COURT OF APPEALS
DECISION
DATED AND FILED

May 29, 2019

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2018AP1695-CR **Cir. Ct. No. 2016CF3856**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAVONTAE WILLIAM COOPER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: FREDERICK C. ROSA, Judge. *Affirmed*.

Before Kessler, P.J., Brennan and Brash, 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. Lavontae William Cooper appeals from a judgment of conviction for one count of first-degree recklessly endangering safety and one

count of armed robbery, both as a party to a crime. *See* WIS. STAT. §§ 941.30(1), 943.32(2), and 939.05 (2015-16).[1] Cooper, who was acquitted of being a felon in possession of a weapon and found not to have used a dangerous weapon when he recklessly endangered safety, argues that the verdicts were inconsistent. He seeks acquittal or a new jury trial.[2] In the alternative, he asks this court to order a new trial in the interest of justice pursuant to WIS. STAT. § 752.35 because the real controversy was not fully tried. We reject his arguments, deny his request for discretionary reversal, and affirm the judgment.

BACKGROUND

¶2 The complaint alleged that Cooper and his girlfriend, Breanne Fowler, were involved in a shooting incident and stole a car belonging to another man, D.H. Specifically, the complaint alleged that while Fowler was driving a van and Cooper was sitting in the front passenger seat, Cooper hung outside the passenger side window and fired a gun at D.H., who was sitting in his car.[3] D.H. said that one of the bullets "struck his front passenger window." D.H. subsequently ran from his car, and then he saw Cooper enter the car and drive it away. The complaint indicated that D.H. identified photographs of Cooper and Fowler from photo arrays provided by the police. Both Cooper and Fowler were

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] Cooper does not specify which charges he anticipates would be retried if a new trial were granted. We need not decide that question because we conclude that Cooper is not entitled to a new trial on any charges.

[3] D.H. told the police that he saw a third individual in the van. At trial, a police officer testified that Cooper told him the man in the back seat of the van was Fowler's brother. Neither Fowler nor her brother was called as a witness at the trial.

charged with two crimes: (1) first-degree recklessly endangering safety, by use of a dangerous weapon, as a party to a crime; and (2) armed robbery, as a party to a crime. Fowler was also charged with bail jumping.

¶3 On the day of the jury trial, Fowler entered a plea agreement with the State, so the jury considered only the charges against Cooper. Before the trial began, the State filed an amended information adding a third charge against Cooper: being a felon in possession of a firearm.

¶4 At trial, D.H. testified that Cooper was the man sitting in the van's front passenger seat who fired a gun at him. D.H. said he did not know Cooper's name but had seen him recently and was aware that Cooper had, in the past, quarreled with D.H.'s cousin.

¶5 The jury also heard testimony from a police detective who interviewed Cooper. The detective testified that Cooper admitted being in the van with Fowler, exiting the van, and driving off in D.H.'s car. Cooper also told the detective that he heard a gun being fired, but he denied that he or anyone in the van possessed a gun or fired a gun at D.H.'s car.

¶6 Cooper told the detective that before hearing the gunshots, he noticed D.H.'s vehicle following the van, so "he called his friend who he only knows as 'G' and told G that a white Acura was following him and that he was driving by G's house." G then asked Cooper what he wanted him to do and Cooper replied, "do whatever." Cooper told the detective that he did not direct G to shoot at D.H.'s car and that he did not see who shot a gun at D.H. or whether G could have been the shooter. The detective said he ultimately was not able to identify G or question him.

¶7 Cooper chose not to testify at trial. In closing arguments, trial counsel argued that Cooper had not shot a gun at D.H. and that D.H. was lying to harm Cooper, perhaps due to the prior interaction between Cooper and D.H.'s cousin. Trial counsel said it was not known whether "G" or someone else was the shooter, but trial counsel asserted that the evidence, including a lack of recovered shell casings, demonstrated that Cooper was not the shooter.

¶8 The jury found Cooper guilty of armed robbery and first-degree recklessly endangering safety, although it answered "no" when asked whether Cooper had recklessly endangered safety while using a dangerous weapon. The jury found Cooper not guilty of being a felon in possession of a firearm.

¶9 Cooper objected to the entry of judgments of conviction on grounds that the verdicts were inconsistent. In post-verdict briefing, the State urged the trial court to enter judgments of conviction for the two felonies of which Cooper was found guilty. The State said that it was "not necessary, and actually not proper, to try and examine the reasoning of the jury," citing case law for the proposition that consistency in the verdicts is not required. In contrast, Cooper argued that it was "apparent" that the jury had concluded that Cooper was guilty as a party to a crime and was not the actual shooter. Cooper further asserted there was insufficient evidence that Cooper aided and abetted another person. Therefore, Cooper argued, he should be acquitted of all charges because the jury

had "ruled twice that it did not believe Mr. Cooper possessed [] a dangerous weapon."[4]

¶10 The trial court entered judgments of conviction consistent with the jury's verdicts. It noted that "there is more than sufficient evidence to support the verdicts here, notwithstanding the fact that they may appear somewhat inconsistent."

