COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP750-CR **Cir. Ct. No. 2011CF4393**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JULIAN L. PEREZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. Julian L. Perez appeals from a judgment convicting him, after a jury trial, of possession of a firearm by a felon in violation of WIS.

STAT. § 941.29(2) (2011-12).[1] On appeal Perez contends that he was denied his constitutional right to a unanimous verdict and that the trial court improperly amended the felon in possession charge. We affirm.

BACKGROUND

¶2 At issue in this appeal is whether Perez was denied his right to a unanimous verdict on the charge of being a felon in possession of a firearm and whether the trial court erroneously amended the felon in possession charge to include acts which occurred in the hallway of an apartment building at 2725 South 12th Street, Milwaukee, when the complaint and information identified the location of the crime as "2725 South 12th Street [Apartment] #107."

¶3 On September 19, 2011, Perez was charged with one count of first-degree reckless injury by use of a dangerous weapon and one count of being a felon in possession of a firearm. The charges stemmed from an incident, which, according to the complaint, occurred at 2725 South 12th Street, Apartment 107. The complaint alleged that on July 27, 2011, Perez shot James Seymer in the arm, at the location identified in the complaint.

¶4 Multiple witnesses testified at trial. Julie Mullins, a resident of the building at 2725 South 12th Street, testified that on the evening of July 27, 2011, she was in her apartment when she heard a "scuffle" in the hallway. Mullins opened her apartment door, at which point she saw Perez—who she knew as "JuJu" or "JuVe"—pointing a gun at an individual. Mullins identified the

[1] Prior to trial, the parties stipulated that Perez had previously been adjudicated delinquent.

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

individual as her heroin dealer, "Billy," who had come to see her. Perez pointed the gun at Mullins and said, "yo, bitch, go back to your apartment." Mullins returned to her apartment and heard a gunshot approximately fifteen to twenty minutes later. Neither the State, nor defense counsel, asked Mullins which apartment number she lived in. Nor did Mullins offer her apartment number.

¶5 Seymer testified that he also lived in the apartment building at 2725 South 12th Street on July 27, 2011. Seymer, a self-described "alcoholic [and] crack head" at that time, testified that he did not remember which apartment number he was living in on the date he was shot. Seymer told the jury that a few hours before the shooting, Perez was at Seymer's apartment with a gun. Perez had been staying with Seymer in the weeks leading up to the shooting and was supplying Seymer with drugs. Seymer said that on the day of the shooting, a steady stream of people were in his apartment and at some point before the shooting, "somebody had went out and shot the shotgun in the dumpster," prompting a neighbor to call the police. Seymer went to a bar after the police left and returned to his apartment to again find multiple people, including Perez, in his apartment. Seymer said that when he returned from the bar, he noticed Perez brandishing a .375 magnum revolver, but did not notice the revolver aimed at him (Seymer) until he was shot. Seymer testified that he thought he resided in apartment number 102 at the time, but admitted that he was not positive and that he could have been living in apartment number 107.

¶6 Both Seymer and Mullins admitted to prior criminal convictions and to initially lying to police or withholding information.

¶7 Milwaukee Police Detective Dale Bormann testified that he was called to the scene of a shooting at 2725 South 12th Street on July 27, 2011.

Bormann identified apartment number 107 as the apartment where the shooting took place.

¶8 The apartment number where the shooting took place was not challenged by either party. Neither party requested that the trial court include the apartment number in the jury instructions, nor did either party request the inclusion of the apartment number at the jury instruction conference. Accordingly, with regard to the felon in possession charge, the trial court read the standard pattern jury instruction, stating, as relevant:

> The second count of the Information charges that on or about July 27, 2011 at 2725 South 12th Street in the City of Milwaukee, … the defendant, … did possess a firearm after having been adjudicated delinquent of felony conduct. That would be in violation of section 941.29(2) of the Wisconsin Statutes….
>
> ….
>
> Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present. One, the defendant possessed a firearm. Firearm means a weapon which acts by the force of gunpowder. Possess means the defendant knowingly had actual physical control of a firearm….

¶9 During deliberations, the jury submitted a series of questions. First, the jury asked: "Are both charges related to the incident in the apartment (the shooting)[?]" Prior to sending a response, the trial court noted that although the Information specified apartment number 107 as the location for both charges, the printed jury instructions did not specify the apartment number. The trial court also noted that neither party requested the inclusion of the specific apartment number in the instructions. The trial court concluded that the proper answer to the jury's question was simply, "yes."

