STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2016AP2475-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

AUGUST D. GENZ,

Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED IN LANGLADE COUNTY CIRCUIT COURT, THE HONORABLE JOHN B. RHODE, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication, as the issues presented can be decided based on well-settled law and the briefs of the parties.

STATEMENT OF THE ISSUES

1. Is August Genz's appeal from his conviction for conspiracy to deliver THC moot?

The circuit court did not address this issue.

2. Was there sufficient evidence presented at trial to convict Genz of conspiracy to deliver THC?

The circuit court answered yes.

INTRODUCTION

A jury convicted Genz of possession with intent to deliver amphetamine and conspiracy to deliver THC. Genz has fully served his two concurrent stayed sentences with one year of probation. Now, Genz seeks to have his conspiracy conviction vacated on the ground that there was insufficient evidence to convict him because the State did not present evidence that he intended to deliver the THC to a third party. Because Genz's appeal is moot, this Court should dismiss it.

Alternatively, there was sufficient evidence for the jury to convict Genz of conspiracy because the evidence presented showed that he and his co-conspirator agreed and intended to commit the same crime—exchanging amphetamine and cash for THC—and that Genz acted in furtherance of the conspiracy.

STATEMENT OF THE CASE

Relevant factual background. The State charged Genz with one count of possession with intent to deliver amphetamine, possession with intent to deliver/distribute a controlled substance on or near a school, and one count of conspiracy to commit manufacture/deliver THC, less than 200 grams. (R. 1, R-App. 101–03; R. 5, A-App. 101–2.) On count one, the maximum sentence was 12 years and six months of imprisonment, with a five-year enhancement because the offense occurred within 1000 feet of a school, and count two carried a maximum sentence of three years and six months of imprisonment, for a total maximum sentence of 21 years in prison. (R. 1, R-App. 101–03.)

The criminal complaint alleged that an individual, Mark Beer,[1] contacted police to report receiving text messages from an unknown person asking for marijuana in exchange for cash and "addies," a street name for D-amphetamine or "Adderall," which is a restricted and controlled substance. (R. 1:2, R-App. 102.) Beer agreed to assist law enforcement in setting up a controlled drug buy near the location suggested by the unknown person—629 Irving Street—that police determined was Genz's residence. Police asked Beer to set up the meeting in the parking lot at St. John's Church instead and the suspect agreed to meet Beer, describing the vehicle that he would be driving as a grey Isuzu truck, which was the type of vehicle owned by Genz and was parked in his driveway at 629 Irving Street. (R. 1:2, R-App. 102.)

At the time of the arranged meeting, police officers saw a grey Isuzu truck drive up and park near the

[1] The complaint identifies Beer by his initials, MGB. Because Beer's identity was not shielded at trial (he was a witness), and because briefing confidentiality rules do not appear to apply to him, the State addresses him by his name throughout this brief.

designated meeting place. (R. 1:2, R-App. 102.) Officers approached the truck, found Genz inside, and found eight D-amphetamine pills prescribed to Genz in his shorts pocket. Genz denied that he was at the location to buy or sell drugs. But during the encounter, police seized Genz's cell phone and later asked Beer to send a text message with the word "test" to the number from which Beer had received the text messages about buying marijuana. The "test" text message appeared on Genz's cell phone. (R. 1:3, R-App. 103.)

At the jury trial, the State called Officer Chris May, who received the initial call from Beer reporting that he was receiving text messages regarding "trading amphetamines for marijuana." (R. 51:48–49.) Officer May testified that in the text messages, the sender asked Beer to meet him at 629 Irving Street in the City of Antigo and, when Officer May drove by that address, he saw the grey Isuzu Rodeo in the driveway that he knew belonged to Genz. (R. 51:50.) Officer May testified that he later saw the same truck parked in front of St. John's Church with Genz inside and, when he and other officers searched Genz, they found a bottle of amphetamines containing eight pills. (R. 51:51–52.)

