COURT OF APPEALS
DECISION
DATED AND FILED

August 31, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-1149-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PHILLIP E. HOLMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Vergeront, JJ.

¶1 PER CURIAM. Phillip Holman appeals from a judgment convicting him of possessing less than five grams of cocaine with intent to deliver and sentencing him to eight years in prison. He claims he was denied due process when the trial court gave a misleading answer to a jury question. Although we

agree that the trial court's answer to the jury question could have been misleading, we conclude that any error was harmless. We therefore affirm.

BACKGROUND

¶2 A Milwaukee police officer observed a woman standing next to a car near an intersection during the early morning hours of August 5, 1998. As he approached in his squad car, the woman walked away and the car drove off. The officer pulled the car over for failing to signal a left turn and called for backup. The officer testified that he saw Holman, who was the sole occupant of the car, reaching under the seat as he approached the vehicle. The officer removed Holman from the car and recovered a scale from under the seat. The police also found a baggie containing a white substance, some marijuana, a pager in the car, and another pager on Holman's person.

¶3 At trial, Holman testified that he had borrowed the car from his girlfriend and did not know how the drugs or scale got there. He claimed he carried a beeper so that his children could contact him. He denied having reached under his seat when the police were approaching. In accordance with a pretrial ruling, he admitted that he had two prior convictions.

¶4 The court instructed the jury, "Evidence has been received that the defendant, Phillip E. Holman, has been convicted of crimes on two prior occasions. This evidence was received solely because it bears upon the credibility of the defendant as a witness." During its deliberations, the jury submitted a written question to the court asking, "Will the judge allow a witness to perjure himself on the stand related to prior convictions?" Over defense counsel's objection, the court answered, "The issue of credibility of a witness' testimony and

the weight to be given to their testimony is strictly within the province of the jury. The Court cannot comment."

STANDARD OF REVIEW

¶5 Whether jury instructions violate a defendant's right to due process is a question of law we review de novo. *See* ***State v. Pettit***, 171 Wis. 2d 627, 639, 492 N.W.2d 633 (Ct. App. 1992).

ANALYSIS

¶6 Holman claims that the trial court's response to the jury's question was misleading because it implied the jury could properly find that Holman had lied about how many prior convictions he had, after the trial court had already determined the number of convictions as a matter of law. He argues that the response deprived him of due process by unfairly undermining his credibility.

¶7 The jury's question indicates some confusion about Holman's testimony that he had two prior convictions. Though it is impossible to know for certain what the jury was thinking, it appears the jury may have taken the trial court's instruction that the prior conviction testimony "bears upon the credibility of the defendant as a witness" as a comment upon the truthfulness of the conviction testimony, rather than as an explanation that the jury could take the defendant's prior convictions into account when assessing his credibility. We will assume for the sake of argument that the trial court's answer that it could not comment on credibility issues was misleading to the extent that it failed to clarify this distinction and allowed the jury to speculate that Holman had perjured himself about the number of his prior convictions, making it more likely that he would have lied in other aspects of his testimony.

¶8 However, we are persuaded by the State that any error in this regard was harmless. An error is harmless when there is "no reasonable possibility that the error contributed to the conviction." ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). Holman's credibility was already in serious doubt before the answer to the jury question was given: His testimony that he never reached under the seat was directly contradicted by the arresting officer; his assertions that he was driving his girlfriend's car rather than his own because his arm was tired from operating his stick shift, that his children needed a pager to reach him, and that some friend of his girlfriend's had left over $500 worth of cocaine in her car were inherently implausible; and his reason for stopping at the intersection near the unidentified female pedestrian at 1:45 a.m. was unexplained. In short, our confidence in the outcome of the trial is not undermined by the jury's possible misunderstanding of the relevance of the prior conviction testimony.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).