COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP523-CR **Cir. Ct. No. 2003CF209**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES E. ASBURY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed.*

Before Brown and Nettesheim, JJ., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. James E. Asbury appeals from a judgment convicting him after a jury trial of receiving stolen property, being party to the crime of issuing a worthless check, and two counts of felony bail jumping, and

from an order denying his postconviction motion. On appeal, Asbury argues that he should have a new trial because the circuit court did not conduct a colloquy with him to waive his right to testify and there was insufficient evidence to convict him. We conclude that the record of the postconviction motion hearing establishes that Asbury knowingly, voluntarily and intelligently waived his right to testify, and the evidence was sufficient to convict him. We affirm.

¶2 At the outset of trial, Asbury and his counsel suggested that he might testify. During trial, the court inquired as to whether Asbury would testify, and Asbury's counsel responded that Asbury was not certain whether he would testify. The defense rested without Asbury's testimony.

¶3 Postconviction, Asbury sought a new trial because the court did not conduct a colloquy with Asbury to waive his right to testify. The circuit court held an evidentiary hearing to address whether, notwithstanding its failure to conduct the colloquy required in ***State v. Weed***, 2003 WI 85, 263 Wis. 2d 434, 666 N.W.2d 485, Asbury nevertheless knowingly, voluntarily and intelligently waived his right to testify.

¶4 At the evidentiary hearing, Asbury's trial counsel testified that he and Asbury discussed the right to testify. Earlier in the trial, counsel believed that Asbury intended to testify. Counsel did not "think there is any question that he knew he could testify." However, at the close of the State's case, Asbury decided not to testify. Counsel was not aware of any threats or other influences on Asbury relating to his right to testify. Counsel advised Asbury that if he testified, his prior convictions could be used to impeach him. Asbury was of at least average intelligence and able to understand the proceedings.

¶5 Asbury testified that counsel never informed him that he had a right to testify, and throughout trial, he intended to testify. However, when his counsel stated at the close of evidence that he would not testify, Asbury did not respond or attempt to assert his right to testify. Asbury did not recall talking to his counsel about whether he would testify. Asbury admitted his prior contacts with the criminal justice system, and that during a previous case, he conferred with his counsel about testifying and he did testify in that case. Asbury conceded that he signed a plea questionnaire in another criminal proceeding which stated that "I give up my right to testify and present evidence at trial."

¶6 The court made the following findings of fact. Trial counsel was credible and forthright; Asbury's testimony was self-serving. Counsel conferred with Asbury about his right to testify and prepared him for direct examination. Even though counsel expected Asbury to testify, Asbury decided not to do so. Asbury's claim that he was ignored and did not participate in the decision not to testify was implausible and not worthy of belief. Asbury testified in a prior criminal case, and he had a better than average knowledge of court procedures and criminal law. The court found it "beyond comprehension that Mr. Asbury would have been, basically, mute if his attorney had not called him to testify when that was the plan all along." The court deemed credible counsel's testimony that Asbury was not going to testify because it was not going to help his case. The court concluded that Asbury deliberately chose not to testify and had more than ample opportunity to raise the issue of testifying with his counsel at the time the evidence closed.

¶7 On appeal, Asbury argues that under ***Weed***, he is entitled to a new trial because the circuit court failed to conduct an on-the-record colloquy to confirm his waiver of his right to testify. A defendant's right to testify is a

fundamental constitutional right. ***Id.***, ¶40. Therefore, the circuit court must engage in a colloquy with the defendant to ensure that he or she is knowingly and voluntarily waiving the right to testify. ***Id.*** The court in ***Weed*** failed to conduct a colloquy, and thereafter held a postconviction motion hearing to address whether Weed had waived her right to testify. ***Id.***, ¶44. Based on the record and the evidence presented at the postconviction motion hearing, the circuit court and the supreme court concluded that Weed knowingly, intelligently and voluntarily waived her right to testify. ***Id.*** While the supreme court specifically declined to decide "whether a postconviction hearing would always be sufficient to ensure that a criminal defendant has waived his or her right to testify," the court determined that Weed received an adequate remedy from the postconviction motion hearing. ***Id.***, ¶47.

¶8 Whether Asbury knowingly and voluntarily waived his constitutional right to testify presents a question of constitutional fact. ***Id.***, ¶13. A question of constitutional fact is "one whose determination is decisive of constitutional rights." ***Id.*** (citation omitted). We address questions of constitutional fact using a two-step process. ***Id.*** First, we review the circuit court's findings of historical fact using a deferential standard of review, and we will uphold that court's findings unless they are clearly erroneous. ***Id.*** Second, we review the circuit court's determination of constitutional fact de novo. ***Id.***

¶9 We do not agree that ***Weed*** compels a new trial in this case.[1] As in ***Weed***, the circuit court in this case did not conduct a colloquy; the court held a

[1] Because the postconviction record compellingly demonstrates that Asbury knowingly, voluntarily and intelligently waived his right to testify, we do not address the State's argument that the failure to conduct a colloquy was harmless error.

postconviction evidentiary hearing on the waiver question. The court's postconviction findings are not clearly erroneous. The court found credible trial counsel's testimony that he discussed the right to testify with Asbury,[2] Asbury knew of this right from counsel and from his prior criminal proceedings, and Asbury decided not to testify because it would not have aided his case. Credibility determinations are solely for the circuit court because it can observe the witnesses as they testify. ***State v. Hughes***, 2000 WI 24, ¶2 n.1, 233 Wis. 2d 280, 607 N.W.2d 621.

