

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 18, 2005

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. 2004AP1227-CR

Cir. Ct. No. 2002CF54

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY ALVEGAS HAMILTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County:
ALLAN B. TORHORST, Judge. *Affirmed.*

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

¶1 PER CURIAM. Anthony Alvegas Hamilton has appealed from a judgment convicting him of one count of robbery by use of force in violation of

WIS. STAT. § 943.32(1)(a) (1999-2000),¹ and one count of armed robbery by threat of use of a dangerous weapon in violation of § 943.32(2). The armed robbery conviction arose from the robbery of a Boston Store on October 26, 2001. The robbery by use of force conviction arose from a robbery of the same Boston Store on November 11, 2001. We affirm the judgment.

¶2 Hamilton was convicted of both offenses at a jury trial. On appeal, he contends that the evidence was insufficient to support either conviction. He also contends that the trial court erroneously exercised its discretion and deprived him of due process by admitting irrelevant and speculative testimony.

¶3 The test on appeal for the sufficiency of the evidence is not whether this court is convinced of the defendant's guilt beyond a reasonable doubt, but whether the jury, acting reasonably, could be so convinced by evidence that it had a right to believe and accept as true. *State v. Poellinger*, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990). We must view the evidence in the light most favorable to the verdict, and if more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the jury. *Id.* at 504.

¶4 The credibility of the witnesses and the weight of the evidence is for the jury. *Id.* Inconsistencies and contradictions in a witness' testimony are for the jury to consider in determining credibility. *Kohlhoff v. State*, 85 Wis. 2d 148, 154, 270 N.W.2d 63 (1978). "A jury, even where a single witness is inconsistent and testifies to diametrically opposed facts, may choose to believe one assertion and disbelieve the other." *Nabbefeld v. State*, 83 Wis. 2d 515, 529, 266 N.W.2d

¹ All references to the Wisconsin Statutes are to the 1999-2000 version, which is the version of the statutes that applies to Hamilton's convictions.

292 (1978). “[T]he jury verdict will be overturned only if, viewing the evidence most favorably to the state and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt.” *State v. Alles*, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation and emphasis omitted).

¶5 We first address the armed robbery conviction. At trial, the State did not argue that Hamilton actually possessed a gun during the October 26, 2001 robbery that led to this conviction. Instead, it argued that he was guilty of armed robbery under WIS. STAT. § 943.32(2) because he threatened to use a dangerous weapon. On appeal, Hamilton contends that the jury could not find beyond a reasonable doubt that the victim’s belief that Hamilton had a gun was reasonable.

¶6 Wisconsin has adopted the “subjective” interpretation of this offense. *State v. Witkowski*, 143 Wis. 2d 216, 219, 420 N.W.2d 420 (Ct. App. 1988). The State need not prove that the defendant was armed with a dangerous weapon. *Id.* Instead, the focus is on the victim’s subjective assessment of the facts and reasonable conclusion that he or she is in danger. *State v. Hubanks*, 173 Wis. 2d 1, 13, 496 N.W.2d 96 (Ct. App. 1992). Resolution of the question of the reasonableness of the victim’s belief depends upon the circumstances of the particular case. *Witkowski*, 143 Wis. 2d at 222. “If the victim’s belief that the defendant was armed was reasonable, that is enough.” *Id.* at 219.

¶7 Christopher Mack, a Boston Store loss prevention officer, testified that on October 26, 2001, he observed Hamilton take clothing from the Boston Store and exit the store without paying. Mack testified that he followed Hamilton into the parking lot, identified himself as a loss prevention officer, and asked Hamilton to accompany him back to the store. Mack testified that Hamilton then

commenced running, and Mack ran after him. Mack testified that merchandise was falling out of Hamilton's clothes as he ran, and that Hamilton appeared to be holding merchandise in his clothes and holding his pants up. Mack testified that Hamilton eventually stopped and turned to look at Mack. He testified that Hamilton then brought his hand to his waistband area and stated that he was going to count to three, and if Mack was still there he would start shooting.

¶8 Mack testified that he believed Hamilton had a gun. He stated that he drew this conclusion because of the way Hamilton's hand was gripped, leading Mack to believe he had something in it, like the grip of a handgun. Mack testified that he also believed that the tone of Hamilton's voice was serious. Mack testified that he then backed off, and Hamilton got into a vehicle and drove away.

