COURT OF APPEALS
DECISION
DATED AND FILED

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David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2006-CR

Cir. Ct. Nos. 2004CM9777
2005CF356
2005CF2538

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEPHEN P. KOTECKI,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Milwaukee County: GLENN H. YAMAHIRO and NEAL NETTESHEIM, Judges. *Affirmed.*

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

¶1 FINE, J. Stephen P. Kotecki appeals judgments entered after a jury found him guilty of two counts of felony bail jumping and one count of violating a

restraining order, *see* WIS. STAT. §§ 946.49(1)(b) and 813.125(7). He also appeals the orders denying his postconviction motions.[1] He argues that the evidence was insufficient to support the guilty verdicts, that the real controversy was not tried, *see* WIS. STAT. § 752.35 (discretionary reversal by the court of appeals), and that his trial lawyer gave him ineffective representation. We affirm.

I.

¶2 Mr. Kotecki was married to Linda Kotecki for twenty-five years. After the divorce, Ms. Kotecki got an injunction prohibiting Mr. Kotecki from harassing her or their children. The injunction prevented Mr. Kotecki from coming onto Ms. Kotecki's property, but did allow him to park at the curb when picking up the minor children.

¶3 Before the charges were filed in this case, the State had charged Mr. Kotecki with felony stalking, *see* § 940.32(2)(a), and he was released on bail. The bail conditions prohibited Mr. Kotecki from having any contact with Ms. Kotecki or their children, and from committing any new crimes. The State charged Mr. Kotecki with violating the harassment injunction based on the State's contention that in December of 2003, Mr. Kotecki went to Ms. Kotecki's residence, and knocked on the window to get their son Patrick's attention. The State also charged Mr. Kotecki with felony bail jumping based on the window incident, because his presence on Ms. Kotecki's property violated the bail conditions in the stalking case.

[1] The Honorable Glenn H. Yamahiro presided over the trial and entered the judgments of conviction. The Honorable Neal Nettesheim issued the orders denying the postconviction motion.

¶4 In April of 2005, Mr. Kotecki attended a track meet where Patrick and his school team were participating. Mr. Kotecki talked to Patrick's coaches, and passed out treats to all the teammates, but did not directly interact with Patrick. Based on this track-meet incident, the State charged Mr. Kotecki with a second felony bail-jumping charge.

¶5 All four charges were consolidated and tried to a jury in September of 2005. The jury started its deliberations on a Friday afternoon. At about 9:00 p.m. Friday night, the jury sent two notes to the trial court; only one is pertinent to an issue raised on appeal. That note asked what would happen if the jury agreed on one or two charges, but could not agree on the others. The trial court brought the jurors into the courtroom and told them they would be sent home, and that they would resume their deliberations on Monday morning. At that point, one juror asked to speak privately to the trial court and said that she did not want to come back on Monday because of family problems:

> This whole week is just such an emotional toll on me. I've been having some personal issues and things at home that I'm dealing with, and my son is down in Kentucky. I wanted to go see about him because they're talking about sending him over to New Orleans, and just feel like I can't take no more of it. Just going home crying everyday, and it's just really taking an emotional toll on me.

¶6 The trial court consulted with the lawyers, and when the trial court asked Kotecki's lawyer "Do you want them to stay?" he said "To be honest, Judge, if they've come to some conclusion on some of the charges, I prefer to take what they've done so far" and later said "I'd like to take what they did with the twelve" and "I think it might be wise to have them put on paper what they've already accomplished." Accordingly, the trial court asked the jury to deliberate for another hour to try to resolve the counts on which it had agreed. After the jury

resumed its deliberations, the trial court consulted with the lawyers as to how to handle the juror who did not want to return on Monday. The State told the trial court that it "would just rather have her ordered back," and Kotecki's lawyer did not disagree, saying "I guess so." The trial court decided to order the juror to return, saying "All right, that's what I'll do." The jury returned a verdict on one count, finding Kotecki guilty of bail jumping based on what happened at the track meet. The trial court dismissed the jury and told it to return on Monday.

¶7 All twelve jurors returned on Monday and Kotecki was found not guilty of stalking, but guilty of violating the injunction and guilty of bail jumping based on the window incident.

II.

A. *Sufficiency of the Evidence.*

¶8 In assessing a jury's verdict, the scope of our review is limited.

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752, 757–758 (1990) (citation omitted). There was sufficient evidence to uphold the convictions.

i. *Window Incident.*

¶9 Kotecki argues that there was no evidence to support the conviction of bail jumping based on the window incident because he claims he did not knock on the window; rather, that he only threw a snowball at it, and that throwing a snowball from the street would not violate the "no contact with the residence." He supports his insufficiency-of-evidence claim by pointing to the cross-examination of Patrick:

> Q. So it's possible your father could have thrown a snowball to the window trying to get your attention, correct?
>
> A. It's possible.
>
> Q. And we know that because you never saw him in the yard?
>
> A. I never saw him in the yard.