¶10 The colloquy is intended to determine that the defendant is aware of the right to testify and that defendant has discussed this right with counsel. ***Weed***, 263 Wis. 2d 434, ¶43. In light of the circuit court's postconviction findings and the references at trial to Asbury's plan to testify, we uphold the circuit court's determination that Asbury knowingly, voluntarily and intelligently waived his fundamental constitutional right to testify.

¶11 Asbury next argues that the evidence was insufficient to convict him of receiving stolen property and being party to the crime of issuing a worthless check.[3]

¶12 The following principles apply to a challenge to the sufficiency of the evidence.

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[2] We do not agree with Asbury that the circuit court made impermissible inferences about his understanding of the right to testify. Trial counsel and Asbury both testified on this question, and the circuit court found counsel's testimony more credible.

[3] Asbury also challenges the bail jumping convictions on the grounds that there was not sufficient evidence that he received stolen property and was party to issuing worthless checks. We hold that there was sufficient evidence of the predicate offenses, and we therefore affirm the related felony bail jumping convictions.

> The standard of review in determining whether the evidence was sufficient to support a conviction is that "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."
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> Our review of a sufficiency of the evidence claim is therefore very narrow. We give great deference to the determination of the trier of fact. We must examine the record to find facts that support upholding the jury's decision to convict.

State v. Hayes, 2004 WI 80, ¶¶56-57, 273 Wis. 2d 1, 681 N.W.2d 203 (citations omitted). Additionally, "If more than one inference can be drawn from the evidence, the inference which supports the jury's finding must be followed unless the testimony was incredible as a matter of law." ***State v. Wilson***, 149 Wis. 2d 878, 894, 4004 N.W.2d 534 (1989). We defer to the jury's weighing and sifting of conflicting testimony, recognizing the jury's ability to assess "those nonverbal attributes of the witnesses which are often persuasive indicia of guilt or innocence." ***Id.*** (citation omitted).

¶13 Jay Van Acker testified that Asbury and Asbury's wife, Dottie, recruited him to participate in a worthless check scheme in exchange for money and a vehicle. Van Acker testified that Asbury drove him and Dottie to a bank where Van Acker and Dottie opened a checking account in Van Acker's name at the Asburys' address. The Asburys provided Acker with the funds to open the checking account. Van Acker then wrote a check on the account to reimburse the Asburys for the funds they provided to open the account, leaving the account with a zero balance.

¶14 Once the checks arrived with Van Acker's name printed on them, Van Acker and the Asburys used those checks to purchase items from numerous

stores on numerous occasions over three days. They returned to certain stores to pass more worthless checks after an employee shift change. Asbury usually waited in the vehicle while Van Acker and Dottie used the checks to purchase merchandise from a list provided by Asbury. The Asburys kept all of the merchandise, except for a few packages of cigarettes retained by Van Acker. Van Acker testified that Asbury decided to pass the checks over a weekend so that the bank would not learn of the worthless checks until the following week. The Asburys gave Van Acker a used car for his role in the worthless check scheme.

¶15 The police traced the worthless checks to Van Acker and questioned him. Van Acker implicated the Asburys. A search of the Asburys' residences yielded numerous items described by Van Acker as having been purchased with the worthless checks. Thereafter, Asbury admitted to the police that the property was obtained through worthless checks, although he claimed that he did not force Van Acker to write the checks.

¶16 A police department investigator testified that Van Acker described the worthless check scheme to him. The investigator participated in the search of the Asburys' residences and located items purchased with the worthless checks. Asbury admitted to the investigator that the property found during the search was obtained via the worthless checks.

¶17 Based on this evidence, the jury convicted Asbury of receiving stolen property and being party to the crime of issuing worthless checks.

¶18 On appeal, Asbury argues that because he never actually signed or issued any of the worthless checks, and only drove Van Acker to the bank and to the merchants, and received some of the merchandise, he could not be a party to the crime of issuing a worthless check.

¶19 Asbury's claim lacks merit. A defendant aids and abets a crime under WIS. STAT. § 939.05 (2001-02)[4] when the defendant, with knowledge that a person is committing or about to commit a crime either: (1) assists the person who commits the crime or (2) is ready and willing to assist and the person who commits the crime knows of the willingness to assist. ***State v. Rundle***, 176 Wis. 2d 985, 1000 n.18, 500 N.W.2d 916 (1993). A person receives stolen property under WIS. STAT. § 943.34(1)(c) if the person intentionally receives stolen property, the property was stolen and when the property was received, the defendant knew or believed that the property was stolen. A person is guilty of issuing a worthless check when the person issues checks within a fifteen-day period that total $2500 or more, and intends that they not be paid.[5] WIS. STAT. § 943.24(2).

¶20 The evidence at trial, which the jury was entitled to deem credible, satisfies all of the foregoing elements. Acker related how Asbury recruited him to participate in a worthless check scheme, the details of which Asbury controlled and the proceeds of which Asbury received. There was sufficient evidence to convict Asbury of receiving stolen property and being party to the crime of issuing worthless checks.

¶21 We also reject any suggestion that the property Van Acker obtained via the worthless checks could not be deemed stolen until the bank failed to honor the worthless checks used to pay for it. The jury was instructed that stolen

[4] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[5] Asbury does not dispute that the fifteen-day period and $2500 or more elements are satisfied on this record.

property is property which was intentionally taken from the owner without consent and with intent to deprive the owner of possession. "Without consent" includes a circumstance where the victim consents by reason of ignorance. ***State v. Inglin***, 224 Wis. 2d 764, 775, 592 N.W.2d 666 (Ct. App. 1999). Here, the merchants were unaware that Van Acker was presenting them with worthless checks in exchange for merchandise to be turned over to Asbury.

By the Court.—Judgment and order affirmed.

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