

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 26, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

**Appeal No. 01-1433-CR
STATE OF WISCONSIN**

Cir. Ct. No. 99-CF-163

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LORNE DEMARS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Chippewa County: RODERICK A. CAMERON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Lorne T. Demars appeals a judgment convicting him of six counts of burglary as party to a crime, two counts as a repeater, contrary

to WIS. STAT. §§ 943.10(1)(a), 939.05 and 939.62.¹ Demars also appeals the denial of his postconviction motion. In addition, Demars challenges the application of the repeater statute, WIS. STAT. § 973.12, to his sentence. We reject Demars' arguments and affirm the judgment and order.

BACKGROUND

¶2 In August 1999, Demars was charged with five counts of burglary, all as a repeater, in Chippewa County. The charges were eventually consolidated with charges filed against him in both Rusk and Sawyer Counties. In exchange for his guilty pleas to two counts of burglary as party to a crime from each county, the remaining charges were dismissed and the Chippewa County district attorney agreed to recommend ten years' imprisonment and ten years' probation on the two counts of burglary, party to a crime as a repeater, in that county.

¶3 The trial court ultimately sentenced Demars to sixteen years in prison on one burglary, the maximum for Demars' conviction as a repeat offender.² On the other burglary, the trial court withheld Demars' sentence and imposed sixteen years' probation concurrent to count one. Demars' motion for postconviction relief was denied and this appeal followed.

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

² With respect to the remaining four convictions, Demars was sentenced to ten years in prison on each of counts three and five, to run concurrent to count one. Finally, Demars was placed on ten years' probation for each of the remaining two counts, to run consecutive to count one and concurrent to each other.

ANALYSIS

¶4 Demars argues that he lacked proper notice of the repeater allegation and that the existence of the prior conviction was not established as required by WIS. STAT. § 973.12(1). We disagree. Whether Demars' sentence as a repeater is proper involves the application of § 973.12(1) to undisputed facts. This is a question of law that we review independently. *State v. Campbell*, 201 Wis. 2d 783, 788, 549 N.W.2d 501 (Ct. App. 1996).

¶5 WISCONSIN STAT. § 973.12(1) provides, in relevant part:

Whenever a person charged with a crime will be a repeater ... under s. 939.62 if convicted, any applicable prior convictions may be alleged in the complaint, indictment or information or amendments so alleging at any time before or at arraignment, and before acceptance of any plea. The court may, upon motion of the district attorney, grant a reasonable time to investigate possible prior convictions before accepting a plea. If the prior convictions are admitted by the defendant or proved by the state, he or she shall be subject to sentence under s. 939.62

¶6 The statute does not explicitly provide how the prior conviction should be alleged in the charging document so as to provide proper notice. Here, the complaint asserted that “the defendant is a repeater as defined in [WIS. STAT. § 939.62], consequently the penalty for this offense is enhanced by 6 years imprisonment.” When repeater allegations are contained in the complaint, a defendant is given notice sufficient to satisfy due process considerations. *State v. Trammel*, 141 Wis. 2d 74, 80, 413 N.W.2d 657 (Ct. App. 1987).

¶7 Demars nevertheless argues that the complaint was insufficient to give notice of the repeater allegation because it did not reference the specific convictions providing a basis for the repeater status. While this is true insofar as the body of the complaint is concerned, the State attached to the complaint a

certified copy of Demars' earlier judgment of conviction in Chippewa County Case No. 95-CF-61.³ As this court noted in *State v. Flowers*, 221 Wis. 2d 20, 32, 586 N.W.2d 175 (Ct. App. 1998), a judgment of conviction is prima facie evidence of an accused's prior conviction for purposes of invoking a repeater allegation. In addition, at the plea hearing, the circuit court noted that the information as prepared did not disclose that there was to be a repeater enhancement applied to the two counts from Chippewa County. Defense counsel nevertheless confirmed that he had discussed the repeater enhancement with Demars. Further, Demars agreed that the State could file an amended information containing the repeater allegation. Based upon the foregoing, we conclude that Demars had proper notice of the repeater allegation.

¶8 Demars also contends that existence of the prior conviction was not established as required by WIS. STAT. § 973.12(1). As noted above, § 973.12(1) requires that the defendant admit or the State prove the prior conviction that serves as the basis for the repeater allegation. Under certain circumstances a no contest plea to a criminal complaint can constitute an admission to prior convictions. *State v. Rachwal*, 159 Wis. 2d 494, 512-13, 465 N.W.2d 490 (1991).

¶9 In *Rachwal*, as here, the circuit court failed to directly ask the defendant whether he had been convicted of the prior offenses, and the defendant never volunteered that he had been convicted of them. *Id.* at 504. However, during the plea colloquy with the defendant, the circuit court drew the defendant's attention specifically to the repeater allegations, explaining the additional penalty

³ In Chippewa County Case No. 95-CF-61, Demars was convicted of three misdemeanors and one felony—second-degree recklessly endangering safety.

he would face with the repeater provision. *Id.* at 502-03. Our supreme court ruled that this part of the colloquy gave Rachwal notice not only that a repeater was being alleged, but also of the potential enhanced exposure over and above the underlying charge. *Id.* at 509. Because of this specific colloquy, the court concluded that the circuit court had sufficiently informed the defendant that he was being asked to admit to the prior convictions contained in the charging document and that the admission would increase his exposure by a certain amount. *Id.* By the defendant's explicit response that he understood what the circuit court was telling him, the supreme court concluded that there was both an understanding and an admission in the record. *Id.*

¶10 Here, as in *Rachwal*, the circuit court drew Demars' attention specifically to the repeater allegations, explaining the additional six-year penalty he would face with the repeater provision. During the plea colloquy, the circuit court again confirmed that Demars understood that his guilty plea would expose him to a maximum of sixteen years in prison on each burglary charge. Under these circumstances, we conclude that Demars' guilty pleas were tantamount to an admission of his prior convictions for purposes of the repeater enhancement.

¶11 In any event, we conclude that the State proved Demars' repeater status by virtue of the presentence report and by attaching a certified judgment of conviction to the complaint. *See State v. Caldwell*, 154 Wis. 2d 683, 693, 454 N.W.2d 13 (Ct. App. 1990); *see also Flowers*, 221 Wis. 2d at 32 ("A certified judgment of conviction is the best evidence we can conceive of to show a trial court the existence of a prior felony conviction."). The *Caldwell* court, concluding that the presentence report satisfied the requirements of WIS. STAT. § 973.12(1), noted that the repeater allegation was expressly contemplated by the investigating probation and parole agent, the date of the relevant prior conviction was included

in the report and the report indicated that the agent independently verified the prior conviction from sources other than the complaint. *Id.* at 694.

¶12 Here, as in *Caldwell*, the presentence report indicates that the probation and parole agent contemplated Chippewa County Case No. 96-CF-61, the conviction that provided a basis for the repeater allegation. In fact, the report makes specific reference to the revocation of Demars' supervision in that case. Moreover, because Demars had reviewed the report and did not challenge its accuracy as it related to Demars' prior criminal record, the court was free to rely on the report and sentence Demars as a repeater. *See id.* at 695.

By the Court.—Judgment and order affirmed.

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

