COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0337-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RAPHAEL PERRY,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Racine County: DENNIS FLYNN, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Raphael Perry appeals from judgments convicting him as party to the crime of possession with intent to deliver cocaine and tetrahydrocannabinols (THC or marijuana) within 1000 feet of a school and two

counts of misdemeanor bail jumping. We reject Perry's challenge to the sufficiency of the evidence of possession with intent to deliver and affirm.

¶2 The State must prove each essential element of the crime beyond a reasonable doubt. *See* ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). Our review of the sufficiency of the evidence is to determine whether 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. *See* ***State v. Ray***, 166 Wis.2d 855, 861, 481 N.W.2d 288, 290-91 (Ct. App. 1992). We must accept the reasonable inferences drawn from the evidence by the jury. *See* ***Poellinger***, 153 Wis.2d at 507, 451 N.W.2d at 757. If more than one reasonable inference can be drawn from the evidence, we must accept the inference which supports the conviction. *See* ***State v. Hamilton***, 120 Wis.2d 532, 541, 356 N.W.2d 169, 173-74 (1984).

¶3 The elements of intent with possession to deliver a controlled substance are: Perry possessed a substance, the substance was a controlled substance, Perry knew or believed the substance he possessed was cocaine or marijuana, and Perry possessed the substance with intent to deliver it. *See* WIS J I—CRIMINAL 6035. A defendant is a party to the crime if he was "concerned in the commission of the crime" either by directly committing the crime or by intentionally aiding and abetting the person who directly committed it. *See* WIS J I—CRIMINAL 400.

¶4 The following facts were adduced at trial. The police entered the apartment where Eddie Lambert was staying with Sheila Everson to execute a no-knock search warrant based on information concerning drug activity by Lambert and

Everson. The police found Perry seated with Lambert and two other men around a coffee table on which marijuana had been cleaned of seeds and stems and a portion of it had been placed in a plastic baggie. A police officer testified that the appearance of the marijuana indicated it was being prepared for sale. When the police entered, Perry ran toward the back of the apartment and was exiting the south bedroom when he was apprehended by officers.

¶5 The police did not find any drugs on Perry's person but found $678 in his front pocket. Drugs, drug paraphernalia, ammunition and cash were found in numerous places in the bedroom where Perry was apprehended, including 6.9 grams of cocaine in three knotted baggies under the bed.

¶6 Under a grant of immunity, Lambert testified at trial that Perry arrived at the apartment to visit him a few hours before the police arrived and he saw Perry and another man run to the back of the apartment when the police entered. When Perry was returned to the living room after being apprehended by the police, Lambert asked Perry in a whisper what he had done with the "little stuff" Lambert had seen on him.[1] Perry responded that he had swallowed it. Lambert then admitted to the police that all the drugs in the apartment were his because he did not want anyone else held responsible. However, once Lambert learned that the police had found cocaine under the bed where Perry had been apprehended, Lambert denied that those drugs were his. Lambert testified that it was possible that Perry threw the cocaine under the bed.

[1] It is not clear from the record whether "little stuff" refers to cocaine, marijuana or something else. However, the jury was free to draw a reasonable inference regarding the identity of the "little stuff."

¶7 A police officer testified that when Lambert claimed that all of the drugs in the apartment were his, he did not know that the police had found cocaine under the bed. The cocaine Lambert acknowledged as his was yellow in color, while the cocaine found under the bed was whiter.

¶8 A police investigator with training in street sales of controlled substances testified that the cocaine found under the bed was whiter than the more yellow cocaine found in other places in the bedroom. The investigator testified that the color of cocaine will vary depending on when the samples are cooked. Most of the cocaine found in the apartment was yellowish. From this evidence, the jury could reasonably infer that the cocaine found under the bed was not part of Lambert's inventory. Rather, the cocaine came from Perry, who fled to the bedroom when police entered and threw his cocaine under the bed. The inference that Perry threw cocaine under the bed is also supported by the presence of $678 in Perry's pants pocket, even though Perry was unemployed at the time of his arrest. An unexplained large quantity of cash can be probative of a defendant's status as a drug dealer, i.e., possessing with intent to deliver, particularly where the defendant is unemployed. *See* ***State v. Griffin***, 220 Wis.2d 371, 384, 584 N.W.2d 127, 132 (Ct. App.), *review denied,* 221 Wis.2d 654, 588 N.W.2d 631 (1998).

¶9 Perry points to the fact that the jury convicted him of possessing less than five grams of cocaine when that amount of cocaine was found in areas of the apartment to which Perry had not been connected. This does not undermine the verdict. The cocaine under the bed in the room where Perry was apprehended weighed 6.9 grams. The jury was free to reach a verdict relating to the amount of cocaine "based on considerations of compromise, leniency, or even nullification." ***State v. Marhal***, 172 Wis.2d 491, 501-02, 493 N.W.2d 758, 763 (Ct. App. 1992)

(citation omitted). The jury's finding that Perry possessed less than five grams of cocaine does not undermine the verdict.

¶10 Perry notes other deficiencies in the evidence. Lambert stated that all of the drugs in the apartment were his. The police did not find any drugs on Perry's person and his fingerprints were not found in the apartment. The evidence connected Lambert and Everson to the apartment, not Perry. The fact that Perry was found with $678 cash in his pocket is insufficient in and of itself to convict him. These concerns are merely an attempt to relitigate the factual disputes presented to the jury. Perry's trial counsel argued to the jury that the evidence was insufficient to convict Perry of possession of cocaine with intent to deliver. The jury did not agree.

¶11 There was also sufficient evidence to convict Perry of possession of THC with intent to deliver as party to the crime. Perry was found around a table where quantities of marijuana were being prepared for sale, Perry had been in the apartment for a few hours before police arrived with the warrant, Perry fled to a back bedroom when police entered with a warrant, and Lambert stated that Perry had swallowed the "little stuff" Lambert had seen in Perry's possession. The jury could reasonably infer that Perry was involved in preparing the marijuana for sale, i.e., concerned in the commission of a crime. *See* WIS J I—CRIMINAL 400. The jury could also have considered Perry's flight when the police entered and that he had a large amount of cash on his person. Flight is evidence of consciousness of guilt. *See* ***State v. Winston***, 120 Wis.2d 500, 505, 355 N.W.2d 553, 556 (Ct. App. 1984) (fact of an accused's flight or related conduct is circumstantial evidence of consciousness of guilt and thus of guilt itself).

¶12 The jury was also free to reject Lambert's testimony that the marijuana in the apartment was his. A jury need not accept a witness's testimony

in its entirety, *see* ***State v. Balistreri***, 106 Wis.2d 741, 762, 317 N.W.2d 493, 503 (1982), and can choose among conflicting statements of a witness, *see* ***State v. Givens***, 217 Wis.2d 180, 197, 580 N.W.2d 340, 347 (Ct. App.), *review denied,* 217 Wis.2d 521, 580 N.W.2d 691 (1998).

¶13 Contrary to Perry's argument on appeal, the evidence before the jury on marijuana possession with intent to deliver consisted of more than Perry's presence in the apartment and proximity to marijuana being prepared for sale. Perry fled when police entered, was found with cash which can be evidence of drug dealing, was linked by Lambert's testimony to the white cocaine found under the bed in the room where he was apprehended and was described as having swallowed the "little stuff" he had. This evidence gave the State the opportunity to argue that Perry threw the cocaine under the bed and swallowed marijuana in his possession after the police entered the apartment. There was sufficient evidence for the jury to infer that Perry was a party to possession of marijuana and cocaine with intent to deliver.

By the Court.—Judgments affirmed.

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