COURT OF APPEALS
DECISION
DATED AND FILED

January 19, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-1660-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICHOLAS DESANTOS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: HAROLD V. FROEHLICH, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Nicholas Desantos appeals a judgment convicting him of conspiring to possess with intent to deliver more than 2,500 grams of marijuana. He argues that the evidence is insufficient to support the finding that

the amount he possessed was greater than 2,500 grams. Because the evidence at trial was sufficient to support the verdict, we affirm the judgment.[1]

¶2 The jury accepted the State's contention that Desantos was part of a group who cooperated in distributing large amounts of marijuana. On appeal, Desantos argues that the evidence showed that he purchased only small quantities primarily for personal use and that only a smaller portion of what he purchased was distributed to others. Thus, he maintains the evidence failed to show that the amount involved was greater than 2,500 grams as charged. We conclude that the jury was not required to accept Desantos's view of the facts.

¶3 Desantos faces a heavy burden challenging his conviction on the basis of insufficient evidence.[2] "It is essential to emphasize initially that the question whether there existed sufficient evidence to establish a single conspiracy is one of fact for the jury to decide." ***United States v. Dickey***, 736 F.2d 571, 581 (10th Cir. 1984). We may not reverse a criminal conviction unless the evidence, viewed most favorably to the jury's verdict, is so insufficient in probative value that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

[1] Desantos does not challenge additional convictions for possession of marijuana and maintaining a drug house.

[2] The State argues that Desantos waived his challenge to the sufficiency of the evidence because he failed to request the multiple conspiracy jury instruction. It cited three cases involving waiver of (1) objections to evidence; (2) a challenge based on omitted jury instructions; and (3) an objection to evidence accompanying the jury in its deliberations. None of the cases that the State cited had to do with waiver of a challenge based on sufficiency of the evidence. Accordingly, we reject its waiver argument.

¶4 We "need not concern [ourselves] in any way with evidence which might support other theories of the crime." ***Id***. at 507. We need only decide whether the theory of guilt accepted by the jury is supported by sufficient evidence to sustain the verdict rendered. ***Id***. at 508. Matters of weight and credibility of evidence are left to the jury, and where the evidence supports more than one reasonable inference, the reviewing court must accept the inference drawn by the jury. *See* ***Staehler v. Beuthin***, 206 Wis. 2d 610, 557 N.W.2d 487 (Ct. App. 1996). As a result, we view the evidence and draw all inferences in the light most favorable to the State and the conviction.

¶5 The record discloses that between January and the end of September 1997, Desantos had four roommates with whom he shared expenses. Desantos knew one of the roommates, Erik Kolda, age twenty-one, for years and had purchased marijuana from him before they began living together. Kolda's only income was derived from marijuana sales. Although Kolda did not have a job, he purchased a Jeep Grand Cherokee in May of 1997.

¶6 Kolda testified that he sold marijuana from the time he was a sophomore in high school, but after he moved in with Desantos "[i]t just kind of snowballed." His source was a friend in Madison named Liebig, and he would regularly go to Madison, purchase an average of eight pounds a month on credit, cut it into smaller quantities, weigh it out and put it in a safe at the residence he shared with Desantos. Kolda would sell smaller quantities on credit to Desantos and others and, when his inventory was gone, he would bring the proceeds of the sales back to Liebig and purchase another quantity of marijuana on credit. This routine continued the entire time Desantos lived with Kolda.

¶7 Kolda sold an average of one and one-half ounces of marijuana on credit each week to Desantos.[3] Kolda kept the marijuana supply, scales, baggies, cash and a ledger in a safe in the basement near the washer and dryer. Desantos would come downstairs to get marijuana from him. Kolda testified that he observed Desantos sell it to friends and then give Kolda the money. Kolda estimated he observed between twenty and forty such transactions. As time progressed, Desantos purchased more frequently and in greater quantities. The most Kolda saw Desantos sell was two ounces at one time.