Kotecki ignores, however, the direct testimony of Patrick and his other son Stephen. Stephen testified that he heard "a knocking on the window" which sounded forceful and lasted for "5 seconds." Stephen said it sounded like a hand knocking on the window and he "doubt[ed] it" could be a snowball. The trial court helpfully described for the Record what Stephen did when asked to demonstrate what the knocking sounded like: "he wrapped the top of the counter about five times in quick succession with his knuckles."

¶10 Patrick also testified that he heard "a banging on … the window" that sounded like "[a] person's fist." Patrick demonstrated how it sounded, and the trial court again memorialized the demonstration: "The record will reflect that he pounded his fist on the counter three times in quick succession." Patrick also

testified during direct examination that he did not believe that the sound he heard could have been made by a snowball hitting the window.

¶11 The evidence was more than sufficient for the jury to find guilt beyond a reasonable doubt in connection with the window incident.

ii. *Bail jumping*.

¶12 Kotecki claims that his conviction for violating the conditions of his bail by committing the crime of violating the harassment-injunction order in connection with the window incident was improper because the State did not put into evidence the standard bail conditions that he refrain from committing any new crimes. Kotecki is wrong. The jury had before it the no-contact order, which ordered Kotecki "as a condition of [his] release in [the stalking case]" to have "**ABSOLUTELY NO CONTACT** with … [Ms.] KOTECKI," at any location and that "Any violation of this Court Order is a crime." (Bolding and uppercasing in the original.) Further, as aptly noted by the trial court,

> [b]ail jumping is self-evidently a crime under Wisconsin law. *See* WIS. STAT. § 946.49. This statutory requirement to not commit a crime as a condition [of] release is not a factual matter for proof by the State in a bail jumping prosecution. Nor is it a factual matter for a jury to decide. Rather, it is an obligation imposed by operation of law.

We agree. WISCONSIN STAT. § 969.03(2) makes a condition of every felony bail bond that the person released "shall not commit any crime." This, of course, is a condition to which we are all bound as well, and is not dependent on, as the trial court noted, independent proof. There was sufficient evidence before the jury that Kotecki committed the crime of violating the harassment injunction. Thus, there was sufficient evidence that he violated the condition of his bond imposed by § 969.03(2).

iii. *Track Meet*.

¶13 Kotecki's last insufficiency-of-the-evidence claim is that there was no evidence that he violated the harassment-injunction order at Patrick's track meet, because he did not have direct contact with Patrick and did not ask the track members to communicate with Patrick on his behalf. Kotecki's claim is without merit.

¶14 The no-contact order declared that it was Kotecki's "responsibility to avoid contact" with Patrick; that "[i]f you accidentally come into contact with [Patrick] on any private or public place, you must leave immediately"; and that "[i]f you go *near* [Patrick], even with permission or consent, you can be arrested for violating this no-contact order." (Emphasis added.) At the trial, Kotecki confirmed that he knew of these requirements. The jury was able to assess Kotecki's excuses for being at the meet, talking to the track coaches, and giving treats to all of Patrick's teammates in their context. There was sufficient evidence to support its verdict on the track-meet charge. *See* ***Poellinger***, 153 Wis. 2d at 507, 451 N.W.2d at 757–758.

B. *Discretionary reversal under WIS. STAT. § 752.35*.

¶15 Kotecki argues that he is entitled to a discretionary reversal under WIS. STAT. § 752.35 because the no-contact orders went into the jury room even though, he contends, they were not entered into evidence. He also asserts that he is entitled to discretionary reversal because of the sequential way the verdicts were accepted. We disagree.

WISCONSIN STAT. § 752.35 provides:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

¶16 There is no reason to exercise discretionary reversal in this case. First, Kotecki's claim that the no-contact orders went into the jury room even though they were never entered into evidence is incorrect. Although the no-contact orders were not entered into evidence individually, they were part of a group of exhibits that were all admitted under the trial court's general admission of "all marked exhibits" during its instructions to the jury. Thus, the trial court said: "So I'm just going to advise you that all of the exhibits that have been marked have been received by the Court." Thus, when the jury asked to see the exhibits, Kotecki's attorney did not object to sending the no-contact orders into the jury room.

¶17 Further, there is no dispute that the exhibits Kotecki challenges here were discussed and testified about during the trial. Thus, Kotecki cannot point to any prejudice. *See* ***Manna v. State***, 179 Wis. 384, 404, 192 N.W. 160, 166 (1923) (irregularities occur during trial and are not grounds for reversal without prejudice).

¶18 Second, as we have seen, Kotecki's trial lawyer agreed to the partial receipt of the verdicts, and, indeed, suggested it. Kotecki nevertheless argues on

this appeal that the procedure was declared improper in ***State v. Knight***, 143 Wis. 2d 408, 421 N.W.2d 847 (1988) (addressing whether taking a split verdict and allowing continued deliberations without telling the jury that additional deliberations will occur adversely affects the fairness of the proceeding). ***Knight*** does not apply here because the jury here was told that it would return Monday to complete the deliberations, while in Knight the trial court's actions gave the jury "the impression that their deliberations were final." ***Id.***, 143 Wis. 2d at 417, 421 N.W.2d at 851.

C. *Ineffective Assistance.*

¶19 Kotecki asserts that his trial lawyer was ineffective for not objecting to hearsay statements of Kara Garcia, the police officer who testified that Ms. Kotecki and the boys did not see anyone other than Kotecki outside the home on the day of the window incident. Kotecki also contends that Patrick's testimony about what his teammates told him was also hearsay. Kotecki also contends that his trial lawyer was ineffective because he did not request a specific unanimity instruction, and because he did not object to the no-contact orders going to the jury room. We disagree.

¶20 To establish ineffective assistance of counsel, a defendant must show: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.***, 466 U.S. at 690. To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.***, 466 U.S. at 687. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he

defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***, 466 U.S. at 694.

i. *Hearsay—Officer Garcia.*

¶21 Garcia answered in the negative when she was asked: "Did the boys or Linda [Kotecki] or the daughter Carrie say that anybody else had been by the home" on the day of the window incident. This testimony was tied to evidence of a footprint in the snow outside the window of Linda's home—the implication was that if the family did not see anyone else outside the home, then Kotecki must have been the one to leave the footprint. Despite the State's contention to the contrary, Kotecki is correct that Garcia's testimony in this regard was inadmissible hearsay. But the jury also heard Patrick and Stephen testify that they had not seen Kotecki in the yard, and Kotecki's trial lawyer elicited concessions from Garcia that the footprint could have been made by anybody, such as a deliveryman, meter reader, repairman, or prowler. Kotecki has not shown that he was prejudiced as that term is used in ***Strickland*** by the admission of Garcia's hearsay testimony.

¶22 The second alleged hearsay was Patrick's testimony that his teammates told him at the track event that Kotecki had told them "Thank you, Thanks, Patrick. Good working out, man." Although Kotecki's assertions were not hearsay, *see* WIS. STAT. RULE 908.01(4)(b)1 (statement by party opponent), what Stephen's teammates told him *was* hearsay, *see* WIS. STAT. RULE 908.05 (multiple levels of hearsay). Again, however, there was no prejudice under the ***Strickland*** standard. There was credible testimony that Kotecki attended the track meet, got within thirty feet of Patrick, talked to Patrick's coaches, and handed out

treats to his teammates. These actions, regardless of what Kotecki may have said to the teammates, were a violation of the no-contact order.

ii. *Unanimity Instruction.*

¶23 Kotecki next asserts that his trial lawyer was ineffective because he did not request a unanimity instruction for both the window incident and Kotecki's presence at the track meet. He argues that without a unanimity instruction, the jurors could have convicted him of different acts for each incident. Again, we disagree.

¶24 We apply the following test to determine whether a unanimity instruction is constitutionally required to "ensure[] that each juror is convinced beyond a reasonable doubt that the prosecution has proved each essential element of the offense," ***State v. Lomagro***, 113 Wis. 2d 582, 591, 335 N.W.2d 583, 589 (1983):

> The first step is to determine whether the jury has been presented with evidence of multiple crimes or evidence of alternate means of committing the *actus reus* element of one crime. If more than one crime is presented to the jury, unanimity is required as to each. If there is only one crime, jury unanimity on the particular alternative means of committing the crime is required only if the acts are conceptually distinct. Unanimity is not required if the acts are conceptually similar.

Id., 113 Wis. 2d at 592, 335 N.W.2d at 589 (italics in original; internal citation omitted).

¶25 Unanimity instructions were not, as alleged by Kotecki on appeal, required here. Thus, his trial lawyer was not ineffective for not asking for them. The window incident involved one alleged act—that Kotecki came onto the property in violation of the injunction and knocked on the window. The track-

meet incident involved a continuous course of conduct, and "Wisconsin has historically held that in 'continuing course of conduct' crimes, the requirement of jury unanimity is satisfied even where the jury is not required to be unanimous about which specific underlying act or acts constitute the crime." ***State v. Johnson***, 2001 WI 52, ¶17, 243 Wis. 2d 365, 376, 627 N.W.2d 455, 461. Thus, the only thing the jury needed to agree on was that Kotecki showed up at Patrick's track meet and was visible to Patrick and was "near" him; they did not need to all agree as to which specific thing Kotecki did at the meet violated the no-contact order.

iii. *No-contact Orders*.

¶26 Finally, Kotecki's last attack on his trial lawyer's performance was that he did not object to the no-contact orders being submitted to the jury during deliberations. As noted, Kotecki contends that because these exhibits were marked, but never admitted into evidence, his trial lawyer should have objected to letting the exhibits into the jury room. As we have seen, however, the trial court did receive the exhibits into evidence, and so announced in open court.

By the Court.—Judgments and orders affirmed.

Publication in the official reports is not recommended.