COURT OF APPEALS
DECISION
DATED AND FILED

October 16, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2629-CR **Cir. Ct. No. 2011CF206**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADDISON F. STEINER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: ELLIOTT M. LEVINE, Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 LUNDSTEN, J. Addison Steiner appeals the circuit court's judgment convicting him of abandonment of a child under WIS. STAT. § 948.20.[1] Steiner also appeals the circuit court's order denying his motion for postconviction relief from the judgment. The parties dispute whether the evidence is sufficient to support Steiner's conviction, with each arguing that the sufficiency of the evidence depends on whether the element of "intent to abandon" a child under § 948.20 requires intent to leave the child permanently. Additionally, the State argues, as a threshold matter, that Steiner forfeited this issue by failing to object during closing argument when the prosecutor made clear that the prosecutor's theory was that abandonment need not be permanent. We conclude that Steiner fails to show that there is a true sufficiency of the evidence issue here, and we agree with the State that Steiner forfeited the statutory interpretation issue he now raises. We affirm.

Background

¶2 The State charged Steiner with two counts of physical abuse of a child, one count of neglecting a child, and one count of abandonment of a child. All of the charges were based on allegations relating to Steiner's conduct toward his three children. The only charge at issue here, the abandonment charge, relates to an April 2011 incident involving Steiner's three-year-old son, D.S. According to trial testimony, on the day in question, Steiner left D.S. at home, secured inside a room and unsupervised, while Steiner went to an appointment.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted. The 2009-10 version is the version that was in effect at the time Steiner engaged in the conduct forming the basis for his abandonment conviction.

¶3 The abandonment statute, WIS. STAT. § 948.20, provides: "Whoever, with intent to abandon the child, leaves any child in a place where the child may suffer because of neglect is guilty of a Class G felony." The jury received an instruction on the abandonment charge that, like the statute and also like the pattern jury instruction, does not further define "abandon." *See* WIS JI—CRIMINAL 2148. During closing argument, the prosecutor argued:

> There's nothing in the jury instruction that abandon means permanently. You won't find it anywhere.
>
> That's because you can abandon somebody even though it's not permanent. You're out with your friends at a concert or a party. At some point you split with your friends. You abandon your friends. For that night, I don't care where they go, I'm going this way.... You're abandoning them for the night.
>
> ... You're giving up on them for that time period.
>
> That's what the Defendant did ….

Steiner's trial counsel did not request a different or additional jury instruction defining "abandon," nor did he object to the prosecutor's argument. Instead, counsel argued that the jury should not convict Steiner because Steiner intended to leave D.S. only briefly while he was at his appointment.

¶4 The jury found Steiner guilty on the abandonment charge.[2] Steiner filed a postconviction motion, arguing that the evidence was insufficient because WIS. STAT. § 948.20 requires intent to leave a child permanently. The circuit court

[2] The jury also found Steiner guilty on the neglect charge. The jury was unable to reach a verdict on the child abuse charges, and the court declared a mistrial on those charges. At Steiner's sentencing on the neglect and abandonment charges, the circuit court dismissed the child abuse charges after the State indicated that it did not intend to retry Steiner on those charges.

denied the motion, concluding that the jury could have reasonably applied the instruction it received to the evidence to find Steiner guilty of abandonment.

Discussion

¶5 As already indicated, the parties dispute whether the evidence is sufficient to support Steiner's abandonment conviction, with each party arguing that the sufficiency of the evidence depends on whether WIS. STAT. § 948.20 requires intent to leave the child permanently. No existing authority establishes what "abandon" means for purposes of § 948.20.

¶6 It is undisputed that there is no evidence that Steiner intended to permanently leave D.S. According to Steiner, this means the evidence is insufficient because the "abandon" element requires proof of intent to permanently leave. The State's sufficiency argument hinges on the proposition that the "abandon" element does not require intent to permanently leave. Additionally, the State argues, as a threshold matter, that Steiner forfeited this issue by failing to object to the prosecutor's closing argument.

¶7 For the reasons we explain below, we conclude that Steiner fails to show that there is a true sufficiency of the evidence issue. We agree with the State's forfeiture argument, and do not reach the novel statutory interpretation question Steiner raises.

¶8 In arguing that we should disregard the forfeiture rule, Steiner relies on ***State v. Hayes***, 2004 WI 80, 273 Wis. 2d 1, 681 N.W.2d 203, for the proposition that a defendant may raise a sufficiency of the evidence challenge as a matter of right regardless whether that challenge is raised at trial. In ***Hayes***, the supreme court concluded that "a challenge to the sufficiency of the evidence did

not have to be raised during trial to preserve the issue for appeal as a matter of right." *See* ***id.***, ¶4.

¶9 Steiner's reliance on ***Hayes*** is insufficient because Steiner's case, unlike ***Hayes***, involves a novel statutory interpretation question first raised after trial, and this leads us to question whether Steiner has presented a true sufficiency of the evidence issue. Steiner does not develop an argument explaining why, in a case like his, we should measure the sufficiency of the evidence by comparing the evidence to WIS. STAT. § 948.20, as we might now interpret that statute, instead of comparing the evidence to the standard in the instructions that the jury received, or to the legal standard the jury might have gleaned from the instructions in combination with closing arguments. The answer to the question of what standard we use to measure the sufficiency of the evidence in a case such as Steiner's is far from apparent. *Compare* ***State v. Wulff***, 207 Wis. 2d 143, 148-49, 151-54, 557 N.W.2d 813 (1997) (measuring sufficiency of the evidence against the jury instruction instead of the statute when the instruction required something different from the statute), *with* ***State v. Beamon***, 2013 WI 47, ¶¶3, 22-23, 42-46, 50, 347 Wis. 2d 559, 830 N.W.2d 681 (distinguishing but not overruling ***Wulff*** and concluding that, when a jury instruction erroneously "adds" a requirement to a statute, sufficiency of the evidence is measured by comparing the evidence to the statute and not to the jury instruction with its added requirement), *cert. denied*, 134 S. Ct. 449 (U.S. Oct. 15, 2013) (No. 13-6131).

