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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

November 8, 2018

To:

Hon. Carolina Stark
Circuit Court Judge
901 N. 9th St.
Milwaukee, WI 53233

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

John Barrett
Room 114
821 W. State Street
Milwaukee, WI 53233

Daniel J. O'Brien
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Basil M. Loeb
Schmidlkofer, Toth, Loeb & Drosen, LLC
949 Glenview Avenue
Wauwatosa, WI 53213

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

2017AP2310-CR State of Wisconsin v. Lalton R. Bell El (L.C. # 2015CF4978)

Before Kessler, P.J., Brash and Dugan, 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).

Lalton R. Bell El appeals from a judgment of conviction entered upon a jury's guilty verdicts. Bell El argues that the trial evidence was insufficient to support two of his three felony convictions. 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 (2015-16).[1] We affirm.

The jury was asked to determine whether Bell El was guilty of four felonies: (1) armed robbery by use of a dangerous weapon; (2) first-degree recklessly endangering safety; (3) attempted armed robbery; and (4) possession of a firearm by a felon. The jury acquitted Bell El of attempted armed robbery and found him guilty of the other three charges. Bell El challenges his convictions for armed robbery by use of a dangerous weapon and first-degree recklessly endangering safety. *See* WIS. STAT. §§ 943.32(2), 939.63(1)(b), and 941.30(1).

At trial, it was undisputed that late one night, Bell El, who had been drinking, approached a vehicle parked in an alley. Holding a gun in his hand, he opened the door, where he observed a man and a woman. It is further undisputed that the man in the car, D.S., lunged at Bell El, which led to Bell El, D.S., and the woman fighting on the ground outside the vehicle. During the fight, the gun discharged and the bullet struck the woman in the leg. Police officers who were nearby heard the gunshot and ran to the scene, where they separated the three individuals, arrested Bell El, and arranged to transport the woman to the hospital.

What was disputed at trial was Bell El's purpose in opening the vehicle door.[2] D.S. testified that he and the woman were preparing to engage in sexual activity for which D.S. had paid the woman. Suddenly, the door to the vehicle opened. D.S. testified that Bell El pointed a gun at D.S. and said, "Give me all your shit." D.S. said he gave Bell El "[e]verything I had in

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

[2] Only D.S. and Bell El testified about what occurred in the vehicle. The woman did not appear at the trial.

my pocket[,] which was $10." D.S. continued: "[Bell El] said something to the effect that it's more, got to be more … and then he directed the woman to empty my pockets and before she got a chance to do that, I jumped on him." D.S. said he "grabbed straight for the gun" and that he and Bell El fell to the ground outside the vehicle. D.S. said he wanted to take the gun from Bell El because he feared for his life.

In contrast, Bell El testified that when he opened the vehicle door, he "had no intentions to rob anyone nor hurt anyone." Bell El explained that he was walking down the alley when he heard what he thought was a little girl saying, "help, stop." Bell El testified that he thought the voice could be coming from the vehicle so he "swung" the vehicle door open and "leaned in" with the gun in his hand. Bell El said the woman "didn't give any impression to me that she was in trouble," so he "turn[ed] to leave," at which point D.S. "leap[t] over the seat and grab[bed Bell El's] arm and the gun."[3] Bell El said the two men ended up fighting on the ground outside the vehicle. Bell El said he tried to hang onto the gun so that D.S. would not shoot him with it. At one point, both men had their hands on the gun. Bell El then bit D.S. on the arm, which led D.S. to "yank[] his arm back," at which point "the gun discharged." The bullet struck the woman, who had joined in the fight.

The jury found Bell El guilty of robbing D.S. and recklessly endangering the woman's safety. Bell El argues there was insufficient evidence to support those two verdicts. At the outset, we note that Bell El's arguments are based on his assertion that the jury could not have

[3] D.S. testified that he and the woman were in the front seat of the vehicle, while Bell El testified they were in the backseat of the vehicle.

believed D.S.'s testimony, rather than on the theory that D.S.'s testimony, if believed, failed to satisfy the elements of each crime. He also challenges the jury's reasoning.

On appeal, we will sustain a conviction "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). "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence … an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." ***Id***. at 507.

Bell El offers four arguments in support of his claim that there was insufficient evidence to convict him of armed robbery and reckless endangerment. First, he challenges the credibility of D.S.'s testimony. Bell El asserts that the jury was correct to acquit him of the attempted armed robbery of the woman, but he contends that the guilty verdicts for armed robbery and reckless endangerment "were not correct and no rational trier of fact could have found guilt beyond a reasonable doubt based on the evidence at trial." Bell El argues that he "was the more credible witness" and that D.S. "was not credible."

We are not persuaded that Bell El is entitled to relief. The jury, not this court, assesses the credibility of witnesses and resolves inconsistencies in the testimony, and we defer to those assessments unless "the evidence is inherently or patently incredible." *See* ***State v. Saunders***, 196 Wis. 2d 45, 54, 538 N.W.2d 546 (Ct. App. 1995). "Where there are inconsistencies in the testimony of a witness or between witnesses, the jury may choose to disbelieve either version or make a choice of one version rather than another." ***Id.*** The fact that D.S. had a criminal history,

was illegally paying for sex, and was granted immunity from prosecution for that illegal act in exchange for his testimony does not render his testimony incredible as a matter of law. We reject Bell El's argument that D.S.'s testimony cannot support the jury's verdicts.

Second, Bell El argues that the jury was not rational because it acquitted Bell El of attempted robbery of the woman but found Bell El guilty of the other charges. Bell El asserts that because the jury "must not have believed [D.S.'s] testimony that Bell El attempted to rob" the woman, it likewise should not have accepted D.S.'s testimony concerning the other charges. We are not persuaded. "[T]he jury, as ultimate arbiter of credibility, has the power to accept one portion of a witness'[s] testimony, reject another portion and assign historical facts based upon both portions." ***O'Connell v. Schrader***, 145 Wis. 2d 554, 557, 427 N.W.2d 152 (Ct. App. 1988). Thus, the jury could have chosen not to accept D.S.'s testimony about Bell El's actions with respect to the woman but still could have found D.S.'s other testimony credible. Alternatively, the jury may have concluded that D.S.'s testimony about Bell El's actions in the vehicle with respect to the woman did not satisfy all of the elements of attempted armed robbery, such as if the jury found Bell El was focused on D.S. and did not attempt to rob the woman. We reject Bell El's argument that the jury's verdict was not rational and should be disregarded.

Third, Bell El argues that with respect to the first-degree recklessly endangering safety charge, "[t]here is no way a rational jury could have concluded that Bell El committed" that crime. Bell El continues:

> The discharge of the gun could have been an accident. It could have been done by [D.S.,] and [D.S.] is the one who endangered [the woman's] safety. Or Bell El could have discharged the gun in self-defense. Any of those theories applied. A rational jury would have applied one of those theories and [would] not have returned a guilty verdict on Count 2.

Once again, we are not persuaded. The fact that the jury could have made certain findings does not mean it was required to do so. At issue is whether the jury could have found that Bell El endangered the woman's safety by criminally reckless conduct under circumstances that showed utter disregard for human life. *See* WIS JI—CRIMINAL 1345 (2015). The facts to which D.S. testified more than satisfy those elements. We agree with this characterization from the State:

> Bell El endangered [the woman's] safety from the moment that he, while admittedly intoxicated, pointed the loaded gun at her and D.S. in the vehicle. That endangerment persisted as all three of them struggled for the loaded gun on the ground. Bell El would not let go of the gun. The reckless endangerment came to fruition when the gun discharged into [the woman's] leg after Bell El bit D.S. on the forearm, causing D.S. to remove his thumb from the hammer.
>
> Bell El's conduct was criminally reckless. Brandishing a loaded gun at two unarmed people and then wrestling over it, all while intoxicated, obviously created an unreasonable and substantial risk of death or great bodily harm of which Bell El was fully aware. Great bodily harm resulted when the gun discharged and [the woman] was shot in the leg.
>
> Bell El's conduct showed utter disregard for human life…. Bell El created a life-threatening situation when he opened the door, pointed the gun at both occupants, and demanded money from them.

Bell El's final argument is that the verdicts "were wrong and not supported by the credible evidence" because it is "common sense" that if he "truly intended on robbing [D.S.], Bell El would have kept himself in a position of control over the situation." While the jury could have chosen to agree with this reasoning, it did not do so. The jury was free to accept D.S.'s testimony, which supports the verdicts. *See* ***Poellinger***, 153 Wis. 2d at 501. Bell El is not entitled to relief.

For the foregoing reasons, we reject Bell El's arguments. There is sufficient credible evidence in the record supporting both of the challenged convictions. We summarily affirm the judgment.

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 and may not be cited under WIS. STAT. RULE 809.23(3)(b).

Sheila T. Reiff
Clerk of Court of Appeals