COURT OF APPEALS
DECISION
DATED AND FILED

October 14, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2999-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DEREK A. HINTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: VICTOR MANIAN AND MICHAEL J. BARRON, Judges.[1] *Affirmed.*

Before Fine, Schudson and Curley, JJ.

[1] The Honorable Victor Manian presided over the jury trial and issued the judgment of conviction. The Honorable Michael J. Barron issued the order denying the motion for a new trial.

PER CURIAM. Derek A. Hinton appeals from a judgment of conviction entered after a jury found him guilty of possession of burglarious tools, contrary to § 943.12, STATS. Hinton also appeals from an order denying his motion for a new trial based on newly discovered evidence. Hinton claims that: (1) the trial court erred by denying his motion for a new trial; (2) the evidence was insufficient to support his conviction; and (3) the court ordered restitution was not sufficiently related to the charged offense. We disagree and affirm.

I. BACKGROUND.

On October 16, 1995, Andrew C. Nealey, who lived at 3021 North 28th Street, in the city of Milwaukee, received a phone call from a neighbor who stated that "some guy" was standing in front of Nealey's garage door. Shortly after that call, Nealey heard a loud "bam" noise and the alarm on his garage went off. Nealey then saw a person moving in a southerly direction in the alley adjacent to his garage. Nealey's wife called the police who arrived between three to five minutes later. When the police arrived, Nealey went outside and saw that a wooden panel had been knocked off the face of his garage door.

Upon arriving, the police encountered Hinton standing next to a refrigerator in the alley one doorway south of Nealey's garage, to the rear of 3017 North 28th Street. Hinton had a bag in his possession containing a large steel mallet, a claw hammer, several kitchen knives, gloves, tubing, and some metal joints. Hinton initially denied that the bag was his, but later admitted that he owned the bag and carried it with him. Hinton told the police that he was removing scrap metal from the refrigerator, and that he had received permission to do so from "the man who lived at 3017 North 28th Street." This man was later identified as Trevor Love.

Hinton was arrested and charged with possession of burglarious tools, contrary to § 943.12, STATS. At trial, Hinton testified that he was in the business of selling scrap metal, that he had been given permission to remove scrap from the refrigerator in the alley, and that he had done so on the day he was arrested. Hinton also testified that he did not attempt to break into Nealey's garage that evening. The jury found Hinton guilty of possession of burglarious tools, and he was sentenced to two years in prison. Hinton filed a motion for a new trial, based on newly discovered evidence, which the trial court denied. Hinton now appeals.

II. ANALYSIS.

A. Newly discovered evidence.

Hinton claims that the trial court erred by denying his motion for a new trial based on newly discovered evidence. A motion for a new trial is addressed to the sound discretion of the trial court. *See* ***State v. Kaster***, 148 Wis.2d 789, 801, 436 N.W.2d 891, 896 (Ct. App. 1989). We will affirm the trial court's exercise of discretion if it has a reasonable basis and was made in accordance with accepted legal standards and in accordance with the facts of record. *See* ***State v. Jenkins***, 168 Wis.2d 175, 186, 483 N.W.2d 262, 265 (Ct. App. 1992). A trial court may only grant a new trial based on newly discovered evidence when all of the following requirements are met:

> (1) [T]he evidence came to the moving party's knowledge after the trial; (2) the moving party has not been negligent in seeking to discover it; (3) the evidence is material to the issue; (4) the evidence is not merely cumulative to that which was introduced at trial; and (5) it is reasonably probable that a new trial will reach a different result.

Kaster, 148 Wis.2d at 801, 436 N.W.2d at 896 (citation omitted). The defendant bears the burden of proving by clear and convincing evidence that each of the requirements has been met. *See* ***State v. Brunton***, 203 Wis.2d 195, 208, 552 N.W.2d 452, 458 (Ct. App. 1996).

Hinton's allegedly newly discovered evidence is Trevor Love's offer to testify that he gave Hinton permission to remove scrap metal from the refrigerator in the alley where Hinton was arrested. This evidence fails to meet at least two of the prongs of the newly discovered evidence test, and accordingly, the trial court properly denied Hinton's motion. First, this is not a situation where a witness, who could not be located before trial, is discovered and offers to testify to facts previously unknown by the defense. In this case, Hinton had to have known that Love gave him permission to strip the refrigerator from the moment that Love actually gave him permission. Therefore, since the evidence came to Hinton's knowledge well before trial, Hinton has failed the first prong of the test.

Second, Hinton claims that, while he may have known that Love was a possible exculpatory witness, he had no knowledge that Love was an "actual exculpatory witness" until after the trial. However, even if this knowledge was the "evidence" which the first prong of the test refers to, Hinton fails the second prong by not proving he was not negligent in failing to locate Love. Hinton bears the burden of affirmatively proving, by clear and convincing evidence, that each element of the newly discovered evidence test has been met. *See* ***id***. Hinton has not met his burden. Hinton told the arresting officer that "the man who lived at 3017 North 28th Street" gave him permission to take scrap metal from the refrigerator. Therefore, from the date of his arrest, Hinton knew where Love lived. Even so, Hinton claims that he was not negligent because an unnamed trial investigator sent Love a letter, asking him to respond. But if Love's testimony is

really as important as Hinton claims it is, Hinton's efforts to locate Love should have gone well beyond merely sending a letter. Thus, we conclude that, without supporting evidence in the record of any attempts to locate Love other than the letter, Hinton has failed to prove that he was not negligent in failing to locate Love, and he has failed the second prong. Because Hinton has failed both the first and second prongs of the test, the trial court properly denied his motion for a new trial.

B. Insufficiency of the evidence.

Hinton also claims that the evidence was insufficient to support his conviction. We disagree. We will not reverse a conviction on the basis of insufficient evidence "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." ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). Although the evidence in Hinton's case was circumstantial, circumstantial evidence is often stronger and more satisfactory than direct evidence, and a finding of guilt may rest entirely on circumstantial evidence. *See* ***id***. at 501-02, 451 N.W.2d at 755. The standard for reviewing the sufficiency of the evidence is the same in either a direct or circumstantial evidence case. *See* ***id***. at 501, 451 N.W.2d at 755.

For a conviction of possession of burglarious tools, contrary to § 943.12, STATS.,[2] the prosecution must prove three elements: (1) that the

[2] Section 943.12, STATS., reads:

> **Possession of burglarious tools.** Whoever has in personal possession any device or instrumentality intended, designed or

(continued)

defendant had possession of a tool or device, possession meaning that the defendant knowingly had actual physical control of the tool or device; (2) the tool or device was suitable for use[3] in breaking into a building; and (3) the defendant intended to use the tool or device to break into a building with the intent to steal. *See* WIS J I—CRIMINAL 1431 (Hinton stipulated to the use of this instruction). Hinton does not dispute the fact that there was sufficient evidence that he possessed the tools found in his bag. Hinton claims, however, that there was insufficient evidence to support a jury finding that the tools were suitable for use in breaking into a building, and that he intended to use them to break into a building.

The tools found in Hinton's bag included a large steel mallet, kitchen knives with bent tips, a long kitchen knife with a serrated edge, and a claw hammer. Officer Russell Harris testified at trial that all of those tools were consistent with tools used to commit burglaries. Therefore, the jury had ample evidence that the tools were suitable for use in breaking into a building. On the question of Hinton's intent, the jury was presented with the following evidence: (1) Hinton was apprehended in close proximity to the victim's garage; (2) after the alarm sounded, the victim observed a person moving toward where Hinton was found; (3) a hole had been smashed in the garage door; (4) Hinton possessed tools, including a large steel mallet, capable of smashing such a hole in the garage door;

> adapted for use in breaking into any depository designed for the safekeeping of any valuables or into any building or room, with intent to use such device or instrumentality to break into a depository, building or room, and to steal therefrom, is guilty of a Class E felony.

[3] The drafters of WIS J I—CRIMINAL 1431 concluded that "suitable for use" was an appropriate substitute for the statutory language "intended, designed, or adapted" based on the legislative history of § 943.12, STATS. *See* WIS J I—CRIMINAL 1431 n.4.

and (5) Hinton initially denied that the tools were his, an act inconsistent with his claim that he was legally at the scene. The jury also had the advantage of being present at the trial, and was in a position to weigh the credibility of witnesses, including Hinton, who admitted to seven prior criminal convictions, and to attribute weight to "nonverbal attributes of the witnesses which are often persuasive indicia of guilt or innocence." *See* ***State v. Allbaugh***, 148 Wis.2d 807, 809, 436 N.W.2d 898, 900 (Ct. App. 1989). Therefore, we cannot conclude that the evidence, including the evidence of Hinton's intent, was 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." ***Poellinger***, 153 Wis.2d at 501, 451 N.W.2d at 755. Thus, the evidence was sufficient to support Hinton's conviction.

C. Restitution.

Finally, Hinton claims that the trial court erred by ordering him to pay restitution to the owner of the garage, on the theory that the restitution was not directly related to his conviction. Hinton failed to object to the restitution order at the time of its imposition, or in his postconviction motion. Therefore, he has waived his right to object to the restitution order on appeal, and we decline to address the issue. *See* ***State v. Schmaling***, 198 Wis.2d 757, 762, 543 N.W.2d 555, 558 (Ct. App. 1995).

By the Court.—Judgment and order affirmed.

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