COURT OF APPEALS
DECISION
DATED AND FILED

October 29, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP440-CR **Cir. Ct. No. 2010CF6237**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROLAND DERLIEL GRAHAM,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 KESSLER, J. Roland Derliel Graham appeals a judgment of conviction, following a jury trial, of possession with intent to deliver a controlled substance (THC) as a party to a crime. Graham argues that the trial court erroneously denied his motion to suppress evidence, issued misleading jury

instructions, and erroneously answered a question from the jury. We disagree and affirm the trial court.

BACKGROUND

¶2 On December 24, 2010, Graham was charged with one count of possession with intent to deliver more than 200 grams, but less than 1000 grams, of a controlled substance (THC) as a party to a crime, as a second or subsequent offense. The charges stemmed from a search of Graham's vehicle, three days earlier, in which Milwaukee Police Officer John Wiesmueller recovered a gallon-size plastic bag filled with marijuana from the floorboard behind the driver's seat. Graham moved to suppress the evidence on the ground that the officer did not have reasonable suspicion to stop Graham.

¶3 The trial court held an evidentiary hearing on Graham's motion. Only Wiesmueller testified at the hearing. Wiesmueller testified that on December 21, 2010, the date of the stop, he was involved in conducting surveillance on the home of Levardis Bentley, along with two Department of Drug Enforcement (DEA) agents and other Milwaukee police officers. Bentley was the target of the surveillance operation. While en route to the surveillance site on the morning of December 21, 2010, Wiesmueller received a call from DEA Agents James Krueger and Matthew McCarthey, informing Wiesmueller that the agents had witnessed Bentley involved in a hand-to-hand transaction with an unknown individual in the alleyway behind Bentley's home. The agent told Wiesmueller the direction in which the individual drove away, and told Wiesmueller to stop the vehicle. Wiesmueller stopped the vehicle and the individual admitted to purchasing marijuana from Bentley.

¶4 Approximately an hour after the stop, Wiesmueller and the other officers involved in the earlier traffic stop returned to the surveillance site. Wiesmueller noticed that Bentley's vehicle was not there and that Bentley's garage, which faced the alleyway behind Bentley's house, was open and empty. Shortly thereafter, a BMW, not operated by Bentley, backed into Bentley's garage. Within three to five minutes of the BMW's arrival, a tan Honda, also not operated by Bentley, pulled up behind the BMW, blocking the BMW's exit from the garage. Within one to two minutes of the Honda's arrival, Bentley pulled up in front of his house.

¶5 Wiesmueller testified that the other officers participating in the surveillance operation detained Bentley immediately upon his arrival. Wiesmueller headed towards the back of Bentley's house, where the garage and alleyway were located, to speak with the occupants of the BMW and the Honda. While walking towards the back of the residence, Wiesmueller was informed that the driver of the BMW, later identified as Walter Jones, was fleeing on foot. Other officers on the scene apprehended Jones. Wiesmueller proceeded to the tan Honda, where he saw Graham in the driver's seat, and Nakia Banks in the passenger seat. Wiesmueller asked Graham to step out of the car. Wiesmueller testified that upon opening Graham's door, he (Wiesmueller) smelled the odor of fresh marijuana, prompting Wiesmueller to order Banks out of the car as well. Wiesmueller stated that he searched Graham's car and found a gallon-sized plastic bag full of a leafy green substance, later identified as marijuana, behind the floorboard of the driver's seat. A subsequent search of Jones's BMW produced multiple gallon-sized plastic bags filled with the same substance.

¶6 The trial court denied Graham's motion to suppress evidence, finding that under the totality of the circumstances, Wiesmueller had reasonable

suspicion to stop Graham. The trial court took into account the following factors: (1) Bentley's property had been under surveillance; (2) DEA agents witnessed a hand-to-hand transaction at Bentley's property earlier on the day of Graham's arrest; (3) the individual that participated in the transaction with Bentley confirmed that he purchased marijuana from Bentley; (4) three cars arrived at Bentley's property, the site of an earlier drug transaction, within four to six minutes; and (5) Wiesmueller had twenty years of experience as an officer and had been involved in thousands of drug offenses involving marijuana.

¶7 The case proceeded to trial. During its closing instructions to the jury, the trial court gave the following instructions:

> The information in this case charges that … as a party to the crime, the defendant, … did knowingly possess with intent to deliver [THC], marijuana, a controlled substance….
>
> ….
>
> The State contends that the defendant was concerned in the commission of the crime of possession with intent to deliver [THC], marijuana, … by either directly committing it or by intentionally aiding and abetting the person who directly committed it.
>
> A person intentionally aids and abets the commission of a crime when acting with knowledge or belief that another person is committing or intends to commit a crime, he normally either assists the person who commits the crime or is ready and willing to assist and the person who commits the crime knows of the willingness to assist.
>
> To intentionally aid and abet possession with intent to deliver … marijuana, … the defendant must know that another person is committing or intends to commit the crime of possession with intent to deliver … marijuana, … and have the purpose to assist the commission of that crime.
>
> ….

> Before you may find the defendant guilty … the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements of possession with intent to deliver [marijuana] were present:
>
> ….
>
> One, the defendant or another possessed the substance. "Possessed" means that the defendant or another normally had actual physical control of a substance. An item is also in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.
>
> It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item. Possession may be shared with another person. If a person exercises control over an item, that item is in his possession even though another person may also have similar control.
>
> Two, the substance was … marijuana.… [M]arijuana, is a controlled substance whose possession is prohibited by law.
>
> Three, the defendant or another knew or believed the substance was … marijuana.
>
> And, four, the defendant or another intended to deliver [marijuana]. "Delivered" means to transfer or attempt to transfer one -- from one person to another. "Intended to deliver" means that the defendant or another had the purpose to deliver or was aware that his or her conduct was practically certain to cause delivery.

¶8 Prior to closing arguments, but outside of the presence of the jury, defense counsel objected to the wording of the instructions, stating that the phrase "or another" in the description of the elements implies "that the defendant or anybody else in the world that he acts in concert with would then make him guilty of this particular offense." Defense counsel requested that the trial court replace the phrase "or another" with "Walter Jones," stating, "it's always been the State's theory that my client acted in concert with Walter Jones." The State opposed

reinstructing the jury. The trial court denied defense counsel's request to reinstruct the jury, stating:

> I've read the instructions. I read the examples, and clearly it says if you know the person, put the person's name; if not, then put … "another."
>
> In this case, there … was [sic] a lot of people involved…. Regarding testimony before the jury, it has to be based upon the evidence before the Court. There are other people that have been mentioned…. I think another is – is perfectly acceptable under the facts of this case.

¶9 During deliberations, the jury submitted the following question: "What does the phrase 'or another' constitute or encompass in the elements of possession (number one) that the State must prove?" (Some quotation marks from the transcript omitted.) The State requested the trial court to instruct the jury that "or another," for the purpose of proving possession, refers to Walter Jones. Defense counsel requested that the trial court instruct the jury that "or another," for the purposes of *all* the elements the State must prove, refers to Walter Jones. The trial court declined to instruct the jury that "or another" referred to Jones with regard to all four elements the State was required to prove, stating that the jury only asked a question with regard to the first element—possession. The trial court instructed the jury that for the purposes of their deliberations as to the element of possession, "or another" "should be constituted as referring to Walter Jones."

¶10 Graham was found guilty as charged. This appeal follows.

DISCUSSION

¶11 On appeal Graham argues that the trial court: (1) erroneously denied his motion to suppress evidence; (2) issued faulty jury instructions; and (3) improperly answered the jury's question during deliberations. We disagree.

Motion to Suppress Evidence.

¶12 When reviewing a trial court's denial of a motion to suppress, we uphold the court's findings of fact unless they are clearly erroneous. *See* ***State v. Waldner***, 206 Wis. 2d 51, 54, 556 N.W.2d 681 (1996). However, whether those facts satisfy the constitutional requirement of reasonableness is a question of law we review without deference. ***Id.***

¶13 The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures, and an investigative stop is a seizure under the Fourth Amendment. ***State v. Post***, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634. To be lawful, an investigatory detention must be supported by reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that a person is or was violating the law. ***Id.*** Specifically, an officer must have reasonable suspicion that a suspect has committed, is committing, or is about to commit an offense. ***State v. Rutzinski***, 2001 WI 22, ¶14 n.5, 241 Wis. 2d 729, 623 N.W.2d 516. An officer need not observe unlawful conduct; rather, the officer must consider the totality of the circumstances and draw reasonable inferences about the cumulative effect. ***Waldner***, 206 Wis. 2d at 58-59.

