**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

December 19, 1996

**NOTICE**



**No. 96-1009-CR**

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

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**RODOBALDO C. POZO,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed*.

Before Eich, C.J., Vergeront and Deininger, JJ.

VERGERONT, J. Rodobaldo Pozo appeals from a judgment of conviction for party to the crime of delivery of cocaine in violation of §§ 939.05 and 161.41(1)(cm)2, STATS., and possession of a schedule II controlled substance as a dealer without a tax stamp in violation of § 139.95, STATS.[1] He also appeals

[1] The delivery charge was enhanced as a second drug offense by § 161.48(2), STATS., and the tax stamp charge was enhanced by § 939.62, STATS., for habitual criminality.

from denial of his postconviction motions. Pozo contends on appeal that the trial court erred in denying his pretrial motion to suppress a statement of his and that his trial counsel was ineffective because counsel failed to present additional evidence at the suppression hearing. We conclude that the trial court did not err in denying the suppression motion and that the ineffective assistance of counsel claim fails because there was no prejudice resulting from any failure of counsel to present additional evidence at the suppression hearing.

Pozo also challenges the tax stamp conviction on the grounds that the cutting agent mixed with the cocaine should not have been weighed in determining whether he possessed more than seven grams of cocaine and thus was a dealer under § 139.87(2), STATS. We conclude the trial court properly interpreted the statute. We therefore affirm the conviction and denial of postconviction motions.

## BACKGROUND

La Crosse County law enforcement officers conducted a controlled drug purchase at the residence of Pozo and Gabrielle Volten on March 14, 1995. Michelle Riley, a citizen, and undercover police officer Cherly Harkey made the purchase. Riley testified at trial that she had arranged the purchase in a discussion some days earlier with Volten and Pozo. When she went to Volten's residence on March 14, 1995, Pozo greeted her at the door with a hug "and in a strange way this time he put his hands on my hip and ran up my back, which he had never done before." Volten's and Pozo's respective roles in the drug purchase that followed was the primary issue at trial and will be discussed in more detail later.

The incident giving rise to the suppression hearing occurred later the same day. Officer Kurt Pappenfuss, an investigator with the La Crosse County Sheriff's Department, had been involved in the controlled purchase and was at the sheriff's department. Pozo and Volten arrived at the courthouse separately, on an unrelated matter. Pappenfuss testified at the suppression hearing as follows. When Pappenfuss learned that Pozo was at the courthouse, he asked two other officers to bring Pozo to the sheriff's department so that he could talk to Pozo. When Pozo arrived with the two officers, Pappenfuss left his office and went into the squad room to meet with Pozo. Pappenfuss asked

how he was doing and Pozo said fine. Pozo asked him where "his lady"--meaning Volten--was. Pappenfuss said she was in his office and "then ... advised [Pozo] what had happened earlier, that we had completed a controlled buy at his residence, [and I] asked him if he wanted to talk about it." According to Pappenfuss, Pozo's response was: "You've got nothing on me. You didn't even have a wire or a body wire. You have to have a body wire." That is the statement Pozo sought to suppress. According to Pappenfuss, at the time Pozo made the statement, Pozo had not been arrested and no ***Miranda*** warnings had been read to him. Pozo was not in handcuffs when the two officers brought him to Pappenfuss.

Pozo testified at the suppression hearing and denied that he had made the statement.

The trial court denied the motion to suppress the statement.[2] The court determined that Pozo was in custody because Pappenfuss had testified that he had told the two officers to arrest Pozo if Pozo would not come voluntarily. However, the court decided that Pozo had "blurted out" the statement and that it was not in response to any question asked by Pappenfuss.

The jury convicted Pozo on both counts. Pozo moved for postconviction relief alleging, among other grounds, the issues raised on this appeal. The trial court denied the motion.

[2] At the same time, the court granted the motion to suppress a statement Pozo made soon after. After Pozo was placed under arrest but before ***Miranda*** warnings were given, Pappenfuss asked Pozo if he had the keys to the car Volten had driven to the courthouse. The court noted this was a specific question and concluded the response was inadmissible.

SUPPRESSION OF POZO'S STATEMENT

Pozo contends that his statement to Pappenfuss should have been suppressed because he was in custody and Pappenfuss engaged in interrogation without first giving him the warnings required by ***Miranda v. Arizona***, 384 U.S. 436 (1966). The State does not dispute the trial court's determination that Pozo was in custody but asserts that he was not subjected to interrogation by Pappenfuss.

The Supreme Court clarified the meaning of interrogation in ***Rhode Island v. Innis***, 446 U.S. 291 (1980), stating:

> [T]he term `interrogation' under ***Miranda*** refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect....

***Innis***, 446 at 301.

Our supreme court elaborated on ***Innis*** in ***State v. Cunningham***, 144 Wis.2d 272, 423 N.W.2d 862 (1988), stating the test in this way:

> [I]f an objective observer (with the same knowledge of the suspect as the police officer) could, on the sole basis of hearing the officer's remarks or observing the officer's conduct, conclude that the officer's conduct or words would be likely to elicit an incriminating response, that is, could reasonably have had the force of a question on the suspect, then the conduct or words would constitute interrogation.

***Cunningham***, 144 Wis.2d at 278-79, 423 N.W.2d at 864.

An incriminating response means any response--whether inculpatory or exculpatory--that the prosecution may seek to use at trial. ***Id.*** at 79, 423 N.W.2d at 865. The focus is primarily on the perception of the suspect, although what the officer knew about "any unusual susceptibility" of the suspect may be important in determining whether the police should have known that their words or conduct were reasonably likely to elicit an incriminating response. ***Id.***

In reviewing the trial court's determination that interrogation did not take place, we accept its findings of fact unless they are clearly erroneous. ***Cunningham***, 144 Wis.2d 282, 423 N.W.2d at 866. Whether the facts satisfy the legal standard in ***Innis*** is a question of law we review de novo. ***Id.***

Pozo argues that Pappenfuss engaged in interrogation because his words and conduct were reasonably likely to elicit an incriminating response; specifically, Pappenfuss first "confronted him with evidence of a crime" and then asked the question: "Do you want to talk about it?"[3] And, according to Pozo, there is evidence that Pappenfuss intended to elicit an incriminating response.[4]

We do not agree with Pozo's contention that Pappenfuss' brief statement that a controlled drug buy had been completed at his house is the

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[3] We do not understand Pozo to argue that solely because Pappenfuss asked a question--"Do you want to talk about it,"--it automatically follows he interrogated Pozo. Although neither ***Innis*** nor ***Cunningham*** define "express questioning," courts have held that a question is not an interrogation within the meaning of ***Miranda*** and ***Innis*** unless under all the circumstances in a given case the question is reasonably likely to elicit an incriminating response. *See* ***U.S. v. Booth***, 669 F.2d. 1231, 1237-38 (9th Cir. 1981); ***Murphy v. Holland***, 845 F.2d 83, 85-86 (4th Cir. 1988); ***U.S. v. Abell***, 586 F. Supp. 1414, 1420 (D. Maine 1984).

[4] Pozo lists as additional pertinent factors that he was in the "inherently coercive environment of a police station with several police officers present" and he was in custody. These factors do not add anything. The ***Innis*** test assumes the suspect is in custody in that it asks whether a suspect in custody is subject to interrogation. ***Rhode Island v. Innis***, 446 U.S. 291, 300 (1980). "Interrogation" must reflect a measure of compulsion beyond that inherent in custody itself. ***Id.*** Being at a police station in the presence of police officers is a factor the court took into account in deciding that Pozo was in custody, and is typical of being in custody.

same as confronting him with incriminating physical evidence or with a verbal summary of the case against him. However, even if it were, that, in itself, does not constitute interrogation. ***Cunningham***, 144 Wis.2d at 282-83, 423 N.W.2d at 866. We next consider that the statement about the controlled drug buy was followed by the question: "Do you want to talk about it?" On its face, this question did not ask for any information relating to the controlled drug buy but instead asked whether Pozo wants to talk about that. The question asked for a yes or no answer, neither of which are incriminating. *See* ***People v. Alvarado***, 644 N.E.2d 783, 788-89 (Ct. App. Ill. 1994) (request for consent to search is not reasonably likely to elicit incriminating response; rather it is request for grant or denial of authority).

We next consider evidence of Pappenfuss' intent. The ***Innis*** test focuses primarily on the perception of the suspect, not the subjective intent of the police; however, where a police practice is designed to elicit an incriminating response, it is unlikely the practice will not be one which the police should have known was reasonably likely to have that effect. ***Cunningham***, 144 Wis.2d at 279-80, 423 N.W.2d at 865. Pappenfuss testified that he did not consider that Pozo was in custody when the two officers brought Pozo to him, even though he had told the officers to arrest Pozo if Pozo would not come voluntarily. When challenged on cross-examination on his belief that Pozo was not in custody, Pappenfuss responded, "Well, obviously it's a fine line. I'm trying to get him in there for that purpose, to question him without being in custody." The trial court concluded that Pozo was in custody when he was brought to Pappenfuss, but did not make findings relating to this particular testimony. Pozo argues that this testimony is evidence that Pappenfuss intended to elicit an incriminating response, and this means Pappenfuss should have known his question was reasonably likely to have that effect.

When a trial court does not make a specific factual finding, we may assume that the court's finding was in favor of its decision, *see* ***State v. Hubanks***, 173 Wis.2d 1, 27, 496 N.W.2d 96, 105 (Ct. App. 1992), and may affirm the decision if the evidence supports that finding. *See* ***Moonen v. Moonen***, 39 Wis.2d 640, 646, 159 N.W.2d 720, 723 (1968). The trial court here did find that Pozo "blurted ... out" his statement and that it was not in response to the question Pappenfuss asked. We infer from this, as well as the court's decision not to suppress the statement, that the court found that Pappenfuss did not intend to elicit an incriminating response. This implicit finding is not clearly erroneous. Pappenfuss' intent to question Pozo without Pozo being in custody does not necessarily mean that Pappenfuss intended to elicit an incriminating

response with the question "Do you want to talk about it?" It is the trial court's role to decide which inference to draw when testimony supports more than one, ***State v. Friday***, 147 Wis.2d 359, 370-71, 434 N.W.2d 85, 89 (1989), and we will assume the court made the inference that is consistent with its other findings and its conclusion.

Of course, even though Pappenfuss did not intend to elicit an incriminating response, his statement, question and conduct could nevertheless be reasonably likely to have that effect on Pozo. *See* ***Cunningham***, 144 Wis.2d at 280, 423 N.W.2d at 865. However, based on the findings and implied findings of the trial court, we conclude that an objective observer, knowing what Pappenfuss knew about Pozo, would not on the sole basis of hearing Pappenfuss' words and observing his conduct conclude that they were reasonably likely to elicit an incriminating response. The reference to the controlled drug buy was brief, providing an explanation as to why Pozo was there. The question was also brief, calling only for a yes or no answer on whether Pozo wanted to talk about the controlled drug buy. There is no indication that Pappenfuss knew anything about a particular susceptibility of Pozo. *See* ***Cunningham***, 144 Wis.2d at 281-82, 423 N.W.2d at 865 (brevity of words and conduct and lack of particular suspectability of suspect are appropriate factors to consider). We see no evidence of compulsion in Pappenfuss' words or conduct or in the surrounding circumstances beyond that inherent in the custody itself. *See* ***Innis***, 446 U.S. at 330.

## INEFFECTIVE ASSISTANCE OF COUNSEL

Pozo contends that even if the trial court did not err in denying Pozo's statement, trial counsel was ineffective for not presenting additional testimony at the suppression hearing. At the postconviction hearing on this claim, Pozo presented testimony from retired Chief of Police James Stefanic and additional testimony from Pappenfuss which, Pozo claims, demonstrated that Pappenfuss did subject Pozo to interrogation.

To succeed on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that the deficient performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To meet the prejudice test, the defendant must show that there is a reasonable probability that, but for trial counsel's unprofessional

errors, the result of the proceeding would have been different. ***Id.*** at 694; ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Id.*** We do not decide whether counsel's performance was deficient because we conclude that Pozo has not shown prejudice.

As the State points out in its brief, another police officer, Donald Sutton, testified that Pozo made substantially the same statement to him.[5] In his reply brief, Pozo does not address Sutton's testimony at all, let alone explain why there is prejudice in view of his testimony. We generally consider that propositions asserted by a respondent and not disputed in the appellant's reply brief are admitted. *See* ***Schlieper v. DNR***, 188 Wis.2d 318, 322, 525 N.W.2d 99, 101 (Ct. App. 1994). We conclude that, because the jury heard a statement Pozo made to Sutton that was substantially the same as the statement Pozo made to Pappenfuss, Pozo has not demonstrated that he was prejudiced by the admission of Pappenfuss' testimony.

In reaching this conclusion, we have assumed that Sutton and Pappenfuss were not testifying to one statement that both heard, but to two statements that were substantially the same in content.[6] However, rather than end our prejudice analysis here, we choose to consider whether Pozo has shown prejudice if we make a different assumption--that Pozo made only one statement on the absence of a body wire. If this is the case, and if both Sutton's and Pappenfuss' testimony on Pozo's statement should have been suppressed but for deficient performance of counsel, then the question on prejudice is: Had the jury not heard any testimony about Pozo's statement that there was no body wire, is there a reasonable probability that the result would have been different? We conclude there is not.

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[5] Sutton testified that he was present at the courthouse later that day with Pozo and Volten. He advised Pozo of the controlled purchase made at his residence earlier that day and told Pozo that he and Volten were under arrest for delivery of a controlled substance, crack cocaine. According to Sutton, Pozo responded that he was not the person who sold the drugs, that the police could not arrest him, that they did not have a body wire, and they had no case against him because they had to have a body wire to use in court. Defense counsel did not object to this testimony, as it did to Pappenfuss' testimony on Pozo's statement.

[6] We have made that assumption based on our own reading of the record as well as Pozo's failure to argue otherwise in his reply brief.

The significance of Pozo's statement about the absence of a body wire is that it corroborated the implication of Riley's testimony on the movement of Pozo's hand when he was hugging her--that he was seeing if she had a body wire. However, even without the corroboration, that implication remains. More importantly, there was much other evidence of Pozo's participation in the drug sale.

Riley described her meeting with Volten and Pozo at their residence several days before the purchase. She was talking to both Pozo and Volten and asked if she could get "an eight ball" (an eighth of an ounce of cocaine). Volten looked at Pozo who nodded at Volten, and Volten said "yes." Riley testified that "*they* said they were going to get it later that week;" that Volten said, "*we* were thinking of more of, more on the lines of an ounce;" and Volten said, "*We* will call you when *we* get back." (Emphasis added.)

Riley did not get a call but went back to their residence on the following Tuesday, March 14, for the controlled purchase. After describing Pozo's hugging her at the door, she testified that he said, "*We* tried to call you, cause it was here." (Emphasis added.) She headed into the bedroom to talk to Volten, and Pozo went into the kitchen. Undercover officer Harkey followed Riley into the bedroom. After Volten and Riley discussed how much "rock" Riley could buy, Volten asked Riley and Harkey to go into the kitchen, and Volten called Pozo into the bedroom. About five minutes later, Volten came out of the bedroom "with what was supposed to be a half ounce of rock cocaine" wrapped in newspaper and put it on the kitchen table. Riley picked it up, paid Volten $800, and left with Harkey.

Harkey's testimony essentially corroborated Riley's on what happened inside the residence, but Harkey did not see or hear what happened at the front door between Riley and Pozo. Harkey added that Pozo sat at the kitchen table with Riley and her, talking briefly while Gabrielle was in the back of the trailer. Harkey testified that Pozo asked if they "wanted to do a line," meaning snorting cocaine through the nose.

The theory of defense was that Volten was responsible for the delivery and Pozo did not participate in the transaction. Pozo did not testify. Volten testified that she bought the cocaine she sold to Riley on the previous evening, in Madison, and Pozo accompanied her. According to Volten, Pozo

was in another room in the house in Madison when she bought the cocaine. Volten acknowledged that she had made a prior statement that after she and Pozo got back home, they each took some of the cocaine. Volten testified that Pozo was not in the bedroom when she discussed the drug deal with Riley on March 14, that she called Pozo back to the bedroom to watch her son who was there, and at the time of the actual exchange of money and cocaine in the kitchen, Pozo was back in the bedroom.

Riley's testimony about the conversation with both Pozo and Volten arranging for the purchase was not contradicted. Volten also did not contradict the significant portions of Riley's and Harkey's testimony about Pozo's presence and statements on March 14. Going with Volten to buy the cocaine is also evidence of his involvement in the delivery. Pozo has not met his burden of showing that, without any testimony on Pozo's statement about the absence of a body wire, the outcome of the trial would have been different.

DEFINITION OF DEALER - § 139.87(2), STATS.

Pozo argues that the evidence was insufficient to convict him on the tax stamp count because in order to be a dealer for tax stamp purposes, he must have possessed more than seven grams of cocaine.[7] The State presented testimony that the substance Volten sold to Riley weighed 7.519 grams and was approximately 83% cocaine and 17% benzocaine, or 6.24077 grams of cocaine and 1.27823 grams of benzocaine. Whether there was sufficient evidence turns on the definition of dealer in § 139.87(2), STATS., which provides:

> "Dealer" means a person who in violation of ch. 161 possesses, manufactures, produces, ships, transports, delivers, imports, sells or transfers to another person more than 42.5 grams of marijuana, more than 5 marijuana plants, more than 14 grams of mushrooms containing psilocin or psilocybin, more than 100 milligrams of any material containing lysergic acid

[7] An occupational tax is imposed on dealers, § 139.88, STATS. Dealers who possess a schedule I controlled substance or schedule II controlled substance that does not bear evidence that the tax has been paid may be fined not more than $10,000 or imprisoned for not more than five years or both. Section 139.95(2), STATS.

> diethylamide or more than 7 grams of any other schedule I controlled substance or schedule II controlled substance. "Dealer" does not include a person who lawfully possesses marijuana or another controlled substance.

Section 139.87(6), STATS., provides that a schedule II controlled substance is a substance listed in § 161.16, STATS. Section 161.16(2)(b)1 lists cocaine as a schedule II controlled substance.[8]

The trial court determined that the statutory seven grams includes "the cutting agent," the benzocaine.[9] On appeal, Pozo argues that the statute plainly requires that there be seven grams of pure cocaine. The State responds that the statute is ambiguous and that related statutes show that the seven grams is to include any substance mixed with the cocaine.

The construction and application of a statute is a question of law, which we review de novo. ***State v. Pham***, 137 Wis.2d 31, 34, 403 N.W.2d 35, 36 (1987). The aim of statutory construction is to ascertain the intent of the legislature, and our first resort is to the language of the statute itself. ***Dieckhoff v. Severson***, 145 Wis.2d 180, 189-90, 426 N.W.2d 71, 73 (Ct. App. 1988). The

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[8] Section 161.16(2)(b), STATS., provides in full:

> Coca leaves and any salt, compound, derivative or preparation of coca leaves. Decocainized coca leaves or extractions which do not contain cocaine or ecgonine are excluded from this paragraph. The following substances and their salts, isomers and salts of isomers, if salts, isomers or salts of isomers exist under the specific chemical designation, are included in this paragraph:
>
> 1. Cocaine.
>
> 2. Ecgonine.

[9] The jury was instructed as follows: "The weight of the substance, as it applies to both Count One and Count Two, includes not only the weight of the controlled substance, if any. It also includes any cutting agent or other substance mixed with the controlled substance."

entire section of a statute and related sections are to be considered in construing or interpreting the words of a statute. ***Id.*** at 90, 426 N.W.2d at 73. If a statute is ambiguous, we may examine the scope, history, context, subject matter and object of the statute in order to determine legislative intent. ***Ball v. Dist. No. 4, Area Bd.***, 117 Wis.2d 529, 538, 345 N.W.2d 389, 394 (1984).

Pozo points out that nothing in the language of § 139.87(2), STATS., indicates that any substance other than cocaine is included in the seven grams. That is true, but we do not interpret statutes in a vacuum. *See* ***In re J.L.W.***, 143 Wis.2d 126, 130, 420 N.W.2d 398, 400 (Ct. App. 1988). When we consider § 139.88, STATS., the statute immediately following, we conclude that the proper interpretation of § 139.87(2) is that substances mixed with cocaine are to be weighed with cocaine in determining whether a person possesses more than seven grams.

Section 139.88, STATS., tracks each category of controlled substance specified in § 139.87(2), STATS., and describes the amount of tax imposed on that category.[10] Section 139.88(2) makes clear that the tax on a dealer possessing a

[10] Section 139.88, STATS., provides:

> **Imposition.** There is imposed on dealers, upon acquisition or possession by them in this state, an occupational tax at the following rates:
>
> (1) Per gram or part of a gram of marijuana, whether pure or impure, measured when in the dealer's possession, $3.50.
>
> (1d) Per marijuana plant, regardless of weight, counted when in the dealer's possession, $1,000.
>
> (1g) Per gram or part of a gram of mushrooms or parts of mushrooms containing psilocin or psilocybin, whether pure or impure, measured when in the dealer's possession, $10.
>
> (1r) Per 100 milligrams or part of 100 milligrams of any material containing lysergic acid diethylamide, whether pure or impure, measured when in the dealer's possession, $100.
>
> (2) Per gram or part of a gram of other schedule I controlled substances or schedule II controlled substances, whether pure or impure, measured when in the dealer's possession, $200.

schedule I or schedule II controlled substance not covered under subsec. (1) is $200 per gram or part of a gram, whether the controlled substance is "pure or impure." There is only one reasonable interpretation of § 139.88(2) and that is that the amount of substance mixed with the controlled substance is weighed in determining the amount of the tax. Because §§ 139.87(2) and 139.88, STATS., both concern weighing controlled substances for purposes of imposing the tax and track each other so precisely, the legislature must have intended that the manner of weighing "other schedule I controlled substances and schedule II controlled substances" under § 139.87(2) is the same as the manner specified for weighing those same controlled substances under § 139.88(2).

Pozo argues that the different treatment of psilocin, psilocybin and lysergic acid diethylamide [LSD] in §§ 139.87(2) and 139.88, STATS., support his interpretation of § 139.87(2). We do not agree. The legislature has provided that mushrooms containing psilocin\psilocybin and material containing LSD are weighed in determining the amount a dealer must possess under § 139.87(2) and the amount of tax a dealer must pay under § 139.88(1g) and (1r). The legislature has provided a different manner of weighing marijuana and other schedule I and schedule II controlled substances--weighing the pure controlled substance along with other substances mixed with it. Section 139.88(1) and (2). Indeed, the consistency of treatment in weighing psilocin/psilocin and LSD under § 139.87(2) and under § 139.88 supports our view that the legislature intended that other schedule I and schedule II controlled substances be weighed in the same manner under § 139.87(2) as they are under § 139.88(2).

We agree with Pozo that the provision in § 161.41(1r), STATS., for determining the amount of controlled substances for purposes of imposing penalties for delivery and possession is limited by its terms to those penalty sections. Section 161.41(1r) provides in part:

> *In determining amounts under subs. (1) and (1m) and s. 161.49 (2) (b)*, an amount includes the weight of the controlled substance included under s. 161.16 (2) (b), heroin, phencyclidine, lysergic acid diethylamide, psilocin, psilocybin, amphetamine, methamphetamine or tetrahydrocannabinols together with any compound, mixture, diluent or other substance mixed or combined with the controlled substance.... (Emphasis added.)

According to Pozo, § 161.41(r) shows that the legislature understands that cocaine may be mixed with noncontrolled substances and knows how to include those substances when it intends to. We agree. The "whether pure or impure" language in § 139.88(2), STATS., expresses the same intent, although with different words.

We are not persuaded by Pozo's argument that the rule of lenity requires a different result. That rule, like other rules of statutory construction, is not to be applied in a manner that is inconsistent with the statutory purpose. ***State v. Hopkins***, 168 Wis.2d 802, 814-15, 484 N.W.2d 549, 554 (1992). Certainly if the purpose of §§ 139.87 through 139.96, STATS., is to raise revenue through the tax, excluding substances that are mixed with the controlled substance in defining what quantity triggers the tax is inconsistent with this purpose. However, we accept Pozo's argument that the primary purpose is not to raise revenue but to penalize criminal conduct. *See* ***State v. Heredia***, 172 Wis.2d 479, 487, 493 N.W.2d 404, 408 (Ct. App. 1992) (referring to this tax as "designed to aid law enforcement rather than raise revenue"). Nevertheless, Pozo's interpretation of § 139.87(2) is inconsistent with the purpose of penalizing criminal conduct as expressed by the legislature in § 161.41, STATS, where the legislature has clearly expressed an intent to deter the sale of controlled substances by structuring penalties based on the weight of the controlled substance together with any substances with which it is mixed. *See* § 161.41(1)(cm).

We are satisfied that, when § 139.87, STATS., is read together with § 139.88, STATS., the legislative intent is clear that substances mixed with "any other schedule I controlled substance or scheduled II controlled substance" are to be weighed in determining whether a person is a dealer under § 139.87(2).

*By the Court.*—Judgment affirmed.

Recommended for publication in the official reports.