

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

April 16, 1997

NOTICE

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 97-0012-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**In the Interest of Demetrius N.O.,
A Person Under the Age of 18:**

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

DEMETRIUS N.O.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Racine County:
GERALD P. PTACEK, Judge. *Affirmed.*

SNYDER, P.J. Demetrius N.O. appeals from an order in which he was found delinquent for recklessly endangering safety contrary to § 941.30(1), STATS., and carrying a concealed weapon contrary to § 941.23, STATS. These charges stemmed from an incident in which Demetrius pointed a handgun at Jermaine R. Demetrius now appeals, claiming that the trial court erred when it allowed into evidence prior juvenile

adjudications of Demetrius and two witnesses for impeachment purposes. He also argues that there was insufficient evidence to support the charge of reckless endangerment because the State failed to produce any evidence that the gun was loaded.

We conclude that the trial court's decision to allow impeachment of the defense witnesses was proper, and we hold that there was sufficient evidence presented whereby the jury could reasonably infer that the gun pointed at Jermaine was loaded. Consequently, we affirm the trial court's order.

Jermaine testified that on June 15, 1996, at approximately 9:00 p.m., he was talking with a girl, Nicole M., at the entrance to an alleyway.¹ Shortly after they parted, he was approached by a young man, who was later identified as Demetrius.² During the ensuing conversation, Demetrius asked him if he was from the area and also asked him "if [he] was trying to talk to the ... girl." At that point, Jermaine stated that Demetrius pulled out a handgun and pointed the barrel of the gun into the right side of Jermaine's abdomen. Jermaine testified that "[h]e had said that he was a folks [a gang affiliation] and that he was from—that he was in this gang I guess." Jermaine also testified that after Demetrius put the gun back in the waistband of his shorts, he "stepp[ed] backwards," facing Jermaine as he left.

A resident, Q.A. Shakoor, who was a neighborhood block captain, came outside after hearing what he believed to be gunshots. He saw several people, including Jermaine, outside a nearby church and approached them. He testified that Jermaine was

¹ Jermaine testified that he did not know Nicole, that he met her outside a church and walked with her a short distance while they were talking, and that he did not know her name when they parted company.

² Demetrius testified that after Nicole walked away, he approached Jermaine because "she go [sic] with David [a friend of Demetrius]" and he wanted to "[s]ee what he was talking to Nicole ... about."

“shook up, very shook up” and that “[h]e was stuttering and he was shaking.” Shakoor also testified that Jermaine told him that “a little fella ... put a gun up to him.”

A police officer who responded to a call to the scene located Demetrius approximately fifteen minutes later in the parking lot of a nearby store. Demetrius agreed to accompany the officer for identification purposes; Jermaine identified him as the individual who had threatened him with the handgun. When Demetrius was searched after being placed under arrest, no handgun was found. Demetrius admitted that he had talked to Jermaine, but denied either possessing a gun or pointing a gun at Jermaine, and denied having any gang affiliation.

A jury trial was held. Prior to the testimony of any defense witnesses, the trial court ruled that any prior delinquency adjudications would be admitted for impeachment purposes. Demetrius and two of his witnesses had to acknowledge prior delinquency adjudications as part of their testimony. In testimony, Demetrius acknowledged that he had talked to Jermaine, but denied ever pointing a gun at him or threatening him. Three other witnesses, friends of Demetrius, testified that they had seen Demetrius talking to Jermaine, but each stated that they did not see Demetrius point a gun at him.³ Demetrius now claims that the evidence of prior adjudications should not have been admitted and also claims that there was insufficient evidence to support the charge of reckless endangerment.

