COURT OF APPEALS
DECISION
DATED AND FILED

February 10, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1698-CR **Cir. Ct. No. 2007CF1076**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILBERT WILLIE THOMPSON,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Wilbert Willie Thompson appeals from a judgment, entered on a jury's verdict, convicting him of one count of burglary as a habitual criminal, and from an order denying his motion to vacate the conviction.

Thompson asserts there is insufficient evidence to support his conviction. We disagree and affirm the judgment and order.

¶2 On July 16, 2005, Steven Puetzer called to report a burglary at neighbor Nancy Dovin's home. City of Milwaukee police officers Broderick Toeller and Ryan DeWitt responded to the complaint. When they arrived at the scene, they observed that a basement window had been removed from the house. They also noticed that the rear basement door deadbolt was damaged and the door opened outward, permitting access to the residence. When the officers entered the home, they found the interior cluttered and torn up.

¶3 DeWitt took Puetzer's statement. Puetzer said he had observed a teal two-door Chevrolet with a female driver in the area that week. When he asked the driver what she was doing, she responded she was waiting for someone to get something out of the trash. Puetzer also told DeWitt that he saw two adult black males and two juvenile black males come out of Dovin's home through the basement door, carrying items that they placed in the waiting Chevrolet.

¶4 Dovin, who had been out of the state, returned to Wisconsin on July 17. She reported several missing items, including rolls of quarters and United States Mint proof sets. When evidence technician Dawn Veytsman processed the scene that day, she recovered seven latent fingerprints, two of which were taken from a plastic coin box. A fingerprint examiner later matched those two prints to Thompson's right middle finger and left palm.

¶5 On July 20, Dovin found a cigarette butt on the basement floor and called police to collect it. In May 2006, she discovered another cigarette butt and an empty soda bottle under a pile of clothing. Dovin again called police to recover the evidence. The second cigarette butt contained Thompson's DNA.

¶6 When he had first been questioned, Thompson told police he did not know Dovin and stated he had never been at or in her residence. After the DNA from the second cigarette was matched to him, Thompson told police he remembered being in the area and giving a cigarette to a woman who had asked for one.

¶7 Thompson was charged with the single count of burglary as a habitual criminal and the jury convicted him. He moved to vacate the conviction, arguing there was insufficient evidence to support it. The court denied the motion and sentenced Thompson to nine and one-half years' initial confinement and five years' extended supervision.

¶8 On appeal, Thompson asserts the State failed to present adequate evidence on three of the four elements of burglary. Specifically, he contends the State failed to adequately show he: (1) intentionally entered a building; (2) knew the entry was without consent; and (3) entered with the intent to steal.[1]

¶9 Thompson contends there is no evidence "how, when or in what manner" his DNA got on the cigarette or ended up in Dovin's house. Likewise, he argues there is no evidence of when or how his fingerprints were left on the coin box. Thus, Thompson asserts, "items upon which Mr. Thompson's fingerprints [were found] and the cigarette butt containing his DNA evidence [had this inculpatory evidence] placed there before these items entered Ms. Dovin's residence" and "the DNA and fingerprint evidence does not exclude this reasonable theory of innocence."

[1] Thompson concedes that the State showed he entered the building without the lawful possessor's consent. *See* WIS JI—CRIMINAL 1421.

¶10 A finding of guilt may rest upon circumstantial evidence. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Indeed, circumstantial evidence is often stronger than direct evidence. ***Id.*** Regardless of whether the evidence is circumstantial or direct, "it must be sufficiently strong and convincing to exclude every reasonable hypothesis consistent with the defendant's innocence in order to meet the demanding standard of proof beyond a reasonable doubt." ***Id.*** at 502.

¶11 However, this rule does not mean that if there is *any* evidence suggesting innocence, the jury cannot convict the defendant. ***Id.*** at 503. It remains the jury's responsibility to weigh the credibility of the witnesses and to accept or reject evidence within the bounds of reason. *See* ***id.*** at 503; *see also* ***State v. Hirsch***, 2002 WI App 8, ¶33, 249 Wis. 2d 757, 640 N.W.2d 140. The rule of excluding every reasonable hypothesis of innocence therefore refers to the evidence the jury believes and relies upon to support the verdict, not every piece of evidence offered at trial. *See* ***Poellinger***, 153 Wis. 2d at 503.

¶12 While the jury must draw all reasonable inferences in the defendant's favor, we make all reasonable inferences in the jury's favor. ***State v. Hauk***, 2002 WI App 226, ¶29, 257 Wis. 2d 579, 652 N.W.2d 393. Under this standard, we do 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 … no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***Poellinger***, 153 Wis. 2d at 501.

¶13 Thompson seeks reversal because he asserts it is possible his fingerprints were left on the coin box and his DNA got on the cigarette before

those items entered Dovin's home. This argument parallels one we rejected in ***State v. Scott***, 2000 WI App 51, 234 Wis. 2d 129, 608 N.W.2d 753.

¶14 There, Scott was convicted of burglary following the theft of a laptop computer from a printing company's office. Scott was convicted, in part, based on a single fingerprint on the bottom of the computer's "dock station." ***Id.***, ¶2. Scott argued his print was on the dock before it entered the company's office, so the State failed to exclude every reasonable theory of his innocence. ***Id.***, ¶¶13-14. We rejected this argument as based "not on reason, but on specious speculation." ***Id.***, ¶15. We asked, "Is it possible that Scott worked for the company that sold the computer dock? Is it possible that during the course of such employment he touched this particular computer dock, and that his fingerprint survived through delivery and use?" ***Id.*** We concluded those scenarios were possible, but not reasonable. ***Id.***

¶15 We likewise reject Thompson's argument. To believe Thompson's hypothesis of innocence, the jury would have to believe that Thompson somehow had access to the coin box before its arrival in Dovin's home, perhaps as an employee of the manufacturer or the store that sold it or as a customer who examined that particular box in a store. The jury would then have to believe that not one but two prints survived Dovin's use and care of the box. The jury would also have to believe that Thompson touched a cigarette, which he gave to a stranger, who fortuitously disposed of the cigarette at the home of an individual possessing a coin box that Thompson had randomly touched in the past.

¶16 As ***Scott*** noted, even if the aforementioned hypotheses of innocence were possible, they must also be reasonable. ***Id.*** Thompson's hypothesis that both

fingerprint and DNA evidence somehow got into Dovin's home without Thompson himself, is unreasonable.

¶17 A reasonable, rational jury could infer Thompson's fingerprints[2] and DNA were found at Dovin's home because Thompson was physically in her house. This satisfies the first element, that Thompson entered the building. Because Dovin testified no one had permission to be in her home while she was away, and because Thompson told police he did not know Dovin, the jury could infer Thompson had to have known his entry into Dovin's home lacked consent. The jury could also reasonably infer Thompson's intent to steal: he had no legitimate reason to be in Dovin's home.[3] These inferences are based on evidence in the record and satisfy the elements of burglary. A jury, acting reasonably, could have found Thompson's guilt beyond a reasonable doubt. *See* ***Hirsch***, 249 Wis. 2d 757, ¶32.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)(5). (2007-08).

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[2] Thompson also criticizes the fingerprint evidence because the automated computer matching system did not match the prints to him, and because the examiner testified the Milwaukee Police Department had no minimum number of matching points within a print required to make a positive identification. However, the examiner also testified why the computer might not produce any matches and that manual identifications are verified by a second examiner. This complaint ultimately goes to the evidence's weight and the witness's credibility, both determinations left to the jury. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990).

[3] Although Thompson asserts there was no evidence he ever possessed any of the stolen goods, possession of the items is not an element of the crime, *see* WIS JI—CRIMINAL 1421, and sufficient other evidence linked Thompson to the burglary.