

**COURT OF APPEALS
DECISION
DATED AND FILED**

SEPTEMBER 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0343-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

THOMAS DUBAK,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for St. Croix County:
SCOTT R. NEEDHAM, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Gordon Myse, Reserve Judge.

PER CURIAM. Thomas Dubak appeals judgments convicting him of burglary and theft as a repeat offender, and felon in possession of a firearm. He argues that the State presented insufficient evidence to support his convictions and that the trial court erred by admitting statements he made to officer David Hake.

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 § 808.10 and RULE 809.62, STATS.

Because we conclude that the State presented sufficient circumstantial evidence to support the convictions and that the statements were made to Hake following *Miranda*¹ warnings and are admissible under the public safety exception, we affirm the judgments.

Dubak was riding in a vehicle driven by Greg Feiner. Police attempted to stop the car because they knew Feiner did not have a valid driver's license. Feiner accelerated his car and officer Michael Brave and other officers pursued it. As Feiner pulled into a driveway, he and another passenger, and Dubak ran from the vehicle into a wooded area. Brave then heard gunshots. As other officers arrived at the scene, Dubak turned himself in and was placed in a squad car. Brave asked Dubak to identify himself and Dubak gave Brave his driver's license. Dubak then volunteered that he had been hitchhiking and was picked up by the people in the car. He said he did not know who they were or whether they were armed. Brave later informed Dubak of his *Miranda* rights.

After Brave read Dubak his *Miranda* rights, thirty to forty minutes after Dubak turned himself in, Hake questioned him about the other people in the vehicle. Dubak made the same statements he made to Brave. Hake did not readminister a *Miranda* warning before he questioned Dubak. Police searched Feiner's car and found weapons and other items taken in a recent residential burglary.

Other witnesses told investigator Ronald Volkert that Dubak got into a vehicle when the occupants, Greg and Jason Feiner, waved and honked the horn. After they dropped Jason off at an apartment, Greg and Dubak left for thirty to

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

forty-five minutes and then came back and picked up Jason. At that time, Jason saw firearms and other items in the back seat of the vehicle which were not there before. At trial, these witnesses denied having made these statements to investigator Volkert, and they were impeached at trial with their prior inconsistent statements.

The State presented sufficient circumstantial evidence to allow a reasonable jury to find Dubak guilty beyond a reasonable doubt. See *State v. Poellinger*, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). The jury could reasonably find that Dubak fled from the police after exiting a vehicle that contained recently stolen items, including firearms. He gave a false story that he was hitchhiking and did not know the driver or passenger. The stolen items were not in the car when Dubak and Greg Feiner dropped off Jason, but were there when they returned thirty to forty-five minutes later. This evidence allows a reasonable inference that Dubak participated in the burglary and stole the items including the firearms. The jury could also reasonably infer that Dubak was in possession of the firearms even though he was in the front seat and the weapons were in the back seat because they were available to him and the evidence showed that he was in joint possession with the other individuals who participated in the burglary. See *Curl v. State*, 40 Wis.2d 474, 482-83, 162 N.W.2d 77, 81-82 (1969); overruled on other grounds, *Schimmel v. State*, 84 Wis.2d 287, 267 N.W.2d 271 (1978).

Dubak argues that the prior inconsistent statements witnesses made to investigator Volkert could only be used to impeach them and were not substantive evidence of Dubak's guilt. A prior inconsistent statement used to impeach a witness may be considered substantive evidence of guilt. See *Vogel v. State*, 96 Wis.2d 372, 384, 291 N.W.2d 838, 844 (1980).

The statements Dubak made to Hake were properly admitted into evidence. The record supports the trial court's finding that Brave read Dubak his *Miranda* rights before Dubak spoke with Hake. See § 805.17(2), STATS. Dubak does not challenge the finding that his statements to Brave were not the product of interrogation. In addition, as a matter of public safety, the police could reasonably inquire about the identity of the other suspects and their weaponry before administering *Miranda* warnings. See *New York v. Quarles*, 467 U.S. 649, 657 (1984). The police were searching for individuals who had inexplicably fled from police and fired shots. One of the suspects was still at large at the time Hake questioned Dubak, the other had been shot. The police were reasonably concerned that the missing suspect might be armed and posed a threat to the officers.

By the Court.—Judgments affirmed.

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

