COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0649-CR **Cir. Ct. No. 99-CF-1414**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ARMINIUS D. JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: MORIA G. KRUEGER, Judge. *Affirmed.*

Before Deininger, P.J., Vergeront and Lundsten, JJ.

¶1 LUNDSTEN, J. Arminius Jones was tried before a jury and convicted of first-degree recklessly endangering safety, party to a crime, endangering safety by reckless use of a firearm, party to a crime, and felon in possession of a firearm, all as a habitual criminal. He appeals the judgment of conviction entered by the circuit court only with respect to the felon in possession

of a firearm conviction. He also appeals an order denying his motion for a new trial. Jones challenges the sufficiency of the evidence, asserts the circuit court misused its discretion in instructing the jury on possession, and contends the possession instruction deprived him of a unanimous verdict. We reject each argument and affirm.

Background

¶2 On July 2, 1999, shots were fired from outside into an apartment in Madison. The defendant, Jones, was seen outside the apartment and later telephoned the apartment and spoke with an occupant named Charles Dickerson. Jones was unhappy with Dickerson because of a dispute concerning a concert. The police were called, and a short time later an officer stopped Jones's car about six blocks from Dickerson's apartment. Jones was driving and his brother, Kenyotta Jones, was in the front passenger seat. A loaded .22 caliber gun was found under armrests separating the two front seats.

¶3 Jones was charged with first-degree recklessly endangering safety, party to a crime, endangering safety by reckless use of a firearm, party to a crime, and felon in possession of a firearm, all as a habitual criminal. A jury convicted Jones of each charged crime. This appeal followed.

Discussion

¶4 Jones only challenges his conviction of felon in possession of a firearm. He asserts that the evidence was insufficient to support his conviction, that the trial court misused its discretion when it instructed the jury on the elements of possession, and that the jury instruction on possession deprived him of a unanimous verdict because the possession instruction permitted the jury to find

him guilty without agreeing on how he possessed the gun: actually, constructively, or jointly. We address and reject each argument.

Sufficiency of the Evidence

¶5 When Jones was stopped by police, the handgun was found under armrests between the front driver and front passenger seat of Jones's car. Jones was driving, and his brother Kenyotta was in the front passenger seat. It is undisputed that there was no evidence that Jones owned the gun, and no one testified that they saw Jones physically possess the gun. Although it is also undisputed that Jones knew the gun was in the car, Jones contends the evidence was insufficient to support his conviction because, in the absence of evidence that he owned or physically possessed the gun, the State needed to prove that he intended to possess it. He claims the State failed to do so. Jones essentially argues that, because there was another person in the car when he was stopped by the police and this other person might have brought the gun into the car and possessed it, no reasonable jury could conclude beyond a reasonable doubt that Jones had brought the gun into the car or that he intended to possess it. Simply put, Jones argues it might not have been his gun and he might have had no intent to possess it. We disagree because we conclude the evidence supports the reasonable inference that Jones intended to possess the gun.

¶6 The State bears the burden of proving all elements of a crime beyond a reasonable doubt. ***State v. Sartin***, 200 Wis. 2d 47, 53, 546 N.W.2d 449 (1996). We may not reverse a conviction "unless 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 (1990). If any possibility exists that the jury could have drawn the appropriate inferences from the trial evidence to find guilt, we may not overturn the verdict. ***Id.*** at 507.

¶7 The facts, viewed most favorably to the conviction, are these. In the early morning hours of July 2, 1999, shots were fired from outdoors into the window of an apartment in Madison. One of the occupants woke another occupant named Charles Dickerson and told Dickerson that someone was shooting at the window. Dickerson looked outside and saw the defendant Jones in a parking lot. The parking lot faced the living room window that was penetrated by shots. Dickerson did not see anything in Jones's hands. About five to ten minutes later, Dickerson heard three or four gunshots. At Dickerson's suggestion, the police were called. These events occurred at about 3:30 or 4:00 a.m.

