COURT OF APPEALS
DECISION
DATED AND FILED

October 21, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2586-CR **Cir. Ct. No. 2006CF762**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY DWAYNE ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CHARLES F. KAHN, JR. and PATRICIA D. McMAHON, Judges. *Affirmed.*

Before Curley, P.J., Fine, J., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Anthony Dwayne Anderson appeals from a corrected judgment of conviction for robbery, armed robbery, and burglary, the latter two offenses as a party to the crime, and from an order denying his

postconviction motion.[1] The issue is whether there was sufficient evidence to prove that Anderson had the intent to steal when he entered the victims' apartment to support the jury's guilty verdict against him for burglary. We conclude that there was sufficient circumstantial evidence and reasonable inferences from the totality of that evidence to prove Anderson's intent to steal when he entered the victims' apartment to support the jury's guilty verdict for burglary. Therefore, we affirm.

¶2 The following rendition of the incident is from the trial testimony of Michael Buckett, one of the victims. Anderson knocked on the door of Kitty Muth's apartment, and asked to use the telephone. Buckett, Muth's adult son, answered the door, and told Anderson that "my mom didn't want them [Anderson and the three other men accompanying him] over." Although Anderson had been an overnight guest at the Muth home previously, and many people used the Muth phone, Buckett "told them my ma doesn't want you guys over here. She's tired of you guys messing with her, harassing her, destroying her property. You guys just leave her alone. She doesn't want to deal with you guys." Anderson demanded that Muth tell him that herself, and when she did Anderson "pushed his way through the door and then he told his buddies to come in with him."

¶3 Buckett testified that once in Muth's apartment, Anderson said "this is [my] block. [I] run[] the block and that we had to start paying him money. It was the first of the month so he knew we got or my mother got her check." Later Anderson asked Buckett for a cigarette, and then "snatched the whole pack out of [Buckett's] hand." Buckett continued that Anderson "saw I had stuff in my pockets

[1] The Honorable Charles F. Kahn, Jr., presided over trial court proceedings, most particularly the jury trial and sentencing. The Honorable Patricia D. McMahon decided the postconviction motion.

and grabbed my pockets of my jacket I had on. He took two packs of cigarettes out and gave them to his buddies." Anderson then demanded the keys for Buckett's truck. Buckett initially refused, but after Anderson threatened to "shoot" him, he gave him the keys because Buckett testified that his "truck was not worth dying [for]." Anderson took Buckett's keys, "smash[ed] the telephone, just [was] being destructive." Anderson told Buckett that "if I [Buckett] called the police on him [Anderson], he would come back and find me and kill me and my family." Anderson then left in Buckett's truck, which was found by police with slashed tires, vomit in the inside of the truck, a dented tire rim, and the alignment ruined by "plow[ing] into the curb." At no time while in the Muth apartment, did Anderson use the telephone.

¶4 Anderson was initially charged with robbery with the threat of force as a party to the crime; he was later charged with and tried for two counts of armed robbery, and for burglary, as a party to each of the three crimes. A jury found him guilty of armed robbery, the lesser-included offense of robbery (from armed robbery), and burglary. For the armed robbery, the trial court imposed a sixteen-year sentence, comprised of nine- and seven-year respective periods of initial confinement and extended supervision. For the robbery, the trial court imposed a seven-year consecutive sentence, comprised of three- and four-year respective periods of initial confinement and extended supervision. For the burglary, the trial court imposed a seven-year sentence, comprised of three- and four-year respective periods of initial confinement and extended supervision, to run consecutive to the sixteen-year sentence, but concurrent to the other seven-year sentence.

¶5 Anderson moved for postconviction relief, contending that there was insufficient evidence to support the burglary conviction, and if the burglary conviction was vacated (for insufficient evidence), for sentence modification on the

robbery sentence that was imposed concurrent to the (then vacated) burglary sentence. The trial court denied the motion, reciting the evidence that supported the jury's verdict, and explained why it was sufficient to prove burglary, and how that decision necessarily disposed of Anderson's sentence modification claim. Anderson appeals.

¶6 Anderson challenges the sufficiency of the evidence to support the burglary conviction. The elements of burglary with intent to steal require proof, beyond a reasonable doubt, that the defendant: (1) intentionally entered a building; (2) without the consent of the person in lawful possession of that building; (3) knew that the entry was without consent; and (4) entered the building with intent to steal or commit a felony. *See* WIS. STAT. § 943.10(1m)(a) (2005-06); WIS JI—CRIMINAL 1421 (2001).[2] Anderson's entire challenge is to the sufficiency of the evidence of the fourth element of the offense, his intent to steal or commit a felony at the time he entered the Muth home.

¶7 Focusing only on the testimony of the timing of Anderson's intent, Buckett testified that Anderson was told not to come in the apartment, but barged in anyhow. Although Anderson claimed that he wanted to use Muth's telephone, he never used it, and ultimately destroyed it. One of the first things Anderson said upon "pushing his way through the door," was that this was "his block," and that he knew that Muth "got her [disability] check." He then began taking whatever he wanted, cigarettes, new clothes, the keys to Buckett's truck, while threatening Buckett and destroying personal property in Muth's apartment.

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

> ¶8 [I]n reviewing the sufficiency of the evidence to support a conviction, an 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 conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citation omitted). Credibility determinations are within the fact-finder's province unless the evidence is incredible as a matter of law. *See* ***Johnson v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). As long as there is sufficient evidence to convict, it is the jury's obligation, not that of the appellate court, to weigh the evidence and reconcile inconsistencies in the testimony. *See* ***Poellinger***, 153 Wis. 2d at 506-07.

¶9 We conclude that the entirety of the evidence and reasonable inferences from that evidence were sufficient for the jury to find that Anderson had the intent to steal or commit a felony when he entered, or "push[ed] his way through the door." He claimed to have wanted to go into the apartment to use the telephone, but he never used the telephone. Once in the apartment, he immediately boasted that this was "his block," and admitted that he knew that Muth "got her check" on the first of the month. He then began stealing things and threatening Buckett when he initially refused to give Anderson the keys to his truck. The reasonable inferences from this evidence are sufficient to prove Anderson's intent to steal or commit a felony when he entered Muth's apartment. The fact that this evidence was circumstantial as opposed to direct is not dispositive because proof of intent generally is inferred. *See* ***State v. Bowden***, 93 Wis. 2d 574, 583, 288 N.W.2d 139 (1980) ("Direct proof is particularly rare with respect to intent, an element which, by its very nature, is elusive.") (citation omitted), *overruled on other grounds by* ***Poellinger***, 153 Wis. 2d at 505.

¶10 Anderson also contends that if he is successful on his sufficiency of the evidence claim, he seeks resentencing on the robbery sentence imposed concurrently to the burglary sentence. Our rejection of his sufficiency of the evidence claim, obviates the need to address his resentencing contention.

By the Court.—Judgment and order affirmed.

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