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November 18, 2014

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

2014AP650-CRNM State of Wisconsin v. Nicholas J. Richter (L.C. #2013CM188)

Before Kessler, J.[1]

Nicholas J. Richter appeals from a judgment of conviction, entered upon a jury's verdict, on one misdemeanor count of concealing stolen property valued at less than $2500, as a repeater. Appellate counsel, George S. Pappas, Jr., has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Richter was advised of his right to file a response, but has not responded. Upon this court's independent review of the record, as

[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.

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.

Richter's girlfriend, Heather McClellan, owed him money. To pay back her debt, McClellan stole three power tools from Edith Ranta, the woman with whom McClellan was staying at the time. McClellan expected Richter to sell the tools and keep the money. The case was tried to a jury, which convicted Richter. The trial court withheld sentence and placed Richter on probation for one year, with four months of jail time with work release privileges as a condition. Richter's sentence was to be consecutive to any other sentence.

Counsel raises four potential issues, each of which he concludes lack arguable merit. One of the issues is whether the trial court erroneously excluded out-of-court statements made by Richter. Specifically, Richter had given a statement to police in which he denied any involvement in the charged offense. During a pretrial hearing, the State indicated it had no intention of introducing Richter's statement and warned that it would object if Richter attempted to introduce it. The trial court agreed with the State's analysis and cautioned Richter that the statement would not be admissible unless he opted to testify. When, during Richter's cross-examination of the investigating detective, counsel attempted to ask about the denial, the State objected, and the trial court sustained the objection.

Appellate counsel concludes the exclusion was appropriate because Richter's denial was hearsay. We agree with this assessment, and with counsel's conclusion that the statement was not admissible as an admission by a party opponent. *See* WIS. STAT. §§ 908.01(3) (defining hearsay), 908.01(4)(b)1. (statement is not hearsay if it is "offered against a party and is … [t]he

party's own statement"), & 908.02 (hearsay inadmissible). There is no arguable merit to a claim that the trial court erroneously excluded Richter's statement.

Another issue counsel raises is whether sufficient evidence supports the verdict. In reviewing the sufficiency of the evidence, 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. The jury is the sole arbiter of witness credibility, and it alone is charged with the duty of weighing the evidence. *See* ***id.*** at 506. A conviction may be supported solely by circumstantial evidence; in some cases, circumstantial evidence may be stronger and more satisfactory than direct evidence. *See* ***id.*** at 501. 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 508.

Whoever knowingly or intentionally conceals stolen property valued at less than $2500 is guilty of a Class A misdemeanor. *See* WIS. STAT. § 943.34(1)(a). To secure a conviction for concealing stolen property, the State had to show that Richter knowingly or intentionally concealed property; that the property was stolen; and that when the property was concealed, Richter knew that it was stolen. *See* WIS JI—CRIMINAL 1481. There is no dispute that the three power tools were stolen from Ranta. Thus, the primary elements in dispute are whether Richter actually concealed the property and whether Richter knew the property was stolen.

Richter attempted to persuade the jury that he had not concealed the power tools. Richter lived in the basement of his mother's home. He shared the level with storage space in a generally open floor plan. When police spoke to Richter's mother about the tools, she went to the basement and located them herself without difficulty.

However, "to conceal" does not mean to hide something from the view of the entire world. Rather, it simply means "to hide the property or to do something else which prevents or makes more difficult the discovery of the property." ***Id.*** By taking the property to his basement living space, Richter at least made it more difficult to discover the property—the tools could not have been easily discovered by a passerby, or the owner, or, save for Richter's mother's cooperation, the police. The jury could have reasonably concluded that by placing the items in the basement, Richter intended to conceal them.

Also disputed was whether Richter knew the tools were stolen. However, McClellan testified that Richter was pressuring her to pay back the money she owed. She told him she did not have money but she might be able to find something she could use to get him money. She subsequently sent him pictures of the tools, asking if he could get rid of them for her. McClellan also told the jury that when Richter asked whether the tools were hers, she admitted that they were not. McClellan also said that Richter subsequently told her he would sell the tools and keep the money. The investigating detective testified that Richter's mother reported that Richter told her he only planned to store the tools for a "short time" and that he had asked if she might know anyone who wanted to buy the tools.[2] Though circumstantial, the jury could reasonably infer

[2] Richter's mother, when asked about this on the stand, did not recall the statement she gave to police.

from this testimony, and from Richter's placement of the items in the basement, that he knew the property was stolen. There is no arguable merit to a challenge to the sufficiency of the evidence.

Appellate counsel has also addressed whether there is any arguable merit to a claim of ineffective assistance of trial counsel. There are two elements that underlie every such claim: the person claiming ineffective assistance must show that counsel's performance was deficient and that the deficient performance was prejudicial. *See* ***State v. Mayo***, 2007 WI 78, ¶60, 301 Wis. 2d 642, 734 N.W.2d 115.

Appellate counsel suggests that it might have been deficient performance for trial counsel to fail to make certain timely objections. *See* ***State v. Nielsen***, 2001 WI App 192, ¶11, 247 Wis. 2d 466, 634 N.W.2d 325. Appellate counsel believes that trial counsel could have objected on hearsay grounds to testimony given by the investigating detective, who testified that Ranta told him the power tools were stolen. Appellate counsel also suggests that trial counsel should have objected to one of the State's questions presented to Richter's mother, as the question called for speculation. After the State established that Richter's mother owned, and Richter had used, tools similar to the stolen ones, the State asked, "So there was no need for the defendant to have or own these [tools] of his own because the family had them already, is that right?" Richter's mother answered, "I guess so."

We agree with appellate counsel's assessment that, even if trial counsel was deficient for failing to object to this testimony, there is no prejudice from the lack of objection. To show prejudice, the defendant must show a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. *See* ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305. The detective's testimony, even if objectionable

hearsay, was cumulative, given that Ranta herself testified the tools had been stolen and that McClellan testified and admitted the theft. The State's question to Richter's mother is more of an argument than a call for speculation but, in any event, it is clear that this question, in light of the other evidence presented, had no import to the verdict, which would have been the same even if trial counsel had successfully objected to the question. Thus, there is no arguable merit to a claim of ineffective assistance of trial counsel for failure to object to certain testimony.

The final issue counsel raises is whether the trial 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 trial court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

Here, the trial court noted that Richter, relatively young at twenty-three years of age, had enough of a prior record to justify a prison sentence if the trial court so chose. It expressed frustration that Richter could not be a productive member of society and lacked any sort of "excuse" that might explain the motivations for his habitual criminality. However, Richter expressed a desire to take responsibility for his actions and begin reforming himself. Consequently, the trial court, noting that Richter had much more serious charges pending against

him, was willing to take a chance by withholding sentence and imposing a probation term. The trial court explained that Richter was at a crossroads in his life and, by withholding sentence and imposing probation, the trial court could review the matter at a later date if Richter turned out to be insincere about his intent to reform.

The maximum possible sentence Richter could have received was two years' imprisonment. Withholding sentence and imposing one year of probation is within the range of penalties 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). There would be no arguable merit to a challenge to the sentencing court's discretion.

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 George S. Pappas, Jr., is relieved of further representation of Richter in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals