COURT OF APPEALS
DECISION
DATED AND RELEASED

April 8, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 96-1085-CR

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

State of Wisconsin,

Plaintiff-Respondent,

v.

Bobby D. Swift,

Defendant-Appellant,

Luis R. Jones,

Defendant.

APPEAL from a judgment of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Bobby Swift appeals from a judgment entered after a jury convicted him of first-degree intentional homicide (while armed as party to a crime), armed robbery, and first-degree recklessly endangering safety (while armed), contrary to

§§ 940.01(1), 943.32(2), 941.30(1), 939.63 and 939.05, STATS. He claims that: (1) the evidence was insufficient to support the armed robbery conviction, which was based on his stealing illegal drugs from the victim; and (2) the trial court erroneously exercised its discretion in instructing the jury. Because the evidence is sufficient to support the armed robbery conviction and because the trial court did not erroneously exercise its discretion in instructing the jury, we affirm.

I. BACKGROUND

On April 9, 1995, Swift entered the home of Jorge Vega and his girlfriend, Tanika Reyes. Swift shot and killed Vega and then intended to steal illegal drugs from the home. Swift asked Reyes where the drugs were. Reyes told him the stuff was in the kitchen and took him to it. Reyes gave the drugs to Swift. Swift was subsequently charged.

At the close of the State's case, Swift moved for dismissal arguing that the State had failed to prove the armed robbery because Swift had not taken the drugs from the "owner." Reyes had testified that the drugs were Vega's and she did not participate in his drug related activity. The trial court denied Swift's motion to dismiss. When instructing the jury, the trial court gave WIS J I—CRIMINAL 1480 (1994), which states: "Owner means a person who has possession of property." The trial court amended the instruction by adding the following sentence: "A person qualifies as an owner if the possession of the property is actual or constructive." Swift objected to this instruction.

The jury convicted Swift on all three counts. Judgment was entered. Swift now appeals.

II. DISCUSSION

A. Insufficient Evidence.

Swift's first complaint is that the evidence is insufficient to support the armed robbery conviction. He claims that there is no evidence proving that Reyes was the owner of the drugs and, because an armed robbery occurs only when property is taken from the "person or presence of the owner," his conviction on this count should be reversed. We are not persuaded.

> [I]n reviewing the sufficiency of the evidence to support a conviction, an 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. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990) (citations omitted).

Based on this standard, we cannot reverse. Section 943.32(1), STATS., provides that a person is guilty of armed robbery if he "with intent to steal, takes property from the person or presence of the owner … (a) [b]y using force against the person of the owner …; or (b) [b]y threatening the imminent use of force against the person of the owner." The only challenged element is whether Reyes was the owner.

Swift argues that Reyes's testimony conclusively demonstrates that she was not the owner because she did not have possession of the drugs. He relies on her testimony that: the drugs belonged to Vega, she did not assist Vega in selling, she did not know where Vega kept the money made from selling the drugs, she did not know where

Vega kept his drug paraphernalia and Vega sold the drugs only late at night when she was sleeping. These portions of Reyes's testimony seem to support his argument.

However, the jury also heard testimony from Reyes that she knew where the drugs were, that she took Swift to the kitchen cabinet containing the drugs, and that she "gave the dope" to Swift. The jury also knew that Reyes was Vega's girlfriend and lived in the apartment with him. Given these facts, there is a reasonable possibility that the jury "could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt." The jury could have inferred from these facts that Reyes did have actual possession over the drugs because she gave them to Swift. She had dominion over the drugs sufficient to surrender them. The jury may have also concluded that because Reyes knew where the drugs were that she was not being truthful when she denied all other knowledge of the drugs. Based on this record, we conclude that there is sufficient evidence to support actual possession of the drugs and, therefore, the element of armed robbery requiring ownership was satisfied. Accordingly, we reject Swift's claim on this issue.

B. Jury Instruction.

Swift next claims that the trial court erroneously exercised its discretion when it instructed the jury. He complains that that trial court added to WIS J I–CRIMINAL 1480, the sentence: "A person qualifies as an 'owner' if his possession of the property is 'actual or constructive.'" Swift argues that the trial court erred when it instructed the jury that a person can be an owner if he or she constructively possesses an item and that this part of the instruction left the jury to speculate as to what the term constructive possession means. We reject Swift's argument.

A trial court has broad discretion when instructing a jury. ***Fischer v. Ganju,*** 168 Wis.2d 834, 849, 485 N.W.2d 10, 16 (1992). "A challenge to an allegedly

erroneous jury instruction warrants reversal and a new trial only if the error was prejudicial. An error is prejudicial if it probably, and not merely possibly, misled the jury. If the overall meaning communicated by the instructions was a correct statement of the law, no grounds for reversal exist." ***Id.*** at 849-50, 485 N.W.2d at 16 (citations omitted). We will affirm a trial court's exercise of discretion as long as it has a reasonable basis and was made in accordance with acceptable legal standard and the facts of record. ***State v. Jenkins***, 168 Wis.2d 175, 186, 483 N.W.2d 262, 265-66 (Ct. App.), *cert. denied*, 506 U.S. 1002 (1992). We cannot say that the trial court in the instant case erroneously exercised its discretion by adding one sentence to the standard instruction.

The trial court added the sentence to the standard instruction pursuant to footnote 3 of WIS J I–CRIMINAL 1480, which cites ***State v. Mosley***, 102 Wis.2d 636, 307 N.W.2d 200 (1981). The court took the added language directly from the footnote. ***Mosley*** held that an "owner" within the meaning of § 943.32(3), STATS., is a person who is in either actual or constructive possession. ***Id.***, 102 Wis.2d at 645, 307 N.W.2d at 206. Footnote 3 of WIS J I–CRIMINAL 1480 recognizes this fact. Therefore, the trial court had a reasonable basis to add the challenged language. The instruction under the facts and circumstances of this case was a correct statement of the law. Accordingly, we conclude that the trial court did not erroneously exercise its discretion.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.