COURT OF APPEALS DECISION DATED AND FILED	NOTICE
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Diane M. Fremgen Clerk of Court of Appeals	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.

Appeal No. 2014AP1873-CR Cir. Ct. No. 2012CF4387

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VAUGHN CARUTH GILMER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed*.

Before Curley, P.J., Brennan and Bradley, JJ.

¶1 CURLEY, P.J. Vaughn Caruth Gilmer appeals the judgment convicting him of one count of possessing with intent to deliver two-hundred grams or less of tetrahydrocannabinols ("THC") as a second or subsequent

offense. *See* WIS. STAT. §§ 961.41(1m)(h)1. & 961.48(1)(b) (2011-12).[1] On appeal, he argues that we should grant him a new trial because the trial court erroneously exercised its discretion by allowing the bag of marijuana that had been admitted into evidence into the jury room during deliberations. We disagree and affirm.

BACKGROUND

¶2 The State charged Gilmer with possession with intent to deliver THC as a second or subsequent offense on September 6, 2012. According to the complaint, police officers first approached Gilmer because he was making his way to a car that they had attempted to stop for speeding the previous week. After the police identified themselves and asked if they could speak with Gilmer, Gilmer took off running, reaching for his waistband and flinging various items as he ran. The pursuing officers eventually arrested Gilmer, and while "retrac[ing] the flight path" recovered a black plastic bag with nine sandwich bags inside containing well over 100 grams of marijuana. As Gilmer had been previously convicted of possession with intent to deliver cocaine between fifteen and forty grams, *see* WIS. STAT. § 961.41(1m)(cm)3. (2005-06), he was charged with possession of the marijuana as a second or subsequent offense.

¶3 Gilmer pled not guilty and the case went to trial. The parties stipulated that: the substance in the black plastic bag was marijuana; the total weight of the marijuana found in the black plastic bag was 135.09 grams; the total weight of marijuana that was found in a small plastic bag in Gilmer's pocket

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

during arrest was 0.51 grams; and the fingerprints on the large black plastic bag containing the marijuana did not match Gilmer.

¶4 Several witnesses testified, including Officer Adam Dettman, Officer Daniel Garcia, and Detective Timothy Graham. Gilmer also testified.

¶5 Officers Dettman and Garcia testified that they first noticed Gilmer approaching a parked car they had attempted to stop for speeding the previous week. When Dettman said, "Milwaukee Police Department. Can I speak with you for a second?" Gilmer looked at the officers and immediately ran the other way, throwing a white hat and a pair of sunglasses to the ground. As Gilmer ran, Dettman saw him "reaching in his waistband area." Dettman testified that he was approximately ten feet behind Gilmer and "could smell the strong scent of fresh marijuana emitting from his person." Dettman also testified that he saw Gilmer discard a black plastic bag that appeared to be "weighted" onto the ground. Dettman eventually stopped Gilmer, and after retracing "the flight path" found a black bag containing nine individual bags of marijuana. The marijuana in the black plastic bag was moved into evidence without objection.

¶6 Officer Garcia testified that although he did not see Gilmer drop the black plastic bag that later was found to contain marijuana, he could smell it while he was chasing Gilmer. Garcia testified that he was twenty-five feet behind Gilmer and could smell marijuana. Officer Garcia testified that marijuana "has a very distinct smell and odor that once you recognize it, … then you smell it, again, you know it's there, especially in the … quantity that we recovered that night." Garcia further testified that during the search following Gilmer's arrest, he recovered a small plastic baggy with marijuana from Gilmer's front right pants

pocket. According to Garcia, Gilmer stated that he "was only going to smoke it." The marijuana found in Gilmer's pocket was not entered into evidence.

¶7 Detective Graham testified that the marijuana in this case appeared to be "high grade" based on its appearance and odor. Graham explained that better marijuana has a "stronger, more pungent odor." Graham also testified that the amount was consistent with street sales and that nine individual bags would support his opinion that the marijuana was for distribution.

¶8 Gilmer testified that he started running on the night of his arrest because he heard "scrambling and noises" coming from the bushes and feared for his life. He testified that he never saw a police car, that nobody identified themselves as police, and that the cops were "like ninjas" because he did not see them or know who they were. Yet he also testified that he eventually stopped running because he determined it was a police officer who was chasing him. Gilmer denied dropping a black bag, and explained that his glasses and hat came off "from just running naturally." He also testified that the marijuana that he referred to while talking to police during arrest was merely the "nickel [bag] of weed" he had in his pocket.