¶11 The trial court also recognized that it may have answered a jury question incorrectly, but it opined that the error benefitted Cooper. Specifically, the jury inquired about the second question on the verdict form for reckless endangerment, which asked: "Did the defendant commit the offense while using a dangerous weapon?" The jury submitted a written note that stated: "This means Cooper personally possessed the dangerous weapon? Not someone else in the vehicle, correct?" The trial court consulted with the parties, who agreed that the trial court should provide this written response to the jury: "You must determine whether Mr. Cooper possessed the dangerous weapon with respect to count one." At the post-verdict hearing, the trial court explained its answer to the jury's question:

> [The jurors] inquired … whether they had to make a specific finding that it was Mr. Cooper that had the gun. And I thought that was consistent with the presentation of the evidence that the State had put forth, and so I sent an answer back saying yes.
>
> You know, now that I thought about that, that was probably an error by the Court, and ... the answer should

[4] Cooper also argued that the jury instructions were confusing. He has not pursued that issue on appeal and we deem it abandoned. *See* ***Reiman Assocs., Inc. v. R/A Advert., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not briefed are deemed abandoned).

> have been, you can find that Mr. Cooper or the person who aided and abetted him possessed a weapon and that would be sufficient for purposes of the while armed penalty enhancer. I think that was a mistake on my part as I think about it.
>
> However, that's a mistake that works to Mr. Cooper's benefit because essentially it took that while armed penalty enhancer off the table and he was not found to have possessed a weapon.[5]

¶12 The trial court later sentenced Cooper to two consecutive terms of three years of initial confinement and three years of extended supervision. This appeal follows.

DISCUSSION

¶13 There are two issues on appeal: whether Cooper is entitled to relief based on what he terms "inconsistent verdicts" and whether this court should exercise its discretionary authority to order a new trial. We consider each issue in turn.

I. Consistency of the verdicts.

¶14 Cooper argues that the verdicts "were clearly inconsistent with each other and no[t] supported by a consistent rational view of the evidence." He offers his theories of what the jury must have found with respect to the evidence.

¶15 In contrast, the State emphasizes that under controlling case law, verdicts that may appear to be inconsistent can be sustained if there is sufficient

[5] Cooper's appellate brief mentions these comments but does not argue that the trial court's answer to the jury's question provides an independent basis for relief. Cooper does, however, assert that these comments are one reason this court should order a new trial in the interest of justice.

evidence to support each verdict. We agree with the State that it is not necessary to hypothesize about what facts the jury may have found with respect to each alleged crime. We are guided by ***United States v. Powell***, 469 U.S. 57 (1984), where the Court refused to overturn a conviction even though the verdicts on two counts were arguably inconsistent. *See* ***id.*** at 69. ***Powell*** explained:

> [I]nconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense.

Id. at 65. Applying this rationale, we have affirmed a defendant's conviction for bail jumping that was based on committing a burglary while on bail, even though the same jury acquitted the defendant of that burglary. *See* ***State v. Rice***, 2008 WI App 10, ¶¶25-27, 307 Wis. 2d 335, 743 N.W.2d 517. Similarly, we recognized in ***State v. Thomas***, 2004 WI App 115, ¶41, 274 Wis. 2d 513, 683 N.W.2d 497, that "inconsistency in criminal verdicts is not *per se* grounds for reversal." ***Thomas*** continued:

> It has been universally held that logical consistency in the verdict as between the several counts in a criminal information is not required. The verdict will be upheld despite the fact that the counts of which the defendant was convicted cannot be logically reconciled with the counts of which the defendant was acquitted.

Id. (quoting ***State v. Mills***, 62 Wis. 2d 186, 191, 214 N.W.2d 456 (1974); emphasis omitted).

¶16 Thus, when considering whether Cooper's convictions can be sustained, we must consider the sufficiency of the evidence to support each

conviction, without regard to the jury's decision on other counts. *See* ***Rice***, 307 Wis. 2d 335, ¶2 ("[W]hether the evidence is sufficient to support a conviction is decided independently of jury verdicts on related charges."). Whether the evidence was sufficient to support a conviction is a question of law that we review *de novo*. *See* ***State v. Smith***, 2012 WI 91, ¶24, 342 Wis. 2d 710, 817 N.W.2d 410. Our review is "highly deferential" to the jury. *See* ***State v. Rowan***, 2012 WI 60, ¶5, 341 Wis. 2d 281, 814 N.W.2d 854. Applying that deferential standard, we will affirm "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 reached the result being appealed. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶17 We will now apply those legal standards to Cooper's convictions. First, Cooper was convicted of first-degree recklessly endangering safety as a party to a crime. That required the State to prove these elements: (1) Cooper or a co-actor endangered D.H.'s safety; (2) Cooper or a co-actor did so by criminally reckless conduct; and (3) the circumstances of that conduct showed an utter disregard for human life. *See* WIS JI—CRIMINAL 1345 and 400. Second, Cooper was convicted of armed robbery as a party to a crime, which required the State to prove these elements: (1) D.H. owned the vehicle; (2) Cooper or a co-actor took and carried away the vehicle from D.H.'s presence; (3) Cooper or a co-actor took D.H.'s vehicle with the intent to steal; (4) Cooper or a co-actor acted forcibly; and (5) Cooper or a co-actor used or threatened to use a dangerous weapon. *See* WIS JI—CRIMINAL 1480 and 400.

¶18 The State argues that it "presented ample evidence" to establish the elements of both crimes. The State explains:

> This evidence included D.H.'s testimony that he recognized Cooper as the individual who shot at him. D.H. also testified that he owned [his car] and that he saw Cooper drive away in it. D.H.'s testimony alone was enough to sustain the verdicts against Cooper—it establishes that Cooper fired shots at D.H. and took his car. The jury could reasonably have concluded that doing so endangered D.H.'s safety by criminally reckless conduct under circumstances that showed utter disregard for human life. *See also* [WIS. STAT.] § 941.30(1). Likewise, the jury could reasonably have concluded that D.H. owned the [car], which Cooper took using a dangerous weapon and forcible action with the intent to steal. *See also* [WIS. STAT.] § 943.32(2).

(Record citations omitted; periods added to the victim's initials.) We agree with this analysis. D.H. provided eyewitness testimony that Cooper shot a gun at him and took his car. This testimony—which was bolstered by Cooper's admission that he took the vehicle—established the elements of each crime.

¶19 Cooper does not dispute that D.H.'s testimony supports the convictions for both crimes. Instead, he argues that this court should interpret the jury's answers on the verdict forms as proof that the jury rejected D.H.'s claim that Cooper was the shooter and then relied on "very weak circumstantial evidence" to find that "G," working in concert with Cooper, was the shooter. Cooper further asserts that "if G was the shooter, the remaining evidence to tie Cooper to the commission of the offenses was not sufficient for a finding of guilt."

¶20 We decline to engage in speculation about how the jury interpreted the evidence and what its specific findings might have been. *See* ***Dunn v. U.S.***, 284 U.S. 390, 394 (1932) ("That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters."). We have concluded that D.H.'s testimony provides sufficient evidence to support each of

the convictions, and our inquiry ends there. *See* ***Rice***, 307 Wis. 2d 335, ¶2; ***Thomas***, 274 Wis. 2d 513, ¶41.

II. New trial in the interest of justice

¶21 In the alternative, Cooper asks this court to order a new trial because the real controversy was not fully tried. WISCONSIN STAT. § 752.35 grants this court the discretionary power "to reverse a conviction and order a new trial where '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.'" ***State v. Langlois***, 2018 WI 73, ¶54, 382 Wis. 2d 414, 913 N.W.2d 812 (quoting § 752.35). "Our discretionary reversal power is formidable, and should be exercised sparingly and with great caution." ***State v. Williams***, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719. Accordingly, we will grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶22 Cooper argues that "[t]he real controversy, whether Cooper was involved in forcibly stealing a car and endangering public safety in conjunction with G, was not tried." He points to inconsistencies in the verdicts and the trial court's observation that in retrospect, it should have answered the jury's question about one verdict form differently.

¶23 We are not persuaded that a discretionary reversal is appropriate here. A court may conclude that the real controversy has not been fully tried when the jury hears evidence it should not have heard or the jury is deprived of evidence it should have heard. *See* ***State v. Schumacher***, 144 Wis. 2d 388, 400, 424 N.W.2d 672 (1988). Cooper has not identified evidence that should have been suppressed or presented. Further, we have already addressed Cooper's argument

concerning the inconsistencies in the verdict, and we have concluded he is not entitled to relief. Finally, Cooper has not adequately explained how the trial court's observation that it should have answered the jury's question differently—even though the trial court believed its answer ultimately benefitted Cooper—led to the controversy not being fully tried. "[W]e will not abandon our neutrality to develop arguments" for Cooper. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82. We decline to exercise our discretionary powers to order a new trial in the interest of justice.

By the Court.—Judgment affirmed.

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