

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 4, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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. 2004AP2911-CR

Cir. Ct. No. 2003CF1242

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHALAMAR BURSINGER,

DEFENDANT-APPELLANT.

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

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Shalamar Bursinger appeals from a judgment entered after a jury convicted him of possession of a controlled substance (cocaine) with intent to deliver, and possession of a controlled substance (marijuana) with intent to deliver, contrary to WIS. STAT. §§ 961.41(1m)(cm)4.

and 961.41(1m)(h)3. (2003-04).¹ Bursinger claims the evidence was insufficient to support the convictions. Because the evidence is sufficient to support the jury's verdict, we affirm.

BACKGROUND

¶2 On February 21, 2003, City of Milwaukee police officers executed a search warrant at 2520-22 West Mitchell Street. This was a two-story residence, with living space in the third-story attic. In searching the attic, the officers located two individuals, Joshua Weber and Terence Gray.² Bursinger was not home at the time of the search, although it is undisputed that he lived at that residence.

¶3 The officers indicated that the attic had a “significant” smell of marijuana. In the bedroom area of the attic, the police found a closet-type box, which was used to store clothing. The box was zippered shut. The odor of marijuana in the box was strong. Inside that box, the officers located a smaller box, which contained three large plastic bags of marijuana.

¶4 Police officers also found a number of jackets along an attic wall, one of which contained bags of marijuana and cocaine. In addition, in plain view, they found a notebook with notations of information relating to the sale of marijuana and cocaine. They also found an electronic scale, a marijuana pipe, “blunts,” knives, a loaded-unregistered handgun and a variety of documents addressed to Bursinger, including telephone bills, a medical bill, a letter from an

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

² Joshua Weber is also referred to as Joshua Gray. Terence Gray is also referred to as Terrance Gray.

insurance company, a notice of a hearing from municipal court and a W-2 wage statement. The documents all were dated within the four months preceding the search. Bursinger's driver's license was also found in the attic.

¶5 The two individuals found in the attic were arrested and each took a coat from the attic before exiting the home. Neither individual took the coat that had the contraband removed from the pockets.

¶6 Bursinger told police that he lived in the upper and lower levels of the home. He was charged as noted above and entered a not guilty plea. The case was presented to a jury.

¶7 During trial, Bursinger's half-sister was subpoenaed to testify. She refused to comply with the subpoena, but did eventually come to court on a body attachment. When asked who lived in the attic, she said she did not know—that “no one” lived in the attic. She claimed Bursinger used the attic for storage. She also testified that she could smell marijuana from the house's vent work, but did not know whether the vents were connected to the attic or the lower level of the house. Her trial testimony contradicted her statement to police at the time of the search—that Bursinger lived in the attic alone and she would occasionally smell marijuana coming from the attic vents.

¶8 The husband of Bursinger's half-sister, another resident of the home, also testified at trial. He stated that Bursinger “stayed on and off” in the attic and that Bursinger lived in the attic alone. He said that he saw a lot of people coming and going from the attic, smelled marijuana coming from the attic, and never heard people in the attic unless Bursinger was there.

¶9 Bursinger did not testify at trial. The defense did not call any witnesses. The jury found Bursinger guilty on both counts. Judgment was entered. He now appeals.

DISCUSSION

¶10 Bursinger's only claim is that the evidence was insufficient to support the jury's verdict that he was guilty of possession of marijuana and cocaine. In essence, he argues that, as a matter of law, he could not be found guilty of possession because there was insufficient evidence to demonstrate that he had dominion and control over the area where the contraband was found and that he knew of the presence of the drugs. He argues that the more reasonable view of the evidence is that the two individuals found in the attic during the search had hidden the drugs in the attic when they heard the police enter the home. The State responds that the evidence supports the reasonable inference that Bursinger knew the drugs were present in the attic. We agree that the evidence was sufficient to uphold the jury's determination.

¶11 Our review of a sufficiency of the evidence claim is limited. We will not reverse a conviction unless 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. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶12 In his claim, Bursinger attacks *only* the possession element of the crimes. He argues that the evidence does not support any reasonable inference that he possessed either the cocaine or the marijuana because there was no evidence that he *knew of the presence of the drugs*.

¶13 This case involved constructive (as opposed to actual) possession. In order to prove that Bursinger had possession of the contraband, the State needed to establish that “the contraband is found in a place immediately accessible to the accused and subject to his exclusive or joint dominion and control,” *Ritacca v. Kenosha County Court*, 91 Wis. 2d 72, 82, 280 N.W.2d 751 (1979) (citation omitted) and that he had “knowledge of the presence of the drug,” *id.* (citation omitted).

¶14 Bursinger admits that the drugs were found in a place subject to his control. He challenges only the second part of the test—that he had no knowledge of the presence of the drugs. When possession of the premises is non-exclusive, certain circumstances will support an inference of knowledge that the drugs are in the premises. These include: (1) the defendant had access to the area where the drugs were found; (2) whether the drugs were in plain view; and (3) the presence of items used to make or package the drugs. *State v. Allbaugh*, 148 Wis. 2d 807, 813, 436 N.W.2d 898 (Ct. App. 1989).

¶15 The record reflects that all these elements were presented to the jury in this case. There is no dispute that Bursinger had access to the areas in the attic where the drugs were discovered. His half-sister testified he used the attic for storage, and her husband testified that Bursinger lived “on and off” in the attic.

¶16 Next, some of the drugs discovered were in plain view, including the marijuana remnants found on the table and the blunts found on the scale in the corner of the attic. Finally, items used to make or package the drugs were found in the attic.

¶17 The jury heard testimony that Bursinger lived sporadically in the attic, which had a strong odor of marijuana. The “clothes”-like box also smelled

of marijuana. Anyone opening it would have known that it contained marijuana. The drugs were found in readily accessible areas. The jury heard one house resident testify that he only smelled marijuana coming from the attic vents when Bursinger was in the attic. The evidence presented to the jury included personal papers suggesting that Bursinger was living in the attic, and the drug paraphernalia and a drug ledger were in plain view in the attic.

¶18 Given all of these facts, we cannot say that no jury could have found Bursinger guilty beyond a reasonable doubt. Further, as the State points out, the evidence could also support a finding that the individuals discovered in the attic during the search planted all the drug evidence to avoid liability. Nonetheless, it is not the role of this court to resolve conflicts in the testimony. Weighing the evidence and determining who is telling the truth is a task particularly assigned to the jury. *Poellinger*, 153 Wis. 2d at 506. This court “need not concern itself in any way with evidence which might support other theories of the crime.” *Id.* at 507-08. Rather, our review is limited to determining whether there is sufficient evidence to support that view, which the jury decided was the truth. We have concluded that there is sufficient evidence to support the determinations reached by the jury. Accordingly, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

