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

**January 27, 2015**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2014AP411-CR**

**Cir. Ct. Nos. 2012CF5392**
**2012CF3938**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS**
**DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DEWON ANTIONE MCGOWAN,**

**DEFENDANT-APPELLANT.**

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APPEAL from judgments of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

Before Curley, P.J., Brennan, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Dewon Antione McGowan appeals judgments of conviction entered after a jury found him guilty of six crimes. He challenges the sufficiency of the evidence supporting four of the convictions, namely, one count each of feloniously intimidating a witness and possessing a firearm while a felon,

and two counts of misdemeanor intimidation of a victim. We reject his challenges and affirm.

## BACKGROUND

¶2 According to the criminal complaint in Milwaukee County case No. 2012CF3938, LaDonna Evans called the police on August 4, 2012, after hearing her neighbor, Sharlet Perkins, screaming for help. When officers arrived at Perkins's apartment, McGowan and Perkins were both inside. Perkins told police that McGowan, the father of her child, climbed into the apartment through the window, threatened to hit her, pointed a gun at her, and then put the gun in a closet when the police arrived. Police found a semi-automatic pistol in Perkins's closet. The complaint further alleged that McGowan had previously been convicted of a felony and that the conviction remained of record and had not been reversed as of August 4, 2012.

¶3 Police arrested McGowan at the scene. The State charged him with possessing a firearm while a felon, intentionally pointing a firearm at another person, and disorderly conduct. *See* WIS. STAT. §§ 941.29(2)(a) (2011-12),[1] 941.20(1)(c), 947.01(1). When McGowan made his initial appearance in the matter on August 8, 2012, the circuit court commissioner ordered that he not have any contact with Perkins and set the matter for a preliminary examination on August 16, 2012.

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

¶4 The charges in case No. 2012CF3938 were still pending when the State charged McGowan with four additional crimes based on his communications with Perkins while he was in custody. According to the criminal complaint in Milwaukee County case No. 2012CF5392, McGowan telephoned Perkins on August 5, 2012, and instructed her "not to answer these peoples' calls" or "answer the door for these mothafuckers." On August 11, 2012, McGowan telephoned Perkins and said that he would send her something, along with instructions about what to do with it. On August 14, 2012, McGowan telephoned Perkins and told her to "find something to do for the whole day" of August 16, 2012, the date set for his preliminary examination. The State further alleged that McGowan sent a letter to Perkins on September 14, 2012, instructing her to sign a statement exculpating McGowan and to give a notarized copy of the statement to the district attorney. In light of the foregoing allegations, the State charged McGowan with: (1) two misdemeanor counts of intimidating a victim, based on the August 5, 2012 telephone call and the September 14, 2012 letter; (2) one misdemeanor count of conspiracy to commit false swearing, a charge also based on the letter; and (3) one felony count of intimidating a witness, based on the August 14, 2012 telephone call.[2] *See* WIS. STAT. §§ 940.44(1), 946.32(2), 940.43(7).

¶5 McGowan disputed the allegations. The circuit court consolidated the cases and the seven charges proceeded to a jury trial.

[2] The State alleged that McGowan committed all of the crimes charged in case Nos. 2012CF3938 and 2012CF5392 as acts of domestic abuse and as a repeat offender. *See* WIS. STAT. §§ 968.075(1)(a), 939.62(1). Those allegations are not material to the issues he presents on appeal.

¶6 Perkins testified at trial, but she told the jury that she did not recall either the events of August 4, 2012, or whether she had any contact with McGowan after his arrest. She did, however, affirmatively state that she has never owned a gun and does not keep one in her home.

¶7 Evans testified that, on August 4, 2012, she heard Perkins yelling and screaming and crying out: "help, he hitting on me." Evans called 911 after speaking briefly to Perkins and concluding that she looked like she had been "scuffling."

¶8 Officer Joseph Dolkiewicz testified and described responding to Perkins's residence on August 4, 2012. He said that both Perkins and McGowan were in the apartment when police arrived and that Perkins was tearful and "shaking." According to Officer Dolkiewicz, Perkins said McGowan "pointed a firearm at her and threatened to shoot her," then put the gun in a closet. Perkins led Officer Dolkiewicz to a closet, where he found a gun on a shelf.

¶9 Deputy Sheriff Dennis O'Donnell, records custodian for the Milwaukee County sheriff's department, testified that a county jail inmate using McGowan's pass code made telephone calls to Perkins's number on August 5, 2012, August 11, 2012, and August 14, 2012. Deputy O'Donnell further testified that, on September 14, 2012, McGowan gave jail authorities an envelope for mailing addressed to "Cory Taylor."

¶10 The jury listened to recordings of the August 2012 telephone calls made from the jail to Perkins's telephone number. An investigator with the Milwaukee County district attorney's office, Joseph Link, testified that he interviewed Perkins in her home on September 21, 2012, and she identified her voice and McGowan's on the jailhouse recordings. According to Link, Perkins

told him that McGowan "did not want her to cooperate, didn't want her to be involved with [the case against him], and she wasn't to come down to court."

¶11 Link also testified that, while interviewing Perkins, he observed, and eventually seized, a letter in an envelope postmarked September 17, 2012, and bearing a return address for McGowan at the Milwaukee County Jail. Perkins said that McGowan's brother, Taylor, had delivered the letter to her. The letter included declarations of affection addressed to "Sharlet" and instructions to type a statement that said McGowan never threatened Perkins with a gun, that the gun police found in Perkins's home on August 4, 2012, belonged to her, and that she did not tell police that McGowan owned the gun. The letter further instructed Perkins to sign the statement in front of a notary and send the statement to the district attorney, adding that Perkins should not answer questions or say anything in response to any "police tactic." Testimony from a fingerprint examiner established that McGowan's fingerprints were on the letter.

¶12 The jury acquitted McGowan of intentionally pointing a firearm at another person and convicted him of the remaining six charges. He appeals, claiming that the evidence was insufficient to sustain the convictions for four of the six crimes of conviction: possessing a firearm as a felon, feloniously intimidating a witness, and the two misdemeanor counts of intimidating a victim.

## DISCUSSION

¶13 When a defendant argues that insufficient evidence supports his or her conviction, "[w]e give great deference to the determination of the trier of fact. We must examine the record to find facts that support upholding the jury's decision to convict." ***State v. Hayes***, 2004 WI 80, ¶57, 273 Wis. 2d 1, 681 N.W.2d 203 (footnote omitted). We will uphold the verdict if any possibility

exists that the jury could have drawn an inference of guilt from the evidence, and we may not substitute our judgment for that of the jury. ***State v. Poellinger***, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990). The jury, and not this court, resolves conflicts in the testimony, weighs the evidence, and draws reasonable inferences from basic facts to ultimate facts. ***Id.*** at 506. We affirm a jury's verdict "unless the evidence, viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *See* ***id.*** at 507.

¶14 We first consider the sufficiency of the evidence to support McGowan's conviction for possessing a firearm while a felon. Before a jury may convict a defendant of that offense, the State must prove beyond a reasonable doubt that: (1) the defendant possessed a firearm; and (2) the defendant had been convicted of a felony before possessing the firearm. *See* WIS JI—CRIMINAL 1343; *see also* ***State v. Black***, 2001 WI 31, ¶18, 242 Wis. 2d 126, 624 N.W.2d 363. McGowan stipulated at the time of trial that he had been convicted of a felony before August 4, 2012, and on appeal he does not dispute the sufficiency of the evidence to prove his status as a felon. He asserts only that the evidence was insufficient to prove that he possessed a firearm.

¶15 A person has possession of a firearm if the person has it under "actual physical control." *See* ***State v. Peete***, 185 Wis. 2d 4, 12, 517 N.W.2d 149 (1994) (citation omitted). Additionally, "[p]ossession 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." ***Id.*** at 16 (citation omitted).

¶16 McGowan argues that the evidence of his gun possession was "inconsistent and unreliable" because Perkins "originally told Officer Dolkiewicz that Mr. McGowan pointed the gun at her ... [but] at trial she testified she could not recall the night of the [i]ncident." In McGowan's view, "it is reasonable to infer that her initial statements made to Officer Dolkiewicz were made in anger.... It is likely that Ms. Perkins felt guilty about lying to police and therefore refused to state anything at trial."

¶17 Assuming without deciding that the inferences suggested by McGowan are reasonable, "'the trier of fact is free to choose among conflicting inferences of the evidence and may, within the bounds of reason, reject that inference which is consistent with the innocence of the accused.'" *See* ***State v. Smith***, 2012 WI 91, ¶31, 342 Wis. 2d 710, 817 N.W.2d 410 (citation omitted). Moreover, the factfinder may believe some parts of a witness's testimony and reject other parts. *See* ***State v. Owens***, 148 Wis. 2d 922, 930, 436 N.W.2d 869 (1989). Therefore, the jury in this case could believe that Perkins truthfully told Officer Dolkiewicz on August 4, 2012, that McGowan had a gun and put it in her closet. The jury could also credit her trial testimony that she had never owned a gun and that the gun found in her home was not hers. Perkins's statements to police and her testimony at trial, coupled with McGowan's presence at the scene on August 4, 2012, the discovery of the gun in the closet, and, of course, McGowan's stipulation to a prior felony conviction, amply support his conviction for possessing a firearm while a felon.

¶18 McGowan next disputes the sufficiency of the evidence to support his misdemeanor convictions for intimidating a victim in violation of WIS. STAT. § 940.44, and his felony conviction for intimidating a witness in violation of WIS. STAT. § 940.43(7). Section 940.44 provides, in pertinent part:

> **940.44 Intimidation of victims; misdemeanor.**
>
> *[W]hoever knowingly and maliciously* prevents or dissuades, or who attempts to so prevent or dissuade, another person who has been the victim of any crime ... from doing any of the following is guilty of a Class A misdemeanor:
>
> (1) Making any report of the victimization to any peace officer or state ... prosecuting agency, or to any judge.
>
> (2) Causing a complaint ... or information to be sought and prosecuted and assisting in the prosecution thereof.

(Italics added.) WISCONSIN STAT. §§ 940.42-43, provide, in pertinent part:

> **940.42 Intimidation of witnesses; misdemeanor.**
>
> *[W]hoever knowingly and maliciously* prevents or dissuades, or who attempts to so prevent or dissuade any witness from attending or giving testimony at any trial, proceeding or inquiry authorized by law, is guilty of a Class A misdemeanor.
>
> **940.43 Intimidation of witnesses; felony.**
>
> Whoever violates s. 940.42 under any of the following circumstances is guilty of a Class G felony:
>
> ...
>
> **(7)** Where the act is committed by a person who is charged with a felony in connection with a trial, proceeding, or inquiry for that felony.

(Italics added.) McGowan asserts on appeal that the State failed to prove that he acted "knowingly and maliciously" when he wrote the letter and made the telephone calls that underlie the charges of victim and witness intimidation.

¶19 For purposes of WIS. STAT. §§ 940.42-44, the terms "malice" and "maliciously" are defined in WIS. STAT. § 940.41(1r). The circuit court therefore instructed the jury that "'[m]alice' or 'maliciously' means an intent to vex, annoy or injure in any way another person or to thwart or interfere in any manner with

the orderly administration of justice." *See* ***id***. According to McGowan, the evidence is insufficient to prove that he "knowingly and maliciously tried to prevent [] Perkins from either reporting the alleged crime or testifying about the alleged crime" when he wrote to her in September 2012. Rather, he says, his letter shows that he "was trying to get [Perkins] to tell the police the truth about the [i]ncident." He contends that the evidence was thus insufficient to prove him guilty of intimidating a victim by writing to Perkins. Our standard of review requires that we reject this argument.

¶20 "[A] reviewing court may overturn a verdict on grounds of insufficiency of the evidence only if the trier of fact could not possibly have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt." ***State v. Watkins***, 2002 WI 101, ¶68, 255 Wis. 2d 265, 647 N.W.2d 244. The evidence here showed that McGowan wrote to Perkins while he was subject to a court order preventing him from having any contact with her. The letter contained specific instructions about precisely what she should say to the district attorney on his behalf. The letter further instructed Perkins not to answer questions or respond to any police "tactic." "[S]tate of mind can never be established by direct evidence; it can only be inferred from assessment of a person's acts and statements in light of the surrounding circumstances." ***State v. Schlegel***, 141 Wis. 2d 512, 517, 415 N.W.2d 164 (Ct. App. 1987). The jury could reasonably infer from the facts and circumstances that McGowan acted with intent to thwart or interfere with the administration of justice. *See* WIS. STAT. § 941.41(1r).

¶21 McGowan also argues that the telephone calls he made to Perkins do not prove that he "knowingly and maliciously tried to prevent Ms. Perkins from testifying against him." Emphasizing that Perkins told McGowan during their

August 14, 2012 telephone conversation that she planned to go to work on the day set for his preliminary examination, McGowan claims that the calls "evidence that Ms. Perkins made up her own mind not to cooperate with police." McGowan fails to explain the relevance of his claim that Perkins was independently disinclined to cooperate with the prosecution. The crimes of victim and witness intimidation are concerned with the actions and intent of the defendant. *See* WIS. STAT. §§ 940.44, 940.42, 940.43(7).

¶22 Moreover, to the extent McGowan suggests that the jury drew unreasonable inferences about his state of mind from his statements during the jailhouse telephone calls, our standard of review dooms his claim. "[W]hen faced with a record of historical facts which supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law." ***Poellinger***, 153 Wis. 2d at 506-07. Here, the jury learned that, during the telephone conversation on August 5, 2012, McGowan told Perkins "not to answer the door" and "not to answer these [people's] calls." During the telephone conversation on August 14, 2012, he told her to "find something to do for the whole day" of his preliminary examination. Perkins herself told the district attorney's investigator that she understood McGowan "did not want her to cooperate" or "to come down to court." The jury could reasonably infer that McGowan's calls to Perkins reflect that he sought to dissuade her from either testifying or otherwise cooperating in his prosecution, and that he acted with the intent to interfere with the orderly administration of justice.

¶23 Finally, McGowan argues in his opening brief that the State failed to prove him guilty of a felony under WIS. STAT. § 940.45. McGowan was not charged with violating that statute, as he concedes in his reply brief. Because the

record plainly shows that McGowan does not stand convicted of violating § 940.45, his arguments in regard to that statute are irrelevant, and we will not consider them. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (unnecessary to address non-dispositive issues). For all of the foregoing reasons, we affirm.

*By the Court*.—Judgments affirmed.

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