

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 20, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP2117-CR

Cir. Ct. No. 2005CF66

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL L. LANDIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for
Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

Before Vergeront, Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. Daniel Landis appeals from a judgment of conviction and an order denying his motion for postconviction relief.¹ We affirm.

¶2 Landis was convicted of several felonies related to a series of bank robberies and other crimes. His first set of arguments relates to sufficiency of the evidence. We affirm the verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Credibility of witnesses is for the trier of fact. *Id.* at 504 (citations omitted).

¶3 Landis first argues that the evidence was insufficient to convict him of carrying a concealed weapon. He argues that the guns were on the floor of a vehicle behind the driver's seat, and therefore were not concealed because they could be seen through the windows of the vehicle. The State responds that, under case law providing several factors to consider for weapons in vehicles, weapons in such a location are properly considered concealed. *See State v. Walls*, 190 Wis. 2d 65, 71-72, 526 N.W.2d 765 (Ct. App. 1994).

¶4 The jury instructions in this case did not include the legal test provided in *Walls*. Instead, they stated: “‘Concealed’ means hidden from ordinary observation. The weapon does not have to be completely hidden.” Thus,

¹ In the circuit court's decision, the court noted that the postconviction motion cited the direct appeal procedures of WIS. STAT. § 974.02 and WIS. STAT. RULE 809.30 (2009-10). However, the court stated that “the motion itself, the timeline and the circumstances of the case are such that the court concludes that the motion should be construed as a request for postconviction relief under § 974.06,” the statute providing for collateral attack on convictions. Later in the decision, the court noted that we had extended Landis's time to file a postconviction motion. Our extension means that Landis's postconviction motion was under the direct appeal procedure, not § 974.06, regardless of how the circuit court construed it.

the jury did not consider all of the factors provided in *Walls*. If we review the verdict using *Walls*, we will be using legal instructions that could have been given, but were not. Instead of reviewing the verdict actually reached by Landis's jury, we would first be improperly reviewing unobjected-to instructions. See *State v. Schumacher*, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988) (court of appeals lacks power to review unobjected-to instructions). We would then be changing those instructions, and then further deciding whether it would have been proper for a hypothetical jury using those instructions to find guilt.

¶5 Instead, we will review the verdict using the actual definition in the instructions. A jury could reasonably conclude that guns on the floor of a car behind the driver's seat are "hidden from ordinary observation." To observe the guns, a person would have had to approach the vehicle closely and look down in a manner that would be out of the ordinary. To the extent the jury might have been concerned that the guns were not concealed because it was still physically possible to see them with effort, the second sentence of the instructions clarified that complete invisibility is not required to find guilt. Therefore, we conclude that the evidence was sufficient to support the verdict.

¶6 Landis next argues that the evidence is insufficient to support the conviction for attempted burglary. He argues that it was insufficient because there was no evidence that he or anyone else entered a building without consent. Landis appears to misunderstand the nature of the charge. While entry without consent is an element of burglary, it is not necessary for entry to have occurred for there to be a conviction for *attempted* burglary. "Attempt" is charged when the crime was

inchoate, meaning not completed. *See* WIS. STAT. §§ 939.30-.32 (2009-10).² That means one can be convicted of attempted burglary even if no entry actually occurs. The Landis jury was instructed that it was necessary for the State to prove only that he *intended* to commit the elements of burglary, including entry without consent, and that he committed acts toward the commission of that crime.

¶7 To the extent Landis argues that the evidence was insufficient to prove that he or others committed acts demonstrating intent to commit burglary, we disagree. There was evidence that Landis and others were found by police in a vehicle at 2:35 a.m., and the vehicle contained firearms, masks and hoods, a bulletproof vest, an army helmet, gloves, a crowbar, two-way radios, and a police scanner and frequency guide. This was sufficient evidence to show intent to commit burglary.

¶8 Landis next argues that the evidence was insufficient to support the conviction for possession of burglarious tools. He argues there was no evidence that he or others possessed tools suitable for breaking into buildings. However, he focuses only on smaller tools, such as screwdrivers and nail pullers, while the State argues that the firearms, masks and hoods, radio scanner, crowbar, bulletproof vest, and helmet are tools or devices suitable for use in breaking into a building. Landis does not appear to dispute that point. Landis also argues that there was no showing of intent to use the tools to break into a building. However, the evidence we previously discussed for attempted burglary, combined with

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

testimony by Landis's cellmate that Landis said they intended to break into a bank, is sufficient.

¶9 Landis next argues that the evidence is insufficient to support the conviction for contributing to the delinquency of a child. Landis argues that there was no evidence that he or another intentionally encouraged or contributed to the child's delinquency. However, it was reasonable to infer that the child was to be a participant in the crimes intended that night because there was evidence that Landis told his cellmate the child had participated in other crimes. This is sufficient evidence. Landis also argues that it was never proved that the child was delinquent. However, the same evidence of what Landis told his cellmate was sufficient to show the child's commission of crimes.

¶10 Landis next argues that the evidence was insufficient to show receipt of stolen property, in this case, cash. Landis argues that federal reserve notes are not property because they have no intrinsic value. The State responds with citation to federal law making the notes legal tender. However, Landis's argument has already been foreclosed by the jury instructions in this case, which assumed that cash is property. The instructions on this count did not ask the jury to find whether Landis received and concealed "property," they asked about "cash." If Landis wanted to argue that cash is not property, it would have been necessary to present that issue to the circuit court in the form of a request for jury instructions or other legal argument.

¶11 Landis next argues that the evidence was insufficient to support the robbery conviction. He again argues that federal reserve notes are not property. On this charge, the jury instruction did not refer to "cash," but to the taking of "property." Landis's argument appears to assume that for an object to be

“property,” it must have value. No such definition appears in the instructions. We conclude that in common use, it is not necessary for an object to have measurable value to be “property.” Therefore, the jury could properly find that the theft of cash, even if it lacked monetary value, is a theft of property.

¶12 Landis also argues that the other evidence of his involvement in the bank robbery was merely circumstantial. Even if we were to agree that the circumstantial evidence was insufficient, there would remain the testimony of Landis’s cellmate that Landis admitted having been involved in that bank robbery. That evidence is not inherently incredible and, if believed, it is sufficient to sustain the conviction.

¶13 Landis next argues that the circuit court improperly failed to inform him what jurisdiction it was proceeding under. He refers us to an exchange at a status conference in which Landis asked whether it was safe to assume that the court was not proceeding as an admiralty court. He argues that the judge’s answer was unclear, and that this uncertainty impaired his ability to defend himself. However, Landis does not explain how this affected his defense. The argument has no merit.

¶14 Landis next argues that he was improperly convicted of both committing a robbery and receiving property stolen in that same robbery. The State appears to concede that it would be improperly multiplicitous to convict Landis of both acts. However, the State also points out that Landis was convicted of receiving *and* concealing stolen property, and that no similar multiplicity problem is presented by the concealing part of the conviction. We agree.

¶15 The jury instructions show that, for the one count of receiving and concealing stolen property, the jury was required to find that he did both.

However, concealment alone is sufficient to violate the statute, which criminalizes receiving “or” concealing stolen property. WIS. STAT. § 943.34. Therefore, even if the jury found that Landis robbed the bank and received stolen property from that same robbery, which would create a multiplicity problem, the jury also found that Landis took the separate step of *concealing* property stolen in that robbery, which does not create a multiplicity problem and is sufficient for a conviction.

¶16 Landis next argues that the court erroneously admitted other-acts evidence. The evidence at issue is the various items that were found in the vehicle when Landis was arrested. Landis argues that this evidence was improperly admitted for the State to use on the robbery charge. However, regardless of whether that evidence would be other-acts evidence for the robbery charge, it was properly admissible as direct proof on other charges, such as possession of burglarious tools and attempted burglary.

¶17 Landis argues that the prosecutor, during his opening statement, relied on “hearsay” evidence by describing potential testimony from people who did not eventually testify. Landis frames his argument in terms of hearsay evidence, but the jury was instructed that statements during argument are not evidence. Landis does not develop any other argument on this point.

By the Court.—Judgment and order affirmed.

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

