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**COURT OF APPEALS OF WISCONSIN
DISTRICT III**

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2016AP002475 CR

AUGUST D. GENZ,

Defendant-Appellant.

Defendant-Appellant's Brief and Appendix

Appeal from the circuit court for Langlade County, Judge John B. Rhoda.

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the evidence at trial satisfied the legal elements of
Count 2: conspiracy to deliver THC.

The trial court answered: yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested because it is anticipated that the
briefs will fully present and discuss the issues on appeal.

The opinion in this case should not be published because it does
not meet any of the criteria for publication under Rule 809.23
(1)(a).

STATEMENT OF THE CASE

Statement of Facts

After waiving his right to a preliminary hearing on October 16, 2014 (R.50), the appellant, August Genz, was charged in an Information with one count of possession with intent to deliver a controlled substance (on or near a school) and one count of conspiracy to deliver THC. A.Ap., A101; R.5.

At Mr. Genz' jury trial on August 12, 2015 the State first called a police officer who testified that in August of 2014 he was contacted by an individual named Mark Beer, who had been exchanging text messages with an individual he didn't know, who seemed to want to exchange methamphetamines for marijuana. R.51:48-49. When Mr. Beer told the officer that the unknown individual had asked him to meet at a residential address, the officer drove by the address and observed a grey Isuzu Rodeo, which the officer testified he knew belonged to Mr. Genz. R.51:49-50.

The officer then testified that later that day, he saw that same vehicle pull up and stop in front of a church, after which the officer pulled up behind and activated his squad lights. R.51:50-51. Upon approaching the vehicle, the officer told the jury that Mr. Genz was inside, that he later saw a deputy search Genz, who had in his possession a bottle containing eight amphetamine pills. R.51:51-52.

Mr. Beer then took the stand and told the jury about the series of texts with the unknown individual, about going to law enforcement when he realized what the individual was asking him to do, and about the texts that law enforcement asked him to send it to the individual, who he believed was later apprehended. R.51:54-63.

After calling an employee from the crime lab to testify about the test results for the amphetamines found on Mr. Genz after his arrest, the State's final witness was the deputy sheriff who had met with Mr. Beer and told him what texts to send to Genz in order to set up the meeting place for the exchange of two amphetamine pills (and \$20) for the imaginary marijuana. R.51:87-91. After the State rested (R.51:112), the defense rested after Mr. Genz told the court he would not be testifying that day. R.51:117. The jury found him guilty of both counts in the Information. R.51:159.

Mr. Genz now appeals the judgment of conviction (A.Ap., A103; R.30) on the grounds that there was insufficient evidence, as a matter of law, to convict him of Count 2.

Procedural History

This is an appeal from the judgment of conviction, entered September 24, 2015 in the circuit court for Langlade County, John B. Rhoda, Judge. Following the filing of the Notice of Intent to Pursue Post Conviction Relief and the appointment of post-conviction counsel, a Notice of Appeal was filed in the trial court on December 15, 2016. R.45. The record in the appeal was filed on January 23, 2017.

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO CONVICT MR. GENZ OF CONSPIRACY.

Standard of Review

Whether the evidence viewed most favorably to the verdict satisfies the legal elements of the crime constitutes a question of law, which the court of appeals reviews *de novo*. *State v. Cavallari*, 214 Wis.2d 42, 47, 571 N.W.2d 176 (Ct.App.1997).

[A] conviction for conspiracy to deliver a controlled substance cannot be upheld where the only evidence presented by the State was that the seller purported to have in his possession and agreed to sell a small amount of the controlled substance consistent with personal use to the buyer and *where there was not even a claim that the buyer intended to sell, deliver or give the controlled substance to a third party*. *State v. Smith*, 189 Wis. 2d 496, 498-99, 525 N.W.2d 264, 265 (1995) (emphasis original).

The only evidence presented at Mr. Genz' trial relating to the conspiracy charged in Count 2 was that the purported seller (Mr. Beer, coached by the deputies) agreed to sell (and exchange with) Mr. Genz however much marijuana could be purchased for \$20, plus a couple of pills of Adderall. There can be no doubt that \$20 worth of marijuana would be consistent with personal use by Genz.

The State presented absolutely no evidence (and did not even argue to the jury) that Genz intended to sell, deliver or give this marijuana to a third party. Even viewing the evidence most favorably to the verdict, as the State will undoubtedly argue, the State failed to present sufficient evidence, as required by the Wisconsin Supreme Court in *Smith*, that there was any type of

agreement for further delivery of the small amount of marijuana to a third party. As a matter of law, there is insufficient evidence to uphold Mr. Genz' conviction for conspiracy to deliver THC.

CONCLUSION

For the foregoing reasons Mr. Genz requests that his conviction for Count 2 in his judgment of conviction be vacated.

RESPECTFULLY SUBMITTED this 28th day of February, 2017.

Schertz Law Office
Attorneys for the Appellant

By: 
Dennis S. Schertz

APPENDIX

INFORMATION	A101
JUDGMENT OF CONVICTION	A103


CERTIFICATION REGARDING APPENDIX CONTENTS

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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CERTIFICATION REGARDING BRIEF LENGTH

I certify that this brief conforms to the rules contained in sec. 809.19(8) (b) and (c), Stats., for a brief produced using the following font:

☒ Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 815 words.

CERTIFICATE OF COMPLIANCE WITH 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 s. 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: February 28, 2017

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