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WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

June 13, 2023

To:

Hon. Janet C. Protasiewicz
Circuit Court Judge
Electronic Notice

Sarah Burgundy
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Angela Conrad Kachelski
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2021AP1084-CR State of Wisconsin v. Dontrail Dominique Burton
(L.C. # 2017CF3204)

Before Brash, C.J., Donald, P.J., and Dugan, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Dontrail Dominique Burton appeals from a judgment of conviction, arguing there was insufficient evidence to support the guilty verdict on one of three charges. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ The judgment is summarily affirmed.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

On July 6, 2017, West Allis police responded to an apartment after a call requested a welfare check. At the apartment, they found twenty-five-year-old Jorie Rohr unresponsive; police suspected a drug overdose. The medical examiner's report later indicated that the cause of death was "[a]cute mixed drug (heroin, fentanyl) intoxication."

As part of their investigation, police interviewed Rohr's cousin, Christian Thieme. Thieme admitted that he bought forty dollars' worth of heroin from a man he knew as "JR" on July 6, 2017, and that Rohr was with him for the purchase. The heroin Thieme received from "JR" had an unusual purple tint to it. Thieme and Rohr drove to Waukesha, where they each "did a small line" of the purple heroin. Thieme returned Rohr to his apartment and left him with the remaining purple heroin. Later, Thieme received a call that Rohr was acting "different." Thieme returned to Rohr's apartment and found him limp, slumped in the bathtub. Thieme pulled Rohr to the living room and propped his head up while someone else called police. Thieme left before police arrived, but returned to the apartment and took the leftover heroin. Thieme provided police with the phone number used to contact "JR." Police used that number to set up a controlled buy.

At the scheduled meeting, Burton was identified as "JR" and arrested. At the time he was arrested, he had purple-tinged heroin in his pocket. Later testing indicated that this heroin was laced with fentanyl. During an interview with police, Burton acknowledged that he sells heroin and recalled selling something to Thieme, although he could not remember precisely whether it was cocaine or heroin. He also recalled that there was another individual waiting in Thieme's vehicle. Additional details will be discussed herein.

Burton was initially charged with manufacture or delivery of three grams or less of heroin as a party to a crime, possession with intent to deliver three grams or less of heroin, and possession with intent to deliver one gram or less of cocaine. An amended criminal complaint and amended information modified the first count to first-degree reckless homicide by delivery of a controlled substance as a party to a crime. A jury convicted Burton on the three counts in the amended information. The trial court sentenced Burton to twenty-three years of imprisonment for the homicide and six years of imprisonment for each of the possession with intent charges, all to be served concurrently.

On appeal, Burton contends that there was insufficient evidence to support the first-degree reckless homicide conviction because Thieme was a “patently incredible” witness. Specifically, Thieme had given varying statements to the police. He first made no mention of Burton at all. In his second statement, Thieme told police that Rohr had bought his own drugs. Thieme also told his probation agent that he did not do drugs on July 6, 2017, and that he was unaware if Rohr had done any drugs that day. Thieme did not mention Burton until after learning Rohr had died. At trial, Thieme disclosed for the first time that he had bought heroin for himself from a second source—his “preferred” dealer—on July 6.

Further, Burton argues, Thieme’s failure to disclose his other purchase of heroin “cast doubt on his credibility[.]” He further asserts that Thieme “had an interest in the result of the trial” because if Burton were convicted, the State “would be happy with” Thieme and not charge him in relation to Rohr’s death. Burton also contends that because Thieme took heroin from Rohr’s home, police “could not verify that the heroin used by [Rohr] was the ‘purplish’ color” and “there was no way to compare the type of heroin found on Mr. Burton with the heroin that [Rohr] actually ingested.”

“A defendant challenging the sufficiency of the evidence used to convict him bears a heavy burden.” *State v. Norman*, 2003 WI 72, ¶66, 262 Wis. 2d 506, 664 N.W.2d 97. We will not reverse a criminal conviction “unless the evidence, viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *State v. Poellinger*, 153 Wis. 2d 493, 501, 507, 451 N.W.2d 752 (1990). The jury is the sole arbiter of witness credibility. *See id.* at 506. It is exclusively within the jury’s providence to decide which evidence is worthy of belief and which evidence is not, and to resolve any conflicts in the evidence. *See State v. Allbaugh*, 148 Wis. 2d 807, 810, 436 N.W.2d 898 (Ct. App. 1989). A jury may believe part of a witness’s testimony and disbelieve another part of the same witness’s testimony. *See State v. Saunders*, 196 Wis. 2d 45, 53-54, 538 N.W.2d 546 (Ct. App. 1995).

We defer to the jury’s determination, *see State v. Long*, 2009 WI 36, ¶19, 317 Wis. 2d 92, 765 N.W.2d 557, and when more than one inference can reasonably be drawn from the evidence, the inference which supports the jury’s must be the one followed on review unless the evidence is incredible as a matter of law, *see Allbaugh*, 148 Wis. 2d at 809.

The elements of first-degree reckless homicide by delivery of a controlled substance required the State to prove, as relevant here, the following: (1) Burton delivered a substance; (2) the substance was heroin; (3) Burton knew or believed the substance was heroin, a controlled substance, and (4) Rohr used the substance delivered by Burton and died as a result of that use. *See WIS. STAT. § 940.02(2)(a); WIS JI—CRIMINAL 1021; State v. Patterson*, 2010 WI 130, ¶17 n.10, 329 Wis. 2d 599, 790 N.W.2d 909. Burton’s sufficiency challenge goes to the fourth element: whether Rohr used the heroin delivered by Burton and died as a result.

Here, the jury clearly believed those portions of Thieme’s testimony that established he purchased heroin from Burton, that the heroin had a purplish tint, and Thieme and Rohr used the purple heroin together. Police testified that the heroin recovered from Burton at the time of his arrest had an uncommon purplish tint. A crime lab analyst testified that the purple heroin recovered from Burton at the time of his arrest contained fentanyl. Toxicology reports indicated that Rohr had fentanyl and heroin byproducts in his system and confirmed that he had used heroin a few hours prior to his death, consistent with the time frame described by Thieme. The medical examiner testified that Rohr’s cause of death was acute drug intoxication and that the heroin was a “substantial factor” in Rohr’s death. *See* WIS JI—CRIMINAL 1021. This evidence combines to support the inference that the heroin consumed by Rohr was the same heroin delivered by Burton to Thieme. The fact that Thieme took leftover heroin from Rohr’s apartment does not undermine confidence in the verdict because Thieme specifically testified that he and Rohr consumed the heroin obtained from Burton. Because we defer to the jury’s credibility determinations, we are satisfied that there is sufficient evidence to support the guilty verdict for reckless homicide.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals