

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 26, 1995

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, STATS.

NOTICE

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

No. 95-1404-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RITA A. WHITISH,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Grant County: JOHN R. WAGNER, Judge. *Affirmed.*

DYKMAN, J. This is a single-judge appeal decided pursuant to § 752.31(2)(f), STATS. Rita A. Whitish appeals from a judgment convicting her of possession of cocaine, marijuana, and drug paraphernalia, contrary to §§ 161.41(3m) and (3r), and § 161.573(1), STATS. Whitish argues that the evidence is insufficient to establish that she knowingly possessed these controlled substances. We disagree and therefore affirm.

BACKGROUND

Rita A. Whitish is the owner of Turner Motors Inc. located in Lancaster, Wisconsin. As she often did, she borrowed one of the loaner cars owned by the dealership on Thursday, June 23, 1994, so that she could drive to Platteville to meet a friend, Steve Heinz. At about 1:30 a.m., after having had dinner with Heinz, she turned the wrong way on a one-way street and was stopped by Officer Bruce Buchholtz. Officer Buchholtz checked her license and found out that it had been suspended. He then arrested her and placed her in handcuffs. Whitish offered to lock her car and turn out the dome light but Officer Buchholtz put her in the backseat of the patrol car and searched her car.

The car was full of many articles including two dresser drawers full of papers, a cellular telephone, crutches, a baby stroller and two purses. Officer Buchholtz found a black nylon bag containing four smaller bags and a cigarette-shaped item on the floor below the driver's seat. The small bags contained some seeds, a brown material and a white powdery substance. Subsequent testing revealed that the small bags contained marijuana and cocaine.

At the police department, Whitish told Officer Buchholtz that all of the items in her car were hers, with the exception of the black nylon bag. Officer Buchholtz asked Whitish to take a blood test but she asked for her attorney because she "thought it was getting a little serious." Officer Buchholtz stopped asking her questions and she posted bail and left the police department. He described her demeanor as "jumpy, really jittery ... [and] nervous." He testified that she told him that she had had a glass of wine at dinner.

Whitish was charged with possession of marijuana, cocaine and drug paraphernalia. At trial, she testified that she did not own the car that she was driving, but that it was a loaner car owned by Turner Motors. She stated that other people, including her employees and customers, had access to the car and that it had not been cleaned before she used it. She claimed that the last time she had used that particular car was the previous Saturday. She admitted that she was driving with a suspended license and that she had been previously convicted of another crime. Whitish also testified that she drank about seven glasses of wine at dinner.

A Turner Motors employee testified that Turner Motors had owned the car for about six months before the arrest and 3,228 miles were put on it by the time it was sold three months later. He confirmed that the car was used by employees and customers whose cars were being serviced, and that his job included periodically cleaning the loaner cars on an as needed basis.

Another employee testified that Whitish used different loaner cars on different occasions and that he knew that this particular car had not been cleaned before Whitish used it. He stated that he had moved a lot of Whitish's property into the car before her trip but that he never saw the black bag when he was loading the car. Heinz also testified that he did not see the black nylon bag when he was in the car for a short period of time and that Whitish had had about six or seven glasses of wine.

Several of the witnesses testified as to Whitish's general demeanor. One employee testified that he was not surprised to learn that Whitish appeared jumpy to Officer Buchholtz because he described her as "high-strung." Another employee described her as fidgety. Heinz testified that she was a very "hyper individual, just always busy, always moving."

SUFFICIENCY OF THE EVIDENCE

When a defendant challenges the sufficiency of the evidence, we must examine whether the evidence is so insufficient in probative value and force that, as a matter of law, no reasonable jury could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). We review the evidence presented at trial and draw reasonable inferences in the light most favorable to the State. *State v. Tarantino*, 157 Wis.2d 199, 218, 458 N.W.2d 582, 590 (Ct. App. 1990). We will only substitute our judgment for that of the jury's when the jury relies upon evidence that is inherently or patently incredible. *Id.*

Whitish was charged with possession of marijuana, cocaine and drug paraphernalia. Possession of a controlled substance requires the jury to find that Whitish had the substances under her dominion or control. *State v. Allbaugh*, 148 Wis.2d 807, 813-14, 436 N.W.2d 898, 901 (Ct. App. 1989). The

State must prove that she knew or believed that she was possessing that substance. *Poellinger*, 153 Wis.2d at 508, 507 N.W.2d at 758. When a controlled substance is found in an area over which Whitish exercised control and she intended to possess the substance, then possession is established. *Allbaugh*, 148 Wis.2d at 814, 436 N.W.2d at 901-02.

Whitish argues that the State failed to prove that she knowingly possessed the marijuana, cocaine and drug paraphernalia because the car in which the controlled substances were found belonged to the dealership and many individuals had access to it before she used it. But it is the function of the jury, and not this court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Poellinger*, 153 Wis.2d at 506, 451 N.W.2d at 757. This is because the jury is in the best position to attribute weight to nonverbal attributes of the witnesses which may indicate guilt or innocence. *Allbaugh*, 148 Wis.2d at 809, 436 N.W.2d at 900.

The jury heard testimony that Whitish was driving the car in which the marijuana, cocaine and drug paraphernalia were found. It knew that Whitish had a considerable amount of personal property in the car, a fact which enhances the likelihood that this was Whitish's car, at least for the time being. It also heard testimony that she was agitated, nervous and did not take a blood test. The jury could have inferred that Whitish did not want Officer Buchholtz to see into her car or to search it because she knew it contained contraband. Because Whitish testified, the jury had the opportunity to assess her credibility and to view her demeanor, as well as consider the fact that she had been previously convicted of a crime. Based upon this evidence, we cannot conclude that the evidence was so lacking in probative value that the jury unreasonably concluded that Whitish knowingly possessed the marijuana, cocaine and drug paraphernalia. We are reluctant to substitute our judgment for that of the jury's especially when it has seen and heard a defendant testify. We conclude that the inferences drawn by the jury are reasonable and, therefore, affirm the judgment of conviction.

By the Court.— Judgment affirmed.

Not recommended for publication. See Rule 809.23(1)(b)4, STATS.