

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 6, 2015

Diane M. Fremgen
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. 2014AP543-CR

Cir. Ct. No. 2012CF5943

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JONATHAN THOMAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

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

¶1 CURLEY, P.J. Jonathan Thomas appeals the judgment convicting him of homicide by negligent handling of a dangerous weapon, contrary to WIS.

STAT. § 940.08(1) (2011-12).¹ On appeal, Thomas argues that there was insufficient evidence to convict him. We disagree and affirm.

BACKGROUND

¶2 In December 2012, the State charged Thomas with armed burglary, and in February 2013, it filed an amended information adding a charge of second-degree reckless homicide. According to the complaint and amended information, Thomas broke into the apartment of his cousin Marquis Thomas and stole a handgun and some video games on about December 3, 2012; he then shot his friend Michael Brown with the stolen gun four days later. Thomas pled not guilty to both counts and the case went before a jury.

¶3 At trial, Thomas admitted to stealing the handgun and the video games from his cousin. Thomas testified that he stole the items intending to sell them because he was homeless at the time and had no money. Thomas further explained that he and Brown negotiated a price of \$400 for the gun, but that Brown initially only paid him \$25 and a few bags of marijuana because that is what Brown could afford at the time.

¶4 Thomas also admitted to being in Brown's car with him when Brown was shot, but Thomas's story was that Brown was fiddling around with the gun and that it went off accidentally. According to Thomas, he and Brown had been riding around in Brown's car and had stopped near their friend Marlon's

¹ The same judgment also convicted Thomas of armed burglary, contrary to WIS. STAT. § 943.10(2)(a). Thomas does not appeal the burglary conviction.

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

house to check the car's brakes. After they stopped the car and waited for Marlon to arrive, Brown began playing with the gun and shot himself:

And we were sitting [in the car] in the back of Marlon's house. And I'm watching a video.² And I see Michael Brown playing with the gun. I didn't think nothing of it because I see him playing with a gun all the time. I'm not thinking my life is in danger or anything is going to happen.

So I'm watching the video. The next thing you know a shot goes off. And I jumped out of the car. I run to Marlon's door and I knocked on the door. Two females come to the door. I tell them to call Marlon, call Marlon because I didn't know what to do. I was scared.

¶5 The State's version of events was far different. According to the State, Thomas was desperate for money, upset with Brown for not paying the full price of the gun, and the physical evidence proved that Brown could not have shot himself.

¶6 The State presented evidence that prior to the shooting, Thomas was angry and frustrated that Brown had not paid him in full for the gun. Thomas's close friend Jason Blake testified that just hours before the shooting, Thomas complained to him about the fact that Brown had not yet paid him. According to Blake, Thomas was upset that Brown was buying new clothes but failing to come up with the money for the gun. Blake also described Thomas as being in a rage:

A: And then it was just like [Thomas] was over the edge. He was stomping. He was raging. He was kind of like bloodshot eyes. He was really shaking, I'm going to do something; somebody going to do something. You know what I'm

² Additional trial testimony revealed that there was a small video screen on the car's stereo system.

saying? I'm oh, slow down. Let me give him a call for you. So I can do that for you, you know.

He was sitting – raging, walking back and forth to my house a few times. And mad and just angry, just kind of like, you know, kicking like, you know how you walk like you're frustrated or something? Just walk[ed] around kind of frustrated.

Q: And did Mr. Thomas tell you why he was so mad?

A: Yes, he did.

Q: Why?

A: He told me he needed money for his gun. He needed something to eat because he was cold. He didn't have no where to go and he was hungry. And he had been waiting on Mr. Brown since eight o'clock that morning.

¶7 The State also elicited testimony that during the time Thomas was waiting for Brown to pay him, Brown not only had new clothes, but also paid someone to fix his car, bought drugs, and bailed someone out of jail.

¶8 In addition, the trial testimony showed that Thomas initially lied to police about where he was when the gun went off. Milwaukee Police Detective Herb Glidewell, who first interviewed Thomas after the shooting, testified that Thomas told him that he left Brown's car to relieve himself and heard a gunshot while he was doing so behind a dumpster. However, Glidewell thought that Thomas's story was untrue because police checked behind the dumpster but saw no signs of urination, and those signs should have been apparent because it was extremely cold that day, with a wind chill near zero. Glidewell further testified that Thomas told him that he returned to Brown's car after hearing the gunshot and saw, through the window, that Brown had been shot; however, Thomas would not have been able to see inside Brown's car because the shooting occurred after

5:30 p.m., when it was already dark outside, and the car's windows were tinted. In addition, Detective Shelondia Tarver testified that Thomas later changed his story. While Thomas had told Glidewell on December 7 that he was behind the dumpster when he heard the gunshot, the next day, December 8, Thomas told Tarver that he and Brown had been sitting in the car together when the gun went off. In addition, Thomas admitted that he lied to police about his familiarity with the gun, testifying that he initially told them that he had never seen it before.

¶9 Moreover, the physical evidence showed that it was extremely unlikely that Brown shot himself. Milwaukee County Medical Examiner Dr. Agnieszka Rogalska examined Brown's body. Dr. Rogalska testified that Brown had two gunshot wounds—an entrance wound on his right cheek and an exit wound on the left side of his head. Dr. Rogalska explained that there was an absence of the characteristic markings and gunpowder deposits, or stippling, that one would observe near a wound caused by a gun that had been fired at close range. The absence of such evidence led Dr. Rogalska to conclude that the injuries Brown suffered were not contact injuries and were not caused by a gunshot fired at close range. In other words, the distance between the barrel of the gun and the entrance wound would have been so great that Brown could not have fired the shot himself. Dr. Rogalska consequently opined that Brown's death was a homicide, not a suicide.

¶10 Furthermore, there were issues with the location and condition of the gun itself. First, the gun was found inside Brown's car between the driver's seat and the center console. Milwaukee Police Officer Paul Vento, who investigated the scene, testified that the gun was wedged in such a position that it could not have been simply dropped there. Second, when the gun was inspected, it was found to be missing a bullet from the chamber. The absence of a bullet in the

chamber meant that the gun was manipulated in some way, as another bullet should have cycled from the magazine into the chamber after the gun was fired. Detective Glidewell explained that someone either fired the gun without the magazine attached and later attached the magazine after the gun was fired, or someone fired the gun and then removed the next bullet that would have cycled into the chamber. Glidewell testified that Brown would not have been able to manipulate the gun as described after being shot. Third, witnesses for the State testified that there were no fingerprints on the gun, no “blowback”—or bodily tissue that would have spattered onto the gun following a shot at close range—and insufficient DNA to determine who may have touched the gun. The State argued that this evidence showed that Thomas had shot Brown and then wiped the gun clean.

¶11 After the close of the testimony, the trial court instructed the jury on second-degree reckless homicide and armed burglary, as charged in the complaint and amended information, as well as homicide by negligent handling of a dangerous weapon. The jury found Thomas guilty of both armed robbery and homicide by negligent handling of a dangerous weapon, and Thomas was sentenced. Thomas now appeals the homicide conviction.

ANALYSIS

¶12 Thomas’s sole argument on appeal is that the evidence was insufficient to support his homicide conviction. “The standard for determining whether sufficient evidence supports a finding of guilt ... is ... well established.” *State v. Watkins*, 2002 WI 101, ¶67, 255 Wis. 2d 265, 647 N.W.2d 244. We cannot reverse a criminal 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.” See *State v. Booker*, 2006 WI 79, ¶22, 292 Wis. 2d 43, 717 N.W.2d 676 (citing *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990)). If any possibility exists that the jury could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, we may not overturn the verdict, even if we believe that the jury should not have found Thomas guilty. See *Poellinger*, 153 Wis. 2d at 506-07. Furthermore, “[a] conviction may be based in whole or in part upon circumstantial evidence.” *State v. Hirsch*, 2002 WI App 8, ¶5, 249 Wis. 2d 757, 640 N.W.2d 140. Circumstantial evidence is often more probative than direct evidence; indeed, circumstantial evidence alone may be sufficient to convict. *Poellinger*, 153 Wis. 2d at 501-02.

¶13 In order for the jury to find Thomas guilty of homicide by negligent handling of a dangerous weapon, the State was required to prove that: (1) Thomas handled a dangerous weapon; (2) did so in a manner that was criminally negligent; and (3) caused the death of the victim, Michael Brown. See WIS. STAT. § 940.08(1); see also WIS JI—CRIMINAL 1175. To prove that Thomas acted in a manner that was criminally negligent, the State had to prove that Thomas created a risk of death or great bodily harm; that the risk was unreasonable and substantial; and that Thomas should have been aware he was creating the unreasonable and substantial risk of death or great bodily harm. See WIS JI—CRIMINAL 1175.

¶14 While it is true that the State did not present direct evidence that Thomas handled the gun or shot Brown, there was ample circumstantial evidence sufficient to prove that he did so, and that his doing so was criminally negligent and ultimately caused Brown’s death. See, e.g., *Poellinger*, 153 Wis. 2d at 501-02 (circumstantial evidence is sometimes stronger and more satisfactory than direct

evidence). Brown was shot in the head with a handgun that Thomas had stolen, and Brown and Thomas were the only ones in the car at the time. Thomas admitted as much at trial, even though he initially told police that he had been relieving himself behind a dumpster and that he had never seen the gun before. The absence of stippling on Brown's wounds and the location of the gun showed that the gun had been fired by someone else, not Brown; indeed, the medical examiner opined that Brown's death was a homicide. Additionally, the gun not only appeared to have been wiped clean after the fact, but also the chamber had been manipulated—something Brown could not have done after shooting himself in the head. Moreover, evidence at trial showed that Thomas was homeless, hungry, and desperate for the money that Brown owed him, and during the same time that Thomas was homeless and hungry, Brown was openly spending money on things like clothes, drugs, and bailing other friends out of jail. Indeed, Blake testified that Thomas was extremely angry with Brown for spending money when he owed Thomas. Thus, the evidence amply supports the jury's conclusion.

¶15 In sum, when we consider all of the evidence, circumstantial as it was, we conclude that the jury could reasonably infer that Thomas handled the gun with which Brown was shot, that he did so in a criminally negligent manner, and caused Brown's death. Consequently, because sufficient evidence supports the verdict, we may not reverse Thomas's conviction. *See Booker*, 292 Wis. 2d 43, ¶22; *Poellinger*, 153 Wis. 2d at 507.

By the Court.—Judgment affirmed.

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