COURT OF APPEALS
DECISION
DATED AND FILED

February 21, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP55-CR **Cir. Ct. No. 2010CF5217**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT MARIO WHEELER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS J. FLYNN, Reserve Judge. *Affirmed.*

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

¶1 BRENNAN, P.J. Robert Mario Wheeler appeals from a judgment of conviction for being a felon in possession of a firearm and an order denying his

post-conviction motion for a new trial.[1] Wheeler argues that the trial court violated his right to procedural and substantive due process by rendering a verdict on the felon in possession count, which was tried to the court, while the jury was deliberating on the count of reckless injury and denying him an opportunity to make a closing argument on the felon in possession count. He also argues that because there was a mistrial as to the reckless injury count and the State ultimately dismissed that count, he is entitled to have a new trial on the felon in possession count under the doctrine of retroactive misjoinder. Finally, he argues that the conviction is not supported by sufficient evidence. We disagree and affirm.

BACKGROUND

¶2 Wheeler was charged with one count of possessing a firearm as a felon and one count of first-degree reckless injury after C.F. was shot through the chest and C.F. identified Wheeler as the person who shot him. C.F. and Wheeler had known each other for about twelve years, and Wheeler's sister was C.F.'s ex-girlfriend. C.F. and Wheeler's sister had had an altercation earlier in the day at her home, and she had called Wheeler to ask him to intervene in the fight. A few hours later, while C.F. was standing on a porch of a relative's home, he saw a person he identified as Wheeler walk toward the porch, pull a gun from his waistband, and fire multiple shots.

[1] There is a scrivener's error in the judgment of conviction indicating that the felon in possession charge was tried to a jury. That charge was tried to the court. We direct the circuit court to correct this upon remittitur. *See* ***State v. Prihoda***, 2000 WI 123, ¶26-27, 239 Wis. 2d 244, 618 N.W.2d 857.

Pre-trial waiver

¶3 On the first day of the jury trial, just before the trial started, Wheeler waived his right to a jury trial on the felon in possession charge to avoid having the evidence of his prior felony presented to the jury. The State agreed to the jury waiver. Trial counsel made the following statement at that time:

> We will agree to waive our right to a jury trial on the charge of felon in possession of a firearm and just have this case proceed on the shooting charge, because the issue is identification, that's the--we are not disputing that the incident happened.
>
> We are just saying it wasn't Mr. Wheeler who did it.
>
> So, after the jury renders its verdict, the Court having heard all the evidence, will--can then make its own determination as to felon in possession of a firearm.

¶4 When trial counsel told the trial court that he would expect the verdict from the bench trial to be the same as the jury's verdict, the State responded:

> [I]t appears to me the Court would be free to make its own determination as to that count. I am not sure if the Court would be bound by the jury's verdict or when the Court would have to make its decision with regard to that and I guess that would be the Court's decision.

¶5 Trial counsel then acknowledged, "I agree with him that Your Honor does not have to be bound by the jury's verdict in theory. I agree and I am mindful of that possibility."

Trial

¶6 The trial proceeded with separate triers of fact for the two charges. Wheeler's defense was that he had been elsewhere at the time of the shooting and that he had been wrongly identified as the shooter.

¶7 The State called three witnesses, including Wheeler's sister, who all testified that Wheeler's sister had called Wheeler about the fight with C.F. at her home. C.F. testified that he had known Wheeler for about twelve years and that Wheeler was the man who shot him. A second witness present at the shooting, S.J., testified that Wheeler was the shooter. C.F.'s cousin testified that C.F. called her immediately after he was shot and told her Wheeler did it. Both the responding officer at the scene and the detective who prepared a photo array testified that the two eyewitnesses identified Wheeler as the shooter at the time.

¶8 A crime lab technician testified that "all the fired nine-millimeter cartridge cases [recovered at the scene] were fired in the same gun." A detective testified that on the night of the shooting, he went to Wheeler's mother's home and, with her help, successfully reached Wheeler by phone. He testified that Wheeler asked if the reason police were looking for him was that C.F. had been shot after a fight with Wheeler's sister. He testified that Wheeler asked if C.F. was dead and said "he wanted to know if he was on the run for a homicide." He testified that Wheeler refused to come in for questioning because his birthday was the following day and he said he did not want to spend it in custody.

¶9 On cross-examination of C.F., trial counsel elicited testimony from C.F. that he had been shot by another person about a year before and that the person tried for the crime was acquitted at trial of the shooting.

¶10 Wheeler's girlfriend and Wheeler's friend both testified for the defense that around the time of the crime Wheeler was walking his dogs. Wheeler's girlfriend testified that Wheeler was at her house on 28th and Wright in the late afternoon when Wheeler got a call from his sister that she had been in an altercation. She testified that Wheeler said he was not coming over and then

Wheeler left to walk their dog and returned two to three hours later. Wheeler's friend testified that he saw Wheeler near his house at 17th and Galena with his dog about 7:00 p.m. He testified that he and Wheeler watched television and talked and Wheeler stayed about thirty to forty minutes. Wheeler did not testify.

¶11 The court and jury heard closing arguments at the end of the day October 26. The jury was excused to deliberate shortly before 5:00 p.m. and was instructed to end at 5:00 p.m. and resume deliberations the following morning. After the jury left the courtroom on October 26, the trial court stated, "The Court is going to reserve making its ruling on the matter that is being tried to the Court until the jury comes in with its verdict." The jury continued its deliberations October 27 and 28.

Verdict and mistrial

¶12 At 4:30 p.m. on October 27, as the jury was deliberating, the trial court stated that it had to be in another court the following day, and therefore it would go ahead and render its verdict on the felon in possession charge. Wheeler made no objection or request for a separate closing argument on that charge. The court first noted that a stipulation had been entered by the parties that Wheeler is a convicted felon for purposes of the felon in possession statute. It then stated that the remaining issue to be decided was whether Wheeler had possessed a firearm. The trial court summarized the evidence, noted that it had heard all of the evidence and the closing arguments in the case, and then concluded that it found the testimony credible, beyond a reasonable doubt, that Wheeler had possessed a firearm while a felon. The court stated it did not find credible the testimony supporting Wheeler's mistaken identity theory, and found Wheeler guilty of the

charge. The trial court also stated that the jury was "not to be advised of my finding as to Count No. 1."

¶13 The court let the jury continue deliberating on October 27 until 5:00 p.m. and then told them to return at 9:00 a.m. the following day. On October 28 deliberations continued in the morning until 3:30 p.m. At that time, the trial court had returned, and the trial court granted the defense motion for mistrial because the jury had failed to reach a unanimous verdict on the reckless injury count.

¶14 Judgment was entered on the felon in possession conviction, and Wheeler was sentenced to two years of prison and four years of extended supervision.

¶15 A date was set for a new trial on the reckless injury charge, but on the day of trial, the State notified the trial court that it was unable to proceed to trial because it was unable to locate a witness. The State moved to dismiss the charge, and the court granted the motion.

Post-conviction motion

¶16 Wheeler filed a post-conviction motion seeking a new trial on the felon in possession charge. After briefing on the motion, the trial court denied the motion.

¶17 This appeal follows.

DISCUSSION

¶18 Wheeler argues that he is entitled to a new trial because of due process violations and misjoinder of the two charges. In the alternative, he argues

that the evidence is insufficient to support his conviction. For the reasons stated below, we disagree and affirm.

1. Wheeler's due process rights were not violated.

¶19 The Due Process Clause of the Fourteenth Amendment prohibits a state from depriving "any person of life, liberty, or property, without due process of law[.]" *See also* WIS. CONST. art. I, §§ 1 and 8. When reviewing a claim that a defendant's due process rights have been violated, "we independently apply the constitutional standard to the facts as found by the trial court." ***State v. Munford***, 2010 WI App 168, ¶20, 330 Wis. 2d 575, 794 N.W.2d 264.

a. Wheeler received notice and an opportunity to be heard, and so there was no violation of his right to procedural due process.

> In procedural due process claims, the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law.* … Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate.

Zinermon v. Burch, 494 U.S. 113, 125-26 (1990) (footnote omitted).

¶20 A party alleging a procedural due process violation must show: (1) that he or she had a protected interest; and (2) that he or she was deprived of that interest without due process of law. ***Brown v. State Dep't of Children & Families***, 2012 WI App 61, ¶31, 341 Wis. 2d 449, 819 N.W.2d 827. "The fundamental requirements of procedural due process are notice and an opportunity to be heard." ***Sweet v. Berge***, 113 Wis. 2d 61, 64, 334 N.W.2d 559 (Ct. App. 1983).

¶21 Wheeler argues that there were two procedural due process violations here. The first occurred when the trial court rendered a verdict on the felon in possession charge without hearing a separate closing argument on that count and the second when it determined guilt on the felon in possession charge *before* the jury verdict on the reckless injury. As to his second point, Wheeler argues the trial court committed itself to a certain order of decision-making and erred by not "follow[ing] the procedures that had been set for determining the guilt or innocence on Count 1 [the felon in possession count] prior to the start of the trial and agreed upon by the parties."

i. Wheeler made a closing argument to the jury and, in the alternative, forfeited the right to a separate closing on the felon in possession charge.

¶22 We reject Wheeler's due process claim based on the absence of a separate closing argument for two reasons. First, although a defendant's Sixth Amendment right to counsel encompasses a right to a closing argument, *see* ***Herring v. New York***, 422 U.S. 853, 856-60 (1975), Wheeler did make a closing argument and accordingly suffered no constitutional violation.[2] Wheeler's defense to both charges was the same—misidentification. Thus trial counsel argued in closing to the jury that Wheeler neither possessed the firearm, nor was he the shooter. He argued that someone else fired the weapon that injured C. F. This was the same theory of defense that Wheeler advanced to the felon in possession charge. And although he was making his closing argument to the jury on the reckless injury count, the trial court was present and heard the argument as well. The trial court had the benefit of Wheeler's closing argument and theory of

[2] We note that Wheeler frames this issue as a due process violation and not as a Sixth Amendment issue. His argument fails under either constitutional analysis.

defense to the felon in possession charge. Wheeler does not identify any other arguments he would have made in a separate closing on the felon in possession charge. Therefore, his constitutional rights were not violated.

¶23 Secondly, in the alternative, Wheeler forfeited any objection to the lack of a separate closing argument on the felon in possession charge. Wheeler never asked to make a separate closing to the trial court on the felon in possession charge and he never objected when the trial court gave its ruling on the felon in possession without a separate closing argument. We therefore deem that issue forfeited. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980) (issues not raised in the trial court are generally not reviewed on appeal).[3]

[3] Although there is no Wisconsin precedent on waiver or forfeiture of closing argument in a court trial, we note that the U.S. Supreme Court's decision in ***Herring*** and cases from other jurisdictions have held that the right to a closing argument in a court trial can be waived. In ***Herring***, in the Sixth Amendment framework, the Supreme Court rejected a statute that permitted a judge to deny a defendant a closing argument *where the defendant has asked for one*. ***Herring v. New York***, 422 U.S. 853, 860 (1975). Similarly, in ***United States v. Bell***, 770 F.3d 1253, 1258 n.1 (9th Cir. 2014), the federal court acknowledged, but distinguished, ***Herring*** and rejected Bell's claim that he was denied his right to make a closing statement. The court concluded Bell was not *precluded* from making the closing; he stood silent and *never asked for one*:

> Nothing in ***Herring*** or our precedents gives a self-represented defendant a right to be affirmatively and individually advised that he or she has a right to present a closing argument. Rather, these cases held that a court may not prevent a litigant from making a closing argument. *Bell's Sixth Amendment right was not violated because he was not precluded from making his closing argument and simply chose to remain silent.*

Id. at 1257 (emphasis added). Similarly here, Wheeler never asked to make a separate closing argument, so under these cases Wheeler would be found to have waived (although we would say forfeited in Wisconsin, *see* ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612) his right to a closing and accordingly he fails to show a constitutional violation under ***Herring*** and ***Bell***.

ii. Wheeler had notice and opportunity to be heard on the trial court's order of decision-making.

¶24 As to Wheeler's second due process argument on the order of decision-making, we conclude there was no procedural due process violation because the record shows that Wheeler had notice and agreed that the trial court was not bound by the jury's verdict and so he forfeited any objection to the court's order of decision-making.

¶25 First, there is no issue here on the propriety of the jury waiver on the felon in possession charge. Wheeler agreed that the trial court was not bound to whatever the jury's decision would be on the reckless injury count. Wheeler's counsel conceded that the two verdicts were independent: "I agree with [the State] that Your Honor does not have to be bound by the jury's verdict in theory. I agree and I am mindful of that possibility."

¶26 Secondly, Wheeler cites no authority for his argument that the trial court was somehow obligated to wait for the jury's verdict before deciding the felon in possession case. Although it is true that the trial court stated that it would "reserve making its ruling on the matter that is being tried to the Court until the jury comes in with its verdict[,]" events transpired during the deliberations and the trial court changed its mind. Due to the jury's lengthy deliberations and other court obligations, the trial court revised its initial plan to wait until after the jury completed deliberations. Given those circumstances, this was not an arbitrary or unreasonable decision.

¶27 Additionally, trial counsel did not object, nor would any objection have been effective because Wheeler waived his right to a jury trial on the felon in possession charge. The trial court made its own independent decision on that

count and took the further precaution of instructing his staff not to disclose that decision to the still-deliberating jury. Because the two verdicts are independent, it makes no difference for purposes of procedural due process analysis in what order they are rendered by the independent triers of fact. And by not objecting, Wheeler forfeited any objection to the order of decision-making. *See* ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612 (with certain limited exceptions, a failure to object constitutes a forfeiture of the right on appellate review).

¶28 In sum, Wheeler received "notice and an opportunity to be heard." *See* ***Sweet***, 113 Wis. 2d at 64. Wheeler had notice of the offense. His motions were heard, and he received a complete trial, represented by counsel, in which he was able to present witnesses, had the opportunity to testify and argue. The process he received fully satisfies the requirements of the state and federal constitutions.

b. Wheeler has identified no action that was "arbitrary, wrong or oppressive," so there is no violation of his substantive due process rights.

¶29 "[T]he Due Process Clause contains a *substantive* component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" ***Zinermon v. Burch***, 494 U.S. 113, 125 (1990). It protects against governmental action that either "shocks the conscience ... or interferes with rights implicit in the concept of ordered liberty." ***State v. Jorgensen***, 2003 WI 105, ¶33, 264 Wis. 2d 157, 667 N.W.2d 318 (citations omitted). "The right of substantive due process protects against a state act that is arbitrary, wrong or oppressive, regardless of whether the procedures applied to

implement the action were fair." ***Dane Cty. Dep't of Human Svcs. v. P.P.***, 2005 WI 32, ¶19, 279 Wis. 2d 169, 694 N.W.2d 344.

¶30 Wheeler argues that the court's action was arbitrary and wrong in two respects: First, "[t]he court was obligated to wait until the jury had rendered its verdict and then rule." And second, "[w]ith no jury finding that Mr. Wheeler had shot at [C.F.] it follows that he did not possess a firearm at the same time." We disagree on both points.

¶31 First, as noted above, the court was not obligated to wait for the jury verdict before ruling on the felon in possession charge. Due process did not require such a procedure nor did the court's earlier intention to make the decision after the jury's decision. As fully discussed above, the length of the deliberations and Wheeler's agreement with the court's independence from the jury verdict establish that the court's decision was not arbitrary.

¶32 Second, the jury's verdict on reckless injury was independent of the court's decision on felon in possession so the trial court was not obligated to wait for the jury decision before ruling on the felon in possession count. Wheeler freely, voluntarily, and intelligently waived his right to have a jury decide the felon in possession charge. Through counsel he asserted he understood that the court was not obligated to reach the same decision that the jury did. Thus, the fact that the court did in fact reach a different decision on the issue of identification and possession is not arbitrary, wrong or oppressive. *See* ***Dane Cty. Dep't of Human Svcs.***, 279 Wis. 2d 169, ¶19. The trial court heard all the evidence presented in the case and heard the closing argument Wheeler's counsel gave to the jury on the reckless injury charge. It listed the evidence on which it relied and which testimony it found credible. Wheeler has identified nothing that shocks the

conscience or is wrong or arbitrary about the trial court's credibility determinations and verdict. To the contrary, it would seem evident that different triers of fact sometimes reach different verdicts on the same facts.

