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February 5, 2014

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

2013AP2066-CRNM State of Wisconsin v. Nathaniel Wallace (L.C. #2012CF981)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Nathaniel NMI Wallace appeals from a judgment convicting him of attempted armed robbery, battery, possession of drug paraphernalia and bail jumping, the latter three as a repeater. Wallace's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Wallace received a copy of the report and filed two essentially similar responses.[2] Upon considering the no-merit report and

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

[2] The first "response" was filed before the no-merit report was filed.

responses and independently reviewing the record as mandated by ***Anders*** and RULE 809.32, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21. We therefore affirm the judgment and relieve Attorney Daniel P. Murray of further representing Wallace in this matter.

Matthew Allaire, a grocery store assistant manager, and Adam Lopez, the store's loss-prevention officer, apprehended Wallace in a physical struggle as Wallace exited the store with seven thirty-five-ounce cans of shoplifted baby formula. Wallace struck Allaire in the head with the bag of merchandise. A four-count complaint and, later, the information, charged Wallace with armed robbery with use of force and the three misdemeanors listed above. Trial was to the court.[3] The trial court sua sponte decided to consider the lesser-included offenses of retail theft and attempted armed robbery. The parties were invited to submit authority on attempted armed robbery as a lesser-included offense.

Wallace ultimately was convicted of attempted armed robbery and the three misdemeanors. The court sentenced Wallace to twelve years' imprisonment for the attempted armed robbery, bifurcated as six years' initial incarceration and six years' extended supervision. The court ordered one year in jail for each of the other three counts, concurrent to the sentence on count one. This no-merit appeal followed.

The no-merit report first considers whether attempted armed robbery is a lesser-included offense of armed robbery and was properly "submitted" to the trier of fact, here, the trial court,

[3] With the court's approval and the State's consent, Wallace waived a jury trial in writing and by his personal statement in open court on the record. *See* WIS. STAT. § 972.02(1); *see also* ***State v. Cloud***, 133 Wis. 2d 58, 62, 393 N.W.2d 123 (Ct. App. 1986).

for its consideration. An included crime does not require proof of any fact in addition to those that must be proved for the crime charged. WIS. STAT. § 939.66(1). Said another way, it "must be 'utterly impossible' to commit the greater crime without committing the lesser." ***Hagenkord v. State***, 100 Wis. 2d 452, 481, 302 N.W.2d 421 (1981) (citation omitted). An included crime also may be an attempted crime under WIS. STAT. § 939.32. Sec. 939.66(4).

The elements of armed robbery are that the defendant took property from the owner, had an intent to steal, threatened imminent use of force to compel acquiescence in the taking or carrying away ("asportation") of the property, and was armed with a dangerous weapon while committing the robbery. WIS. STAT. § 943.32(1)(b) & (2); ***State v. Grady***, 93 Wis. 2d 1, 5, 286 N.W.2d 607 (Ct. App. 1979). Attempt requires that the actor intends to perform acts and attain a result which, if accomplished, would constitute the named crime, and does acts toward committing the crime that demonstrate unequivocally under all the circumstances that he or she formed that intent and, but for an intervening person or extraneous factor, would commit the crime. WIS. STAT. § 939.32(3). "The intervention of another person or some other extraneous factor that prevents the accused from completing the crime is not an element of the crime of attempt." ***State v. Stewart***, 143 Wis. 2d 28, 31, 420 N.W.2d 44 (1988). We agree with counsel's analysis and his conclusion that no meritorious issue possibly could be raised on appeal that attempted armed robbery is not a lesser-included offense of armed robbery.

To submit a lesser-included offense to the finder of fact, a court must determine, first, whether the offense is a lesser-included one and, second, whether there is a reasonable basis in the evidence for acquittal on the greater and conviction on the lesser. ***State v. Muentner***, 138 Wis. 2d 374, 387, 406 N.W.2d 415 (1987). The lesser-included offense may be submitted if there is a reasonable doubt as to some particular element included in the higher degree of crime.

State v. Foster, 191 Wis. 2d 14, 23, 528 N.W.2d 22 (Ct. App. 1995). Here, the trial court concluded there was reasonable doubt about the element of asportation because the store employees intervened before Wallace could make off with the merchandise.

A court "may without any request instruct on the degree[ ] of the offense the evidence will sustain." ***Neuenfeldt v. State***, 29 Wis. 2d 20, 32, 138 N.W.2d 252 (1965). Also, the court may allow the information to be amended at trial to conform to the proof if the amendment is not prejudicial to the defendant. WIS. STAT. § 971.29(2). Amending the information to a lesser-included offense does not materially prejudice the defendant because, as all of the elements of the lesser crime are included in the greater crime, the defendant necessarily has notice and opportunity to prepare a defense to the included crime. ***Moore v. State***, 55 Wis. 2d 1, 7-8, 197 N.W.2d 820 (1972). No issue of arguable merit could arise from the court's sua sponte consideration of attempted armed robbery.

Wallace asserts that attempted armed robbery is not an offense known to law. The pattern jury instruction WIS JI—CRIMINAL 582 "Example Attempted Armed Robbery" shows that this claim has no merit. Further, his reliance on ***State v. Cvorovic***, 158 Wis. 2d 630, 462 N.W.2d 897 (Ct. App. 1990), for the principle that an attempt crime is not a recognized offense if not specifically named in WIS. STAT. § 939.32(1) or (2) is misplaced. ***Cvorovic*** held that "attempted fourth-degree sexual assault" is not an offense recognized under Wisconsin law because § 939.32(1) or (2) did not list fourth-degree sexual assault as a crime that may be prosecuted as an attempt. ***Cvorovic***, 158 Wis. 2d at 633. Fourth-degree sexual assault is a misdemeanor, however. WIS. STAT. § 940.225(3m). Armed robbery is a felony and so comes under the express language of § 939.32(1) ("Whoever attempts to commit a felony *or* a crime

specified in s. 940.19, 940.195, 943.20, or 943.74 may be fined or imprisoned or both as provided under sub. (1g)") (emphasis added).

The no-merit report next considers whether a meritorious challenge could be mounted to the sufficiency of the evidence to support the conviction. We agree that such a challenge would be frivolous. On review of a trial to the court, this court may not set aside the trial court's findings of fact unless clearly erroneous, and we must give due regard to that court's opportunity to judge the credibility of the witnesses. WIS. STAT. § 805.17(2).

Wallace contends he should have been charged with retail theft instead of armed robbery. He admitted that he went to the store with the intent "to shoplift," put the baby formula in a bag he brought with him, and intended to leave the store without paying, but argues that he did not have either a weapon or the intent to harm anyone. Rather, he says, Allaire came at him without identifying himself and, startled, he put his arm out straight to fend Allaire off, making the bag swing and hit Allaire, and that he attempted to get away from Allaire and Lopez because he did not want to miss his bus.

Based on all of the testimony and the security camera videotape, the court found Allaire's testimony the more credible and Wallace's "not plausible." The trier of fact is free to discount defense testimony. ***Grady***, 93 Wis. 2d at 7. The court found that Lopez recognized Wallace as being on the store's "Top Ten" list of shoplifters, that Allaire was wearing the standard store uniform with a name badge while most shoppers were clad in shorts, that Wallace intended to hit Allaire because Allaire was struck on the crown of his head, that, given its heft and its use at that moment, the over-fifteen-pound bag of merchandise constituted a dangerous weapon, that intent and premeditation can be formed quickly, that Wallace struck Allaire and tried to flee to

accomplish the crime, and that, but for Lopez subduing him, Wallace would have done so. The question of intent generally is for the trier of fact and legal intent can be inferred from conduct. ***Id.*** These findings are not clearly erroneous. This claim presents no arguable issue.

Wallace also contends that being convicted of attempted armed robbery after being tried for armed robbery violated his constitutional right to be free from double jeopardy. This issue likewise has no arguable merit. A person charged with and tried for one crime and convicted of a lesser-included offense is not subjected to double jeopardy. *See* ***Moore***, 55 Wis. 2d at 6-7. Wallace was neither tried and convicted more than once for the same offense nor tried for and convicted of both the completed and inchoate crimes. *See* WIS. STAT. §§ 939.71, 939.72.

Finally, we consider the sentencing.[4] Sentencing is left to the trial court's discretion and appellate review is limited to determining whether that discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The court here addressed at length the gravity of the offense, Wallace's character, the need to protect the public, Wallace's significant past record of criminal offenses, and his history of undesirable behavior, including his long-standing need for and failure to undergo AODA treatment. *See* ***State v. Harris***, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. Wallace's twelve-year sentence, well below the twenty-three years he faced, is not so excessive or unusual so as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975); *see also* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. The court's thorough, "rational and

[4] To be complete, a no-merit report must consider the discretion exercised at sentencing. Also, case citations should contain pinpoint cites. *See* WIS. STAT. RULE. 809.19(1)(e); *see also* SCR 80.02.

explainable basis" for the sentence demonstrate that discretion in fact was exercised. *See* ***Gallion***, 270 Wis. 2d 535, ¶¶39, 76.

Our review of the record discloses no other potential issues for appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Daniel P. Murray is relieved from further representing Wallace in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals