COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-1945-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MAJOR C. LATIMER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Major C. Latimer appeals from a judgment convicting him of burglary and possession of burglarious tools as an habitual offender, and from an order denying him postconviction relief. He challenges the trial court's refusal to allow him to represent himself at trial, the sufficiency of the evidence to convict him, and the length of his sentences. We conclude that the

trial court properly determined Latimer lacked sufficient competency to assert his right to self-representation, that there was circumstantial evidence presented at trial from which the jury could properly find Latimer guilty beyond a reasonable doubt, and that the sentences were not unduly harsh in light of Latimer's prior criminal record. Accordingly, we affirm.

BACKGROUND

¶2 The two complaining witnesses returned home one evening to find the front door of their apartment unlocked. Upon entering, they heard the bedroom window being closed. They immediately determined that items were missing and called the police, who advised them to wait outside the building for officers to arrive. While waiting, the complaining witnesses observed a person dressed in black and carrying a black canvas bag come out from between their building and an adjacent building in the apartment complex.

¶3 When the police arrived, they searched the area and spotted an individual dressed in black carrying a black canvas bag. They gave chase and observed the suspect discarding items before they apprehended him. The suspect turned out to be Latimer and the discarded items were a flashlight, three screw drivers, a pair of gloves and a black stocking cap. A black coat and canvas bag were found under the porch where Latimer was apprehended. The complaining witnesses identified Latimer as the person they had seen walk past them earlier in the evening. The police later discovered the stolen items in the basement of a neighboring building in the apartment complex, near a storage locker containing Latimer's belongings. Another witness said he had seen Latimer in that basement on the night of the burglary. In addition, the police were able to match a shoeprint

under the window of the burglarized apartment with the shoes Latimer was wearing when apprehended.

¶4 After a substitution of counsel, Latimer asked to be allowed to represent himself. The trial court denied the motion after a hearing, ruling that Latimer was not competent to handle his own defense. A jury found Latimer guilty of possessing burglarious tools, but was unable to reach a verdict on the burglary count. After Latimer's renewed request to proceed *pro se* was denied and substitute counsel was again appointed, a second jury found Latimer guilty on the burglary charge. The trial court sentenced Latimer to ten years for the burglary and two years for the possession of burglarious tools. The sentences were to be served consecutive to each other and to a prior sentence which Latimer was already serving. The trial court denied Latimer's postconviction motions and he appeals.

STANDARDS OF REVIEW

¶5 Our standard of review of the trial court's refusal to allow the defendant to represent himself is mixed. We will independently determine whether the facts of record establish that a waiver of counsel was knowingly and voluntarily made. *See* ***State v. Klessig***, 211 Wis. 2d 194, 204, 564 N.W.2d 716 (1997). However, because the trial court is in the best position to observe the defendant, we will uphold its competency determination unless it is totally unsupported by the facts of record. *See* ***Pickens v. State***, 96 Wis. 2d 549, 568-70, 292 N.W.2d 601 (1980), *overruled on other grounds by* ***Klessig***, 211 Wis. 2d 194.

¶6 We review the evidence, as viewed most favorably to the State and the conviction, to determine whether it "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. Ray***, 166 Wis. 2d 855, 861, 481 N.W.2d 288 (Ct. App. 1992) (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990)). If more than one reasonable inference can be drawn from the evidence, we must accept the inference which supports the conviction. *See* ***State v. Hamilton***, 120 Wis. 2d 532, 541, 356 N.W.2d 169 (1984).

¶7 Finally, we review sentencing determinations under the erroneous exercise of discretion standard. A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. *See* ***Burkes v. Hales***, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991). Because the trial court is in the best position to consider the relevant sentencing factors and the demeanor of the defendant, we are reluctant to interfere with its sentencing discretion and we presume that it acted reasonably. *See* ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984).

ANALYSIS

Self-representation

¶8 A criminal defendant has a constitutional right to represent himself which must be balanced against his constitutional right to counsel. *See* U.S. CONST. amend. VI; WIS. CONST. art. I, § 7; ***Klessig***, 211 Wis. 2d at 203. Therefore, before allowing a criminal defendant to proceed *pro se*, the trial court must first determine that the defendant has knowingly, intelligently, and voluntarily waived his right to the assistance of counsel, and that he is competent to represent himself. *See* ***id.***

¶9 Latimer asserted his desire to represent himself four times during the proceedings below. The State does not challenge his assertion on appeal that his requests were knowingly, intelligently and voluntarily made, and we are satisfied that the record supports that aspect of his attempted waiver of counsel. The issue for us to resolve is whether the trial court properly determined that Latimer was incompetent to represent himself.

¶10 Latimer first claims that, under ***Godinez v. Moran***, 509 U.S. 389 (1993), any defendant who is competent to stand trial is also competent to represent himself. However, the Wisconsin Supreme Court specifically rejected that contention in ***Klessig***. ***Klessig***, 211 Wis. 2d at 208-12. We are, of course, bound by the precedent of the Wisconsin Supreme Court. *See* ***State v. Clark***, 179 Wis. 2d 484, 493, 507 N.W.2d 172 (Ct. App. 1993). Therefore, the trial court assessed Latimer's competency under the proper legal standard.

¶11 Assuming the trial court applied the proper standard, Latimer still challenges the trial court's evaluation of the relevant factors. ***Pickens*** and ***Klessig*** direct the trial court to consider "the defendant's education, literacy, fluency in English, and any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury." *See* ***Klessig***, 211 Wis. 2d at 212 (quoting ***Pickens***, 96 Wis. 2d at 569). Here, the trial court acknowledged that Latimer had average intelligence and some post-secondary education, but noted that he could not describe the elements of the crime and was not familiar with the rules of evidence. Most significant to the trial court was a psychiatrist's report on file which stated Latimer had a tendency to be defensive, guarded, and paranoid, and his judgment could be weakened by obsession with issues he was paranoid about. Defense counsel reinforced the psychiatrist's report by informing the court that Latimer's inability to make decisions about his case

had caused several delays and postponements in the case. The trial court determined that Latimer would likely be unable to make decisions about his case within the proper time frames, and this inability would paralyze him at trial. In short, the trial court's decision was properly based upon its evaluation of the effect which Latimer's psychological tendencies would have upon his ability to effectively represent himself at trial, and, despite the existence of some contravening factors, was not "totally unsupported" by the record.

Sufficiency of the evidence

¶12 Burglary is committed by one who intentionally enters any building or dwelling without the consent of the owner with intent to steal. *See* WIS. STAT. § 943.10(1)(a) (1997-98).[1] Possession of burglarious tools occurs when a person has in his or her possession "any device or instrumentality intended, designed or adapted for use in breaking into any depository designed for the safekeeping of any valuables or into any building or room, with the intent to use such device or instrumentality to break into a depository, building or room to steal." WIS. STAT. § 943.12.

¶13 Latimer claims the evidence at trial was insufficient to convict him because he testified that he did not commit the burglary and offered an explanation as to how the stolen items were recovered from near his storage area. He says there was no direct evidence as to his intent or his possession of the discarded items, and that the witnesses' identification of him was unduly suggestive. However, the jury was entitled to determine that Latimer's testimony was

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

incredible, and to discount it entirely. The circumstantial evidence that Latimer was in the area at the time of the burglary in black clothing with a black bag and shoes that matched a print left outside the burglarized apartment, that the stolen items were recovered from an area near his storage locker, and that he discarded items which could have been used in the burglary while running from police was more than sufficient for the jury to conclude, beyond a reasonable doubt, that all of the elements of each crime had been satisfied.

Sentences

¶14 The trial court sentenced Latimer to ten years in prison for burglary and two years in prison for possession of burglarious tools. Each sentence was to be served consecutive to the other and to previously imposed prison sentences which Latimer was already serving on other offenses. Latimer claims that his burglary sentence was unduly harsh because it exceeded the former guidelines for burglary, and did not take into account the fact that he had already had his probation on other charges revoked as a result of the burglary. He also challenges the trial court's determination that he was unlikely to be rehabilitated. However, having reviewed the transcripts, we are satisfied that the trial court properly considered all of the relevant factors before imposing the sentences, and that the sentences were not so excessive as to shock the conscience. *See* ***Harris***, 119 Wis. 2d at 623; ***State v. Owen***, 202 Wis. 2d 620, 645, 551 N.W.2d 50 (Ct. App. 1996).

¶15 The trial court observed that Latimer had come from a good family, but had embarked on a life of crime rather than taking advantage of the opportunities available to him. It noted that he had nineteen prior convictions, and that his pattern of breaking the law had continued over a period of eighteen years.

Although the burglary was nonviolent, the trial court considered the offense fairly serious due to the trauma of having one's home invaded. It found that Latimer's past history indicated he was unlikely to change or to overcome his mental health, alcohol and drug problems, and that he represented a continuing danger to the public. Taking the repeater allegations into account, the trial court sentenced Latimer to only half of the time which he faced. We see no misuse of sentencing discretion.

By the Court.—Judgment and order affirmed.

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