COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1960-CR **Cir. Ct. No. 2008CF5265**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL GREGORY SCOTT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Michael Gregory Scott appeals from a judgment of conviction, entered upon a jury's verdict, on one count of robbery with the threat of force. Scott argues there was insufficient evidence to show he acted forcibly, one of the four elements of his offense. We disagree and affirm the judgment.

BACKGROUND

¶2 On October 15, 2008, a tall, thin black male entered an Anchor Bank branch and approached the teller. He told her he wanted to close his account and handed her a slip of paper that read, "Put all the money in the bag, no ink bags, just the money in your drawer, this is a robbery." The teller surrendered more than $3000, including five twenty-dollar bills whose serial numbers were pre-recorded. Police responded, and Scott was found hiding in a garbage can about seven blocks away. He had over $3000 cash on him, including the recorded currency, which he claimed to have found in a bag on a playground. The teller was unable to identify Scott in a lineup.

¶3 Following a jury trial, Scott was convicted. The circuit court sentenced him to six years' initial confinement and five years' extended supervision. Scott's first attorney filed a no-merit report, which we rejected by order dated October 17, 2013, after concluding that an appellate challenge to the sufficiency of the evidence supporting the conviction would not lack arguable merit. *See* ***McCoy v. Court of Appeals***, 486 U.S. 429, 437 (1988). Successor counsel then converted the no-merit appeal to the instant merits appeal.

DISCUSSION

¶4 When we review the sufficiency of the evidence to support a jury's verdict, the test is not whether this court is convinced of the defendant's guilt beyond a reasonable doubt, but whether a jury, acting reasonably, could be so convinced by evidence that it had a right to believe and accept as true. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990). The credibility of the witnesses and the weight of the evidence is for the jury to decide. ***Id.*** at 504.

¶5 We view the evidence in the light most favorable to the verdict and, if more than one reasonable inference can be drawn from the evidence, we must accept the inference drawn by the jury. *See* ***id.*** The jury's verdict will be reversed "'only if, viewing the evidence most favorably to the [S]tate and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt.'" ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation and italics omitted).

¶6 Convictions may be supported solely by circumstantial evidence. ***Poellinger***, 153 Wis. 2d at 501. In some cases, circumstantial evidence may be stronger and more satisfactory than direct evidence. ***Id.*** at 501-02. The standard of review is the same whether the conviction relies upon direct or circumstantial evidence. ***Id.*** at 503. "Once the jury accepts the theory of guilt, an appellate court need only decide whether the evidence supporting that theory is sufficient to sustain the verdict." ***State v. Mertes***, 2008 WI App 179, ¶11, 315 Wis. 2d 756, 762 N.W.2d 813.

¶7 Robbery is committed by one who, with intent to steal, takes property from the person or presence of the owner by using force against the owner or, as was alleged here, by threatening the imminent use of force with the intent to compel the owner to submit to the taking or carrying away of the property. *See* WIS. STAT. § 943.32(1) (2011-12). The State must prove four elements: the victim was the owner of property; the defendant took and carried away property from the victim or her presence; the defendant took the property with the intent to steal; and the defendant acted forcibly. *See* WIS JI—CRIMINAL 1479. "Forcibly means that the defendant … threatened the imminent use of force against [the owner] with the intent to compel [her] to submit to the taking or

carrying away of the property. 'Imminent' means 'near at hand' or 'on the point of happening.'" ***Id.***

¶8 The only sufficiency-of-the-evidence issue in this appeal relates to the fourth element: whether Scott acted forcibly.[1] At the preliminary hearing, the bank teller had testified, among other things, that the robber was holding the note in one hand while his other hand was in his pocket. One implication of such testimony is that Scott used his hand to feign having a gun, which could be viewed as a threat of force. The teller did not, however, repeat that testimony at trial. At the trial, the teller told the jury that the robber was wearing vinyl gloves, sunglasses, and a hat, and she also testified about the contents of the letter the robber handed her. Scott contends that none of this testimony is sufficient to establish that he acted forcibly. We disagree.

¶9 "The threat of force element does not require express threats of bodily harm." ***State v. Johnson***, 231 Wis. 2d 58, 69, 604 N.W.2d 902 (Ct. App. 1999). "It is met 'if the taking of the property [is] attended with such circumstances of terror, or such threatening by menace, word, or gesture as in common experience is likely to create an apprehension of danger and induce a [person] to part with property for [his or her] safety.'" ***Id.*** (brackets in ***Johnson***; citation omitted).

[1] At trial, Scott had essentially attempted to dispute the second and third elements by claiming he was not the robber. The State argues that, in light of the identification defense, Scott should be judicially estopped from arguing sufficiency of the evidence relative to a different element. We conclude, however, that we need not address this alternate argument by the State. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (Generally, an appellate court should decide cases on the narrowest possible grounds.).

¶10 Here, it is true that there was no evidence adduced at trial of any explicit verbal threats or overtly threatening actions by Scott. Nevertheless, we are satisfied that Scott's words and gestures, as testified to by the teller, were meant to create an impression that he was threatening to use force, if necessary, to obtain money from the teller.

¶11 Scott approached the teller with a pretense of closing an account. He had taken steps—by donning the gloves, sunglasses, and hat—to conceal his identity. His note instructed the teller not to include any dye packs with the money—an instruction from which, we think, the threat of a forceful and immediate consequence for disobedience can reasonably be inferred. Finally, the note itself informed the teller that the event was a robbery, a word that really only serves one purpose in that context: to frighten the victim into submission and compliance. Accordingly, there was sufficient evidence presented from which a jury could draw the appropriate inferences necessary to convict Scott for robbery with the threat of force.

By the Court.—Judgment affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).