COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3274

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ALBERT G. HOLMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: KITTY K. BRENNAN, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Albert G. Holman appeals, following a jury trial, from a judgment of conviction for possession of a controlled substance (cocaine) with intent to deliver as a party to a crime, second or subsequent offense, within 1,000 feet of a school, contrary to WIS. STAT. §§ 961.41(1m)(cm)2, 939.05,

961.48, 961.49(2)(a) (1997-98).[1] Holman argues that the evidence was insufficient to establish that the offense occurred within 1,000 feet of a school, and that the trial court erred in denying his request for the voluntary intoxication instruction. We affirm.

I. BACKGROUND

¶2 The relevant facts are undisputed. At approximately 2:00 a.m. on March 27, 1998, Milwaukee police stopped a car Holman was driving. Prior to exiting the squad car, Officer Christopher Blaszak saw the passenger in Holman's car throw a plastic bag and a film canister out the passenger-side window. Officer Blaszak retrieved the bag, which contained thirty-five chunks of crack cocaine, and the canister, which contained eight or nine rocks of crack cocaine. The car's passenger was Holman's brother, Troy Holman, who was then arrested.

¶3 Officer Blaszak then ordered Albert Holman to step out of the car. After Holman exited, Officer Blaszak found nine corner cut baggies of cocaine and $1,579 stuffed in the driver's side of the car seat. Police also found a pager on Albert Holman.

¶4 After being taken into custody, Albert Holman gave a statement to Detective James Bizub. Detective Bizub testified that he met with Holman at approximately 7:00 a.m. on March 27, and that Holman was cooperative and coherent. Detective Bizub said that prior to taking Holman's statement, he asked him whether he was on any medication. Holman told Detective Bizub that he was taking prescription medication for an ear infection. He also told him that he had

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

consumed alcohol the night before his arrest, but had not used any other drugs. Detective Bizub stated that Holman did not appear intoxicated.

¶5 Albert Holman testified, however, that he was intoxicated at the time of the interview. He testified that earlier that evening he had been drinking heavily at a friend's house, consuming at least a six-pack of beer, that he had taken his prescribed medication, and that he also had taken Benadryl and smoked marijuana and cocaine. When shown the statement taken by Detective Bizub, Holman acknowledged that it bore his signature, but denied having any recollection of making the statement.

¶6 Albert Holman also detailed the events of the evening. He said that after he left a friend's house, he returned home to get some money and then went to Potawatomi Bingo and Casino Hall, where he played the slot machines until just after midnight. After winning approximately $1,800, he left Potawatomi and picked up his brother, Troy. Holman said that Troy wanted to go out for food so he agreed to drive him to a restaurant. On the way to the restaurant, Holman heard the police siren and pulled over. Holman explained that if he had not been stopped by the police, he would have gone to the restaurant, and then to another friend's house where he hoped to meet a woman he knew and others with whom he would share his cocaine.

II. ANALYSIS

¶7 Holman first argues that the evidence was insufficient to prove beyond a reasonable doubt that the offense occurred within 1,000 feet of a school. We disagree.

¶8 We review a challenge to the sufficiency of evidence to determine whether the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value and force 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. ***State v. Ray***, 166 Wis. 2d 855, 861, 481 N.W.2d 288 (Ct. App. 1992). The credibility of the witnesses and the weight of the evidence are for the trier of fact; we review the evidence in the light most favorable to the verdict, drawing inferences from the evidence that support the verdict if more than one reasonable inference can be drawn. ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). We are not concerned with evidence that might support other theories of the crime; we decide only whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence. *See* ***id.*** at 507. On appeal, this court must accept the reasonable inferences drawn from the evidence by the jury. ***Id.*** Applying these standards, we conclude that sufficient evidence supported the jury's finding that Holman's offense occurred within 1,000 feet of a school.

¶9 Kenneth Huber, an engineering technician with the City of Milwaukee, testified that Notre Dame Middle School was 800 feet from the crime scene. Huber authenticated a map, dated September 1998, showing the location of the school and the location of Holman's arrest. Holman argues that this testimony does not prove that the school existed at the time of the crime, approximately six months before the date of Huber's testimony and the date marked on the map. Holman contends that "[f]or all anyone knows, perhaps shortly before the trial and long after the offense allegedly occurred, someone converted an old warehouse into a school." But no evidence in the trial suggested that, six months earlier, the school was not at the location indicated on the map. Huber's testimony clearly established the existence and location of the school; the jury could have logically

inferred and concluded beyond a reasonable doubt that the school existed at that location at the time of Holman's arrest.

¶10 Additionally, Holman implicitly conceded that the school existed at that location at the time of his arrest. First, in his opening statement, Holman's counsel stated that the sole issue for the jury was whether Holman had the intent to deliver or sell the cocaine. He advised the jury that Holman:

> admits that some of the cocaine on him was for his personal consumption by him. We're being very frank with you in saying that because we know that that's a crime, too. We're, frankly, admitting that he was possessing some of the cocaine, but not that he was planning to sell it.

Cf. ***United States v. Hart***, 729 F.2d 662, 664 n.5 (10th Cir. 1984) ("Defendant also appears to argue that there was insufficient evidence to prove that the firearms seized in the search of the motor home traveled through interstate commerce. . . . However in his opening statement to the jury, defendant's trial counsel conceded this point.").

¶11 Next, during cross-examination of Huber, defense counsel questioned only the distance of the school from the crime scene, not the school's existence at that location at the time of Holman's arrest. And finally, in his closing argument, defense counsel noted: "It's also undisputed . . . that the place of arrest was also within the [sic] thousand feet of the school as the map indicates. We're not disputing that either." Thus, having acknowledged the school's existence and location, Holman cannot now reasonably argue that the jury did not have sufficient evidence to convict him of committing a crime within 1,000 feet of a school. *See* ***Struzik v. State***, 90 Wis. 2d 357, 365-66, 279 N.W.2d 922 (1979) (existence of a fact at one time permits the inference that the fact existed at a previous time).

¶12 Holman next argues that, based on his testimony that he had consumed at least six beers, had taken prescription medication for an ear infection, had ingested Benadryl, and had smoked marijuana and cocaine, the trial court should have granted his request for the voluntary intoxication instruction. Holman concedes, however, that his testimony that he intended to visit friends and share cocaine with them negates the applicability of an intoxication defense to his *intent* to deliver. Still, he asserts that the defense applied to the *amount* of cocaine he intended to share. He explains, "The focus is on the amount, and the intoxication defense pertained to the question of whether [he] intended to deliver that large of an amount or whether he was too intoxicated to form any intent other than to share a small amount of cocaine with a woman."

¶13 Apparently, Holman misunderstands the law. Conceding that he was not too intoxicated to form the requisite *intent*, but arguing that he was "too intoxicated to form any intent other than to share a small amount of cocaine," Holman implies that whether one commits possession with intent to deliver depends on the *amount* one intends to deliver. Obviously, it does not, and Holman offers no authority to suggest otherwise.

¶14 As we have noted:

> It is well established that a trial court has wide discretion in instructing the jury based on the facts and circumstances of each case…. When we review a discretionary decision, we test whether the trial court rationally applied the appropriate legal standard to the relevant facts before it.

State v. Wenger, 225 Wis. 2d 495, 502-03, 593 N.W.2d 467 (Ct. App. 1999) (citations omitted). Pursuant to WIS. STAT. § 939.42(2)[2], to be entitled to the voluntary intoxication instruction, a defendant must establish "that degree of complete drunkenness which makes a person incapable of forming intent to perform an act or commit a crime…. [T]hat means he was utterly incapable of forming the intent requisite to the commission of the crime charged." ***State v. Guiden***, 46 Wis. 2d 328, 331, 174 N.W.2d 488 (1970).

¶15 In light of the evidence establishing that Holman knew he possessed cocaine and intended to share it with others, the trial court properly denied his request for the voluntary defense instruction. Holman testified that he intended to deliver cocaine to another person or persons, and therefore, negated any claim that voluntary intoxication precluded him from forming the necessary intent to commit the crime. Specifically, Holman testified that if the police had not intervened, he planned to drop off his brother at the restaurant, and go to a friend's house and share his cocaine with unidentified friends and with a female companion.

¶16 As the State aptly notes:

> Holman's testimony flatly negated his claim that voluntary intoxication prevented him from forming the intent to distribute a controlled substance. Before and at the time of his arrest, Holman had a definite and ongoing plan: to find a female, share his cocaine with her, and smoke it together.

[2] WISCONSIN STATUTE § 939.42(2), in part, provides: "**Intoxication.** An intoxicated or drugged condition of the actor is a defense only if such condition: …**(2)** Negatives the existence of a state of mind essential to the crime, except as provided in s. 939.24 (3)."

Clearly this admission negated his claim that voluntary intoxication prevented him from forming the intent to distribute a controlled substance. *See* ***State v. Holt***, 128 Wis. 2d 110, 127, 382 N.W.2d 679 (Ct. App. 1985) (defendant's "own description of his activities on the night in question as well as the undisputed testimony of those who observed [defendant] that evening failed to evidence the impairment necessary to create a jury issue on intoxication").

By the Court.—Judgment affirmed.

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