

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 17, 2003

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-2995-CR

Cir. Ct. No. 01-CF-598

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT J. SMOKOVICH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
JAMES R. KIEFFER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Robert J. Smokovich appeals from a judgment convicting him of burglary contrary to WIS. STAT. § 943.10(1)(a) (2001-02)¹ after

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

a jury trial.² We conclude that because the jury was properly instructed and trial counsel was not ineffective, a new trial is not necessary. We further conclude that the evidence was sufficient to convict Smokovich. Therefore, we affirm.

¶2 At trial, Officer Michael Fixel testified that while on patrol the morning the burglary occurred, but before the burglary was discovered, he observed the vehicle in which Smokovich was a passenger. Fixel checked the license plate and found that the vehicle's registration was suspended. Fixel stopped the vehicle. While he was speaking with the driver and Smokovich, Fixel noticed a case between Smokovich's feet. After the driver and Smokovich exited the vehicle, the officer found a laptop computer in the case and noticed women's bracelets on the driver's seat. When questioned, Smokovich told the officer that he and his companion had been driving around and had stopped for gas. Smokovich then stated that he was looking for work, although his unkempt appearance was inconsistent with that claim. Smokovich denied knowing who owned the computer.

¶3 Upon further search of the vehicle, the officer located more bracelets, necklaces, rings, earrings and collectibles. The vehicle also contained a black tire iron wrapped in a shirt. Fixel found two sets of cotton gloves in the vehicle, one set each under the driver's seat and the passenger's seat. The officer also located the homeowner's name in a bag containing jewelry. After inquiring

² Smokovich filed a motion seeking a new trial and alleging ineffective assistance of trial counsel before sentencing. The motion was heard and denied before sentencing. Therefore, the motion was not brought pursuant to WIS. STAT. RULE 809.30(2)(a), which contemplates proceedings subsequent to sentencing. The judgment of conviction subsumes the posttrial motions, and the appeal is deemed taken from the judgment of conviction, not from the order denying the posttrial motion.

about the homeowner's name through dispatch, the officer learned that the homeowner lived in a neighboring community. Police checked the home and found that the home had been forcibly entered and ransacked.

¶4 Officer Tim Esser, who investigated the burgled residence, testified that based upon his training, the tire iron found in the vehicle was the type of tool which could have been used to forcibly open the back door of the burgled residence. The officer testified that no fingerprints or footwear impressions were found at the residence. However, if the burglars wore gloves, there would not have been any fingerprints.

¶5 The homeowner testified that she locked the home when she left for work that morning and that she did not give anyone permission to forcibly enter the home. The homeowner identified all of the personal property recovered by police from the vehicle in which Smokovich was riding.

¶6 At the jury instruction conference, the court stated that it would give the jury this version of WIS JI—CRIMINAL 173: "Evidence has been presented that the defendant possessed recently stolen property. Whether the evidence shows that the defendant ... participated in some way in the taking of the property is exclusively for you to decide. Consider the time and circumstances of the possession in determining the weight you give to this evidence." Defense counsel did not object to the instructions. The jury convicted Smokovich of burglary.

¶7 Post-trial, Smokovich argued that trial counsel was ineffective for not requesting that the jury also be instructed about the meaning of possession as set forth in WIS JI—CRIMINAL 920. Additionally, Smokovich sought a new trial because the real controversy was not tried as a result of the poor instructions. He further claimed that justice miscarried at trial.

¶8 WISCONSIN JI—CRIMINAL 920 provides:

“Possession” means that the defendant knowingly had the item under his actual physical control.

An item is (also) in a person’s possession if it is in an area over which the person has control and the person intends to exercise control over the item.

It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.

Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.

¶9 The circuit court held that WIS JI—CRIMINAL 173 was properly given in light of the evidence before the jury and that WIS JI—CRIMINAL 920 was not essential to the jury’s deliberation. The court found “a multitude of evidence” of Smokovich’s participation in the burglary, particularly the presence of recently stolen property and the gloves in the vehicle. In light of the evidence adduced at trial and the closing arguments which highlighted Smokovich’s relationship or lack thereof to the stolen property, a specific definition of possession was not necessary. The court concluded that Smokovich did not show that the absence of a specific definition of possession had any impact on the case, that trial counsel was ineffective in failing to request an instruction defining possession, or that a new trial was warranted.

¶10 On appeal, Smokovich argues that because the jury was improperly instructed, we should exercise our power under WIS. STAT. § 752.35 to reverse his conviction. That statute allows us to reverse a judgment “if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried.” *Id.*

¶11 When the real controversy has not been fully tried, we may exercise our power of discretionary reversal under WIS. STAT. § 752.35 without first finding that there is a probability of a different result on retrial. *State v. Wyss*, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985), *overruled on other grounds by State v. Poellinger*, 153 Wis. 2d 493, 451 N.W.2d 752 (1990). In contrast, the miscarriage of justice standard requires a showing that a different result would be substantially probable upon retrial. *State v. Caban*, 210 Wis. 2d 597, 610, 563 N.W.2d 501 (1997).

¶12 We may order a new trial where an erroneous jury instruction prevented the real controversy from being fully tried. *State v. Harp*, 161 Wis. 2d 773, 776, 469 N.W.2d 210 (Ct. App. 1991).³ However, if the instructions adequately covered the law applicable to the facts, we will not find error by the circuit court. *State v. Lenarchick*, 74 Wis. 2d 425, 455, 247 N.W.2d 80 (1976).

¶13 The jury was instructed: “Evidence has been presented that the defendant possessed recently stolen property. Whether the evidence shows that the defendant participated in some way in the taking of the property is exclusively for you to decide. Consider the time and circumstances of the possession in determining the weight you give to this evidence.” WIS JI—CRIMINAL 173. The instruction was preceded by WIS JI—CRIMINAL 170 which informs the jury that circumstantial evidence may be considered to determine if the State has met its burden of proof. Smokovich’s defense counsel argued to the jury that there was a

³ Although we may not directly review a jury instruction absent a timely objection, we may review an instruction under a claim of ineffective assistance of counsel and WIS. STAT. § 752.35 when the defendant claims that the real controversy has not been fully tried. *State v. Marcum*, 166 Wis. 2d 908, 916, 480 N.W.2d 545 (Ct. App. 1992).

dispute as to whether Smokovich was in possession of the stolen items found in the vehicle. Defense counsel emphasized that Smokovich was a passenger in someone else's vehicle and did not possess the items found in it. The State argued that Smokovich was found with the stolen property, notably the laptop, at his feet. The parties' arguments and the evidence placed the issue of possession squarely before the jury.

¶14 While WIS JI—CRIMINAL 920, the possession instruction, may have given the jury an additional framework for analyzing the significance of the stolen items found in proximity to Smokovich, it is not substantially probable that Smokovich would have been acquitted of burglary had the instruction been given. The factors set forth in the instruction can be satisfied from the evidence presented at trial. WISCONSIN JI—CRIMINAL 920 defines possession as: (1) actual physical control (the officer first found the laptop case between Smokovich's feet); (2) a person need not own an item to possess it but must merely be exercising control over it (the laptop case was within Smokovich's control); and (3) possession may be shared with another (the stolen property was found in a vehicle in which Smokovich was a willing passenger).

¶15 It is unclear how WIS JI—CRIMINAL 920 would have aided Smokovich's argument that he did not possess the stolen property. The instructions did not mislead the jury or misstate the law in relation to the evidence presented at trial. Justice did not miscarry, and the real controversy regarding Smokovich's possession of the stolen property and his involvement in the burglary was fully tried.

¶16 Having determined that the instructions were not erroneous, the real controversy was fully tried and justice did not miscarry, we need not reach Smokovich's ineffective assistance of trial counsel claim.

¶17 Smokovich next argues that the evidence was not sufficient to convict him of burglary. We determine whether 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. Ray*, 166 Wis. 2d 855, 861, 481 N.W.2d 288 (Ct. App. 1992). In reviewing the sufficiency of circumstantial evidence, we need not concern ourselves in any way with evidence which might support other theories of the crime. *Poellinger*, 153 Wis. 2d at 507-08. We need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence. *Id.* at 508. We must accept the reasonable inferences drawn from the evidence by the jury. *Id.* at 507. If more than one reasonable inference can be drawn from the evidence, we must adopt the inference which supports the conviction. *State v. Hamilton*, 120 Wis. 2d 532, 541, 356 N.W.2d 169 (1984).

¶18 The evidence was sufficient to convict Smokovich. The jury heard that Smokovich was a passenger in a vehicle which contained stolen property and burglarious tools, and Smokovich did not have a plausible explanation for his presence in the county of the burglary. Smokovich focuses on the absence of direct evidence that he entered the residence and possessed the stolen property. There was more than sufficient evidence for the jury to find that Smokovich committed a burglary.

By the Court.—Judgment affirmed.

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

