COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP865-CR **Cir. Ct. No. 2002CF1376**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ODELL M. HARDISON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: JOHN SIEFERT and JEFFREY A. WAGNER, Judges. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 FINE, J. Odell M. Hardison appeals, *pro se*, from a judgment entered after a jury found him guilty of two counts of possessing a firearm as a felon; one count of delivering between fifteen and forty grams of cocaine, as a

second or subsequent offense; one count of delivering between five and fifteen grams of cocaine, as a second or subsequent offense; and one count of maintaining a drug trafficking place, as a second or subsequent offense. *See* WIS. STAT. §§ 941.29(2), 961.41(1)(cm)3, 961.48, 961.41(1)(cm)2, 961.42(1) (2001–02). Hardison also appeals from orders denying his motions for postconviction relief.[1] He claims that: (1) the evidence was insufficient to support his convictions; (2) the State withheld evidence; (3) his trial lawyer was ineffective; (4) the trial court sentenced him based on inaccurate information; and (5) his sentences exceed the maximum. We affirm.

¶2 Hardison was convicted of selling cocaine to a police informant on February 27, 2002, and March 4, 2002. Based on the drug buys, the police got a search warrant and, on March 6, 2002, searched a carwash that Hardison owned. During the search, they found a digital scale, cocaine, and a handgun. They also found a second handgun on Hardison after Hardison tried to run away.

A. *Sufficiency of the Evidence.*

¶3 When reviewing the sufficiency of the evidence, we will reverse a conviction only if "the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752, 755 (1990). The jury, not a reviewing court, determines the

[1] The Honorable John Siefert presided over the trial and entered the judgment of conviction. The Honorable Jeffrey A. Wagner issued the orders denying Hardison's motions for postconviction relief.

credibility of witnesses and weight of their testimony, ***Whitaker v. State***, 83 Wis. 2d 368, 377, 265 N.W.2d 575, 580 (1978), and resolves any conflicts in the evidence, ***State v. Daniels***, 117 Wis. 2d 9, 18, 343 N.W.2d 411, 416 (Ct. App. 1983). We address each conviction in turn.[2]

1. Felon-in-Possession Convictions.

¶4 Hardison was charged with being a felon in possession of a firearm for the handgun that was found on his person during the search of the carwash. A person is guilty of the crime of unlawfully possessing a firearm when he or she possesses the firearm and "has been … [c]onvicted of a felony in this state." WIS. STAT. §§ 941.29(1), (2). The elements are thus: (1) a prior felony conviction, and (2) possession of a firearm. ***State v. Gibson***, 2000 WI App 207, ¶8, 238 Wis. 2d 547, 551–552, 618 N.W.2d 248, 250. Both elements were satisfied here. First, the parties stipulated that Hardison had previously been convicted of a felony. Second, at Hardison's trial, Lieutenant Stephen Basting, who was present during the search of the carwash, testified that he searched Hardison and found a .380 semi-automatic handgun in one of Hardison's front pants pockets.

¶5 Hardison claims that this evidence was insufficient, however, because a police report indicated that the handgun was found in his waistband, not his pocket. We disagree. Any inconsistency between the police report and Basting's trial testimony is *de minimis*. Under either circumstance, there was enough evidence for a reasonable jury to find that Hardison possessed a handgun.

[2] Hardison's appeal does not challenge his conviction for maintaining a drug trafficking place. Accordingly, we do not address it. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (contentions not briefed are waived).

See ***State v. Black***, 2001 WI 31, ¶19, 242 Wis. 2d 126, 142, 624 N.W.2d 363, 371 ("[P]ossess … simply means that the defendant knowingly had actual physical control of a firearm.") (internal quotation marks and citation omitted).

¶6 Hardison was charged with a second count of being a felon in possession of a firearm for the handgun that was found inside the carwash. There was sufficient evidence that he possessed the firearm.

¶7 At the trial, Detective Herb Glidewell testified that while he and his partner were searching an office in Hardison's carwash, his partner opened a desk drawer and found a .45 caliber semi-automatic handgun. Documents in the drawer had Hardison's name and the address of the carwash on them.

¶8 Hardison contends that this evidence was insufficient because the police did not take fingerprints from the gun and there is no evidence showing to whom it was registered. Again, we disagree.

> 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.

WIS JI—CRIMINAL 920. A reasonable jury could infer from this evidence that Hardison possessed the firearm found in the drawer in his office.

2. Delivery-of-Cocaine Convictions.

¶9 A person is guilty of unlawfully delivering cocaine if he or she transfers or attempts to transfer cocaine to another person. *See* WIS. STAT. §§ 961.01(6) (defining "delivery"); 961.41(1)(cm) (assessing penalties for

unlawful delivery of cocaine) (2001–02). The evidence here was sufficient for both of Hardison's delivery-of-cocaine convictions.

a.

¶10 Glidewell testified that, on February 27, 2002, a police informant, Antonio Howard, bought cocaine from Hardison at a bar. According to Glidewell, Howard called Hardison on a cellular telephone while Glidewell recorded the call. Glidewell then searched Howard and his car for drugs, and gave Howard $400 in marked money. Glidewell testified that he followed Howard to a bar where Hardison had agreed to meet Howard, watched Howard go in, and, after Howard came out, followed him to a nearby area where Howard gave to Glidewell approximately fourteen grams of cocaine. Glidewell then showed a photograph of Hardison to Howard, and Howard told Glidewell that the man in the photograph sold the cocaine to him.

¶11 Howard also testified at Hardison's trial. Howard claimed that he called a man, whom he identified at trial as Hardison, on February 27, 2002, and arranged to meet Hardison at a bar. According to Howard, he then drove to the bar and bought cocaine from Hardison in the bar's bathroom. Howard testified that he gave the cocaine to Glidewell, and told Glidewell that he bought the cocaine from the man in the photograph that Glidewell showed to him. The jury could reasonably find Hardison guilty of delivering cocaine on February 27, 2002.

b.

¶12 Glidewell testified that, on March 4, 2002, Howard purchased cocaine from Hardison at Hardison's carwash. Before the drug buy, Glidewell searched Howard, gave him $900 in marked money, and followed him to the

carwash. Glidewell testified that, after Howard came out of the carwash, Howard gave to Glidewell approximately 28 grams of cocaine.

¶13 Howard testified that, on March 4, 2002, he again called Hardison and arranged to meet Hardison at the carwash. Howard claimed that he then drove to the carwash and bought cocaine from Hardison inside the garage. Howard testified that, after he bought the cocaine, he gave it to Glidewell.

¶14 Hardison claims that this evidence was insufficient to convict him on the drug charges because: (1) Glidewell did not see Howard buy the cocaine; (2) no one was arrested to recover the marked money; (3) tape recordings of telephone calls that Howard made to Hardison do not specifically mention drugs; (4) the cocaine from the February 27, 2002, buy was not produced at trial; and (5) the marked money from the March 4, 2002, buy was found on another person. Again, we disagree. The jury was free to accept Glidewell's and Howard's testimony and find Hardison guilty beyond a reasonable doubt.

B. *Discovery.*

¶15 At Hardison's trial, the State played cassette tapes of telephone calls from Howard to Hardison. Hardison claims that his due-process rights were violated because the State allegedly withheld the tapes. "There are three components of a [due-process] violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." ***Strickler v. Greene***, 527 U.S. 263, 281–282 (1999).

¶16 WISCONSIN STAT. § 971.23(1)(a) provides:

> **(1)** WHAT A DISTRICT ATTORNEY MUST DISCLOSE TO A DEFENDANT. Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the state:
>
> (a) Any written or recorded statement concerning the alleged crime made by the defendant, including the testimony of the defendant in a secret proceeding under s. 968.26 or before a grand jury, and the names of witnesses to the defendant's written statements.

