COURT OF APPEALS
DECISION
DATED AND FILED

April 23, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1429-CR **Cir. Ct. No. 2011CF799**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ONTRELL TAMAR VIRGIL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELLEN R. BROSTROM, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Ontrell Tamar Virgil appeals from a judgment of conviction, entered after a jury trial, for one count of possessing a firearm as a felon and one count of possessing a firearm while subject to an injunction prohibiting such possession (domestic abuse injunction), contrary to WIS. STAT.

§ 941.29(2) (2011–12).[1] Virgil argues that there was insufficient evidence to support the convictions. Specifically, he argues that the State failed to prove that Virgil possessed "a weapon which acts by the force of gunpowder," *see* WIS JI—CRIMINAL 1343 (2011) and WIS JI—CRIMINAL 1344 (2008), because the "visual observations" of three witnesses who testified they saw Virgil with a gun were "not sufficient to show that the weapon was a firearm under th[at] definition." Virgil also argues that the trial court erroneously exercised its sentencing discretion when it imposed the $250 DNA surcharge. We affirm.

BACKGROUND

¶2 It is undisputed that Virgil and his girlfriend, Davoughna Haley, had an argument in front of her two adult sisters, her seven-year-old daughter, and several other people. Virgil denies that he possessed a firearm during the argument.

¶3 The State charged Virgil with five crimes related to his behavior during the argument. In addition to the firearm possession charges, the State charged Virgil with one count of felony intimidation of a victim and two counts of endangering safety by use of a dangerous weapon. The case proceeded to a jury trial.

¶4 The jury found Virgil guilty of the firearm possession charges and acquitted him of the other three charges. Virgil was sentenced to two concurrent terms of four-and-one-half years of initial confinement and three-and-one-half

[1] All references to the Wisconsin Statutes are to the 2011–12 version unless otherwise noted.

years of extended supervision. The trial court also ordered Virgil to pay the DNA surcharge "as a portion of his rehabilitation."

¶5 Virgil filed a postconviction motion asserting that there was insufficient evidence to support the firearm possession charges. He also challenged the imposition of the DNA surcharge. The trial court denied the motion in a written order, for reasons outlined below.

DISCUSSION

¶6 On appeal, Virgil argues that he is entitled to acquittal on the firearm possession charges because there was insufficient evidence to support the convictions. He also challenges imposition of the DNA surcharge. We consider each issue in turn.

I. Sufficiency of the evidence.

¶7 We begin with the applicable legal standards. On appeal, we will uphold a criminal 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. Booker***, 2006 WI 79, ¶22, 292 Wis. 2d 43, 61, 717 N.W.2d 676, 684 (citation omitted). If more than one inference can be drawn from the evidence, we must adopt the inference that supports the verdict. ***State v. Poellinger***, 153 Wis. 2d 493, 506–507, 451 N.W.2d 752, 757 (1990). "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence" to find the defendant guilty, this court may not overturn the verdict. ***Id.***, 153 Wis. 2d at 507, 451 N.W.2d at 758. The standard is the same whether the evidence is direct or circumstantial. *See*

ibid. Assessing the credibility of the witnesses is within the jury's province, and we defer to the jury's function of weighing and sifting conflicting testimony. ***State v. Wilson***, 149 Wis. 2d 878, 894, 440 N.W.2d 534, 540 (1989).

¶8 At the close of the State's case, after the jury found Virgil guilty, and in a postconviction motion, Virgil sought dismissal of the firearm possession charges on grounds that the State failed to prove that Virgil possessed "a weapon which acts by the force of gunpowder." *See* WIS JI—CRIMINAL 1343 (2011) and WIS JI—CRIMINAL 1344 (2008). He argued in his postconviction motion:

> The police never recovered a gun as part of their investigation. The State never presented, as an exhibit at the trial[,] the firearm or any pictures of a firearm. In fact, the State did not provide any physical evidence in support of the claim that Ontrell Virgil possessed a firearm on the date of the incident. The only evidence the State presented at trial … was the testimony of the child witness [and Haley's two sisters]…. The witnesses only testified to the fact that the weapon they observed ... appeared to be a firearm…. [Neither sister] testified to the fact that they were familiar with firearms[,] … had held the firearm, or had held firearms in the past. The visual observations of these witnesses are not sufficient to show that the weapon was a firearm … which acts by force of gunpowder.

