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September 23, 2026

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You are hereby notified that the Court has entered the following opinion and order:

2025AP862-CR

State of Wisconsin v. Dayvon A. Lewis (L.C. #2022CF1572)

Before Lazar, P.J., Grogan, and LoCoco, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Dayvon A. Lewis appeals from a judgment entered after a jury found him guilty of possession of tetrahydrocannabinol (THC), possession of methamphetamine, resisting an officer,

and attempting to flee an officer, contrary to WIS. STAT. §§ 961.41(3g)(e), 961.41(3g)(g), 946.41(1), and 346.04(3) (2023-24).¹ He challenges only the THC conviction—claiming the evidence was insufficient to convict because the State failed to prove the concentration of THC in his possession was greater than .3 percent. The State responds that, even assuming it has the burden to prove the THC had a .3 percent concentration, the evidence presented was sufficient for the jury to so find.² Based upon our review of the briefs and Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

BACKGROUND

On October 2, 2022, at around 1:20 a.m., police stopped a vehicle after observing it illegally parked on a roadway and later driving erratically. Police identified the driver as Lewis. When the police smelled “fresh marijuana” coming from Lewis’s vehicle and noticed his speech was “slow and slurred, as if intoxicated by drugs and alcohol[,]” they asked him to get out of the vehicle. When he refused, they tried to physically remove him, but he continued to resist. Lewis eventually restarted the vehicle, fled the scene, and led police on a short chase, which ended when Lewis swerved into a curb, soon after disabling the vehicle. Lewis got out of the vehicle and attempted to run away, but police apprehended him.

¹ All references to the Wisconsin Statutes are to the 2023-24 version.

² The State argues it does not have the burden to prove the concentration of the THC. Instead, it claims proving the THC was under a .3 percent concentration is an affirmative defense, which places the burden of proving it on the defendant. We need not resolve this dispute because, as we explain, under the facts presented in this case, the evidence was sufficient to uphold the conviction.

In searching Lewis's vehicle, police found what they suspected was marijuana. Police also found a baggie of suspected marijuana in Lewis's hoodie, which had come off during the struggle. The substances all tested positive for THC. Additionally, police found a suspected ecstasy pill in his wallet, which testing later confirmed was methamphetamine. The State charged Lewis with possession of THC, possession of methamphetamine, attempting to flee an officer, and two counts of resisting an officer. Lewis pled not guilty, and the case was tried to a jury.

At trial, the State called three officers to testify. Two officers testified that Lewis was making lane deviations and speeding, with one officer testifying he was going 50 mph in a 25 mph zone and the other testifying they thought he was "possibly impaired" in part due to "speeding [and] unsafe lane deviation." Two officers testified Lewis had slow, slurred speech. All three officers testified to smelling marijuana coming from the vehicle, while two specifically testified to smelling both fresh and burnt marijuana. When Lewis refused to get out of the vehicle, one officer testified that "[they] were forced to respond" with and use physical force against Lewis "in order to safely take him into custody." Two officers testified to using physical force, and all three testified to tasing him. All three testified the force—either physical or through tasing—was ineffective. One officer even testified that Lewis exhibited no pain reaction nor change in his demeanor after physically striking him, even though that is generally meant to "get some kind of pain reaction[.]" An officer testified Lewis started the vehicle, made a U-turn, drove away, reached estimated speeds of 70 mph, and hit a curb—disabling the vehicle. At that point, Lewis fled on foot and was eventually taken into custody by officers. An officer told the jury that during a search of Lewis's vehicle and possessions, the police found two black film containers with one containing brown balls of suspected marijuana hash and the other containing

“a green, leafy plant-like substance,” a hoodie that had “more green plant-like substance located in the front ... pocket” contained in a “sandwich-style baggie[,]” and a yellow pill in his wallet. Another officer testified that he observed “marijuana roaches” in the center console.

A State Crime Lab analyst also testified at trial and discussed three items of bagged evidence: Items A and B both contained “plant material,” and Item C contained “one round yellow tablet.” For efficiency purposes, the analyst only examined Item B and testified that THC was present. The analyst also testified that methamphetamine was present in Item C. The analyst admitted during her testimony that she did not know whether Item B had more than .3 percent THC or less. The State rested.³

Lewis then testified in his own defense. He testified that he and his friends were doing a “pregame” before going to a party at a bowling alley. During his “pregame,” Lewis told the jury he took an ecstasy pill and smoked “[m]arijuana.” He stated that he then drove to the bowling alley but did not drink or smoke anything while there. Lewis later testified that he had purchased the substances from a cannabidiol (CBD) shop and that he thought they were legal to possess.⁴ On cross-examination, he claimed the “marijuana” he testified to smoking was purchased from

³ After the State rested, Lewis moved for a directed verdict on the grounds that “a jury would [not] be able to find the elements ... have been met. Particularly related to the substance testimony from the lab analyst” because the analyst could not testify “whether there was an amount of Delta 9 THC greater than .3 percent. [Point 3] percent or less is legal in the State of Wisconsin under the hemp statutes.” See WIS. STAT. § 94.55(1) (“[H]emp means the plant *Cannabis sativa* L. ... with a delta-9[THC] concentration of not more than 0.3 percent on a dry weight basis[.]”). The trial court denied this motion, stating “[i]n the light most favorable to the State, the Court does find that there is evidence that a jury could rely on to find each of the elements.”

⁴ WISCONSIN STAT. § 961.01(3r) defines “[CBD] product” as “a derivative or extract of the plant *Cannabis sativa* L. that contains [CBD] and a delta-9-[THC] concentration at a level without a psychoactive effect.”

the CBD store and was CBD. The State, during closing argument, refuted this and asked the jury to “consider [Lewis’s testimony] carefully” because the item the State Crime Lab analyst analyzed from the vehicle had THC present. The trial court instructed the jury that to convict on possession of THC, it had to find the State proved three elements beyond a reasonable doubt: (1) Lewis possessed THC; (2) the product was THC; and (3) Lewis knew the product was THC.

The jury found Lewis guilty for possessing THC, possessing methamphetamine, fleeing an officer, and one count of resisting an officer. The trial court imposed a sentence, which was stayed pending appeal.⁵ Lewis’s appellate counsel filed a no-merit report to this court, but we rejected it. This appeal followed.

DISCUSSION

Lewis argues there is insufficient evidence to uphold the jury’s verdict with respect to his conviction for possession of THC. Specifically, he contends the State never presented evidence that the THC concentration of the substance found in Lewis’s possession was more than .3 percent, and thus “no jury could reasonably factually conclude that a substance with an unknown Delta 9 concentration is unlawful marijuana.” An amicus brief⁶ asks us to go one step further and hold “the State must prove the illegality of *cannabis* by evidence probative of and demonstrating an illegal concentration of delta-9-THC.” The State responds that we do not need to address the burden of proof question because the evidence at trial was sufficient to prove

⁵ The trial court sentenced him to 18 months of initial confinement and 2 years of extended supervision for fleeing in a vehicle from an officer, 30 days in jail and costs for resisting an officer, and costs for possession of methamphetamine and THC.

⁶ The non-party amicus brief was submitted by The Office of the Public Defender and the Wisconsin Association of Criminal Defense Lawyers.

Lewis possessed an unlawful THC substance. We agree with the State. We conclude that under *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990), the Record is sufficient to sustain the possession-of-THC conviction. Therefore, we do not need to resolve the additional question involving who carries the burden of proof challenged here. See *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (“[C]ases should be decided on the narrowest possible ground[.]”).

Whether evidence “was sufficient to sustain a verdict of guilt in a criminal prosecution is a question of law, subject to our de novo review.” *State v. Smith*, 2012 WI 91, ¶24, 342 Wis. 2d 710, 817 N.W.2d 410. In reviewing the sufficiency of the evidence to support a conviction, we “may not substitute our judgment for that of the” jury “unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that” no jury, “acting reasonably, could have found guilt beyond a reasonable doubt.” *Poellinger*, 153 Wis. 2d at 507. “Therefore, this court will uphold the conviction if there is any reasonable hypothesis that supports it.” *Smith*, 342 Wis. 2d 710, ¶24; see also *State v. Minck*, 2025 WI App 35, ¶26, 417 Wis. 2d 1, 24 N.W.3d 125 (“Ultimately, if any possibility exists that the jury could have drawn the appropriate inferences from the evidence adduced at trial to find the defendant guilty, then we may not overturn the jury’s verdict, even if we believe the jury should not have found guilt based on the evidence before it.”). We complete our analysis by considering the totality of the circumstances. *Smith*, 342 Wis. 2d 710, ¶36.

Here, the jury heard police testify that Lewis made unsafe lane deviations and drove at excessive speeds—twice the legal speed limit—leading the police to believe he was impaired. The jury heard testimony that the police smelled fresh and burnt marijuana coming from Lewis’s vehicle and that Lewis’s speech was slow and slurred. It heard the physical force and tasers

police used against Lewis were ineffective and that he showed no pain reaction from the physical force. It also heard that Lewis refused to get out of the vehicle, restarted the vehicle, drove away from officers at excessive speeds, crashed into a curb—disabling the vehicle, fled on foot, and was subsequently arrested. Moreover, the jury heard testimony that substances were found in two black film containers, one of which contained suspected balls of marijuana hash, and another which contained “a green, leafy plant-like substance,” and in a hoodie, which contained “more green plant-like substance” in a “sandwich-style baggie.” The jury heard another officer testify that “marijuana roaches” were in the center console of Lewis’s vehicle and that the State Crime Lab analyst confirmed the “plant material” contained THC. The jury also heard Lewis’s testimony personally admitting to smoking marijuana that day. Given these facts, we cannot say that no jury, acting reasonably, could have found guilt beyond a reasonable doubt. **Poellinger**, 153 Wis. 2d at 507. One reasonable hypothesis from the evidence presented is that Lewis possessed THC—not a legal CBD product—because THC was present in the sample tested by the State Crime Lab, the substance was stored in sandwich bags and film containers instead of branded packaging one would expect from a legal product, and Lewis’s driving was impaired.

Even though Lewis later testified that he believed the marijuana he smoked was not illegal THC because he bought it from a CBD store, the jury was ““free to choose among conflicting inferences of the evidence and [could], within the bounds of reason, *reject that inference which is consistent with the innocence of the accused.*”” **Smith**, 342 Wis. 2d 710, ¶31 (emphasis added; citation omitted). All of the facts and circumstances support that Lewis in fact possessed illegal THC except for his self-serving testimony, which the jury was free to reject. It was reasonable for the jury to conclude that had Lewis actually purchased the THC from a CBD store, he would not have resisted, fled, and ran. It was reasonable for the jury to conclude that

had Lewis actually purchased the THC from a CBD store, it would not have been in black canisters, but in store packaging. Based on the foregoing, we conclude the evidence is sufficient to uphold the conviction for possession of THC.

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals