COURT OF APPEALS
DECISION
DATED AND RELEASED

September 26, 1996

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. 95-2597-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL STUBBS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Affirmed*.

Before Dykman, P.J., Vergeront, J., and Paul C. Gartzke, Reserve Judge.

PER CURIAM. Michael Stubbs challenges the sufficiency of the evidence to support his conviction for possession of cocaine base with intent to deliver.[1] Because sufficient evidence supports the jury verdict, we affirm.

On September 8, 1993, Officer Jeff Twing was conducting surveillance of a Madison park. Twing was located on the roof of an apartment building across the street, and used binoculars for monitoring activity in the park. Twing observed Stubbs hand something to Larry Crawford, who passed it to Leonard Jones. Twing could not identify the object that the men were passing. Jones then passed something back to Crawford, who passed it to Stubbs. Twing then saw Stubbs count what he had received and place it in his pocket. At the time, Stubbs was wearing a grey sweat suit with white stripes on the arms.

After observing this transaction, which he suspected was drug-related, Twing radioed other officers to investigate further. Several unmarked squad cars then entered the park area. Twing testified that Stubbs appeared to notice the squad cars, and "became nervous." Stubbs then entered a park shelter for a few seconds. Twing could not see Stubbs while he was in the park shelter. When Stubbs exited from the shelter, he "continued to look around" and walked over to a group of people at a nearby picnic table. Stubbs then left the park "at a fast pace" and walked towards West Washington Avenue. Another officer followed Stubbs and later arrested him. Stubbs did not have any cocaine on him when arrested, but did have $130 in cash. Twing testified that he did not see Stubbs discard anything.

Odvar Klovrud was bicycling through the park at the time. Klovrud testified that he saw a man wearing dark clothing with a white band on his shirt sleeves enter the park shelter and stuff something up into the chimney of a park fireplace. After noticing the police enter the park, Klovrud stopped and told officers what he had seen. An officer found two plastic "baggies" containing cocaine base on a ledge in the upper left side of the fireplace. The baggies were not dust-covered.

[1] Stubbs does not challenge the repeater and location (within 1,000 feet of a city park) penalty enhancers attendant to his conviction.

Stubbs was charged with the possession, with intent to deliver, of the cocaine base found in the chimney. Stubbs contends, however, that no reasonable jury could have concluded that he possessed those drugs. He notes that no one testified that they saw Stubbs with any cocaine and that no cocaine was found on him when he was arrested. Stubbs suggests that other items could have been passed between the men, such as cigarettes or matches. Stubbs argues that Klovrud's testimony that Stubbs stuffed something into the chimney is insufficient to support a conviction for possession of the cocaine found in the chimney.

Upon a challenge to the sufficiency of evidence to support a jury finding of guilt, this court may not substitute its judgment for that of the jury unless the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value and force that 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). The jury, and not this court, resolves conflicts in the testimony, weighs the evidence and draws reasonable inferences from basic facts to ultimate facts. ***Id.*** at 506, 451 N.W.2d at 757. When the record contains facts which support more than one inference, this court must accept the inference drawn by the jury unless the evidence, on which that inference is based, is incredible as a matter of law. ***Id.*** at 506-07, 451 N.W.2d at 757. This court's standard of review remains constant, whether the evidence is direct or circumstantial. ***Id.*** at 503, 451 N.W.2d at 756.

While Stubbs accurately identifies the circumstantial aspects of the State's case, the absence of direct evidence of possession does not render the evidence insufficient as a matter of law. Direct evidence of physical possession is not required. ***State v. Allbaugh,*** 148 Wis.2d 807, 813, 436 N.W.2d 898, 901 (Ct. App. 1989). Possession of an illegal substance may be imputed to a person "when the contraband is found in a place immediately accessible to the accused and subject to his [or her] exclusive or joint dominion and control, provided that the accused has knowledge of the presence of the drug." ***Id.*** at 814, 436 N.W.2d at 902, *quoting* ***Schmidt v. State,*** 77 Wis.2d 370, 379, 253 N.W.2d 204, 208 (1977).

In this case, the chimney was "immediately accessible" to Stubbs. While the chimney was in a public park and not within Stubbs's "exclusive control," it could be considered within his "joint control." The jury could reasonably infer that Stubbs secreted the drugs in the chimney after he noticed

police entering the area, and that he intended to retrieve the drugs after the police had left. The jury heard evidence that supported the reasonable inference that Stubbs had been involved in a drug sale immediately before he was seen stuffing something into the chimney. No one other than Stubbs was seen placing any item into the chimney. The baggies were not covered with dust, dirt or ashes, suggesting that they had been placed in the chimney recently.

This court "need not concern itself in any way with evidence which might support other theories of the crime. An appellate court need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence to sustain the verdict rendered." ***Poellinger,*** 153 Wis.2d at 507-08, 451 N.W.2d at 758. Under that standard, Stubbs's judgment of conviction easily survives appellate review.

By the Court.— Judgment affirmed.

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