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November 11, 2014

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

2014AP331-CRNM State of Wisconsin v. Casimier L. Wright (L.C. #2012CM2343)

Before Kessler, J.[1]

Casimier L. Wright appeals from a judgment of conviction, entered upon a jury's verdicts, on one count of theft of property valued at less than $2500 and one count of criminal damage to property, both as party to a crime. Appellate counsel, Timothy L. Baldwin, has filed a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Wright was advised of his right to file a response, but has not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and counsel's report, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

On April 26, 2012, Milwaukee police responded to a theft-in-progress call. Maintenance workers at an apartment complex had observed three individuals standing around the air conditioning units of a building in the complex. One of the individuals had a tool that looked like bolt cutters, and he appeared to be stripping copper from the units. The three individuals fled when the workers went to investigate, but the workers followed them by car. Eventually, the trio split, with the suspect carrying the copper going one way and his two companions another way. Police caught up to the pair, identified as Wright and Ruben Coleman. The third suspect was never apprehended. Wright was charged with theft and damage to property, both as party to a crime, and both Class A misdemeanors. A jury convicted him. The circuit court sentenced him to eighty days in jail for the theft, plus a consecutive six months in jail for the damage. The six-month sentence was imposed and stayed in favor of two years' probation.

Counsel raises three potential issues for appeal, each of which he concludes lacks arguable merit. Upon our independent review of the record, we also conclude that the issues lack arguable merit. However, we reach this conclusion without the aid of counsel's analysis because, as we will explain herein, counsel's analysis is inadequate and, in some cases, inaccurate.

Counsel first addresses whether it "would be frivolous to challenge Mr. Wright's conviction by trial." After providing five pages of standards of review and relevant legal principles for at least fifteen topics with no connection drawn to the facts of Wright's case, counsel concludes simply that:

> Mr. Wright had a two-day jury trial in which he was represented by counsel and timely objections were made or waived. Mr. Wright's trial was conducted under the perimeters [sic] of his Due Process Constitutional Rights. Therefore, whether Wright's conviction could be overturned is not a potential issue for appeal or consideration in an Anders brief.

This conclusion is useless, at least in part because it fails to address the primary issue related to Wright's conviction that should be analyzed: whether there is any arguable merit to a claim that insufficient evidence supported the verdict.

We view the evidence presented in the light most favorable to the verdict and, if more than one inference can be drawn from the evidence, we accept the one drawn by the jury. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). We overturn the verdict only if, when we view the evidence most favorably to the State and the conviction, the evidence is inherently or patently incredible or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt. *See* ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982).

A conviction may be supported solely by circumstantial evidence; in some cases, circumstantial evidence may be stronger and more satisfactory than direct evidence. *See* ***Poellinger***, 153 Wis. 2d at 501-02. The standard of review is the same whether the evidence is direct or circumstantial. *See* ***id.*** at 503. The jury is the sole arbiter of witness credibility, and it alone is charged with the weighing of the evidence. *See* ***id.*** at 506. This court need only decide

whether the evidence supporting the theory of guilt accepted by the fact-finder is sufficient to sustain the verdict. *See* ***id.*** at 508.

Wright was charged as a party to a crime for supposedly aiding and abetting the suspect who did the cutting and stripping of the air conditioning units. A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, he knowingly either assists the person who commits the crime; or is ready and willing to assist and the person who commits the crime knows of the willingness to assist. *See* WIS JI—CRIMINAL 405. To support the party-to-a-crime modifier, the State presented testimony from two of the maintenance workers. One expressed an opinion that Wright and Coleman seemed to be acting as lookouts, while the other testified that, as he was watching them, the three suspects were clearly communicating with each other. Additionally, while the workers were following the suspects, the apartment complex's security guard joined the pursuit. When he confronted the suspects, Wright said, "Fuck you. You're not the cops." All of this was circumstantial evidence that Wright knew a crime had been committed and was assisting or ready and willing to assist the main actor.

There are four elements to theft: the defendant took and carried away movable property of another; the owner of the property did not consent to that taking and carrying; the defendant knew the owner did not consent; and the defendant intended to deprive the owner permanently of the possession of the property.[2] *See* WIS JI—CRIMINAL 1441. It was undisputed that the

[2] The dollar amount of the property taken is not an element; it simply determines the classification of the offense. *See* WIS. STAT. § 943.20(3). Wright was charged with the lowest level of theft.

unapprehended suspect took and carried away the property of the apartment complex. One of the maintenance workers testified that no consent had been given to take the property. With respect to whether Wright knew the complex did not consent, his flight from the scene and his reaction to the security guard are circumstantial evidence thereof. The intent to permanently deprive the owner of the property is evidenced by the fact that the property has not been recovered and is implicit in the very nature and method of extracting the copper.

There are five elements to criminal damage to property: the defendant caused damage, which includes anything from mere defacement to total destruction, to physical property; the defendant intentionally caused the damage; the property belonged to another person; the defendant caused the damage without consent; and the defendant knew the property belonged to another person and knew that the person did not consent to the damage. *See* WIS JI—CRIMINAL 1400. The maintenance workers testified about the damage, and the State showed pictures of the damaged units to the jury. Like the intent to commit the theft, the intent to cause damage could be inferred from the suspects' behavior. The maintenance workers testified that the air conditioning units were part of buildings that belonged to the complex, and one of the workers testified that no consent had been given. Knowledge that the property belonged to someone who did not consent was also inferable by action.

Accordingly, based on the foregoing, there is no arguable merit to a challenge to the sufficiency of the evidence necessary to support the verdicts.

The second 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 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 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.

Counsel concludes that "Wright's sentencing falls within the discretionary authority of the circuit court" because "[a]t sentencing, the circuit court discussed the sentencing recommendation of all the parties and crafted a sentence in parity with the balance of all recommendation[s]." This suggests that the circuit court considered two disparate recommendations and imposed a sentence between both extremes when, in fact, Wright joined the State's recommendation of sixty days in jail but the circuit court actually *exceeded* that recommendation.[3]

The circuit court was generally amenable to the proposed sixty-day sentence, but thought that a small upward deviation was necessary because of Wright's poor character, as evidenced by Wright swearing at and fleeing from the security guard when confronted and because he evidently boasted to others in jail that the State had nothing on him. The circuit court declined to

[3] Counsel also asserts that there is no issue with the sentence because the State "made no sentencing recommendation or argument that would violate the spirit of the plea bargain[.]" Of course, this case was resolved through a jury trial, not a plea agreement.

authorize work-release privileges because Wright was unemployed, but offered to amend the sentence if Wright presented a job offer, acknowledging that Wright had a good work history. The circuit court explained its sentence on count two—six months in jail, imposed and stayed in favor of two years' probation—by expressing its hope that probation would turn Wright into a "good working man" who does not commit crimes. Further, the circuit court hoped that Wright would learn that "doing shaky stuff to the people in the neighborhood that he's acquainted with is not the way for him to go."

The maximum possible sentence Wright could have received was eighteen months' imprisonment. The sentence of eighty days in jail, plus an imposed-and-stayed six months in jail, is 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 is 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). The two-year probation term is also within the range authorized by law. *See* WIS. STAT. § 973.09(2)(a)2. The sentence appropriately reflects considerations of protecting the community, punishment, and rehabilitation. There would be no arguable merit to a challenge to the sentencing court's discretion.

Finally, counsel addresses whether it would be frivolous to challenge the performance of Wright's trial attorney. In concluding that there is no arguable merit to such a challenge, appellate counsel explains that trial counsel "demonstrated professionalism. Based on the early evaluation and scheduling of this case, the trial attorney presumably considered all potential pretrial motions and filed an other acts' evidence motion in preparation for trial."

It is not clear how "early evaluation and scheduling of this case" leads appellate counsel to simply presume that trial counsel considered all potential pretrial motions. We note, for example, that trial counsel perhaps should have pursued a motion alleging a violation of ***County of Riverside v. McLaughlin***, 500 U.S. 44 (1991), which held that a probable cause determination must be made within forty-eight hours of a warrantless arrest. As far as we can tell from the record, Wright was arrested without a warrant on April 26, 2012, but not seen for a probable cause determination until his initial appearance on May 1, 2012. The complaint was filed a day prior, on April 30, 2012.

However, while it might have been deficient performance for trial counsel not to raise such a challenge, we can discern no prejudice. A ***Riverside*** violation is not jurisdictional, nor does it adversely impact the circuit court's competency. *See* ***State v. Golden***, 185 Wis. 2d 763, 769, 519 N.W.2d 659 (Ct. App. 1994). Dismissal with prejudice is not the required remedy unless the State intentionally delays and the delay hampers the defendant's ability to prepare a defense, *see* ***id.***, and there is no indication that Wright was so hampered. Nor is there any evidence to be suppressed as a result of any ***Riverside*** violation. *See* ***Golden***, 185 Wis. 2d at 769. In addition, Wright received credit for the days spent in custody between his arrest and his initial appearance. As a result, there is no prejudice to Wright from any failure of trial counsel to raise a ***Riverside*** violation.

Further, the record does *not* indicate that trial counsel filed an other acts motion. Rather, the State sought permission to introduce evidence that Wright had engaged in multiple scrap-metal-recycling transactions shortly before the theft in this case. Trial counsel, however, was adequately prepared to defend against the State's efforts, and the trial court ruled that the State could only introduce such evidence in rebuttal.

Appellate counsel further suggests there is no arguable merit to a challenge to trial counsel's performance because "[d]uring the pendency of this case, Mr. Wright defied the criminal process to convict him, considering that Mr. Wright was so defiant and the evidence so easily rose to the level of beyond a reasonable doubt amongst the jury; the outcome was reasonable." It is not clear what counsel believes made Wright "so defiant," although this comment may refer to Wright's supposed boasting in jail. In any event, it is not clear what Wright's behavior has to do with trial counsel's effectiveness. Based on our review of the record, however, we must agree with appellate counsel's ultimate conclusion that there is no arguable merit to a claim that trial counsel was ineffective. *See* ***State v. Mayo***, 2007 WI 78, ¶¶59-61, 301 Wis. 2d 642, 734 N.W.2d 115.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Timothy L. Baldwin is relieved of further representation of Wright in this matter.[4] *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[4] A copy of this opinion is being sent to the State Public Defender.