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

2014AP1516-CRNM State of Wisconsin v. Irell D. Green (L.C. # 2012CF14)

Before Kloppenburg, P.J., Sherman, and Blanchard, JJ.

A jury found Irell Green guilty of attempted armed robbery, party to a crime; being a felon in possession of a firearm; and resisting or obstructing an officer, all as a repeater. *See* WIS. STAT. §§ 943.32(2); 941.29(2)(a); 946.41(1); 939.05; and 939.62(1)(a), (b) and (c) (2013-14).[1] Green's appellate counsel, Anthony Jurek, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U. S. 738 (1967). Green filed a response and

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

counsel filed a supplemental no-merit report. *See* RULE 809.32(1)(e) and (f). Upon reviewing the entire record and counsel's report, we conclude there are no arguably meritorious issues.

Sufficiency of the Evidence

This court may not reverse a conviction on the basis of insufficient evidence "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We will uphold the verdict if any possibility exists that the jury could have drawn the inference of guilt from the evidence. *See* ***id.*** at 507. It is the jury's province to fairly resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts. *See* ***id.*** at 506. If more than one inference can be drawn from the evidence, the inference which supports the jury's finding must be followed unless the testimony was incredible as a matter of law. *See* ***State v. Witkowski***, 143 Wis. 2d 216, 223, 420 N.W.2d 420 (Ct. App. 1988).

A finding of guilt may rest upon evidence that is entirely circumstantial and such evidence is often much stronger and more satisfactory than direct evidence. *See* ***Poellinger***, 153 Wis. 2d at 501-02. The standard of review is the same regardless of the extent of circumstantial evidence. *See* ***id.*** at 507-08. In reviewing the sufficiency of circumstantial evidence, we need not concern ourselves with evidence that might support other theories of the crime. *See* ***id.*** We need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence to sustain the verdict rendered. *See* ***id.*** at 508. It is the function of the jury to decide issues of credibility, to weigh the evidence, and resolve conflicts in the evidence. *See* ***id.*** at 506.

The following evidence was presented to the jury through the testimony of the victim, W.T., a state crime laboratory employee, and several City of Madison police officers. On December 29, 2011, at approximately 6:40 p.m., W.T. drove to the U.W. Credit Union on Madison's east side to use an ATM machine located on the far right drive-up banking lane. It was dark out but the area around the machine was lighted. As he approached the ATM, W.T. saw two persons walking toward his minivan. They walked up to the front right corner of the vehicle, got within two feet so they could see inside, and then walked past the van and out of the view of the passenger-side side-view mirror. W.T. was alone in his car. W.T. then rolled his window down to use the ATM. As he reached out of the window to put his card into the ATM, W.T. saw, in his driver's side side-view mirror, that the two men had walked to the rear of van on the driver's side. W.T. testified that "it all happened within seconds" that, as he was putting his hand out, he saw one of the men "open his coat with his left hand and pull a gun up and out and point it right straight at me." W.T. testified that the man was wearing a dark-colored waist length coat and was standing near the van's gas cap when he pulled the gun. In his side-view mirror, W.T. saw the barrel of a handgun pointed towards him. W.T. pulled his hand back into the car, put it into gear, and "took off." Looking back in his rear-view mirror, W.T. could see the second man "laughing" at the man who had pulled the gun. W.T. drove a short distance and then called 911.

The 911 call was played for the jury. In that call, W.T. told the 911 operator he

> had pulled up to a ATM machine to get some money, and a couple black guys were walking through the parking lot … while one pulled a gun out, they were running towards my car, so I just threw it into drive and took off out of there.
>
> ….

> … I'm pretty sure the guy that pulled the gun out, he was wearing kind of a long brown coat, but I didn't like check these guys out, but I saw the long brown coat, and I saw the gun in my side view mirror, so I just high-tailed it out of there.

W.T. estimated the men to be in their late twenties or early thirties.

W.T. admitted that he was unable to identify anyone when a detective presented him with a photo array. However, W.T. testified that he identified Green at "the first pretrial" as the man who pulled the gun on him. Green was wearing glasses in court, whereas no one in the photo array had been wearing glasses. W.T. also identified Green at trial. On cross-examination, Green's attorney questioned W.T. extensively about the identification, focusing on his lack of familiarity with African-Americans. W.T. testified that "black people to me generally look the same."

Officer Jane Zahalka testified that, just before 6:40 p.m., she was driving northbound on Stoughton Road when she saw a person walking on the grass shoulder abutting the Highway 30 on-ramp. Zahalka testified that it was a "very strange area" for a pedestrian to be walking. Zahalka described the individual as a black male, aged 20 to 40, medium build, wearing neutral colored clothing, and a waist-length jacket. Zahalka was stopped at a red light when she saw the man. When she proceeded under the Highway 30 bridge, Zahalka saw a second black male, about the same age, with a heavier build and wearing a dark top, dark pants, and a white tee-shirt, walking under the bridge on the right side of the roadway. Both persons were walking away from the UW Credit Union. Shortly thereafter, an "alert tone" was issued over police airways, indicating that a "weapons violation" had taken place at the UW Credit Union. Zahalka was one block from the credit union, and she immediately went there to search the area. After she saw nothing at that site, she radioed in a description of the two pedestrians she had just seen

walking away from the area. Other officers could immediately hear Zahalka's report. She then drove to a nearby parking lot to look for suspects. At 6:48 p.m., another officer radioed that he had stopped a suspect walking southbound on Stoughton Road at the Milwaukee Street exit. Zahalka went to that location and identified the stopped person as the second pedestrian she had seen shortly before the alert tone had been issued. That person was later identified as Taron Randle.

Officer Matthew Magolan responded to the alert tone and met with the officer who had stopped the suspect at Stoughton Road. He and Officer Justin Garcia then drove south and west in search of the second suspect. When Magolan turned onto West Corporate Drive, he saw a black male, medium build, wearing a "brown coat extending slightly past the belt line." Magolan shined his squad's spotlight on the person. The person turned and looked over his shoulder briefly at Magolan and kept walking, with his hand in his pockets. Magolan stopped the squad, stepped out, and yelled, "Stop, police." Magolan radioed that he had a second suspect in sight. The suspect took four to six more steps and then started running away. Magolan and Garcia chased the suspect, yelling at him to stop and take his hands out of his pockets. Magolan testified that the suspect's hands were in his pockets "[d]uring the initial portion of the chase … because [Magolan] was yelling at him to show us his hands." The suspect continued to run towards a large warehouse parking lot, with a grassy area on one side of the lot. The suspect ran across a wooded area that abutted a grassy, mown area before reaching the parking lot, where several semitrailers were parked at loading docks. Eventually, the officers caught the suspect and apprehended him. Magolan identified the suspect as Green. Green was wearing glasses when apprehended. After a frisk revealed that Green was unarmed, Magolan and Garcia retraced the chase route in search of a gun. Within ten minutes, Garcia found a gun, in tall grass in the

wooded area, about two to three feet from the path of the chase. When Zahalka arrived at the scene, she identified the suspect as wearing the same clothing and having the same general build as the first pedestrian she had seen walking along Stoughton Road.

A DNA analyst from the State Crime Laboratory testified that she obtained DNA samples from Green, Randle, and D.G., the person from whom the recovered gun had been stolen. She tested those samples against "touch DNA" obtained from the gun and the box that D.G. had kept it in. Using the sample obtained from the gun's trigger, the analyst was able to exclude Randle and D.G., but not Green. However, she was not able to conclusively link Green to the trigger's DNA. Using the sample from the gun's handle, the analyst could not determine the source of the DNA. The analyst also testified that having a gun inside a pocket where it rubs against clothing or throwing the gun into brush or grass could potentially rub off skin cells that had been deposited on the gun.

In his no-merit response,[2] Green argues that the conviction for attempted armed robbery was based on "speculations and assumptions." Green contends that there was insufficient evidence that he intended to rob W.T. Green notes that nothing was said to W.T. and he did not try to grab any property from W.T. Green suggests that he might have intended to ask W.T. for a cigarette, directions, or a ride and the gun was merely slipping down his saggy pants.

A person is guilty of attempted armed robbery when a person "with intent to commit armed robbery, does acts toward the commission of [armed robbery] which demonstrate

[2] Green also contends that the filing of a no-merit report by appointed counsel is merely a motion to withdraw, not a direct appeal, and therefore he is being denied his constitutional right to an appeal. (continued)

unequivocally, under all of the circumstances, that he … had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor." WIS JI—CRIMINAL 582. Walking up to a person about to use an ATM machine and pointing a gun at the person is not innocent behavior. Words are not necessary to convey the likely meaning behind that conduct. Green's flight when confronted by a police officer was further indication of guilt. *See* ***Berry v. State***, 90 Wis. 2d 316, 331, 280 N.W.2d 204 (1979). A reviewing court must view the evidence in the light most favorable to the inference chosen by the jury. *See* ***Witkowski***, 143 Wis. 2d at 223. The jury was not required to accept Green's alternative explanations for what W.T. observed in his mirrors. An appellate challenge to the sufficiency of the evidence would lack arguable merit.

