COURT OF APPEALS
DECISION
DATED AND FILED

April 19, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2009AP2444 **Cir. Ct. No. 2007CF5497**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN DEANGELO JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Blanchard, JJ.

¶1 PER CURIAM. Steven Johnson appeals an order that denied his motion for postconviction relief from convictions for first-degree recklessly endangering safety, possession of a firearm by a felon, endangering safety by reckless use of a firearm, and carrying a concealed weapon. Johnson raises the

following issues on appeal:[1] (1) the possession-of-a-firearm-by-a-felon statute is unconstitutionally overbroad; (2) the endangering-safety-by-reckless-use-of-a-firearm statute is unconstitutionally vague; (3) Johnson was denied the right to the attorney of his choice at the preliminary hearing; (4) Johnson was denied his right to self-representation at trial; (5) counsel was not authorized to stipulate as to Johnson's identity in a photograph; (6) evidence seized following Johnson's warrantless arrest should have been suppressed; (7) the State produced perjured testimony and withheld exculpatory evidence at trial; (8) Johnson did not knowingly and voluntarily enter into a stipulation as to his prior felony conviction; (9) there was insufficient evidence to show that Johnson "went armed" on the charge of carrying a concealed weapon; (10) evidence of Johnson's prior felony conviction should have been "foreclosed"; (11) there was insufficient evidence to establish the prior felony conviction, possession, or identity elements on the charge of possession of a firearm by a felon; (12) there was insufficient evidence to show that Johnson discharged a weapon "into" a vehicle on the charge of reckless endangerment; and (13) Johnson is entitled to damages against the appellate judges on the court that denied his writ of habeas corpus immediately following his conviction. For the reasons discussed below, we reject each of Johnson's contentions and affirm the decision of the circuit court.

BACKGROUND

¶2 The charges were based upon allegations that Johnson engaged in a gun battle with Willie Brown, his ex-girlfriend's brother-in-law, in the parking lot

[1] We have reorganized several of Johnson's arguments in what we consider to be a more logical order than that presented in the brief so that we may discuss related issues together.

of a Family Dollar Store, and then fired a shot into a car at Brown's wife, Lynette. We will set forth additional facts relevant to each issue as necessary in our discussion below.

STANDARD OF REVIEW

¶3 In order to obtain a hearing on a postconviction motion, a defendant must allege sufficient material facts to entitle him to the relief sought. *See* ***State v. Allen***, 2004 WI 106, ¶¶9, 36, 274 Wis. 2d 568, 682 N.W.2d 433. We review the sufficiency of a postconviction motion de novo, based on the four corners of the motion. ***Id.***, ¶¶9, 27.

DISCUSSION

¶4 As a threshold matter, we note that Johnson's brief on appeal fails to develop cogent arguments applying relevant legal authority to the facts of record on many of his issues and instead relies largely upon conclusory assertions to support his case. "A party must do more than simply toss a bunch of concepts into the air with the hope that either the trial court or the opposing party will arrange them into viable and fact-supported legal theories." ***State v. Jackson***, 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999). Therefore, this court need not consider arguments that are undeveloped or unsupported by references to relevant legal authority and record citations. *See* WIS. STAT. RULE 809.19(1)(d) & (e) (2009-10)[2] (setting forth the requirements for briefs); ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992); ***Gorthe v. Valley Coatings, Inc.***, 2000

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463. Although we could refuse to address many of Johnson's claims based upon the deficiencies of his brief alone, we will briefly explain why each of his issues is without merit. The depth of our discussion corresponds to Johnson's development—or lack of development—of each issue.

Constitutionality of Offense Statutes

¶5 Johnson contends that WIS. STAT. § 941.29—the statute prohibiting a convicted felon from possessing a firearm—is unconstitutionally overbroad because it "has no termination mechanism" requiring the state to prove that the predicate felony conviction had not been reversed. "The overbreadth doctrine applies when the language of a statute, given its normal meaning, is so broad that the sanctions of the statute may apply to conduct which the state is not entitled to regulate, such as First Amendment activity." ***National Motorists Ass'n v. Office of Comm'r of Ins.***, 2002 WI App 308, ¶33, 259 Wis. 2d 240, 655 N.W.2d 179 (citation omitted). Johnson has not developed any argument that persuades us that the language of § 941.29 would actually apply to subsequently reversed felony convictions.

¶6 Johnson argues that WIS. STAT. § 941.20(2)(a)—the statute prohibiting endangering safety by reckless use of a firearm—is unconstitutionally vague because the phrase "under circumstances in which he or she should realize there might be a human being present" turns the offense into a guessing game. "The test of vagueness of a penal statute is whether it gives reasonable notice of the prohibited conduct to those who would avoid its penalties" and is not "so obscure that persons of common intelligence must necessarily guess at its meaning and differ as to its applicability." ***State v. Tronca***, 84 Wis. 2d 68, 86,

267 N.W.2d 216 (1978) (citations omitted). The vagueness doctrine must be applied to the actual conduct charged, rather than hypothetical situations. ***Id.***

¶7 Here, Johnson was charged with endangering safety by reckless use of a firearm based upon allegations that he demanded that Lynette Brown exit a vehicle and then, when she refused, shot at her through the car door. Those circumstances could leave no doubt as to whether Johnson realized there was a person present in the vehicle. Therefore, the statute was not unconstitutionally vague as applied to Johnson.

Representation

¶8 Johnson complains that the circuit court failed to honor his assertion at the preliminary hearing that he wanted to retain an attorney of his own choosing and his subsequent request at a pretrial hearing that he wanted to represent himself at trial. We disagree with his characterization of the circuit court's actions.

¶9 The federal and state constitutions protect both a defendant's right to counsel and a defendant's right to self-representation. U.S. CONST. amend. VI; WIS. CONST. art. I, § 7; ***Faretta v. California***, 422 U.S. 806, 818-21 (1975); ***State v. Klessig***, 211 Wis. 2d 194, 201-03, 564 N.W.2d 716 (1997). It is well established that the right to counsel attaches automatically and remains in effect throughout a criminal proceeding unless it is affirmatively waived in a knowing, voluntary, and intelligent manner by a defendant who is competent to do so. ***Klessig***, 211 Wis. 2d at 203-04. As a logical corollary to that rule, the right to self-representation must be "clearly and unequivocally" invoked. *See* ***Faretta***, 422 U.S. at 835.

¶10 At the preliminary hearing, the court did not bar Johnson from discharging appointed counsel and retaining private counsel; it merely refused to postpone the hearing while Johnson attempted to find a new attorney. If Johnson had the financial ability to retain counsel, his new attorney could have appeared on his behalf at any time, including at the preliminary hearing. Similarly, the court did not bar Johnson from representing himself at trial. After Johnson expressed interest in firing his attorney on the morning of trial so he could file his own pro se motions, the court explained to him why counsel was in the best position to evaluate the legal merit of the motions. Johnson did not thereafter knowingly and voluntary waive his right to counsel or clearly and unambiguously invoke his right of self-representation.

Stipulation on Identity

¶11 Johnson refused to appear before the jury and instead spent most of the trial in another room adjoining the courtroom. As a result, the State asked witnesses to identify the defendant based upon a photograph, Exhibit 14. When the State began laying a foundation as to how the photograph was obtained, the court interrupted and asked whether the defense would stipulate that it was a photograph of Johnson. Defense counsel agreed to the stipulation without consulting Johnson, who was not in the courtroom.

¶12 Johnson contends that counsel's stipulation was unauthorized and deprived him of due process because Johnson did not agree to have defense counsel represent him at trial. As we have explained above, however, the record does not demonstrate a valid waiver of counsel. Therefore, defense counsel was authorized to act on Johnson's behalf, and Johnson has not presented any authority to show that it was outside of counsel's authority to stipulate that Exhibit 14 was,

in fact, a photograph of Johnson. Moreover, he has presented no reason to believe that the State would not have been able to establish a foundation for the photograph absent the stipulation.

Suppression

¶13 A police officer chased Johnson from the scene of the shooting and found him hiding behind a dumpster in an alley. Another officer searched the dumpster and found a gun that was introduced into evidence as having been the weapon used in the shooting.

¶14 Johnson contends that the gun should have been suppressed because it was not within Johnson's reach when he was arrested and therefore was not seized pursuant to a valid search "incident to arrest." However, Johnson did not have any Fourth Amendment expectation of privacy in the dumpster. *See* ***State v. Sigarroa***, 2004 WI App 16, ¶22, 269 Wis. 2d 234, 674 N.W.2d 894. Therefore, police did not need a warrant or any other special justification for the search. They were free to search or canvas the area near the shooting and in the direction the shooter fled.

¶15 Johnson also challenges the admission of a surveillance video of the shooting and the testimony of Willie Brown identifying Johnson as the shooter in the video. He argues that the video and Brown's initial statement to police are "fruit of the poisonous tree" because they were obtained after the police arrested Johnson without probable cause. Aside from Johnson's failure to adequately develop an argument as to why the police lacked probable cause to arrest him after chasing him directly from the scene of the shooting, he has failed to even address why the evidence would not still have been admissible under the inevitable discovery doctrine. *See* ***State v. Lopez***, 207 Wis. 2d 413, 427-28, 559 N.W.2d 264

(Ct. App. 1996) (citations omitted). In the normal course of responding to and investigating the shooting, the police would certainly have spoken with the victim and requested surveillance video.

¶16 Finally, Johnson argues that Brown's identification of him was "impermissibly suggestive" or coercive because Brown was himself in custody and had not been Mirandized when he gave his statement to police. This argument is not persuasive because Brown was not attempting to identify a stranger from a lineup. He was telling police that he knew the shooter based on prior familiarity with Johnson.

Prosecutorial Misconduct

¶17 Johnson asserts that the State produced perjured testimony and withheld exculpatory evidence at trial, particularly with respect to what the State offered one of the witnesses for his testimony. Johnson improperly incorporates by reference portions of his postconviction motion, rather than developing arguments on these points in his brief. Even looking at his motion, his arguments boil down to conclusory assertions that various witnesses lied and the State knew it or should have known it.

Prior Felony Conviction

¶18 Johnson entered into a stipulation that he was a convicted felon in order to preclude the State from presenting more detailed evidence as to the nature of his felony convictions. *See* ***State v. McAllister***, 153 Wis. 2d 523, 451 N.W.2d 764 (Ct. App. 1989). Johnson contends that counsel failed to explain to him that his stipulation that he had a prior felony conviction would act as a de facto guilty plea on the first element of the charge of possession of a firearm by a

felon. Therefore, Johnson asserts, his stipulation was not knowingly, voluntarily, and intelligently entered. However, the record plainly shows that the court directly advised Johnson that his stipulation would relieve the State of the burden of proving that he had a prior felony conviction.

Sufficiency of the Evidence

¶19 When reviewing the sufficiency of the evidence to support a conviction, this court will sustain the verdict "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." ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (citation omitted). The credibility of the witnesses and weight to be given to their testimony are for the jury to determine and are not subject to appellate review. ***Hoffman v. Wisconsin Elec. Power Co.***, 2003 WI 64, ¶9, 262 Wis. 2d 264, 664 N.W.2d 55. Thus, we will sustain a verdict that is supported by any credible evidence, even if we might consider contradictory evidence to be more persuasive. ***Richards v. Mendivil***, 200 Wis. 2d 665, 670-72, 548 N.W.2d 85 (Ct. App. 1996). Our review includes even evidence that may have been erroneously admitted. ***Lockhart v. Nelson***, 488 U.S. 33, 41 (1988).

¶20 Johnson argues that the evidence was insufficient to show that he "went armed," as necessary to prove the charge of carrying a concealed weapon, because he did not have a weapon on his person or within his reach when he was arrested. However, the charge did not allege or require proof of possession at the time of arrest. Rather, the charge was based upon the testimony of the victims about the incident at the Family Dollar Store. The Browns testified that, following an altercation inside the store, Johnson told them that he had something for them.

Johnson then left the store, went to his car, and came toward the Browns' car pointing a gun at them. The Browns' account was corroborated by surveillance video showing that Johnson produced a gun in the parking lot that had not been visible when he was in the store moments before. The only reasonable inferences from the testimony and video are that Johnson "went armed" with a gun he had been concealing on his person or in his car.

¶21 Johnson argues that the State should have been foreclosed from presenting evidence of his prior felony conviction "under double jeopardy principals of collateral estoppel" because the State failed to show that Johnson's predicate felony conviction had not been reversed.[3] From that premise, Johnson further argues that there was insufficient evidence to establish the felony conviction element of the charge of possession of a firearm by a felon.

¶22 We have already rejected Johnson's contention that the statute is unconstitutionally overbroad because it does not specify that the predicate felony conviction has not been reversed. In other words, there was no requirement that the State put on evidence that Johnson's predicate conviction had not been reversed. In any event, Johnson's stipulation relieved the State from having to prove the felony conviction element, including whether any such conviction had been reversed.

¶23 Johnson next contends that there was insufficient evidence to establish the possession element of the firearm possession count because he did

[3] The State points out that there is nothing in the docket entries to indicate that any of Johnson's prior convictions were reversed, although he challenged them on appeal and by writ. It appears that Johnson may be trying to use the dismissal of repeater allegations as a basis to argue there was insufficient proof of prior convictions.

not have a weapon on his person or within his reach when he was arrested, and because he believes there was an insufficient link between the gun recovered from the dumpster where Johnson was found hiding and the gun used in the incident. Again, however, the surveillance video and the Browns' testimony was sufficient in and of itself to establish that Johnson had possessed a firearm. Although the State also produced into evidence the gun police believed Johnson had possessed, there was no actual requirement that they do so; and the strength of the evidence linking the recovered gun to the offense was for the jury to determine.

¶24 Johnson also argues that the Browns' identification of him was insufficient because the State did not present testimony from Lynette Brown's sister to verify that she was Johnson's ex-girlfriend and had children with him. Again, there was no requirement that the State do so. The jury was entitled to judge the Browns' credibility based on their demeanor while testifying.

¶25 Johnson argues that the evidence was insufficient to show that he discharged a weapon "into" the Browns' car on the charge of endangering safety by use of a firearm because the State did not introduce any photograph showing that there was a bullet hole in the car. There is no requirement that the State introduce photographs to meet its burden of proof, however. A victim testified that the bullet put a hole through a door of the car and cracked the windshield. One of the investigating detectives testified that he observed a bullet hole in the front passenger door and a fired bullet lying on the dashboard.

Refusal of Writ

¶26 Finally, Johnson contends that he is entitled to damages against the appellate judges on the court that denied his writ of habeas corpus. WISCONSIN STAT. § 782.09 provides that "[a]ny judge who refuses to grant a writ of habeas

corpus, when legally applied for, is liable to the prisoner in the sum of $1,000." Aside from the fact that the proper mechanism for seeking such damages would appear to be by a civil lawsuit, not a motion filed in a criminal case, Johnson has not shown that his writ petition was "legally applied for." As noted in the decision, Johnson had improperly attempted to use habeas corpus as a substitute for a direct appeal.

By the Court.—Order affirmed.

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