¶10 Later, the jury asked a second question: "If we feel the defendant had a gun in the hallway but find him not guilty of the shooting, can we find him guilty of possession only[?]" The court concluded that "[u]nder the laws of the State of Wisconsin I have to answer that question [']yes,['] that they may find him guilty of possession only."

¶11 The final question submitted by the jury asked: "[D]id the charge number two come from the possible act of robbery in the hallway, or did it come from the possible act of shooting Mr. Seymer?" Defense counsel argued that "charge number two," the felon in possession charge, pertained only to Perez's possession at the time Seymer was shot in apartment number 107 because possession in the hallway was a separate act. Specifically, defense counsel argued:

> Even though it's the same location, same day, these are actually separated by time. So I think there could be some danger if we don't answer as 107 because half of them could find him guilty of felon in possession in the hallway, and half of them could find him guilty of felon in possession in the apartment, and he is due a unanimous verdict on the charge.

¶12 The State, and ultimately the trial court, disagreed. The trial court stated:

> [R]eally the evidence is what prevails and not the original charge…. As to the unanimous verdict of the jury, again, I really do think that [the State] has the correct answer…. [I] am confident … that being a felon in possession of a firearm that close in time as the evidence showed in this case in that same location whether inside an apartment or outside in the hallway, that even if half the jurors believed that Mr. Perez had a firearm in apartment 107 and the other half believed that [he] had the firearm outside in the hall outside of 102, that that still would be a unanimous verdict on the question of having a firearm in that location, that is at that street address on that date, even at that street address

> at apartment 107, which is strongly suggested by the evidence to be very close to 102.

The trial court's ultimate response to the jury's question was: "Please determine whether the evidence established the elements of the offense charged beyond a reasonable doubt."

¶13 The jury returned verdicts finding Perez not guilty of first-degree reckless endangerment, but guilty of being a felon in possession of a firearm. This appeal follows.

DISCUSSION

¶14 On appeal Perez argues that his right to a unanimous verdict was violated because "the [trial] court did not instruct the jury that it had to be unanimous as to whether the defendant possessed a firearm inside Apartment #107 or … in the hallway outside Apartment #102." This omission, he claims, amounted to "amending the charge to include acts occurring in the hallway outside Apartment #102." We discuss the arguments separately.

I. The verdict was unanimous.

¶15 We note first that defense counsel did not request a specific apartment number on the jury instructions and only expressed concern about the apartment number after the jury raised the issue. Accordingly, we are not convinced that the defendant preserved the issue of whether his verdict was unanimous for appeal. *See* ***Best Price Plumbing, Inc. v. Erie Ins. Exch.***, 2012 WI

44, ¶37, 340 Wis. 2d 307, 814 N.W.2d 419 (Errors in jury instructions are forfeited if parties fail to request, or object to, instructions.).[2]

¶16 The right to a jury trial guaranteed by article I, sections 5 and 7 of the Wisconsin Constitution includes the right to a unanimous verdict with respect to the ultimate issue of guilt or innocence. ***State v. Derango***, 2000 WI 89, ¶13, 236 Wis. 2d 721, 613 N.W.2d 833. The primary justification for the unanimity requirement is that it ensures that each juror is convinced that the prosecution has proved each essential element of the offense beyond a reasonable doubt. ***Id.*** "Jury unanimity, however, is required 'only with respect to the ultimate issue of the defendant's guilt or innocence of the crime charged, and ... not ... with respect to the alternative means or ways in which the crime can be committed.'" ***Id.***, ¶14 (citation omitted; ellipses in ***Derango***).