¶9 Based upon WIS JI—CRIMINAL 1480, the jury was instructed as follows:

It is sufficient if the victim reasonably believed defendant had a dangerous weapon at the time of the threat. Whether the victim reasonably believed that the defendant was armed with a dangerous weapon is to be determined from the standpoint of the victim at the time of the alleged offense. The standard is what a person of ordinary intelligence and prudence would have believed under the circumstances that existed at that time.

¶10 The evidence was clearly sufficient to permit the jury to find that Mack reasonably believed that Hamilton possessed a gun and that he was in danger. Hamilton's verbal representation that he was going to count to three and start shooting, standing alone, was sufficient to permit Mack to reasonably conclude that Hamilton was armed. *See Witkowski*, 143 Wis.2d at 221-22. Moreover, Mack testified that when Hamilton made the threat, he brought his hand to his waistband, a place where a robber might reasonably carry a gun. Mack also

testified that Hamilton's hand was gripped like that of a person holding a gun. Under these circumstances, Mack could reasonably believe that Hamilton had a gun in his waistband or under his clothing. *See State v. Hopson*, 122 Wis. 2d 395, 405, 362 N.W.2d 166 (Ct. App. 1984).²

¶11 Hamilton's next argument is that the trial court erred when it permitted Mack to testify that if a person tells him that he or she has a gun, he is going to believe that person has a gun. Hamilton also claims that the trial court erred when it permitted Mack to testify that as a loss prevention officer, he had never previously had anyone say he or she had a gun.

¶12 Hamilton contends that this evidence was irrelevant and speculative, and that the trial court's admission of it denied him due process by changing the burden of proof as to the reasonableness of Mack's fear. Although his argument on this subject is confusing, we need not address it at length because it is clear that the evidence was properly admitted.

¶13 As previously noted, the jurors were required to determine whether Mack subjectively believed that Hamilton was armed and, if so, whether his belief was reasonable. Mack's testimony that he would believe a person who claimed to have a gun was relevant to whether he subjectively believed Hamilton had a gun. His testimony that he had never previously been threatened with a gun was relevant because it showed why he personally would be more or less likely to

² Hamilton cites to other evidence and inferences from the evidence to contend that Mack did not or could not reasonably believe he was armed. However, regardless of whether the jury could have reached a different conclusion, as stated previously, if more than one reasonable inference can be drawn from the evidence, we are required to accept the one drawn by the jury. *See State v. Witkowski*, 143 Wis. 2d 216, 224-25, 420 N.W.2d 420 (Ct. App. 1988). The jury's verdict therefore may not be disturbed.

believe Hamilton's claim that he possessed a weapon. Mack's personal thoughts and experiences were relevant information for the jury to consider in determining whether he subjectively believed Hamilton was armed. However, the admission of this testimony did not absolve the jury of its responsibility of determining whether Mack's belief was reasonable or alter the State's burden of proof in any way.

¶14 Hamilton's final argument is that the evidence was insufficient to convict him of robbery by use of force. We disagree.

¶15 Mack testified that on November 11, 2001, he observed Hamilton again take clothing from the Boston Store and exit without paying. Mack testified that he followed Hamilton outside of the store and identified himself as a loss prevention officer. Mack testified that when Hamilton commenced running, he reached up to grab Hamilton's shoulders. He testified that Hamilton then reached up and grabbed him, pulling or pushing him so that he flipped over Hamilton's back, causing him to land on the ground and dislocate his shoulder. He testified that Hamilton continued to flee but was followed by another loss prevention officer.

¶16 Mack's testimony was corroborated by the testimony of Bradley Zenoni, a citizen witness who was in the parking lot at the time. Zenoni testified that he saw a security person get flipped by Hamilton over Hamilton's shoulder and land on the ground. Zenoni testified that he observed Hamilton trying to get Mack off of him and saw Hamilton grab Mack's arm.

¶17 Based upon the testimony of Mack and Zenoni, the jury could reasonably find that Hamilton used force against Mack with the intent to overcome his physical resistance to the taking away of property from the Boston Store. The

conviction under WIS. STAT. § 943.32(1)(a) must therefore be upheld, regardless of whether the jury could have reasonably drawn an alternative inference from the evidence.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2003-04).

