COURT OF APPEALS
DECISION
DATED AND FILED

October 23, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-3514-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

EVERTON TAYLOR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Affirmed*.

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Everton Taylor appeals from the judgment of conviction for possession of marijuana with intent to deliver, as a party to a crime, following a jury trial. He argues that the trial court erred in denying his suppression motion because: (1) there was not probable cause for his warrantless

arrest; and (2) testimony in support of the application for a warrant to search his residence included statements that were "intentionally untrue or made with reckless disregard for the truth." He also argues that the evidence presented at trial was insufficient to sustain his conviction. We affirm.

I. BACKGROUND

¶2 On January 20, 2000, United States Postal Inspector Daniel Kakonis was notified by a San Diego postal inspector that members of a Jamaican gang "known [to be] mailers of marijuana packages across the country" had recently sent two express mail packages, suspected of containing marijuana, from California to Milwaukee—one to 7135 West Silver Spring Drive, and the other to 2829 North 49th Street. Kakonis intercepted the packages in Milwaukee on January 21, and a police dog detected drugs in them, leading to the application for a warrant to search the packages. Both packages were opened and found to contain marijuana.

¶3 The packages were resealed, and their controlled deliveries were arranged, with Kakonis posing as a letter carrier while surveillance units were in place throughout the delivery areas. When Kakonis attempted to deliver the package addressed to "Alice Rhodes" at 2829 North 49th Street, the female who answered the door refused delivery, saying that nobody by that name lived there. As he was leaving the area, Kakonis, responding to a page from the express mail office, learned that someone had just called there to inquire about the package he had tried to deliver. Since the caller had left a phone number, Kakonis called it and arranged to return to the address in about fifteen minutes to deliver the package, again with surveillance units in place. The same female again answered the door and refused delivery of the package.

¶4 Meanwhile, a green Mitsubishi Diamante pulled into the alley behind the target address.[1] A black female, later identified as Tamitha King, exited the vehicle, which then left the scene. King walked around to the front of the building, claimed that she was "Alicia" Rhodes, and said that the package was supposed to have gone to 2831, rather than 2829, North 49th Street. Although King was unable to produce any documentation confirming her identity, she was allowed by Kakonis to accept delivery of the package, signing and printing the name, "Alicia Rhodes." King walked back to the alley, put the package in the trunk of a Buick Regal at the end of the alley, removed the package from the trunk, and then returned the package to the trunk. Surveillance team members saw the Mitsubishi reappear at the scene, and they observed nonverbal communication between King and the Mitsubishi's occupants, Taylor and his brother, Leon Lace.

¶5 Surveillance team members followed the Buick as it was driven away with King as a passenger and, upon their direction, a marked police cruiser stopped it and the police arrested King. King told them that the package belonged to "E.T." Other officers had information that "E.T." either owned or was in the Mitsubishi. As surveillance team members followed the Mitsubishi, a marked police squad car, with its emergency lights and siren activated, attempted to pull it over; the Mitsubishi, however, did not stop until about two blocks later, when its path was obstructed by a police van. Shortly after Lace, the driver, and Taylor, the passenger, exited the Mitsubishi, police arrested them.

[1] Surveillance team members had seen a green Mitsubishi Diamante at 7135 West Silver Spring Drive a short time earlier.

¶6 Subsequently, a Milwaukee County assistant district attorney, together with City of Milwaukee Police Detective Jeff Micklitz, applied for a search warrant of Taylor's residence. A circuit court judge issued the search warrant, resulting in the ultimate seizure of numerous items from Taylor's residence that were introduced in evidence at his trial.

¶7 Taylor was charged with possession of marijuana with intent to deliver, party to a crime. He moved for suppression of evidence seized from his residence, requesting an evidentiary hearing to show that testimony presented by Detective Micklitz in support of the search warrant application was "untrue, misleading, unreliable and insufficient to lead a reasonable mind to the conclusion that probable cause existed for the issuance of a search warrant." Additionally, contending that law enforcement officers had lacked "reasonable grounds" to believe that he had committed a crime, Taylor moved for an evidentiary hearing to obtain an order suppressing information acquired as a result of his January 21, 2000 "illegal seizure and arrest," including a statement he made to law enforcement officers on January 22. After hearing testimony and argument, the trial court found that there had been probable cause to support the issuance of the search warrant and that the arrest had been lawful. Accordingly, the court denied Taylor's motions. Following the jury's return of a guilty verdict, the court sentenced Taylor to fifteen years of imprisonment—an initial ten-year term of confinement and a maximum of five years of extended supervision.

II. DISCUSSION

A. Probable Cause for Warrantless Arrest

¶8 Taylor argues that the police did not have probable cause to arrest him without a warrant. He is wrong. As our supreme court has explained:

> Probable cause to arrest refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime. It is not necessary that the evidence giving rise to such probable cause be sufficient to prove guilt beyond a reasonable doubt, nor must it be sufficient to prove that guilt is more probable than not. It is only necessary that the information lead a reasonable officer to believe that guilt is more than a possibility, and it is well established that the belief may be predicated in part upon hearsay information. The quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case.

State v. Paszek, 50 Wis. 2d 619, 624-25, 184 N.W.2d 836 (1971) (citations omitted). We will not "disturb the circuit court's finding of historical or evidentiary fact unless it is against the great weight and clear preponderance of the evidence," ***State v. Mitchell***, 167 Wis. 2d 672, 682, 482 N.W.2d 364 (1992), and we determine *de novo* whether the facts satisfy the constitutional standards regarding probable cause to arrest, ***id.*** at 684.

¶9 Prior to concluding that there had been probable cause for Taylor's warrantless arrest, the circuit court made these factual findings: (1) a police dog detected drugs in two packages that were sent from known marijuana dealers to Milwaukee; (2) a search of those packages confirmed the presence of marijuana; (3) a resident at 2829 North 49th Street refused to accept delivery of the package sent to that address; (4) a female who had been dropped off by a green Mitsubishi accepted delivery of the package at 2829 North 49th Street, after coming around the side of the building and identifying herself as the intended recipient; (5) surveillance personnel had seen a green Mitsubishi at 7135 West Silver Spring Drive, the intended destination of the second package, a short time earlier; (6) police then saw a green Mitsubishi move slowly past the female who had accepted the package, and they observed nonverbal communication between the female and the occupants of the vehicle; (7) the license plate number of the

Mitsubishi matched that of the Mitsubishi seen earlier at the Silver Spring address; (8) the female who had accepted delivery of the package told police that the package was for "E.T."; (9) the driver of the Mitsubishi did not "com[e] to a stop like most people come to when they hear sirens and they see the lights of a squad car behind them"; and (10) the initials of one of the occupants of the Mitsubishi were "E.T."

¶10 We conclude that the trial court's findings of fact are not "against the great weight and clear preponderance of the evidence," *see* ***Mitchell***, 167 Wis. 2d at 682, and, unquestionably, that these facts "would lead a reasonable police officer to believe" that Taylor probably was a party to the crime of possession of marijuana with intent to deliver, *see* ***Paszek***, 50 Wis. 2d at 624. Thus, these facts satisfy the constitutional standards regarding probable cause to arrest. *See* ***Mitchell***, 167 Wis. 2d at 684. Accordingly, we uphold Taylor's warrantless arrest.

B. Validity of Search Warrant

¶11 Taylor contends that Detective Micklitz made three statements in support of the application for the warrant to search his home that were either "intentionally untrue or made with reckless disregard for the truth": (1) that police had connected packages of marijuana to Taylor's residence; (2) that King had told police both that she had seen Taylor using a computer at his residence to track marijuana shipments and that she had overheard Taylor's end of a telephone conversation regarding a marijuana shipment; and (3) that King had told police that she had accepted packages of marijuana for Taylor at 7135 West Silver Spring Drive.

¶12 In determining whether probable cause existed for issuance of a search warrant, "we are confined to the record that was before the warrant-issuing commissioner." ***State v. Kerr***, 181 Wis. 2d 372, 378, 511 N.W.2d 586 (1994). Taylor, however, has failed to provide an adequate record to support his claims. He has not included in the appellate record a transcript of the hearing of the application for the search warrant. While he has, instead, included a copy of the transcript of that hearing in the appendix to his brief on appeal, we note that, in that hearing, the prosecutor specifically "incorporate[d] by reference the contents of the earlier search warrant obtained by the Vice Control Division in order to discover the contents of the packages, together with the supporting affidavits," and The judge specifically "incorporated by reference" the other search warrant in concluding that "there's a showing of probable cause." We must assume, therefore, that the contents of the earlier search warrant and the supporting affidavits support the judge's finding of probable cause. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993) (appellant is responsible for ensuring completion of appellate record and "when an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling").

C. Sufficiency of Evidence to Support Conviction

¶13 Taylor argues that the evidence was insufficient to support his conviction. We disagree.

¶14 Whether the evidence supporting a conviction is direct or circumstantial, we utilize the same standard of review regarding its sufficiency. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We must uphold Taylor's conviction "unless the evidence, viewed most favorably to the

state and the conviction, is so insufficient 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." ***Id.*** If there is a possibility that the jury "could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt," we must uphold the verdict even if we believe that the jury "should not have found guilt based on the evidence before it." ***Id.*** at 507.

¶15 The trial court instructed the jury that in order to find Taylor guilty of possession of marijuana with intent to deliver, the State must prove beyond a reasonable doubt that: (1) Taylor knowingly had actual physical control of a substance, or the substance was located in an area over which he had control and he intended to exercise control over the substance; (2) the substance was marijuana; (3) Taylor either knew or believed that the substance was marijuana; and (4) Taylor intended to deliver the substance to another person. The court also instructed the jury that in order to find Taylor guilty of possession of marijuana with intent to deliver, as a party to the crime, the State must prove beyond a reasonable doubt that Taylor either directly committed the crime or intentionally aided and abetted the person who directly committed it. The court explained that in order to find that Taylor intentionally aided and abetted the person who directly committed the crime charged, the jury must find that he knew that another person was committing or intended to commit the crime of possession of marijuana with the intent to deliver it, and that he had "the purpose to assist the commission of that crime."

¶16 Law enforcement personnel testified that: (1) when King was arrested, she claimed that the package recovered from the trunk of the Buick belonged to "E.T."; (2) they recovered from the Mitsubishi two cellular telephones, a pager, King's purse, and marijuana residue; (3) the cardboard boxes

shipped to 2829 North 49th Street and 7135 West Silver Spring Drive contained marijuana encased in packaging peanuts, "greenish, bluish clear Saran Wrap," oil- or grease-soaked newspaper, "clear Saran Wrap," and fabric softener sheets; (4) Taylor had admitted to them that he and his brother had given a black female a ride in the Mitsubishi; and (5) the black female who exited the Mitsubishi in the alley behind 2829 North 49th Street walked around to the front of the building, accepted delivery of the package containing marijuana, returned to the alley, placed the package in the trunk of the Buick, removed it from the trunk, and returned it to the trunk, staying near the Buick as the Mitsubishi, upon returning to the scene, briefly stopped near it while the Mitsubishi's two black male occupants communicated nonverbally with the black female before the Mitsubishi left again.

¶17 Additionally, the jury heard testimony that while searching Taylor's residence, law enforcement personnel recovered: (1) a marijuana cigarette, from underneath the refrigerator; (2) a paper shredder, plus two plastic garbage bags and a basket, each filled with shredded paper, which contained remnants of labels from express mail packages, telephone bills, and Western Union money orders; (3) numerous express mail envelopes and blank labels, boxes, and a Federal Express air bill; (4) a digital gram scale—the type of scale frequently used to weigh drugs to be packaged for sale; (5) a Glock nine-millimeter semiautomatic pistol that was on a shelf, and a bag of marijuana that was on the floor; (6) a white plastic garbage bag containing packaging materials "identical to the packing material that was used on the marijuana recovered from the boxes"—"green [S]aran wrap," "newspapers soaked in axle grease," "dryer [fabric softener] sheets[,] and clear plastic wrap"; and (7) opened Federal Express envelopes, a box of sandwich bags, two large boxes filled with packaging peanuts, dismantled boxes that were identical to those that had been shipped from California, a large

serrated knife "covered in marijuana residue," a plastic tub containing marijuana residue, another plastic bag containing marijuana, and additional green plastic wrap, newspaper coated with axle grease, and dryer sheets.

¶18 Clearly, this evidence, though circumstantial, was powerful. It was more than enough to allow a jury to draw "appropriate inferences" leading to the conclusion that Taylor was an active participant in the crime. *See* ***Poellinger***, 153 Wis. 2d at 507. Because "the evidence, viewed most favorably to the state and the conviction, is [not] so insufficient 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," *see* ***id.*** at 501, we uphold Taylor's conviction, *see* ***id.***

By the Court.—Judgment affirmed.

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