¶17 The threshold question in a unanimity challenge is therefore whether the statute creates multiple offenses or a single offense with multiple modes of commission. ***Id.*** This presents a question of statutory construction, which is a question of law, and our review is therefore *de novo*. *See* ***State v. DeRango***, 229 Wis. 2d 1, 11, 599 N.W.2d 27 (Ct. App. 1999), *aff'd*, 2000 WI 89, 236 Wis. 2d 721, 613 N.W.2d 833. If we conclude the legislature intended multiple offenses, then the jury must be unanimous as to each crime. *See* ***State v. Hammer***, 216 Wis. 2d 214, 219, 576 N.W.2d 285 (Ct. App. 1997). On the other hand, if we determine "that the legislature intended to enact a statute creating one crime with

[2] In ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612, the supreme court "recognized that the terms 'forfeiture' and 'waiver' are often used interchangeably, but that the terms embody distinct legal concepts. Forfeiture is the failure to make the timely assertion of a right, and waiver is the intentional relinquishment of a known right. In the context of the failure to object to a jury instruction, the applicable concept is forfeiture." *See* ***Best Price Plumbing, Inc. v. Erie Ins. Exch.***, 2012 WI 44, ¶37 n.11, 340 Wis. 2d 307, 814 N.W.2d 419.

alternate modes of commission, [we] must make a second inquiry to determine whether an instruction allowing a conviction based upon a finding as to either mode, in the alternative, violates an accused's constitutional right to unanimity." *See* ***State v. Norman***, 2003 WI 72, ¶60, 262 Wis. 2d 506, 664 N.W.2d 97. Whether the statute meets that constitutional standard presents a question of law, which we review *de novo*. *See* ***State v. Piddington***, 2001 WI 24, ¶13, 241 Wis. 2d 754, 623 N.W.2d 528 (reconciling constitutional consideration of due process with statutory requirements presents question of law).

¶18 Here, Perez was charged with violating WIS. STAT. § 941.29, which, as relevant, provides:

> **Possession of a firearm.**
>
> **(1)** A person is subject to the requirements and penalties of this section if he or she has been:
>
> ….
>
> (bm) Adjudicated delinquent for an act committed on or after April 21, 1994, that if committed by an adult in this state would be a felony….
>
> ….
>
> **(2)** A person specified in sub. (1) is guilty of a Class G felony if he or she possesses a firearm under any of the following circumstances:
>
> ….
>
> (b) The *person possesses a firearm* subsequent to the adjudication, as specified in sub. (1)(bm).

(Emphasis added.)

¶19 The statute contains two elements: First, a prior adjudication of a person (here as a delinquent) for a felonious act. Second, possession of a firearm

by that person. The first element was conclusively established by the parties' stipulation. Therefore, possession of a firearm by Perez is the only element the State had to prove at trial. *See* ***State v. Black***, 2001 WI 31, ¶19, 242 Wis. 2d 126, 624 N.W.2d 363. Moreover, the statute does not specify how long a felon must be in possession of a firearm, as "there are no temporal limitations in this statute. It does not specify what length of time a felon must possess the firearm in order to violate the statute." ***Id.***

¶20 The State contends that jury unanimity was only required as to the elements of the statute and that Perez's possession of a firearm at two locations within the same building during a short span of time constituted a continuous course of conduct; therefore, jury unanimity was only required as to the question of whether Perez had a firearm in the building in question on July 27, 2011. We agree.

¶21 The Wisconsin Supreme Court addressed the question of jury unanimity in ***State v. Giwosky***, 109 Wis. 2d 446, 326 N.W.2d 232 (1982). In ***Giwosky***, Daniel Giwosky was charged with of one count of battery. ***Id.*** at 447-48. The charge stemmed from an incident in which Giwosky witnessed John Noldin and Dan Minesal carp fishing on his property. ***Id.*** at 448. After Noldin refused to vacate the property, Giwosky threw a log at Noldin, striking Noldin. ***Id.*** Noldin climbed out of the river and a physical altercation between Noldin and Giwosky ensued, resulting in Giwosky delivering multiple punches to Noldin. ***Id.*** at 448-49. Giwosky was found guilty of a single count of battery. ***Id.*** at 450.

¶22 Giwosky appealed, arguing that his right to a unanimous verdict was violated because the trial court did not instruct the jury whether it had to be unanimous as to whether Giwosky committed battery when he threw the log, or

whether he committed battery during the physical altercation with Noldin. ***Id.*** at 451. The supreme court held that Giwosky's right to a unanimous verdict was not violated because his "behavior constituted one continuous course of conduct." ***Id.*** The court further stated:

> Unanimity is required only with respect to the ultimate issue of the defendant's guilt or innocence of the crime charged, and unanimity is not required with respect to the alternative means or ways in which the crime can be committed…. To permit any other conclusion would be to permit the guilty defendant to escape accountability under the law because jurors could not unanimously choose beyond a reasonable doubt which of several alternate ways the defendant actually participated, even though all agree that he was, in fact, a participant.

Id. at 453-54 (quotation marks and citation omitted).

¶23 This case is analogous to ***Giwosky***. Here, the ultimate issue is whether Perez possessed a firearm. Whether he possessed the firearm within a short period of time in the hallway of the apartment building, or inside an apartment unit within the same building, raises the same "continuous course of conduct" issue as ***Giwosky***. *See* ***id.*** at 451. Like in ***Giwosky***, where throwing a log and then entering into a separate physical altercation within a short time span was considered an alternative means of committing the offense of battery, possessing a firearm in a hallway or an apartment unit in the same building, within a short timespan, is an alternative means of committing the offense of possessing a firearm as a felon. Perez's offense was one, continuous offense.

¶24 Similarly, in ***State v. Lomagro***, 113 Wis. 2d 582, 335 N.W.2d 583 (1983), the Wisconsin Supreme Court reviewed a court of appeals order for a new trial based on the lack of unanimous verdict. ***Id.*** at 583. A woman was trapped in a car between two men who drove around in Milwaukee County, stopping at

various locations and forcing different types of sexual acts on her over a period of several hours. ***Id.*** at 583-84. Lomagro, the passenger, was convicted as a participant in those assaults. ***Id.*** at 584-85. He denied any of the acts had occurred, claiming he and the driver took the woman directly from a bar to her home and left her there safely. ***Id.*** at 585. The supreme court observed that the underlying issue of the case was "[i]f the prosecutor issues only one charge but introduces evidence of multiple acts which separately constitute the criminal offense charged, must the jurors unanimously agree as to which act or acts the defendant committed in order to find the defendant guilty?" ***Id.*** at 590. The court determined that the different acts of nonconsensual sexual intercourse were alternative means of committing the same crime, ***id.*** at 592, and were as conceptually similar as the alternative methods of committing battery in ***Giwosky***. ***Lomagro***, 113 Wis. 2d at 594. Consequently, a unanimous verdict was achieved. ***Id.***

¶25 Here, there is evidence that Perez possessed a shotgun on the morning of July 27, 2011, in Seymer's apartment at 2725 South 12th Street. There is evidence that Perez possessed a .357 Magnum in the hall near Mullins's apartment later that evening. There is evidence that Perez possessed a .357 Magnum that evening in Seymer's apartment, which is corroborated by inference because Mullins heard a shot in the building shortly after her encounter with Perez in the hall. Just as surely as different types of sexual assault occurring over a period of several hours are conceptually similar acts of nonconsensual sexual intercourse, *see* ***Lomagro***, *supra*, possession of one type of firearm in the hall or in an apartment of the same building, or possession of another type of firearm a few hours earlier in an apartment in the same building, are conceptually similar means of committing the same crime.

II. The trial court did not improperly amend the charge.

¶26 WISCONSIN STAT. § 971.29(2) provides that "[a]t the trial, the court may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant." Here, the trial court did not amend the Information to charge a new crime. The location of the offense and date on which it occurred are not elements of the offense, but rather notice requirements so that a defendant may prepare a defense. *See* ***State v. Conner***, 2011 WI 8, ¶20, 331 Wis. 2d 352, 795 N.W.2d 750. "'In order to determine the sufficiency of the charge, two factors are considered. They are whether the accusation is such that the defendant [can] determine whether it states an offense to which he is able to plead and prepare a defense and whether conviction or acquittal is a bar to another prosecution for the same offense.'" ***Id.*** (citation omitted).

¶27 The transcript of the trial demonstrates a vigorous defense based on cross-examinations which obviously used police reports of prior statements to attack the credibility of Mullins and Seymer. As to these witnesses, counsel established drug and alcohol use, prior criminal convictions, lies to the police, and inconsistent prior statements. That Perez's counsel's opening statement and closing arguments made good use of the serious credibility issues in this case is underscored by the acquittal obtained for the more complex and more serious offense charged.

¶28 As we have concluded above, the only two elements of WIS. STAT. § 941.29(2) are the status of the accused as a statutorily defined felon, and the accused's possession of a firearm. Evidence of possession of a firearm in one or more locations, in or around the same building, on the same day, in reasonable

temporal proximity, merely demonstrates alternate means of committing the same offense.

¶28 For the foregoing reasons, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.