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DISTRICT II

November 15, 2017

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

2017AP53-CR State of Wisconsin v. Timothy I. Johnson (L.C. #2015CF514)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Timothy I. Johnson appeals from a judgment convicting him after a jury found him guilty of possession of THC, second or subsequent offense; possession of a firearm by a felon, as a repeater; and two counts of manufacture/delivery of THC, > 200 grams, second or subsequent offense. Upon reviewing the briefs and the record, we conclude at conference the case is

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We affirm the judgment.

A confidential informant (CI) recorded two transactions in which he bought marijuana from Johnson at the apartment Johnson shared with his girlfriend, Samantha Koons. The CI told police that he saw a silver-and-black gun on the bed in Johnson's bedroom, heard Johnson talking on the telephone about buying another gun, and saw a television connected to surveillance cameras monitoring activity outside of the apartment.

Police executed a no-knock warrant. While searching Johnson's and Koons' bedroom, they found a .22-caliber rifle beneath a chaise and a stun gun and two handguns in a dresser Johnson and Koons shared. One of the guns in the dresser, a silver-and-black Kahr, was in a drawer with women's clothing. Pictures from Johnson's cell phone showed a Kahr gun and Johnson holding a large wad of cash. The lead investigator testified that Johnson, a convicted felon, said he knew guns belonging to Koons were in the apartment but, though he had searched, he had not been able to find any, and that he would rather chance being arrested as a felon in possession than to let Koons and her children be in danger.

The State charged Johnson with possession of marijuana, three counts of being a felon in possession of a firearm, and two counts of delivery of marijuana. A jury found him guilty of the three marijuana counts and one felon-in-possession charge. He appeals, challenging the sufficiency of the evidence to sustain the guilty verdict on the felon-in-possession charge and the "inconsistency" between that verdict and the two felon-in-possession acquittals.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

On reviewing the sufficiency of the evidence to support a conviction, we "may not substitute [our] judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt," and we must accept the reasonable inferences the jury drew from the evidence. ***State v. Poellinger***, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990).

The crime of possession of a firearm by a felon is a strict liability offense that requires the State to show only that "the felon 'possessed' the firearm with knowledge that it is a firearm." ***State v. Black***, 2001 WI 31, ¶19, 242 Wis. 2d 126, 624 N.W.2d 363. Ownership is not required, as possession "means that the defendant knowingly had actual physical control of a firearm." ***Id.*** (citations omitted). "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." WIS JI—CRIMINAL 1343. Possession "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 [its] presence." ***Schmidt v. State***, 77 Wis. 2d 370, 379, 253 N.W.2d 204 (1977).

Looking to ***State v. R.B.***, 108 Wis. 2d 494, 322 N.W.2d 502 (Ct. App. 1982), Johnson argues that the State endeavors to prove possession by proximity. In that case, R.B., a minor, was convicted of possessing beer based on his presence at a party at which beer was freely accessible, although he claimed he was there just to socialize and denied that he obtained, drank, or even intended to drink any beer. ***Id.*** at 495-96. The trial court nonetheless found that he constructively possessed beer because it was available to him. ***Id.*** at 496. This court reversed. We held that, absent actual possession, "there must be found from the surrounding facts and

circumstances, aided by reasonable inferences, an intent to exercise control over the prohibited item." ***Id.*** at 498. The trial court's finding that R.B. did not intend to possess any beer thus defeated his conviction. ***Id.***

Here, however, the jury found credible that Johnson *did* intend to possess a firearm and had control and dominion over at least one. The CI testified that he saw a silver-and-black gun on Johnson's bed and overheard Johnson's side of a phone conversation in which Johnson said he had a firearm and was looking to buy another. In Johnson's bedroom, police found two guns, one a silver-and-black Kahr, in a dresser Johnson used next to his side of the bed, a picture of a Kahr on his phone, and a rifle under a chaise. The investigator testified that Johnson at first denied, then admitted, dealing drugs and said he knew guns were in the apartment, and that he knew drug dealing was dangerous. Johnson testified that he was unaware of guns in the apartment but "had a feeling" Koons had purchased at least one as she told someone she had bought "protection." He also admitted lying to the investigator. Both Johnson and Koons testified that she never told him she had purchased a firearm. The jury decides issues of credibility, weighs the evidence, and resolves conflicts in the testimony. ***Poellinger***, 153 Wis. 2d at 506. As their inferences were reasonable, we must accept them. ***Id.*** at 507.

Johnson next argues the guilty verdict on one felon-in-possession charge was fatally inconsistent with the two acquittals because the evidence on all three counts was the same.

> [L]ogical consistency in the verdict as between the several counts in a criminal information is not required. The verdict will be upheld despite the fact that the counts of which the defendant was convicted cannot be logically reconciled with the counts of which the defendant was acquitted.
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> …

> "Each count in an indictment is regarded as if it was a separate indictment."
>
> …
>
> "The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt."

State v. Mills, 62 Wis. 2d 186, 191-92, 214 N.W.2d 456 (1974) (footnote and citation omitted).

As recounted above, it is clear that enough credible evidence supported a finding that Johnson possessed at least one of the firearms. The jury heard that, for about a year, Johnson and Koons shared the bedroom in which the three firearms were found, shared the dresser in which two of them were kept, and discussed Koons' safety concerns. A gun was seen on their bed and a picture of a gun was on Johnson's phone. The jury reasonably could have concluded that Johnson, being engaged in a dangerous enterprise, was aware of and exercised dominion and control over at least one of the weapons, thus supporting at least one guilty verdict. Or, as in ***Mills***, the jurors perhaps considered that prosecutors sometimes overcharge a defendant, such that they felt "disposed through lenity" to acquit him of two of the charges. *See* ***id.*** at 192 (citation omitted). We decline to exercise our supervisory authority and remand for entry of a judgment of not guilty on count 2 of the information. Therefore,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals