COURT OF APPEALS
DECISION
DATED AND FILED

May 26, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1192-CR **Cir. Ct. No. 2007CF875**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROSHAWN SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: SUE E. BISCHEL, Judge. *Reversed and cause remanded for further proceedings.*

Before Vergeront, P.J., Higginbotham and Blanchard, JJ.

¶1 VERGERONT, P.J. Roshawn Smith appeals the judgment of conviction for possession with intent to deliver more than 10,000 grams of tetrahydrocannabinol (THC) as party to the crime. He also appeals the circuit

court's order denying his motion for postconviction relief. Smith contends that the evidence was insufficient to prove his guilt beyond a reasonable doubt and that he was denied his right to a jury trial on the weight element of the crime. We conclude there was sufficient evidence presented at trial. However, we agree with Smith that he did not waive his right to a jury trial on the weight element of the crime and the circuit court therefore erred when it answered the verdict question. Accordingly, we reverse the conviction and remand to the circuit court for further proceedings.

BACKGROUND

¶2 The State charged Smith with possession of more than 10,000 grams of THC with intent to deliver contrary to WIS. STAT. § 961.41(1m)(h)5., as a party to a crime under WIS. STAT. § 939.05 (2009-2010).[1] The State alleged that Smith participated in the shipment of marijuana by commercial delivery from California to the home of Smith's friend in Green Bay.

¶3 The following evidence was presented at trial. The Green Bay Police Department was notified in September 2006 by a California police official that two suspicious packages were being transported from California to Green Bay via FedEx. The Green Bay officers, with the consent of FedEx, took a trained dog to a FedEx facility to sniff the packages for the presence of narcotics. The dog "alerted" to the packages.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶4 The packages were addressed to "Jo Korbine" at a Green Bay address. A police officer dressed as a FedEx employee delivered the packages to that address. A person named Shannon Kortbein accepted delivery, signed for the packages, and asked that they be placed on the porch. Shortly thereafter, police officers executed a search warrant and seized the packages. The shipping labels had been removed and were found torn up in Kortbein's kitchen. While the officers were searching Kortbein's residence, they saw two men—one later identified as Terri Thomas—appear to approach the residence.

¶5 Subsequent testing showed that each package contained about twenty-five pounds of marijuana and tested positive for THC.

¶6 Kortbein testified at trial that she and Smith had been friends for several years, and Smith had introduced her to Thomas. Shortly after their introduction, Thomas called Kortbein on her cell phone and offered to pay her $500 if she would accept delivery of packages at her residence. She agreed. Approximately a week later she received a package. Thomas picked up the package a few days later, and shortly thereafter Smith gave her $400 without explanation. Prior to September 20, 2006, she had received two more deliveries. Both times Thomas picked up the packages and, shortly thereafter, Smith paid her $400.

¶7 David Mehlhorn testified that he was a friend of Smith and had agreed to accept delivery of packages between July and October of 2006. Mehlhorn accepted deliveries on three occasions. After the packages were delivered, Smith and Thomas would pick them up. Mehlhorn reported this to the police after seeing a story about Thomas in the news.

¶8 Prior to the trial, Smith stipulated that the packages contained THC and weighed 22,477 grams. During the trial, the court read the stipulation to the jury. The court instructed the jury on the elements of the crime of possession with intent to deliver THC as party to the crime. The court also instructed the jury that the court was answering the verdict question regarding the weight of the THC.[2] We discuss the stipulation and related jury instructions and verdict question in more detail later in the opinion.

¶9 The jury found Smith guilty of the crime of possession with intent to deliver THC as party to the crime. The court entered a judgment of conviction for possession with intent to deliver more than 10,000 grams of THC as party to the crime and sentenced Smith to a term of six years initial confinement plus five years extended supervision.

¶10 Smith filed a motion for postconviction relief, asserting that there was insufficient evidence to support the conviction and that he did not waive his right to a jury trial on the weight of the THC. The circuit court denied the motion.

DISCUSSION

¶11 On appeal, Smith renews his contentions that the evidence was insufficient to support his conviction and that he did not waive his right to a jury trial on the weight of the THC.

[2] The weight of the THC includes the marijuana plant material containing the controlled substance. WIS. STAT. § 941.41(1r). Accordingly, when we refer to the weight of the THC in this opinion, we mean the weight of the marijuana containing the THC.

I. Sufficiency of the Evidence

¶12 Whether the evidence is sufficient to support a conviction beyond a reasonable doubt presents a question of law, which we review de novo. *See* ***State v. Booker***, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676. The scope of our review is narrow. We do not reverse for insufficient evidence "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). This standard applies regardless of the mix of direct and circumstantial evidence in a case. ***Id.*** at 501.

¶13 Although the jury must exclude every reasonable hypothesis of a defendant's innocence before returning a guilty verdict, this does not mean that, if there is any evidence at trial suggesting innocence, the jury cannot find the defendant guilty. ***Id.*** at 503. "The function of the jury is to decide which evidence is credible and which is not and how conflicts in the evidence are to be resolved. A jury can … within the bounds of reason, reject evidence and testimony suggestive of innocence." ***Id.***

¶14 On appeal, we "affirm the jury's finding if there is *any* reasonable hypothesis that supports the conviction." ***State v. Hauk***, 2002 WI App 226, ¶12, 257 Wis. 2d 579, 652 N.W.2d 393 (citation omitted) (emphasis in original). We therefore examine the record to find evidence that supports the jury's decision to convict. ***State v. Hayes***, 2004 WI 80, ¶57, 273 Wis. 2d 1, 681 N.W.2d 203. In

reviewing the evidence, we adopt all reasonable inferences that support the jury's verdict. *See* ***Poellinger***, 153 Wis. 2d at 507.[3]

¶15 Applying this standard to our review of the evidence, we conclude for the following reasons that the evidence is sufficient to prove beyond a reasonable doubt that Smith was guilty of the crime of possessing more than 10,000 grams of THC with intent to deliver as party to the crime.

¶16 The circuit court instructed the jury that the elements of possession of a controlled substance (THC) with intent to deliver are: (1) the defendant or another person possessed a substance; (2) the substance was THC; (3) the defendant or another person knew or believed that the substance was THC; and (4) the defendant or another person intended to deliver THC. Because Smith was charged as party to the crime, the jury was also instructed that it must find that Smith directly committed the crime of possession of THC with intent to deliver, or that he was a member of a conspiracy to commit this crime, or that he intentionally aided and abetted the commission of this crime. *See* WIS JI—CRIMINAL 402.

¶17 The State does not contend that Smith directly committed the crime. The State's theory is that Smith was a member of a conspiracy to commit the

[3] Smith asserts that, if "there are two or more possible inferences but there was no basis on which the factfinder could make a reasoned choice between them, then the evidence failed to satisfy the burden of proof." If Smith means that the jury may not choose between two competing reasonable inferences from the evidence, we disagree. This is directly contrary to ***Poellinger's*** holding 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 the innocence of the accused." ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990) (citation omitted) (emphasis in original). The cases on which Smith relies pre-date ***Poellinger***: ***State v. Haugen***, 52 Wis. 2d 791, 796, 191 N.W.2d 12 (1971); ***Merco Distributing Corp. v. Commercial Police Alarm Co.***, 84 Wis. 2d 455, 460, 267 N.W.2d 652 (1978); and ***State v. Hall***, 271 Wis. 450, 73 N.W.2d 585 (1955). ***Haugen*** and ***Merco*** can be reconciled with ***Poellinger*** and, to the extent ***Hall*** cannot be, it is no longer good law.

crime or that he aided and abetted the commission of the crime. Liability as a party to a crime for aiding and abetting requires that the individual undertake a verbal or overt action that objectively assists at least one other person in the commission of a crime and requires that the individual consciously intend to provide that assistance. ***State v. Hecht***, 116 Wis. 2d 605, 619-20, 342 N.W.2d 721 (1984) (citation omitted). Liability as a party to a crime for conspiracy requires that the individual enter into an agreement with at least one other person to commit a crime and that the individual intend that the particular crime be committed. ***Id.*** at 625 (citation omitted).

¶18 The evidence presented at trial showed the following. Smith introduced Kortbein to Thomas. Kortbein did not give Thomas her cell phone number, but he called her within a few weeks of being introduced to her. He asked if she would be willing to accept delivery of packages in exchange for $500. She agreed. Approximately a week later, a package was delivered to Kortbein. In total, Kortbein received packages on three occasions prior to September 20, 2006. Each time, Thomas picked up the packages within a few days and, shortly thereafter, Smith gave her $400 without explanation. In the days surrounding the deliveries, there were many calls among Kortbein's, Thomas's and Smith's cell phones. On September 20, Kortbein received two packages that were consistent in size with the previous packages. She expected that Smith would pay her for these packages. These packages each contained approximately twenty-five pounds of marijuana. This amount of marijuana has a street value of approximately $50,000 and far exceeds the amount indicative of personal use.

¶19 The packages delivered on September 20, 2006, were "layered with tape" and the THC was covered with several layers of saran wrap. These packages were addressed to "Jo Korbine," an alteration of Shannon Kortbein.

There was testimony that these are common strategies used by persons sending drugs through the mail.

¶20 About the same time that Kortbein was receiving packages for Thomas, Mehlhorn agreed to receive packages for Smith. Smith and Thomas would pick up these packages. Smith told Mehlhorn that he had been involved in a marijuana operation with a girl, but that he was not concerned because it was his word against hers.

¶21 Smith assumes for purposes of argument that the above evidence is sufficient to show that an unknown person or persons in California possessed more than 10,000 grams of THC with the intent to deliver it.[4] His contention is that the evidence is insufficient to prove his involvement as a party to the crime.

¶22 We first address liability by aiding and abetting. We agree with the State that the jury could reasonably infer that, by introducing Kortbein and Thomas and by giving Kortbein $400 after each delivery, Smith objectively assisted in the crime of possessing THC with intent to deliver. Smith does not argue otherwise. But he does argue that the evidence is not sufficient to support a reasonable inference that he intended this result.

¶23 Specifically, Smith argues that the facts that he introduced Thomas to Kortbein and paid Kortbein $400 after each delivery, considered individually,

[4] Smith does not expressly state that he is assuming for purposes of argument that the evidence is sufficient to establish that the weight of the THC was greater than 10,000 grams. However, given his stipulation that the weight of the THC was 22,477 grams, we understand him to implicitly concede there is sufficient evidence of the weight to support the conviction. We address in the next section his contention that the jury, not the judge, should have decided this element.

are insufficient evidence to show Smith's intent to aid and abet the commission of a crime on September 20, 2006. In support of this argument, he presents a number of innocent inferences that the jury could have drawn from this evidence.

¶24 Smith's argument fails for several reasons. First, we do not consider pieces of evidence individually, but rather view the evidence as a whole in order to determine whether a reasonable jury could have found guilt beyond a reasonable doubt. Second, we do not draw our own inferences from the evidence, but instead adopt the reasonable inferences a jury could have drawn to support the verdict. Finally, Smith's argument ignores other evidence supporting the verdict—namely, the evidence from Mehlhorn that he had accepted delivery of packages for Smith, that Smith and Thomas had picked up the packages together, and that Smith had admitted to Mehlhorn that he was involved in a marijuana operation.

¶25 Viewing this evidence most favorably to the verdict, we conclude it supports a reasonable inference that Smith both objectively assisted in the commission of the crime of possession with intent to deliver and intended to provide that assistance. Accordingly, the evidence is sufficient to establish that Smith aided and abetted the crime of possession with intent to deliver THC.

¶26 The same evidence also supports a verdict based on a theory of conspiracy to commit the crime. Circumstantial evidence used to demonstrate a conspiracy need not show an express agreement between the parties. ***Hecht***, 116 Wis. 2d at 625. A "tacit understanding of a shared goal" is sufficient. ***Id.*** Mehlhorn's testimony that Smith and Thomas together picked up the packages from him and evidence that both were involved with the packages delivered to Kortbein are sufficient for the jury to reasonably infer that Smith and Thomas had

an agreement to possess and deliver THC and that Smith intended that this crime be committed.

II. Waiver of Jury Trial

¶27 Smith contends that his constitutional right to a jury trial was violated because the jury did not determine whether the weight of the THC in the packages was greater than 10,000 grams. He argues that, although he stipulated to the weight of the THC in the packages, he did not waive his right to a jury determination of this issue.

¶28 Whether Smith's constitutional right to a jury trial was violated is an issue we review de novo. ***State v. LaCount***, 2007 WI App 116, ¶27, 301 Wis. 2d 472, 732 N.W.2d 29.

¶29 A defendant's right to a jury trial is guaranteed by both the United States and Wisconsin Constitutions. U.S. CONST. amend. VI; WIS. CONST. art. I, § 7. This right "includes the right to have a jury determine *each element* of the crime." ***Hauk***, 257 Wis. 2d 579, ¶32 (citation omitted) (emphasis in original). Generally, any fact that exposes a defendant to a greater punishment is an element of the crime on which the defendant has the right to a jury trial.[5] ***Apprendi v. New Jersey***, 530 U.S. 466, 477 (2000); ***State v. Warbelton***, 2009 WI 6, ¶¶20-21, 315 Wis. 2d 253, 759 N.W.2d 557.

[5] The exception is the fact of a prior conviction. ***State v. Warbelton***, 2009 WI 6, ¶21, 315 Wis. 2d 253, 759 N.W.2d 557. The legislature has the authority to designate a prior conviction as a penalty enhancer, in which case it is not an essential element of the crime on which a defendant has the right to a jury trial. ***Id.***

¶30 The constitutional right to a jury trial is personal and fundamental and can be waived only if the defendant makes a voluntary, knowing, and intelligent waiver on the record. ***Warbelton***, 315 Wis. 2d 253, ¶56. Waiver of this right cannot be based on circumstantial evidence or reasonable inferences. ***State v. Anderson***, 2002 WI 7, ¶11, 249 Wis. 2d 586, 638 N.W.2d 301.

¶31 The procedure for waiving a jury trial is set forth in WIS. STAT. § 972.02(1). Pursuant to this section, "[e]xcept as otherwise provided in this chapter, criminal cases shall be tried by a jury … unless the defendant waives a jury in writing or by statement in open court or under s. 967.08(2)(b), on the record, with the approval of the court and the consent of the state." Wisconsin courts interpreting § 972.02(1) have established that a jury waiver is valid only if the circuit court conducted a colloquy to ensure that the defendant "(1) made a deliberate choice, absent threats or promises, to proceed without a jury trial; (2) was aware of the nature of a jury trial, such that it consists of a panel of 12 people that must agree on all elements of the crime charged; (3) was aware of the nature of a court trial, such that the judge will make a decision on whether or not he or she is guilty of the crime charged; and (4) had enough time to discuss this decision with his or her attorney." ***Anderson***, 249 Wis. 2d 586, ¶¶23-24. If the circuit court does not conduct a sufficient colloquy, this court "may not find, based on the record, that there was a valid waiver...." ***Id.***, ¶24, (quoting ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997)). Waiver of a jury trial of one element requires the same procedure as a full jury trial waiver. ***Warbelton***, 315 Wis. 2d 253, ¶59.

¶32 There is no dispute that the weight of the THC increases the penalty of the crime of possession of THC with intent to deliver.[6] Thus, Smith is entitled to a jury trial on this element in the absence of a valid waiver. The facts relevant to this issue are as follows.

¶33 Prior to the trial, Smith personally stipulated, both in writing and orally on the record, that the packages at issue contained THC and that they weighed 22,477 grams. The written stipulation, signed by Smith and his attorney, provided:

> The State, by Assistant District Attorney Wendy W. Lemkuil, the Defendant, Roshawn Smith and Attorney Andrew Williams, hereby stipulate that the substance in the aforementioned case and tested by analyst Kim Vonnahme, at the Wisconsin State Crime Lab in Wausau, was identified to have the presence of tetrahydrocannabinol (THC), a substance from marijuana and weighed 22,477 grams.

¶34 The circuit court conducted this colloquy with Smith concerning the stipulation:

> THE COURT: … But I still need to ask you personally, you agree that the crime lab person doesn't need to come to testify about the fact that what's in the bag contains THC, which is the active ingredient in marijuana? That is your agreement?
>
> SMITH: Um, I believe so….
>
> ….
>
> THE COURT: … That it is my understanding that your defense is you didn't have anything to do with this, you

[6] WISCONSIN STAT. § 961.41(1m)(h) prescribes the penalties for possession of THC with intent to deliver according to the weight of the THC. Possession of more than 10,000 grams with intent to deliver is a Class E felony punishable by a fine of up to $50,000, imprisonment of not more than 15 years, or both. §§ 961.41(1m)(h)5. and 939.50(3)(e).

> knew nothing about it, you weren't involved. And that's your defense. And that's what this document tells me is because there is no reason for you to disagree that that was really marijuana, because your defense is that you didn't have anything to do with it, and to drag the crime lab person in here to testify that it was marijuana isn't part of your defense. And I just wanted to be sure that you understand that and you agreed with that. You signed it. I would fully expect that [your attorney] explained it to you. But I just wanted to be sure that you understood that. Because it's not part of your defense, there is no reason to drag this crime lab person in here to say it was marijuana.
>
> SMITH: I agree.[7]

¶35 With the agreement of the assistant district attorney and defense counsel, the circuit court read the written stipulation to the jury during the trial.

[7] The circuit court had addressed Smith on this same subject on two earlier occasions when there was a discussion regarding the witness from the state crime lab. On the first occasion, the court addressed Smith as follows:

> THE COURT: You don't want to have that crime lab person come up here?
>
> SMITH: No.
>
> THE COURT: Okay. Any promises or threats made to get you to make that decision?
>
> SMITH: No, ma'am.
>
> THE COURT: Okay. You're not disputing that it's marijuana. You just—your position is that you didn't have anything to do with it, is that right?
>
> SMITH: Yes.

On the second occasion, the court asked:

> THE COURT: Is that true, Mr. Smith? You're not going to make the State prove what was in the boxes?
>
> SMITH: No.

The court instructed the jury that it must accept the stipulated facts "as conclusively proved."

¶36 During discussions on the verdict forms, the State proposed and defense counsel agreed that the court would answer for the jury the question on the weight of the THC. The jury was presented with two verdict forms, one finding Smith guilty and one finding him not guilty. The form finding him guilty stated, "If you find the defendant guilty, the court has answered the following question based on the Stipulation of the parties: Was the amount of THC including the weight of any other substance or material mixed or combined with it, more than 10,000 grams? Yes." The court explained this "yes" answer to the jury as follows:

> If you find the Defendant guilty, I have answered the following question based on the stipulation of the parties. Was the amount of THC including the weight of any substance or material mixed or combined with it more than 10,000 grams? That is the question that you would normally have to answer if you found the Defendant guilty. But because of the stipulation of the parties, I have answered it yes for you. So you don't need to answer that question.

¶37 There is no dispute on these facts that the jury did not decide the weight of the THC. The State's position is that the record as a whole is adequate to demonstrate a voluntary, knowing, and intelligent waiver of the right to a jury trial on this element. The State asserts that a circuit court need not use "magic words" in conducting the requisite colloquy. The State contends that there is no basis for concluding that Smith did not understand that, in entering into the stipulation, he was giving up his right to a jury determination on the weight element. As we understand the State's position, Smith's personal stipulation to the weight of the THC is the equivalent of a personal waiver of the right to a jury trial

on that element and the court's colloquy on the stipulation satisfies its obligation to conduct a colloquy for a valid jury waiver.

¶38 The State's argument overlooks the case law establishing that a stipulation to a fact constituting an element of a crime, even if made personally by the defendant, is not the same as a waiver of a jury trial on the element. In ***State v. Benoit***, 229 Wis. 2d 630, 635, 600 N.W.2d 193 (Ct. App. 1999), the defendant stipulated on the record that he entered premises without the owner's consent, a fact constituting an element of the charged crime of burglary. The circuit court instructed the jury on all elements of the crime, including nonconsent, and also informed the jury that it must accept the stipulated facts as conclusively proved. ***Id.*** The jury returned a guilty verdict. The defendant argued on appeal that he was denied a jury trial on the element of nonconsent. ***Id.*** at 636. We disagreed, concluding that the defendant received a jury trial on every element because the jury was instructed on all elements of the crime and "the jury made a complete and final determination of guilt based on the evidence presented." ***Id.*** at 636-37. The stipulation did not constitute a waiver of the right to a jury trial on the element of nonconsent, we stated, but instead, relieved the State from the burden of proving nonconsent. ***Id.*** at 638-39. We contrasted Benoit's situation with that in ***State v. Villarreal***, 153 Wis. 2d 323, 450 N.W.2d 519 (Ct. App. 1989), in which an element of the charged crime was decided by the court, not by the jury. ***Id.*** at 637-38.

¶39 The supreme court in ***Warbelton***, 315 Wis. 2d 253, ¶59 n.23, approved the distinction we drew in ***Benoit*** between a stipulation to a fact constituting an element of the crime and the waiver of the right to a jury trial on that element. In its discussion on the distinction between a stipulation and a partial jury waiver, the court stated:

> A stipulation to an agreed fact is evidence, and its admissibility is governed by the statutory rules of evidence. In contrast, a waiver of one or more elements of a crime is a partial jury waiver, and it is governed by separate statutory and constitutional rules.

Warbelton, 315 Wis. 2d 253, ¶49.

¶40 The State cites to ***Hauk***, 257 Wis. 2d 579, ¶8, in support of its argument. In ***Hauk*** the defense counsel filed a document stating that the defendant wished to stipulate to certain elements of one of the charged crimes. The jury did not determine those elements. In rejecting the State's argument that the stipulation showed the defendant waived her right to a jury trial on those elements, we stated: "The problem with the stipulation, however, is that it was signed by Hauk's attorney only, and not by Hauk herself. The supreme court has held that the waiver must be made *personally* on the record by the defendant." ***Id.***, ¶34 (citation omitted) (emphasis in original). The State contends that, because Smith, unlike Hauk, did sign the stipulation, it is a valid waiver of the right to a jury trial.

¶41 We do not agree with the State's reading of ***Hauk***. ***Hauk*** confirms the principle that a jury waiver must be made personally by the defendant; thus, a stipulation that is not signed by the defendant cannot be a jury waiver. ***Id.*** ***Hauk*** does not address the question whether a stipulation to a fact constituting an element of the crime, if it is signed by a defendant, can be a valid waiver of the right to a jury trial on that element. Moreover, reading ***Hauk*** to hold that such a stipulation is the equivalent of a jury waiver is inconsistent with ***Benoit*** and ***Warbelton***.

¶42 We recognize that there is no requirement that a valid waiver of the right to a jury trial be in writing. *See* WIS. STAT. § 972.02(1). Thus, even though

the written stipulation signed by Smith did not address the waiver of the right to a jury trial, a colloquy satisfying the requirements of ***Anderson***, 249 Wis. 2d 586, ¶¶23-24, could nonetheless accomplish a valid waiver of that right. But that did not occur here. While the State suggests that the record as a whole shows an adequate colloquy, the State does not point to anything in the record indicating that the circuit court specifically asked Smith if he wished to waive his right to a jury trial on the element of the weight of the THC. We see nothing showing a colloquy on the waiver of that right. Instead, the circuit court's inquiries addressed whether Smith agreed that the crime lab analyst did not need to testify that the substance contained THC. Because the circuit court failed to conduct the required colloquy, there was not a valid waiver and Smith was denied his right to a jury trial on the weight element. *See* ***Hauk***, 257 Wis. 2d 579, ¶36 (informing the defendant that she had a right to have the jury determine all the elements was not adequate because the circuit court never asked her if she wanted a jury trial or wished to waive it).

¶43 Smith asserts that, because there was not a valid waiver of his right to a jury trial on the weight element, he is entitled to a new trial. He relies on ***State v. Livingston***, 159 Wis. 2d 561, 573, 464 N.W.2d 839 (1991). The State does not address what remedy is proper if we agree with Smith that there was not a valid waiver.

¶44 Unlike this case, ***Livingston*** does not involve an invalid waiver of a jury trial on an element that determines the penalty but does not affect what might be called the "base" crime. ***Id.*** at 573. That is, Smith is not asserting that he was deprived of a right to have the jury determine the four elements of the crime of possession with intent to deliver THC (or the elements of party to the crime). His challenge is limited to the weight of the THC, which determines the penalty. With

no proof of the weight but proof that the substance in the packages contained THC, it appears that the penalty in WIS. STAT. § 961.41(1m)(h)1. would apply: when the amount of THC possessed with intent to deliver is "[t]wo hundred grams or less … the person is guilty of a Class I felony." The penalty for a Class I felony is "a fine not to exceed $10,000 or imprisonment not to exceed 3 years and 6 months, or both." WIS. STAT. § 939.50(3)(i).

¶45 A case that appears more applicable than ***Livingston*** to the facts here is ***Villarreal***, 153 Wis. 2d 323. In that case, the jury returned a verdict finding the defendant guilty of second-degree murder and, pursuant to a stipulation, the court determined that the defendant had used a dangerous weapon. ***Id.*** at 324. We concluded that the defendant had the right to a jury trial on the use-of-a-dangerous-weapon element of the crime of second-degree murder by use of a dangerous weapon. ***Id.*** at 332. We also concluded that the defendant had not validly waived that right. ***Id.*** Because the jury found her guilty of second-degree murder, we remanded with directions to the court to enter a judgment of conviction for second-degree murder only. ***Id.***

¶46 Neither Smith nor the State discusses ***Villarreal***. Because the State does not address the proper remedy and because it appears that ***Villarreal*** may have some bearing on this issue, we conclude the circuit court should determine the proper remedy on remand.

CONCLUSION

¶47 We conclude that the evidence was sufficient for the jury to find Smith guilty of possession with intent to deliver more than 10,000 grams of THC as a party to a crime. However, because we conclude that Smith was denied his right to have the jury determine the weight element, we reverse the judgment of

conviction for possession with intent to deliver more than 10,000 grams of tetrahydrocannabinol (THC) as party to the crime and the order denying postconviction relief. On remand the court shall determine the appropriate remedy for the denial of the right to a jury trial on the weight element.

By the Court.—Judgment and order reversed and cause remanded for further proceedings.

Not recommended for publication in the official reports.