¶8 Kolda also "fronted" marijuana to another roommate, Jason Perrault, who also sold it to others. Marijuana was used in the house by "everybody" on a "daily basis." Stephanie Tapelt, a fourth roommate, testified that she observed "a lot of people" smoking marijuana at their residence. She described their living situation in the following way: "The phone calls, the people coming over, it was very stressful."

¶9 Desantos testified in his own defense. He claimed that he only purchased marijuana from Kolda for personal use and never sold to anyone. He claimed he never saw Kolda deliver marijuana to anyone other than himself. He testified he did not know the safe was in his basement near the washer and dryer. He further testified that he worked at a car wash and was not home much. Although he earned only approximately $500 per month net, he claimed to spend $360 a month on marijuana. His share of the rent was $120 a month, and he paid the phone bill as his contribution to utilities.

[3] There was testimony at the trial from which the jury could find that this amount was greater than an amount needed for personal use.

¶10 The jury rejected Desantos's testimony and found him guilty of conspiring with intent to deliver more than 2,500 grams of marijuana, contrary to WIS. STAT. § 961.41(1m)(h) and (1x) (1997-98).[4] Sentence was withheld, and Desantos was placed on probation for ten years to be served concurrently with other sentences.

¶11 "[A]ccording to § 939.31, the elements of the crime of conspiracy are: (1) an agreement between the defendant and at least one other person to commit a crime; (2) intent on the part of the conspirators to commit the crime; and (3) an act performed by one of the conspirators in furtherance of the conspiracy." ***State v.***

[4] WISCONSIN STAT. § 961.41 (1m)(h) and (1x) (1997-98) provide:

> (1m) POSSESSION WITH INTENT TO MANUFACTURE, DISTRIBUTE OR DELIVER. Except as authorized by this chapter, it is unlawful for any person to possess, with intent to manufacture, distribute or deliver, a controlled substance or a controlled substance analog. Intent under this subsection may be demonstrated by, without limitation because of enumeration, evidence of the quantity and monetary value of the substances possessed, the possession of manufacturing implements or paraphernalia, and the activities or statements of the person in possession of the controlled substance or a controlled substance analog prior to and after the alleged violation. Any person who violates this subsection with respect to:
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> ….
>
> (h) Tetrahydrocannabinols, included under s. 961.14 (4) (t), or a controlled substance analog of tetrahydrocannabinols, is subject to the following penalties if the amount possessed, with intent to manufacture, distribute or deliver, is:
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> ….
>
> 3. More than 2,500 grams, or more than 50 plants containing tetrahydrocannabinols, the person shall be fined not less than $1,000 nor more than $100,000 and shall be imprisoned for not less than one year nor more than 10 years.
>
> ….
>
> (1x) CONSPIRACY. Any person who conspires, as specified in s. 939.31, to commit a crime under sub. (1) (cm) to (h) or (1m) (cm) to (h) is subject to the applicable penalties under sub. (1) (cm) to (h) or (1m) (cm) to (h).

West, 214 Wis. 2d 468, 476, 571 N.W.2d 196 (Ct. App. 1997).[5] "Criminal conspiracies are by their very nature covert. … A conspiratorial agreement may be demonstrated by circumstantial evidence." ***State v. Cavallari***, 214 Wis. 2d 42, 51, 571 N.W.2d 176 (Ct. App. 1997). "The agreement need not be an express agreement; rather, a mere tacit understanding of a shared goal is sufficient." ***State v. Seibert***, 141 Wis. 2d 753, 762, 416 N.W.2d 900 (Ct. App. 1987).

¶12 The State need not show direct contact or an explicit agreement between all the conspirators. *See* ***United States v. Kostoff***, 585 F.2d 378, 380 (9th Cir. 1978). It is sufficient to show that each knew or had reason to know of the conspiracy's scope and that the defendant had reason to believe that his own benefits were dependent upon the success of the entire venture. *See* ***id***.

¶13 Based on Kolda's testimony, a reasonable jury could find that Desantos, Kolda and Perrault shared the common goal of maintaining a marijuana inventory for distribution. It also could have found that Desantos and Perrault tacitly agreed with Kolda to use their residence as a storage place for the marijuana inventory. The jury could have reasonably inferred that Kolda, Desantos and Perrault benefited from their cooperative group activity because it helped finance a continuous and convenient marijuana supply for their own use.

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[5] WISCONSIN STAT. § 939.31 (1997-98) defines the crime of conspiracy as follows:

> Except as provided in ss. 940.43 (4), 940.45 (4) and 961.41 (1x), whoever, with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime may, if one or more of the parties to the conspiracy does an act to effect its object, be fined or imprisoned or both not to exceed the maximum provided for the completed crime; except that for a conspiracy to commit a crime for which the penalty is life imprisonment, the actor is guilty of a Class B felony.

¶14 Based upon the conduct surrounding the transactions, the jury could have believed that Kolda, Desantos and Perrault agreed that Kolda would obtain the marijuana on credit and that Desantos, Perrault and others would help finance the purchase by selling smaller quantities and giving the money to Kolda to give to Liebig. To support this finding, the jury could have considered the ongoing nature of the parties' relationships. The facts do not involve a single isolated sale of drugs, but rather a series of regular purchases made on credit over eight months. Desantos and Perrault did not pay Kolda for the marijuana when they obtained it, but instead sold a portion of it and returned the proceeds to Kolda. The evidence that Kolda regularly "fronted" the marijuana to Perrault and Desantos established that they had an understanding to this effect.

¶15 The record permitted a finding that over the course of thirty-five weeks, Kolda distributed approximately sixty pounds of marijuana with the help of Desantos, Perrault and others. Thus, the evidence permitted the jury to reasonably conclude that Desantos tacitly agreed with Kolda to participate in a group that distributed more than 2,500 grams of marijuana.[6]

¶16 Desantos relies on ***United States v. Townsend***, 924 F.2d 1385, 1392 (7th Cir. 1991), and argues that a mere purchase with intent to redeliver fails to show a conspiracy. ***Townsend*** stated:

> A seller of narcotics in bulk surely knows that the purchasers will undertake to resell the goods over an uncertain period, 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

[6] An ounce equals 28.375 grams. Thus, 2,500 grams equals 88.11 ounces. Accordingly, the State was obliged to prove that Desantos conspired to possess with intent to deliver more than 88.2 ounces, or an average of more than 2.52 ounces of marijuana per week.

> 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 1392 (quoting ***United States v. Borelli***, 336 F.2d 376, 384 (2d Cir. 1964) (emphasis omitted)).

¶17 We agree that evidence of an isolated sale is inadequate to establish conspiracy. *See* ***State v. Smith***, 189 Wis. 2d 496, 501, 525 N.W.2d 264 (1995).[7] We further agree that mere knowledge by the supplier of the purchaser's intent to further distribute the contraband is also insufficient. *See* ***Townsend***, 924 F.2d at 1392. Rather, the evidence must show an agreement between the parties. *See* ***id***.

¶18 Here, the parties' conduct evinced more than simply a buyer-seller relationship and more than merely Kolda's knowledge that Desantos would redistribute. Evidence of Kolda's arrangement with Desantos and Perrault in which Kolda would regularly "front" marijuana to them and use the proceeds from their sales to help purchase the next supply establishes a tacit agreement to cooperate in maintaining an inventory for distribution. *See* ***United States Mealy***, 851 F.2d 890, 891 (7th Cir. 1988) ("Even without personal communication, tacit understanding of the usual business arrangements through a long course of conduct between the parties is enough to constitute an agreement.") (citation omitted).

[7] "Nothing in the record suggests that [the defendant] had more than this one transaction with the conspiracy. A buyer does not automatically become a member of the conspiracy. … The prosecution must establish by substantial evidence that the defendant knew the existence and scope of the conspiracy and sought to promote its success." ***United States v. Baker***, 905 F.2d 1100, 1106 (7th Cir. 1990) (citations omitted); *see also* ***United States v. Moran,*** 984 F.2d 1299, 1302-03 (1st Cir. 1993).

¶19 Desantos does not deny that the facts established that he and Kolda arguably conspired to distribute marijuana, but claims that only disconnected multiple conspiracies could have existed between Kolda, himself and others to distribute small quantities. He contends that he could be convicted of conspiracy to possess with intent to deliver only the quantity of marijuana that he alone intended to redeliver, amounting to much less than 2,500 grams.[8]

¶20 Desantos relies on ***Townsend*** and other federal cases that describe a "wheel" conspiracy where "the pattern was 'that of separate spokes meeting at a common center.'" ***Kotteakos v. United States***, 328 U.S. 750, 755 (1946), *see also* ***Townsend***, 924 F.2d at 1391. In this paradigm, Kolda would be the hub of the conspiracy, and Desantos, Perrault and others would be separate spokes. For a wheel conspiracy to exist, the spokes "must have been aware of each other and must do something in furtherance of a single illegal enterprise …. Otherwise, the conspiracy lacks the rim of the wheel to enclose the spokes." ***United States v. Levine***, 546 F.2d 658, 663 (5th Cir. 1977) (citations omitted). Desantos argues that the State failed to prove the "rim" of the wheel and thus failed to prove that Desantos was part of a single conspiracy to distribute more than 2,500 grams.

¶21 Desantos's analytical approach is unconvincing. As the seventh circuit observed in ***Townsend***: "The fact that we can squeeze a group into a hypothetical organizational chart says little about whether a single agreement exists between the members of the group." ***Id***. at 1392. The fifth circuit has declared: "Although diagrams and charts of conspiracies as either 'wheels' or 'chains' were once

[8] Desantos argues that assuming he made three one-half ounce purchases every week for a total of 105 purchases, the evidence would support a finding that he purchased only 1,488 grams and redistributed less.

important in analyzing this criterion, this court has moved away from a structural and formal examination of the criminal enterprise." ***United States v. Morris***, 46 F.3d 410, 415 (5th Cir. 1995) (footnote omitted). It further stated: "Finding that they impede rather than facilitate analysis of the 'single conspiracy-multiple conspiracy' issue, we eschew utilization of figurative analogies such as 'wheels,' 'rims' and 'hubs,' which are often used to describe the nature of complex conspiracies." ***Id***. at 416 n.2.

¶22 Accordingly, we reject Desantos's argument that because the State has failed to prove the rim of the wheel, it demonstrated only a buyer-seller relationship between Kolda and Desantos involving small quantities of marijuana. Desantos fails to demonstrate any requirement that every member must participate in every transaction to find a single conspiracy. In ***Morris***, the fifth circuit observed that parties who knowingly participate with core conspirators to achieve a common goal may be members of an overall conspiracy. ***Id***. at 416.

> A single conspiracy exists where a "key man" is involved in and directs illegal activities, while various combinations of other participants exert individual efforts toward a common goal. The members of a conspiracy which functions through a division of labor need not have an awareness of the existence of the other members, or be privy to the details of each aspect of the conspiracy. (Citations omitted.)

¶23 Although Desantos attempts to characterize himself merely as a customer and not part of a larger distribution network, his characterization is one the jury rejected. The question whether the evidence established a conspiracy to possess with intent to deliver more than 2,500 grams of marijuana is one of fact for the jury:

> Common knowledge, interdependence, shared purpose and the other ingredients of a conspiracy are matters of degree. Almost everything in such a case depends upon the context and the details. The evaluation of the facts is entrusted largely to the jury.

United States v. Moran, 984 F.2d 1299, 1303 (1st Cir. 1993).

¶24 Based upon our scope of review, we must view the evidence and draw all inferences in the light most favorable to the State and the conviction. The evidence permitted the jury to infer that because a continual stream of marijuana was constantly available, Desantos knew that he was a participant in a wide ranging venture, the success of which depended not only on his performance but also on that of several others. As a result, the jury could find a tacit agreement between Desantos, Kolda, and Perrault to cooperate in the possession with intent to deliver more than 2,500 grams of marijuana and find further that Desantos and Perrault sold smaller quantities of marijuana to help accomplish that common goal.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(2)(b)5.