The State next called Beer, who testified that on August 2, 2014, he exchanged text messages with an unknown person, who Beer initially thought was his friend, Adrian Tomlin, or "Adie." (R. 51:55–58.) Beer testified that he exchanged texts with the same phone number again on August 11 and August 23. On that latest date, Beer realized that the messages were not from his friend Adie, but were asking Beer to engage in a drug transaction, i.e., to get "green" and exchange it for cash and "Addies to sweeten the deal." (R. 51:60–61.) Beer explained that when he realized his misunderstanding, he contacted the police. (R. 51:61–62.)

According to Beer, the police asked him to request a meeting with the text sender. Beer did so, and in response,

the person agreed to meet Beer to exchange "green" for the amphetamines and told Beer that he could get "two 30 milligrams for now." (R. 51:62–63.) Beer told him to meet at St. John's Church and the person said "he is going to be in a grey Isuzu truck."(R. 51:63.)

Billie Robbins, an employee at the State Crime Lab, testified that she examined the evidence in this case—a plastic prescription bottle continuing eight capsules—and determined that the capsules were amphetamine. (R. 51:77–78.)

The final witness for the State, Officer Greg Carter, testified consistently with Officer May and Beer that Beer told police that he was getting text messages from a number that he thought was Adrian Tomlin but then, based on the content of the messages, he believed it was "somebody else looking for illegal drugs." (R. 51:87.) Officer Carter asked Beer to assist in the investigation of a potential drug transaction and chose the St. John's Church parking lot because it was near the 629 Irving Street location suggested by Genz, but it allowed better surveillance and safety for the officers. (R. 51:88–89.) Officer Carter testified that the "drug deal was set up" and, based on the address given in the text messages and the vehicle description, he was "pretty confident" that the party sending text messages intending to set up the drug deal was Genz. (R. 51:89–90.)

According to the text messages, Genz was "looking for 'green,' which is street slang for marijuana" in exchange for "Addies," which is the street term for "Adderall," and "20 bucks." (R. 51:91.) When police arrived at the church parking lot, they asked Genz to get out of the truck, took him into custody, and searched him. They found a bottle with the prescription made out to Genz, which contained the D-amphetamine that the text messages indicated would be exchanged for marijuana. (R. 51:92.)

Officer Carter testified he found a cell phone in Genz's truck, seized it, and drafted a search warrant. (R. 51:94–95.) The text messages exchanged on the phone seized from Genz's truck "truly and accurately reflect[ed]" the text messages that were on Beer's phone. (R. 51:96.) Further, the text messages indicated that Genz asked to receive marijuana or "green" in exchange for the Adderall. (R. 51:98–99.) Officer Carter testified that it was "absolutely" clear from the texts sent from Genz's phone that Genz "was intending to trade or deliver amphetamine in exchange for something else" and that Genz's intent was to trade the amphetamine pills "for marijuana because that's what he was requesting in prior messages. Marijuana. Green." (R. 51:108.)

After the State rested, Genz did not testify and did not call any witnesses. (R. 51:117.) The circuit court gave instructions to the jury, including the instructions for Conspiracy as a Crime, Wis. Stat. § 939.31. (R. 16:9–11, R-App. 104–06; R. 51:127–29.) The jury returned a guilty verdict on count one, possession with intent to deliver amphetamine contrary to Wis. Stat. § 961.41(1m), and found that Genz intended to deliver it within 1000 feet of school premises. (R. 18; R. 51:158–59.) The jury also found Genz guilty of conspiracy to commit delivery of THC, contrary to Wis. Stat. §§ 961.41(1)(h)1 and 961.41(1x). (R. 19; R. 51:159.) The circuit court sentenced Genz to two withheld prison sentences with one year of probation on each of the counts, with a 120 days in county jail as a condition of probation, to be served concurrently. (R. 52:14; R. 30.) Genz's status with the Wisconsin Department of Corrections is currently listed as "terminated." (R-App. 107–08.)

Litigation history. The State filed the criminal complaint and information charging Genz with one count of possession with intent to deliver amphetamine within 1000

feet of a school and one count of conspiracy to deliver THC. (R. 1, R-App. 101–03; R. 5.) After a one-day jury trial (R. 51), the jury returned guilty verdicts on both counts (R. 18; R. 19). The circuit court entered the judgment of conviction and Genz appeals. (R. 30; R. 45.)

