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January 23, 2019

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

2017AP2154-CR State of Wisconsin v. Felton T. Canon (L.C. #2016CF320)

Before Neubauer, C.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).

Felton Canon appeals pro se from a circuit court judgment convicting him of being a felon in possession of a firearm, endangering safety by use of a dangerous weapon (as party to the crime), and disorderly conduct. On appeal, Canon challenges the sufficiency of the evidence and sets out other challenges to his conviction. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT.

RULE 809.21 (2015-16).[1] We affirm because the evidence was sufficient and the other challenges are forfeited because they were not raised in the circuit court.

Canon challenges the sufficiency of the evidence to convict him of felon in possession of a firearm and endangering safety by use of a dangerous weapon.[2] The State must prove each essential element of the crime beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We "need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence…." ***Id.*** at 508. We "may not reverse 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." ***Id.*** at 501. It is the function of the jury, not the appellate court, to weigh and resolve conflicts in the evidence and to draw reasonable inferences from the evidence. ***Id.*** at 506. If any possibility exists that the jury could have drawn the appropriate inferences from the evidence at trial to find Canon guilty, we may not overturn the verdict. ***Id.*** at 507.

With regard to the conviction for being a felon in possession of a firearm,[3] Canon claims that the State failed to prove that he possessed a loaded, gunpowder-driven weapon. Canon cites no authority that such proof was required, and we could reject these claims on that basis. *See*

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

[2] Canon does not challenge the sufficiency of the evidence to convict him of disorderly conduct.

[3] Canon does not dispute the sufficiency of the evidence that he was a convicted felon at the time of the incident in this case. Canon's defense was that the State did not prove that he possessed a weapon and failed to offer the weapon into evidence.

State v. Pettit, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) ("We cannot serve as both advocate and judge."). As the State points out, the law is against Canon. Proof that a weapon operated by force of gunpowder was not required. *Cf.* ***State v. Powell***, 2012 WI App 33, ¶¶12-14, 340 Wis. 2d 423, 812 N.W.2d 520 (where possession of a weapon was at issue in a carrying a concealed and dangerous weapon case, WIS. STAT. § 941.23 (2009-10), the court recognized that proof of operation by gunpowder was not required).[4] Proof that the firearm was operational is also not required. *See* ***State v. Rardon***, 185 Wis. 2d 701, 705-07, 518 N.W.2d 330 (Ct. App. 1994) (a felon in possession of an inoperable firearm is in violation of WIS. STAT. § 941.29(2) (1993-94)). Finally, in light of the other evidence adduced at trial, discussed below, the absence of the firearm from evidence was not fatal to Canon's conviction for felon in possession of a firearm.

We conclude that the evidence was sufficient to convict Canon of being a felon in possession of a firearm. The victim testified that, in the early morning hours of April 26, 2016, she awoke to find a drunk Canon holding a firearm to her head and demanding that she engage in sexual activity with a stranger who had accompanied Canon into her bedroom. Later that day, the victim confronted Canon by text message about his conduct (holding a firearm to her head). Canon responded that he had been "super drunk" and further texted "Say no more. I'm not going to argue. I'm sorry." Canon also admitted that he wanted the victim to "suck on his gun." While Canon argues on appeal that his texts meant something else, the jury was free to draw an

[4] Canon's reliance upon the definition of firearm in WIS. STAT. § 167.31(1)(c) is misplaced ("a weapon that acts by force of gunpowder"). The definition of dangerous weapon in WIS. STAT. § 939.22(10) ("any firearm, whether loaded or unloaded") applies to endangering safety by use of a dangerous weapon under WIS. STAT. § 941.20(1)(b). Sec. 939.22 (definitions applicable to WIS. STAT. chs. 939-48).

inference of guilt from these texts and the other evidence. The other evidence included the testimony of a correctional officer who received a Facebook message from the victim describing Canon's conduct. The correctional officer contacted law enforcement. In his testimony, Canon denied he was drunk, claimed the victim was on drugs, claimed he and the victim had argued, and denied that he possessed a firearm. Canon characterized his next-day texts as exculpatory.

In rebuttal, the victim's sister testified that she heard Canon come into the residence around the time the victim testified the incident occurred.

Applying the sufficiency of the evidence standard, we conclude that the evidence was sufficient to convict Canon of being a felon in possession of a firearm. The evidence and reasonable inferences from the evidence established that Canon, a convicted felon, possessed a firearm, i.e., he "knowingly had actual physical control of a firearm." WIS JI—CRIMINAL 1343 (2016). The jury was charged with determining the weight and credibility of the evidence before it and rejected Canon's theory of the case and his characterization of the facts.

The evidence was also sufficient to convict Canon of endangering safety by use of a dangerous weapon contrary to WIS. STAT. § 941.20(1)(b): Canon operated or went armed with a firearm, and Canon was under the influence of an intoxicant at the time. WIS JI—CRIMINAL 1321 (2016). On the question of intoxication, the State had to prove that Canon's "ability to … handle a firearm … [was] materially impaired" because of "consumption of an alcohol beverage." WIS. STAT. § 939.22(42).

As we have held, the evidence was sufficient that Canon was armed with a firearm. A firearm qualifies as a dangerous weapon. WIS. STAT. § 939.22(10) ("dangerous weapon" is "any firearm, whether loaded or unloaded"). The jury was free to find credible the victim's testimony

that Canon drunkenly held a firearm to her head and to rely upon Canon's next-day admission by text that he had been "super drunk." The jury could reasonably infer from this evidence that Canon's ability to handle a firearm was materially impaired due to alcohol.

The balance of Canon's appellate issues are forfeited because he did not raise them in the circuit court. *See* ***State v. Ndina***, 2009 WI 21, ¶¶29-30, 315 Wis. 2d 653, 761 N.W.2d 612. Canon failed to litigate an ineffective assistance of trial counsel claim (because counsel failed to object to the correctional officer's testimony and trial counsel should not have let him testify). This claim had to be preserved via a circuit court postconviction motion. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). As Canon himself acknowledges, he also did not raise in the circuit court his claim that the State failed to disclose the victim's Facebook message. This issue is also forfeited.

Upon the foregoing reasons,

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.

Sheila T. Reiff
Clerk of Court of Appeals