The State complied with § 971.23(1)(a). At Hardison's trial, the prosecutor told the trial court that the tapes were listed on police inventories, and that during discovery, the State had provided Hardison's lawyer with a transcript of the tapes. Hardison's lawyer confirmed that he had received the transcript, and that he had not asked for copies of the tapes or to listen to them. There was no discovery violation, and Hardison was not deprived of due process. First, the State did not "suppress" what was on the tapes. Second, Hardison has not pointed to anything on the tapes that is inconsistent with the transcript, so that, in ***Strickler***'s phrasing, he was "prejudiced" by having the transcripts at trial and not the actual tapes.

C. *Ineffective Assistance.*

¶17 Hardison claims that his trial lawyer was ineffective because the lawyer:

> fail[ed] to object to any issues in trial the state could or could not produce fact: Hearsay. Count 3, missing drugs, and the two cassettes (entering evidence after trial). [The trial lawyer] failed to use the police report in his defense of any inconsistent testimony's, by Det[ective] Glidewell and Antonio Howard, when in fact Mr. Howard didn't have a confidential informant number stating credibility. When

> inconsistent testimony through out [*sic*] the trial of location and procedure.

(Transcript references omitted.) These allegations are conclusory and undeveloped. Hardison does not allege with specificity what "issues" his trial lawyer should have "object[ed]" to, or how his trial lawyer's alleged failure to object would have affected the outcome of his trial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (defendant claiming ineffective assistance must prove deficient performance and that he or she suffered prejudice as a result). Accordingly, we decline to address Hardison's ineffective-assistance claim. *See* ***Barakat v. Department of Health & Soc. Servs.***, 191 Wis. 2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (we will not review arguments that are "amorphous and insufficiently developed"); ***Waushara County v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16, 20 (1992) (*pro se* litigants "bound by the same rules that apply to attorneys on appeal").

D. *Sentencing.*

¶18 Hardison claims that the trial court sentenced him "based on false allegations from [the presentence investigation report] of stealing, obstructing the police and firemen during a fire when on parole. [R]ecords will show false allegations. The discussion of my prior case, the state labeled Hardison a killer." (Transcript references omitted). A sentence that is based on untrue information is a due-process violation. *See* ***State v. Perez***, 170 Wis. 2d 130, 138, 487 N.W.2d 630, 633 (Ct. App. 1992) (defendant has due-process right to be sentenced on the basis of true and correct information). To establish a due-process violation, the defendant has the burden of proving by clear and convincing evidence that the information used in sentencing was inaccurate and that the trial court actually relied on the inaccurate information in sentencing. ***State v. Groth***, 2002 WI App

299, ¶22, 258 Wis. 2d 889, 906, 655 N.W.2d 163, 171. Beyond mere assertion, Hardison has not made either showing. Further, the trial court considered all of the appropriate factors, and other than his unsupported claim that the trial court relied on inaccurate information, Hardison does not contend otherwise.

¶19 Hardison also contends that the sentences imposed for delivering between fifteen and forty grams of cocaine and delivering between five and fifteen grams of cocaine exceed the maximum permitted by law. Hardison is incorrect.

¶20 The crime of delivery of between fifteen and forty grams of cocaine had a maximum possible penalty of thirty years in prison when Hardison committed it. *See* WIS. STAT. § 961.41(1)(cm)3 (2001–02). The trial court sentenced Hardison to sixteen years in prison, with eight years of initial confinement and eight years of extended supervision. The crime of delivery of between five and fifteen grams of cocaine had a maximum possible penalty of twenty-two years and six months in prison when Hardison committed it. *See* § 961.41(1)(cm)2 (2001–02). The trial court sentenced Hardison to ten years in prison, with five years of initial confinement and five years of extended supervision. Hardison's sentences were well within the maximum.

By the Court.—Judgment and orders affirmed.

Publication in the official reports is not recommended.