COURT OF APPEALS
DECISION
DATED AND FILED

February 21, 2018

Sheila T. Reiff
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 Nos. 2016AP1706-CR
2016AP1707-CR

Cir. Ct. Nos. 2014CF265
2014CM798

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA L. TANNER,

DEFENDANT-APPELLANT.

APPEALS from judgments and orders of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. In these consolidated appeals, Joshua Tanner appeals from judgments convicting him of two counts of being party to the crime of retail theft as a repeater and from orders denying his postconviction motion challenging his convictions and proof of his repeater status. We affirm the circuit court in all respects.

¶2 On September 19, 2014, Tanner allegedly removed or assisted in the removal of an anti-theft device ("spider wrap," which is tightly wrapped around merchandise) from a Walmart television valued at more than $500. For this conduct, a jury convicted Tanner of felony retail theft, a class I felony, as party to the crime. WIS. STAT. § 943.50(4)(bf) (2013-14).[1] Thereafter, Tanner then pled no contest to the following misdemeanor retail theft: as party to the crime, on September 20, 2014, Tanner allegedly removed from the store a television valued at less than $500 for which the store was not paid. We will recite additional facts as needed when we address the appellate issues.

¶3 Tanner first argues that there was insufficient evidence to convict him of felony retail theft as party to the crime because there was insufficient evidence that he intentionally removed the spider wrap anti-theft device from the television box. Tanner suggests that the following evidence is insufficient: the spider wrap was on the television box when Tanner and his female companion, Heidi Winkel, entered Walmart's home lines aisle, but the spider wrap was off the television box when they exited the aisle. Additionally, Tanner argues that he was

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

no longer in Walmart when Winkel exited the store with the television and a personal care item without paying for the items.

¶4 Tanner's argument ignores our standard of review for the sufficiency of the evidence, the other evidence before the jury, and the nature of criminal liability arising from being party to the crime.

¶5 Our sufficiency of the evidence review is guided by the following principles. We review the sufficiency of the evidence, both direct and circumstantial, to determine whether 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." ***State v. Ray***, 166 Wis. 2d 855, 861, 481 N.W.2d 288 (Ct. App. 1992) (citation omitted). We must accept the reasonable inferences drawn from the evidence by the jury, which is the sole arbiter of the credibility of the witnesses. ***State v. Poellinger***, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990). "[I]f more than one reasonable inference can be drawn from the evidence," we must adopt the inference that supports the conviction. ***State v. Hamilton***, 120 Wis. 2d 532, 541, 356 N.W.2d 169 (1984).

¶6 At trial, a Walmart assistant manager trained in retail theft detection testified that he observed Tanner and Winkel "acting suspiciously" in the electronics section in a manner that suggested that they wanted to be sure no one was nearby. As the assistant manager continued observing Tanner and Winkel, he saw Tanner pick up and deposit a television in the shopping cart and walk toward the home furnishings (home lines) area of the store. The assistant manager observed that when Tanner put the television in the shopping cart, the box had spider wrap on it. The assistant manager lost sight of Tanner and Winkel for fifteen to twenty seconds.

When the assistant manager next saw Tanner, the spider wrap had been removed from the box and a corner of the television box was crushed. The assistant manager testified that it appeared that the box had been damaged when the spider wrap was removed. The assistant manager saw the couple split up, Tanner left the building, and Winkel tried to leave the store without paying for the television, which was being sold for $548. The assistant manager approached Winkel to discuss the unpaid merchandise in her cart, but Winkel left the store and entered a Cadillac. The assistant manager testified that the driver drove the Cadillac over a six-inch curb to pick up Winkel outside Walmart. The assistant manager called law enforcement.

¶7 Walmart's video surveillance showed Tanner and Winkel in the electronic department and the damage to the corner of the box.

¶8 A deputy sheriff testified that she stopped a Cadillac matching the description of the vehicle Winkel entered; Tanner was driving the Cadillac and Winkel was a passenger. Upon being stopped by law enforcement and being informed that the officer wanted to discuss the Walmart incident, Tanner responded, "You have me dead to rights. There's pretty much cameras everywhere.… There's nothing more I can say to you. I'll just bury myself."

¶9 Based on the foregoing evidence, the jury could have reasonably found or inferred that Tanner was guilty as party to the crime of removing an anti-theft device as he and Winkel worked together to take the television from Walmart without paying for it.[2] We reject Tanner's reliance on ***State v. Rundle***, 176 Wis. 2d

[2] A defendant is liable as party to the crime if the defendant intentionally aids and abets another in the commission of a crime if the defendant, knowing or believing the other person is intending to commit a crime, knowingly either aids the person who commits the crime or is ready and willing to aid the person committing the crime, and the person who commits the crime knows that the defendant is willing. WIS JI—CRIMINAL 400.

985, 1008, 500 N.W.2d 916 (1993), to support his claim that he was a mere bystander to Winkel's activity. The evidence before the jury was sufficient for the jury to find that Tanner's conduct was not that of a bystander.

¶10 Tanner next argues that there was insufficient evidence of the value of the television from which the spider wrap was removed. To make the crime a class I felony, the television had to be offered for sale at more than $500. WIS. STAT. § 943.50(4)(bf). At trial, a Walmart assistant manager testified that the value of the television was established by scanning the price on the television in the shopping cart abandoned by Tanner and Winkel and creating a "training receipt" for the item. This evidence was undisputed. Tanner places great weight on the "training receipt" aspect of the evidence, but he did not object to this form of proof at trial. We conclude that the evidence offered by the State in the form of the assistant manager's testimony and the training receipt established that the television was offered for sale at more than $500.

¶11 Finally, Tanner argues that the State did not establish that he was a repeat offender for purposes of his enhanced felony and misdemeanor retail theft sentences. We disagree.

¶12 Postconviction, Tanner challenged the repeater allegations. At the postconviction motion hearing, the circuit court pointed out that during his plea hearing on the misdemeanor retail theft offense, Tanner acknowledged his prior 2014 felony convictions for burglary and possession of narcotics (Sheboygan County circuit court case No. 2013CF496). Furthermore, Tanner's presentence investigation report identifies his 2014 case as the requisite prior felony conviction for his repeater status. WIS. STAT. § 939.62(2). The presentence investigation report qualifies as an official government report for purposes of proving a defendant's prior offenses to

establish repeat offender status. ***State v. Goldstein***, 182 Wis. 2d 251, 257-58, 513 N.W.2d 631 (Ct. App. 1994). The circuit court found that Tanner did not object to the recitation of his prior offenses in the presentence investigation report. We conclude that Tanner's repeater status was established for purposes of sentencing.

¶13 We conclude that the evidence was sufficient to convict Tanner of retail theft by removing an anti-theft device from a television valued at more than $500. There was also sufficient proof of Tanner's repeater status.[3]

By the Court.—Judgments and orders affirmed.

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

[3] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").