COURT OF APPEALS
DECISION
DATED AND FILED

April 16, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2236-CR **Cir. Ct. No. 00 CF 2532**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JULIUS L. ARBERRY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Julius L. Arberry[1] appeals from a judgment entered after a jury found him guilty of possession of a firearm by a felon (second or

[1] In reviewing this matter, we note that Arberry's middle initial is reflected as both "L" and "C". We elect to use "L" because that is the middle initial used on the judgment of conviction.

subsequent offense), and carrying a concealed weapon, contrary to WIS. STAT. §§ 941.29(2m) and 941.23 (1999-2000).[2] He also appeals from an order denying his postconviction motion. Arberry claims: (1) the evidence was insufficient to sustain the conviction of possession of a firearm; (2) the State should not have been allowed to identify the nature of his prior conviction for the jury; (3) the trial court erroneously exercised its discretion when it excluded two photographs; and (4) he is entitled to a new trial in the interests of justice. Because we resolve each issue in favor of upholding the judgment and order, we affirm.

I. BACKGROUND

¶2 On May 20, 2000, at approximately 8:40 a.m., City of Milwaukee Police Officer Mitchell Ward observed an automobile driven by Arberry pass through the intersection Ward was monitoring. Ward heard the loud sound of music emanating from Arberry's vehicle. Ward activated his squad lights and proceeded to conduct a traffic stop. Arberry pulled into the parking lane, slowed the vehicle to five miles per hour, but did not stop. During this time, Ward noticed Arberry reach behind his back, then lean forward to the right, and appear to stuff something under the dashboard of the vehicle.

¶3 Arberry stopped his vehicle, and exited it when Ward approached. Arberry stated he was sorry, that he was "just smoking a joint," and that he "just stuffed it in the seat." When Ward determined that Arberry was driving without a

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted. Our review of this matter revealed that the judgment inaccurately states that the conviction for possession of a firearm was under WIS. STAT. § 941.29(2). The trial court should amend the judgment to reflect the accurate statutory reference of WIS. STAT. § 941.29(2m). *See* ***State v. Prihoda***, 2000 WI 123, ¶5, 239 Wis. 2d 244, 618 N.W.2d 857.

license, Ward took him into custody. A search of the vehicle revealed a loaded .25 caliber semi-automatic pistol on the hump of the car, underneath the dashboard. No marijuana was recovered from the vehicle.

¶4 As a result, Arberry was charged and the case was tried to a jury. The jury convicted Arberry, and the trial court denied his postconviction motion. Arberry now appeals.

II. DISCUSSION

A. Insufficient Evidence.

¶5 Arberry contends there was insufficient evidence to support the possession of a weapon element of the crime charged. He argues that he was merely driving his sister's automobile and had no knowledge of the gun under the dashboard. Arberry points to the testimony by his sister, Debracca Arberry, and her friend, Latarsha Bush. Both testified that the gun belonged to Bush, and that Bush had accidentally left the gun in the car the night before. Arberry also contends that based on the foregoing, the State failed to prove that he actually or constructively possessed the gun. We cannot agree.

> [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 (1990) (citations omitted). Where there are inconsistencies within a witness' or witnesses' testimony, it is the trier of fact's duty to determine the weight and credibility of the testimony. ***Thomas v. State***, 92 Wis. 2d 372, 382, 284 N.W.2d 917 (1979). We will substitute our judgment for that of the trier of fact only when the fact finder relied on evidence that was "inherently or patently incredible"—that kind of evidence which conflicts with nature or with fully established or conceded facts. ***State v. Tarantino***, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990).

¶6 Here the jury heard two conflicting accounts. The first was that of Officer Ward, who testified about Arberry's furtive movements before stopping the car. Ward testified that Arberry reached behind his back with his right hand, as if he was removing something from his waistband and then leaned forward, as if he was stashing the object under the dashboard. Officer Ward testified that he discovered the gun on the hump under the dashboard, that it was simply resting there loosely, and it would have slid down either to the passenger or driver side if the car was moving.

¶7 The second account was from Arberry's sister and her friend, who claimed that the gun belonged to Bush and was accidentally left in the car the night before. The jury was free to assess the credibility of the witnesses as to these conflicting accounts. Officer Ward's account was certainly sufficient to support the jury's finding that Arberry was in possession of the gun. The jury chose to find Officer Ward's version more believable. Officer Ward's account was not "patently incredible" and, therefore, we cannot substitute our judgment for that of the jury. There was sufficient evidence for a reasonable jury to conclude that Arberry possessed the gun found, and that when he saw the officer, he pulled the gun out of his waistband and placed it on the hump under the dashboard.

B. Prior Conviction Identified for the Jury.

¶8 Arberry claims the trial court erred in allowing the jury to hear that he had previously been convicted of the crime of felon in possession of a firearm. He argues that because he was willing to stipulate to the fact, the jury should not have been told about the exact nature of the previous conviction. We cannot agree.

¶9 Arberry was charged with violating WIS. STAT. § 941.29(2m), which states, "Whoever violates this section after being convicted under this section is guilty of a Class D felony." We have held that this subsection has three elements: (1) the defendant has been convicted of a prior felony; (2) the defendant was in possession of a firearm; and (3) the defendant has a prior conviction for felon in possession of a firearm. ***State v. Gibson***, 2000 WI App 207, ¶8, 238 Wis. 2d 547, 618 N.W.2d 248. Arberry contends that because he was willing to stipulate to the first and third elements, the jury did not need to be told about either element and could simply decide whether he was in possession of a firearm.

¶10 Arberry wanted the trial court to instruct the jury as if Arberry had been charged with violating WIS. STAT. § 941.29(2), which provides: "A person … is guilty of a Class E felony if he or she possesses a firearm … (a) … subsequent to the conviction for the felony or other crime …." Citing ***State v. McAllister***, 153 Wis. 2d 523, 451 N.W.2d 764 (Ct. App. 1989), Arberry contends that the jury should not have been told about the nature of the prior felony conviction. In ***McAllister***, we held that when a defendant is willing to stipulate that he or she has a prior felony conviction, the nature of the felony is not relevant unless the evidence is being admitted under WIS. STAT. § 904.04(2) to show a defendant's motive, opportunity, intent, etc. ***Id.*** at 529. Thus, the nature of the

felony must be excluded when the defendant stipulates to the felony-conviction element. ***Id.***[3]

¶11 Arberry's situation, however, is distinguishable from ***McAllister***. The crime in ***McAllister*** involved felon in possession of a firearm under WIS. STAT. § 941.29(2)(a), not § 941.29(*2m)* (emphasis added). This is a significant difference. When a defendant stipulates to the felony-conviction element in a § 941.29(2)(a) case, the jury is advised that the defendant has stipulated to that fact, and there is no reason to advise the jury as to the nature of the previous felony. In Arberry's case, the crime charged was felon in possession of a firearm as a second or subsequent offense under § 941.29(2m). The legislature made prior conviction of possessing a firearm while being a felon an element of the crime under that statute. ***Gibson***, 2000 WI App 207 at ¶10. Thus, the jury needed to be instructed regarding the three elements of the crime with which Arberry was charged. In the ***McAllister*** situation, the jury can be informed that the defendant stipulated to the first element without identifying the nature of the charge. In Arberry's situation, that was not practicable. In order to convict Arberry of the crime with which he was charged, the jury had to either be told that Arberry stipulated to some or all of the elements and then decide whether the State had satisfied its burden on any unstipulated to elements. Because the legislature made a prior conviction of felon in possession of a firearm the third element of the crime

[3] Arberry also cites ***Old Chief v. United States***, 519 U.S. 172 (1997), for the same reasons he cites ***State v. McAllister***, 153 Wis. 2d 523, 451 N.W.2d 764 (Ct. App. 1989). Like ***McAllister***, ***Old Chief*** does not control here. In ***Old Chief***, the United States Supreme Court held that when a defendant who is charged with felon in possession of a firearm is willing to stipulate to the prior felony, the state must accept that stipulation and not offer evidence as to the nature of the prior felony. ***Id.*** at 174. ***Old Chief*** did not address the situation presented by Arberry's case where a defendant does not want the jury to be informed that he has stipulated to an element of the crime because that element informs the jury of the nature of a previous charge.

under § 941.29(2m), the jury must either be told that the defendant stipulated to that fact or decide on its own from the evidence whether the State proved that fact.

