COURT OF APPEALS
DECISION
DATED AND RELEASED

July 24, 1996

No. 95-1200-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FREDERICK F. HAFEMANN,

Defendant-Appellant.

APPEAL from judgments of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Frederick F. Hafemann appeals from judgments convicting him of two counts of attempted kidnapping, attempted interference with custody of a child and violating a restraining order, all while armed with a dangerous weapon, and carrying a concealed weapon. On appeal, Hafemann argues that the trial court should have suppressed evidence seized from his vehicle, that there was insufficient evidence that he attempted to kidnap his former wife and child or that he attempted to take the child from his former wife without her consent, and that a new trial is necessary because a juror failed

to reveal his familiarity with a member of the district attorney's office during voir dire. We reject these claims and affirm.

SUPPRESSION OF EVIDENCE

Hafemann argues that the court should have suppressed evidence found in his vehicle as a result of three warrantless searches. The facts of the searches were adduced at the suppression hearing.

Walworth County Deputy Sheriff Dana Nigbor testified that she was directed to travel to the village of East Troy on February 14, 1994, after the sheriff's department received a telephone call from a woman claiming that her former husband, Hafemann, who was the subject of a restraining order, had appeared at her son's school. Nigbor was advised that the former husband was apparently attempting to take the child. Before Nigbor reached the school, she encountered a vehicle matching Hafemann's traveling near the school. Nigbor pulled the vehicle over, asked Hafemann for identification and inquired whether he had just left one of the local schools. Hafemann stated that he had and that he had wanted to see his former wife and drop off some items he had for her. While Hafemann was sitting in the vehicle, Nigbor peered inside and noticed that the seats were filled with boxes, blankets, clothes and numerous food items. Nigbor testified that "it appeared that he was going somewhere for awhile." Hafemann told Nigbor's partner that he was moving. While Nigbor was calling in the traffic stop and checking on Hafemann's license, Officer Jeffrey McSwain of the town of East Troy arrived at the scene and advised that he had just left the complaining witness, Joyce Hafemann, at the school and that there was a restraining order in effect against Hafemann. Hafemann was then removed from his vehicle, handcuffed, arrested and read his ***Miranda*** rights. After Hafemann was out of the vehicle, McSwain advised Nigbor that Hafemann was "very dangerous and that he may be in possession of a weapon at this time." Hafemann was then placed in a police car and Nigbor searched Hafemann's vehicle to determine if there were any weapons in the vehicle.

Nigbor found maps and a note indicating the location of Joyce's employment, the child's school and that Hafemann intended to kidnap his son and remove him from East Troy. The note also indicated that he intended to

abduct his former wife as well. Nigbor left those items in the front seat of the car and searched the backseat. In the backseat she found a coat in which she found a note that referred to kidnapping Joyce and killing her if she tried to escape. Nigbor then found a loaded .22 caliber pistol underneath the front seat on the passenger side. She entered the trunk using the vehicle's keys. There she found a loaded rifle, a knife and numerous boxes of food and other items. She left everything where she found it and secured the vehicle. The vehicle was towed to a secured building in the village of East Troy.

Officer Thomas Zeimentz of the Village of East Troy Police Department described his inventory search of Hafemann's vehicle once it was secured by the village police department.[1]

The trial court denied the motion to suppress. The court ruled that the first search occurred as the result of an investigative detention under ***Terry v. Ohio,*** 392 U.S. 1 (1968). Hafemann was then arrested on probable cause of having violated the restraining order based upon the information provided by McSwain regarding the existence of a restraining order and Hafemann's statement that he had gone to the school to make contact with his former wife. The second search was a search incident to a lawful arrest. Thereafter, the police conducted a lawful inventory search of the vehicle.

Our review is limited by the concessions Hafemann makes on appeal. He concedes that his vehicle was lawfully stopped on February 14, 1994, that the police lawfully inspected the interior of the passenger compartment from the outside before he was arrested, and that the police lawfully searched the passenger compartment of his car incident to his arrest.[2] Hafemann argues that Nigbor had to immediately seize any incriminating evidence she found during the search incident to arrest or forego reliance upon it and that Nigbor lacked cause to search Hafemann's trunk.

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[1] The inventory search occurred pursuant to a written directive that all items secured by the village would be properly inventoried.

[2] Hafemann does not challenge his arrest.

When asked to review a circuit court's refusal to suppress evidence and its conclusion that a search was reasonable, we will uphold the court's findings of historical or evidentiary fact unless they are clearly erroneous. *See* ***State v. Jackson,*** 147 Wis.2d 824, 829, 434 N.W.2d 386, 388 (1989). However, whether these facts satisfy the constitutional requirement of reasonableness presents a question of law which we determine independently. ***Id.***

While search of a trunk incident to an arrest is not within the scope of the ***Belton***[3] rule, ***State v. Fry,*** 131 Wis.2d 153, 181, 388 N.W.2d 565, 577 (1986), other justifications exist in this case for searching the trunk. If the search of the automobile is based on probable cause to believe that evidence of a crime is in the automobile, the search may include the trunk area. ***Id.*** at 181, 388 N.W.2d at 577 (citing ***United States v. Ross,*** 456 U.S. 798 (1982)). Probable cause to arrest Hafemann authorized the police to search the trunk of his car. Given the information within the command of law enforcement authorities at the time of the arrest and the items found in the passenger compartment of the vehicle, the officers had probable cause to open the trunk.

Even if we did not conclude that there was probable cause to open the trunk, the items in the trunk were lawfully obtained in the course of an inventory search once Hafemann's vehicle was secured by Village of East Troy police. Inventory searches of impounded vehicles are a recognized exception to the warrant requirement. ***State v. Milashoski,*** 159 Wis.2d 99, 112, 464 N.W.2d 21, 26 (Ct. App. 1990), *aff'd*, 163 Wis.2d 72, 471 N.W.2d 42 (1991). The justification for an inventory search does not rest upon probable cause; it is an administrative function, not a search for evidence. ***State v. Weber,*** 163 Wis.2d 116, 132, 471 N.W.2d 187, 194 (1991). An inventory search protects the owner's property while in police custody, protects the police against disputes over lost or stolen property and protects the police from potential danger. ***Id.*** To determine the reasonableness of an inventory search, we examine the reasonableness of the intrusion and the reasonableness of the scope of the intrusion. ***Id.*** at 133, 471 N.W.2d at 194. Reasonableness must be based on the facts and circumstances of each case. ***Id.*** Whether the facts in this case satisfy the constitutional requirement of reasonableness is a question of law which we review de novo. ***State v. Whitrock,*** 161 Wis.2d 960, 973, 468 N.W.2d 696, 701

[3] ***New York v. Belton,*** 453 U.S. 454 (1981).

(1991). The underlying findings of fact of the case must be upheld unless they are contrary to the great weight and clear preponderance of the evidence. ***Id.***

Zeimentz testified that he inventoried the vehicle at the direction of his superior, and at the point he began the inventory, he was unaware of the items Nigbor had discovered during her search of the vehicle. The trial court found that the inventory search was performed pursuant to police policy and that Zeimentz had to read the various notes found in the car, including the trunk, so they could be properly identified for the inventory.

Hafemann argues that the true purpose of the inventory search was to investigate, rather than to administratively record the items found in Hafemann's car. The trial court's findings are not clearly erroneous and Hafemann's contention is not borne out by the record. We cannot conclude that the inventory search was actually a pretext for an investigatory search.[4] The trial court properly declined to suppress items located during the inventory search.

We reject Hafemann's contention that police had to seize items at the scene in order to avoid suppression. Where there is a delay between the first observation of an object and its later seizure, the subsequent seizure is not constitutionally offensive. *See* ***State v. Mazur,*** 90 Wis.2d 293, 303-04, 280 N.W.2d 194, 198-99 (1979).

SUFFICIENCY OF THE EVIDENCE

Hafemann challenges the sufficiency of the evidence that he attempted to kidnap his former wife and child and that he attempted to take the child away from his former wife. We conclude that the evidence supports

[4] Hafemann does not contend that the department failed to comply with the inventory protocol.

Hafemann's convictions for attempted kidnapping and attempted interference with parental custody.[5]

Upon a challenge to the sufficiency of the evidence to support a jury's guilty verdict, we may not substitute our judgment for that of the jury "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force" that no reasonable jury "could have found guilt beyond a reasonable doubt." ***State v. Poellinger,*** 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). We will uphold the verdict if any possibility exists that the jury could have drawn the inference of guilt from the evidence. *See* ***id.*** at 507, 451 N.W.2d at 758. It is within the jury's province to fairly resolve conflicts in the testimony, weigh the evidence and draw reasonable inferences from the facts. *See* ***id.*** at 506, 451 N.W.2d at 757. If more than one inference can be drawn from the evidence, the inference which supports the jury's finding must be followed. ***State v. Witkowski,*** 143 Wis.2d 216, 223, 420 N.W.2d 420, 423 (Ct. App. 1988).

Hafemann concedes that there was sufficient evidence that he possessed the requisite intent to kidnap[6] and interfere with custody.[7] However, Hafemann argues that there was insufficient evidence that he acted in furtherance of his criminal intent.

In interpreting § 939.32(3), STATS.,[8] the court in ***State v. Stewart,*** 143 Wis.2d 28, 420 N.W.2d 44 (1988), held that "to prove attempt, the state must

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[5] Hafemann does not challenge the sufficiency of the evidence for the other convictions.

[6] Section 940.31(1)(b), STATS., makes guilty of a Class B felony a person who "[b]y force or threat of imminent force seizes or confines another without his or her consent and with intent to cause him or her to be secretly confined or imprisoned or to be carried out of this state or to be held to service against his or her will."

[7] Section 948.31(1)(b), STATS., provides that "whoever intentionally causes a child to leave, takes a child away or withholds a child for more than 12 hours beyond the court-approved period of physical placement or visitation period from a legal custodian with intent to deprive the custodian of his or her custody rights without the consent of the custodian is guilty of a Class C felony."

[8] The court in ***State v. Stewart,*** 143 Wis.2d 28, 420 N.W.2d 44 (1988), interpreted the 1985-86 version of the statute. The current version, 1993-94, has been made gender-neutral. Otherwise, it is the same as the statute interpreted in ***Stewart.*** We use the 1993-94 version of the statute.

prove an intent to commit a specific crime accompanied by sufficient acts to demonstrate unequivocally that it was improbable the accused would desist of his or her own free will." ***Id.*** at 31, 420 N.W.2d at 45.

> The conduct element of § 939.32(3) is satisfied when the accused engages in conduct which demonstrates that only a circumstance beyond the accused's control would prevent the crime, whether or not such a circumstance actually occurs. An attempt occurs when the accused's acts move beyond the incubation period for the crime, that is, the time during which the accused has formed an intent to commit the crime but has not committed enough acts and may still change his mind and desist.

Id. at 42, 420 N.W.2d at 49-50.

Hafemann argues that all he did on February 14, 1994, was go to his son's school and attempt to hail his former wife. He never saw or spoke with his son. When Joyce did not emerge from the school, Hafemann departed. Hafemann also argues that his conduct at the time he was stopped by police did not indicate that he was fleeing apprehension. Hafemann contends that he was punished for guilty intentions rather than manifest dangerousness. *See* ***id.*** at 41, 420 N.W.2d at 49.

It was within the jury's province to draw reasonable inferences from the evidence. ***Poellinger,*** 153 Wis.2d at 507, 451 N.W.2d at 758. It was for the jury to weigh the evidence and draw reasonable inferences from it. ***Id.*** at 506, 451 N.W.2d at 757. There was sufficient evidence from which the jury could determine that Hafemann had undertaken the implementation of his plan and had gone beyond the mental formulation to commit it. The maps and notes in Hafemann's car outlined a sequence of events, the first steps of which were to kidnap his son from school, interfere with Joyce's custody rights and kidnap Joyce.

Joyce testified at trial that when she arrived at the school to pick up her son, she saw Hafemann's car turning around in the driveway across from the school. She parked and ran toward the school. As she was going into the school, Hafemann pulled across the driveway, got out and called to her. She ran into the school and told the school secretary to call the police. A parent volunteered to move Joyce's car after Joyce learned that it was blocking the other parents' access to the school. When the woman returned from moving the car, she told Joyce that Hafemann had pulled behind the car, approached her and said "oh, you're not the bitch."

David Bickford, a corrections officer with the Walworth County Sheriff's Department, testified that he books people into the Walworth county jail. After the officer who brought Hafemann into the jail left, Hafemann told Bickford that he did not understand why he was there and that "all he was going to do was take his kid and that if she got in the way, he was going to put her in the trunk and put her out in a field."

The officer who conducted the inventory search, Zeimentz, testified that one of the notes found in Hafemann's vehicle detailed, step-by-step, a plan in which Hafemann would attempt to locate his former wife, take his child and depart for a chosen spot. The note contemplated that if Hafemann could seize his former wife, he would do so. Zeimentz testified to other notes threatening the former wife's health and safety. The jury was also provided with a full description of the items found in Hafemann's car.

We conclude that the evidence adduced at trial was sufficient for the jury to find beyond a reasonable doubt that Hafemann's conduct in furtherance of his intent to kidnap and interfere with parental custody had proceeded far enough toward completion of the crimes to make it improbable that he would have desisted but for Joyce's arrival at the school.

JUROR BIAS

Finally, Hafemann seeks a new trial because a juror failed to reveal during voir dire that he knew a member of the district attorney's office, Diane Resch. Hafemann contends that the juror's familiarity with Resch, who was not involved in the Hafemann prosecution but was teaching a criminal law course the juror was taking, rendered the juror impartial.

During voir dire, the court asked the jurors if any of them were acquainted with any of the lawyers "in this case." Some jurors indicated familiarity with some of the police officers in East Troy and Walworth county. The juror in question, Mark Lyons, indicated that a corrections officer who would be a witness was his neighbor. He stated that this familiarity would not interfere with his ability to be a fair and impartial juror.

During trial, the prosecutor advised the court that one of the jurors knew an attorney in his office. Juror Lyons was brought into court for examination by the court on the question of whether he knew Resch. Lyons confirmed that he was taking a criminal law class from Resch toward a police science degree. He stated that he did not feel that this would interfere with his ability to be a fair and impartial juror. Lyons indicated that he heard the prosecutor mention Resch's name in the course of identifying the members of his office, but he understood the voir dire question to be whether he knew anyone in the courtroom at the time and not whether he knew anyone in the district attorney's office. Lyons denied that he concealed the fact that he knew Resch. Hafemann's counsel proposed replacing Lyons with the alternate. The court found that Lyons could be a fair and impartial juror.

On appeal, Hafemann argues that Lyons failed to answer a material question during voir dire. The record does not bear out this contention. Rather, Lyons was asked whether he knew any of the parties, witnesses or lawyers "in this case." Resch was not involved in the Hafemann prosecution and therefore Lyons technically answered the question correctly. Hafemann also argues that Lyons was biased. However, the court found that Lyons would be a fair and impartial juror.

Whether a prospective juror is biased and should be dismissed from the jury panel for cause is a matter within the trial court's discretion. ***State v. Louis,*** 156 Wis.2d 470, 478, 457 N.W.2d 484, 488 (1990), *cert. denied*, 498 U.S. 1122 (1991). The trial court's determination that a juror can be impartial should be overturned only when bias is "manifest." ***Id.*** at 478-79, 457 N.W.2d at 488. We discern no misuse of the trial court's discretion in declining to replace Lyons with an alternate. The court questioned Lyons closely regarding his familiarity with Resch and his ability to be impartial. Based upon the record created on this question, we cannot conclude that Lyons manifested any bias. Moreover, Lyons' interpretation of the question put to him—whether he knew any of the lawyers "in this case"—is a fair interpretation and does not require an inference that Lyons was attempting to avoid acknowledging his familiarity with Resch when he failed to do so during voir dire.

By the Court.—Judgments affirmed.

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