SUMMARY OF ARGUMENT

Genz's sole argument on appeal is that there was insufficient evidence presented at trial to convict him of count 2, conspiracy to commit manufacture/deliver THC, less than 200 grams. (Genz's Br. 3.) Genz's sentence on that count was concurrent to his sentence on count one, possession with intent to deliver amphetamine within 1000 feet of a school—a stayed sentence, with one year probation and 120 days in jail—and these two concurrent sentences have been completely served and terminated. (R-App. 107–08.) Therefore, Genz's appeal is moot and should be dismissed. Further, even if Genz's appeal was not moot, there was sufficient evidence to convict Genz of conspiracy to deliver THC. The evidence, taken in the light most favorable to the State, supports the conviction because Genz, as the buyer of the THC, agreed with the seller to exchange THC for amphetamine, intended to exchange the controlled substances, and acted in furtherance of the conspiracy. Therefore, this Court should affirm Genz's conviction for conspiracy to deliver THC.

STANDARD OF REVIEW

The issue of whether a case is moot presents a question of law that this Court decides de novo. *McFarland State Bank v. Sherry*, 2012 WI App 4, ¶ 9, 338 Wis. 2d 462, 809 N.W.2d 58.

"[W]hether the evidence was sufficient to sustain a verdict of guilt in a criminal prosecution is a question of law, subject to our de novo review." *State v. (Roshawn) Smith,*

2012 WI 91, ¶ 24, 342 Wis. 2d 710, 817 N.W.2d 410 (citing *State v. Booker*, 2006 WI 79, ¶ 12, 292 Wis. 2d 43, 717 N.W.2d 676).

ARGUMENT

I. Genz's appeal is moot and should be dismissed.

A. Relevant law.

A case is moot when it seeks resolution of "an abstract question which does not rest upon existing facts or rights." *State ex rel. Ellenburg v. Gagnon*, 76 Wis. 2d 532, 535, 251 N.W.2d 773 (1977) (quoting *Fort Howard Paper Co. v. Fort Howard Corp.*, 273 Wis. 356, 360, 77 N.W.2d 733 (1956)). "[A] case is moot when a determination is sought upon some matter which, when rendered, cannot have any practical legal effect upon a then existing controversy." *Milwaukee Police Ass'n v. City of Milwaukee*, 92 Wis. 2d 175, 183, 285 N.W.2d 133 (1979). The question of mootness should be determined without reference to the merits of the appellant's contentions on appeal. *See State ex rel. Treat v. Puckett*, 2002 WI App 58, ¶ 19, 252 Wis. 2d 404, 643 N.W.2d 515.

Where the defendant has completed his sentence, an appeal may be moot. *See State v. Walker*, 2008 WI 34, ¶¶ 1, 14, 308 Wis. 2d 666, 747 N.W.2d 673 (a challenge to a reconfinement order was moot because the defendant had completed the reconfinement term and the court's decision would not affect the underlying controversy). When analyzing for mootness, appellate courts look to the circumstances as they exist in real time, rather than relying on the circumstances as they existed when the initial challenge was raised. *See State ex rel. Renner v. Dept. of Health & Soc. Services*, 71 Wis. 2d 112, 116, 237 N.W.2d 699 (1976).

Exceptions to the rule of mootness may be made for questions of great public importance or constitutional magnitude; where a decision is necessary to guide the trial courts; or where the situation is likely to be repeated yet will consistently evade review due to delays inherent in the appellate process. *In re the Commitment of Elizabeth M.P.*, 2003 WI App 232, ¶ 28 n.4, 267 Wis. 2d 739, 672 N.W.2d 88. In order to avoid the rule of mootness, the appellant must show that an existing legal right is affected. *See State v. Zisch*, 243 Wis. 175, 178, 9 N.W.2d 625 (1943).

B. This Court should dismiss Genz's appeal from his conviction for conspiracy as moot because he has fully served his sentence, resolution of his appeal will have no effect, and future litigation of the same issue is unlikely to evade review.

