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**DISTRICT IV**

June 21, 2017

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

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2016AP911-CRNM State of Wisconsin v. James Alfred Knowler, Sr.
(L.C. # 2013CF40A)

Before Lundsten, Higginbotham and Sherman, JJ.

James Knowler appeals a judgment convicting him of one count of misdemeanor theft and one count of felony theft as a party to a crime, following a jury trial, and an order amending the amount of restitution imposed. *See* WIS. STAT. § 943.20(1)(a) (2011-12). Attorney Clayton Griessmeyer has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS.

STAT. RULE 809.32 (2015-16);[1] ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). Knowler was sent a copy of the report, but has not filed a response. Upon reviewing the entire record, as well as the no-merit report, we conclude that there are no arguably meritorious appellate issues.

Knowler was charged with two counts of burglary, one count of misdemeanor theft, and one count of felony theft, all as a party to a crime. The charges arose from the removal of several collectible pedal tractors from the garage of the tractors' owner, Gerald Gebhard, without Gebhard's consent. Some of the tractors were then sold to another collector, Edmund Lewis Henderson, in Boone, Iowa. Another individual, David Walker, was charged for the same crimes, also as a party to a crime. Walker was tried separately and acquitted of all four charges.

Knowler was tried by jury and found guilty of the theft charges, but not guilty of the burglary charges. The circuit court withheld sentence and ordered Knowler to serve three years of probation on the felony count and two years of probation on the misdemeanor count, to run concurrently, with ninety days of jail time as a condition of probation. The circuit court also ordered Knowler to pay restitution in the amount of $8,650.

Attorney Griessmeyer filed a no-merit notice of appeal. In an order issued on December 16, 2015, this court rejected Griessmeyer's no-merit report on the basis that there was arguable merit to a claim that the restitution amount had been miscalculated. We dismissed the

[1] All further references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

appeal and extended the time to file a notice of appeal or postconviction motion. Griessmeyer filed a postconviction motion on behalf of Knowler, requesting that the circuit court amend the restitution order. On March 1, 2016, the circuit court entered an order amending the restitution amount to $6,650.

Griessmeyer then filed a second no-merit notice of appeal. The no-merit report filed in the current appeal addresses only two issues, both related to the effectiveness of Knowler's trial counsel. The first issue is whether counsel provided ineffective assistance by failing to object to the circuit court's decision to exclude evidence of Walker's acquittal. The second issue is whether counsel provided ineffective assistance by failing to move to strike a juror who may have seen Walker, who was a witness at Knowler's trial, in shackles. To establish ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

We turn first to the issue of Walker's acquittal. The circuit court ruled that it would allow the parties to question Walker about his previous testimony, prior inconsistent statements, and prior consistent statements to the extent they were offered to show recent fabrication by Walker. The court also ruled that it would permit defense counsel to elicit testimony from Walker about the fact that he had been on trial. However, the court ruled that testimony about the outcome of Walker's trial was not relevant and would not be admitted. Knowler's trial counsel did not object.

We will uphold a circuit court's evidentiary ruling if the court "examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a

conclusion that a reasonable judge could reach." ***State v. Hunt***, 2003 WI 81, ¶34, 263 Wis. 2d 1, 666 N.W.2d 771. That is what occurred here. The court considered the proper factors under WIS. STAT. § 904.03 and reasoned that, although the fact of acquittal was not particularly prejudicial, it had the "potential to confuse the jury and get them off topic." Because the record demonstrates that the circuit court properly exercised its discretion when it ruled to exclude evidence of Walker's acquittal, we agree with counsel's conclusion in the no-merit report that there would be no arguable merit to a claim that Knowler's trial counsel was ineffective for failing to object to that ruling. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987) (failing to raise an argument that does not have merit does not constitute ineffective assistance of counsel).

We turn next to the issue of whether Knowler's trial counsel was ineffective for failing to move to strike a juror or to otherwise object after learning that a juror may have seen Walker in restraints outside the courtroom. On the morning of trial, outside the presence of the selected jury but prior to the jury being sworn in, the court deputy informed the court and the parties that a juror may have seen Walker in the hallway in restraints. The deputy stated that the juror was outside the courtroom on a phone call at the time that Walker was being transported to a holding cell. The deputy reported that Walker was dressed in street clothes, but was handcuffed. The deputy further stated that the juror did not give any indication that he had seen Walker. The court asked the prosecutor to comment on the issue, and the prosecutor agreed with the court that Walker could come into the courtroom "through the regular door like a regular witness" without shackles. The court asked defense counsel if there were any issues he saw, based on what the deputy reported, and defense counsel answered in the negative. The jury was then brought in and sworn in.

We dispose of this issue on the prejudice prong of the ineffective assistance test. *See* ***Strickland***, 466 U.S. at 687, 697. Even if we assume that the juror did actually see Walker in handcuffs, Knowler could speculate, at most, that the sighting may have caused the juror to question Walker's credibility. However, Walker's testimony included admissions that he had been convicted of a crime sixteen times and that he went to jail. Thus, the juror did not need to see Walker in handcuffs to know that he had a criminal history and had been in jail, and to draw any related credibility inferences.

In addition, any doubt as to Walker's credibility likely played to Knowler's favor, since Walker was a witness of the State and not the defense. Walker, who lived in an apartment above Knowler, testified that he was a long-time collector of toy tractors and that Knowler had taken an interest in the tractors and looked at Walker's *Toy Farmer* magazines. According to Walker, Knowler found Henderson, "the guy out of Boone County," when looking through a *Toy Farmer* magazine and called him. Walker drove Knowler on two occasions in October 2012 to sell tractors to Henderson. Walker denied having any participation in stealing the tractors and testified that he did not know where they came from, other than that Knowler had told him they came from a family member. Walker also testified that Knowler didn't have any identification, so Walker cashed the checks from Henderson and then gave the money to Knowler. Given that Walker was an adverse witness whose testimony was not favorable to Knowler, we fail to see how Knowler could make any arguably meritorious argument that he was prejudiced by his trial counsel's failure to move to strike the juror who may have seen Walker in restraints.

We turn next to the sufficiency of the evidence to support the jury's verdicts. Although the no-merit report does not address it, we conclude that any challenge to the sufficiency of the evidence would lack arguable merit. In order to convict Knowler of theft, the State needed to

prove that Knowler intentionally took and carried away movable property of another, that the owner of the property did not consent to taking and carrying away the property, that Knowler knew the owner did not consent, and that Knowler intended to deprive the owner permanently of possession of the property. *See* WIS JI—CRIMINAL 1441. As to the count of felony theft, the State needed to prove that the value of the property was more than $2,500. *See* WIS. STAT. § 943.20(1)(a) and (3) (2011-12).

The testimony presented at trial was sufficient to satisfy these elements. The State elicited testimony from Gebhard that, on two occasions in September 2012, a total of eighteen pedal tractors were stolen from his shed. On the first occasion, three tractors were taken, and Gebhard testified that one of the tractors was worth almost $2,500. On the second occasion, fifteen tractors were stolen, and Gebhard estimated that they had a combined value of between $20,000 and $25,000. Gebhard testified that he did not give Knowler permission to take the tractors. Of the eighteen tractors that were stolen, Gebhard eventually got nine of them back.

The State also elicited testimony from Henderson that he bought pedal tractors on two different occasions in October 2012. Henderson testified that, on the first occasion, Walker and another individual came to his home in Boone, Iowa. Henderson paid $400 for four tractors. He testified that the second transaction took place "out in the country" because Walker called and said they had run out of gas. Henderson met the men, brought them some gas, and purchased five tractors for $550. Henderson testified that, on both occasions, he wrote out checks to David Walker. Henderson further testified that he no longer had the nine tractors because he gave them back to the owner. He testified that he turned over to the police the phone numbers from which he had received calls about the tractors.

The State also elicited testimony from Boscobel assistant police chief Kevin Copus, who testified that he met with Gebhard to investigate the thefts of Gebhard's tractors. Based on information he wrote in his report about the thefts, Copus testified that Knowler's cell phone number in 2012 was 608-379-1531. Copus sent out information to tractor shows in an effort to locate the stolen tractors. Copus ended up having contact with Dan Ruter, of the sheriff's department of Boone County, Iowa, who had met with Henderson. Ruter was also a witness at Knowler's trial, and testified that when Henderson showed Ruter his cell phone to show him the numbers from which he received communications about the tractor sales, one of the numbers was 608-379-1531. The State also elicited testimony from David Turpen, a deputy sheriff in Iowa, that he was out on patrol in October 2012 when he was called to the scene of a vehicle that had run out of gas. Turpen testified that the vehicle was stopped about fifteen miles from Boone, Iowa, that two men were in the vehicle, and that the vehicle had Wisconsin license plates.

Knowler did not testify at trial. The court conducted a colloquy with Knowler on the record regarding his waiver of the right to testify. There is nothing in the record that would give rise to an arguably meritorious claim that Knowler's waiver was not knowing, voluntary, and intelligent.

Our standard of review to determine whether the evidence was sufficient to support the conviction is that "'an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so [insufficient] in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" ***State v. Hayes***, 2004 WI 80, ¶56, 273 Wis. 2d 1, 681 N.W.2d 203 (quoted source omitted). In light of all of the above, we are satisfied that that is not the case here.

We also have considered whether there is arguable merit to a claim that the sentence was the result of an erroneous exercise of discretion. Our review of a sentence determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. *See* ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984).

Here, the circuit court withheld sentence and ordered Knowler to serve three years of probation on the felony count and two years of probation on the misdemeanor count, to run concurrently, with ninety days of conditional jail time. The sentences imposed were within the applicable penalty ranges. *See* WIS. STAT. §§ 943.20(3)(bf) (classifying theft of property valued at more than $2,500 but not to exceed $5,000 as a Class I felony); 943.20(3)(a) (classifying theft of property of value not exceeding $2,500 as a Class A misdemeanor); 973.09(2)(a)1m. (original term of probation for Class A misdemeanors shall be not less than 6 months nor more than one year); 973.09(2)(b)1. (original term of probation for felonies is not less than one year nor more than the greater of either three years or the maximum term of confinement in prison, which here is one year and six months under WIS. STAT. § 973.01(2)(b)9.); 973.09(2)(b)2. (if the probationer is convicted of two or more crimes, including at least one felony, at the same time, the maximum original term of probation may be increased by one year for each felony conviction) (all 2011-12, Stats.).

In imposing the sentence, the court considered the seriousness of the offense, including the value of the property taken and the effect on the victim in terms of feeling safe in his own home. The court also considered Knowler's character, criminal history, and the need to deter further crimes. Under these circumstances, it cannot reasonably be argued that Knowler's sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185,

233 N.W.2d 457 (1975). In addition, we have reviewed the circuit court's amended restitution order and we are satisfied that there would be no arguable merit to further appellate review of the restitution issue.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Knowler further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction and order amending the amount of restitution imposed are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Clayton Griessmeyer is relieved of any further representation of James Knowler in this matter pursuant to WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

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*Diane M. Fremgen*
*Clerk of Court of Appeals*