COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2502-CR **Cir. Ct. No. 2010CF119**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARTONEZ R. WALLACE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: PATRICK L. WILLIS, Judge. *Affirmed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Martonez R. Wallace appeals a judgment of conviction for two counts of battery or threat to a judge, as party to a crime and as a repeater. Wallace mainly contends that all which linked him to the crime was an

uncorroborated, patently incredible, prior inconsistent statement, such that the evidence to convict him was insufficient as a matter of law. His appellate arguments fail. We affirm the judgment.

¶2 Sheboygan County Circuit Court Judges Timothy Van Akkeren and Gary Langhoff each received a letter threatening to kill them and their children. It is undisputed that Waupun Correctional Institution inmate Jessie Williams wrote and sent the letters. Williams initially told investigators that he wrote the letters himself out of frustration and that he chose his targets at random. Williams later changed his story and said that Wallace, also an inmate at Waupun, offered him $500 to write the letters as "payback" to the judges. Williams said that Wallace passed him a note via a correctional officer (CO); that the note contained the judges' names and addresses and was signed "New York" because Wallace is from New York; that, when finished, he flushed the note down the toilet; and that when he accomplished the task he signaled to Wallace by shouting, "It's all good."

¶3 At Wallace's jury trial, Williams reverted to his original story. Williams testified that, as a result of being in segregation for three years, he acted "out of frustration and anger" and wrote the letters on his own simply to "get attention for myself." He said he did not know either judge; had chosen them purely at random from the segregation building law library; and that it was coincidence that both judges were from Sheboygan county, as he had never been charged with any crime, had any type of hearing or been held in custody there and, in fact, did not even know where Sheboygan county was. The jury found Wallace guilty. The court denied his motion to vacate the judgment and set aside the verdict. This appeal followed. More facts will be supplied as needed.

¶4 On review of the sufficiency of the evidence,

> an appellate court may 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 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. Poellinger, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Said another way, we may not overturn a verdict on the basis of insufficient evidence unless the trier of fact "could not possibly have drawn the appropriate inferences from the evidence adduced at trial." ***State v. Watkins***, 2002 WI 101, ¶68, 255 Wis. 2d 265, 647 N.W.2d 244. The standard is the same whether the evidence is direct or circumstantial. ***Poellinger***, 153 Wis. 2d at 501.

¶5 Wallace contends that because of Williams' two markedly divergent accounts, Williams is incredible as a matter of law and the prior inconsistent statement therefore is insufficient as a matter of law to sustain the conviction. "Incredible as a matter of law means inherently incredible, such as in conflict with the uniform course of nature or with fully established or conceded facts." ***State v. King***, 187 Wis. 2d 548, 562, 523 N.W.2d 159 (Ct. App. 1994).

¶6 Discrepancies between a witness's trial testimony and his or her previous statements do not mandate a conclusion that the witness is wholly incredible. ***Ruiz v. State***, 75 Wis. 2d 230, 232, 249 N.W.2d 277 (1977). The question remains one of credibility and that is a question for the jury. ***Id.*** The jury may choose to believe some, all, or none of the witness's testimony. ***Penister v. State***, 74 Wis. 2d 94, 103, 246 N.W.2d 115 (1976). Even "wilfully false testimony on one point does not require the jury to reject all of the witness' evidence." ***Id.*** (citation omitted).

¶7 Wallace's main argument is that the State's only evidence tying him to the crime was Williams's uncorroborated prior inconsistent statement. Directing us to ***United States v. Orrico***, 599 F.2d 113, 118-19 (6th Cir. 1979), Wallace argues that a prior inconsistent statement alone is insufficient to sustain a conviction. We need not resort to ***Orrico***. Wallace's conviction was adequately supported by other evidence, albeit circumstantial. "It is well established that a finding of guilt may rest upon evidence that is entirely circumstantial." ***Poellinger***, 153 Wis. 2d at 501.

¶8 For example, during Williams' testimony, the prosecutor showed Williams one of the envelopes he admitted addressing. The prosecutor asked Williams what judge's name appeared on the envelope. Williams answered "Thomason," then "Thomas M. Van Akkson" and finally agreed that the name was "Timothy M. Van Akkeren." The jury could have concluded that Williams did not recall Judge Van Akkeren's name, having selected it at random, and misread it because, as he explained, his "handwriting is kind of sloppily." On the other hand, the jury reasonably could have inferred that Williams stumbled over the name because his single exposure to it was Wallace's note, which Williams destroyed a year before trial.

¶9 Other evidence also permitted competing inferences. The envelopes were postmarked November 30, 2009. Williams testified that he randomly selected the judges at the law library; that he went to the library on about twenty days in November 2009 and specifically recalled going the 24th through the 30th; and that he mailed the letters right after writing them. Captain Debra Gempeler, who supervises the inmates' activities, testified that inmates must request to use the library; that a log is kept of their requests and use; and that the log indicated no library attendance by Williams between October 30 and November 30, 2009.

¶10 Gempeler also testified that Williams and Wallace were in the same segregation "range," or wing in November 2009; that segregation inmates get two pieces of "free paper" a week; that inmates communicate by "yelling from one end of the range to the other" and by passing notes during recreation periods; and that she is aware that COs sometimes violate regulations by passing notes between inmates, although they risk termination if caught. The CO Williams identified as having passed the note denied that he did so.

¶11 Judge Van Akkeren testified that, to his recollection and per a CCAP search, he never had had contact with a Jesse Williams; that he presided over Wallace's sentencing and reconfinement hearings; that he received a letter from Wallace in January 2007 requesting leniency on reconfinement; and that he ordered a reconfinement sentence exceeding even the DOC recommendation.

¶12 The jury reasonably could have found it more believable that Wallace was motivated by a desire to retaliate than that Williams lashed out at random members of the judiciary. The jury reasonably could have inferred that Wallace gave Williams the judges' names by passing him a note and then decided that the CO's testimony denying any role was immaterial: if true, Wallace could have passed the note directly; if false, the CO's testimony was self-serving.

¶13 Wallace next challenges the sufficiency of the evidence on the second count involving the threatening letter Judge Langhoff received. He argues there is no evidence of a motive or that he even knew who Judge Langhoff was.

¶14 The State introduced evidence regarding the January 8, 2007 letter Wallace sent to the court asking for leniency about a week before his reconfinement hearing. The letter used only "Your Honor," but referred to being "in front of you on January 17 at 9:15," when Wallace was scheduled to appear

before Judge Van Akkeren. The letter itself was stamped as having been received by Judge Van Akkeren and Judge Van Akkeren testified that he received it but the related CCAP entry indicated that the letter was received by Judge Langhoff. Sheboygan County Clerk of Circuit Court Nan Todd testified at trial that the CCAP entry was incorrect and that when she learned of the error in June 2010, she changed the entry to reflect that Judge Van Akkeren had received the letter.

¶15 The jury thus heard that, for over three years, CCAP indicated that Judge Langhoff was the recipient of Wallace's letter requesting leniency on reconfinement. It also heard that segregation inmates do not have internet access but that they can communicate with each other and can send and receive mail. It is not inherently or patently incredible that someone accessed and provided Wallace with the erroneous information that Judge Langhoff was associated with his reconfinement.

¶16 Williams' prior inconsistent statement was not in conflict with the uniform course of nature or the established facts. ***King***, 187 Wis. 2d at 562. If the evidence allows for conflicting inferences, we are bound by those supporting the jury's verdict. *See* ***Poellinger***, 153 Wis. 2d at 504. We cannot say that the jury could not possibly have drawn appropriate inferences from the evidence before it. ***Watkins***, 255 Wis. 2d 265, ¶68. We therefore uphold Wallace's conviction.

By the Court.—Judgment affirmed.

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