COURT OF APPEALS
DECISION
DATED AND FILED

May 26, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3103 **Cir. Ct. No. 03JV000339**

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

IN THE INTEREST OF WILLIAM D.H.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

WILLIAM D.H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Reversed.*

¶1 SNYDER, J.[1] William D.H. appeals from a delinquency adjudication for possessing a dangerous weapon as a child, contrary to WIS. STAT.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

§ 948.60(2)(a). William contends that his admission to the offense was not corroborated by independent evidence that the offense occurred. We agree and reverse.

STANDARD OF REVIEW

¶2 In order to be adjudged delinquent, William must be found to have violated a state or federal criminal law. *See* WIS. STAT. § 938.02(3m). An allegation of delinquency, like an alleged adult crime, must be supported by evidence beyond a reasonable doubt. WIS. STAT. § 938.31(1). "[I]t is axiomatic in the law that the state bears the burden of proving all elements of a crime beyond a reasonable doubt." ***State v. Schulz***, 102 Wis. 2d 423, 427, 307 N.W.2d 151 (1981). We apply this same standard to determine the sufficiency of evidence to support a delinquency determination.

¶3 Evidence of delinquency may be either direct or circumstantial and is reviewed in the same manner concerning a sufficiency of the evidence challenge. ***State v. Poellinger***, 153 Wis. 2d 493, 503, 451 N.W.2d 752 (1990). "[A]n 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 [delinquency adjudication], is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***Id***. at 507.

¶4 The elements of violating WIS. STAT. § 948.60(2)(a), possession of a dangerous weapon by a child, are: (1) The accused possessed some object. WIS JI—CRIMINAL 2176. "Possessed" means that the accused knowingly had the object under his or her actual physical control. ***Id***. (2) The object was a dangerous weapon. ***Id***. (3) The defendant had not attained the age of eighteen years at the time he or she allegedly possessed a dangerous weapon. ***Id***.

DISCUSSION

¶5 After conducting a WIS. STAT. § 938.31 fact-finding hearing, the trial court found that "William at one point, at some point was in possession of a six shot clip, blue steel, dangerous weapon," and that "William is an individual under the age of seventeen." Three witnesses testified at the fact-finding hearing: Sonia S., City of Racine Police Officer Jason Gorgen, and City of Racine Police Officer Ryan Comstock.

The Hearing Evidence

¶6 *Sonia S.* The first witness called to testify was Sonia, William's aunt, who stated that on May 6, 2003, William and his mother, Joann, were chasing a person who had swung at Joann. Sonia testified that Joann never told her that William ever had a gun taken from him from some Vice Lords and that she had provided a written statement to the police (marked and received into evidence as prosecution Exhibit #1). Sonia testified as follows about the contents of her written statement to the police:

> I was sitting in my home when Joann [] came over very troubled. She was upset. She said that she was just jumped by thirteen Vice Lords. Okay. She said, I said this, yes, but I was also on the telephone talking at the same time…. It said because of her son had had a gun taken, but I did not see or hear a gun on him or at any other time…. It says she did not say how it was taken or if it was on him at the time.

¶7 Sonia testified that she was not advised that William had a gun taken from him and that her written statement was "going on hearsay, what I heard." Sonia concluded her direct testimony in the following manner:

> Q. [ASSISTANT DISTRICT ATTORNEY] So someone told you that William had a gun taken from him?
>
> A. [SONIA] In the argument with the kids, yeah you.

¶8 *City of Racine Police Officer Jason Gorgen*. Gorgen testified that on May 6, 2003, he investigated an unoccupied vehicle parked in the middle of the road and three persons chasing one person across the road. Gorgen stated that "the three people that were chasing after the one said, asked to stop him because he had a gun." Gorgen spoke to Sonia who told him that "her nephew had a gun taken from him and he had pointed out Tyrell, the one they were chasing, as the one that took the gun from him." Sonia said her nephew was William. Gorgen testified that Sonia provided a written statement later at the police station. Gorgen stated that "the gun was taken from William as far as we knew" and that an investigator would follow up on who owned the gun so he did not pursue that question.