¶12 Arberry's proposed solution was for the trial court to pretend that this was actually a WIS. STAT. § 941.29(2)(a) case, and to instruct the jury as if Arberry had been charged with that statute. Arberry, however, failed to provide any authority to suggest that the trial court had the legal authority to do so. The trial court held that the law requires it to instruct the jury on each element of the offense charged and, because previous conviction of felon in possession of a firearm is an element of WIS. STAT. § 941.29(2m), the jury had to be advised of such fact, whether Arberry stipulated to it or not.[4] Insulating the jury from hearing proof on the third element would have precluded the jury from convicting under the crime charged. The trial court did not err.

C. Exclusion of Photographs.

¶13 Next, Arberry argues that the trial court erroneously exercised its discretion when it failed to allow him to introduce two photographs into evidence in this case. We cannot agree.

¶14 An appellate court reviews a trial court's evidentiary rulings according to the erroneous exercise of discretion standard. *See* ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983); ***State v. Alsteen***, 108 Wis. 2d 723, 727, 324 N.W.2d 426 (1982). If a trial court applies the proper law to the established facts, we

[4] The trial court noted that any risk of unfair prejudice from the jury hearing about the prior conviction could be addressed with a cautionary instruction, and invited defense counsel to prepare such instruction.

will not find a misuse of discretion if there is any reasonable basis for the trial court's ruling. ***Id.***

¶15 After Officer Ward testified about the tinting in the windows of the vehicle Arberry was driving, Arberry attempted to introduce two photographs taken one month before trial that depicted the tinting on the windows. Here, the trial court excluded the proffered photographs on two grounds. First, it held that there was insufficient foundation to admit the photos. Second, the trial court held that the photos should be excluded as a sanction for Arberry's failure to turn them over to the State pursuant to a discovery request. Although we disagree with the trial court's ruling on foundation, we cannot conclude that it erroneously exercised its discretion.

¶16 It is undisputed that the photos constituted physical evidence under WIS. STAT. § 971.23(2m)(c), and were subject to the State's discovery demand if the defendant intended to offer them as evidence at trial. Arberry told the court that he did not turn the photos over to the State because he did not intend to use them at trial until he heard the testimony of Officer Ward.

¶17 The trial court barred the photographs as a sanction for discovery violation. Imposition of a sanction for discovery violation is in the discretion of the trial court. ***State v. Wild***, 146 Wis. 2d 18, 28, 429 N.W.2d 105 (Ct. App. 1988). Sanctions are governed by WIS. STAT. § 971.23(7m)(a) which provides: "The court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, unless good cause is shown for failure to comply."

¶18 The good cause here was allegedly that Arberry did not intend to use the photographs as evidence at trial. The trial court was not persuaded by the argument for justifiable reasons. First, this case hinged upon Officer Ward's testimony about Arberry's furtive movements before he stopped the vehicle.

Whether or not Ward could see well enough through the tinted windows of the car to observe Arberry reach behind him and then place an object under the dashboard was a critical issue. Second, the photos were taken one month before trial, long before Ward testified at trial. Hence, Arberry's explanation that he did not turn the photos over because he did not intend to use them before he heard Ward's testimony is ingenuous at best.

¶19 Under these circumstances, we cannot conclude that the trial court's decision to exclude the photos as a sanction for discovery violation constituted an erroneous exercise of discretion. It was reasonable for the trial court to rule that Arberry withheld the photos for strategic reasons, and not because he never intended to use them at trial.

D. Interests of Justice.

¶20 Finally, Arberry requests that we reverse the convictions and remand the matter for a new trial in the interests of justice pursuant to WIS. STAT. § 752.35. We decline his request. Arberry's argument on this issue presents nothing new. Instead, he argues that the collective mistakes resulted in a miscarriage of justice. We have rejected all of Arberry's other claims. Thus, there is no "collective" error and no miscarriage of justice. Accordingly, we see no reason to reverse the convictions here and no reason to order a new trial.

By the Court.—Judgment and order affirmed.

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