

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

August 13, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2668-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN E. CARR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Steven E. Carr appeals from a judgment convicting him of armed robbery, false imprisonment, battery and burglary of a building or dwelling as a repeat offender,¹ and from an order denying his postconviction

¹ The jury acquitted Carr of criminal trespass to a dwelling.

motion. On appeal, he challenges the sufficiency of the evidence and the length of his sentence. We reject both challenges and affirm.

Upon a challenge to the sufficiency of the evidence to support a jury's guilty verdict, we may not substitute our judgment for that of the jury "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force" that no reasonable jury "could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). We will uphold the verdict if any possibility exists that the jury could have drawn the inference of guilt from the evidence. *See id.* at 507, 451 N.W.2d at 758. It is the jury's province to fairly resolve conflicts in the testimony, weigh the evidence and draw reasonable inferences from the facts. *See id.* at 506, 451 N.W.2d at 757. If more than one inference can be drawn from the evidence, the inference which supports the jury's finding must be followed unless the testimony was incredible as a matter of law. *See State v. Witkowski*, 143 Wis.2d 216, 223, 420 N.W.2d 420, 423 (Ct. App. 1988).

It is well established that a finding of guilt may rest upon evidence that is entirely circumstantial and that such evidence is often much stronger and more satisfactory than direct evidence. *See Poellinger*, 153 Wis.2d at 501-02, 451 N.W.2d at 755. The standard of review is the same for circumstantial evidence cases. *See id.* at 507-08, 451 N.W.2d at 758. In reviewing the sufficiency of circumstantial evidence, we need not concern ourselves with evidence which might support other theories of the crime. *See id.* We need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence to sustain the verdict rendered. *See id.* at 508, 451 N.W.2d at 758.

The charges arose out of Carr's early morning entrance into the Transitional Living home for mentally challenged individuals. The home's third-shift caretaker, Michael Harvey, testified that as he came up from the basement with laundry and entered the hallway near the main entrance, someone placed an object in the small of his back. A male voice said that it was a real gun. The intruder, later identified as Carr, then moved Harvey through the living room into the dining room and told Harvey to place his hands on the table. Carr repeatedly asked Harvey for money, patted Harvey's pockets and turned his front pockets inside out. Carr took five dollars from Harvey's pocket. The entire time, Harvey felt the object he believed to be a gun in his back. In a ruse designed to get Harvey near an alarm which he hoped he could set to summon police, Harvey told Carr that he needed to check the security system hourly or an alarm would summon police. When Harvey walked into the kitchen, he was struck in the back of the head with a bottle. The blow to the back of Harvey's head was hard enough to break the bottle and cause a bump.

Harvey and Carr left the kitchen to tend to the alarms. While Harvey pretended to check the alarms, he felt the gun in the small of his back. While Harvey was in the second floor hallway checking an alarm, Carr went through the open door of the room of a sleeping resident and searched a pair of pants which were draped on a chair. Harvey then saw that Carr's gun was plastic and he attempted to apprehend Carr. Harvey grabbed Carr, wrestled him to the floor, and tried to roll him over on his stomach so that he could hold him there more easily. Carr wriggled away from Harvey and slid down the stairs where Harvey caught him again and they wrestled to the floor. A resident came out of his room and saw the two men scuffling. Harvey asked the resident to call police while Harvey held Carr on the floor. Harvey and the resident noted that Carr

smelled of intoxicants and had red and bloodshot eyes and did not appear to be extremely alert. The police arrived thereafter.

Harvey surmised that Carr entered through a door to the facility which was left ajar by a departing employee. Harvey testified that during the third shift, the home's doors are locked for security purposes. No visitors are allowed during the third shift. Visiting hours were posted on the door through which Carr likely entered. Harvey testified that he did not give Carr permission to enter the facility, batter him or take his money. Harvey also testified that when he believed a real gun was pressed in the small of his back, he did not feel free to leave.

Kenosha Police Officer Jeffery Wamboldt testified that he was dispatched to the home where he discovered Carr and Harvey fighting on the floor. The officer observed a plastic replica of .45 handgun and a five dollar bill lying next to the men as they struggled on the floor.

The resident whom Harvey asked to call the police also testified. He heard the bottle break on Harvey's head and a few minutes later heard people in the hallway outside his door. While he was in his room with his door shut, he heard someone go into another bedroom and heard Harvey tell the other person that he could not enter the bedroom because it belonged to a resident. He then heard a slap and the sound of a plastic object hitting the wall and heard Harvey exclaim that the gun was fake. He then heard a struggle and Harvey yelling for someone to call the police. The resident exited his room and saw the gun on the floor. The resident complied with Harvey's request to call the police and then assisted Harvey in restraining Carr until the police arrived. The resident identified Carr.

The resident also testified that two months before the incident, Carr visited the facility and waived a gun around at people in the living room. The resident testified that Carr was introduced as the cousin of an employee. The resident testified that the employee was not on duty at the home the night of the incident. The resident was extensively cross-examined regarding his ability to discern and recall events in light of his mental and physical difficulties.

Charlene Holmes, a third-shift employee who worked in a different building in the complex, testified that Carr was her cousin. She testified that Harvey was not a truthful person. She was cross-examined regarding her limited contacts with Harvey.

Carr testified that he went to the home in the early morning hours of April 27, 1994, to pick up drugs from Harvey. Harvey admitted him to the premises and told Carr to accompany him while he made his rounds. Harvey refused to give Carr the drugs and they had a fight. Carr threw a bottle at Harvey but it did not hit Harvey. Carr said he had a toy gun which he wanted Harvey to believe was real. He admitted not giving the police this version of the story. He testified that he and Harvey were members of the same gang. Carr denied brandishing the weapon at Harvey and denied putting it in the small of his back.

The State called Harvey in rebuttal. He denied meeting Carr prior to Carr's invasion of the home, denied admitting him to the premises and denied accepting money from him or giving him cocaine. He also denied belonging to a gang.

The jury was instructed regarding the fact that the State relied in part upon circumstantial evidence. The jury was instructed that "[c]ircumstantial evidence is the proof of certain facts in [sic] which the jury may logically infer the

existence of other facts according to the knowledge or experience of mankind.” *See also* WIS J I—CRIMINAL 170. The jury convicted Carr of all counts except criminal trespass to a dwelling.

On appeal, Carr argues that there was insufficient evidence to show that he had the requisite intent to steal on the armed robbery and burglary counts. We disagree. Harvey’s testimony regarding the events of that night was sufficient to demonstrate that Carr had the required intent to steal. Intent is nearly always established by circumstantial evidence and inference. *In re C.A.S. and C.D.S.*, 185 Wis.2d 468, 489, 518 N.W.2d 285, 292 (Ct. App. 1994). Intent “must be inferred from the acts and statements of the person, in view of the surrounding circumstances.” *Id.* (quoted source omitted). We must accept the inference drawn by the finder of fact. *See id.* Here, the jury performed its function of weighing the credibility of the witnesses. Harvey testified that Carr robbed him downstairs and entered a sleeping resident’s room and searched his pants. The jury was free to infer intent to steal from this evidence.

We also reject Carr’s contention that there was insufficient evidence to show that he threatened the imminent use of force against Harvey with the intent to compel him to submit to the taking or carrying away of property with regard to the armed robbery count. Harvey’s testimony is sufficient to support the conviction. Carr also contends that he did not restrain or confine Harvey for purposes of the false imprisonment charge. Again, Harvey’s testimony is sufficient to support conviction on this count. Harvey testified that until he realized the gun was a fake, he was scared and under the control of Carr who was brandishing what Harvey believed was a real gun.

Carr also contends that he did not batter Harvey. Again, we disagree. Harvey's testimony that Carr hit him on the head with a bottle is sufficient proof of the crime. The jury was free to weigh Harvey's testimony against Carr's denials to determine which witness was more credible.

Carr argues that the evidence was insufficient to support a conviction for burglary arising out of Carr's intentional, nonconsensual entry of a resident's room while the resident was sleeping. The trial court deemed it unnecessary to have the resident testify that he did not consent to Carr's entry into the room and search of his pants. We agree with the trial court that there was sufficient circumstantial evidence to convict Carr of burglary. Burglary, § 943.10(1)(a), STATS., 1993-94, prohibits intentionally entering a building or dwelling without consent and with intent to steal or commit a felony.

Harvey testified that he was robbed by Carr in the middle of the night and that Carr was armed. He also stated that the resident of the room in question was sleeping when Carr entered his room and searched his pants. There is no evidence that Carr was a resident, guest or acquaintance of the resident in the room. Moreover, Harvey testified that visiting hours ended well before Carr entered the facility. From this evidence, the jury could infer that the resident did not consent to Carr's entry into his room.

Carr makes much of the fact that he was acquitted of criminal trespass to a dwelling and suggests that this acquittal undermines the sufficiency of the evidence on the burglary charge. We disagree. At the postconviction motion hearing, the trial court distinguished the acquittal on the trespass charge from the conviction on the burglary charge. The elements of criminal trespass, *see* § 943.14, STATS., and burglary *see* § 943.10(1)(a), STATS., differ. Entry with

intent to steal is an element of burglary whereas it is not an element of criminal trespass to property. While “mere intentional entry into a premises without the consent of the person in lawful possession thereof [is] insufficient to infer an intention to steal ... proof of ‘additional circumstances’ may be sufficient to permit the trier of fact to find an intent to steal.” *Raymond v. State*, 55 Wis.2d 482, 487, 198 N.W.2d 351, 353 (1972) (quoted source and citation omitted). Here, there were additional circumstances which warranted the jury’s guilty verdict on burglary. Carr entered the building in the middle of the night when it was not open to the public. He entered a resident’s room while the resident was sleeping and searched his pants after robbing Harvey downstairs. The jurors could reasonably infer intent to steal from this evidence.

Carr challenges his sentence of sixty-eight years on the four counts to be served consecutively. He contends that the trial court’s sentence is in excess of what reasonable people would judge right and proper under the circumstances and had no justifiable basis. Carr argues that the trial court unduly emphasized his prior juvenile record and his failure to profit from the juvenile services offered to him. He also argues that the trial judge placed too much weight on protecting the community in the face of contravening factors, such as the length of pretrial detention,² Carr’s employment history, the nature of the charges and their seriousness.

Public policy strongly disfavors appellate courts interfering with the sentencing discretion of the trial court. *See State v. Teynor*, 141 Wis.2d 187, 219, 414 N.W.2d 76, 88 (Ct. App. 1987). We review whether the trial court misused its

² We note that Carr received sentence credit for his pretrial detention.

sentencing discretion. *See State v. J.E.B.*, 161 Wis.2d 655, 661, 469 N.W.2d 192, 195 (Ct. App. 1991), *cert. denied*, 503 U.S. 940 (1992). We presume that the trial court acted reasonably, and the defendant must show that the trial court relied upon an unreasonable or unjustifiable basis for its sentence. *See id.*

The trial court examined Carr's character (including his long history of criminal conduct), the gravity of the offenses and the need to protect the public, all appropriate considerations in sentencing. *See State v. Paske*, 163 Wis.2d 52, 62, 471 N.W.2d 55, 59 (1991). The weight to be accorded these considerations is for the sentencing court to determine in its discretion. *See State v. Spears*, 147 Wis.2d 429, 446, 433 N.W.2d 595, 603 (Ct. App. 1988).

In sentencing Carr, the court emphasized that he had an extensive criminal record for a twenty-eight-year-old and the record was among the worst the court had ever encountered. The court noted that Carr faced a total of seventy-seven years of imprisonment on all charges for which he was convicted. The court reviewed Carr's criminal history at length and noted that the services provided to Carr as a juvenile did not deter him from criminal activity. The court considered Carr's character and sporadic employment history. It found that attempts to rehabilitate Carr had failed and that the overriding concern at this point in Carr's criminal career was to protect the public from him. The weight to be assigned to these factors was within the trial court's discretion, and it did not misuse its discretion in evaluating them and imposing a lengthy sentence.

By the Court.—Judgment and order affirmed.

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

