COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1614-CR **Cir. Ct. No. 2010CF636**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY I. LONDON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: GREGORY B. HUBER, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Larry London appeals a judgment convicting him of burglary and attempted armed robbery with use of force, both as a repeat offender. He also appeals an order denying his motion to vacate the portion of the sentences that are based on the repeater enhancer. He contends the sentences

should be commuted under WIS. STAT. § 973.13 (2011-12)[1] because the charging documents did not identify the specific offense that was the basis for the repeater enhancer, and the State failed to prove that London committed a felony within the previous five years excluding the time he spent in confinement. We conclude the invited error doctrine precludes London from seeking relief under § 973.13.

¶2 The information charged London with burglary, attempted armed robbery and false imprisonment with use of a dangerous weapon, all as a repeat offender. Pursuant to a plea agreement, London entered no-contest pleas to the first two counts, and the State dismissed count three. The parties jointly recommended one year initial confinement and five years' extended supervision on count one, and fourteen years' initial confinement and seven years' extended supervision on count two, consecutive to count one. The court imposed the jointly recommended sentence.

¶3 In his postconviction motion, London asked the court to vacate the repeater portion of his sentence, alleging the charging documents failed to provide adequate notice and the State failed to establish London's prior felony conviction within five years excluding the time he was incarcerated. *See* WIS. STAT. § 973.12(1). The State responded that London received notice of the specific allegation in discovery and his attorney at the sentencing hearing identified a prior federal conviction and sentence that would qualify London as a repeat offender. The circuit court denied the postconviction motion.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶4 Under WIS. STAT. § 973.13, a sentence that exceeds the maximum penalty authorized by law is commuted to the maximum sentence. The sentences imposed do not exceed the maximum sentences allowed for the crimes to which London entered no-contest pleas. London does not dispute that he is a repeat offender. Rather, he seeks to have the sentence for the armed robbery charge commuted to the maximum sentence he could have received without the repeater enhancer. We conclude that London's attempt to invoke § 973.13 is barred by the invited error doctrine.

¶5 The doctrine of invited or strategic error was summarized in ***State v. Gary M. B.***, 2004 WI 33, ¶11, 270 Wis. 2d 62, 676 N.W.2d 475: "A defendant cannot create his own error by deliberate choice of strategy and then ask to receive the benefit from that error on appeal." The sentence London seeks to reduce is the exact sentence he urged the court to impose. Having received the benefit of the plea agreement, including dismissal of count three and the State's recommendation for only one year initial confinement on count one, London now seeks to reduce the agreed-upon sentence without repudiating the parts of the plea agreement that were favorable to him. This court will not review the merits of a strategic or invited error that was induced by London's own argument in the circuit court.

¶6 London concedes the invited error doctrine would apply if his challenge were to the sentence. But he contends his specific arguments, lack of notice and lack of proof, are independent of the sentencing argument and should be addressed despite his request for the sentence the court imposed. However, London did not request plea withdrawal. Rather, he invoked WIS. STAT. § 973.13, a sentence commutation statute. Because the remedy he seeks affects the sentence

and not the validity of his convictions, London's arguments are not independent of the sentences imposed at his invitation.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.