future delivery. Therefore, we conclude there is no basis upon which to grant Midthun a new trial.[1]

By the Court.—Judgment affirmed.

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

[1] Midthun argues that the prosecution introduced none of the evidence traditionally probative of intent to deliver, such as drug money, scales, packaging materials, or cutting tools. In his view, the jury needed evidence of this kind before it could convict Midthun. While such evidence is classic proof of intent to deliver, it is not exclusive. We believe that the quantity of evidence was also sufficient.