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November 19, 2015

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You are hereby notified that the Court has entered the following opinion and order:

2015AP667-CR State of Wisconsin v. Donte D. Whitlock (L.C. # 2014CF337)
2015AP668-CR State of Wisconsin v. Donte D. Whitlock (L.C. # 2014CF600)

Before Lundsten, Higginbotham and Sherman, JJ.

A jury found Donte D. Whitlock guilty of operating a motor vehicle while intoxicated and with a prohibited blood alcohol concentration; operating a motor vehicle after revocation; and disorderly conduct. Based upon those verdicts, the circuit court found Whitlock guilty of two counts of misdemeanor bail jumping and one count of felony bail jumping. On appeal, Whitlock challenges the sufficiency of the evidence to support the jury's verdicts and the court's finding of guilt. Based upon our review of the briefs and record, we conclude at conference that

this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] Because Whitlock incorrectly applies this court's standard of review, his contentions fail and, therefore, we affirm the judgments of conviction.

Standard of Review

This court may not reverse a conviction on the basis of insufficient evidence "unless the evidence, viewed most favorably to the [S]tate 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). We will uphold the verdict if any possibility exists that the jury could have drawn the inference of guilt from the evidence. *See* ***id.*** at 507. It is the jury's province to fairly resolve conflicts in the testimony, weigh the evidence and draw reasonable inferences from the facts. *See* ***id.*** at 506. 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. *See* ***State v. Witkowski***, 143 Wis. 2d 216, 223, 420 N.W.2d 420 (Ct. App. 1988).

A finding of guilt may rest upon evidence that is entirely circumstantial and such evidence is often much stronger and more satisfactory than direct evidence. *See* ***Poellinger,*** 153 Wis. 2d at 501-02. The standard of review is the same for circumstantial evidence cases. *See* ***id.*** at 507-08. In reviewing the sufficiency of circumstantial evidence, we need not concern ourselves with evidence which might support other theories of the crime. *See* ***id.*** We need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

to sustain the verdict rendered. *See* ***id.*** at 508. It is the function of the jury to decide issues of credibility, to weigh the evidence and resolve conflicts in the testimony. *See* ***id.*** at 506.

Discussion

Whitlock contends that there was no evidence that he: (1) drove a car; (2) drove a car while intoxicated; or (3) committed any act that could be considered disorderly. Whitlock's appellate brief summarizes various perceived gaps in the evidence on each point. Whitlock neglects, however, any mention of the evidence that supports the jury's verdicts. Given that we must review the evidence in the light most favorable to the verdicts, *see* ***id.*** at 507, Whitlock's omissions doom his appeal.

We consider each contention in turn. Regarding whether he drove a car, Whitlock points out that no witness testified to seeing Whitlock drive and no witness testified that the key relied on by the State was the key to the car that actually operated the car. He also dismisses a police officer's testimony as "pure speculation" that the configuration of the driver's seat rendered it impossible for the person Whitlock suggests was the driver, D.F., to actually drive the car. Whitlock, however, ignores other testimony that supported the jury's inference that he drove the car.

In the early morning hours of February 22, 2014, T.N. was awakened from her sleep by shouting coming from an alley next to her house, located on North Franklin Street in downtown Madison. From a second-floor window overlooking the alley, T.N. saw a parked car. A man, wearing a tan winter jacket, was standing outside the car on the driver's side, and a woman was standing outside the car on the passenger side. The woman got into the car on the passenger side and was yelling at the man to get in the car. The man yelled back, and eventually got into the car

on the driver's side. T.N. called 911 as the car drove out of the alley and was able to give the car's license plate to the 911 operator. As the car left, it hit the neighboring house. T.N. testified that the woman was never in the driver's seat. The next morning, T.N. saw two new scrapes along the concrete part of the neighboring house.

Officer Derek Huber responded to the 911 call. He was told that a car with license plates matching the car seen by T.N. had been located in a parking lot not far from T.N.'s house. When he arrived, Huber encountered Whitlock and a woman, D.F. Whitlock was wearing a tan or brown winter jacket. Huber asked Whitlock where he had been, and Whitlock replied that he had been at a friend's house on Franklin Street. Whitlock denied driving the car. He first told Huber that he had walked to the car from his friend's house and then he told Huber that D.F. had driven him there. A car key had been placed inside a bag containing items taken from Whitlock by other officers. Whitlock told Huber that he took the key from D.F. because she was drunk. As part of his investigation, Huber sat in the car. Huber testified that the driver's seat of the car was pulled very far back. While he could reach the gas and brake pedals, Huber did not think that D.F., who was only about five foot tall, would have been able to drive the car with the seat in that position. Huber estimated Whitlock to be about five foot, ten inches tall. Huber testified that he stood about six foot to six foot, one inch tall.

Although T.N. did not identify Whitlock as the driver, her testimony contains circumstantial evidence of that fact. T.N. saw a man, wearing a tan jacket, get into a car and drive off. The woman was never in the driver's seat. The license plate match confirms that the car found in the parking lot with Whitlock and D.F. was the same car parked in the alley outside T.N.'s house. Huber testified that Whitlock was wearing a tan jacket and a car key was among the items taken from Whitlock when initially searched. Whitlock offered conflicting stories to

Huber regarding how he got to the parking lot, casting doubt on his claim that D.F. was driving. Finally, the pushed-back position of the driver's seat supports the inference that Whitlock was the driver, not D.F.

We next consider Whitlock's contention that there was no evidence that he drove the car while intoxicated. On this point, Whitlock emphasizes that the car was parked properly in the parking lot and a perceived lack of precision in the chronology of the events. For example, Whitlock relies on the lack of evidence concerning the time lapse between the incident outside T.N.'s house and when police found the car in the parking lot. Whitlock asserts the car could have been parked and then he could have consumed intoxicants. Whitlock concludes that the State failed to provide a link between the incident outside of T.N.'s house and his intoxication in the parking lot.

The record contains ample evidence that supports the inference chosen by the jury, namely, that Whitlock drove the car while intoxicated. The evidence summarized above concerning Whitlock's identity as the driver of the car is pertinent to this inquiry. There was abundant evidence of Whitlock's intoxication. Whitlock's breathalyzer result exceeded .15. Huber testified that Whitlock's eyes were bloodshot, his speech was slurred, and Huber smelled alcohol on Whitlock's breath. In Huber's opinion, Whitlock was "very intoxicated." Huber testified that Whitlock was falling asleep intermittently and had difficulty responding to questions. Most importantly, the damage to the car, first observed by T.N. when the car hit the neighboring house and later by police, supported the inference that the driver was intoxicated.

We next consider Whitlock's contention that there was no evidence that he committed any actions that disturbed T.N. T.N. could not identify Whitlock. Whitlock relies on T.N.'s

testimony that she heard a woman's yells and screams during the incident. In his view, D.F. was disorderly, not him. Again, Whitlock ignores other evidence that supports the jury verdict. In addition to a woman's yells, T.N. also heard a man's voice yell "'I will do what I fucking want to.'" After both people were in the car, T.N. heard repeated shouts of "ow" and "blood[-] curdling screams" from inside the car. T.N. saw the car "shak[e] back and forth" as she heard "bam[s]" coming from inside the car. T.N. testified that she was disturbed by what she heard and saw from her window. From that evidence, the jury could have inferred that Whitlock engaged in "violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tend[ed] to cause or provoke a disturbance." WIS. STAT. § 947.01(1).

We must view the evidence in the light most favorable to the verdict and accept the inferences drawn by the jury. *See* ***Poellinger***, 153 Wis. 2d at 506-07. Under that standard, Whitlock's arguments fail.

Lastly, we consider Whitlock's challenge to his convictions for bail jumping. Whitlock concedes that the convictions for misdemeanor bail jumping must be upheld if this court upholds the guilty verdicts for operating while intoxicated and operating after revocation. Whitlock argues, however, that the felony bail jumping conviction, which rests upon the disorderly conduct conviction, must be reversed for insufficient evidence.

"There are three elements to the crime of bail jumping: (1) the individual must have been arrested for, or charged with, a felony or misdemeanor; (2) the individual must be released from custody on bond; and (3) the individual must have intentionally failed to comply with the terms of his or her bond." ***State v. Hansford***, 219 Wis. 2d 226, 244, 580 N.W.2d 171 (1998).

Whitlock contends there is insufficient evidence of the third element because "intent" is not an element of disorderly conduct. We are not persuaded. Under WIS. STAT. § 969.03(2), every person released on bond is subject to the condition that he or she "shall not commit any crime." The statute is not limited to crimes that include an element of intent. Such an interpretation is an unreasonable reading and limitation of the statute. We agree with the circuit court that the jury verdict of guilty in the disorderly conduct charge may support a bail jumping conviction.

Upon the foregoing reasons,

IT IS ORDERED that the judgments of conviction are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals