COURT OF APPEALS
DECISION
DATED AND FILED

November 11, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP268-CR **Cir. Ct. No. 2012CF314**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL C. HESS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Barron County: JAMES C. BABLER, Judge. *Reversed and cause remanded for further proceedings*.

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

¶1 HOOVER, P.J. Michael Hess appeals a judgment of conviction for possession of methamphetamine. Hess argues there was insufficient evidence to

convict him. We reject Hess's insufficiency of the evidence argument, but we reverse and remand for a new trial in the interest of justice.

BACKGROUND

¶2 On the afternoon of August 3, 2012, Steven and Susan Ruble were driving south on Highway 63, approximately two and a half miles south of the city of Cumberland. Steven maneuvered onto the road's shoulder to avoid an oncoming Bravada SUV that swerved into his lane, but the Bravada struck the rear of Steven's vehicle, spinning it into the ditch. The Bravada slid through the ditch, also on the southbound side of the road, and came to rest in a driveway accessing the highway. The vehicles ended up between 100 to 200 feet apart.

¶3 The Rubles' vehicle had an Onstar emergency system that contacted law enforcement immediately after the collision. Cumberland police officer Greg Chafer was the first to arrive on scene, five to six minutes after receiving a dispatch call at 2:59 p.m. Chafer first approached the Bravada, where he found Hess sitting on the ground, leaning against his vehicle. Hess had his head in his hands, and Chafer observed cuts and scratches on his head. Hess acknowledged he was the driver of the Bravada and stated he did not know how the collision occurred.

¶4 Chafer then went to speak with the Rubles, who explained they were unable to avoid the Bravada after it swerved into their lane. When Chafer returned to Hess, EMTs were assessing him and helping him onto a gurney. Chafer observed Hess's eyes were dilated and bloodshot. However, Hess denied drinking and neither smelled of alcohol nor slurred his speech. Chafer administered a preliminary breath test, which registered "triple zeroes." Chafer then suspected drugs were involved. When asked where he was coming from and going to, Hess

kept changing his story. Additionally, he stated there were no passengers in his vehicle, but he later admitted to Chafer at the hospital that there was a female passenger.

¶5 When Barron County sheriff's deputy Michael Reinikainen arrived, the ambulance, fire department, and Chafer were already on the scene. Tow trucks also arrived to remove the vehicles. Reinikainen took photographs of the scene, including the paths that the vehicles traveled after colliding. In the photos, the Rubles' vehicle is already connected to a tow truck, and Hess's vehicle is shown in a yard, partly on a driveway. Reinikainen later obtained a blood draw from Hess at the hospital.

¶6 Richard Rydberg operated the tow truck that transported Hess's vehicle from the scene to the impound lot. Prior to loading the vehicle, Rydberg picked up parts he found on the ground. He was shown a photograph of the scene, which he described: "It shows where the car went into the ditch and then slid sideways and up where it stopped, right where it is right there." When asked where he found parts, Rydberg stated, "Right where the big divot is … in the ditch." Rydberg was asked what he found in the big divot, and explained:

> Well, there was some lower valance, panel parts, plastic parts from the Bravada, like grill pieces, things like that. And, you know, just some debris and stuff like that. … That's basically it, you know, … anything that was in the ditch there I picked up and threw it in the driver's window of the Bravada.

¶7 Rydberg also testified he was familiar with the general condition in which the property at the accident scene was typically kept, explaining "it's pretty neat, well groomed, well mowed. As you can see the ditch, you know, is mowed right out to the … dirt." Rydberg did not observe any other debris or trash in the

ditch aside from where he found the car parts, "[o]ther than back a ways where the other car was, there was debris basically from that." When asked if he found anything other than car parts and shown an exhibit, Rydberg testified, "there was a cylinder similar to this … [l]aying right in that big divot … right next to that big divot" where all the other debris from the car was. He put it in the Bravada together with the other items.

¶8 On cross-examination, Rydberg was asked, "So you picked up items that were not near that … divot, as well?" He responded:

> No. Just basically in the trail of where that vehicle had stopped, all through that area. I mean, there wasn't a lot of stuff there. There was, you know, like lower valance plastic pieces and things like that. I know I picked up a couple of rubber gloves and I know that that canister I picked up. I didn't sit there and study the canister, I just—I was in a hurry to pick everything up at the time.
>
> ….
>
> And I know how he kept his property clean, so I picked everything up that was there.

When asked to estimate the distance between the canister and the Bravada, he stated, "However far it is from that—that major divot to the vehicle. I'm going to say that it was probably 10 yards, 12, 15 yards, maybe … from where the vehicle had stopped."

¶9 After Rydberg delivered the Bravada to the impound lot, detective David Kuffel performed an inventory search. Kuffel located a BB pellet tin container on the driver's side seat. He opened the container and found a magnet and a baggie containing two baggies of methamphetamine. Kuffel would later testify that, in his experience, placing a magnet in a metal container was a common method of transporting and concealing drugs in vehicles, with the magnet

holding the container atop the vehicle frame. Kuffel called Rydberg to inquire if he had found a container at the scene of the accident, and Rydberg explained he found a tin container and described its location. Kuffel sent the tin container and baggies to the state crime lab for analysis, but no suitable DNA or fingerprint evidence was discovered.

¶10 The State charged Hess with one count of possession of methamphetamine. After his blood test results indicated the presence of methamphetamine, the State added one count of operating while under the influence of a controlled substance causing injury, and one count of operating with a restricted controlled substance in blood.

¶11 Witnesses testified at trial as set forth above. Additionally, deputy Reinikainen testified he sent Hess's blood sample to the state hygiene lab, but ultimately received the results from an out-of-state lab. During his testimony, the State presented the lab report as an exhibit, via an overhead projector. Hess immediately objected on foundational and hearsay grounds. The court asked that the report be taken off the screen, held a sidebar, and sustained the objection. Reinikainen then confirmed he sent the blood and received the result back from NMS labs in Pennsylvania. Later, in the jury's absence, the court commented it had briefly seen the word "methamphetamine" on the exhibit and some jurors may have seen it, and agreed the display of the test results was prejudicial. However, the court deferred any ruling because the State still had witnesses who could lay the proper foundation. The court observed, "If they can't get it in by the witness—Well, obviously, if they can't, they're going to lose their case, anyway."

¶12 The hospital nurse who drew Hess's blood sample testified she filled two tubes, placed a tape strip over each tube, and then a second piece of tape around the strip covering the top of each tube.

¶13 The State then called Wendy Adams of NMS Labs to testify concerning their analysis of the blood samples. Hess objected because the State did not have a witness from the state hygiene lab to testify as to the chain of custody. The court recognized a standing objection and permitted the State to question Adams regarding what NMS Labs received, what condition the blood samples were in when it received them, and whether they appeared to be opened or sealed. Adams testified that NMS Labs' log-in verification forms indicated the tubes containing Hess's blood samples were not sealed, meaning there was no evidence tape sealing the top of the tubes, and were not full.

¶14 The court then excused the jury. The State acknowledged it had an insurmountable problem with the chain of custody, and moved to dismiss both drugged-driving charges. When the jury returned, the court explained:

> Ladies and gentleman, Miss Adams has been excused as a witness and I have dismissed the two counts that have any connection with driving, because the State was unable to show the blood sent to Pennsylvania is the same blood that was received at the Cumberland Hospital.
>
> So the only count that they're proceeding on now is the charge of possession of methamphetamine. And so the State will have its next witness then.

¶15 At the close of the State's case and again at the close of the defense, Hess moved for dismissal or a directed verdict of acquittal, arguing there was insufficient evidence of possession because the tin can of methamphetamine was never observed in close proximity to Hess. The court denied the motions. Before final arguments, Hess raised the issue of the jury's exposure to the blood-draw lab

results. Hess requested an instruction to disregard the evidence. After a brief discussion, the parties and the court agreed to a verbal instruction, appended to the pattern instruction, to not consider any evidence that was not received. Accordingly, the court instructed the jury:

> Apply [the] law to the facts in the case which have been proven by the evidence. Consider only the evidence received during the trial and the law as given to you by these instructions and from these alone, guided by your soundest reason and best judgment, reach your verdict.
>
> ….
>
> As I told you earlier, evidence is defined as three things. First, the sworn testimony of witnesses. … Second, the exhibits the Court has received, whether or not an exhibit goes into the court—into the jury room. And, third, any facts to which the lawyers have agreed or stipulated, or which the Court has directed you to find.
>
> Anything you may have seen or heard outside the courtroom is not evidence. You are to decide the case solely on the evidence offered and received at trial. If evidence was not received during this trial, you may not consider it.