¶9 *City of Racine Police Officer Ryan Comstock.* Comstock stated that he responded to a request for assistance on May 6, 2003, and that Gorgen directed Comstock to detain William. Comstock asked William for his name, date of birth, address and phone number, and "basically what was going on" at the time. William stated that his date of birth was "2/24 of '89." Comstock testified regarding William's response to his inquiry of "what was going on" at the scene:

> Q. [ASSISTANT DISTRICT ATTORNEY] And what did [William] tell you was going on?
>
> A. [OFFICER COMSTOCK] [William] said that a Tyrell [], who was the party that Officer Gorgen detained, had taken a gun from him earlier, about a week ago, and that in driving through the neighborhood at this point, on that date, he had seen Tyrell and he wanted to, he went after him to beat him up.
>
> Q. So William said he had a gun taken from him?

A. Yes.

Q. Did you ask him what kind of gun that this was?

A. No, I didn't.

Q. Did you ask him where he obtained the gun from?

A. No, I didn't.

Q. Did he indicate when the gun was taken from him?

A. He said it was a week ago, a week prior to that, to that date.

Q. And did he describe how it was taken from him?

A. No, he didn't.

¶10 Comstock testified during cross-examination that he never saw a gun, that a gun was not taken from the scene, and that at the time of his testimony neither he nor any other police officer knew of the location of a gun. On redirect examination, Comstock testified that William did not indicate whether the gun was loaded or not, but William had "mentioned the capacity of the magazine," and Comstock had taken that to mean that the gun mentioned was a firearm as opposed to a water pistol. Further, Comstock stated that William "was saying it was a pistol, six shot clip, blue steel, things that are, are characteristics of a firearm." On recross-examination, Comstock stated that he had prepared a written report of the incident and had mentioned the six-shot clip in the report, but had not described a gun any further in the report.

Sufficiency of the Evidence

¶11 William does not dispute that he confessed to knowingly possessing a dangerous weapon while under the age of eighteen. He contends, however, that the confession cannot be used to establish guilt because it was not corroborated by independent evidence.

¶12 A criminal conviction may not be grounded solely on the confession of the accused. ***State v. Hauk***, 2002 WI App 226, ¶20, 257 Wis. 2d 579, 652 N.W.2d 393. There must be corroboration of a "significant fact" of the crime to sustain the corroboration standard. *See* ***Barth v. State***, 26 Wis. 2d 466, 468, 132 N.W.2d 578 (1965). A confession made to a layperson at another time can corroborate a confession made to the police when there is no other corroborating evidence. ***Triplett v. State***, 65 Wis. 2d 365, 372, 222 N.W.2d 689 (1974). Whether the earlier admission to a layperson has the legal effect of corroborating a confession to police presents a question of law. ***Nottelson v. DILHR***, 94 Wis. 2d 106, 116, 287 N.W.2d 763 (1980) ("[W]hether the facts fulfill a particular legal standard is a question of law."). We review the question de novo, owing no deference to the trial court in deciding a question of law. *See* ***Dugan v. County of Pierce***, 170 Wis. 2d 89, 94, 486 N.W.2d 579 (Ct. App. 1992) ("We review questions of law without deference to the trial court.").

¶13 The State contends that Sonia's statements to Gorgen corroborate a "significant fact" of the offense to which William confessed. According to Gorgen, Sonia told him at the scene of the chase that "her nephew had a gun taken from him and he had pointed out Tyrell, the one they were chasing, as the one that took the gun from him." Sonia told Gorgen that her nephew was William. A gun was not found at the scene of the chase.

¶14 Sonia testified that her statement at the scene was made because Joann, William's mother, told her that a gun had been taken from Joann's son. Sonia further testified that William never told her that he had a gun taken from him, and that she had no personal knowledge of the existence or location of the alleged gun. Joann, Tyrell, and William did not testify at the hearing.

¶15 At best, Sonia related that the person she, Joann and William were chasing took a gun from her nephew, William. While Sonia's opinion might explain the reason for the chase and the purpose for confronting Tyrell on May 6, we must determine if it corroborates the existence of a gun or the possession of a gun by William. Sonia arrived at the reason why Tyrell was being chased on May 6 from information she had received from Joann. The record is void of William admitting to Sonia that he possessed a gun. A gun was never recovered and Sonia testified that she had no personal knowledge of the existence of a gun. While we are satisfied that William's confession to Comstock is sufficient to support the delinquency adjudication if properly corroborated, we are hard pressed to conclude that Sonia has provided a "significant fact" that would corroborate William's confession.

¶16 The State cites to ***State v. Verhasselt***, 83 Wis. 2d 647, 266 N.W.2d 342 (1978), in support of Sonia providing corroboration of a significant fact. In ***Verhasselt***, however, there were several significant facts corroborating the defendant's confession:

> [Verhasselt] was seen, immediately after the shooting, alongside a garage adjacent to the alley from which the shots are believed to have been fired. He was carrying a loaded 30.06 rifle, and he attempted to escape. He fit the description given by several witnesses. His father's .35 mm pump-action Remington rifle was found at the scene. It is unnecessary to recite further facts to establish that the confession was adequately corroborated.

Id. at 662.

¶17 Here, unlike in ***Verhasselt***, there are no independent witnesses to William possessing a gun or real evidence such as a gun being obtained from the scene. In addition, ***Verhasselt*** did not involve layperson testimony that alone supported the defendant's confession. We cannot read ***Verhasselt*** to support a

criminal conviction based upon a confession that is corroborated solely by the opinion of a layperson testifying as to why a separate, later event occurred. We are satisfied that ***Verhasselt*** does not support the State's contention that Sonia's statements provide a "significant fact" that corroborates William's confession.

¶18 The State also relies upon ***Triplett*** to support its argument. In ***Triplett***, our supreme court held that an admission of murder made to a fellow prison inmate was "itself sufficient" to corroborate the defendant's confession to murder.[2] ***Triplett***, 65 Wis. 2d at 372. In ***Triplett***, however, the defendant admitted the crime directly to the layperson who testified, his fellow prison inmate. Here, the record fails to establish that William ever admitted directly to Sonia that he possessed a gun. Information as to William's possession of a gun came not from William, but from William's mother, Joann. Again, Joann never testified. William made no evidentiary admission to Sonia, as did Triplett to his fellow prison inmate, of the offense that he admitted. We conclude that ***Triplett*** does not support the contention that Sonia's statements provided a "significant fact" to corroborate William's confession.

¶19 Gorgen's testimony includes a telling response to whether Sonia's statement was sufficient to corroborate William's confession on possession of a gun. Gorgen testified that "the gun was taken from William *as far as we knew*." (Emphasis added.) Gorgen explained that because an investigator would follow up on who owned the gun, he did not pursue that question. Further investigative

[2] The ***Triplett*** confession was also corroborated by the gun being found on the seat of the car in which Triplett was riding, the gun being the murder weapon, and a witness testifying that she saw Triplett leave their shared apartment with a .45 automatic and four shells, and that when he returned Triplett "was laughing and displayed two bullets to her, informing her that he had just 'killed a pig.'" ***Triplett v. State***, 65 Wis. 2d 365, 372-73, 222 N.W.2d 689 (1974).

evidence of the existence and/or the ownership of a gun may have provided a "significant fact" supporting William's admission. However, no such investigative evidence was provided during the fact-finding hearing.

CONCLUSION

¶20 We conclude that William's response to Comstock was a naked confession that is not corroborated by evidence of any other "significant fact" in the record. Accordingly, William's confession cannot alone be the basis for the delinquency determination entered against him. We reverse the dispositional order adjudicating William delinquent.

By the Court.—Order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.