COURT OF APPEALS
DECISION
DATED AND FILED

February 22, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP188-CR **Cir. Ct. No. 2009CF1045**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM C. BUNCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: CHARLES H. CONSTANTINE, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. William C. Bunch appeals a judgment convicting him of possession of a firearm by a felon. The trial court denied Bunch's motion to suppress the gun found in his car during a traffic stop, ruling that the plain-view

exception justified its seizure. Bunch argues that the trial court made insufficient factual findings and that it applied an incorrect legal standard in determining witness credibility. We reject his arguments and affirm.

¶2 City of Racine police officers Ted Batwinski and Thomas Riegelman executed a traffic stop of a vehicle after observing that the two occupants were not wearing seatbelts. Bunch was the driver; his passenger was Shawntea Hudson. Batwinski ran checks on the two men and found that Bunch's driver's license was revoked and Hudson had a warrant out for his arrest.

¶3 By this time two back-up officers had arrived. Batwinski reapproached Bunch, and Riegelman and another officer removed Hudson from the car and placed him in custody. Batwinski testified that, as the officers removed Hudson from the vehicle, Bunch also moved, shifting almost out of his seat, allowing Batwinski to see the handle of a handgun protruding from the front of the seat. He directed Bunch to exit the vehicle and move to the rear of the car, where he patted Bunch down for "further contraband." Batwinski then returned to the vehicle and entered the passenger side because it was out of traffic and he already knew the gun was on the driver's side. After searching the interior, he told the other officers about the gun for the first time.

¶4 The State charged Bunch with possession of a firearm by a felon, due to a prior robbery conviction, and with receiving stolen property, since the gun turned out to be stolen. Bunch moved to suppress the evidence from the warrantless search of the vehicle based on ***Arizona v. Gant***, 556 U.S. 332 (2009).

The State contended that ***Gant*** did not apply because the seizure of the gun was permitted under the plain-view doctrine.[1]

¶5 At the suppression hearing, Batwinski testified that Bunch appeared "extremely nervous" during the stop and had his legs clenched tightly together, causing Batwinski to suspect he might be concealing something. Batwinski recounted how he saw the handle of the gun when Bunch twisted in his seat, and that he directed Bunch to exit the vehicle, conducted a pat-search and, without handcuffing Bunch, returned to the vehicle to search it. Batwinski admitted that it was "an oversight" not to handcuff Bunch. He also explained that he initially did not tell the other officers that he had seen a gun because he "didn't want to spark an incident that didn't need to happen," and because the back-up officers were new and he did not know how they would respond if he called out the numeric police code for "man with a gun."

¶6 Defense counsel attempted to undermine Batwinski's claim that he had seen the gun before Bunch exited the car. Batwinski conceded on cross-examination that, in another "oversight," he left the driver's door open with Bunch uncuffed at the rear of the car, leaving no one between Bunch and the open door. Because Batwinski entered the car from the passenger side, both front doors were open, which he admitted was "another mistake." Riegelman, who also testified, agreed that Batwinski had probable cause to arrest Bunch after viewing the gun and that at that point it is "normal practice" to put the person in handcuffs.

[1] Under ***Gant***, police may search a vehicle incident to the arrest of an occupant "only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." ***Arizona v. Gant***, 556 U.S. 332, 351 (2009). The trial court did not decide the suppression motion based on ***Gant*** and Bunch does not argue ***Gant*** on appeal.

¶7 The trial court viewed the DVD made from the police-car video of the traffic stop. The DVD had no audio. The court acknowledged that the DVD corroborated the defense claim—and Batwinski's concessions—that some breaches of protocol occurred. The court also agreed that it was "difficult … to believe that if you find a gun in the car, you're not going to alert your other officers there's a gun in the car," and that it was "not sure [it was] buying" Batwinski's explanation. Nonetheless, while "procedurally, this was not a perfect stop and not a perfect search," the court concluded that Batwinski's testimony was sufficiently credible to find that the gun was in plain view, and declined to suppress the evidence.

¶8 Bunch pled no contest to the felon-in-possession charge. The receiving-stolen-property charge and the separate charge for operating after revocation flowing from the traffic stop were dismissed. This appeal followed.

¶9 When we review a trial court's ruling on a motion to suppress evidence, we apply the clearly erroneous standard to the court's findings of fact. ***State v. Vorburger***, 2002 WI 105, ¶32, 255 Wis. 2d 537, 648 N.W.2d 829. Where the evidence consists of disputed testimony and video recordings, we also apply the clearly erroneous standard to the trial court's findings based on the recording. ***State v. Walli***, 2011 WI App 86, ¶17, 334 Wis. 2d 402, 799 N.W.2d 898. We review de novo, however, the court's application of constitutional principles to its findings. ***Vorburger***, 255 Wis. 2d 537, ¶32.

¶10 The plain-view doctrine applies if: (1) the evidence is in plain view; (2) the officer is justified in being in the position from which the evidence is discovered in plain view; and (3) the evidence in itself or coupled with facts known to the officer at the time of the seizure provides probable cause to believe

there is a connection between the evidence and criminal activity. ***State v. Guy***, 172 Wis. 2d 86, 101-02, 492 N.W.2d 311 (1992). Bunch argues that the trial court failed to make two critical findings: that the gun was in plain view and that Batwinski was lawfully in a position to observe it.

¶11 The traffic stop occurred about 11:30 p.m. The court found that the gun was "in a location that could be observed with a flashlight; ergo, it could be in plain view." Bunch complains that the finding that the gun could be observed with a flashlight is clearly erroneous because there was no testimony that a flashlight was used, and so is without support in the record. He also argues that a finding that the gun *could* be in plain view is not a finding that it *was* in plain view, nor is it a finding that Batwinski observed the gun when it was in plain view or that he was legally in a position to observe it.

¶12 We disagree. We conclude that the court simply was speaking in the context of plain-view case law. The gun was not in the trunk or in a closed duffle bag or in the glove box. Rather, it was in a location that "could be"—not was, but could be—observed with a flashlight. We read the court's remark more as a comment on the gun's location than on the use of a flashlight. The gun's location put it in plain view. The finding is not clearly erroneous.

¶13 Further, Bunch's argument that "could be" falls too far short of "was" is hypertechnical. We read the court's phrasing as a finding that, if it accepted Batwinski's testimony, the gun "could be in plain view." On that finding, the court could deny the suppression motion. Denying the motion necessarily, therefore, carries with it an implied finding that Batwinski's testimony was sufficiently credible to believe the gun was in plain view. *See* ***State v. Echols***, 175 Wis. 2d 653, 673, 499 N.W.2d 631 (1993). "When a trial court does not

expressly make a finding necessary to support its legal conclusion, an appellate court can assume that the trial court made the finding in the way that supports its decision." ***Id.*** (citations omitted). We defer to a trial court's implicit credibility findings, just as we do to those that are explicit. *See* ***Jacobson v. American Tool Cos., Inc.***, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998).

¶14 Bunch also claims that the court failed to specifically find that Batwinski was justified in being in a position to see the gun. Bunch does not contend that there was no weapon or that it was planted. Therefore, Batwinski had to see the gun either from the outside of the car, as he testified, or as he searched inside. Despite being "a little bit troubled" by some of the testimony, the court found Batwinski credible overall.

¶15 We say again what we have said many times: this court does not resolve questions as to the weight of testimony or the credibility of witnesses. *See* ***Johnson v. Merta***, 95 Wis. 2d 141, 151, 289 N.W.2d 813 (1980). So even in a case such as this, where more than one reasonable inference can be drawn from credible evidence, we will not disturb the trier of fact's determination. *See* ***id.*** We operate largely from a paper record. The trial court, by contrast, has "the superior opportunity … to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony," a fact that justifies our deference to the trial court's credibility determinations. ***Id.*** at 151-52 (citation omitted). With those principles in mind, we find no reason here to disturb the trial court's determination resolving factual discrepancies in favor of Batwinski's account. The court at least implicitly found it sufficiently credible that Batwinski was outside the car on a routine traffic stop when he spotted the gun in plain view. As such, he was justified in being there.

¶16 Finally, Bunch asks that we remand to the trial court even if we rule as we just have. He asserts that the court judged Batwinski's credibility by the wrong legal standard and should be directed to assess it by the proper one. Upon a close reading of the trial court's statement, we decline Bunch's request.

¶17 The trial court observed that the only way it could make a finding that the weapon was not in plain view would be to make a finding that Batwinski's testimony "in toto was not credible," or that he "totally fabricated everything." We agree with Bunch that Wisconsin law permits a trier of fact to choose to believe some parts of a witness' testimony and to disbelieve others. *See* ***Nabbefeld v. State***, 83 Wis. 2d 515, 529, 266 N.W.2d 292 (1978). We agree with the State, however, that to find incredible or fabricated that Batwinski saw the gun when Bunch shifted about on the front seat almost would have required that the court find the remainder of his testimony incredible or fabricated.

¶18 Directing Bunch to get out of the car for a pat-down for "further contraband," entering the car from the passenger side partly for safety, partly because he already knew the gun was on the driver's side, deciding not to call out the man-with-a-gun code so as not to inflame the scene—none of this testimony would have made sense if the court disbelieved that Batwinski saw the gun at the outset of the stop. The court's comment might have been more artfully stated, but we do not read it either as a misstatement or a misunderstanding of the law.

By the Court.—Judgment affirmed.

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