

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 16, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 04-0642-CR
STATE OF WISCONSIN**

Cir. Ct. No. 02CF000776

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WAYNE K. ELWORTH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Wayne Elworth appeals a judgment, entered upon a jury's verdict, convicting him of three counts of intentionally retaining possession of moveable property of another, contrary to WIS. STAT.

§ 943.20(1)(a).¹ Elworth argues that the evidence at trial was insufficient to support his conviction. We reject Elworth’s arguments and affirm the judgment.

BACKGROUND

¶2 An Information charged Elworth with three counts of intentionally retaining possession of moveable property of another—specifically, two shotguns and a rifle stolen from James McKinzie’s house. After a trial, the jury returned verdicts finding Elworth guilty of the crimes charged.

DISCUSSION

¶3 Elworth argues that the evidence at trial was insufficient to support his conviction. Whether the evidence supporting a conviction is direct or circumstantial, we utilize the same standard of review regarding its sufficiency. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We must uphold Elworth’s conviction “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.” *Id.* If there is a possibility that the jury “could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt,” we must uphold the verdict. *Id.* at 507. It is the jury’s function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. *State v. Toy*, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). Thus, if more than one inference can be drawn from the evidence, this

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

court must follow the inference that supports the jury's finding "unless the evidence on which that inference is based is incredible as a matter of law." *Poellinger*, 153 Wis. 2d at 506-07.

¶4 Here, the trial court instructed the jury that in order to find Elworth guilty of the crimes charged, the State had to prove beyond a reasonable doubt that: (1) Elworth intentionally retained possession of moveable property of another; (2) the owner of the property did not consent to Elworth's retaining possession of the property; (3) Elworth knew the owner did not consent; (4) Elworth intended to permanently deprive the owner of possession of the property; and (5) the moveable property was a firearm. *See* WIS. STAT. § 943.20(1)(a); WIS JI—CRIMINAL 1441 (2002).

¶5 At trial, McKinzie testified that five guns were stolen from his residence, including a 12-gauge shotgun, a 16-gauge shotgun and a .22 caliber rifle. Frank Talaga testified that as part of a plea agreement, he helped the State recover firearms he stole from the McKinzie residence and a lawnmower he had stolen from another residence. Talaga testified that he sold the lawnmower and three of the five McKinzie firearms to one individual.

¶6 Although Talaga could not recall the individual's name and was unable to identify Elworth as the man to whom he sold the firearms, the State introduced a police report in which Talaga indicated that he sold the guns for approximately \$125 to a man named Wayne. Talaga did not dispute making the statement. He maintained, however: "I'm not saying I didn't sell them to this guy or I'm not saying I did sell them. I just don't remember this guy's face. I don't remember him." Talaga explained that every time he sold items to "this guy," it occurred during nighttime hours at the man's house. Talaga also testified that he

had stolen the lawnmower after talking to “a Wayne on the phone” who wanted a riding lawnmower for his wife.

¶7 Outagamie County Sheriff’s Department investigator James Kobiske testified that Talaga told officers he sold the three firearms to a man named Wayne who lived on Laird Road. Kobiske further testified that the guns and the lawnmower were seized in a subsequent search of Elworth’s property on Laird Road. Kobiske added that when he questioned Elworth regarding his possession of stolen property, Elworth responded that, as a “collector” who bought and sold various items, “he realized that a certain amount of these items were stolen.” Staff sergeant Corey Besaw testified that during a search of Elworth’s residence he overheard Elworth on the phone saying: “One of these guys that has been coming out here for the last year or so must have ratted me out to save their own hide.”

¶8 Elworth argues that the circumstances of the sale, in conjunction with Talaga’s inconsistent testimony, were insufficient to establish that Elworth knew the firearms were stolen. We are not persuaded. Although there were inconsistencies in Talaga’s testimony, this court has held that the existence of “glaring discrepancies” in a witness’s testimony at trial, does not, in itself, necessitate concluding as a matter of law that the witness is wholly incredible. *State v. Smith*, 2002 WI App 118, ¶20, 254 Wis. 2d 654, 648 N.W.2d 15.

¶9 The jury was entitled to believe that Talaga sold the stolen lawnmower and firearms to a man named “Wayne” on Laird Road. It is undisputed that the items were found at Elworth’s residence on Laird Road. Because the jury was also entitled to believe that Talaga stole the lawnmower at Elworth’s request, it could infer that Elworth knew the firearms he bought from Talaga were likewise stolen. Moreover, given the circumstances of the nighttime

transactions, Elworth's professed assumption that some of the items he bought were stolen, and his statement that someone he dealt with had "ratted him out," the jury could conclude that Elworth knew the firearms were stolen. Because we conclude that the jury heard sufficient evidence to support Elworth's conviction, we affirm the judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

