**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**June 19, 2018**

**Sheila T. Reiff**
**Clerk of Court of Appeals**



**Appeal No. 2017AP418-CR** **Cir. Ct. No. 2015CF2559**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TARRANCE D. JENKINS,**

**DEFENDANT-APPELLANT.**

APPEAL from a judgment of the circuit court for Milwaukee County: STEPHANIE ROTHSTEIN, Judge. *Affirmed*.

Before Kessler, P.J., Brash and Dugan, JJ.

**Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

¶1 PER CURIAM. Tarrance D. Jenkins appeals from a judgment, entered on a jury's verdict, convicting him on one count of endangering safety by

use of a dangerous weapon as a party to a crime.[1] Jenkins claims that the trial court lost competency when it ordered the complaint dismissed with prejudice, so the court erred when it vacated the dismissal a few minutes later. Jenkins further claims that the court erred when it denied his motion to dismiss at the close of the State's case. Jenkins also asserts this court should exercise its discretionary powers to grant him a new trial in the interest of justice. We reject Jenkins' arguments and affirm the judgment.

## BACKGROUND

¶2 The victim in this case, L.B., testified that she had known Jenkins for about two years. One night in February 2015, she agreed to meet him at a nightclub. However, the club made L.B. uncomfortable, so she told Jenkins she was leaving. He became upset, walked past L.B. as she was walking to the door, and drove off. L.B. went home.

¶3 After leaving the club, Jenkins called and texted L.B. several times. When she texted him to say she had made it home, he responded with a series of vulgar texts, including one that said, "Fuck you in every way." Jenkins then called L.B. several times, calling her names like "punk bitch" and asking her how she could embarrass him like that. L.B. hung up on Jenkins' name calling, but called

[1] We question whether the judgment of conviction accurately describes the crime of conviction. While the statutory reference and party-to-a-crime modifier are correctly listed, the judgment describes the offense as "Endanger Safety/Reckless Use of Firearm" even though the offense for which he was convicted requires an intentional act. *See* WIS. STAT. § 941.20(2)(a) (2015-16). Upon remittitur, the trial court may wish to consider whether it is appropriate to direct the clerk of the circuit court to revise the judgment to more accurately describe the crime of conviction. *See* ***State v. Prihoda***, 2000 WI 123, ¶¶26-27, 239 Wis. 2d 244, 618 N.W.2d 857.

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

him back because she was scared that he was so angry. During one of the calls, she heard a "dinging" sound that suggested he was in his car. He called her some more names. She told him that she did not want to talk to him anymore and would block him from her phone. The call dropped, and L.B. heard gunshots nearby. She did not, however, see the shooting. She called 911 and her brother.

¶4 Officer Jeffrey Emanuelson from the Milwaukee Police Department was dispatched at 2:56 a.m. on February 22, 2015. He spoke with L.B. He identified multiple bullet holes in the west wall of her home. In the west alley, Emanuelson recovered a pair of gold-rimmed Cartier glasses, which L.B. thought looked like a prescription pair Jenkins wore. The glasses were clean; they had not been snowed on or trampled, and they were free of salt, mud, and dirt. Five shell casings were recovered near the glasses. Emanuelson also recovered bullets from inside L.B.'s home. L.B. identified Jenkins by name and birthdate to Emanuelson, then confirmed his identity when the officer showed her a booking photo of Jenkins. The glasses were swabbed for possible DNA, and a reference sample was later collected from Jenkins; the profiles developed from both samples were a match. Jenkins was charged with one count of endangering safety by use of a dangerous weapon (firearm) discharged into a vehicle or building as a party to a crime. Additional details related to the offense will be discussed below.

¶5 The complaint was filed on June 10, 2015. An information was filed on June 18, 2015. At a scheduling conference held off the record on July 2, 2015, Jenkins invoked his speedy trial right, meaning trial had to commence by

September 29, 2015.[2] *See* WIS. STAT. § 971.10(2)(a). A jury trial was thus scheduled to begin on Monday, September 21, 2015.

¶6 On the day of trial, the assigned branch was unavailable, so the case was "spun" to another branch. The trial court asked whether the parties were prepared to proceed. The State indicated its DNA analyst was unavailable, but the peer who reviewed the report was prepared to testify. The court approved the peer to testify, provided proper foundation was laid.

¶7 The parties then addressed Jenkins' motion *in limine* relating to the State's use of a recorded interrogation. Jenkins claimed the State had not properly turned over the recording because the recording always malfunctioned at the point where Jenkins began to provide material statements. Jenkins claimed to have made the State aware of this multiple times, but defense counsel still did not have a working copy of the recording. The State explained that it now had a working copy of the interrogation recording to offer counsel. The trial court asked the defense for its position in light of now receiving two more hours of recording and the speedy trial demand. Defense counsel specified she was not asking for an adjournment because Jenkins wanted a speedy trial. The court ruled that the State could play from the functioning portion of the recording and the detective who conducted the interview could testify as to the substance of the interrogation, as previously provided in a written summary.

[2] The trial court later stated Jenkins' statutory speedy trial deadline was October 2, 2015. However, trial must be commenced within ninety days, not three months, so the actual deadline was September 29, 2015. *See* WIS. STAT. § 971.10(2)(a).

¶8 The trial court then gave the defense an opportunity to either adjourn the trial in the interest of justice or delay until the following afternoon so that counsel could review the recording. Counsel reiterated she was not asking for an adjournment, but she did want the recording turned over. She then asked for clarification about using the recording and recalling the detective if necessary.

¶9 At that point, the State interjected, saying, "I think given everything right now, the [S]tate would request an adjournment of the jury trial." The trial court denied that request and determined that the State could not use the recovered—and heretofore undisclosed—portions of the recording in its case-in-chief, only in rebuttal. The court then set the case over to the following day.

¶10 On Tuesday, September 22, 2015, the State told the trial court that one of its officers was unavailable and the repaired recording was still malfunctioning. The court thus reinstated its prior ruling that the State could use the functioning portions of the recording and have the detective testify about the rest. When the court asked if there was anything further, the State explained that its officer would be back the following Monday, within the speedy trial time frame. The court, not inclined towards further delay, pointed out that the trial had been scheduled to start the day before.

¶11 The State then indicated that it "at this time would not be able to be prepared to proceed." It noted it had made an in-chambers, off-the-record request for an adjournment, which had been denied, and it was now requesting dismissal of the case without prejudice. Jenkins objected, asserting the State was trying to circumvent his speedy trial demand. He asked the trial court to instead dismiss the case with prejudice.

¶12 The trial court, believing the State was trying to circumvent the speedy trial statute, dismissed the charge with prejudice. The State immediately attempted to clarify that although it wanted the case dismissed without prejudice, it would prefer to proceed to trial over dismissal with prejudice. The court noted that the State had not argued in the alternative that it could proceed to trial. After additional discussion, the trial court allowed the State to rephrase its request to include an alternative option of proceeding to trial, but required the State to decide immediately how to proceed. The State asked for a jury panel.

¶13 Jenkins objected and argued that if the State did not like the trial court's ruling, it could appeal. The court said it was allowing the State to renew its motion in the alternative. The jury panel was called. At the end of the day's proceedings, the court asked if anything else needed to go on the record. Jenkins asserted his belief that the court had lost jurisdiction when it dismissed the charge with prejudice. The court said it would consider Jenkins' position in the morning.

¶14 Jenkins filed a formal motion for reconsideration, reiterating his belief that the trial court had lost jurisdiction. The court considered but denied the motion. It explained that Jenkins asked for dismissal with prejudice, which the court granted, but the State immediately asked for reconsideration to proceed to trial. The court reconsidered and vacated the dismissal. It explained that the whole process took less than five minutes and there was no break in the proceedings, so Jenkins "had not relied upon the … decision in any way, shape, or form other than perhaps a momentary hope that this was all over with." It concluded that there was no prejudice, jeopardy had not attached, and that it had properly exercised its discretion on the State's request that it reconsider.

¶15 The matter proceeded to a jury trial. The State called several witnesses, including Officer Emanuelson, L.B., a DNA analyst, and Detective Michael Caballero, who had interviewed Jenkins. At the close of the State's case, Jenkins moved to dismiss the case, arguing the State had failed to present sufficient evidence to sustain a guilty verdict. The trial court denied the motion. Jenkins called one witness, his first cousin, who was supposedly an alibi witness. The jury ultimately convicted Jenkins of the offense as charged. The trial court sentenced him to five years' initial confinement and three years' extended supervision. Jenkins appeals.

## DISCUSSION

### *I. Whether Dismissal Deprived the Trial Court of Competency*

¶16 The first argument Jenkins makes on appeal is that the trial court "lost competence when it granted the motion to dismiss this action" and, thus, it erred when it reversed the dismissal. We are satisfied that the court did not lose competency upon dismissal.

¶17 Subject matter jurisdiction is conferred upon the trial courts by the state constitution and cannot be curtailed by statute. *See* ***City of Eau Claire v. Booth***, 2016 WI 65, ¶7, 370 Wis. 2d 595, 882 N.W.2d 738. Competency is the power of a court to exercise subject matter jurisdiction in a particular case. *See* ***State v. Smith***, 2005 WI 104, ¶18, 283 Wis. 2d 57, 699 N.W.2d 508. Although Jenkins argued to the trial court that it had lost jurisdiction with the dismissal, the argument on appeal focuses on whether the trial court lost competency, and Jenkins expressly disavows any jurisdictional complaint. This is a proper revision, as "a [trial] court is never without subject matter jurisdiction." ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶1, 273 Wis. 2d 76, 681 N.W.2d 190. We

independently review questions about the trial court's competency. *See* ***Booth***, 370 Wis. 2d 595, ¶6.

¶18 We begin by noting that trial courts have no inherent authority to dismiss a criminal case with prejudice "except for those situations in which a defendant's constitutional right to a speedy trial is implicated[.]" *See* ***State v. Braunsdorf***, 98 Wis. 2d 569, 570, 297 N.W.2d 808 (1980). Jenkins points out that his speedy trial deadline was approaching. However, the deadline at issue was a ninety-day statutory deadline,[3] *see* WIS. STAT. § 971.10(2)(a), not a constitutional deadline.[4]

¶19 Relying on ***State v. Harrison***, 2015 WI 5, 360 Wis. 2d 246, 858 N.W.2d 372, Jenkins argues that when the trial court granted the dismissal, it lost competence to continue to act, "due to a failure of the State to adequate[ly] prepare for trial." But ***Harrison*** is not on point.

¶20 ***Harrison*** dealt with WIS. STAT. § 971.20, the judicial substitution statute. *See* ***Harrison***, 360 Wis. 2d 246, ¶2. Subsection 971.20(9) specifically states that when a substitution request is made, timely and in proper form, "the judge whose substitution has been requested *has no authority to act further in the action* except to conduct the initial appearance, accept pleas and set bail."

[3] We question whether the statutory right to a speedy trial was properly invoked. WISCONSIN STAT. § 971.10(2)(a) requires a felony defendant to make a speedy trial demand "in writing or on the record." The record does not contain a written demand and the hearing at which Jenkins purportedly invoked the right was held off the record.

[4] For constitutional purposes, the general rule is that delay is presumptively prejudicial as it approaches a year. *See* ***State v. Borhegyi***, 222 Wis. 2d 506, 510, 588 N.W.2d 89 (Ct. App. 1998).

(Emphasis added.) The case has nothing to do with whether dismissal of a charge with prejudice causes a loss of competency.

¶21 Jenkins appears to be citing ***Harrison*** to support a claim that noncompliance with a statute—in Jenkins' case, the speedy trial statute—results in a loss of trial court competency. *See* ***Mikrut***, 273 Wis. 2d 76, ¶2 (trial court's competency "may be affected by noncompliance with statutory requirements"). But such reliance is unavailing.

¶22 For one thing, the ninety-day statutory speedy trial deadline had not yet expired, so there was not yet any noncompliance. More importantly, the original trial judge in ***Harrison*** lost competency because Harrison had complied with the statute, not because of anyone's noncompliance. The judge had been properly substituted; thus, by the express terms of WIS. STAT. § 971.20(9), the judge lost competency to continue in the case. *See* ***Harrison***, 360 Wis. 2d 246, ¶¶43, 84, 87. The only statutory "noncompliance" was the judge's return to the case, even though the specified procedure for restoring a substituted judge was not followed. *See* ***id.***, ¶¶74, 77. ***Harrison*** does not support Jenkins' claim that the trial court here lost competency.

¶23 Jenkins also contends that in ***State v. Asfoor***, 75 Wis. 2d 411, 424, 249 N.W.2d 529 (1977), "the [supreme] court held that where a trial court dismisses a case with prejudice, it is a final disposition of the matter and the trial court no longer has the power to act." In fact, ***Asfoor*** does not so hold. Asfoor argued the court lost jurisdiction over a charge by dismissing it, but the supreme court held that "[o]nce jurisdiction has attached, it continues until final disposition." ***Id.*** In other words, ***Asfoor*** is not a competency case.

¶24 In any event, a dismissal, even with prejudice, does not by itself suffice to automatically deprive a trial court of competency. For example, a trial court may reopen a case that was dismissed with prejudice pursuant to WIS. STAT. § 806.07.[5] *See* ***State v. A.G.R., Jr.***, 140 Wis. 2d 843, 847, 412 N.W.2d 164 (Ct. App. 1987).

¶25 More significantly, while the trial court may not have inherent authority to dismiss a case with prejudice, it does have the inherent authority to reconsider its own rulings. *See* ***Butcher v. Ameritech Corp.***, 2007 WI App 5, ¶44, 298 Wis. 2d 468, 727 N.W.2d 546. Jenkins has not established that his case involves anything more complicated than that.

¶26 We are unpersuaded that the trial court lost competency when it dismissed with prejudice the charge against Jenkins. The court was therefore free to reconsider its decision to do so,[6] and Jenkins does not argue that the trial court's

[5] In his reply brief, Jenkins contends that the dismissal could not be revisited under WIS. STAT. § 806.07 because that statute requires a motion and has been interpreted to also require reasonable notice and an opportunity to be heard. *See* ***Gittel v. Abram***, 2002 WI App 113, ¶27, 255 Wis. 2d 767, 649 N.W.2d 661. Jenkins also complains that none of the criteria for reopening a judgment under § 806.07 are present.

At least two paragraphs of WIS. STAT. § 806.07(1) are unavailable for challenging criminal convictions, *see* ***State v. Henley***, 2010 WI 97, ¶70, 328 Wis. 2d 544, 787 N.W.2d 350 (holding § 806.07(1)(g)-(h) is a civil procedure statute that cannot be used to uphold grant of new trial to defendant), so the applicability of § 806.07 in this case is not clear. However, it does not appear that the trial court granted relief on the basis of § 806.07, so we need not consider its applicability. Rather, we have referenced § 806.07 above because it illustrates that a dismissal with prejudice does not automatically end a trial court's competency.

[6] We note that the State also argues that the trial court maintained competency, dismissal notwithstanding, because, under WIS. STAT. § 808.075(3), "the circuit court retains the power to act on all issues until the record has been transmitted to the court of appeals." However, § 808.075, entitled "Permitted court actions pending appeal," is part of the "Appeals and Writs of Error" chapter, and subsections (2) and (3) indicate limits on trial court competency in the event a notice of appeal is filed. Section 808.075 thus has limited application; it is not a statute prescribing a general rule of trial court competency.

reconsideration decision itself was an erroneous exercise of discretion. Rescinding the dismissal and proceeding to trial was, therefore, not improper.

*II. The Motion to Dismiss/Sufficiency of the Evidence*

¶27 "At the close of the [S]tate's case … the defendant may move on the record for a dismissal." WIS. STAT. § 972.10(4). Jenkins did so, asserting insufficient evidence. The trial court denied the motion. On appeal, Jenkins argues that was error, because there was no evidence that he discharged a firearm, had any intention to discharge a firearm, or was part of any conspiracy[7] to have committed the crime. He further argues that "[s]omething more than the presence in an alley of Mr. Jenkins' glasses is required for a felony conviction for the crime of endangering the safety of L.B. by use of a firearm."

¶28 "The test of the sufficiency of the evidence on a motion to dismiss in the trial court is the same as that on appeal." ***State v. Duda***, 60 Wis. 2d 431, 439, 210 N.W.2d 763 (1973). That test is whether "'the evidence, viewed most favorably to the [S]tate … 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. Hanson***, 2012 WI 4, ¶31, 338 Wis. 2d 243, 808 N.W.2d 390 (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990)). "This high standard translates into a substantial burden for a defendant seeking to have a jury's verdict set aside on grounds of insufficient evidence." ***Hanson***, 338 Wis. 2d 243, ¶31.

[7] While conspiracy is one way in which a person may be convicted under party-to-a-crime liability, *see* WIS. STAT. § 939.05(2)(c), conspiracy was not alleged in this case, and the jury was not instructed on conspiracy as a party-to-a-crime theory.

¶29 Convictions may be supported solely by circumstantial evidence. *See* ***Poellinger***, 153 Wis. 2d at 501. In some cases, circumstantial evidence may be stronger and more satisfying than direct evidence. *See* ***id.*** at 501. The standard of review is the same whether the conviction is based on direct or circumstantial evidence. *See* ***id.*** at 503.

¶30 To prove the offense of endangering safety by use of a dangerous weapon by discharging a firearm into a building, the State had to prove that: (1) Jenkins discharged a firearm into a building; (2) he did so intentionally; and (3) under the circumstances, Jenkins should have realized that there might be a human being present in the building. *See* WIS JI—CRIMINAL 1324. Because the State charged Jenkins as a party to a crime, it also had to convince the jury that he either directly committed the offense or that he aided and abetted the crime. *See* WIS JI—CRIMINAL 400. Far more evidence than the mere presence of Jenkins' glasses in the alley was presented to the jury.

¶31 While there is no direct evidence that Jenkins was the shooter, sufficient circumstantial evidence would allow a jury to convict him. Jenkins was angry with L.B. after their disagreement at the club when L.B. said she was leaving. The shooting occurred moments after L.B. told Jenkins she was going to block him from her phone. Background sounds during that conversation hinted that Jenkins was in his car. Jenkins' own statements to police put him at the scene—he admitted that after he left the club, he went to L.B.'s home, though he said she did not answer so he went to a friend's instead. Detective Caballero testified that during his interview, Jenkins never actually denied the shooting, he simply attempted to offer alternate explanations for facts the detective presented.

¶32 As noted, Jenkins' glasses—matched by DNA—were found in the alley behind L.B.'s home. Jenkins told police he dropped them earlier in the week while shoveling, but Officer Emanuelson testified that the glasses were free of dirt, mud, and salt, and had not been trampled or snowed upon, suggesting they were dropped more recently. The glasses were near the shell casings, suggesting the shooter and the owner of the glasses were the same person.

¶33 After the shooting, L.B. called 911 and her brother. Jenkins texted her not long thereafter and said, "I can't believe you just called your brother[.]" After the shooting, Jenkins texted a friend, asking the friend to call him ASAP. When the friend replied he could not call but asked what happened, Jenkins replied, "It's a whole bunch of shh that went down." The morning after the shooting, Jenkins texted L.B. that he was "[c]hecking on" her and her children because she "may be feeling kind of uneasy" and he was "very concerned" about her. Jenkins also tried to email L.B. after the shooting and tried to send her money. All of this evidence, taken together, is more than sufficient for a reasonable jury to infer that Jenkins discharged a firearm into L.B.'s home.

¶34 Intent must often be inferred; it is, by its nature, "rarely susceptible to proof by direct evidence." *See* ***State v. Williams***, 2002 WI 58, ¶79, 253 Wis. 2d 99, 644 N.W.2d 919. Five shots were fired directly into L.B.'s home in the same general location; the wall into which the shots were fired included L.B.'s bedroom. A jury could reasonably conclude that the cluster of shots in one particular location on that particular night showed intent rather than an accident.

¶35 Finally, L.B. had texted Jenkins when she arrived home. The shooting occurred shortly after that text. A reasonable jury could thus conclude

the circumstances were such that Jenkins should have realized a human being was present in the building when he intentionally discharged a firearm into it.

¶36 Based on the foregoing, the State presented adequate evidence which, viewed most favorably to the State, supported a guilty verdict. The trial court therefore properly denied Jenkins' motion to dismiss at the close of the State's case.

*III. Interests of Justice*

¶37 Jenkins also asks us to use our discretionary powers and reverse in the interest of justice. *See* WIS. STAT. § 752.35. Such reversals "'should be granted only in *exceptional* cases.'" ***State v. McKellips***, 2016 WI 51, ¶30, 369 Wis. 2d 437, 881 N.W.2d 258 (citation omitted; emphasis in ***McKellips***). Here, Jenkins argues for discretionary reversal because he believes "the jury could not have followed the trial court's instructions on the law of this case." This, however, is nothing more than a rehash of his insufficient evidence claim. We have explained that there is sufficient evidence to support the verdict. We are, therefore, unpersuaded that this is the type of exceptional case warranting an exercise of our discretionary powers.

*By the Court.*—Judgment affirmed.

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