¶9 During closing arguments, the State emphasized that Gilmer possessed the black bag with nine sandwich baggies in part because the smell of marijuana was strong as the officers were chasing him. The State argued:

> Well, what else do we know? We know that both officers could smell the marijuana coming from … the defendant. Now, kind of common sense, if you're running, someone's chasing you, and they're in your path, makes sense that they're going to smell what's on you. Walk[] into an elevator and you smell cologne. I walk in the elevator here, [and] sometimes … smell marijuana.

> Got to ask yourself in this situation, what are they smelling? What makes more sense? Are they smelling a half a gram of marijuana that's in his pocket? Or are they smelling 135 grams of marijuana that he's pulling out of a pocket or out of his waistband?
>
> Now, both officers say it was the strong smell of fresh marijuana. What is going to be stronger, 135 grams or a half a gram? They're smelling that 135 grams that's on him that he's pulling out and dropping to the side.

¶10 The State also told the jurors that they would be able to smell the marijuana during deliberations. The prosecutor said:

> Detective Graham [has] posed as a drug dealer, he's posed as a drug buyer, he's seen pounds of marijuana, he's seen tiny bits of marijuana. I had him take a look at the marijuana that we had in this case, and he looked at it, he could smell it, and he said, well, this is the high grade good stuff. That is State's Exhibit No. 2. If you want when you're back there talking about the case, you can probably have the deputy come by and show it to you. I don't know if you're going to get to hold it. But you can smell it. It's strong.

¶11 In response, Gilmer's attorney argued there was no evidence presented in this case that the marijuana smelled the same at trial as it did at the time of the offense. Trial counsel further argued that it did not make sense that the officers smelled marijuana when running, given that there was no testimony that the smell dissipated once Gilmer allegedly dropped the black plastic bag.

¶12 After closing arguments, the trial court inquired whether there was an objection to any of the exhibits going to the jury room. Trial counsel objected to sending the marijuana that was found in the black plastic bag to the jury room on the grounds that there was no testimony in the record that the smell of marijuana was the same today as at the time of the incident. The circuit court overruled the objection and stated that the smell of the marijuana would be appropriate for the jury to consider:

> THE COURT: All right. I'm going to overrule the objection, allow it to go back…. There's a question about the value of the marijuana, and to the extent that it's high grade marijuana, the description by Officer Graham and regarding the distinct nature of the different types of marijuana, and there is truly in all the cases that I've … had testimony about, that there is a unique smell to the marijuana, and whether it's stronger or less strong, there's no indication one way or another at this point, and yet it does have a distinctive smell that would be appropriate for a jury to consider. So I'll overrule that.

¶13 During deliberations, the jury asked to review three exhibits, including the marijuana, and the black plastic bag of marijuana was "sent in with the bailiff." The jurors "reviewed it briefly" and it was removed. Subsequently, the jury found Gilmer guilty.

¶14 Gilmer now appeals.

ANALYSIS

¶15 On appeal, Gilmer argues that the trial court erroneously exercised its discretion when it allowed the marijuana to go back to the jury room during deliberations. Whether evidence "should be sent to the jury during deliberations is a discretionary decision for the trial court." *See* ***State v. Hines***, 173 Wis. 2d 850, 858, 496 N.W.2d 720 (Ct. App. 1993).

> A trial court's decision whether to send [evidence] to the jury during deliberations is guided by three considerations: (1) whether the exhibit will aid the jury in proper consideration of the case; (2) whether a party will be unduly prejudiced by submission of the exhibit; and (3) whether the exhibit could be subjected to improper use by the jury.

See ***id.*** at 860. "We will not reverse a discretionary decision if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision." ***Id.*** at 858. Moreover, we will not reverse the trial court if, after

independently reviewing the record, "we can conclude that there are facts which would support the court's decision." *See* ***id.*** at 860-61.

