

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 31, 2001**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

**No. 00-3066-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**THOMAS R. TISHER,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment and an order of the circuit court for Brown County: RICHARD D. DIETZ, Judge. *Affirmed.*

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

¶1 PER CURIAM. Thomas Tisher appeals a judgment convicting him of conspiracy to deliver less than five grams of cocaine. He also appeals an order denying his motion to conform the judgment to the jury verdict, that is, to enter a judgment of acquittal. Because we conclude that the judgment is consistent with the jury verdict, we affirm the judgment and order.

¶2 During the jury instructions conference, the trial court suggested a form of verdict that would ask the jury whether Tisher was guilty of conspiracy to deliver cocaine and whether the amount of cocaine exceeded 100 grams. The alternative verdict would find Tisher not guilty of conspiracy to deliver cocaine. The prosecutor and defense counsel both approved these forms of verdict. When the prosecutor questioned what would happen if the jury answered that Tisher was guilty of conspiracy but the amount in question was not over 100 grams, defense counsel indicated that the verdict should not list all of the possible weights that would be significant for the penalties involved. Defense counsel suggested that the verdict include a line where the jury would plug in the number of grams if it found that it was not over 100 grams. The trial court then proposed that if the jury found Tisher guilty but answered “no” to the question whether the amount was over 100 grams, the court should construe the verdict as a finding of conspiracy to deliver five grams or less, the lowest level available. Counsel agreed that would expose Tisher to the lowest tier of penalties if the jury found the amount was less than 100 grams.

¶3 When the court instructed the jury, it stated that if the jury found that Tisher conspired to deliver cocaine, it must answer whether the amount of cocaine exceeded 100 grams. The court instructed the jury that it must be satisfied beyond a reasonable doubt that the amount was more than 100 grams. The court then erroneously instructed the jury “if you are not so satisfied, you must find Thomas Tisher not guilty.” The jury returned a verdict finding Tisher guilty of conspiracy to deliver cocaine and answered “no” to the question whether the amount exceeded 100 grams. The court sentenced Tisher within the range of penalty for conspiracy to deliver not more than five grams of cocaine. Defense counsel did not argue that the verdict should be construed as an acquittal.

¶4 Tisher filed a postconviction motion in which he contended for the first time that the jury should have followed the court's erroneous instruction and should have returned a not guilty verdict upon finding that the amount involved was less than 100 grams. Tisher requested that the judgment be modified to conform with the verdict, in essence a judgment of acquittal. The trial court denied the motion and Tisher appeals.

¶5 The judgment is not inconsistent with the verdict. By finding Tisher guilty of conspiring to sell cocaine, the jury necessarily concluded that some amount was involved. The trial court set the amount at the lowest level defined in the statutes. We perceive no inconsistency.

¶6 Tisher is judicially estopped from arguing that he was entitled to a judgment of acquittal because that argument is directly contrary to the position he took at trial. See *State v. Michels*, 141 Wis. 2d 81, 98, 414 N.W.2d 311 (Ct. App. 1987). A party may not assume a certain position in the course of litigation and then, after the court maintains that position, argue on appeal that the action was error. See *State v. Gove*, 148 Wis. 2d 936, 944, 437 N.W.2d 218 (1989). Tisher's argument attempts to take advantage of the trial court's erroneous jury instruction that would require acquittal if the jury found the amount was less than 100 grams. Defense counsel registered no objection to the instruction as given, which benefited Tisher because it deprived the jury of the ability to find any amount greater than five grams and less than 100 grams, thus limiting his exposure to the lowest penalty range. At sentencing, defense counsel joined the prosecutor in arguing for probation based on the fact that the jury found the amount to be less than 100 grams and counsel did not object when the court sentenced Tisher within the penalty range for conspiracy to deliver not more than five grams.

¶7 Tisher argues that he and the State went for an “all or nothing” strategy as reflected in the jury instruction that required conviction involving more than 100 grams or acquittal. Tisher’s argument is not consistent with his suggestion that the court put a blank in the verdict for the jury to fill in the amount. Rather, that strategy arises only as a result of the trial court’s erroneous instruction. The record suggests that all of the parties assumed that the jury’s answer “no” to whether the conspiracy involved more than 100 grams would result in a judgment convicting Tisher of conspiracy to deliver not more than five grams.

¶8 Tisher argues that his trial counsel’s failure to argue that the jury verdict should have resulted in a judgment of acquittal constitutes “plain error.” The plain error rule does not apply because none of Tisher’s substantial rights were affected by the error. *See State v. Vincent*, 183 Wis. 2d 297, 303, 515 N.W.2d 314 (Ct. App. 1994). The erroneous instruction does not create a substantial legal right such that the plain error rule would apply. Tisher does not have the right to be acquitted based on the trial court’s misstatement of the law to which he did not object.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

