COURT OF APPEALS
DECISION
DATED AND FILED

November 13, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0559-CR **Cir. Ct. No. 99CF000042**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARY E. SCHUMANN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Adams County: RICHARD O. WRIGHT, Judge. *Affirmed*.

Before Deininger, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Gary Schumann appeals from a judgment convicting him of possession of THC with intent to deliver. The only issue he raises is whether the trial court erred in not granting his motion to dismiss at the end of the State's case in chief. We note that Schumann waived any right to review of the trial court's refusal to direct the verdict at that stage in the

proceedings by presenting evidence rather than resting. *See* ***State v. Gebarski***, 90 Wis. 2d 754, 773-74, 280 N.W.2d 672 (1979). Nonetheless, because Schumann could still challenge the sufficiency of the evidence in the record as a whole under WIS. STAT. § 974.02(2) (2001-02),[1] we have examined his arguments in that context. For the reasons discussed below, we are satisfied that the evidence presented was sufficient to support the verdict, and therefore affirm.

¶2 When reviewing the sufficiency of the evidence, this court will sustain a conviction "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. Zimmerman***, 2003 WI App 196, ¶24, ___ Wis. 2d ___, 669 N.W.2d 762.

¶3 Here, the evidence most favorable to the conviction included testimony that a confidential informant had told the police that a man named Christopher Smith was going to deliver a fairly large quantity of marijuana to someone called "Animal." The police were aware that "Animal" was Schumann's nickname. The police followed and stopped Smith and found about three pounds of marijuana in his car. Smith named Schumann as the person to whom he was going to deliver the marijuana, and then agreed to make a delivery under surveillance. The police observed Smith enter Schumann's house with three pounds of marijuana and exit about five minutes later. Almost immediately after Smith left, the police executed a search warrant on Schumann's house. They found one of the three bags of marijuana Smith had delivered in the kitchen, being

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

repackaged, and the others in the bedroom. They also found a pipe and ashtray with marijuana residue, a top grinder with marijuana residue, cigarette rolling papers and a metal scale. Schumann was the only adult in the house.

¶4 Schumann contends that the evidence was insufficient because Smith himself did not testify and many of Smith's statements were admitted as hearsay, depriving Schumann the opportunity to cross-examine Smith. The State was under no obligation to call Smith, however. If Schumann felt Smith would offer testimony favorable to the defense, he could have subpoenaed him. Schumann's arguments are beside the point. Sufficiency of the evidence is judged by the evidence presented, not by the evidence that might or should have been presented. The evidence produced was more than sufficient to establish each of the elements of possession of THC with intent to deliver. *See* WIS. STAT. § 961.41(1m)(h)2.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.