The rule of mootness applies to this case because the relief requested by Genz on appeal—an order vacating his felony conviction on count two because he alleges there was insufficient evidence to convict him of conspiracy to deliver THC—has no effect on Genz's existing rights. Genz appeals only from his felony conviction for conspiracy to deliver THC, but does not appeal from his felony conviction for possession with intent to deliver amphetamines. (Genz's Br. 4.) As a practical matter, an order vacating Genz's felony conviction on count two would have no effect on Genz's status as a felon, or a court's consideration of that status at any potential future sentencing. In addition to the felony conviction in count one for possession with intent to deliver, Genz had several other prior felony convictions and had served time in prison in the past. (R. 52:3.) Therefore, even if this Court were to vacate count two, it would be entirely symbolic given Genz's history and given that he has fully served his stayed sentence and one year probation and has been terminated by DOC. (R-App. 107–08.)

The exceptions to the rule of mootness do not apply. This is not a question of great public or constitutional importance. A decision on Genz's appeal from his conviction for conspiracy to deliver THC is not likely to guide trial courts or be repeated because of the unique situation presented: Genz and a police informant conspired and agreed to exchange D-amphetamines for THC and, as a result of this agreement and Genz's intent to buy THC in exchange for the amphetamines, Genz was prosecuted for and convicted of both possession with intent to deliver amphetamines and for conspiracy to deliver THC. Resolution of the question whether there was sufficient evidence under these unique facts to convict Genz of conspiracy to deliver THC is not likely to be repeated.

Additionally, if the issue of the sufficiency of the evidence to convict for conspiracy to deliver a controlled substance and possession with intent to deliver another controlled substance, based on an agreement to exchange one for the other, arises again in another case it would likely not evade review. In this case, Genz served two concurrent, one year stayed sentences with probation. The maximum imprisonment for both counts was 21 years in prison. (R. 1:1, R-App. 101.) It is unlikely in a future case, a similar challenge to the sufficiency of the evidence to convict for conspiracy to deliver a controlled substance based on such an agreement would be moot because the sentence would likely be longer. Therefore, any future appeal of this issue would not evade review.

The only issue presented by this appeal—whether there was sufficient evidence to convict Genz of conspiracy to deliver THC—is moot because Genz has fully served his jail sentence and probation term and has been terminated by DOC. (R-App. 107–08.) A decision in this appeal would not have any practical impact on Genz and is unlikely to be

repeated in future cases. Therefore, the State asks this Court to dismiss Genz's appeal as moot.

II. There was sufficient evidence to convict Genz of conspiracy to deliver THC.

A. Relevant law

"The question of whether the evidence was sufficient to sustain a verdict of guilt in a criminal prosecution is a question of law, subject to our de novo review." *(Roshawn) Smith*, 342 Wis. 2d 710, ¶ 24. However, review of a sufficiency of the evidence challenge is very narrow, and the reviewing court must give great deference to the trier of fact. *State v. Hayes*, 2004 WI 80, ¶ 57, 273 Wis. 2d 1, 681 N.W.2d 203. "[A]n appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state 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, 507, 451 N.W.2d 752 (1990). The reviewing court "must examine the record to find facts that support upholding the jury's decision to convict," *Hayes*, 273 Wis. 2d 1, ¶ 57, regardless of whether the verdict is based on direct or circumstantial evidence. *Poellinger*, 153 Wis. 2d at 507.

Thus, the burden for an appellant alleging that there was insufficient evidence to support a jury's verdict is extremely high; this Court may overturn the fact finder's verdict "only if the trier of fact could not possibly have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt." *State v. Watkins*, 2002 WI 101, ¶ 68, 255 Wis. 2d 265, 647 N.W.2d 244. It is the trier of fact that decides which evidence is worthy of belief, which evidence is not, and how to resolve any conflicts in the evidence. *State v. Wilson,* 149 Wis. 2d 878, 894, 440 N.W.2d

534 (1989). Therefore, when more than one inference can reasonably be drawn from the evidence, the inference that supports the trier of fact's verdict must be the one followed on review. *State v. Allbaugh*, 148 Wis. 2d 807, 809, 436 N.W.2d 898 (Ct. App. 1989); *see also (Roshawn) Smith,* 342 Wis. 2d 710, ¶ 31 (reaffirming the holding in *Poellinger,* 153 Wis. 2d at 506, that "the trier of fact is free to choose among conflicting inferences of the evidence and may, within the bounds of reason, reject that inference which is consistent with innocence of the accused").