The decision to admit the prior adjudications for impeachment purposes turns on the construction of statutory language that is part of the applicability provisions

³ One of Demetrius' witnesses testified that Demetrius gave Jermaine directions to a church and that “[h]e wasn't threatening him or nothing.” The second witness testified that “[a]ll I seen him say was it was up to Nicole. That is it, and he just stood there with Nicole.” When Demetrius testified, he stated that he had asked Jermaine why he was talking to Nicole “because I was wondering was she cheating on my friend, David”

of the new Juvenile Justice Code. This presents a legal issue which this court reviews de novo. See *Brandt v. LIRC*, 160 Wis.2d 353, 361, 466 N.W.2d 673, 676 (Ct. App. 1991). Furthermore, where the language of a statute is clear, the reviewing court may not look beyond the statute to determine its meaning. See *Olson v. Township of Spooner*, 133 Wis.2d 371, 375, 395 N.W.2d 808, 810 (Ct. App. 1986).

The parties agree that as part of the revisions to the Children's Code, § 906.09, STATS., has been amended to allow delinquency adjudications to be used for impeachment purposes. See § 906.09(3); see also 1995 Wis. Act 77, § 625. However, the parties disagree as to whether the current section is applicable to this case or whether § 906.09, STATS., 1993-94, should be applied, which prohibited the use of juvenile adjudications for impeachment of a witness.

We begin with the relevant statutory provisions as to the applicability of the new Juvenile Justice Code as it pertains to § 906.09(3), STATS. Section 9300 of 1995 Wis. Act 77 provides in general terms:

Except as otherwise provided in SECTION 9310 of this act, this act first applies to violations committed on the effective date of this subsection.

Demetrius argues that since none of the exceptions outlined in 1995 Wis. Act 77, § 9310 are applicable to this question and because the incident with which he is charged occurred on June 15, 1996, before the effective date of the new Juvenile Justice Code, the impeachment evidence was inadmissible.

However, we must also consider a provision of 1995 Wis. Act 77, § 9400, which gives the effective date of the Act as July 1, 1996. The trial court reasoned that because the revision at issue was a revision to the evidence code and that the specific amendment was "for the purpose of attacking the credibility of a *witness*" (emphasis

added), the amendment to the evidence code was applicable on July 1. The trial court then determined:

It's not the charge that's affected. It's the evidence code that's affected. The evidence code is drafted to apply to a witness. A person is a witness when they come to court and are going to give testimony or in a position to give testimony about some event. That person subpoenaed is a witness here today, and I'm satisfied that the law became effective July 1st of 1996, and that adjudications of delinquency are in fact includable at this point in time.

We agree with the analysis of the trial court.

In addition, we agree with the State that the trial court's decision to admit the impeachment evidence is supported by 1995 Wis. Act 352, § 134v, which created 1995 Wis. Act 77, § 9310(1t). Section 9310(1t), entitled "Judgments and dispositions in adult court," provides:

The treatment of sections 906.08(2), 906.09(title), (1), (2), (3), (4) and (5) ... first applies to proceedings in a court ... held on the effective date of this subsection, *but does not preclude the use of a disposition entered by, or a record of evidence given in, [a ch. 48 court] ... for the purpose of ... impeaching a witness.* [Emphasis added.]

According to the plain language of this subsection, the issue of the admissibility of the prior adjudications for impeachment purposes was directly addressed by the legislature in the implementation directives of the Juvenile Justice Code. We read this provision as allowing the use of impeachment evidence in any court proceeding on or after the effective date of the Act.

Demetrius argues that this section does not apply to his case "by its very terms." He claims that because the section is entitled "Judgments and Dispositions in Adult Court" the above language is not applicable in this instance. We are not persuaded.

Consideration of a statutory title may be used only to resolve doubt as to the meaning of the statute. *See State v. Black*, 188 Wis.2d 639, 645, 526 N.W.2d 132,

134 (1994). When the language of a statute is plain and unambiguous, we must disregard the title of a statute. *See id.* Because the legislature clearly provided that the applicability of the evidentiary amendments was July 1, 1996, *see* 1995 Wis. Act 77, § 9400, we must ignore the title of this related subsection and construe it in such a way as to give full force to both sections. *See State v. Robertson*, 174 Wis.2d 36, 44, 496 N.W.2d 221, 224 (Ct. App. 1993). The basic rule that the intent of the legislature should control statutory interpretation is especially important when two provisions are claimed to be inconsistent; in such a situation, this court's aim is to reconcile the two provisions. *See Phillips v. Wisconsin Personnel Comm'n*, 167 Wis.2d 205, 217, 482 N.W.2d 121, 125 (Ct. App. 1992).

We conclude that by the plain language of the two provisions, it is apparent that the legislature intended to allow the changes in the evidentiary code to be applicable on July 1, 1996. The trial court was correct in its decision to allow the evidence of prior juvenile adjudications to be used to impeach witnesses in Demetrius' trial on July 15, 1996.

Demetrius also contends that there was insufficient evidence to support a conviction of recklessly endangering safety because there was no evidence that the gun was loaded. The evidence and any inferences which may reasonably be drawn from it must be viewed in the light most favorable to the verdict. *See State v. Poellinger*, 153 Wis.2d 493, 504, 451 N.W.2d 752, 756 (1990). This court may not substitute its judgment for that of the trier of fact unless the evidence is so lacking in probative value that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *See id.* at 507, 451 N.W.2d at 757-58. It is within the province of the jury to determine the credibility of the witnesses and the weight to be given to their testimony. *See York v. National Continental Ins. Co.*, 158 Wis.2d 486, 493, 463 N.W.2d 364, 367 (Ct. App. 1990).

“[W]hen the state proves that a gun or revolver was pointed at a person within shooting distance with a threat or other words indicating intention to fire, the person assailed not knowing but that it is loaded, the state has made *prima facie* proof that the gun or revolver is loaded” *Lipscomb v. State*, 130 Wis. 238, 242, 109 N.W. 986, 988 (1906). Such facts, if proven beyond a reasonable doubt, conclusively establish an assault and are proof that the assault was committed with a dangerous weapon. *See id.* at 242-43, 109 N.W. at 988. If the State proves that such pointing occurred, it “devolves upon [the defendant] to show that the weapon was not loaded in order to meet the presumption that the revolver was loaded.” *See id.* at 243, 109 N.W. at 988.

In the instant case, the State presented the victim’s testimony that Demetrius approached him alone, although Demetrius had friends nearby. Jermaine testified that Demetrius pulled a handgun out of the waistband of his shorts and pointed it at Jermaine’s abdomen. Although Jermaine was unable to remember exactly what Demetrius said as he held the gun to Jermaine’s stomach, he did recall Demetrius stating that he was “a folks,” which denoted gang membership. He also testified that after this incident Demetrius left, “stepping backwards” and continuing to face Jermaine. The jury also heard testimony from an individual who talked to Jermaine just after the incident occurred, who described Jermaine as “very shook up.”

The defense countered this with the testimony of three of Demetrius’ friends, who all testified that they never saw a gun. It is apparent that the jury concluded that Jermaine was the more credible witness in finding Demetrius guilty of reckless endangerment. The jury’s determination that Demetrius did pull out a gun and point it at Jermaine, coupled with the testimony that Demetrius claimed gang membership and that he backed away from Jermaine after holding the weapon to his abdomen, without any countervailing testimony that the gun was not loaded, made it reasonable for the jury to infer that Demetrius was guilty of reckless endangerment. “In viewing evidence which

could support contrary inferences, the trier of fact is free to choose among conflicting inferences of the evidence and may ... reject that inference which is consistent with the innocence of the accused.” *Poellinger*, 153 Wis.2d at 506, 451 N.W.2d at 757.

We therefore conclude that the trial court’s decision to allow the impeachment of defense witnesses through the use of prior juvenile adjudications was supported by a proper application of the statutory changes that are part of the new Juvenile Justice Code. We also hold that there was sufficient evidence to support the jury’s verdict.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

