NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

FRANKIE EUGENE BYBEE, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D17-4515

Opinion filed May 6, 2020.

Appeal from the Circuit Court for Sarasota County; Donald H. Mason, Associate Judge.

Howard L. Dimmig, II, Public Defender, and Karen M. Kinney, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Blain A. Goff, Assistant Attorney General, Tampa, for Appellee.

ROTHSTEIN-YOUAKIM, Judge.

Frankie Eugene Bybee appeals from the judgment and sentence rendered after a jury found him guilty of felony kidnapping; exploitation of the elderly or disabled; fraudulent use of personal identification of another person; and offenses against users

of computers, computer systems, computer networks, and electronic devices. After a careful examination of the multiple issues that Bybee raises, we affirm without discussion the judgment on all counts except one. For the reasons set forth below, we reverse Bybee's kidnapping conviction and remand for resentencing pursuant to a corrected scoresheet.

A limited recitation of the facts pertinent to the instant analysis follows. The charges against Bybee arose out of his relationship with then-seventy-nine-year-old M.S. and covered a period of about three months. On October 16, 2016, Bybee and another Sarasota County Sheriff's deputy were dispatched to M.S.'s house in response to a call from M.S.'s doctor that M.S. was threatening to commit suicide. After M.S. continued to threaten suicide, the deputies determined that she should be taken into custody and transported to the local hospital for further evaluation under the "Baker Act."[1] When they arrived at the hospital, Bybee prayed with M.S., and they exchanged personal cell phone numbers.

Before M.S.'s release from the hospital on October 25, 2016, she and Bybee began communicating regularly, primarily via text message. This communication continued after her release and often concerned M.S.'s requests for Bybee to come to her house to do chores, painting, and some minor repairs. Over the next two months, their interactions became more frequent even as M.S.'s mental and physical health

[1]See § 394.463(2)(a)(2), Florida Statutes (2016) (providing that a law enforcement officer shall take a person who appears to meet the criteria for involuntary examination under the Act into custody and to deliver that person to the nearest appropriate facility for examination).

continued to decline; she was admitted to the hospital more than once and spent time in rehabilitation facilities.

By December 2016, however, the relationship between Bybee and M.S. had soured. On two occasions, M.S. called the Sheriff's Office to complain about Bybee and his involvement in her life. On December 21, 2016, Bybee's supervisor directed him to have no further contact with M.S. After interviewing M.S. on December 27, 2016, the Internal Affairs section of the Sarasota County Sheriff's Office initiated an investigation of Bybee to determine whether he was engaging in an inappropriate relationship with someone with whom he had been involved in his official capacity.

In the meantime, without M.S.'s authorization, Bybee had, among other things, repeatedly accessed M.S.'s AOL account and emails, accessed her financial information, accessed and used her PayPal account, and withdrawn money using her ATM card.

On December 29, 2016, M.S.'s doctor, who was out of town on vacation, received an email ostensibly sent from M.S. the night before with a subject line reading "Killing Myself Tonight." The doctor called his office and asked an associate to see about having M.S. "Baker Acted" again. His staff, in turn, called the Sheriff's Office, and two deputies—neither of which was Bybee—were dispatched to M.S.'s house. When they arrived, they found M.S. apparently confused, combative, and screaming profanities.

Based on their observations, the two deputies agreed that M.S. should be transported to the hospital for further examination under the Baker Act. At the hospital,

M.S. was involuntarily committed after an independent examination and subsequently transferred to a regional mental health facility.

Although sent from M.S.'s AOL account, the email to M.S.'s doctor was later discovered to have originated from Bybee's internet protocol (IP) address. This email and the events that it set in motion formed the basis for the kidnapping and exploitation charges. As to the kidnapping charge, Count 2 of the information alleged that Bybee "did forcibly, secretly, or by threat confine, abduct or imprison [M.S.] against HER will and without lawful authority, with intent to commit or facilitate the commission of a felony, to-wit: EXPLOITATION OF AN ELDERLY PERSON contrary to [section 787.01(1)(a)(2), Florida Statutes (2016)]."

On appeal, Bybee challenges the sufficiency of the evidence on Count 2. But although he moved for a judgment of acquittal at the conclusion of the State's case-in-chief and again at the close of all evidence, his motions were perfunctory and raised none of the specific arguments that he now raises.[2] Consequently, his sufficiency challenge is unpreserved, F.B. v. State, 852 So. 2d 226, 230 n.2 (Fla. 2003) ("[A] motion or objection must be specific to preserve a claim of insufficiency of the evidence for appellate review. A boilerplate objection or motion is inadequate." (citing Brooks v. State, 762 So. 2d 879, 894-95 (Fla. 2000))), and our review is only for fundamental error, Tate v. State, 136 So. 3d 624, 626 (Fla. 2d DCA 2013).[3]

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[2]The record indicates that defense counsel believed that such a motion would be meritless; therefore, he was not going to "insult anybody" or "waste any time" by making it anything more than pro forma.

[3]Bybee urges us to hold that he preserved his challenge by raising it in his post-trial motion for arrest of judgment, but a motion for arrest of judgment is not a substitute for a motion for a judgment of acquittal based on the sufficiency of the

To establish fundamental error with regard to the sufficiency of the evidence in a non-capital case, a defendant must show that the evidence was insufficient to establish "that [he] committed *any* crime." Monroe v. State, 191 So. 3d 395, 401 (Fla. 2016) (citing Fla. R. App. P. 9.140(i)); see also H.R. v. State, 45 Fla. L. Weekly D306, D308 (Fla. 3d DCA Feb. 12, 2020) (recognizing historic uncertainty over the meaning of "any crime" and concluding that "read together," Monroe and other supreme court cases "stand for the proposition that the fundamental error exception does not permit appellate review of unpreserved error in the State's evidentiary failure to prove the crime/delinquent act unless the evidence failed to establish the commission of **any** crime/delinquent act whatsoever"). Bybee, who commandeered M.S.'s AOL account and identity to send a fraudulent email to her doctor announcing her supposed intent to commit suicide, has failed to establish that he did not commit *any* crime.

For the reasons set forth below, however, we agree with Bybee's alternative assertion that counsel's failure to preserve his sufficiency challenge constituted ineffective assistance on the face of the record and that he suffered prejudice as a result. See Monroe, 191 So. 3d at 403 (recognizing that "[t]he failure to properly preserve an otherwise clear error *may* constitute ineffective assistance of counsel cognizable on direct appeal" and adopting the suggestion by "several district courts of this State . . . that the failure to move for judgment of acquittal when there are serious concerns pertaining to the sufficiency of the evidence presented by the

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evidence. Clifton v. State, 79 So. 707, 709 (Fla. 1918) ("A motion in arrest of judgment does not raise the question of the sufficiency of the evidence, nor does it reach a question of variance between the allegation and proof."); see also Fla. R. Crim. P. 3.610.

prosecution may constitute ineffective assistance reviewable on direct appeal" (citations omitted)); White v. State, 45 Fla. L. Weekly D63, D64 (Fla. 2d DCA Jan 3, 2020) (reversing defendant's convictions on direct appeal because it was "apparent from the record that the failure of White's counsel to move for a judgment of acquittal on the criminal mischief and burglary charges constituted ineffective assistance"); Twigg v. State, 254 So. 3d 464, 469 (Fla. 4th DCA 2018) (reversing defendant's conviction on direct appeal because "the State did not prove, and from our review of the record could not prove . . . an essential element of the offense," and "[t]hus, it is plain from the face of the record that counsel's failure to seek a [judgment of acquittal] . . . was prejudicial to Appellant and constituted ineffective assistance of counsel" (citing Bagnara v. State, 189 So. 3d 167, 172 (Fla. 4th DCA 2016))).

Section 787.01(1)(a)(2) defines kidnapping as "forcibly, secretly, or by threat confining, abducting, or imprisoning another person against her or his will and without lawful authority, with intent to . . . [c]ommit or facilitate commission of any felony." "[T]he first step in determining if particular conduct constitutes a kidnapping is to determine 'whether the facts show conduct that can reasonably be described as "confining, abducting or imprisoning." ' " Conner v. State, 19 So. 3d 1117, 1123 (Fla. 2d DCA 2009) (quoting Berry v. State, 652 So. 2d 836, 838 (Fla. 4th DCA 1994), approved, 668 So. 2d 967 (Fla. 1996)).

We have no trouble concluding that the evidence that M.S. had been involuntarily committed to a mental health facility pursuant to the Baker Act was sufficient to establish that she had been confined against her will. See § 787.01(1)(a)(2). But the evidence failed to establish that it was Bybee who confined

her. Unquestionably, by sending the fraudulent email to M.S.'s doctor, Bybee set in motion the chain of events that led to her being Baker Acted again, and the evidence supported a finding that his *intent* in sending the email was that she be Baker Acted again. Nonetheless, M.S.'s confinement resulted not from his sending of the email but from two intervening and independent causes: first, the deputies who were dispatched to M.S.'s house pursuant to the phone call from her doctor's office made an independent determination, based on their personal observations of her behavior, that she should be transported to the hospital for further examination; second, the medical staff at the hospital examined M.S. and made their own independent determination that she should be involuntarily committed. The record is devoid of evidence of any common plan or scheme among Bybee, the responding deputies, and the medical staff at the hospital to secretly confine M.S. against her will. Cf. § 777.011, Fla. Stat. (2019) ("Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he or she is or is not actually or constructively present at the commission of such offense.").

Moreover, and more significantly, in light of those two intervening and independent causes of M.S.'s involuntary commitment, the evidence wholly failed to establish that M.S. had been confined "without lawful authority." See § 787.01(1)(a) (providing that kidnapping requires "forcibly, secretly, or by threat confining, abducting, or imprisoning another person against her or his will *and without lawful authority*"

(emphasis added)). Both the responding deputies and the hospital staff were statutorily authorized to make the determinations that they made. See § 394.463, Fla. Stat. (2016). In transporting and committing M.S. to the hospital, they committed no crime, so there is no criminal liability that can be imputed to Bybee. In other words, because M.S. was never kidnapped, Bybee cannot be guilty of having kidnapped her.

Under these circumstances, "it would be a waste of judicial resources to wait until [Bybee] seeks postconviction relief for ineffective assistance of counsel when the unreasonableness of the actions of trial counsel and the prejudice to [Bybee] are indisputable from the face of the record before us." See Monroe, 191 So. 3d at 404; Twigg, 254 So. 3d at 470 ("Under these circumstances, '[i]t would be a waste of judicial resources to postpone addressing this issue until [Appellant] seeks post-conviction relief for ineffective assistance of counsel below.' " (quoting Lesovsky v. State, 198 So. 3d 988, 992 (Fla. 4th DCA 2016))). Accordingly, we reverse the conviction on Count 2 and remand for resentencing pursuant to a corrected scoresheet.[4]

Bybee asks that we remand for resentencing before a different judge, arguing for the first time that the trial judge improperly considered acquitted conduct in imposing sentence. Because Bybee failed to object on this ground at the sentencing hearing, we consider this argument only for fundamental error.[5] See Hannum v. State,

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[4]Although the jury was also instructed on the lesser included offense of false imprisonment, that statute likewise requires that the victim be confined "without lawful authority." See § 787.02(1)(a).

[5]Because the asserted error goes to the sentencing process rather than the sentencing order, it would not be cognizable under Florida Rule of Criminal Procedure 3.800(b)(2). See Jackson v. State, 983 So. 2d 562, 572-73 (Fla. 2008) (explaining that rule 3.800(b)(2) "was never intended to allow a defendant (or defense

13 So. 3d 132, 135 (Fla. 2d DCA 2009) (stating that an argument that the trial court improperly considered certain factors in imposing sentence is cognizable for the first time on direct appeal if it is fundamental).

Having reviewed the sentencing transcript and observing that although facing a sentencing range of 8.79 years' imprisonment to life, Bybee was sentenced to less than sixteen years' imprisonment—well below the maximum—we hold that he has failed to carry his burden of establishing fundamental error. See Strong v. State, 254 So. 3d 428, 436-37 (Fla. 4th DCA 2018) (Levine, J., dissenting) (rejecting the majority's assessment that "the state did not meet its burden of showing that the trial court did not rely on impermissible factors in sentencing" because fundamental error analysis shifts the burden to the defendant to show that the trial court *did* rely on them). We do not, therefore, direct resentencing by a different judge. We note, however, that this court has recently stated for the first time that "[a] court cannot 'rely on conduct of which the defendant has actually been acquitted when imposing a sentence.' " Love v. State, 285 So. 3d 344, 346 (Fla. 2d DCA 2019) (quoting Ortiz v. State, 264 So. 3d 1032, 1034 (Fla. 4th DCA 2019)).

As stated above, we reverse the conviction on Count 2 and remand for resentencing pursuant to a corrected scoresheet. In all other respects, the judgment is affirmed.

Affirmed in part; reversed in part; remanded for further proceedings.

CASANUEVA and SMITH, JJ., Concur.

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counsel) to sit silent in the face of a procedural error in the sentencing process and then, if unhappy with the result, file a motion under rule 3.800(b)").