COURT OF APPEALS
DECISION
DATED AND FILED

November 5, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0398-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD R. WOODEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Deininger, JJ.

PER CURIAM. Donald R. Wooden appeals from a judgment of conviction for which he was sentenced to a total of 106 years in prison for three counts of second-degree sexual assault as a repeat offender and one count of burglary as a repeat offender. He also appeals from an order denying him

postconviction relief. He claims the State failed to prove the repeater allegations against him. Based upon the judgment of conviction before the trial court, we disagree and affirm.

BACKGROUND

On October 28, 1998, a Tennessee court convicted Wooden of a felony and subsequently sentenced him to ten years in the Tennessee Department of Corrections. On September 9, 1996, Wooden committed the offenses that form the basis for the present convictions. Based upon the prior conviction, the State alleged that Wooden was a repeat offender under § 939.62, STATS. The State presented the trial court with a certified copy of the Tennessee conviction, certified copies of records relating to orders denying Wooden's petitions for a writ of habeas corpus, and an uncontested PSI report which indicated that Wooden had spent all but eight months of the last ten years in the State Penitentiary or the Dane County Jail. Although the information alleged that Wooden had been released from a Tennessee prison on December 22, 1995, the State failed to introduce any direct evidence as to his date of release. Nonetheless, the circuit court concluded that the documents supplied by the State sufficiently established Wooden's status as a repeat offender.

STANDARD OF REVIEW

Generally, when reviewing a fact-finder's determination that the State has proved a necessary element beyond a reasonable doubt, we limit our consideration to whether "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 [been satisfied] beyond a reasonable doubt." ***State v. Owen***, 202 Wis.2d 620, 630,

551 N.W.2d 50, 55 (Ct. App. 1996) (quoting ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990)). Wooden, however, cites authority for the proposition that whether a given set of facts is sufficient to prove a defendant's status as a repeat offender is a question of law, which we review *de novo.* ***State v. Squires***, 211 Wis.2d 873, 880, 565 N.W.2d 309, 311 (Ct. App. 1997). It is unnecessary for us to resolve this apparent conflict, because we would reach the same result under either standard of review.

ANALYSIS

A criminal offender may be subject to enhanced penalties when he has been convicted of a felony within five years preceding the commission of the offense for which the sentence is being imposed. Section 939.62, STATS. The five-year period shall be tolled during "time which the actor spent in actual confinement serving a criminal sentence." Section 939.62(2). Unless the accused admits his repeater status, the State must prove it beyond a reasonable doubt. ***State v. Zimmerman***, 185 Wis.2d 549, 558, 518 N.W.2d 303, 306 (Ct. App. 1994). Reasonable doubt is that for which a reason can be given and which would cause a person of ordinary prudence to pause or hesitate when called upon to act in the most important affairs of life. WIS. J I—CRIMINAL 140, *cited with approval in* ***State v. Avila***, 192 Wis.2d 870, 889-90, 532 N.W.2d 423, 429-30 (1995). Circumstantial evidence may be used to establish by inference the facts necessary to carry the State's burden. WIS. J I—CRIMINAL 170, *cited with approval in* ***State v. Cooper***, 127 Wis.2d 429, 434-35, 380 N.W.2d 383, 386 (Ct. App. 1985) (Dykman, J., dissenting).

We agree with Wooden that the PSI's reference to the eight years that he resided in prison and jail is insufficient, by itself, to establish the amount of

time for which he had spent "serving a criminal sentence," because it does not separate the time spent in prison from that spent in jail. We also acknowledge that a mere statement of a conviction and release dates in a charging document are insufficient to show continuous incarceration between those dates, because it does not take into account the possibility of intervening periods of probation or parole. ***Zimmerman***, 185 Wis.2d at 558, 518 N.W.2d at 305. However, those were not the only two pieces of evidence in the record relevant to establishing the length of Wooden's incarceration on his felony conviction.

The certified copy of Wooden's judgment of conviction from Tennessee shows that he was sentenced to serve ten years in the Tennessee Department of Corrections, without any term of probation, commencing February 24, 1989. The judgment also states that Wooden would not be eligible for release status until he had served at least thirty percent of his sentence. Taking into account the jail credit reflected in the judgment, the judgment is sufficient to establish that Wooden was in a Tennessee prison at least until October 25, 1992. *See* § 973.12(1), STATS. (an official government report is *prima facie* evidence that the period of time shown by the report was actually served). In other words, the certified copy of the judgment was alone sufficient to prove beyond a reasonable doubt that the time from which to count Wooden's repeater status was tolled at the very least until three years and 319 days before the commission of the present offense.

It may also be inferred from the certified copies of the docket entries and appellate court decision presented to the court that Wooden was in a Tennessee prison from June 8, 1992, when he filed a document which was construed as a petition for habeas corpus, until August 13, 1993, when the trial court's denial of his petition was affirmed on appeal. In conjunction with the

PSI's statement that Wooden had come to Wisconsin after being released from prison and had then worked for his brother for eight months, the State more than satisfied its burden that Wooden's prior offense had been committed within the past five years, excluding the time served for that offense.

By the Court.—Judgment and order affirmed.

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