The jury convicted Hess of the possession charge, and he now appeals.

DISCUSSION

¶16 Hess renews his argument that the State introduced insufficient evidence to prove he possessed the can of methamphetamine found in the ditch at the accident scene. The standard for reviewing the sufficiency of the evidence to support a conviction is the same in either a direct or circumstantial evidence case. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). In either case, an appellate court may not reverse a conviction unless the evidence, viewed most favorably to the state 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 found guilt beyond a reasonable doubt. ***Id.*** Further:

> The test is not whether this court or any of the members thereof are convinced [of the defendant's guilt] beyond reasonable doubt, but whether this court can conclude the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true. … Reasonable inferences drawn from the evidence can support a finding of fact and, if more than one reasonable inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted …

Id. at 503-04 (quoted sources omitted; brackets in ***Poellinger***). "It is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." ***Id.*** at 506.

¶17 The State was required to prove Hess knowingly possessed the methamphetamine found in the tin can in the ditch. *See* ***id.*** at 508. However, the State need not prove actual possession. "[T]he term "possession" includes both actual and constructive possession." ***State v. Peete***, 185 Wis. 2d 4, 14-15, 517 N.W.2d 149 (1994) (citing ***Schmidt v. State***, 77 Wis. 2d 370, 253 N.W.2d 204 (1977); ***State v. Dodd***, 28 Wis. 2d 643, 137 N.W. 2d 465 (1965)). Discussing ***Schmidt***, our supreme court explained:

> Although the court did not use the specific phrase "constructive possession," the court approved the concept, stating that possession "may be imputed when the contraband is found in a place immediately accessible to the accused and subject to his exclusive or joint dominion and control, provided that the accused has knowledge of the presence of the drug."

Peete, 185 Wis. 2d at 15 (quoting ***Schmidt***, 77 Wis. 2d at 379). Alternatively, our supreme court has explained, "To be found guilty of possessing a controlled

substance, physical possession is not necessary; it is enough if the defendant has constructive possession of the controlled substance or is 'within such juxtaposition' to the substance such that he [or she] might be said to possess it." ***Ritacca v. Kenosha Cnty. Court***, 91 Wis. 2d 72, 82, 280 N.W.2d 751 (1979) (quoting ***Dodd***, 28 Wis. 2d at 649).

¶18 Hess argues there was insufficient evidence to prove he constructively possessed the methamphetamine. He first contends there was no evidence the tin can was "immediately accessible" to him because it was found thirty to forty-five feet away from him in the ditch.[1] This argument is easily dispatched. The State's theory was not that Hess possessed the drugs while in the ditch. Rather, its theory was that Hess possessed the drugs while driving down the highway with the tin can attached to the underside of his vehicle via a magnet.

¶19 Hess also argues there was no evidence presented that he had knowledge of the tin container or that it contained drugs. Again, he emphasizes the can was found far away from him in the ditch. We reject this argument for essentially the same reason we rejected the first. The State's theory was that the tin can was previously hidden under Hess's vehicle. If the State sufficiently demonstrated that fact, it would be reasonable to infer Hess's knowledge. The fact

[1] Hess alternatively suggests the tin can was not even demonstrated to be at the accident scene because police did not discover it until the vehicle was in the impound lot. He asserts it required inferences to conclude the tin can found in Hess's vehicle was the same one placed there by the tow truck operator. The reasonableness of such inferences aside, Hess apparently fails to appreciate that if the can of methamphetamine was not placed on his driver's seat by the tow truck operator, then the State likely had an even stronger case of knowing possession based on the drugs' location inside his vehicle.

that the can was concealed in such an elaborate manner could amply lead one to believe that the person who hid it knew of its contents.[2]

¶20 Hess further argues the State failed to prove the drugs were under his "dominion or control" because they were found in a ditch abutting a busy highway accessible to all who happened by. According to Hess, "In cases where contraband is found on the side of a road, possession invariably turns on whether someone actually saw the contraband being thrown from a vehicle, or saw the contraband inside a vehicle prior to its being thrown onto the side of the road." Hess relies on several nonbinding cases.

¶21 Hess explains that in ***Hamilton v. State***, 496 So. 2d 100, 102 (Ala. Crim. App. 1986), police saw a plastic bag thrown from Hamilton's automobile during a chase. One officer immediately stopped to retrieve the package, which contained marijuana. ***Id.*** The court held, "Where a defendant is actually seen throwing contraband from his automobile onto the public way, he is held to be in possession of the jettisoned item even though, technically, the contraband is not under his control at the time he is later apprehended." ***Id.*** at 104. Hess also cites ***United States v. Hooks***, 551 F.3d 1205, 1208 (10th Cir. 2009), where Hooks' vehicle was chased after an officer observed a wood-handled pistol next to Hooks' leg. During the chase, an officer observed a dark shirt floating in the air in front of his car. ***Id.*** An officer later retraced the pursuit route and found a wood-handled pistol near a black t-shirt. ***Id.*** at 1209. The court found sufficient evidence to prove prior possession based on, inter alia, the officer's identification of the pistol

[2] Indeed, the person hiding the tin can beneath the vehicle would have to know there was a magnet inside to hold the can in place. When placing or observing the magnet, the person could be expected to see the baggies of methamphetamine.

as being the same one he observed in the vehicle and the fact the pistol was found near the shirt. ***Id.*** at 1213.

¶22 Hess contrasts the above cases with ***Atwell v. State***, 594 So. 2d 202, 205 (Ala. Crim. App. 1991), where a pursuing officer observed a large object being thrown from the vehicle at a sharp curve in the road. About an hour and a half later, police retraced the search route and found a sack containing five pounds of marijuana at the same curve in the road. ***Id.*** at 206. The court found the evidence insufficient to link the contraband to the defendants, emphasizing the intervening time and that the pursuing officer did not identify the sack as the object he observed thrown during the chase. ***Id.*** at 213. The court commented, "While it is possible that the bag of marijuana found on Boe Road was originally in the possession the appellants, 'the possibility that a thing may occur is not alone evidence even circumstantially that the thing did occur.'" ***Id.*** (source omitted).

¶23 The State does not discuss Hess's proffered foreign cases or cite any Wisconsin precedent for comparison. However, we agree with the State: the fact that previous cases show a crime can be proved one way does not mean that it cannot be proved a different way under different facts. *See* ***State ex rel. Cornellier v. Black***, 144 Wis. 2d 745, 758-59, 425 N.W.2d 21 (Ct. App. 1988). We therefore reject Hess's argument that the evidence is per se insufficient because nobody observed the tin can in or on the vehicle or being thrown from it. We think the most that can be said of the foreign cases, as they apply here, is that when a defendant is alleged to have previously possessed drugs, there must be a sufficient nexus between the drugs and the alleged possessor to remove the case from the realm of speculation.

¶24 We conclude there was a sufficient nexus between Hess and the tin can containing methamphetamine that was found in the ditch. The color photographs of the accident scene are in the record; the path of Hess's vehicle is apparent from skid marks in the grass, and the divot is clearly visible at the base of a moderately sloped ditch. It is also apparent that the ditch is mowed as part of a residence's yard. Given the photos, the witnesses' descriptions of them and the witnesses' testimony as to their recollections, the jury was well aware of the physical aspects of the accident scene.

¶25 Rydberg, the tow-truck operator, testified he was familiar with the property and it was regularly well-maintained. He recovered the tin can shortly after the accident occurred. The can was lying in the divot, interspersed with the pieces that broke off of Hess's vehicle in that same location. Aside from what Rydberg believed were the first responders' latex gloves, no other trash or vehicle debris was present nearby. Further, the can contained a magnet.

¶26 Detective Kuffel testified as an expert. He testified that placing a magnet in a metal container is a common method of transporting and concealing drugs in vehicles, explaining that the magnet would hold the container atop the vehicle frame.

¶27 Considering the convergence of the above factors, a juror could reasonably deduce that the tin can dislodged from beneath Hess's vehicle when it bottomed out in the ditch. Hess complains that no witness, expert or otherwise, testified to their opinion that this was what occurred. Jurors, however, are expected to use their common sense and common knowledge to arrive at their own conclusions. ***State v. Messelt***, 185 Wis. 2d 254, 264, 518 N.W.2d 232 (1994). Paraphrasing the State's argument, it would be a significant coincidence for a

magnet-can of drugs to be found in an otherwise clean and mowed ditch in someone's yard, right after an accident, right at that single point where a vehicle left behind a divot and vehicle pieces.

¶28 Hess argues the finding of guilt relied upon an impermissible stacking of inferences upon inferences. Inferences are drawn by logical deduction from admitted or established facts viewed in the light of common knowledge or experience. ***Belich v. Szymaszek***, 224 Wis. 2d 419, 425, 592 N.W.2d 254 (Ct. App. 1999). "[A] jury may infer facts from other facts that are established by inference, [so long as] each link in the chain of inferences [is] sufficiently strong to avoid a lapse into speculation." ***Piaskowski v. Bett***, 256 F.3d 687, 693 (7th Cir. 2001) (citing ***Yelk v. Seefeldt***, 35 Wis. 2d 271, 280-81, 151 N.W.2d 4 (1967)). While there was no direct proof that the tin can was previously secured beneath Hess's vehicle, the inferences required to come to that conclusion were reasonably and sufficiently supported by the evidence. Accordingly, viewing the evidence and all reasonable inferences therefrom in the light most favorable to the State, we conclude the State demonstrated a sufficient nexus between Hess and the drugs to remove the case from the realm of speculation.

¶29 Although we reject Hess's sufficiency of the evidence argument, we nonetheless reverse for a new trial in the interest of justice.[3] Under WIS. STAT. § 752.35,[4] we may grant a new trial in the interest of justice "if it appears from the

[3] Hess does not argue for a new trial in the interest of justice, but the issue discussed in this portion of our decision was presented as part of his sufficiency of the evidence argument. We conclude this is an appropriate case to resolve on interest of justice grounds "without further assistance from the parties." *See* ***State v. Roberson***, 2006 WI 80, ¶30 n.11, 292 Wis. 2d 280, 717 N.W.2d 111.

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

record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried[.]" "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. We grant a new trial in the interest of justice "'only in exceptional cases.'" ***State v. Armstrong***, 2005 WI 119, ¶114, 283 Wis. 2d 639, 700 N.W.2d 98 (source omitted).

¶30 As discussed above, Hess was initially charged with, and tried for, drugged driving, in addition to the methamphetamine possession charge of which he was convicted. A nurse testified she took blood samples from Hess at deputy Reinikainen's request. Reinikainen testified he then sent that blood to a lab for analysis and received results back. During that testimony, the State displayed a copy of that lab report via the Elmo overhead projector. The report was promptly removed from the projector at the court's request, but not before the court had observed that the report indicated the term "methamphetamine." All of the evidence regarding the blood samples later became inadmissible.

¶31 As the trial court observed, some or all of the jurors may have viewed the term "methamphetamine" on the lab report. The court consequently gave a generic cautionary instruction, which we set forth above, emphasizing that the jury should only rely on evidence that was "received" at trial. Considering the entire content and context of that instruction, we have some concern as to whether the common juror would understand that the court was using "received" in a technical sense. More importantly, however, we conclude the instruction was insufficient to "unring the bell" given the unique factual circumstances of this case. While we ordinarily presume jurors follow a trial court's instructions, "cases may arise in which the risk of prejudice inhering in material put forth before the

jury may be so great that even a limiting instruction will not adequately protect a criminal defendant's constitutional rights." ***State v. Pitsch***, 124 Wis. 2d 628, 644 n.8, 369 N.W.2d 711 (1985). This is one of those cases.

¶32 If Hess had methamphetamine in his blood at the time of the accident, the State's possession case would have been significantly stronger. In ***Schmidt***, 77 Wis. 2d at 381, the court made the unremarkable observation that "evidence that a defendant was a user of narcotics has been held to be a sufficient circumstance in itself to link the defendant with narcotics found in an area of which he was in nonexclusive possession so as to sustain his conviction for illegal possession of such narcotics." While knowledge that Hess had methamphetamine in his blood would have been only further circumstantial evidence that the tin can of methamphetamine found in the ditch originated from beneath his vehicle, such knowledge would have unquestionably tipped the scale in the State's favor. Given that this was a close, circumstantial case in the first instance, the jury's exposure to evidence regarding Hess's blood test results undermines our confidence in the verdict.

By the Court.—Judgment reversed and cause remanded for further proceedings.

Not recommended for publication in the official reports.