¶16 Specifically, Gilmer, renewing the argument he made at trial, argues that allowing the jury to consider the marijuana's smell was "misleading" and "not part of the case" (one set of quotation marks omitted) because there was "no testimony in the record that the smell of the marijuana at the time of the trial was the same as the smell at the time of the incident." He further argues that allowing the jury to consider the large bag of marijuana was "improper, misleading, and prejudicial" because the much smaller bag of marijuana found on his person was not admitted into evidence; therefore, the jury could not compare the two bags to evaluate the witnesses' credibility. In addition, Gilmer argues that "allowing the marijuana to go to the jury room … effectively produced new off-the-record evidence that [he] did not have an opportunity to cross-examine or rebut."

¶17 We disagree; allowing the jury to examine the marijuana properly allowed them to determine whether the officers' testimony that the bag appeared to be "weighted" and that a strong odor emanated from the bag was credible.

¶18 As ***Robinson v. State***, 52 Wis. 2d 478, 190 N.W.2d 193 (1971), demonstrates, it is entirely proper to allow an exhibit into the jury room during deliberations so that the jury can test the validity of a witness's testimony. In ***Robinson***, a Milwaukee police officer responding to a cry for help at Daniel Robinson's house saw Robinson waving a gun in his hand and threatening "to kill him unless he got off the porch." ***Id.*** at 480. Additional officers arrived on the scene, one of whom "observed [Robinson] make a motion with his trigger finger on the gun." *See* ***id.*** at 480-81. One of the police officers testified that "just before he moved toward [Robinson] he heard a 'click' which, in his opinion,

sounded like a misfire." ***Id.*** at 481. Thereafter, at Robinson's trial for attempted murder, a firearms expert "demonstrated various 'click' sounds made by the operation of the weapon," and the trial court allowed the jury to examine the gun during deliberations. ***Id.*** at 481-83. On appeal, the supreme court held that the trial court did not err in allowing the jury to see the gun during deliberations because hearing the various "clicks" made by the gun helped the jury determine whether the State's witnesses were credible. *See* ***id.*** at 484-85. Likewise, in the case before us, feeling the weight of the bag and determining whether a smell was emanating from the bag helped the jury determine whether the testifying officers were credible.

¶19 Contrary to what Gilmer argues, in the particular circumstances before us, there was no need to establish that the bag of marijuana smelled exactly the same on the day of the arrest as the day of trial. The point made by the testimony and the prosecutor's argument was that there was a discernible smell coming from Gilmer, and that the smell came from the large bag of marijuana that Gilmer discarded while running from the police. Moreover, the jury did not require the very small bag—which contained less than one-percent of the weight of the large bag—to fairly evaluate the officers' credibility. Given the facts of this particular case, the jury could use its common sense to determine whether the smell described by the officers would have come from the large bag containing over 100 grams of marijuana or the very small one containing less than one gram found on his person during arrest.

¶20 In addition, we disagree with Gilmer's contention that allowing the marijuana to go to the jury room produced "off-the-record evidence" that he did not have an opportunity to cross-examine or rebut. Gilmer contends this case is unlike ***Robinson*** because in that case experts had already performed a variety of

demonstrations with the gun that was sent back to the jury, *see **id.***, 52 Wis. 2d at 481-82, 485 (trial court "'could not … conjure up any experimentation that the jury could have done in that jury room … that wasn't done for them here in Court'"), whereas here the jury could have been conducting its own experiments—for example, trying to smell the marijuana "from multiple distances or smelling the marijuana with the packing open and closed." As the State points out, however, it is highly unlikely that the evidence was improperly manipulated because it was in a sealed bag and was accompanied by the bailiff. There is no evidence that the jury took the marijuana out of the bag or did anything inappropriate with it. As for Gilmer's suspicion that the jury may have smelled the bag from different locations within the jury room, that, as we have already explained, was precisely the point of allowing the bag to go back to the jury: to validate (or invalidate) the officers' testimony about it. *See **id.*** at 484-85.

¶21 Finally, we emphasize again that the officers testified regarding not only the bag's smell, but also its color, size, and weight. Gilmer does not argue that the jury should not have been allowed to evaluate those attributes in determining whether the officers' testimony was credible. Therefore, even though the trial court may have allowed the jury to have the bag to determine whether it smelled, it would have been within its discretion to do so in order for the jury to evaluate any number of qualities about the bag. *See **Hines***, 173 Wis. 2d at 860-61.

¶22 Thus, for all the forgoing reasons, the judgment is affirmed.

By the Court.—Judgment affirmed.

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