STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP1873-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

VAUGHN CARUTH GILMER,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE TIMOTHY G. DUGAN PRESIDING.

BRIEF OF THE PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin does not request oral argument or publication. This case can be resolved by applying well-established legal principles to the facts of the case.

SUPPLEMENTAL STATEMENT OF THE CASE

As the plaintiff-respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2.[1]

ARGUMENT

I. The trial court appropriately exercised its discretion in allowing Exhibit # 2 to go to the jury room.

Whether to send trial exhibits into the jury room during jury deliberations is a matter left to the trial court's discretion. *State v. Larsen*, 165 Wis. 2d 316, 321, 477 N.W.2d 87 (Ct. App. 1991) (citing *Shoemaker v. Marc's Big Boy*, 51 Wis. 2d 611, 619, 187 N.W.2d 815 (1971)). In determining whether to send an exhibit into the jury room, the court should consider whether the exhibit will aid the jury in its understanding of the case, whether the exhibit will cause undue prejudice to either party, and whether the exhibit could be improperly used by the jury. *State v. Jensen*, 147 Wis. 2d 240, 260, 432 N.W.2d 913 (1988). On review, the court of appeals "will not reverse a discretionary decision if the record shows that discretion was in fact exercised" and there was a "reasonable basis" for the trial court's decision. *State v. Hines*, 173 Wis. 2d 850, 858, 496 N.W.2d 720 (Ct. App. 1993) (citation omitted).

In this case, the court allowed the jury to view Exhibit # 2 in the jury room during deliberations (49:51-52; 51:2) (A-Ap. 114). Exhibit #2 was 135.09 grams of marijuana (49:51-52, 84). The record reveals that the trial court exercised proper discretion in granting the jury access to the exhibit. Gilmer was charged with possession with the intent to deliver tetrahydrocannabinol less than or equal to 200 grams, contrary to Wis. Stat. § 961.41(1m)(h)1 (5). In order for Gilmer to be guilty of that offense, the jury needed to find that Gilmer possessed tetrahydrocannabinol, that Gilmer knew the substance to

[1] All citations to Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

be tetrahydrocannabinol, and that Gilmer intended to deliver the tetrahydrocannabinol (50:18-19).

The jury heard testimony that two Milwaukee police officers encountered Gilmer and asked to speak to Gilmer for a second (49:38). Gilmer immediately fled, giving way to a short foot chase (49:39, 57). The jury heard testimony that the officers could smell marijuana as they chased Gilmer on foot (49:40, 73). The jury also heard testimony that marijuana has a very distinctive odor (49:40, 73). The jury heard that Gilmer was observed reaching into his waistband and then discarding a black plastic bag that appeared to have some weight to it (49:41-42). That bag was later recovered and the green leafy substance inside weighed 135.09 grams and tested positive for tetrahydrocannabinol (49:46, 51-52, 63, 84).

Before deliberations had begun, the court inquired if there would be any objections to allowing exhibits in the jury room (50:65) (A-Ap. 111). Gilmer objected to allowing the jury to view Exhibit # 2, which was the marijuana recovered from the black plastic bag (49:51-52; 50:65) (A-Ap. 111). He argued, as he does now, that while there was testimony that the officers could smell marijuana as they chased Gilmer, there was no testimony regarding how the marijuana would smell now versus how the marijuana smelled on the day of the incident (50:65) (A-Ap. 111) (Gilmer's Br. at 9). The trial court expressed its belief that it was appropriate for the jury to be granted access to Exhibit # 2 in order to allow the jury to make connections between the physical evidence and testimony regarding marijuana's distinctive smell and the quantity (value) of the marijuana (50:65-66) (A-Ap. 111-12).

It is permissible to allow exhibits into the jury room so that the jury can examine them for the purpose of testing the validity of statements made by witnesses. *Robinson v. State*, 52 Wis. 2d 478, 483-84, 190 N.W.2d 193 (1971) (citation omitted). Allowing the jury to view Exhibit # 2 in the jury room provided the jury with the opportunity test the validity of the testimony establishing that marijuana has a distinctive odor, and the validity of the testimony establishing that there was some weight to the black plastic bag that Gilmer allegedly discarded. Thus, based on the facts of the case and the circumstances of the trial, the court could rationally conclude

that viewing Exhibit # 2 in the jury room would appropriately assist the jury in testing the validity of statements made by witnesses.

Gilmer further argues that sending Exhibit # 2 to the jury room created "new off-the-record evidence" (Gilmer's Br. at 11). It is true that the jury cannot consider facts not in evidence. *See State v. Poh*, 116 Wis. 2d 510, 343 N.W.2d 108 (1984). However, that is not the case here. Exhibit # 2 was introduced into evidence (49:52). Gilmer fails to cite any case law to support his claim that submission of introduced evidence to the jury room during deliberation somehow creates new evidence. Gilmer offers only conjecture that the jury could have improperly manipulated the exhibit in order to perform experiments (Gilmer's Br. at 11).

