

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 11, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2013AP1435-CR

Cir. Ct. No. 2011CF5369

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

FRANCISCO LUIS CANALES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JONATHAN D. WATTS, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Francisco Luis Canales appeals from the judgment of conviction, following a jury trial, of one count of being a felon in possession of a firearm. We affirm.

BACKGROUND

¶2 On November 3, 2011, Canales was charged with one count of possession of a firearm by a felon. The charges stemmed from an incident that took place two days earlier at 5401 North 92nd Street, Milwaukee. According to the complaint, Canales's ex-girlfriend, Amber Wagner, told police that she looked out of her apartment window and observed Canales running out of the parking lot with an object in his hand. She then observed bullet holes and broken glass inside of the car driven by her then-boyfriend, Anthony Cross. Bullets also entered a neighboring apartment building. Police recovered nine .40 caliber bronze Smith & Wesson spent casings from the scene.

¶3 The complaint also states that police went to Canales's home, where his mother gave police permission to search the house. Police recovered a box of bronze .40 caliber Smith & Wesson cartridges from Canales's bedroom. The box held 100 cartridges, but contained only 86. Canales was arrested and charged with one count of being a felon in possession of a firearm. The parties stipulated that Canales was a felon. His case went to trial solely on the question of possession.

¶4 Prior to *voir dire*, the defense objected to the State's request to play portions of a DVD showing Milwaukee police's interrogation of Canales. Defense counsel requested exclusion of the DVD, arguing that the State's purpose for showing the video was to show that Canales's demeanor in the video was evidence of a guilty mind. Specifically, defense counsel argued that portions of the video showing Canales rubbing his hands together, on his pants and in his hair, were simply indicative of nervousness, not attempts to rub off gun residue as theorized by the State. The trial court ruled in favor of the State, but permitted defense counsel to present other instances in the video where Canales wiped his hands.

¶5 Multiple witnesses testified at trial. Milwaukee Police Officer Henry Flemming testified that he was dispatched to the scene following a 911 call reporting shots fired. Flemming spoke with Wagner, who informed him that her ex-boyfriend (Canales) “shot up her new boyfriend’s car that he was driving.” Flemming testified that Wagner told him that after firing rounds into Cross’s car, Canales jumped into a white Chevy with a different colored hood and drove away. Flemming testified that Cross’s car was damaged from bullet holes and that he (Flemming) recovered four .40 caliber Smith & Wesson bullets from the vehicle, as well as nine .40 Smith & Wesson casings from the scene. Flemming testified that based on his conversation with Wagner, he contacted Officer Robert Valez to search for Canales.

¶6 Valez testified that he went to 1561 South 2nd Street to look for Canales after Flemming contacted him. Valez encountered Canales’s parents behind the duplex located at that address. While speaking with Canales’s parents, Valez observed Canales walking his dog in the alleyway. Valez confirmed Canales’s identity, placed Canales into custody, and received permission from Canales’s mother to search the residence. Canales’s mother also gave Valez keys to a locked bedroom. In the bedroom, Valez recovered a plastic baggie containing .40 caliber Smith & Wesson ammunition, a box of ammunition and bullets. Valez testified that the ammunition box had a 100-cartridge capacity, but only contained 86 cartridges. In a nearby crawlspace, Valez also recovered three magazines. Two of the magazines were empty, however, the remaining magazine was for a .40 caliber Smith & Wesson. Valez also found the missing 14 cartridges from the ammunition box in the magazine.

¶7 Detective Terrence Bender told the jury that he interviewed Canales after Canales was placed in custody. Bender testified that he conducted a video

recorded interview with Canales in which Bender asked Canales to submit to a DNA/gunpowder residue test. Bender testified that the Wisconsin State Crime Laboratory does not actually test for residue on a suspect's hands and rarely tests clothing. Bender admitted that his question was merely a "ruse" that was used as an "investigative tool." Bender stated that after he left the interrogation room he observed Canales through a small monitor, with the recorder still running. Bender stated that Canales started rubbing his hands on his pants and rubbing his hands together as though Canales "was trying to rub some powder or anything off of his hands." Shortly thereafter, a portion of the DVD showing Canales rubbing his hands was shown to the jury.

¶8 Wagner also testified, recanting much of the statement she gave to Flemming. Wagner testified that she remembered that "[s]omeone came in and shot up my boyfriend's car" on November 1, 2011, but stated that she did not recall: (1) seeing anything out of her front window; (2) telling police that she saw Canales running away with an object in his hand; or (3) seeing Canales jump into a vehicle before leaving. Assistant District Attorney Laura Crivello testified that she spoke with Wagner on the date of Canales's preliminary hearing. Crivello told the jury that Wagner denied seeing the face of the shooter, but admitted that she was afraid of Canales and Canales's family.