Sentencing

This court next considers whether an appellate challenge to the sentence would have arguable merit. On appeal, this court's review of sentencing is limited to determining if discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When discretion is exercised on the basis of clearly irrelevant or improper factors, there is an erroneous exercise of discretion." ***Id.*** When the exercise of discretion has been demonstrated, we follow "a consistent and strong policy against interference with the discretion of the trial court in passing sentence." ***Id.***, ¶18 (quoting ***McCleary v. State***, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971)). "[S]entencing decisions of the circuit court are generally afforded a strong presumption of reasonability because the circuit court is best suited to consider

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Green is wrong. The no-merit procedure of WIS. STAT. RULE 809.32 has been upheld as constitutional. *See* ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 486 U.S. 429 (1988).

the relevant factors and demeanor of the convicted defendant." ***Id.*** (quoting ***State v. Borrell***, 167 Wis. 2d 749, 781, 482 N.W.2d 883 (1992), *overruled on other grounds by* ***State v. Greve***, 2004 WI 69, 272 Wis. 2d 444, 681 N.W.2d 479).

"Circuit courts are required to specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Id.***, ¶40. Also, under truth-in-sentencing, the legislature has mandated that the court shall consider the protection of the public, the gravity of the offense, the rehabilitative needs of the defendant, and other aggravating or mitigating factors. ***Id.***, ¶40 & n.10.

In this case, the court considered the facts of the underlying crimes and the impact on W.T. The court expressed its concern that Green has not accepted responsibility for the crimes, a hindrance to rehabilitation. The court considered Green's difficult adolescence, and credited Green for getting an education and for not abusing drugs. The court stated that Green was not a good risk for placement in the community and that probation would unduly depreciate the seriousness of the offenses. Green needed to be confined for a sufficiently long period of time so that he might be deterred from further criminal activity. The court considered appropriate and relevant factors in sentencing Green. An appellate challenge to the sentence would lack arguable merit.

DNA Surcharge

The court ordered Green to provide a DNA sample and "pay the court costs relating to these crimes." The judgment of conviction states that the DNA "surcharge imposed" but no monetary amount appears in the "DNA Analysis Surcharge" field. The no-merit report does not

discuss the imposition of the DNA surcharge. We assume without deciding that Green is obligated to pay the DNA surcharge.

Green committed these crimes on December 29, 2011, and, therefore, the imposition of a DNA surcharge was discretionary. *See* WIS. STAT. § 973.046(1g) (2011-12) (repealed by 2013 Wis. Act 20, §§ 2353-2355 & 9426, effective Jan. 1, 2014). When the trial court has discretion under § 973.046(1g), to impose the DNA surcharge when a sample is ordered, "in exercising discretion, the trial court must do something more than stating it is imposing the DNA surcharge simply because it can." ***State v. Cherry***, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 752 N.W.2d 393. Although the trial court erroneously exercises discretion when it fails to delineate the factors that influenced its determination, "[r]egardless of the extent of the trial court's reasoning, we will uphold a discretionary decision if there are facts in the record which would support the trial court's decision had it fully exercised its discretion." ***State v. Payano***, 2009 WI 86, ¶41, 320 Wis. 2d 348, 768 N.W.2d 832 (quoting ***State v. Shillcutt***, 116 Wis. 2d 227, 238, 341 N.W.2d 716 (Ct. App. 1983), *aff'd.*, 119 Wis. 2d 788, 350 N.W.2d 686 (1984)). This court has rejected the notion that the trial court must explicitly describe its reasons for imposing a DNA surcharge or otherwise use "magic words." ***State v. Ziller***, 2011 WI App 164, ¶¶12, 13, 338 Wis. 2d 151, 807 N.W.2d 241. The court's entire sentencing rationale may be examined to determine if imposition of the DNA surcharge is a proper exercise of discretion. *See* ***id.***, ¶¶11-13. For arguable merit to exist to a claim that the trial court erroneously exercised its discretion in imposing the surcharge, Green would have to show that imposition of the surcharge is unreasonable. ***Id.***, ¶12. One of the relevant factors identified by this court in ***Cherry*** is "whether the case involved any evidence that needed DNA analysis so as to have caused DNA cost." ***Cherry***, 312 Wis. 2d 203, ¶10. In this case, DNA evidence was used as part of the State's case to

link Green to the weapon found by officers after the foot pursuit. This is not a case where the surcharge was imposed simply because it was possible; here at least one of the reasons recognized in ***Cherry*** for imposing the surcharge was satisfied. *See* ***State v. Long***, 2011 WI App 146, ¶9, 337 Wis. 2d 648, 807 N.W.2d 12. It is not necessary for the trial court to repeat an obvious reason for imposing the surcharge. ***Ziller***, 338 Wis. 2d 151, ¶13. There would be no arguable merit to a claim that it was unreasonable to impose the DNA surcharge at sentencing.

Upon our independent review of the record, we have found no arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Therefore,

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

IT IS FURTHER ORDERED that Anthony Jurek is relieved of any further representation of Green in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals