COURT OF APPEALS
DECISION
DATED AND RELEASED

July 25, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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

No. 94-2642-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT E. MORRISON,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: LEE E. WELLS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Robert E. Morrison appeals from a judgment of conviction, following a jury trial, for one count of possession of a controlled substance as a repeat offender. Morrison argues that the jury instructions violated his due process rights and that the evidence was insufficient to support the jury's verdict. We affirm.

On the evening of October 6, 1993, Morrison was under police surveillance. South Milwaukee Police Officer Francis Rotter testified that he saw Morrison and Michael Kleban leave Morrison's apartment building, get into a tan Buick and drive off. Kleban drove and Morrison sat in the right passenger seat. They drove the car to a bowling alley, which Kleban entered for approximately "fifteen to twenty minutes" while Morrison stayed in the car. They then drove to a local drug store where Kleban briefly entered the store. Kleban and Morrison then traveled to another location where Officer Rotter stated that he observed Kleban enter and exit a building twice to use a telephone. An unidentified male entered the car, staying approximately two minutes. Kleban used the phone one more time and then Kleban and Morrison drove off. They eventually parked and another person entered the car and then left after "a couple of minutes." Officer Rotter stated that he then observed "somebody" exit the car and "saw the trunk go up." Officer Rotter stated that "when the trunk of the car went up, I had lost sight of Mr. Morrison." Officer Rotter testified that he then saw the car drive off. When the police stopped the car "[a]pproximately ten to twelve minutes" later, Morrison was not in the car. The vehicle was searched, and cocaine was discovered in an orange bag found in the trunk.

South Milwaukee Officer Kerry Fischer testified that while the police were following the tan Buick, Morrison was seated in the passenger seat. Officer Fischer stated that when the car stopped, the passenger door swung open but he didn't actually see Morrison exit the car because traffic obscured his vision "for a split second." Officer Fischer testified that he then saw Morrison standing behind the vehicle at the trunk, open the trunk, put a bright orange and yellow bag into the trunk, close the trunk and then walk away. Officer Fischer admitted, however, that he did not actually see Morrison carry the orange bag from the passenger compartment of the car to the trunk.

South Milwaukee Police Officer Peter Jaske's testimony was substantially similar to Officer Rotter's testimony. In addition, however, Officer Jaske testified that no one opened the trunk between the time Morrison opened it and the time when Kleban was stopped by the police.

Officer Fischer stated that he interviewed Morrison five days after the incident. He testified that Morrison told him that the cocaine belonged to Kleban. Morrison stated that Kleban had been obtaining drugs from a woman

who lived in the area where they had been driving. Although the vehicle was registered to a different individual, Morrison admitted that the car was his and that a friend had let Morrison register the car in the friend's name because Morrison had unpaid tickets. Officer Fischer stated that Morrison told him that Kleban borrowed his car because Kleban's car was "overheating." Officer Fischer stated that Morrison said that he and Kleban had been driving around because he was supposed to do a "tune-up" on a car for a man named "Dennis." When Officer Fischer asked Morrison for a phone number to call "Dennis," Morrison said that Dennis didn't have a phone. Morrison also stated that he did not know Dennis's address and that "[h]e only knew the house." Morrison, however, refused to point the house out to the police officers. Officer Fischer stated that when asked if he had handled the orange bag, Morrison said "he moved the bag to get at the tools in his trunk." Officer Fischer further testified that Morrison stated that he did not see Kleban go into the trunk that night and that there had not been cocaine in the trunk before they had left his apartment building. Officer Fischer stated that Morrison told him "that if it was his [Morrison's] cocaine in the trunk of the vehicle, he wouldn't have let Mr. Kleban drive off with it."

Morrison argues that the trial court erred in giving the jury an instruction under the aiding and abetting portion of the party-to-a-crime theory of liability in combination with the jury instruction on possession. He claims that the combination of these instructions had the effect of directing a guilty verdict against him and that his due process rights were violated. Morrison, however, raises this argument for the first time on appeal. At no time during the trial did Morrison object on this particular basis. Therefore, he waived this issue. *See* ***State v. Fawcett***, 145 Wis.2d 244, 256, 426 N.W.2d 91, 96 (Ct. App. 1988) (issue was waived where new grounds for objection raised on appeal).

Given that Morrison did object to the jury instructions on other grounds, we also note, "'[A] trial judge may exercise wide discretion in issuing jury instructions based on the facts and circumstances of the case.'" ***State v. McCoy***, 143 Wis.2d 274, 289, 421 N.W.2d 107, 112 (1988) (citation omitted). While the practice of including the party-to-a-crime charge in the information has been commended, it is not required. ***Holland v. State***, 91 Wis.2d 134, 142, 280 N.W.2d 288, 292 (1979), *cert. denied*, 445 U.S. 931 (1980). Further, the evidence at trial plainly warranted the trial court's decision to instruct the jury under the party-to-a-crime instruction. Morrison let Kleban use his car, was present during the various stops, including two incidents were persons entered

the car for brief periods, was seen handling the bag containing the cocaine, and indicated to police that he was aware that Kleban was dealing drugs. Based on these facts, an instruction that the jury could consider whether Morrison was a party to a crime of possession was appropriate.

Morrison also argues that the evidence was insufficient to support the jury's guilty verdict. We disagree.

The rules governing appellate review of the sufficiency of evidence to support a conviction are well-settled.

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-758 (1990) (citations omitted). We employ this standard for reviewing a challenge to the sufficiency of the evidence regardless of whether the evidence presented at trial was direct or circumstantial. ***Id.*** at 503, 451 N.W.2d at 756. We will substitute our judgment for that of the trier of fact when the fact-finder relied on evidence that was "inherently or patently incredible—that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." ***State v. Tarantino***, 157 Wis.2d 199, 218, 458 N.W.2d 582, 590 (Ct. App. 1990).

The jury clearly had sufficient evidence upon which to find Morrison guilty beyond a reasonable doubt. Morrison was seen in possession

of the bag containing cocaine, which was later found in the trunk of Morrison's car. Morrison stated that the bag was not in the trunk prior to when Kleban and Morrison began driving around on the night of October 6th. Morrison was the only person to open the trunk prior to the police search. Additionally, Morrison was present in the car while numerous stops were made and while two persons entered the car for brief periods of time. Also, Morrison admitted to the police that he had knowledge of Kleban's drug-dealing. The record contains sufficient evidence from which the jury could draw reasonable inferences to conclude Morrison was guilty.

Therefore, we reject both of Morrison's arguments and we affirm the judgment of conviction.

By the Court. – Judgment affirmed.

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