COURT OF APPEALS
DECISION
DATED AND FILED

May 3, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2998-CR **Cir. Ct. No. 2007CF2834**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DERRICK D. BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed*.

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

¶1 PER CURIAM. Derrick D. Brown appeals from a judgment of conviction, entered upon a jury's verdict, on one count of possession with intent to deliver more than forty grams of cocaine. Brown contends that the trial court erroneously approved a stipulation wherein Brown agreed that the substance

police recovered was, in fact, cocaine weighing 123.69 grams. We conclude the court properly accepted the stipulation and we affirm the judgment.

¶2 Just before Brown was apprehended, the police, who were following up on information from a confidential informant, observed Brown discard a plastic bag. An officer recovered the bag, and its contents tested positive for cocaine.

¶3 At a pretrial conference, the State indicated that the parties would stipulate to the test results of the plastic bag's contents so that a crime lab analyst would not have to be produced as a trial witness. Defense counsel agreed that Brown was willing to concede that the substance recovered was cocaine. Brown himself did not speak, and the stipulation was not discussed further that day.

¶4 At a subsequent pretrial conference, the trial court indicated its understanding that the parties were prepared to stipulate that 123 grams of cocaine were recovered. The court then had a discussion directly with Brown. Brown first acknowledged that the State had to prove both that the substance was cocaine and that it weighed more than forty grams. Brown also confirmed that he understood he had a right to have a jury determine whether the State had fulfilled its evidentiary burden. The court then asked:

> Q: And your attorney is indicating that you're willing to agree that the substance involved was, in fact, cocaine and that the amount of the substance was 123 grams; is that correct?
>
> A: I don't know what it was, but he told me something like that. He said it may go smoother.

The court then noted, "If you don't know that it was cocaine, that is one of the elements that the State has to prove, that it was cocaine and you knew it was

cocaine. If you say you didn't know it was cocaine, then I really don't think you can stipulate it was cocaine[.]"

¶5 Defense counsel interjected, explaining that the real issue in the case was possession. He said that he had explained to Brown that absent a stipulation, the State would call a chemist to talk about the scientific process used to test the bag's contents, and that a stipulation was "simply a question of making things go smoother." The court then attempted to clarify further for Brown, but when Brown continued to express some confusion, the State suggested that "for the sake of making a safe record, we shouldn't go along with that stipulation." That hearing was on a Tuesday; the court set the matter for trial the following Monday.

¶6 On the first day of trial, prior to *voir dire*, the State indicated that the stipulation would be renewed. Defense counsel agreed, telling the court that he had spoken with Brown on Thursday, Saturday, and Sunday, and that Brown was prepared to stipulate that the police recovered 123.69 grams of cocaine. The trial court engaged Brown in a colloquy. This time, Brown expressed no confusion, and the court accepted the stipulation.

¶7 On appeal, Brown contends that the trial court erroneously approved the stipulation because it "was aware that Brown did not truly want to agree to the stipulation and waive his rights to trial upon the elements subject to stipulation."[1]

[1] The State complains that Brown never challenged the stipulation in the trial court, either by objection or by postconviction motion. Therefore, the State concludes, he should be precluded from raising the issue now on appeal. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). We decline to invoke this waiver doctrine in this case. *See* ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 417, 405 N.W.2d 354 (Ct. App. 1987).

¶8 First, we observe that while Brown may have expressed some confusion or reluctance to enter the stipulation during a pretrial conference, it does not necessarily follow that he remained reluctant to enter the stipulation on the day of trial. Contrary to appellate counsel's assertion that "nothing materially changed" between the two dates, it appears that trial counsel—who met with Brown three times between the hearing with the aborted stipulation and the day of trial—determined the source of Brown's confusion, then explained away to Brown's satisfaction any lingering doubt Brown might have had.[2] We therefore discern no impropriety or inadequacy in the court's acceptance of the stipulation even though Brown had earlier expressed some equivocation. *See* ***State v. Tomlinson***, 2001 WI App 212, ¶37, 247 Wis. 2d 682, 635 N.W.2d 201.

¶9 Second, appellate counsel characterizes the stipulation as an inadequate waiver of a jury trial. Despite the court's reference to Brown "voluntarily giving up his right to a jury trial," it does not appear such was the intended role of the stipulation. Instead, Brown was merely conceding facts as they related to the weight and nature of the substance police recovered. *See* ***State v. Benoit***, 229 Wis. 2d 630, 636-37, 600 N.W.2d 193 (Ct. App. 1999) (defendant stipulating to certain facts "waived his right to challenge" issue but was not surrendering right to jury trial). Indeed, the jury was still instructed that in order to find Brown guilty of possession with intent to deliver cocaine, it would have to

[2] It appears that Brown may have initially thought he was stipulating to the element that *he knew* the substance was cocaine as opposed to the element that the recovered substance *simply was* cocaine.

find that the substance in question was, in fact, cocaine. *See* ***id.*** Accordingly, the court's colloquy was more than adequate for accepting the stipulation.[3]

¶10 We also conclude that any error by the court in entertaining the stipulation when re-raised by the parties on the day of trial was invited error. *See* ***Tomlinson***, 247 Wis. 2d 682, ¶36. Brown affirmatively approved the stipulation after the court rejected it once; he will not be heard to disavow it on appeal. *See* ***State v. Gary M.B.***, 2004 WI 33, ¶11, 270 Wis. 2d 62, 676 N.W.2d 475; ***Shawn B.N. v. State***, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992); ***State v. Michels***, 141 Wis. 2d 81, 98, 414 N.W.2d 311 (Ct. App. 1987). We similarly reject any "plain error" argument.

By the Court.—Judgment affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

[3] However, it appears that the court did not instruct the jury about determining the weight of the substance recovered, *see* WIS JI—CRIMINAL 6001, although introductory instructions reminded the jury that Brown had been charged with possession with the intent to deliver more than forty grams of cocaine. It is not clear why the instruction on weight was not given; Brown had initially requested it. Nevertheless, we conclude there is no reversible error because: (1) we conclude that the colloquy was also sufficient to serve as a jury waiver on the weight element, *see* ***State v. Hauk***, 2002 WI App 226, ¶36, 257 Wis. 2d 579, 652 N.W.2d 393; (2) there was no contemporaneous objection to the lack of a jury instruction, either when the court listed the instructions it would give or when it actually gave them, *see* ***State v. Laxton***, 2002 WI 82, ¶¶25-26, 254 Wis. 2d 185, 647 N.W.2d 784; and (3) at no point was it ever in doubt that the weight of the recovered substance far exceeded the forty grams as charged.