The crime of delivery of the controlled substance THC is governed by Wis. Stat. § 961.41(1)(h), and as provided in subdivision 1., for two hundred grams or less, or 4 or fewer plants, is a Class I felony punishable by 3 years and 6 months in prison. Wis. Stat. §§ 961.41(1)(h)1. and 939.50(3)(i). Wisconsin Statute § 961.41(1x) proscribes the crime of conspiracy to manufacture/deliver THC and refers to the definition of "conspiracy" set forth in Wis. Stat. § 939.31. Conspiracy liability is established when the defendant "with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime . . . [and] one or more of the parties to the conspiracy does an act to effect its object." Wis. Stat. § 939.31. The elements of the crime of conspiracy to deliver THC are: "(1) an agreement between the defendant and at least one other person to commit a crime; (2) intent on the part of the conspirators to commit the crime; and (3) an act performed by one of the conspirators in furtherance of the conspiracy." *State v. Sample*, 215 Wis. 2d 487, 505 n.18, 573 N.W.2d 187 (1998) (quoting *State v. West*, 214 Wis. 2d 467, 475, 571 N.W.2d 196 (Ct. App. 1997)).

"Wisconsin Stat. § 939.31 focuses on the subjective behavior of the individual defendant." *Sample*, 215 Wis. 2d at 505. "In the context of an agreement between a defendant

charged under Wis. Stat. § 939.31 and another person, as long as the parties agree or combine by their words or actions, it is not necessary that the other person intend agreement." *Id.* at 500.

"A conspiratorial agreement may be demonstrated by circumstantial evidence." *State v. Cavallari*, 214 Wis. 2d 42, 51, 571 N.W.2d 176 (Ct. App. 1997); *Hawpetoss v. State*, 52 Wis. 2d 71, 80, 187 N.W.2d 823 (1971). "The agreement need not be an express agreement; rather, a mere tacit understanding of a shared goal is sufficient." *Cavallari,* 214 Wis. 2d at 51–52 (quoting *State v. Seibert*, 141 Wis. 2d 753, 762, 416 N.W.2d 900 (Ct. App. 1987)). A series of events and circumstances can be considered as a whole to provide sufficient evidence to support the inference necessary for finding an agreement. *Hawpetoss*, 52 Wis. 2d at 80–81.

To obtain a conspiracy conviction, "the prosecutor need only prove that the conspirators agreed to undertake a criminal scheme or, at most, that they took an overt step in pursuance of the conspiracy." *State v. Peralta*, 2011 WI App 81, ¶ 21, 334 Wis. 2d 159, 800 N.W.2d 512 (citation omitted). "*Even an insignificant act may suffice.*" *Id.* (citation omitted). The State does not have to prove that the agreed-upon crime—here, the delivery of THC—actually occurred. This distinguishes the inchoate crime of conspiracy from the party-to-a-crime theory of liability under Wis. Stat. § 939.05, which requires both proof of a conspiracy and completion of the agreed-upon crime. *See Sample*, 215 Wis. 2d at 504–05.

B. This Court should affirm Genz's conviction for conspiracy to deliver THC because Genz and Beer agreed to commit the same crime—to exchange THC for D-amphetamine—and the jury correctly found that all the elements of a conspiracy to deliver THC were satisfied.