¶9 Each time this argument was raised with the trial court, it rejected Virgil's argument and concluded that the evidence was sufficient to support the charges. In its written decision denying the postconviction motion, the trial court stated:

> The State presented the testimony of [the] … sisters of victim Davoughna Haley, who testified that when they arrived at their sister's house, the defendant was waving a gun around. There was evidence that [Haley's seven-year-old daughter] … told police that she was going to call 911 and that the defendant pointed the gun at her and told her he would shoot her if she called 911. There was, in fact, a 911 call made (officers believed it to have been made by Davoughna Haley) that there was a man with a gun, to which police responded on the evening of the incident.

> Based on the above submission of evidence, the court finds that sufficient evidence was presented that the defendant possessed a firearm … in Haley's residence.

The trial court further explained its decision by quoting from its trial ruling on this issue:

> "The two adult witnesses also testified that [the gun] was silver or silver [and] black. And that they described it to the police officers and the police officers helped them kind of nail down what it looked like. They could have easily given descriptions to the officers where the officers would have concluded this doesn't sound like a real gun. Clearly, they didn't think so."

(First set of brackets supplied by trial court; footnote omitted.)

¶10 Finally, the trial court implied that its conclusion was consistent with a recently published case that considered a defendant's claim that the State failed to prove that the firearm it seized was a "dangerous weapon" because there was no testimony that the particular firearm that was recovered by police "operated by force of gunpowder." *See* ***State v. Powell***, 2012 WI App 33, 340 Wis. 2d 423, 812 N.W.2d 520. We agree that ***Powell*** supports the trial court's decision.

¶11 In ***Powell***, the defendant was charged with carrying a concealed and dangerous weapon, contrary to WIS. STAT. § 941.23(2). *See* ***Powell***, 2012 WI App 33, ¶1, 340 Wis. 2d at 424, 812 N.W.2d at 521. The term "dangerous weapon" is defined by WIS. STAT. § 939.22(10) to include "any firearm, whether loaded or unloaded," and the State proceeded to trial on the theory that the dangerous weapon that Powell possessed was a firearm. *See* ***Powell***, 2012 WI App 33, ¶¶3, 10, 340 Wis. 2d at 424, 428, 812 N.W.2d at 522, 523. At the close of the State's case, Powell argued "that the State failed to prove that the firearm recovered was a 'dangerous weapon,' … because there was no testimony indicating that the firearm

acted 'by force of gunpowder.'" *See* ***id.***, 2012 WI App 33, ¶7, 340 Wis. 2d at 427, 812 N.W.2d at 522. The trial court denied the motion.

¶12 On appeal, this court noted that the criminal statutes do not define the term "firearm" and discussed the origin of the definition that appears in numerous pattern jury instructions related to firearms: "'A firearm is a weapon that acts by force of gunpowder.'" *See* ***id.***, 2012 WI App 33, ¶¶9–13, 340 Wis. 2d at 428–430, 812 N.W.2d at 523–524 (citation omitted). We explained that the definition was first used by the Wisconsin Supreme Court in 1892 "to note the difference between a child's air gun, and an actual, conventional, firearm." *See* ***id.***, 2012 WI App 33, ¶11, 340 Wis. 2d at 429, 812 N.W.2d at 523 (citing ***Harris v. Cameron***, 81 Wis. 239, 242–244, 51 N.W. 437, 438 (1892)). ***Powell*** explained:

> The ***Harris*** court did not … address the question of whether the State must provide evidence of a firearm operating by force of gunpowder in criminal proceedings. Since ***Harris***, however, case law has recognized handguns and pistols as "firearms" without requiring the State to provide evidence that the weapons operate by force of gunpowder.

See ***Powell***, 2012 WI App 33, ¶12, 340 Wis. 2d at 429, 812 N.W.2d at 524.

¶13 ***Powell*** continued:

> [N]either the statutes nor case law required the jury in this case to separately determine whether the .38 caliber semi-automatic pistol Powell attempted to conceal operated by "force of gunpowder." Rather, the jury was required to decide whether the pistol was a "firearm" for the purposes of determining whether it was a dangerous weapon.

