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December 7, 2015

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

2014AP1840-CR State of Wisconsin v. Jeremy L. Rigelsky (L.C. # 2013CF463)

Before Kloppenburg, P.J., Higginbotham and Blanchard, JJ.

Jeremy Rigelsky appeals from a judgment of conviction for being a felon in possession of a firearm. *See* WIS. STAT. § 941.29(2) (2013-14).¹ The only issue on appeal is whether sufficient evidence supports the jury's verdict. 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. We affirm.

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

We may not reverse a conviction on the basis of insufficient evidence “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). Circumstantial evidence may be and often is stronger and more satisfactory than direct evidence. *See id.* at 501-02. In reviewing the sufficiency of evidence, including circumstantial evidence, an appellate court need not concern itself in any way with evidence which might support other theories of the crime. *See id.* at 507-08. An appellate court need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence. *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. “[T]he jury, as ultimate arbiter of credibility, has the power to accept one portion of a witness’ testimony, reject another portion and assign historical facts based upon both portions. *See O’Connell v. Schrader*, 145 Wis. 2d 554, 557, 427 N.W.2d 152 (Ct. App. 1988). A jury can find that a witness is partially truthful and partially untruthful. *See id.* We defer to the jury’s function of weighing and sifting conflicting testimony in part because of the jury’s ability to give weight to nonverbal attributes of the witnesses. *See State v. Wilson*, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989).

To prove the crime of possession of a firearm by a felon, the State must prove a prior felony conviction and possession of a firearm. *See State v. Black*, 2001 WI 31, ¶18, 242 Wis. 2d 126, 624 N.W.2d 363. Because Rigelsky stipulated that he had a prior felony conviction the only issue for the jury was whether he possessed a firearm.

The jury was instructed that:

Possess means the defendant knowingly had actual physical control of a firearm.

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 a 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.

See WIS JI—CRIMINAL 920. With those principles in mind, we turn to the evidence in this case.

On July 8, 2013, a police officer stopped a car speeding through a public park. Rigelsky was driving a car owned by his then-girlfriend, Taylor Riniker. Rigelsky was arrested on a different matter and the car was left parked and unlocked, with the keys under the driver's seat.

Later that day, Tracy Alexander, Riniker's mother, picked up the car and drove it to her house. Alexander testified that she sat in the driver's seat as her daughter looked through the car for her cell phone. Rigelsky had used the car for a couple of days and it was "a total mess." After looking through the trunk and back seat, Riniker sat in the front passenger seat and pointed to a black bag on the floor, telling her mother that it was the bag that had the gun in it. Alexander testified that no one touched the bag and she called the police "[b]ecause there was a gun in the car and [she] didn't want anything to do with it."

Riniker testified that she spent July 7, 2013, “hanging out” at McKade Susag’s house. While there, she lent her car to Rigelsky. Some time that day, she and Rigelsky had a “small argument” and she left Susag’s house. She spent the night at a friend’s house. Riniker’s recollection of the search of the car differed from that of her mother. According to Riniker, her mother was inside the house when Riniker began looking through the car. “[A]t some point” in her search through the car, Riniker found a zippered case under the passenger seat about halfway back. She put the case into another bag along with other items belonging to both her and Rigelsky. Riniker testified that her mother then came out to help and Riniker brought the bag to the front seat and looked inside. Riniker could feel that a gun was inside the zippered case and she pulled it partly out of the case. Her mother then “kind of freaked out” and called police.

Officer Andrew Rosenow testified that he responded to Alexander’s house and that Riniker told him that everything inside the bag belonged to Rigelsky. Riniker also told Rosenow that she had been “driving around” with Rigelsky the night before when Rigelsky started “acting very strange.” Riniker became “uncomfortable,” left the car, and did not see Rigelsky again that night. Riniker did not mention Susag in her recounting of her activities on July 7.

Susag owned the gun found in Riniker’s car. As of July 8, Susag had known Rigelsky about three weeks to a month and they had a “casual ... [i]n passing” relationship. Susag called police at about 2:00 p.m. on July 8, 2013, to report his gun missing. Susag told police that the gun had been in the trunk of his car when it was parked in front of his house and that a person could “jimmy open” the trunk. Susag estimated that the gun had gone missing between 9:00 p.m. on July 7 and 12:30 p.m. on July 8. Susag testified that Rigelsky called Susag from jail at 4:23 p.m. on July 8. After that call, Susag “realized that [Susag had] left ... the firearm ... in [Rigelsky’s] car” the day before and called police to inform them of his error. Officer Alexander

Burg testified that he responded to Susag's initial call and that Susag did not mention Rigelsky or that Susag had used the gun on July 7.

Luke Olson, an analyst employed by the State Crime Lab, testified that he compared DNA obtained from the gun with a DNA sample obtained from Rigelsky. Olson concluded that three or more persons had contributed to DNA found on the gun and that one of the contributors was male. Analysis of Rigelsky's DNA led Olson to conclude that Rigelsky was a possible contributor of the DNA found on the gun and that if one randomly selected a person from the general population, the chance that the person would be included in the DNA mixture found on the gun was 1 in 1,647. Officer Rosenow had asked Rigelsky if his DNA would be found on the gun and Rigelsky replied "maybe" and that he had "handled a lot of firearms."

From the above evidence the jury could reasonably infer that Rigelsky had control of Riniker's car starting on July 7 until his arrest the next day. The jury could also reasonably infer that the firearm was in Riniker's car while Rigelsky was driving the car and that Rigelsky handled the firearm. On appeal, Rigelsky emphasizes inconsistencies in the testimony and points to evidence that suggests his innocence. There is no question that the jury heard conflicting statements from, or attributed to, Alexander, Riniker, Susag, and Rigelsky. However, it was the jury's exclusive role to sort out conflicting testimony and this court cannot disturb the jury's determination. *See Poellinger*, 153 Wis. 2d at 506.

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals