COURT OF APPEALS
DECISION
DATED AND RELEASED

January 4, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 94-1131-CR
94-1132-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LARRY D. BENOIT,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed*.

Before Eich, C.J., Dykman and Vergeront, JJ.

EICH, C.J. Larry D. Benoit, appearing pro se, appeals from a judgment convicting him of attempted second degree sexual assault of a child as a repeater, contrary to §§ 939.32, 948.02(2) and 939.62(1)(b), STATS., and of bailjumping, also as a repeater, contrary to §§ 946.49(1)(b) and 939.62(1)(b),

STATS.[1] He asserts dozens of claimed evidentiary, legal and constitutional errors during the course of his trial, and because we conclude that all his claims either are waived or lack merit, we affirm his convictions.

On December 24, 1992, Benoit propositioned a 13-year-old boy, Steve C., for oral sex in the presence of Steve C.'s friend, Tim B. Benoit was dating Tim B.'s mother, Donna B., at the time. When Donna B. learned of the incident, she reported it to Benoit's probation officer.[2] Benoit was jailed on a probation hold in January 1993 but released from the hold in March 1993. Later that month, Benoit was arrested and charged with several crimes in connection with the December 24, 1992, incident. Benoit's probation was later revoked.

While out on bail on the sexual assault charge, Benoit was discovered violating a condition of his bond, that he have no contact with Tim B. He was charged with bailjumping and pled guilty to the charge. He went to trial on the attempted sexual assault charge and the jury found him guilty.

As indicated, Benoit attempts to raise numerous issues in his brief. Among other things, he challenges the voluntariness of his plea to the bailjumping charge, claims that the trial court made numerous errors in the admission of evidence, challenges the sufficiency of the evidence to support his conviction for attempted sexual assault, claims he was subjected to double jeopardy, and challenges his sentences. We reject all of his arguments and affirm the judgment.

I. The Bailjumping Plea

Benoit argues that his plea to the bailjumping charge was involuntary. He claims that he was taking medication at the time that affected

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[1] Benoit's two convictions were each the subject of separate trial court proceedings below, but the cases have been consolidated for this appeal.

[2] At the time of the incident, Benoit was serving parole on a sentence for oral sexual assault of a child in another state and was also on probation after a conviction for criminal damage to property in Wisconsin.

his ability to comprehend the consequences of his plea and, additionally, that he was "under duress by his attorney" to accept the state's offer of a plea agreement.

The proper procedure for challenging a claimed defect in a plea proceeding is to move the trial court for withdrawal of the plea. ***State v. Riekkoff***, 112 Wis.2d 119, 130, 332 N.W.2d 744, 750 (1983). Benoit did not file such a motion until after he had appealed his conviction, and the trial court properly denied the motion for lack of jurisdiction. His challenge to the plea is not properly before us.[3]

II. The Attempted Sexual Assault Charge

Claims of Evidentiary Error

The bulk of Benoit's assignments of error on his appeal consist of claims of improperly admitted evidence. The admission or rejection of evidence is within the trial court's discretion, ***State v. Plymesser***, 172 Wis.2d 583, 591, 493 N.W.2d 367, 371 (1992), and "[w]e will not reverse a discretionary determination by the trial court if the record shows that discretion was ... exercised and we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). Indeed, "`[b]ecause the exercise of discretion is so essential to the trial court's functioning, we generally look for reasons to sustain discretionary decisions.'" ***Burkes v. Hales***, 165 Wis.2d 585, 590-91, 478 N.W.2d 37, 39 (Ct. App. 1991) (quoted source omitted).

[3] Benoit also claims that the condition of his bond--that he have no contact with minors and in particular no contact with Tim B. or Steve C.--was void on grounds of vagueness and impossibility. Because he attempts to raise the issue for the first time on appeal, we do not review it. In ***State v. Dean***, 105 Wis.2d 390, 402, 314 N.W.2d 151, 157-58 (Ct. App. 1981), we said that "absent a showing of compelling circumstances, an appellate court will not review a claim that was not raised before the trial court." Benoit has made no such showing.

We will consider, *seriatim*, as many of Benoit's challenges as we can ascertain have been properly preserved for appeal in his brief.[4]

While in jail on the probation hold for the attempted sexual assault, Benoit wrote a letter to a newspaper criticizing the lack of state funding for sex offender counseling programs, concluding the letter with the statement: "I speak from experience." When the State sought admission of the letter at trial, Benoit objected on the basis of relevancy and privilege.[5]

Evidence is relevant if it makes the existence of a fact more or less probable than it would be without the evidence. Section 904.01, STATS. We agree with the State that the letter, written by Benoit while incarcerated pending

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[4] Several of Benoit's evidentiary challenges are raised for the first time on appeal, and it is well established that the failure to make a timely and specific objection to evidence waives the right to challenge its admission on appeal. ***State v. Hartman***, 145 Wis.2d 1, 9-10, 426 N.W.2d 320, 323 (1988). Although pro se litigants are entitled to some leniency in complying with procedural requirements, "[t]he right to self-representation is not a license `not to comply with relevant rules of procedural and substantive law.'" ***Waushara County v. Graf***, 166 Wis.2d 442, 452, 480 N.W.2d 16, 20 (1992), *cert. denied*, 113 S. Ct. 269 (1992) (quoted source omitted). In addition to the claims specifically discussed in this opinion are the following, each of which we deem waived as being raised for the first time on appeal: (1) that certain testimony of Steve C. was "perjured"; (2) that the trial court improperly allowed mention of a prior conviction which previously had been ruled inadmissible; (3) that privileged information from his presentence investigation report was improperly allowed into evidence; (4) that a handwriting expert called by the state was not qualified as such; and (5) that Tim B.'s testimony concerning Benoit's sexual proposition to Steve C. was improperly admitted.

His challenge to remarks made by the prosecutor in closing argument is also waived by his failure to voice his objection at the time. *See* ***State v. Fawcett***, 145 Wis.2d 244, 256, 426 N.W.2d 91, 96 (Ct. App. 1988).

[5] On appeal, Benoit argues for the first time that the letter was inadmissible because the danger of unfair prejudice outweighed its probative value. *See* § 904.03, STATS. His failure to so object at trial waives the objection. *See* ***Hartman***, 145 Wis.2d at 9-10, 426 N.W.2d at 323; ***State v. Peters***, 166 Wis.2d 168, 174, 479 N.W.2d 198, 200 (Ct. App. 1991) (defendant must apprise trial court of specific grounds for objection to preserve the issue for appeal). *See also* ***State v. Gollon***, 115 Wis.2d 592, 604, 340 N.W.2d 912, 918 (Ct. App. 1983) (appellate court will not find an erroneous exercise of discretion where party fails to ask the court to exercise its discretion).

trial on the charges in this case, is relevant to a determination of whether he may have committed the charged offense.

Nor is the letter privileged. Even if, as Benoit asserts, it might qualify for a medical or therapeutic privilege because it discusses counseling (a point we find extremely tenuous), Benoit waived privilege when he voluntarily discussed the matter in a public forum. *See* § 905.11, STATS. (disclosure by person claiming privilege waives privilege).

Benoit also argues that admission of the letter violated his Fifth Amendment right against compelled self-incrimination and shifted the burden of proof of his guilt away from the State. Neither argument has merit. The Fifth Amendment protects an individual against being *compelled* to incriminate himself or herself, ***Hoffa v. United States***, 385 U.S. 293, 304 (1966), and there is no evidence in the record that Benoit's decision to write the letter was involuntary. Nor has he referred us to any evidence that the jury mistakenly believed that he was forced to carry the burden of establishing his innocence. The existence of incriminating evidence, without more, does not shift the burden of proof to the defendant. *See* ***Struzik v. State***, 90 Wis.2d 357, 366, 279 N.W.2d 922, 926 (1979). The trial court did not erroneously exercise its discretion in allowing the evidence.

Benoit next argues that the trial court erred in admitting evidence of his prior conviction for oral sexual assault of a child. The trial court, over objection, allowed the evidence, concluding that it was admissible as an exception to the general ban against character evidence under § 904.04(2), STATS., in order to show a common scheme or plan and, further, that its probative value outweighed any potential danger of unfair prejudice that might result from its admission.

The admissibility of so-called "other acts" or "other wrongs" evidence is governed by a two-part test. ***State v. Friedrich***, 135 Wis.2d 1, 19, 398 N.W.2d 763, 771 (1987). First, the evidence must be admissible under § 904.04(2), STATS., which prohibits evidence of past acts to show character or propensity, but allows evidence offered for another purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ***Id.*** The purpose of the statute is to prevent the jury

from concluding that "because an actor committed one bad act, he necessarily committed the [charged] crime." ***State v. Fishnick***, 127 Wis.2d 247, 261-62, 378 N.W.2d 272, 280 (1985). Second, if the evidence is admissible under § 904.04, the trial court must exercise its discretion under § 904.03 to determine whether the possibility of unfair prejudice resulting from the admission of such evidence outweighs its probative value. ***Friedrich***, 135 Wis.2d at 19, 398 N.W.2d at 771.

In ***Friedrich***, another child sexual assault case, the supreme court held that the defendant's commission of other acts of sexual contact with minors was admissible to show a common plan where the other acts and the crime charged were "quite similar."[6] ***Id***. at 24, 398 N.W.2d at 773. The same is true in Benoit's case,[7] and we see no error in the admission of the evidence.

Benoit next claims that he was prejudiced by the prosecutor's reference to his "sexual deviancy" in the presence of the jury. There was but a single reference to Benoit as having a "sexual deviancy" problem. Defense counsel immediately objected, and the trial court sustained the objection. The error, if any, was *de minimis* and therefore harmless. ***State v. Dyess***, 124 Wis.2d 525, 540, 370 N.W.2d 222, 230 (1985).

Benoit also complains that the trial court improperly admitted hearsay evidence of statements Steve C. made to his social worker. The record shows that the trial court carefully limited the State to questioning the social worker only as to Steve C.'s alleged indication that he would not testify truthfully at trial, contrary to his statement on the witness stand. Prior inconsistent statements do not constitute hearsay. *See* § 908.01(4)(a), STATS.

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[6] Both Friedrich's earlier charge and the pending charge involved girls of like age, similar sexual conduct on Friedrich's part, a family or quasi-family relationship between Friedrich and the victim, and situations where he took advantage of the girls in a context of implied trust. ***State v. Friedrich***, 135 Wis.2d 1, 24, 398 N.W.2d 763, 773 (1987).

[7] Benoit's prior conviction involved an act of oral sex with a thirteen-year-old boy--whose family he knew and whom he had babysat for--after watching video tapes and playing video games. In this case, Benoit claimed to have befriended a young teenage boy by watching television and playing video games with him and then seeking to have oral sexual contact with him.

Benoit next argues that the trial court erred by failing to rule on his attorney's objection to a question to Donna B. regarding her fear of him. Although the trial court did not say "objection sustained" after Benoit objected to the question, we think it is clear that the trial court did sustain the objection when it directed the prosecutor to ask a different question.

While in jail on the probation hold, Benoit prepared a written statement, at the request of his probation officers, responding to the accusations at issue in this case, as well as allegations of other probation violations. Benoit claims that the trial court violated his fifth amendment protection against compelled self-incrimination by allowing the statement into evidence. Here, too, he did not raise any such objection at trial and we have held that claims--whether of legal error or error of constitutional dimension--are waived if not raised in the trial court. ***State v. Damon***, 140 Wis.2d 297, 300, 409 N.W.2d 444, 446 (Ct. App. 1987).

Sufficiency of the Evidence

The trial court denied Benoit's motion to dismiss the sexual assault charge at the close of the evidence. He challenges that denial, as well as the sufficiency of the evidence to support the jury's verdict.

We employ the same standard of review in either instance: whether, considering the evidence in the light most favorable to the state, the evidence adduced, if believed and rationally considered by a jury, was sufficient to prove the defendant's guilt beyond a reasonable doubt. ***State v. Johnson***, 135 Wis.2d 453, 456, 400 N.W.2d 502, 503 (Ct. App. 1986); ***State v. Dahlk***, 111 Wis.2d 287, 304-05, 330 N.W.2d 611, 620 (Ct. App. 1983). In reviewing a jury verdict, we must accept the inferences drawn by the jury unless the evidence on which the inferences are based is incredible as a matter of law. ***State v. Gomez***, 179 Wis.2d 400, 406, 507 N.W.2d 378, 380 (Ct. App. 1993).

To prove an attempted crime, the State must show beyond a reasonable doubt that the defendant: (1) had an intent to commit the crime charged; and (2) committed sufficient acts to demonstrate unequivocally that it

was improbable that the he or she would desist from the crime of his or her own free will. ***State v. Stewart***, 143 Wis.2d 28, 31, 420 N.W.2d 44, 45 (1988).

The crux of Benoit's argument is that the State proved only that he had verbally propositioned Steven C., and that because his actions consisted of "mere words," unaccompanied by threat of physical action or coercion, the State failed to prove either element of the offense.

Benoit has not referred us to any Wisconsin case in support of his "mere words" argument; and we agree with the State that, as the jury was instructed in this case, in order to discharge its burden of proof, all the prosecution was obligated to prove was that Benoit intended to commit the crime of second-degree sexual assault of a child (in this case, by engaging in oral sexual contact with Steve C., a child under the age of sixteen) and that his conduct unequivocally demonstrated that he intended to and would have done so but for the intervention of some extraneous factor. *See* WIS J I—CRIMINAL 580.

Steve C. and Tim B. each testified that Benoit brought Steve C. into his bedroom where he asked the boy to engage in oral sex with him. Both boys also testified, without objection, that Benoit told them he had engaged in oral sex with other teenage boys in the past, and that he was sure Steve C. would "enjoy" it. Additionally, as we have noted above, the State had properly introduced evidence of Benoit's prior conviction for the same offense on a previous occasion to show a common plan on this occasion. Finally, the evidence of Steve C.'s angry reaction to the proposition, coupled with the boys' immediate departure from the room, is adequate, given our highly deferential standard of review of jury verdicts, to indicate that, but for that reaction and the boys' departure, Benoit would have continued in his efforts to engage Steve C. in the sexual act.

The trial court did not err in denying Benoit's motion to dismiss for insufficient evidence. The evidence, if believed and rationally considered by the jury, was sufficient to prove his guilt beyond a reasonable doubt.

Other Claims of Error

Double Jeopardy. Benoit asserts three double jeopardy violations. First, he contends that his current prison sentence and the sentence he received when his probation was revoked constitute multiple punishments for the same offense. We see no violation. A sentence imposed for revocation of parole or probation does not constitute an additional punishment for a single act. "`The sentence [a probationer] is required to serve upon revocation is the *punishment for the crime of which [the probationer] has previously been convicted*' and [only] involves changing the manner of serving the previously imposed sentence." ***State v. Verstoppen***, 185 Wis.2d 728, 736-37, 519 N.W.2d 653, 656 (Ct. App. 1994) (quoted source omitted) (emphasis in the original). Probation revocation is not a criminal proceeding "designed to punish a defendant for [the] newly charged wrong ...." ***Id***. at 736, 519 N.W.2d at 656. We agree with the State that while Benoit's conduct giving rise to the charges in this case may have provided one of the reasons--or even the sole reason--for terminating his probation on the earlier offense and imposition of the previously withheld sentence, that sentence constitutes punishment for the earlier offense, not the present one.

Benoit sees a double jeopardy violation in the trial court's action of ordering him, as part of the bailjumping sentence, to participate in a sex-offender counseling program when the court must have "know[n] ... that [he] will be ordered to attend ... counseling when released on parole [on the sexual assault charge]." He does not explain the argument further, other than to state that he will thus be subjected to "multiple punishment for two (2) crimes in one (1)."

We see no grounds for relief. The bond violation and the sexual assault offense are factually and legally distinct offenses, and separate punishment for each violation does not implicate the double jeopardy clause, for the clause protects against being subjected to multiple punishments for the same offense, ***State v. Kurzawa***, 180 Wis.2d 502, 515, 509 N.W.2d 712, 717, *cert. denied*, 114 S. Ct. 2712 (1994), not against a similar punishment--even accepting Benoit's assertion that a requirement to attend sexual counseling is part of his "punishment"--for two different offenses. *See* ***State v. Grayson***, 172 Wis.2d 156, 159 n.3, 493 N.W.2d 23, 25 (1992).

Finally, as best we can discern, Benoit argues that the trial court has imposed "multiple punishments" on him by using a single prior felony conviction to enhance both the sentence for bailjumping and the sentence for sexual assault under the repeater statute, § 939.62, STATS. We see no error. The trial court used the repeater statute only to enhance Benoit's sentence for bailjumping; it did not enhance his sentence for the attempted sexual assault conviction. Moreover, the supreme court has concluded that statutory enhancements for repeat offenders do not constitute multiple punishments for the same offense. ***State v. James***, 169 Wis.2d 490, 496-97, 485 N.W.2d 436, 439 (Ct. App. 1992).

Ineffective Assistance of Counsel. Benoit next puts forth a series of unspecified claims which we construe as a challenge to the effectiveness of his counsel. He asserts that his counsel: (1) "should have objected numerous times during trial to hearsay testimony"; (2) "misled [him] ... in regards to what the judge [would] do" regarding the bailjumping charges, if taken to trial rather than plea bargained; and (3) prejudiced his case by referring during voir dire to a prior incident in which Benoit had sexual contact with a juvenile.

Benoit did not raise these issues in the trial court, however, and because claims of ineffective assistance of counsel necessarily involve an evidentiary inquiry by the trial court into counsel's actions, we do not consider such arguments when raised for the first time on appeal. *See* ***State v. Schultz***, 148 Wis.2d 370, 379 n.3, 435 N.W.2d 305, 309 (Ct. App. 1988), *aff'd*, 152 Wis.2d 408, 448 N.W.2d 424 (1989), *cert. denied*, 493 U.S. 1092 (1990).

Sentencing Error. Benoit claims that the trial court sentenced him to more time than the law allows. We have reviewed his sentences and conclude that each falls within the statutory maximums for his convictions.

On the attempted sexual assault conviction, he received a sentence of five years in prison, the maximum allowed for the offense.[8]

[8] Under § 948.02(2), STATS., sexual assault of an individual under the age of sixteen (a class C felony), the maximum possible prison sentence is ten years. However, the attempt

On the bailjumping conviction, the trial court sentenced Benoit to six years in prison, staying the sentence and placing him on probation for ten years. Section 946.49(1)(b), STATS., allows the court to impose up to five years in prison for bailjumping while released on felony charges. Benoit, however, was a repeater, having been convicted of a felony within the preceding five years, and thus subject to having his sentence increased by up to six years under § 939.62(1)(b), STATS. His bailjumping sentence was well within the enhanced eleven-year maximum.

As for the ten-year probationary term, § 973.09(2)(b), STATS., permits a sentencing court to order probation for a period of time up to the statutory maximum term of imprisonment for the crime in question. As explained above, the maximum prison sentence for the bailjumping conviction, enhanced by the repeater provisions of § 939.62, is five plus six, or eleven years.

Due Process. Benoit, claiming lack of notice and surprise, argues that the trial court erred by allowing the State to add a third prior conviction to the two convictions previously recognized as available for impeachment, should he testify at trial. Because Benoit never testified, and the evidence was never used, we need not consider the argument further.

Preparation of the Transcript. Benoit makes a general argument, unsupported by references to the record or to authority, that the court reporter incorrectly transcribed the testimony of witnesses. We agree with the State that the argument is vague, is devoid of details and presents neither citation to the record nor any legal authority for the proposition advanced. For those reasons, we do not consider this issue. *See* ***Lechner v. Scharrer***, 145 Wis.2d 667, 676, 429 N.W.2d 491, 495 (Ct. App. 1988) (appellate court need not consider arguments unsupported by citations to authority or references to the record).

(..continued)
statute limits the sentence for an attempted crime to half the maximum for the completed crime. Section 939.32, STATS.

Although the trial court was empowered to enhance Benoit's sentence beyond the five-year maximum because Benoit is a repeater, it apparently chose not to do so. *See* § 939.62(1)(b), STATS. Enhancing a sentence for repeater status is discretionary on the part of the trial court. ***State v. Harris***, 119 Wis.2d 612, 617-18, 350 N.W.2d 633, 636 (1984).

Fees and Costs. Benoit argues that the court never specifically ordered him to pay fees and costs and thus the State imposed these costs on him without court authorization. The judgments of conviction, dated August 23, 1993, and signed by the sentencing judge, plainly order fees and costs.

Miscellany. Even though we do not address them specifically in this opinion, we have examined Benoit's briefs in detail and expressly reject his other arguments as either unintelligible, unsupported by references to the record or legal authority, or waived.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.