COURT OF APPEALS
DECISION
DATED AND FILED

October 16, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2011AP2381-CR
2011AP2382-CR

Cir. Ct. Nos. 2010CF1509
2010CF1936

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW A. UITZ,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: JEAN A. DIMOTTO, Judge. *Affirmed.*

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

¶1 PER CURIAM. Andrew A. Uitz appeals judgments convicting him of one count of burglary and one count of felony bail jumping. He also appeals an order denying his motion for sentence modification. He argues that: (1) the circuit court misused its discretion because it considered a fact that was an element

of the crime of burglary as an aggravating factor in sentencing; (2) the circuit court relied on inaccurate information at sentencing because it incorrectly believed that Tony Menzer was a victim in this burglary, when he was actually an alleged victim from a non-charged offense; (3) the circuit court relied on inaccurate information at sentencing because it incorrectly believed that the victim of this burglary, Erik Stenglein, was entitled to restitution of $6000 for musical equipment, when in fact Stenglein's property was returned; (4) the circuit court relied on inaccurate information at sentencing because it treated the alleged, uncharged burglary against Menzer as if it were a read-in; and (5) the circuit court erroneously exercised its sentencing discretion because it did not believe that Uitz was in the process of returning stolen property when he was apprehended despite corroboration in the police report. We affirm.

¶2 Uitz pled guilty to one count of burglary and one count of bail-jumping for violating the conditions of his bond. The circuit court dismissed one count of retail theft and read it in for purposes of sentencing. Stenglein, the victim of the burglary, read a statement at sentencing about the effect Uitz's crimes had on him. After Stenglein addressed the court, Menzer also made a statement, alleging that Uitz had taken $5000 of musical equipment from him, although the crime had not been charged. In imposing sentence, the circuit court incorrectly believed that the Menzer burglary was the crime for which Uitz was being sentenced and awarded Menzer $6000 in restitution, but quickly realized its mistake. The circuit court then awarded $6000 in restitution to the actual victim, Stenglein, even though his musical equipment had been returned to him, and stated—again incorrectly—that the Menzer case was a read-in.

¶3 Uitz filed a postconviction motion for sentence modification or resentencing arguing that the circuit court erred in awarding $6000 in restitution to Stenglein because the items stolen from him had been returned. The State conceded that the circuit court erred in awarding Stenglein $6000 in restitution. The circuit court vacated the restitution order, but denied the motion to modify the resentence or for sentencing in all other respects.

¶4 Uitz first argues that the circuit court erred when it said that the fact that he was clever enough to remove a piece of drywall to gain entrance to the building he was burglarizing was an aggravating factor because it showed "intentionality." Uitz argues that all burglaries by definition involve the element of "intent," so intent to commit the burglary should not be considered an aggravating factor at sentencing. *See* WIS JI—CRIMINAL 1421. We disagree. A circuit court may consider the facts and elements of a crime in imposing sentence. The circuit court did not conclude that having "intent," by itself was an aggravating circumstance; it concluded that the forethought that went into removing a piece of drywall to commit this burglary was an aggravating circumstance because it showed that Uitz had planned this crime. The circuit court's comment was not a misuse of discretion.

¶5 Uitz next argues that the circuit court erred in imposing sentence because it incorrectly believed that Menzer was a victim of the burglary in this case. As corollary arguments, Uitz contends that the circuit court erred because it incorrectly believed that Stenglein lost $6000, when, in fact, Stenglein's property was returned and it treated the alleged, uncharged burglary against Menzer as if it were read in. Uitz contends that the circuit court's "belief that the victim suffered a $6,000 loss undoubtedly added to the court's view of the gravity of this

particular burglary, especially since the actual victim … suffered no losses." He contends that the sentencing as a whole was tainted by these mistakes.

¶6 "'A defendant has a due process right to be sentenced based on accurate information.'" ***State v. Payette***, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423 (citation omitted). "The defendant requesting resentencing must prove, by clear and convincing evidence, both that the information is inaccurate and that the trial court relied upon it." ***Id.*** (citation omitted). "'Once a defendant does so, the burden shifts to the State to show that the error was harmless.'" ***Id.*** "'An error is harmless if there is no reasonable probability that it contributed to the outcome.'" ***Id.*** (citation omitted).

¶7 We conclude that the circuit court relied on inaccurate information in imposing sentence because it incorrectly awarded Stenglein $6000 in restitution, even though Stenglein's property was returned to him, and incorrectly believed that Menzer was a victim at first and, later, incorrectly believed that the alleged Menzer burglary was read in. The circuit court relied on the inaccurate information because it imposed restitution based on its incorrect view of the facts. However, we conclude that the errors were harmless.

¶8 The circuit court sentenced Uitz to three years and two months of imprisonment for burglary, with two years and six months of initial confinement and eight months of extended supervision. The circuit court also sentenced Uitz to two years and six months of imprisonment for felony bail jumping, with two years of initial confinement and six months of extended supervision, to be served consecutively. On the day he was sentenced, Uitz had numerous retail theft, bail-jumping, and other charges pending or being investigated in multiple counties, all stemming from criminal activity he engaged in to support his drug habit. Even

though he was only twenty-one years old, Uitz had received drug treatment in the past by court order but kept returning to drug use and criminal activity to continue to buy drugs. His actions harmed dozens of people, some of whom lost their livelihood because their musical instruments were taken from them and they could not perform. Uitz had been released on bond eight months before sentencing, with an admonishment to stop his criminal activities, but he had continued his crime spree unchecked for most of that period. In light of these circumstances, especially the large number of as yet uncharged or pending cases against Uitz, we believe that there is no reasonable probability that the circuit court's mistakes about the status of the Menzer case caused it to impose a longer sentence than it would have had it known the Menzer case was uncharged. We therefore conclude that the error was harmless.

¶9 Finally, Uitz argues that the circuit court improperly refused to consider mitigating information because it did not believe that Uitz was in the process of returning Stenglein's stolen music equipment when he was apprehended. He contends that the circuit court should have believed that he was in the process of returning the equipment because this fact was corroborated by a police report; the police report stated that Stenglein told police that Uitz texted him to admit that he had taken the property and was on his way to return it just before Uitz was stopped by the police and arrested. The circuit court was entitled to draw its own conclusions about Uitz's veracity from his actions and demeanor. Just because Uitz texted Stenglein and said he was going to return the property does not mean that was necessarily true. We conclude that the circuit court did not misuse its discretion when it stated that it did not know whether to believe Uitz's assertion that he was in the process of returning the stolen property when he was arrested.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).