COURT OF APPEALS
DECISION
DATED AND FILED

February 13, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP367-CR **Cir. Ct. No. 2005CF485**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL D. SIMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: ANDREW T. GONRING, Judge. *Affirmed*.

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 SNYDER, J. After a two-day trial, a jury found Michael D. Sims guilty of second-degree recklessly endangering safety and being a felon in possession of a firearm. Sims appeals the judgment of conviction and the order denying his postconviction motion. We reject Sims' argument that the trial court's

grant of the jury's request during deliberations to send to the jury room two exhibits admitted at trial was error because the jury may have improperly experimented with the evidence to arrive at its guilty verdict. Assuming only for the sake of argument that the trial court's decision was an erroneous exercise of discretion, we conclude that it was harmless. We affirm.

Background

¶2 The State originally charged Sims with four crimes: Count 1, pointing a firearm at another; Count 2, second-degree reckless endangerment; Count 3, possession of a firearm by a felon; and Count 4, disorderly conduct. Counts 1 and 4 were dismissed on the State's motion at the outset of trial. The charges arose from the following events, as adduced through the trial testimony. Shortly after 4:00 a.m. on December 22, 2005, City of Hartford police responded to a report of gunshots inside an apartment. They found three unarmed men in a bedroom in the apartment: Sims, nicknamed "Wooskey," Kyle Brath and Scott Evans. A search of the bedroom yielded spent and live ammunition, lead fragments in the wall and mattress, and a black Winchester 1300 12-gauge shotgun with a Simmons scope. Brath and Evans told police that Sims arrived with the shotgun and, after arguing with Brath about drugs, pointed the gun at Brath and "shot a round off," missing him and hitting the bed instead. The police arrived shortly thereafter and Brath testified Sims put the gun beneath the mattress. Evans told police he saw Sims pull up the bed covers. Brath testified that he did not believe Sims meant to shoot him, but only "to let me know he wasn't playing." Brath also testified neither he nor Evans discharged the firearm.

¶3 Frank Pankava leases the apartment and rents a room to Brath. Pankava testified that he and his girlfriend, Corinne Nowicki, were awakened at

4:00 a.m. by arguing in Brath's room. One voice was Brath's; the other, not Evans', demanded the speaker's money and his "shit." After hearing a "very extremely loud bang," Pankava and Nowicki fled, on their way out encountering Evans, who said "Wooskey" had a gun in Brath's room. Pankava and Nowicki called 911 and reported that "there was a gun involved."

¶4 The police found a van registered to Sims parked outside the apartment. A consent search yielded a shotgun case containing a scope cover, a cleaning cloth, two loose red Federal magnum shotgun rounds, two Rottweil 12-gauge Brenneke magnum shells and a 7.62-millimeter rifle round cartridge. Sims said he owned the gun case in the van, but did not own a gun and had not shot a gun since he was nine years old. Sims told police he drove his van to Brath's apartment to scold Evans for not washing Sims' son's school clothes that he needed that morning. He told police he had arrived only minutes before they did and gunshots, if any, must have happened before he got there.

¶5 Officer Patrick Beine, an evidence technician, prepared a property inventory record of the evidence from Brath's room, including a spent Federal brand rifled slug, several Rottweil Brenneke magnum shells and lead fragments from the spent slug, some containing cloth snags. Reginald Timplin, a state crime lab examiner, testified that he determined that the spent shell had been shot from the recovered shotgun, which also can fire the other type of shell. Timplin also testified that the ammunition found in Brath's room were of the same manufacturer, gauge and type as the rifled slugs in the gun case.

¶6 Detective Randall Abbott testified that the shotgun was found with two more rounds in the magazine and a round chambered, all Rottweils. One of the Federal slugs in the gun case seemed to Abbott to be the "same gauge, same

length … and … a slug, not shot, which was very, to me, identical" to the Federal casing found in the apartment. Abbott testified that he interviewed Sims, who said the fact that the ammunition in his gun case matched that at the crime scene was purely a coincidence. Abbott said when he then asked Sims "why he even had the ammunition," Sims told him it "came with the gun," then later insisted that he did not say it came with the gun, but came with the case.

¶7 The jury also heard evidence undermining the State's case. For instance, one rifle shell found in the gun case cannot be shot through the shotgun found in the bedroom, and Detective Abbott could not say the gun and the case definitely were linked. Also, a state crime lab analyst did not find Sims' fingerprints on the shotgun.

¶8 The gun with its attached scope and the gun case and its contents, including a scope cover, were admitted into evidence. The State did not demonstrate to the jury or produce evidence that the scope cover in the gun case fit the scope attached to the gun. As the State asserted in its closing argument, Sims admitted owning the gun case, "everything … in that gun case matches this gun," "[e]verything with this gun matches what is in that gun case" and "[Sims] is what ties the gun case and the gun together … [W]e don't have to prove ownership of the gun, just that he possessed it." Sims did not testify or offer any evidence. A witness defense counsel said in his opening statement would testify that Sims did not have a weapon when he exited his van failed to appear.

¶9 During deliberations the jury submitted requests for certain items, including Detective Abbott's crime scene sketch, police notes of the interview

with Evans, and the "scope cap, scope and gun case all together."[1] The issue Sims raises on appeal arose from its request to view the latter items, which the court said it had "no problem" sending in. This colloquy ensued:

> MR. SCHMAUS [defense counsel]: You know, I guess my only objection … is that … by giving them that, it was never, you know, the caps that are in there. There was never any testimony from anybody, any of the detectives or anyone else, about that particular thing fitting the scope that's on that gun, and, frankly, we are giving them, at this point in time, the ability to take that cap and do some investigation work basically on their own that wasn't presented during the trial.
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> THE COURT: Which is exactly why they want it.
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> MR. SCHMAUS: I know.
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> THE COURT: But I think they are entitled to it, and I'm surprised that no one, during the course of the trial or closing arguments, made the connection between those scope caps and the scope and whether they fit or not. I don't know whether they fit or not, but that is evidence that—that has been introduced during the trial and I have no problem with giving them that. If that's what they do with it, that's what they do with it.
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> MR. SCHMAUS: And that would be my objection. It wasn't tied in during the trial, and by doing this, they are basically getting to do their own investigation work. I don't think it's the appropriate thing to do once deliberations are started.
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> THE COURT: I don't think it's inappropriate. All that has been introduced into … evidence. If they want to put some connection between various pieces of the evidence to another piece of evidence properly admitted, I think they can do that.

[1] The jury also apparently requested clarification of the word "aware" from the jury instruction on reckless endangerment. *See* WIS JI-CRIMINAL 1347.

¶10 The court permitted the shotgun with its attached scope and the gun case containing scope caps to go to the jury room.[2] The jury found Sims guilty of both second-degree reckless endangerment and possession of a firearm by a felon. He was sentenced to two concurrent bifurcated sentences of three years' confinement and four years' extended supervision. The court denied Sims' motion for postconviction relief on grounds that the exhibits had been admitted without objection, that it was speculation as to why the jury wanted the exhibits or what they did with them and, if error, it was harmless because the other evidence against Sims was "overwhelming." Sims appeals.

Discussion

¶11 Sims challenges the trial court's decision to permit the gun and gun case to go to the jury room. He argues that sending the items to the jury room in essence generated new off-the-record evidence, thereby violating his constitutional rights to be present at trial and to have the assistance of counsel. He also contends that the State could not prove beyond a reasonable doubt that sending the items to the jury room did not contribute to the guilty verdicts.

¶12 Whether an exhibit should be sent to the jury room during deliberations is a discretionary decision for the trial court. ***State v. Anderson***, 2006 WI 77, ¶27, 291 Wis. 2d 673, 717 N.W.2d 74. A court properly exercises its discretion when it employs a process of reasoning which depends on facts that either are in the record or are reasonably derived by inference from the record, and which yield a conclusion based on logic and proper legal standards. ***State v.***

[2] The jury did not request the shotgun but, since the scope was attached to the gun, the trial court opted not to dismantle a piece of evidence.

Hines, 173 Wis. 2d 850, 858, 496 N.W.2d 720 (Ct. App. 1993). We will not reverse a discretionary decision if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision. ***Id.***

¶13 Factors the court should consider include whether sending an exhibit into the jury room: (1) will help the jury properly consider the case; (2) will unduly prejudice one of the parties; and (3) could result in the jury subjecting the exhibit to improper use. *See* ***Anderson***, 291 Wis. 2d 673, ¶27; *see also* ***State v. Jensen***, 147 Wis. 2d 240, 260, 432 N.W.2d 913 (1988). The court observed that the exhibits had been admitted into evidence and stated that it saw no problem with the jury "put[ting] some connection between various pieces of the evidence to another piece of evidence."

¶14 Exhibits may be sent to the jury room so that the jury "may test the validity of the inferences for which such items of evidence are offered, by examining them, and by such reasonable manipulation or experimentation as is appropriate for the purpose." ***Robinson v. State***, 52 Wis. 2d 478, 483-84, 190 N.W.2d 193 (1971); *see also* ***Taylor v. REO Motors, Inc.***, 275 F.2d 699, 706 (10th Cir. 1960). Sims argues, however, that while exhibits already before the jury may be sent to the jury room to test the validity of testimony given in respect to them, here none addressed whether the scope caps fit the scope, nor did the trial court examine the three factors.

¶15 The State asserts that we should uphold the court's decision because it completely, if indirectly, evaluated the necessary factors. At the postconviction motion hearing, the trial court again defended its decision about permitting the exhibits to go to the jury room because they had been "thoroughly discussed and handled in front of the jury and admitted without objection." Nonetheless, it

stated that even assuming an erroneous exercise of discretion, the error was harmless to Sims because the other evidence against him was "overwhelming." We will proceed with our review in the same manner, assuming solely for argument's sake that the trial court erroneously exercised its discretion.

¶16 A trial court's error in sending an exhibit to the jury room during deliberations is subject to a harmless error test. ***Anderson***, 291 Wis. 2d 673, ¶27. An error is harmless if the beneficiary of it, here the State, proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *See* ***State v. Mayo***, 2007 WI 78, ¶47, 301 Wis. 2d 642, 734 N.W.2d 115 (citations omitted). We review a trial court's own harmless-error conclusion de novo. *See* ***State v. Keith***, 216 Wis. 2d 61, 69, 573 N.W.2d 888 (Ct. App. 1997).

¶17 Several factors play into a harmless error analysis: the frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence, the nature of the defense, the nature of the State's case, and the overall strength of the State's case. ***Mayo***, 301 Wis. 2d 642, ¶48. We conclude that the strength of the untainted evidence is, as the trial court said, overwhelming and the State has shown beyond a reasonable doubt that any manipulation of the evidence did not contribute to the guilty verdict.

¶18 The first factor is the frequency of the error. Here, the alleged error—sending the exhibits to the jury room—occurred once. If we further assume that the jury tried to fit the gun in the case and the cap on the scope, that, too, presumably occurred but once; the items either fit or did not. And further supposing everything fit, the importance of this evidence in the full picture—the

second criterion—is far less than Sims urges. As the trial court noted at the hearing on the postconviction motion, there existed so much evidence of Sims' guilt that the scope caps played only a minor role.

¶19 That is because the third criterion, the existence of contradictory or corroborating evidence, weighs heavily against Sims, thus diluting the impact of any jury room experimentation that may have occurred. The jury heard a plethora of testimony from Brath, Evans, Pankava, Nowicki and various police officers that pointed to Sims possessing a weapon and recklessly endangering Brath's safety. From that combined testimony, the jury heard that Sims arrived with a gun which he fired at Brath and shoved under the mattress, where the police later found it. It heard that Evans told a police officer that Sims fired the shot, that Pankava and Nowicki heard arguing and what sounded like a gunshot, and that Evans told Pankava that Sims had a gun.

¶20 The jury also heard that Sims admitted owning the gun case and the van, and driving the van to Brath's. The jury heard that the gun case contained ammunition identical to that recovered at the scene and compatible with that required to shoot the recovered weapon, and that the shotgun found under Brath's mattress fired the spent shell recovered in Brath's room. They heard a state crime lab analyst testify that pushing the gun between the mattress and box spring could have obliterated fingerprints.

¶21 The fourth factor is whether the erroneously admitted evidence duplicates untainted evidence. Here it does, to a degree. The challenged exhibits were properly admitted without objection. And while it is true that no one demonstrated or testified as to whether the items fit each other, this factor alone—even if we were somehow to deem it favorable to the defendant—does not auger

for a holding that the error was not harmless. The factor must be balanced against the other factors.

¶22 The nature of the defense, the fifth factor, was that Sims did not possess a firearm and therefore did not recklessly endanger anyone. He argued at trial that the credibility of many of the witnesses was suspect, that the police testimony in large part was "like a supporting cast" offering not even circumstantial evidence about the elements of the offenses, and that the shotgun did not bear Sims' fingerprints. Thus, the jury was called upon to assess the testimony it did hear and determine whether his Sims' defense held water. It is for the jury, not this court, to balance the witnesses' credibility and to decide upon weight to give their testimony. ***State v. Nelson***, 2006 WI App 124, ¶52, 294 Wis. 2d 578, 718 N.W.2d 168, *review denied*, 2006 WI 113, 296 Wis. 2d 63, 721 N.W.2d 486. It may accept or reject any part or all of a witness's testimony. *See* ***State v. McAllister***, 153 Wis. 2d 523, 533, 451 N.W.2d 764 (Ct. App. 1989). The fifth factor also favors the State.

¶23 Criterion six, the nature of the State's case, likewise weighs in the State's favor. Sims was charged with possession of a firearm by a felon, contrary to WIS. STAT. § 941.29(2) (2005-06). The statute creates a possession offense; it does not require ownership. ***State v. Loukota***, 180 Wis. 2d 191, 200, 508 N.W.2d 896 (Ct. App. 1993). Therefore, the State had to show only that Sims was a felon and that he "possessed" the firearm with knowledge that it is a firearm. *See* ***State v. Black***, 2001 WI 31, ¶19, 242 Wis. 2d 126, 624 N.W.2d 363. As the jury was instructed, to "possess" means that Sims knowingly had actual physical control of a firearm. *See* WIS JI - CRIMINAL 1343 (1997). The record is replete with evidence that at the date and time of the alleged offense, Sims possessed a firearm

within the meaning of the statute. Likewise, it is devoid of evidence that anyone else possessed one.

¶24 The last factor is the overall strength of the State's case. Direct evidence in the form of Brath's testimony placed a black shotgun in Sims' hands, had Sims firing it at Brath, the slug hitting the mattress, and Sims putting the weapon beneath the mattress as the police arrived. Abbott also testified that Evans told him that Sims fired the shot. The jury heard about slug fragments in Brath's bedroom wall, some with cloth fragments on them, slug holes in the comforter, and elongated exit holes in the mattress suggesting a trajectory compatible with the angle at which Brath and Evans said Sims had fired the gun. It also heard that Sims claimed to have gone to Brath's to confront Evans about doing laundry and that he denied shooting a gun since he was a child.

¶25 Other evidence that Sims had a shotgun in his possession, while largely circumstantial, is hardly insubstantial, and it is not in dispute. All accounts place the time of the incident at about 4 a.m. On their arrival, the police found only Brath, Evans and Sims. The weapon found under Brath's mattress was a black shotgun. The spent ammunition came from that shotgun and ammunition still in the gun or elsewhere in the room matched that found in the gun case. Pankava and Nowicki testified that they were awakened by someone arguing with Brath about drugs, fled after hearing what they thought was a gunshot, and Evans told them somebody, or "Wooskey," was inside with a gun. With or without any experimentation in the jury room, the jury easily could have concluded beyond a reasonable doubt that Sims was in possession of a firearm and recklessly endangered Brath with it. We affirm.

By the Court.—Judgment and order affirmed.

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