COURT OF APPEALS
DECISION
DATED AND FILED

March 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1442-CR **Cir. Ct. No. 2006CF672**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NAKIEA L. DAVIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: THOMAS CANE and VINCENT K. HOWARD, Judges.[1] *Reversed in part; affirmed in part, and cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

[1] Judge Thomas Cane presided over the judgment proceedings. Judge Vincent K. Howard presided over the postconviction proceedings.

¶1 PER CURIAM. Nakiea Davis appeals a judgment of conviction for misdemeanor endangering safety by negligent handling of a dangerous weapon and possession with intent to deliver between five and fifteen grams of cocaine, as party to a crime.[2] He also appeals an order partially denying his postconviction motion. Davis argues there was insufficient evidence to convict him of either charge. We conclude the State presented insufficient evidence to convict Davis of negligent handling of a dangerous weapon, but presented sufficient evidence to convict him of the cocaine possession charge. We therefore direct the circuit court to enter a judgment of acquittal on the negligent handling of a dangerous weapon charge.

BACKGROUND

¶2 Wausau police officer Jason Rasmussen testified he responded in August 2006 to a hospital emergency room, where he observed Davis with a gunshot wound to the upper calf of his left leg. Davis reported he was "rapping" with two friends, Little Field and B, in the area of Seventh and Franklin Streets, when he thought he heard a car backfire. Davis then fell to the ground as he realized he had been shot. Davis stated he did not know Little Field's or B's name. He told Rasmussen he was driven to the hospital by Joe. Rasmussen later learned Joe was Davis's cousin, Malcolm,[3] who was also present at the hospital. Davis claimed a female had called Malcolm, who was parked on Eighth Street.

[2] Davis was also convicted of possession of a firearm by a felon and two counts of felony bail jumping. Davis does not challenge the firearm possession conviction, and the circuit court has already granted a new trial on the bail jumping charges.

[3] Malcolm's last name is also Davis. We refer to him by his first name to avoid confusion.

Davis reported he did not know who shot him and there were no other people or cars in the area.

¶3 Rasmussen testified that he eventually told Davis he thought Davis had shot himself. Rasmussen further told Davis that Malcolm's car was being impounded, a search warrant would be obtained, and if the evidence showed Davis was being untruthful, Davis would be charged with obstructing an officer. Davis then admitted he shot himself. Davis indicated he had been with his friends, Little Field and B, at the location identified earlier when he saw what he thought was a BB gun lying on the ground. He stated he picked it up and, as he was getting in the car, it fell and went off without anyone pulling the trigger.

¶4 Police obtained a key to the car that transported Davis to the hospital from Kristy Matti, the mother of Davis's children. Police searched the vehicle, a Lincoln Town Car, license plate number 250 GHE. Officers discovered a pistol between the driver's seat and the center console. The weapon contained a loaded magazine and a spent casing in the chamber. A second magazine containing ammunition was found in a compartment beneath a hinged armrest in the passenger door. Beneath that magazine was a photograph of Davis and Matti. In a similar compartment on the driver's door, the officers found twelve individually wrapped baggies containing cocaine. Lying loose in the back seat was a license plate, number 438 JTT. Blood was located on the passenger seat and the armrest between the seats, and the interior of the windshield above the passenger seat contained blood spatter. No latent fingerprints suitable for comparison were found on the gun, magazine, or baggies. The jury was shown photos of the blood in the car. Davis did not testify.

¶5 The pistol discovered in the car, a 9mm semiautomatic World War II German P38, was examined at the state crime lab by William Newhouse. Newhouse testified that the weapon properly expelled spent casings when he fired it in the laboratory. Newhouse opined the most likely explanation for the presence of the empty casing found in the chamber was that the pistol's operator interfered with the slide mechanism, preventing it from properly moving back and ejecting the casing. However, he believed the discovery of the spent casing in the magazine could also be related to the manner in which the pistol was fired. Newhouse explained that a firm grip by the operator resists a semiautomatic pistol's recoil force, which then permits the action to eject the casing as designed. However, if a semiautomatic pistol is held loosely, or goes off when dropped, the recoil is not resisted and the cartridge casing could remain in the gun.

¶6 Kronenwetter police chief Daniel Joling testified he photographed a duplex located at 2322 and 2324 Bonney Dune Drive in Kronenwetter in March 2005. He had personal knowledge that Davis and Matti lived at the 2322 address. The photographs showed a Lincoln Town Car, license number 250 GHE, parked in front of 2322. In May 2006, Joling observed Davis driving a Cadillac with license plate number 438 JTT. In May or June 2006, Joling photographed a GMC Suburban bearing license plate 250 GHE parked next to the 2322 Bonney Dune Drive residence. That same day he photographed the Lincoln Town Car with the same license plate number, 250 GHE, parked nearby.[4]

[4] Joling further explained the two vehicles only bore rear license plates, with one containing annual registration stickers and the other not.

DISCUSSION

¶7 Davis argues there was insufficient evidence to convict him of either endangering safety by negligent handling of a dangerous weapon or possession with intent to deliver cocaine. We may not substitute our judgment for that of the jury unless the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value and force that no jury, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If any possibility exists that the jury could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, we may not overturn a verdict even if we believe that the jury should not have found guilt based on the evidence before it. ***Id.***

Endangering safety by negligent handling of a dangerous weapon

¶8 To convict Davis of endangering safety by negligent handling of a dangerous weapon, the State was required to prove: (1) Davis handled a dangerous weapon; (2) Davis handled a dangerous weapon in a criminally negligent manner; and (3) Davis's handling of a dangerous weapon in a criminally negligent manner endangered the safety of another. WIS JI—CRIMINAL 1320 (May 2005); *see* WIS. STAT. §§ 941.20(1)(a), 939.25(2).[5] Further, to demonstrate the criminal negligence element, the State had to prove: (1) Davis's handling of the pistol created a risk of death or great bodily harm; (2) the risk of death or great bodily harm was unreasonable and substantial; and (3) Davis should have been aware that his handling of a dangerous weapon created the unreasonable and

[5] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

substantial risk of death or great bodily harm. *See* WIS. STAT. § 939.25(1); WIS JI—CRIMINAL 1320 (May 2005).

¶9 WISCONSIN JI—CRIMINAL 1320 (May 2005), which was provided to the jury, defines a dangerous weapon as "any firearm, whether loaded or unloaded."[6] Davis concedes there was sufficient evidence of the first element, that he handled a dangerous weapon. However, Davis argues the State failed to present sufficient evidence that his conduct was criminally negligent or substantially endangered the safety of another.

¶10 Criminal negligence has been explained in various ways, all of which focus on conduct. The criminal code defines it as "ordinary negligence to a high degree, consisting of *conduct* that the actor should realize creates a substantial and unreasonable risk of death or great bodily harm to another[.]" WIS. STAT. § 939.25(1) (emphasis added). We have explained, "In criminal negligence cases, the emphasis is on the conduct[.]" ***State v. Lindvig***, 205 Wis. 2d 100, 105, 555 N.W.2d 197 (Ct. App. 1996). Further, "the relevant inquiry is whether a reasonable person, under the same or similar circumstances, would realize that the *conduct* creates a substantial and unreasonable risk of death or great bodily harm." ***Id.*** (emphasis added). The supreme court has described criminal negligence as "*conduct* that not only creates an unreasonable risk of bodily harm to another, but also involves a high degree of probability that substantial harm will result to such other person." ***Hart v. State***, 75 Wis. 2d 371, 381 n.2, 249 N.W.2d 810 (1977)

[6] WISCONSIN JI—CRIMINAL 1320 (May 2005), like all jury instructions, constitutes only persuasive authority. *See* ***State v. Rardon***, 185 Wis. 2d 701, 706, 518 N.W.2d 330 (Ct. App. 1994). However, the definition used therein comes from WIS. STAT. § 939.22(10). *See* WIS JI—CRIMINAL 1320 cmt. n.1 (May 2005); *see also* WIS JI—CRIMINAL 910 cmt. (May 2009) (citing 1953 Judiciary Committee Report on the Criminal Code) (explaining rationale for the definition).

(emphasis added). "[A] high degree of negligence consists of the standard definition of ordinary negligence with the additional element of 'a high probability of death or great bodily harm' *as a result of the culpable act*." ***Id.*** at 383 (emphasis added).[7]

¶11 We agree with the State that, based on the extra loaded magazine found in the vehicle, the jury could reasonably reject Davis's claim that he found the pistol on the ground and thought it was a BB gun. For the same reason, the jury could also reasonably infer Davis knew the pistol was loaded.

¶12 However, there was no direct evidence of Davis's handling of the pistol—his conduct—prior to dropping it. The only evidence arguably relevant to Davis's handling of the pistol was the following: Davis's statement that he dropped it while entering the car and it fired without anyone pulling the trigger, the bullet wound to Davis's upper calf, blood spatter on the windshield, and Newhouse's testimony about why an empty casing might remain in a

[7] The court further recited legislative history regarding the criminal negligence standard:

> The difference between a high degree of negligence and ordinary negligence is one of degree. The primary function of the ordinary negligence concept is determining whether a person should be required to pay damages. The function of the negligence concept in the criminal law is in determining the sort of conduct which is, although inadvertent, sufficiently dangerous to warrant criminal sanction. Since the emphasis in both cases is upon the conduct and not the state of mind of the actor, it follows that the distinction should be based upon the dangerousness of the conduct; that is, for a high degree of negligence the conduct must contain a greater risk of harm than is necessary to form a basis for tort liability only.

Hart v. State, 75 Wis. 2d 371, 383 n.4, 249 N.W.2d 810 (1977) (quoting Comments, Judiciary Committee Report on The Criminal Code (Wis. Legislative Council 1953), sec. 339.25).

semiautomatic pistol. The State presented no witness who observed Davis handling the pistol.

¶13 Additionally, there was no evidence presented bearing on the likelihood of the pistol discharging. No witness testified to the likelihood of a semiautomatic pistol, generally, or a German P38, specifically, firing when dropped. No witness testified whether a P38 has a manually operated safety or, if so, whether use of it could prevent the pistol from firing when dropped.

¶14 It is altogether possible that Davis handled the pistol in a criminally negligent manner. Perhaps Davis was twirling the pistol on his finger; perhaps he was waving the pistol around; perhaps he threw the pistol; perhaps he was startled by a car backfiring; perhaps he tripped. Yet, none of these possibilities constitutes a reasonable inference deduced from actual evidence. Absent any evidence of Davis's handling of the P38 prior to dropping it, much less the likelihood—or for that matter, the possibility—of discharge when dropped, the jury could only speculate whether Davis handled the pistol with the requisite lack of care.[8]

¶15 Davis further argues the State failed to present sufficient evidence for the jury to conclude his handling of the pistol created a substantial and unreasonable risk of severe harm to another person. Davis argues there was no direct evidence that any other person was nearby when the weapon discharged into his calf. The State responds that because the shooting occurred in a residential neighborhood, any number of people were potentially at risk. The State further

[8] By relying on the pistol's fall and discharge as evidence of Davis's preceding negligence, the State's theory is essentially reduced to one of res ipsa loquitur. We are aware of no authority suggesting this torts theory of ordinary negligence is applicable to the heightened criminal negligence standard, where the standard of proof is beyond a reasonable doubt.

contends that the jury could infer Little Field or B was present, or that because Davis was entering the vehicle's passenger side, somebody else was present to occupy the driver seat.

¶16 Regardless of the presence or proximity of others, because the jury did not know the nature of Davis's conduct leading to dropping the pistol, it was impossible for the jurors to assess whether that conduct created an unreasonable and substantial risk of harm to another person.

¶17 The State failed to present sufficient evidence on which the jury could reasonably rely to convict Davis of criminally negligent handling of a dangerous weapon beyond a reasonable doubt. Davis is therefore entitled to a judgment of acquittal on that count. *See* ***State v. Miller***, 2009 WI App 111, ¶44, 320 Wis. 2d 724, 772 N.W.2d 188.

Possession with intent to deliver cocaine

¶18 Davis next argues the State presented insufficient evidence to prove he possessed the cocaine recovered from the Lincoln Town Car. We reject this argument.

¶19 Davis emphasizes the physical evidence demonstrated he rode to the hospital in the passenger seat, while the cocaine was found in the driver's door. A defendant need not, however, maintain exclusive possession of cocaine to be convicted. Rather, as 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.
>
> 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.

See WIS JI—CRIMINAL 6035 cmt. n.2 (May 2010); WIS JI—CRIMINAL 920 (Apr. 2000).

¶20 The jury learned that the Town Car and both sets of license plate numbers were tied to Davis or his residence. Davis's fiancée, Matti, produced a key for the Town Car, on a key ring no less. Police found a photograph of Davis and Matti beneath the loaded magazine. All of this evidence linking Davis to the Town Car could suggest Davis either owned or exercised authority over the vehicle. Further, Davis's possession of a loaded pistol, and an additional loaded magazine, is evidence that he exercised control over the drugs for two reasons. First, possession of a loaded weapon gave Davis the ability to exert control over any people or items in the car. Second, the individually bagged cocaine provides a possible explanation for carrying the weapon and extra ammunition—it is no secret drug dealers often carry weapons. These facts demonstrate there was sufficient evidence on which the jury could rely to conclude Davis possessed the cocaine.[9]

By the Court.—Judgment and order reversed in part; affirmed in part, and cause remanded with directions.

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

[9] Because we conclude there was sufficient evidence to convict Davis directly of possession, we need not address whether he could also be convicted as a party to the crime. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).