¶8 Dickerson testified that he had had a conflict with Jones. Jones wanted Dickerson to help Jones and others perform in a concert that was held two or three weeks before the shooting. When Dickerson told Jones that the promoter would not let Jones and the others perform in the concert, Jones's brother Kenyotta got upset. Dickerson testified that he and Arminius Jones "[had] words."

¶9 Police who responded to Dickerson's apartment observed six holes in the living room window that faced the parking lot. Inside the apartment, police found five spent bullets consistent with .22 caliber copper-coated bullets. As the police were leaving Dickerson's apartment between 5:00 and 5:30 a.m., Jones telephoned and police listened to the conversation. Dickerson asked Jones why he was shooting at the house, and Jones denied knowing what Dickerson was talking about.

¶10 Dickerson testified that, shortly after the police left, Jones called again. Dickerson told Jones that Jones did not have to shoot at the house and suggested they meet to "fight it out." Dickerson said that one of Jones's brothers suggested they meet at the Highlander Motel and fight. Dickerson thought the brother was Kenyotta Jones. Dickerson reported this call to the police and described Jones's car, including its distinctive bronze color.

¶11 Dickerson received a third call from Kenyotta Jones in which Kenyotta said, "we'll come finish the job." A shift commander told a patrol officer, who was at the Highlander Motel, that the victims had reported receiving another call and had been told the perpetrators were going to come back and finish the job. The patrol officer drove toward Dickerson's apartment and, on the way, spotted Jones's car. The officer followed Jones's car into a parking lot five to six blocks from Dickerson's apartment. Defendant Jones was driving and his brother Kenyotta was in the passenger seat. A loaded .22 caliber gun was found under two armrests separating the two front seats. It was "slightly" closer to the driver's side. Six unspent .22 caliber rounds were found in a container on the floor between the driver and passenger. During booking, Jones asked if police had taken "the gun" from his car.

¶12 Possession includes both actual and constructive possession. ***State v. Peete***, 185 Wis. 2d 4, 14-15, 517 N.W.2d 149 (1994). In this case, the evidence was sufficient to support a finding of constructive possession. The jury was instructed:

> An item is in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item. It is not required that the 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.

¶13 We conclude that the evidence was not "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." *See* ***Poellinger***, 153 Wis. 2d at 501. The jury could have reasonably inferred that (1) the gun found in Jones's car was used to fire into Dickerson's apartment when Jones was present outside Dickerson's apartment; (2) Jones had a motive to use a gun to frighten or harm Dickerson; (3) Jones owned the car in which the gun was found; (4) Jones was well aware of the location of the gun in his car; and (5) Jones had ready access to and intended to exercise control over the gun. The fact that the evidence shows that Jones's brother Kenyotta similarly possessed the weapon does not preclude a finding that Jones possessed the gun. *See* WIS JI—CRIMINAL 920, at 1 ("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.").

¶14 We agree with the State that the possession issue in this case is much the same as the possession issue in ***State v. Allbaugh***, 148 Wis. 2d 807, 436 N.W.2d 898 (Ct. App. 1989). In ***Allbaugh***, the issue was possession of drugs in a house. Allbaugh lived in a house with other people. When police executed a search warrant, they found marijuana in several common rooms and bedrooms in the house, but not in the bedroom apparently occupied by Allbaugh. ***Id.*** at 811-12. The marijuana was laying out drying in multiple rooms. For example, marijuana was drying in a pan on the dining room table. Allbaugh did not dispute that the evidence was sufficient to prove that he knew about and had access to the

marijuana, but he contended that his knowledge of and proximity to the marijuana were insufficient to support a finding of "possession." We disagreed, explaining:

> [C]ourts in other jurisdictions have indicated that among the "incriminating" facts which can "buttress" the inference of knowing possession from joint occupancy of premises in which the drugs are found are: (1) the defendant's "access to ... area[s] in which drugs are found," (2) whether the drugs are in "plain view," and (3) the presence of items used in the manufacture or packaging of drugs. In this case, Allbaugh had access to all areas of the house in which drugs were found. Indeed, even the "common" areas, such as the living and dining rooms, had loose, bagged and drying marijuana spread about in plain view; and a triple beam balance scale was found in a room containing nineteen pounds of drying marijuana.
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> In ***Ritacca v. Kenosha County Court***, 91 Wis. 2d 72, 82, 280 N.W.2d 751, 756 (1979), the Wisconsin Supreme Court recognized similar principles when it stated that
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> > [t]o be found guilty of possessing a controlled substance, physical possession is not necessary; it is enough if the defendant has constructive possession of the ... substance or is "'within such juxtaposition'" to the substance such that he [or she] might be said to possess it. [Citation omitted.]
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> The Wisconsin Criminal Jury Instructions Committee argues against use of the term "constructive possession" because, in the committee's view, the term implies something other than "actual" or "real" possession. The committee feels that the concept should be viewed not as "constructive possession," but rather as "a description of circumstances that are sufficient to support an inference that the person exercised control over, or intended to possess, the item in question." Wis J I – Criminal 920, Comment (1987). We agree, and so view "constructive possession" as that term is used in cases in this and other jurisdictions.
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> The pattern instruction, Wis J I – Criminal 920, expresses the concept in the following language: "An item is ... in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item." (Footnote omitted.) This is

> consistent with the supreme court's statement in ***Schmidt v. State***, 77 Wis. 2d 370, 379, 253 N.W.2d 204, 208 (1977), that "[p]ossession of an illicit drug may be imputed when the contraband is found in a place immediately accessible to the accused and subject to his [or her] exclusive or joint dominion and control, provided that the accused has knowledge of the presence of the drug."
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> In this case, Allbaugh had been staying at the house long enough to have an identifiable room, and, in fact, was apprehended by police when he returned to the house with a load of groceries. He had been there long enough to feel comfortable taking and driving a tractor for the purpose of doing "chores" in the area of the house. The marijuana plants drying on the dining room table, and the "loose" marijuana, bagged marijuana, marijuana seeds and cigarettes scattered around the living room would have been visible to him as he entered the house and proceeded to his "room." The child's room was on the same floor as Allbaugh's. It was unlocked and accessible, and the entire bed and floor were covered with marijuana, with more—totaling all in all some nineteen pounds—hanging in the open closet. Also in plain view on top of the dresser in the child's room, police found a balance scale and loose marijuana leaves. In a second-floor bedroom, also open and accessible to anyone in the house, nearly three more pounds of marijuana were spread on the bed to dry. The entire house smelled of drying plants. A book about marijuana botany was lying on the living room floor next to a pile of marijuana seeds, and another drug-related book, *Psychedelic Chemistry*, was found in the same dresser from which the police recovered Allbaugh's checkbook.
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> Given these facts, the jury could well infer that Allbaugh not only knew of the presence and nature of the plants and leaves that filled much of the house, but also that the substances were subject to the joint "dominion and control" of Allbaugh and his housemate ….

Id. at 813-15 (citations omitted).

¶15 The facts here parallel those in ***Allbaugh***. Allbaugh lived in the house where the marijuana was found; Jones owned and drove the car where the gun was found. Allbaugh was obviously aware of the marijuana; Jones admitted his awareness of the gun. Allbaugh had ready access to the marijuana; Jones had

ready access to the gun. Also, in both cases there was reason to believe the contact with the contraband item was ongoing. Finally, the fact that another had similar "possession" does not negate the sufficiency of the evidence to support a finding of possession.

Alleged Instructional Error

¶16 Jones contends that the trial court erred by giving the possession instruction, WIS JI—CRIMINAL 920, because the evidence was insufficient to support a finding of possession under this instruction. We have just explained that the evidence was sufficient to support a finding of possession and, accordingly, we reject this argument. ***State v. Loukota***, 180 Wis. 2d 191, 201-02, 508 N.W.2d 896 (Ct. App. 1993) (constructive possession instruction properly given when evidence indicated defendant did not physically control weapon).[1]

Jury Unanimity

¶17 Jones contends that the standard jury instruction used in his case, WIS JI—CRIMINAL 920, creates an impermissible risk of a lack of jury unanimity. Jones contends that the standard instruction on possession deprives the charged defendant of a unanimous verdict because the instruction permits a jury to find him guilty without agreeing on how he possessed the gun: actually, constructively, or jointly. Relying on ***State v. Lomagro***, 113 Wis. 2d 582, 335 N.W.2d 583 (1983), Jones contends these alternatives are impermissible because

[1] We agree with the State that Jones's instructional error challenge was waived because there was no objection on the grounds argued on appeal. However, we choose to ignore waiver and address the merits of Jones's argument.

they are conceptually distinct. We disagree and conclude that the alternative means charged in this case are conceptually similar.

¶18 The similarity here is comparable to the similarity discussed in ***State v. Koeppen***, 2000 WI App 121, 237 Wis. 2d 418, 614 N.W.2d 530. The allegedly conceptually dissimilar alternatives in ***Koeppen*** were two means of committing the crime of failing to comply with an officer while being taken into custody contrary to WIS. STAT. § 946.415(2). ***Koeppen***, 237 Wis. 2d 418, ¶24. Consistent with the statutory language, the information charged that Koeppen "'did refuse to comply with an officer's lawful attempt to take him into custody, and remains in a place and through *action* or *threat*, attempts to prevent officers from taking him into custody, and further remains armed with a dangerous weapon.'" ***Id.***, ¶11 (emphasis added). Koeppen asserted that his jury had the choice of finding that he acted or that he threatened to act, two conceptually different means of committing the crime. We rejected that argument, explaining:

> The right to a jury trial, as guaranteed by article I, sections 5 and 7 of the Wisconsin Constitution, includes the right to a unanimous jury verdict. *See* ***Holland v. State***, 91 Wis. 2d 134, 138, 280 N.W.2d 288 (1979). "Unanimity is required only with respect to the ultimate issue of the defendant's guilt or innocence of the crime charged, and unanimity is not required with respect to the alternative means or ways in which the crime can be committed." ***Id.*** at 143.
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> ….
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> … [W]e consider the nature of the proscribed conduct to determine whether the statute's alternative means of conduct are similar or conceptually different. When the same factual theory or concept supports either alternative conduct, the modes of commission are conceptually similar. *See* ***Baldwin***, 101 Wis. 2d at 450. We are guided in our analysis of this issue, as was the trial court, by the ***Cheers*** decision.

> The ***Cheers*** court resolved that armed robbery was a single offense committed by the alternate means of either using or threatening to use force. It dismissed the appellants' argument that the two actions were conceptually different, reasoning that both actions would compel owners to surrender their property. *See* ***Cheers***, 102 Wis. 2d at 400-01. It determined that jury unanimity was only required as to whether the force component was present in the evidence, not as to the specific form of force used. *See* ***id.*** at 402. "The jury should not be obliged to decide between two statutorily prohibited ways of committing the crime if the two ways are practically indistinguishable." ***Id.*** at 401 (citation omitted).
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> Similar to the result in ***Cheers***, we determine that "action" and "threat" in WIS. STAT. § 946.415 are conceptually similar because both terms express alternative ways of threatening an officer to prevent oneself from being taken into custody. Likewise, "retreating" and "remaining" are alternative means of physically manifesting the refusal; and "remaining armed," "becoming armed" and "threatening to use a dangerous weapon" are alternative means of committing the threat with a dangerous weapon. The same factual theories are used to prove each term of the components; they are thus conceptually similar. Because the legislature's intention in creating § 946.415 was to proscribe the several modes of conduct whereby suspects refuse to comply with an officer's attempt to take them into custody using a dangerous weapon, the jury was only required to unanimously agree that each component of the crime was committed. The court's instruction to the jury using the statute's disjunctive language neither deprived Koeppen of his right to a unanimous verdict as to each element of the crime nor relieved the State of its burden of proving every element of the crime beyond a reasonable doubt. An instruction requiring unanimity was not required.

Id., ¶¶15, 22-24.

¶19 Similar to the results in ***Koeppen*** and ***Cheers***, we determine that actual and constructive possession are conceptually similar because both terms express alternative ways of controlling a weapon. Accordingly, we reject Jones's unanimity challenge.

By the Court.—Judgment and order affirmed.

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