¶9 The State's final witness was Vanessa Reed, a 911 operator. Reed stated that when 911 calls are received, the calls are recorded and a corresponding computer-aided dispatch (CAD) entry is made. During Reed's testimony, the State played a recording of a 911 call from an anonymous caller reporting shots fired and a white Chevy leaving the scene. Outside of the presence of the jury, defense counsel moved to strike Reed's testimony, saying Reed was not the

operator who received the call, Reed had no personal knowledge of the case, and Reed was not a custodian of the corresponding CAD report.

¶10 The trial court agreed that Reed's testimony did not satisfy the hearsay exception allowing for the admission of records of regularly conducted activity (WIS. STAT. § 908.03(6) (2011-12)¹), but granted the State an opportunity to lay the proper foundation.

¶11 The State recalled Reed, wherein she testified that 911 calls and the corresponding CAD reports are recorded contemporaneously, kept in the regular course of business, and are linked together by a time stamp. During the course of cross-examination and off-record discussions, it became apparent that the anonymous 911 call previously played for the jury and the CAD report Reed was using to discuss the call did not correspond. The CAD report used to introduce the anonymous 911 call into evidence was actually the CAD report corresponding with Wagner's 911 call.

¶12 The State requested an opportunity to locate the CAD report that corresponded with the anonymous call and requested an opportunity to recall Reed. Defense counsel objected to introducing additional CAD reports that it never received, stating that its discovery demand was made well before trial so that the evidence could be thoroughly reviewed. Defense counsel moved for a mistrial, stating that the State also withheld other CAD reports relating to other anonymous calls, thereby preventing the defense the opportunity to adequately investigate all possible witnesses. Defense counsel argued that the State failed to comply with discovery demands by failing to adequately notify the defense that Reed would be a witness, failing to identify other officers on the scene of the

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

shooting (as identified in the CAD reports), and failing to turn over all relevant CAD reports. The State maintained that the failure to turn over the accurate CAD report relating to the anonymous call, as well as the other CAD reports, was a mistake, and thereafter provided the defense with multiple additional reports. Defense counsel maintained her motion for a mistrial, arguing that she did not have an opportunity to investigate the callers or officers identified in the reports, nor did she have an opportunity to investigate the inconsistencies between the reports.

¶13 After a lengthy and thoughtful recitation of the facts and issues regarding defense counsel's motion for a mistrial, the trial court ultimately denied the motion. The trial court found that in the context of the evidence already presented, additional names of police officers would not be exculpatory. However, the trial court granted a continuance, finding that the State failed to turn over additional CAD reports and that defense counsel needed time to make the necessary investigations. The trial court granted a continuance until the following morning. Ultimately, however, the trial court held that the missing CAD reports were an oversight, there was no misconduct by the State, and the continuance rectified any errors.

¶14 The following day, the State informed the trial court that it made contact with three witnesses from the CAD reports corresponding with the additional anonymous 911 calls. The court offered Canales additional time to interview the witnesses, however, defense counsel stated that the public defender's office investigators were unavailable. Defense counsel did not renew her motion for a mistrial, but was informed by the trial court that the motion would have been denied because the State did not act in bad faith and defense counsel's inability to investigate witnesses based on the missing CAD reports was not prejudicial. As a

remedy to the discovery issues presented by the CAD reports, the trial court ordered Reed's testimony, in its entirety, stricken from the record, along with the 911 call played for the jury. The trial court also indicated that striking Reed's testimony would have the effect of preventing the State from introducing the other anonymous 911 calls and corresponding CAD reports.

¶15 The defense moved for a directed verdict, which was denied by the trial court. Ultimately, the jury found Canales guilty. The defense immediately moved for a judgment notwithstanding the verdict. The trial court denied the motion, finding that sufficient evidence supported the jury's verdict. Canales was sentenced to six years, bifurcated as two years of initial confinement and four years of extended supervision.

¶16 This appeal follows. Additional facts are discussed as relevant to the discussion.

DISCUSSION

¶17 On appeal Canales argues that the trial court erroneously denied his motion for a mistrial, that there was insufficient evidence to support his conviction, and that he is entitled to a new trial in the interest of justice. We disagree.

A. The Trial Court did not Erroneously Exercise its Discretion in Failing to Grant a Mistrial.

¶18 Wisconsin's criminal discovery statute, WIS. STAT. § 971.23, requires that the prosecutor disclose exculpatory evidence to the defendant within a reasonable time before trial. *See* § 971.23(1). This statute employs the favorable evidence and materiality tests, and the standard is whether the

nondisclosure of the evidence sufficiently undermines the court's confidence in the outcome of the trial. *See State v. Harris*, 2004 WI 64, ¶¶30-31, 272 Wis. 2d 80, 680 N.W.2d 737.

¶19 The decision as to whether or not to grant a mistrial is “within the sound discretion of the trial court.” *State v. Pankow*, 144 Wis. 2d 23, 47, 422 N.W.2d 913 (Ct. App. 1988). “The trial court must determine, in light of the whole proceeding, whether the claimed error [is] sufficiently prejudicial to warrant a new trial.” *Id.* The denial of a motion for mistrial will be reversed only upon a clear showing of an erroneous exercise of discretion. *Id.*

¶20 Canales argues that because the State violated WIS. STAT. § 971.23(1)(e) when it failed to turn over multiple CAD reports without “good cause,” he was entitled to a mistrial. Specifically, Canales argues that the State's discovery violation resulted in his inability to properly investigate some of the witnesses on the CAD reports.

¶21 Not all errors warrant a mistrial and “the law prefers less drastic alternatives, if available and practical.” *State v. Bunch*, 191 Wis. 2d 501, 512, 529 N.W.2d 923 (Ct. App. 1995). A mistrial is appropriate only when a “manifest necessity” exists for the termination of the trial. *See id.* at 507 (citation omitted).

¶22 The State concedes that it did not disclose multiple CAD reports. The trial court agreed with defense counsel that the State's failure to disclose the reports created a duty for the defense to investigate. The trial court granted a continuance until the following morning. The following morning, the State informed the trial court that it had contacted three of the witnesses named in the CAD report. The trial court offered defense counsel additional time to investigate.

Counsel told the court that all of the investigators at the public defender's office were unavailable, did not request the witnesses to come to court, and did not renew her motion for a mistrial.

¶23 The missing CAD reports did not create a “manifest necessity” requiring the termination of Canales’s trial. Canales did not explain how he would have changed his trial strategy had he known the witnesses’ names prior to trial, nor did he pursue the named witnesses. Canales also did not renew his motion for a mistrial after the witnesses were identified. Canales cannot now argue that he suffered prejudice.

¶24 Canales also contends that Reed’s testimony, though stricken, still was prejudicial because the 911 call played during her testimony explained that the caller heard gunshots and saw the possible shooter drive off in a white Chevy, corroborating Wagner’s statement to police that Canales drove off in a white Chevy. Jurors are presumed to follow the court’s instructions, *see State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989), and therefore presumably followed the trial court’s instruction not to “consider ... use ... think about...[or] argue” Reed’s testimony or the 911 call played for the jury. Canales has not established that the jury disregarded the trial court’s instruction to disregard Reed’s testimony.

B. Sufficient Evidence Supported the Conviction.

¶25 Canales argues that the evidence presented at trial was insufficient to support his conviction. Specifically, Canales argues that all of the State’s evidence was circumstantial because it is undisputed that the police never actually found a firearm in Canales’s possession, in his vehicle, in his home, or at the scene of the shooting.

¶26 When we review a conviction for sufficiency of the evidence, we will not reverse a conviction “unless the evidence, viewed most favorably to the [S]tate 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 (1990). We may not substitute our judgment for that of the factfinder. *See id.* at 506-07. The jury determines the credibility of all witnesses and the weight to be accorded their testimony. *See Bautista v. State*, 53 Wis. 2d 218, 223, 191 N.W.2d 725 (1971). Therefore, “[i]f any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt,” we may not overturn the verdict even if we believe the factfinder should not have found guilt. *Poellinger*, 153 Wis. 2d at 507.

¶27 A conviction may be supported solely by circumstantial evidence, and in some cases, circumstantial evidence may be stronger and more satisfactory than direct evidence. *Id.* at 501-02. Although a special jury instruction is often used when circumstantial evidence is relied upon, on appeal the standard of review is the same whether the conviction relies upon direct or circumstantial evidence. *Id.* at 502-03. Once the jury accepts the theory of guilt, we need only decide whether the evidence supporting that theory is sufficient to sustain the verdict. *Id.* at 507-08. In this case, we conclude that the evidence supporting the State’s theory is sufficient to uphold the conviction.