Id., 2012 WI App 33, ¶14, 340 Wis. 2d at 430–431, 812 N.W.2d at 524. ***Powell*** concluded that the testimony—including statements about the discovery of the firearm and references to the weapon as a particular type of pistol—provided a

sufficient basis for the jury's finding. *See* ***id.***, 2012 WI App 33, ¶14, 340 Wis. 2d at 431, 812 N.W.2d at 524. ***Powell*** added:

> Further, in weighing the evidence, the jury was permitted to take into account matters of common knowledge, observations and experience in the affairs of life. Common knowledge suggests that at this point in time, one would have to be devoid of any media source not to understand that firearms fire bullets as a result of ignited gunpowder. The operation of firearms is constantly depicted in movies, television, video games and books. Testimony explaining the obvious, that the pistol operated by force of gunpowder, was not necessary to prove that it was a dangerous weapon.

See ***id.***, 2012 WI App 33, ¶14, 340 Wis. 2d at 431, 812 N.W.2d at 524–525 (citations omitted).

¶14 Virgil argues that ***Powell***'s holding is inapplicable here, because the issue in ***Powell*** was whether the pistol that was recovered by police "'was a firearm for purposes of determining whether it was a dangerous weapon.'" (Quoting ***id.***, 2012 WI App 33, ¶14, 340 Wis. 2d at 431, 812 N.W.2d at 524.) In contrast, Virgil asserts, because the issue in his case was simply whether he possessed a firearm, the State "was required to show that what [he] possessed was in fact a firearm under the law." We are not convinced that the difference in crimes compels a different result.

¶15 In both ***Powell*** and here, the jury was explicitly told that "[a] firearm is a weapon which acts by the force of gunpowder." In both cases, the jury had to determine if the defendant possessed a firearm. The only difference is that in Powell's case, the jury had to decide if he possessed a firearm in order to determine the ultimate question of whether Powell possessed a dangerous weapon. *See* WIS JI—CRIMINAL 1344 (2008) (jury instruction for being a felon in possession of a firearm); WIS JI—CRIMINAL 990 (2006) (jury instruction for

possessing a dangerous weapon). ***Powell***'s conclusion—that there need not be testimony that a particular firearm operated by force of gunpowder—is equally applicable here. *See* ***id.***, 2012 WI App 33, ¶14, 340 Wis. 2d at 431, 812 N.W.2d at 525.

¶16 Virgil also implies that the testimony that he possessed a firearm was less compelling than in ***Powell***, where the police recovered the firearm and introduced it as evidence at trial. While the physical and testimonial evidence in ***Powell*** may have been more extensive than the testimonial evidence offered in Virgil's case, it does not automatically follow that there was insufficient evidence to convict Virgil. The crucial inquiry is whether the witnesses' testimony provided sufficient credible evidence that what they saw was, in fact, a firearm. We conclude that the testimony of the two sisters provided a sufficient basis for the jury to find that Virgil possessed a firearm.[2]

¶17 One sister referred to the weapon as a "firearm" and said it was "silver and black." She testified that although she does not know the names of different types of guns, "I know what they look like when I see them." She described how Virgil "had a firearm in his hand" as he and Haley were "going back and forth" with their argument. She said she asked Virgil to "please go and put the gun away" and that Virgil left the house and returned without the firearm.

¶18 The second sister testified that the gun was silver. When asked how she knew it was a gun, she indicated that she had seen guns in the past, even

[2] The testimony of Haley's daughter was admitted in the form of a videotaped interview. Neither the videotape nor the transcript of that videotape has been included in the appellate Record, so we do not discuss whether Haley's videotaped testimony also supports the jury's finding.

though she does not know the names of particular guns. She also said that "everyone was telling [Virgil] to put the gun away because the kids [were] in the house."