¶14 In reviewing the trial court's determination, we accept the court's findings of fact unless they are clearly erroneous, and we review *de novo* the application of those facts to the constitutional standard. ***State v. Young***, 2006 WI 98, ¶17, 294 Wis. 2d 1, 717 N.W.2d 729. In this case, Wiesmueller was the only witness and the trial court accepted his testimony as credible. We therefore apply the constitutional standard to the events and circumstances described by the officer.

¶15 We conclude that under the totality of the circumstances described by Wiesmueller, there was reasonable suspicion to stop Graham. Graham was stopped on property that had been the subject of DEA and police surveillance for suspected drug activity. Earlier on the day of Graham's arrest, a hand-to-hand drug transaction took place between Bentley and another individual in the general location where Graham parked his car. The individual told Wiesmueller that he purchased drugs from Bentley. Upon returning to Bentley's residence, Bentley's car was gone, but two vehicles pulled up within three to five minutes of each other. Almost immediately thereafter, Bentley arrived. Jones, presumably upon noticing police officers on the scene, attempted to flee. All of these factors, taken together, give rise to the suspicion that Graham either had committed, was committing, or was about to commit, a criminal act. The trial court did not erroneously exercise its discretion in denying Graham's motion to suppress evidence.

Jury Instructions and Jury Question.

¶16 In reviewing a claimed jury instruction error, we do not view the challenged words or phrases in isolation. *See* ***State v. Pettit***, 171 Wis. 2d 627, 637, 492 N.W.2d 633 (Ct. App. 1992). "Wisconsin courts should not reverse a conviction simply because the jury possibly could have been misled; rather, a new trial should be ordered only if there is a reasonable likelihood that the jury was misled and therefore applied potentially confusing instructions in an unconstitutional manner." ***State v. Lohmeier***, 205 Wis. 2d 183, 193-94, 556 N.W.2d 90 (1996). "[I]n making this determination, appellate courts should view the jury instructions in light of the proceedings as a whole, instead of viewing a single instruction in artificial isolation." ***Id.*** at 194. Relief is not warranted, however, unless the court is "persuaded that the instructions, when viewed as a

whole, misstated the law or misdirected the jury" in the manner asserted by the challenger to the instruction. ***Pettit***, 171 Wis. 2d at 638.

¶17 A trial court has broad discretion in instructing a jury but must exercise that discretion in order to fully and fairly inform the jury of the applicable rules of law. ***State v. Coleman***, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996). Whether a jury instruction is appropriate, under the given facts of a case, is a legal issue subject to independent review. *See* ***Pettit***, 171 Wis. 2d at 639.

¶18 As stated, Graham argues that the trial court inaccurately instructed the jury that the State was required to prove the elements of possession with intent to deliver as a party to a crime with regard to Graham "or another." Graham contends that the phrase "or another" implies that he "could have been convicted if someone else committed the offense even though [he] was not acting as a party to the crime with that person." We disagree.

¶19 In looking at the instructions as a whole, we conclude that the trial court neither inaccurately instructed the jury, nor rendered an inaccurate or confusing answer to the jury's question. The trial court was clear that in order to find Graham guilty, the jury must find that Graham either directly committed the crime of possession with intent to deliver, or that Graham aided and abetted another in committing the crime. The trial court issued this instruction both before and after discussing the four elements of possession with intent to deliver marijuana. Contrary to Graham's claim, the trial court did not imply that Graham could be found guilty "regardless of whether [he] was acting in concert with that person." Moreover, the trial court explained that it did not name Walter Jones when initially instructing the jury because multiple people were mentioned during the course of the trial. It was up to the jury to determine who Graham aided and

abetted. When the jury asked who the term "or another" applied to, it only asked with regard to the first element the State was required to prove—possession. In keeping with the trial court's earlier statements—that multiple people were mentioned during the trial—the trial court did not err in refusing to instruct the jury that "or another" referred to Jones as to the other elements. The jury was not precluded from asking additional questions. If the jury was confused as to who "or another" referred to regarding the remaining elements, it was free to submit additional questions. There is no reasonable likelihood that the jury was misled either by the initial instructions, or by the trial court's response to its question. *See* ***Lohmeier***, 205 Wis. 2d at 193-94.

By the Court.—Judgment affirmed.

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