In this case, it is unclear whether the jury wished to see Exhibit # 2 in order to view the evidence once again, or to perform an experiment. However, the nature of the exhibit did not readily lend itself to manipulation as it was within a sealed evidence bag (49:52), and the court noted that the jury wanted to "look at the marijuana" and it was sent into the jury room "with the bailiff" (51:2) (A-Ap. 114). This suggests that the bailiff maintained control over the exhibit, which was previously discussed as the best way to provide the jury with access to the exhibit (50:65-66) (A-Ap. 111-12). Furthermore, the time frame surrounding the jury's request for Exhibit # 2 and the jury's other inquiries lead to the inference that no experimentation took place.

The jury retired to deliberate at 11:39 a.m. (1:4). At 12:28 p.m., the jury requested to "see the bag of pot that's evidence" (18:3). Later, the jury submitted questions at 1:07 p.m. and at 1:35 p.m. (18:1-2). When the court convened to address those questions, the court noted that the jury had asked to see Exhibit # 2 (51:2) (A-Ap. 114). The bailiff had taken Exhibit # 2 to the jury room briefly and had since removed it (51:2) (A-Ap. 114). The court responded to the jury's questions at 1:40 p.m. (51:3). Therefore, the longest possible duration that Exhibit # 2 could have been inside the jury room would be approximately one hour. However, based on the court's comment that the exhibit was viewed only briefly, it is more likely that it was in the jury room for only a very short period of time. Therefore, the

timeline suggests that the jury did not manipulate or experiment with the exhibit.

Again, it is permissible for the jury to examine exhibits for the purpose of testing the validity of statements made by witnesses. *Robinson*, 52 Wis. 2d at 483-84. The court considered whether Exhibit # 2 would serve that purpose (50:66) (A-Ap. 112). The evidence was already before the jury, so allowing the jury to briefly view it again would not likely result in prejudice. It was also unlikely that the jury could put the exhibit to any improper use. Therefore, the court appropriately exercised its discretion in allowing the jury to briefly view Exhibit # 2 in the jury room during deliberations.

II. Even if the trial court erred in allowing the jury to view Exhibit # 2 in the jury room, its error was harmless.

A trial error is harmless "if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *State v. Harvey*, 2002 WI 93, ¶ 49, 254 Wis. 2d 442, 647 N.W.2d 189 (citation omitted). Given the evidence of Gilmer's guilt in this case, a rational jury would have found him guilty even if the jury had not briefly viewed Exhibit # 2 in the jury room.

Two Milwaukee police officers were walking a beat when they encountered Gilmer (49:38). One of the officers, who was in full uniform and who had identified himself as a police officer, asked if he could speak to Gilmer for a second (49:38). Gilmer immediately fled, giving way to a short foot chase (49:39, 57). During the chase, the officer continually shouted, "Milwaukee Police Department, stop" (49:43). Gilmer continued to run. "Analytically, flight is an admission by conduct" and flight, therefore, is "circumstantial evidence of consciousness of guilt and thus of guilt itself." *State v. Winston*, 120 Wis. 2d 500, 505, 355 N.W.2d 553 (Ct. App. 1984).

The jury was informed that the officers could smell fresh marijuana as the officers chased Gilmer (49:40, 73). The jury was also informed that the area of the chase was fairly well-lit (49:42), and the officers observed Gilmer discarding items as he fled. The jury heard that Gilmer first discarded his hat and sun glasses (49:39). Next, Gilmer reached into his waistband and discarded a black plastic bag

that appeared to have some weight to it (49:41-42). Finally, he threw away several hundred dollars in small bills and a bank card (49:45).

The black bag was later recovered and the green leafy substance inside weighed 135.09 grams and tested positive for tetrahydrocannabinol (49:46, 51-52, 63, 84). The marijuana within the black plastic bag was packaged into nine smaller bags (49:47). In addition to the large quantity of marijuana discarded during flight, a smaller amount of marijuana was recovered from Gilmer's pocket (49:72).

According to Gilmer, he fled because he heard a noise and he did not know that he was fleeing from police officers (50:7). Gilmer claimed that the lead officer never identified himself as a police officer, and the officer was using profane language and yelling that he would shoot Gilmer (50:8). Gilmer claimed to later realize that he was being chased by a police officer, and at that time he immediately stopped and put his hands up (50:8). He denied discarding a black plastic bag (50:8). He also denied throwing out any money, claiming that the money was dragged out of his pockets as the officers where allegedly throwing him around (50:9-10).

There were no fingerprints on the black plastic bag that belonged to Gilmer (49:82). However, the jury heard testimony that fingerprints are very delicate, meaning a fingerprint is easily destroyed, and that there was only a 40% probability that any finger print would be recovered from a substance like a plastic bag (49:92-93).

Regardless of the lack of fingerprints, there was sufficient circumstantial evidence to find Gilmer guilty. Ultimately, the jury found Gilmer's version of evidence not credible. The jury is the sole arbiter of the credibility of witnesses and alone is charged with the duty of weighing the evidence. *State v. Poellinger*, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990). The jury reached its verdict at approximately 3:09 p.m. (1:5; 51:2-3), which means the jury weighed the evidence over a prolonged period of time after Exhibit # 2 was removed from the jury room. This careful deliberation after the removal of the exhibit from the jury room supports the conclusion that the jury would have found Gilmer guilty absent the error.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of conviction.

Dated this 13th day of February, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,894 words.

Dated this 13th day of February, 2015.

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Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 13th day of February, 2015.

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