¶19 Based on this testimony, the jury could conclude that both sisters were sufficiently familiar with guns to recognize that what Virgil was holding was a genuine firearm. The jury could also find that both sisters had sufficient time to observe the gun during the argument. Further, the jury heard evidence that numerous people present at the argument, including Haley's daughter, were scared of the gun and told Virgil not to display it with children in the house. Finally, there was no evidence that Virgil stated during the argument that he was not, in fact, holding a genuine firearm (as opposed to a toy or some other object). Given all of the facts presented, the jury could find that Virgil was holding a genuine firearm, which jurors applying common knowledge know means a firearm that operates "as a result of ignited gunpowder." *See* ***Powell***, 2012 WI App 33, ¶14, 340 Wis. 2d at 431, 812 N.W.2d at 525. "Testimony explaining the obvious, that the [gun] operated by force of gunpowder, was not necessary." *See* ***ibid.*** We affirm Virgil's convictions because they are supported by sufficient evidence.

II. Challenge to the DNA surcharge.

¶20 At sentencing, the trial court stated the following with respect to having Virgil provide a DNA sample and pay the DNA surcharge: "I believe he would have already provided DNA samples, but if he has not, he needs to do so. I am going to order the payment of that DNA sample as a portion of his rehabilitation."

¶21 In his postconviction motion, Virgil argued that the trial court erroneously exercised its discretion because it "failed to explain on the record why the DNA surcharge ordered was necessary." He continued:

> The only comment that the court made as it relates to the DNA surcharge was that the court was going to order it as a portion of Mr. Virgil's rehabilitation. There was no other analysis by the court to justify why the DNA surcharge was necessary in this case. The court was aware that Mr. Virgil had previously provided a DNA sample as it related to his previous felony conviction. There was no indication on the record that any DNA sample was taken from Mr. Virgil in this case. There was no indicat[ion] that any DNA analysis was necessary as part of the police investigation in this matter.

¶22 The trial court denied Virgil's request to vacate the DNA surcharge. It explained that it "imposed the DNA surcharge for purposes of rehabilitation" and concluded that was a valid basis to impose the surcharge under ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393. ***Cherry*** provided a non-exclusive list of numerous factors a court could consider when deciding whether to impose a DNA surcharge, including "any other factors the trial court finds pertinent." *See* ***id.***, 2008 WI App 80, ¶10, 312 Wis. 2d at 208–209, 752 N.W.2d at 396.

¶23 On appeal, Virgil again argues that "the reasons set forth by the trial court are insufficient to demonstrate that the trial court actually exercised its discretion."

¶24 The State disagrees, noting that a "full review" of the trial court's sentencing remarks indicates that the trial court was imposing the DNA surcharge for rehabilitation purposes. The State contends that "[w]hile Virgil might disagree with the wisdom of imposing the DNA surcharge, he cannot dispute that discretion was in fact exercised."

¶25 The State also argues that imposition of the surcharge was permissible pursuant to ***State v. Jones***, 2004 WI App 212, ¶¶7–11, 277 Wis. 2d 234, 240–242, 689 N.W.2d 917, 920–922, a case that rejected the defendant's argument that WIS. STAT. §§ 973.046 and 973.047 do not permit the trial court to impose a surcharge unless a DNA specimen is ordered in the same case and affirmed the order that the defendant pay the surcharge unless he shows he paid it in another case. The State explains:

> Virgil contends that his conviction in Milwaukee County case 2002CF005810, in which he was ordered to submit a DNA sample and pay the associated surcharge, means that he should not have to pay the surcharge in connection with this case. But the record does not reflect that Virgil ever actually paid the surcharge, and does not make clear that he has, in fact, submitted a DNA sample as required under [WIS. STAT.] § 973.047(1f). Thus, the [trial] court's order can be viewed as properly conditioned on whether or not a prior sample was submitted, and if the previously ordered surcharge was ever in fact paid.

(Record citation omitted.)

¶26 Virgil has not responded to the State's arguments, and they are therefore deemed admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (unrefuted arguments are deemed admitted). We are unconvinced that the trial court erroneously exercised its discretion. *See* ***Cherry***, 2008 WI App 80, ¶10, 312 Wis. 2d at 208–209, 752 N.W.2d at 396; ***Jones***, 2004 WI App 212, ¶¶7–11, 277 Wis. 2d at 240–242, 689 N.W.2d at 920–922.

By the Court.—Judgment and order affirmed.

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