¶28 Multiple witnesses tied Canales to the shooting. Flemming testified that Wagner identified Canales as the shooter and told Flemming that Canales fled the scene in a white Chevy with a purple or brown hood. Flemming also testified that he recovered nine .40 Smith & Wesson casings from the scene, along with

four .40 bullets from inside Cross's vehicle. Valez testified that he went to Canales's mother's residence, where he located a white vehicle with a different colored hood, and spoke with Canales's parents. Valez searched Canales's bedroom in his mother's home and found a plastic bag containing .40 Smith & Wesson ammunition and bullets. Valez also found three magazines in a crawl space, two of which were empty. The remaining magazine was for a .40 Smith & Wesson. Valez also found 86 cartridges in a 100-cartridge ammunition box. Bender testified that Canales began rubbing his hands, as though attempting to wipe them clean, after being informed that he (Canales) would be subject to a gun residue test. Finally, although Wagner recanted much of her statement to police, Assistant District Attorney Crivello cast doubt on the truthfulness of Wagner's recantation when Crivello testified that Wagner expressed fear of Canales and his family.

¶29 The jury also heard from Canales's mother, Amparo Cruz Jinenez, who told the jury that Canales did not live at her home on the date of the shooting. Jinenez testified that while Canales occasionally spent the night at her home, the bedroom police searched did not belong to Canales. Rather, Jinenez stated that two of Canales's cousins actually stayed in that bedroom. She also testified that Canales did walk by the crawl space in order to access the home gym, but that the bedroom doors remained locked and only she and the homeowner had the keys.

¶30 "It is the jury's responsibility to determine the credibility of the witnesses and the weight to be afforded their testimony." *Nowatske v. Osterloh*, 201 Wis. 2d 497, 511, 549 N.W.2d 256 (Ct. App. 1996). "[W]here more than one inference can be drawn from the evidence, the court must accept the inference drawn by the jury." *Fischer v. Wisconsin Patients Comp. Fund*, 2002 WI App 192, ¶20, 256 Wis. 2d 848, 650 N.W.2d 75 (citation omitted).

The jury was within its right as the factfinder to regard Jinenez’s testimony as less persuasive because it involved her son. The jury could reasonably infer, based on the testimony of the State’s witnesses, including testimony regarding the exact number of bullets and casings recovered from the scene of the shooting and testimony matching the type of bullets and casings to the ammunition found in a bedroom and crawl space that Canales had at least occasional access to, that Canales was a felon in possession of a firearm. There is sufficient evidence to support the jury’s verdict.

C. Canales is not Entitled to Reversal of his Conviction or a New Trial in the Interests of Justice.

¶31 Finally, Canales asks us to either reverse his conviction or grant a new trial in the interest of justice. Canales contends that “[t]he highly improbable circumstantial evidence used to sustain the conviction, in conjunction with the State’s discovery abuses and the consequential error by the trial court in refusing to grant a mistrial, prove that this is exactly the type of case where this Court should either reverse the conviction or grant a new trial in the interests of justice.” Canales also argues that the trial court’s refusal to exclude the DVD of Bender’s interrogation of Canales was prejudicial and entitles Canales to a new trial.

¶32 This court has the discretionary power to reverse judgments in cases where the real controversy was not fully tried, or for any reason justice was miscarried under WIS. STAT. § 752.35. See *Vollmer v. Luety*, 156 Wis. 2d 1, 17, 456 N.W.2d 797 (1990). Under the first category of cases, when the real controversy has not been fully tried, we need not decide that the outcome would be different on retrial before exercising our discretionary power. See *id.* at 19. “[S]ituations in which the controversy may not have been fully tried have arisen in

two factually distinct ways: (1) when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case; and (2) when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried.” See *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996).

¶33 We conclude that none of the claimed errors prevented the real controversy from being fully tried. Circumstantial evidence is sufficient to support to a conviction. The trial court remedied the State’s discovery error by excluding Reed’s testimony and by granting Canales a continuance to permit the necessary investigations. The trial court offered Canales an additional continuance after the State indicated that it made contact with three witnesses, which Canales’s counsel refused. Canales is not entitled to reversal of his conviction, or a new trial, in the interests of justice based on the facts in this case.

¶34 For the foregoing reasons, we affirm the trial court. To the extent Canales raises arguments not addressed in this decision, we conclude that our resolution of the issues discussed are dispositive of Canales’s appeal. See *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (“[C]ases should be decided on the narrowest possible ground.”).

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

