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DISTRICT I

December 4, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2013AP700-CRNM State of Wisconsin v. Larry James Carter (L.C. #2011CF3281)
2013AP701-CRNM State of Wisconsin v. Larry James Carter (L.C. #2012CF832)

Before Curley, P.J., Fine and Kessler, JJ.

Larry James Carter appeals from judgments of conviction for two counts of burglary, one of which was entered upon a jury's verdict and one of which was entered upon Carter's guilty plea. Appellate counsel, Donna Odrzywolski, has filed a consolidated no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2011-12).[1] Carter was advised of his right to file a response, but he has not responded. Upon this court's

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

independent review of the records, as mandated by ***Anders***, and counsel's report, we conclude that there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgments.

On July 13, 2011, Carter broke the window of an auto parts store, entered, and removed a box containing a truck bed liner. Surveillance video caught a man with blue jeans, a white shirt, and a tan jacket with a red lining inside the store. A witness, Ashley Baker, watched Carter leaving the parking lot with the box, and she followed him through the nearby residential area. Meanwhile, the store's security monitoring company detected the break-in and notified police and the store manager.

When police arrived, witnesses still on the scene pointed out the direction in which Carter had fled. The squad car turned out of the store's lot, and one of the officers got out to secure the southern perimeter. The east-west corridor was generally blocked by buildings or other structures, so the other officer went up to secure a northern perimeter. There, the officer encountered Baker, who offered a description of the man she had followed: African-American, forty to fifty years old, wearing a tan jacket and blue jeans. A man later determined to be Carter peeked out from between two houses, saw the officer, and fled southbound, where he was apprehended by the first officer. In between the houses, a box with a truck bed liner was recovered.

The officers returned to the scene to consult the store manager; another officer came to transport Carter to the prisoner processing location. The officers viewed the security tapes with the manager. Upon realizing that they could not clearly see the suspect's face on the video, only

his clothes, the officers contacted the transport officer to have him preserve Carter's clothes as evidence. Carter was charged with one count of burglary and convicted by a jury.

Previously, in June 2009, the same store had been burglarized. The manager at that time was able to determine that an air compressor had been stolen and told police the model number. Witnesses had seen a man fleeing the scene with a box in a cart. Officers began looking in nearby garbage cans and, in a can next to a home, they found the box to an air compressor with a matching model number. The homeowner told police that just before they arrived, he had heard banging outside the house. Upon inspection of the box, police noted what appeared to be blood. The box was swabbed for evidence, DNA was extracted, and a match was made to Carter. It is not wholly clear when the DNA match was made—either at the time of the offense or subsequent to Carter's 2011 arrest—but the case was not prosecuted in 2009. The charge was filed shortly before the trial in the 2011 case, and Carter agreed to plead guilty in exchange for the State recommending a concurrent sentence. Ultimately, the circuit court imposed five years' initial confinement and five years' extended supervision for each of the two convictions, to be served concurrently.

The first potential issue counsel identifies is whether the circuit court followed the appropriate procedures in accepting Carter's plea in the second case. Our review of the record—including the plea questionnaire, waiver of rights form, and plea hearing transcript—confirms that the circuit court complied with its obligations for taking a guilty plea, pursuant to WIS. STAT. § 971.08, ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), and subsequent cases, as collected in ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. There is no arguable merit to a claim that the circuit court failed to fulfill its obligations or that Carter's plea was anything other than knowing, intelligent, and voluntary.

The second potential issue counsel raises is whether sufficient evidence supports the jury's guilty verdict in the first case. In reviewing the sufficiency of the evidence to support a conviction in circumstantial evidence cases, we may not substitute our judgment for that of the trier of fact unless the evidence, viewed most favorably to the verdict, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found the requisite guilt. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If more than one reasonable inference can be drawn from the evidence, we must adopt the inference that supports the verdict. *See* ***id.*** at 506-07.

A conviction may be supported solely by circumstantial evidence and, in some cases, circumstantial evidence may be stronger and more satisfactory than direct evidence. *See* ***id.*** at 501-02. On appeal, the standard of review is the same whether the conviction relies upon direct or circumstantial evidence. *See* ***id.*** at 503. An appellate court need only decide whether the evidence supporting that theory is sufficient to sustain the verdict. *See* ***id.*** at 507-08.

To prove Carter committed a burglary, the State had to show that Carter: (1) intentionally entered a building; (2) entered without the consent of the person in lawful possession; (3) knew the entry was without consent; and (4) entered the building with the intent to steal. WIS JI—CRIMINAL 1421. Intent can be inferred from actions. *See* ***id.*** As the State argued, Carter's entry was clearly not accidental—he did not "fall" into the window or mistakenly enter an unlocked door. Though Carter disputed being the burglar, his identification was strongly circumstantial. The video showed a perpetrator in the same clothes as Carter, and Baker watched him dragging a box across the parking lot before following him to the area in which he was apprehended. The store manager testified that Carter had no permission to be in the store, and Carter's knowledge that he lacked that permission can be inferred by the fact of the

broken window. Finally, Carter's intent to steal can be inferred from his actions. There is no arguable merit to a challenge to the sufficiency of the evidence.[2]

The final issue counsel raises is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a circuit court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the circuit court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

The circuit court here noted that Carter's record stretched back to 1981, and it calculated that the present offenses were Carter's seventh and eighth felonies. It concluded that his record merited prison time, noting that Carter required psychological help, and that could not happen outside of confinement given Carter's record. The circuit court explained to Carter, whose mother lives in the neighborhood near the store, that crime harms the area by driving businesses away and making the area unattractive. The circuit court told Carter that when it reviewed the

[2] There is at least one reference to the possibility that Carter was intoxicated at the time of the burglary. However, mere intoxication is not a defense—a defendant must be *so* intoxicated as to completely negate any intent element. *See* WIS JI—CRIMINAL 765 (cmt). There is no evidence to suggest that Carter's intoxication rose to that level.

presentence investigation report, it thought about imposing the maximum sentence. However, it noted that Carter's remorse seemed genuine, and it appreciated that he was taking responsibility for his actions.

The maximum possible sentence Carter could have received for the two offenses was twenty-five years' imprisonment. The concurrent sentences totaling ten years' imprisonment are well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and are not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There would be no arguable merit to a challenge to the sentencing court's discretion.

Our independent review of the records reveals no other potential issues of arguable merit.[3]

Upon the foregoing, therefore,

IT IS ORDERED that the judgments are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Donna Odrzywolski is relieved of further representation of Carter in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[3] We have considered whether there is any arguable merit to raising a speedy trial violation. We conclude that there is not: when the circuit court realized it could not hold the trial in a timely fashion, it allowed Carter to be released on a signature bond. *See* WIS. STAT. § 971.10(2)(a) & (4).