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

OCTOBER 31, 1995

**NOTICE**

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

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

**No. 95-0833-CR**

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

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**MICHAEL J. BAYE,**

**Defendant-Appellant.**

APPEAL from a judgment and an order of the circuit court for Vilas County: JAMES B. MOHR, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Michael Baye appeals his felony convictions for possessing (1) less than 500 grams of marijuana with intent to manufacture, as a party to the crime, and (2) more than 42.5 grams of marijuana without having paid the controlled substance occupational tax. The police arrested Baye while he was loading marijuana growing equipment on his truck and just after he had taken physical possession of some marijuana from his accomplice, Andrew Wal. The State charged Baye and Wal of producing marijuana at Wal's residence. Baye submits several arguments on appeal: (1) the State did not prove possession; (2) the trial court should have given the jury a lesser included

offense instruction for simple marijuana possession without intent to manufacture; (3) §§ 139.87(2), 139.88, 139.89 and 139.95(2), STATS., created an unconstitutional irrebuttable presumption effectively classifying anyone who possesses more than 42.5 grams of the drug as a dealer; (4) the occupational tax violated substantive due process and exceeded the State's tax levying power; (5) the above mentioned statutes violated substantive due process, as specifically applied to him; and (6) the conviction merits a new trial in the interest of justice. We reject Baye's arguments and affirm his convictions.

Baye first argues that the State did not prove possession. He maintains that, at most, he possessed a small amount of marijuana momentarily, unexpectedly, and involuntarily, just before the police arrested him. Prosecutors had an obligation to prove all elements of the offense beyond a reasonable doubt. ***State v. Oimen***, 184 Wis.2d 423, 436, 516 N.W.2d 399, 405 (1994). Baye views the evidence and characterizes the State's case too narrowly. The prosecution's theory of possession, based on Wal's testimony and inferences from the other evidence, encompassed more than Baye's limited physical possession just before his arrest. Wal testified that Baye supplied him with the equipment and plants, assumed the costs of running the equipment, paid Wal with part of the crop, sold the remainder, and kept the profits from the operation. At a minimum, this evidence showed the existence of a common enterprise, in which Wal and Baye shared the enterprise's proceeds and over which Baye exerted substantial control. In the alternative, the evidence permitted a finding that Baye had exclusive control over the operation and that Wal was an employee. If the jury reached either conclusion, then it could find that Baye legally possessed at least a share of the marijuana that the enterprise produced, including the inventory that the police recovered, even if Baye's physical possession just before his arrest was insufficient by itself, arguendo, to prove legal possession.

Baye next argues that the State never proved intent to manufacture and that he therefore deserved a lesser included offense instruction for simple possession. Trial courts must give lesser included offense instructions if there are reasonable grounds for acquittal on the greater charge and conviction on the lesser charge. ***State v. Sarabia***, 118 Wis.2d 655, 661, 348 N.W.2d 527, 531 (1984). Here, Baye has not shown reasonable grounds for conviction on the simple possession lesser charge. Wal testified that the possession was commercial, and other evidence supported this view. Baye possessed substantial amounts of marijuana at his residence; he also was removing marijuana growing

equipment from the Wal operation when the police arrested him. The jury had the responsibility to draw reasonable inferences from this evidence. Based on the quantity of the marijuana grown, the nature of the growing operation, and the testimony of Wal, no reasonable jury could conclude that the marijuana was for personal use.

Baye next argues that §§ 139.87(2), 139.88, 139.89, and 139.95(2), STATS., created an (1) irrebuttable presumption violating procedural due process, and (2) an occupational tax violating substantive due process and exceeding the State's tax levying power. He states that many who possess more the 42.5 grams of marijuana are not dealers and that the legislature has no rational basis for effectively presuming all such possessors to be engaged in a taxable occupation. This position lacks merit. States have broad authority to define the elements of crimes, so long as they do not relieve themselves of their burden to prove the defendant's guilt. ***Sandstrom v. Montana***, 442 U.S. 510, 516 (1979). Here, the State rationally defined anyone who possessed 42.5 grams as a tax owing dealer. The level at which the State may require a tax stamp is within the province of the legislature. This did not reshuffle elements of a crime in order to shift burdens of proof; it simply defined what conduct constituted the crime. The State also rationally levied an occupational tax on such possessors. States have broad taxation powers, ***GTE Sprint v. Wisconsin Bell***, 155 Wis.2d 184, 194, 454 N.W.2d 797, 801 (1990), and their tax levies enjoy a strong presumption of validity. ***Woodward Communications v. Rev. Dept.***, 143 Wis.2d 512, 523, 422 N.W.2d 137, 141 (Ct. App. 1988). Baye has not shown that the State lacked either the power or a rational basis to tax 42.5 grams as occupational possession.

Baye next argues that these statutes, as applied to him, violated substantive due process. He states that he was incapable of meeting the tax requirements, having obtained possession momentarily, unexpectedly, and involuntarily, without time to pay a tax. He claims that this irrationally forces him to anticipate possession and to prepay the tax, something he claims is impossible. Although due process bars States from applying laws in irrational manners, *see* ***Kmiec v. Town of Spider Lake***, 60 Wis.2d 640, 651-52, 211 N.W.2d 471, 476-77 (1973), Baye's argument has no factual underpinning. The State decisively showed that Baye had long term legal possession of the drug through his interest in the enterprise; this predated his claimed brief, prearrest physical possession and thereby refuted his assertion of having nothing more than brief physical possession. Baye may not attack the controlled substance tax on the

basis of hypothetical facts. *See* ***State v. LaPlante***, 186 Wis.2d 427, 435-36, 521 N.W.2d 448, 451 (Ct. App. 1994).

Finally, Baye asks us to reverse his conviction in the interest of justice, maintaining that the trial court's jury instructions materially misstated the elements of the crime. Baye requests this relief should we decide to narrowly interpret §§ 139.87(2), 139.88, 139.89, and 139.95 to avoid the constitutional defects that he maintains caused his conviction. In other words, if we purge these statutes of their unconstitutional irrebuttable presumptions, their unconstitutional tax levies, and their due process deficiencies, then the trial court must provide new jury instructions corresponding to these changes. We have the discretionary power in appropriate cases to reverse convictions and order new trials in the interests of justice. ***State v. Ray***, 166 Wis.2d 855, 874-75, 481 N.W.2d 288, 295-96 (Ct. App. 1992). Here, however, Baye's reference to the interests of justice is just a restatement of his constitutional arguments. It provides no independent basis for reversing the judgment, instead simply recapitulating prior arguments that we have already rejected in terms of the interests of justice. As a result, the jury instructions need no modification, and Baye's interest of justice argument has no basis.

*By the Court.*—Judgment and order affirmed.

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