2. The doctrine of retroactive misjoinder does not apply in this case.

¶33 The doctrine of retroactive misjoinder applies where two or more counts that were properly joined at the time of trial are deemed due to later developments in the case to have been misjoined. *See* ***United States v. Vebeliunas***, 76 F.3d 1283, 1293 (2d Cir. 1996). Where the requirements of the doctrine are met, the defendant is entitled to a new trial on the misjoined count. ***Id.*** at 1293-94. This court adopted the doctrine in ***State v. McGuire*** and described how it works:

> We conclude that where an appellate court has determined that conviction on one or more counts should be vacated, even if the defendant did not move for severance before the trial court, the defendant is entitled to a new trial on the remaining counts if the defendant shows compelling prejudice arising from the evidence introduced to support the vacated counts.

State v. McGuire, 204 Wis. 2d 372, 380, 556 N.W.2d 111 (Ct. App. 1996). The court adopted the three-factor analysis set forth in ***Vebeliunas*** for applying the doctrine and determining whether there was such compelling prejudice that a new trial is required:

> (1) whether the evidence introduced to support the dismissed count is of such an inflammatory nature that it would have tended to incite the jury to convict on the remaining count; (2) the degree of overlap and similarity between the evidence pertaining to the dismissed count and that pertaining to the remaining count; and (3) the strength of the case on the remaining count.

Id. at 379-80.

¶34 We note that neither ***McGuire*** nor ***Vebeliunas*** involved different triers of fact for the separate counts involved. Both involved juries which decided all of the counts at issue. We agree with the State that the justification for the doctrine is absent where there are two factfinders, as there were here, rather than a single factfinder. The State points out that the charges were effectively severed by the jury waiver and were in fact *not* joined for trial before a single fact-finder.

¶35 The fact that this is not a true misjoinder case is illustrated by the first of the ***Vebeliunas*** factors that considers whether the "inflammatory nature" of the vacated count "would have tended to incite the jury to convict on the remaining count." ***McGuire***, 204 Wis. 2d at 379-80. The clear implication is that the doctrine is intended to rectify a situation where the jury is the finder of fact for both the vacated charge *and* the remaining charge. In this case, the jury did not decide both charges, and in fact it failed to reach a verdict on the charge of reckless injury, so it cannot be that the reckless injury charge "incite[d] the jury to convict on the remaining count." As the State points out, the strategic purpose of the jury waiver as to the felon in possession charge was to avoid the risk of inciting the jury to convict on the reckless injury charge, a strategy that seems to have succeeded. There is no basis for assuming that the retroactive misjoinder rule applies where the charges are decided by two separate finders of fact.

¶36 Additionally, the State correctly notes that concerns about prejudice typically apply where a jury, not a court, is the trier of fact. There is a presumption that in a bench trial, prejudicial evidence is disregarded so long as proper evidence supports the findings of the trial court. *See* ***McCoy v. May***, 255 Wis. 20, 25, 38 N.W.2d 15 (1949). There is no basis for applying the misjoinder doctrine where a jury is not the finder of fact for the remaining charge.

¶37 Because in this case there were two finders of fact, and the jury did not reach a verdict and had no possibility of prejudicing the trial court's decision, we conclude that the retroactive misjoinder doctrine is simply inapplicable, and we need not proceed to the three-factor analysis to determine whether the degree of prejudice requires a new trial.

3. The evidence is sufficient to support the conviction.

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

¶38 Wheeler's sufficiency of the evidence arguments are based on attacks on the credibility of the State's witnesses and alternate interpretations of the evidence. However, "the credibility of witnesses and the weight to be given testimony is for the trier of fact. This is especially true because the trier of fact has the opportunity to observe their demeanor on the witness stand." ***Syvock v. State***, 61 Wis. 2d 411, 414, 213 N.W.2d 11 (1973).

¶39 The trial court heard the witnesses and reviewed the evidence and concluded that C. F. and the other eyewitness's identification of Wheeler as the shooter was more believable than the defense witnesses on Wheeler's dog-walking alibi. The court explicitly found them to be credible and believable. The trial court also noted the corroborating testimony from Wheeler's sister that she had told Wheeler about the altercation she had had with C.F. that day. We cannot say that the evidence relied on by the court lacks probative value such that the court's conclusion was unreasonable. *See* ***Poellinger***, 153 Wis. 2d at 507. Viewing that

evidence in the light most favorable to the state and the conviction, we conclude that a trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt, and therefore we must affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.