The jury's verdict that Genz was guilty beyond a reasonable doubt of conspiracy to delivery THC was supported by substantial evidence. Genz was found guilty of conspiring to violate Wis. Stat. § 961.41(1)(h)1., which prohibits the manufacture, distribution or delivery of two hundred grams or less, or 4 or fewer plants, containing tetrahydrocannabinols (THC). (R. 51:159.) Because Genz was found guilty of conspiring to violate Wis. Stat. § 961.41(1)(h)1., the State was not required to prove that Genz himself committed the crime, but that Genz was a member of a conspiracy that agreed to, and took actions towards, committing the crime. Wis. Stat. § 939.31. The other alleged member of the conspiracy was Beer, the informant who contacted police and agreed to set up a drug deal with Genz, whereby Beer would agree to sell THC to Genz in exchange for cash and amphetamines. Therefore, with respect to the conspiracy charge against Genz, the jury was properly instructed that the State had to prove that: (1) Genz intended that Beer commit the crime of delivery of THC; (2) Genz conspired with Beer to commit the crime of delivery of THC; and (3) Genz or Beer took an act toward the commission of delivery of THC that went beyond mere planning and agreement. (R. 51:127–29.) *See* Wis. JI-Criminal 570. (R. 16:9, R-App. 104.)

At trial, the State presented evidence supporting all of the elements of a conspiracy between Genz and Beer, including the following testimony: Genz asked Beer by text message to exchange "green"—a street name for marijuana

or THC—for cash and "Addies," a street name for the controlled substance D-amphetamine (R. 51:60–61, 91, 98–99); Genz and Beer agreed and intended to meet for the purpose of exchanging THC for cash and D-amphetamine (R. 51:62–63, 108); Genz told Beer he would be driving a grey Isuzu truck and arrived at the agreed upon time and meeting place in that vehicle (R. 51:51–52, 63, 89–90); and when Genz arrived at the agreed upon location, he had a pill bottle containing D-amphetamine in his pocket (R. 51:51–52, 77–78, 92).

Based on this evidence, the jury reasonably found that Genz intended and agreed with Beer to commit the crime of delivery of THC and that, by driving to the designated meeting spot with the agreed upon payment for the THC—"Addies," or D-amphetamine pills—found in his pocket, Genz took action toward the commission of delivery of THC that went beyond mere planning and agreement. The jury's verdict is supported by the evidence and satisfies the deferential standard of review applied in "sufficiency of the evidence" appeals.

Genz's sole argument on appeal is that because the State did not present evidence that he, as the buyer of the THC, intended to sell, deliver, or give the marijuana to a third party, there was insufficient evidence as a matter of law to convict him conspiracy to deliver THC under *State v. (Thomas C.) Smith*, 189 Wis. 2d 496, 498–99, 525 N.W.2d 264 (1995). (Genz's Br. 3–4.) Genz's argument fails because he misreads *Smith* and because the holding in *Smith* is distinguishable.

In *Smith*, the defendant attempted to sell $20 worth of cocaine to the potential buyer, "Geri G." Instead of buying the cocaine from Smith, Geri G. alerted the police, and Smith pled guilty to conspiracy to deliver cocaine. *Smith*, 189 Wis. 2d at 499–500. Smith sought to withdraw his plea,

and the Wisconsin Supreme Court held that "the buy–sell agreement between Smith and Geri G." did not constitute a conspiracy because "the legislature did not intend a buyer-seller relationship for a small amount of cocaine for the buyer's personal use to be a conspiracy and thus make the buyer guilty of a felony." *Id.* at 501. Because "there was no claim or proof that the buyer intended to further deliver the cocaine," "the most the buyer could have been guilty of was the misdemeanor of possession." *Id.* at 501–02.

Therefore, the supreme court concluded that the State could not, "by adding a conspiracy charge to the possession charge, create a felony charge against the buyer" for purchasing "an amount of cocaine consistent with personal use" where there was no claim "that the buyer intended to further deliver the cocaine to a third party." *Id.* at 502. Under these circumstances, the supreme court concluded that there was no factual basis to sustain a theory of conspiracy to deliver a controlled substance, and allowed Smith to withdraw his guilty plea. *Id.* at 504. But in *Sample*, 215 Wis. 2d 487, the supreme court clarified its holding in *Smith*: "The true rationale of *Smith*, however, [is] that members of the conspiracy must be in agreement to commit the same crime." *Sample,* 215 Wis. 2d at 503.

