COURT OF APPEALS
DECISION
DATED AND FILED

December 4, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP879 **Cir. Ct. No. 1999CF149**

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

STATE OF WISCONSIN EX REL. THOMAS C. OWENS,

PETITIONER-APPELLANT,

V.

ANA BOATWRIGHT, WARDEN,

RESPONDENT-RESPONDENT.

APPEAL from orders of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Affirmed*.

Before Higginbotham, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Thomas Owens appeals an order denying a petition for habeas corpus relief and an order denying reconsideration. He claims that there was insufficient evidence to support one of the elements of the burglary

charge for which he is currently serving a prison sentence. We affirm the circuit court for the reasons discussed below.

BACKGROUND

¶2 A jury convicted Owens of burglary in 1999 based on the following evidence produced at trial. Nicole Zollman testified that she came out of a bathroom at her boyfriend Peter Moe's house to discover a man she subsequently identified as Owens standing in the upper-level hallway. Owens introduced himself as Thomas, asked where Zollman's boyfriend was, and, when told he was in the shower, asked to wait for him. Zollman agreed, thinking that Owens was a friend of her boyfriend. Owens chatted with Zollman for ten to twenty minutes and offered to sell her a bracelet, then said he had to run outside and would be right back. He came back and asked for a glass of water. After Zollman came back with the water, she noticed that her diamond and sapphire ring, which she had seen earlier that morning just before she put her contacts in, was missing. Owens then went to the bathroom, and Zollman went downstairs and told Moe that he had a friend waiting upstairs. Moe went upstairs and saw a man whom he did not know. The man offered to sell Moe a gold necklace, and then just walked away when Moe declined. Moe and Zollman went to the police to report her ring stolen. When they returned home, they discovered other items were missing as well, including a watch, a Nintendo unit, and games.

¶3 The circuit court imposed a seven-year indeterminate prison sentence, which was stayed pending a five-year term of probation. Owens did not pursue a timely direct appeal from the conviction. However, after the revocation

of his probation in 2004, Owens filed two postconviction motions under WIS. STAT. § 974.06 (2005-06),[1] raising a number of issues. The circuit court denied both motions, and this court affirmed those decisions. Owens then filed the present habeas corpus action, claiming *inter alia* that the evidence produced at trial was insufficient to sustain the verdict because there was no proof he intended to steal anything when he entered Moe's home. That is the sole issue he now raises on appeal.

DISCUSSION

Procedural Bar

¶4 As a threshold matter, the State contends Owens' habeas corpus action should be procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We are not persuaded that ***Escalona-Naranjo*** applies here. First of all, ***Escalona-Naranjo*** holds that constitutional claims that either were or could have been raised in a direct appeal or in a postconviction motion under WIS. STAT. § 974.02 *cannot be the basis for a postconviction motion under WIS. STAT. § 974.06*, unless the court finds there was sufficient reason for failing to raise the claim earlier. ***Id.*** at 185. The present appeal arises from a habeas corpus action, not a § 974.06 motion. It is ***State v. Pozo***, 2002 WI App 279, 258 Wis. 2d 796, 654 N.W.2d 12, which holds that habeas is not available to hear claims that the petitioner either has already litigated or has failed to raise in prior proceedings unless there was a valid reason to excuse the failure. ***Id.***, ¶9.

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

¶5 Secondly, the State has not adequately explained why a procedural bar should apply here even if we were to substitute ***Pozo*** for ***Escalona-Naranjo*** as the proper authority for the bar. The State has not specified any point in the record where Owens actually raised the sufficiency of the evidence on the last burglary element during the proceedings on either of his two prior WIS. STAT. § 974.06 motions. Moreover, it is not clear that Owens *could* have raised a sufficiency of the evidence claim in his § 974.06 motions. The general rule is that a challenge to the sufficiency of the evidence is not the sort of constitutional or jurisdictional argument which falls within the scope of that statute. *See* ***State ex rel. Santana v. Endicott***, 2006 WI App 13, ¶8, 288 Wis. 2d 707, 709 N.W.2d 515; *see also* ***State v. Lo***, 2003 WI 107, ¶24, 264 Wis. 2d 1, 665 N.W.2d 756; *but cf.* ***Weber v. State***, 59 Wis. 2d 371, 379, 208 N.W.2d 396 (1973) (while sufficiency of the evidence in the sense of the weight of the evidence cannot be raised by motion under § 974.06, a complete failure to produce any evidence can be reviewed in such a postconviction motion because a conviction with no evidence of guilt would constitute a denial of due process).

¶6 The fact that sufficiency of the evidence is not generally considered a constitutional claim would also seem to raise the question whether habeas corpus is an appropriate vehicle for Owens' argument. Because the State's procedural bar argument is insufficiently developed, we choose to address the merits of Owens' sufficiency challenge.

Sufficiency of the Evidence

¶7 When reviewing the sufficiency of the evidence to support a conviction, this court will sustain the verdict "'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.'" ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)). Thus, we will sustain a verdict that is supported by any credible evidence, even if we might consider contradictory evidence to be more persuasive, leaving the credibility of witnesses and drawing of inferences to the jury. ***Richards v. Mendivil***, 200 Wis. 2d 665, 670-72, 548 N.W.2d 85 (Ct. App. 1996).

¶8 In order to obtain a burglary conviction, the State needed to establish that Owens: (1) intentionally entered a building or dwelling; (2) without the consent of the person in lawful possession; (3) knowing that the entry was without consent; and (4) with intent to steal or commit a felony. *See* WIS. STAT. § 943.10(1)(a) (1997-98); WIS JI—CRIMINAL 1421. Owens concedes that the first three elements were satisfied, but contends the evidence was insufficient to show that he entered Moe's home with intent to steal, or that he in fact stole any items. We disagree.

¶9 Intent to steal may be properly inferred from circumstances such as the type, manner, place, and time of entry; the type of building; the identity of the accused; and the defendant's conduct when interrupted. ***Raymond v. State***, 55 Wis. 2d 482, 487, 198 N.W.2d 351 (1972). Here, Owens entered a stranger's house without knocking or identifying himself, until Zollman found him in an upstairs hallway where he had no reason to be; after he left, the occupants determined that several items were missing, including the ring that Zollman had seen just before she encountered Owens. The jury could properly infer from Owens' unannounced and unexplained presence that Owens had taken the items and that he had entered the house with the intent to steal. Contrary to Owens' contention, that inference is not negated by the facts that Owens entered the house

in broad daylight, without using force, and did not flee when confronted. Those circumstances simply underscore the bold nature of the burglary.

By the Court.—Orders affirmed.

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