Genz is wrong when he argues on appeal that the supreme court in *Smith* "required" evidence of an "agreement for further delivery of the small amount of marijuana to a third party" in order to convict Genz of conspiracy to deliver THC. (Genz's Br. 3–4.) In this case, unlike in *Smith*, the evidence presented at trial established that Genz and Beer were in agreement to commit the same crime: delivery of THC to Genz in exchange for delivery of D-amphetamine to Beer.

Therefore, *Smith* is distinguishable from this case. Here, as a result of the "deal" agreed to by Genz and Beer to

exchange "green" for "Addies" (R. 51:60–61, 91, 98–99), Genz was not a mere "buyer" for personal use. Indeed, Genz played a key role and, in fact, instigated the planning of the agreement with Beer to meet and to exchange THC for D-amphetamine. The evidence of the plan and agreement for this drug transaction led the jury to find Genz guilty of both count two, conspiracy to delivery THC, as well as of count one, felony possession of amphetamine with intent to deliver. Genz does not challenge his conviction on count one. Therefore, the concern in *Smith* about creating a felony charge against the buyer who otherwise would not be convicted of a felony is not present here, because Genz was convicted of felony possession of amphetamine with intent to deliver.

To convict Genz of conspiracy to deliver THC as part of this agreement to exchange THC for amphetamine, the State did not need to present evidence that Genz would sell, deliver, or give the THC to a third party because here, unlike the buyer in *Smith*, Genz agreed with Beer to commit the same crime. Obviously, Beer was not charged or convicted for his involvement. However, based on the evidence presented at trial, the jury convicted Genz of two felonies involving controlled substances: the possession with intent to deliver D-amphetamine and the related conspiracy to exchange the THC for the D-amphetamine.

In this case, unlike in *Smith*, there is unrefuted evidence in the record satisfying all the elements of the crime of conspiracy: agreement, intent, and an act in furtherance of the conspiracy by Genz beyond mere planning. Genz and Beer agreed and intended to meet for the purpose of exchanging THC for D-amphetamine (R. 51:62–63, 108) and Genz arrived at the agreed-upon time and meeting place with the promised D-amphetamine to exchange for the THC (R. 51:51–52, 77–78, 92). The evidence

at trial demonstrated that Genz conspired and agreed with Beer that Beer would deliver the THC to Genz and intended to exchange the THC for amphetamine, unlike in *Smith* where the buyer for personal use did not have any intent or agreement to enter into a conspiracy. The trial testimony of Beer and law enforcement officers and the text messages exchanged between Genz and Beer showed that Genz and Beer agreed that Beer would deliver THC to Genz and that Genz intended that Beer would deliver THC to him.

And there was an overt act in furtherance of the conspiracy: Genz drove to the location designated for him to purchase THC in exchange for the D-amphetamine and cash and had eight prescription D-amphetamine pills with him. The action provided evidence both of Genz's act in furtherance and of his intent to complete the conspiracy to deliver THC. The totality of this evidence, taken in the light most favorable to the State, allowed the jury to reasonably find that Genz and Beer entered into a conspiracy to deliver two hundred grams or less of THC in exchange for D-amphetamine.

Therefore, the evidence viewed most favorably to the State and the conviction was sufficient to establish all of the elements of conspiracy, and for the jury to reasonably find Genz guilty beyond a reasonable doubt of conspiracy to deliver THC. Based on this unrefuted evidence, this Court should affirm the jury's verdict finding Genz guilty of conspiracy to deliver THC.

CONCLUSION

For the foregoing reasons, the State requests that this Court dismiss this appeal as moot or, in the alternative, affirm the judgment of conviction.

Dated this 30th day of March, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 5,086 words.

ANNE C. MURPHY
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 30th day of March, 2017.

ANNE C. MURPHY
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. August D. Genz
Case No. 2016AP2475-CR

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

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 one or more initials or other appropriate pseudonym or designation, 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.

ANNE C. MURPHY
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(13). I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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

Dated this 30th day of March, 2017.

ANNE C. MURPHY
Assistant Attorney General