¶10 To illustrate, if we measure the sufficiency of the evidence against the jury instruction here, there is no sufficiency of the evidence problem because nothing in the instruction required the jury to find that Steiner intended to abandon D.S. permanently. Rather, as the circuit court recognized, the jury was not

instructed on any particular definition of "abandon," thus leaving the jury free to decide what that term means in this context.

¶11 Steiner does not meaningfully address the circuit court's reasoning, nor does he satisfactorily explain why he should not be held to his failure to object to the jury instruction—i.e., object that the instruction was misleading or incomplete—or, at a minimum, his failure to object to the prosecutor's closing argument. The general rule is that a defendant's failure to object to either the jury instructions or the prosecutor's closing argument forfeits that objection. *See* WIS. STAT. § 805.13(3) ("Failure to object at the [jury instruction] conference constitutes a waiver of any error in the proposed instructions or verdict."); ***State v. Goodrum***, 152 Wis. 2d 540, 549, 449 N.W.2d 41 (Ct. App. 1989) ("Failure to object at the time of the alleged improprieties in the closing argument … waives review of that alleged error."); *see also* ***State v. Miller***, 2012 WI App 68, ¶17, 341 Wis. 2d 737, 816 N.W.2d 331 ("Because [the defendant] neither objected to the prosecutor's comments nor moved for a mistrial, he forfeited these challenges.").

¶12 Instead of making a timely objection, Steiner now argues that there is a sufficiency of the evidence problem based on a novel legal theory that was not put before the jury, and not put before the circuit court until it was too late for the circuit court to efficiently correct any error. In his reply to the State's forfeiture argument, Steiner does not provide support for the proposition that we should disregard the forfeiture rule under these circumstances.

¶13 A recent discussion by the supreme court is apt, and persuades us that we should not address a legal theory Steiner could have timely raised during the instruction conference or during closing arguments. Specifically, the court in

Best Price Plumbing, Inc. v. Erie Insurance Exchange, 2012 WI 44, 340 Wis. 2d 307, 814 N.W.2d 419, explained:

> In ***State v. Shah***, 134 Wis. 2d 246, 251 n.4, 397 N.W.2d 492 (1986), this court interpreted the [jury instruction and verdict] statute[, WIS. STAT. § 805.13(3),] as follows: "even when an instruction misstates the law, the party must object to the instruction to preserve a challenge to the instruction as of right on appeal. Failure to object to an instruction constitutes a waiver of the error." *See also* ***Tammy W.-G. v. Jacob T.***, 2011 WI 30, ¶72, 333 Wis. 2d 273, 797 N.W.2d 854; ***D.L. Anderson's Lakeside Leisure Co. v. Anderson***, 2008 WI 126, ¶39, 314 Wis. 2d 560, 757 N.W.2d 803; ***State v. Schumacher***, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988); ***Air Wis., Inc. v. N. Cent. Airlines, Inc.***, 98 Wis. 2d 301, 315-16, 296 N.W.2d 749 (1980).
>
> The court of appeals was presented with a similar situation in ***Kovalic v. DEC International, Inc.***, 161 Wis. 2d 863, 873 n.7, 469 N.W.2d 224 (Ct. App. 1991). In that case, the jury instruction was misleading, but the defendant failed to object to the misleading instruction. ***Id.*** When it later moved to change the jury's answer, the court of appeals concluded that the defendant had waived the objection to the misleading instruction. It stated: "Such a motion challenges the sufficiency of the evidence to sustain the answer ... and it must be considered in the context of the instructions given to the jury." ***Id.***
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> Wisconsin Stat. § 805.13(3) and the above cited cases represent the policy that parties should marshal the relevant facts and law prior to trial. A party is not permitted to save its legal arguments until after trial, only to present those arguments if the party dislikes the jury's ultimate conclusion. "[I]f attorneys are not required to raise issues at the trial court level, there is less of an incentive for attorneys to diligently prepare their cases for trial ... [and] it may result in hardship to one of the parties." ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990). Accordingly, because there was no objection, we conclude that any error in the jury instructions has been forfeited.

Id., ¶¶39-41. Although the court's discussion in ***Best Price Plumbing*** does not address closing arguments, we think that the court's reasoning applies equally to Steiner's failure to object to the prosecutor's closing argument here.

¶14 Steiner makes two additional arguments for disregarding the forfeiture rule. We reject both.

¶15 First, Steiner argues that we should disregard the forfeiture rule because Steiner's postconviction motion gave the circuit court the opportunity to rule on Steiner's statutory interpretation argument. This argument completely sidesteps the policy underpinnings of the forfeiture rule. As we have indicated, Steiner's postconviction motion came too late for the circuit court to efficiently remedy the potential discrepancy between the statute and the jury instruction or the prosecutor's closing argument. *See* ***State v. Erickson***, 227 Wis. 2d 758, 765-68, 596 N.W.2d 749 (1999) (discussing policy reasons for requiring a timely objection, including the efficient use of resources and the need to discourage strategic failures to lodge objections).

¶16 Second, Steiner asserts that we have discretionary authority to decide the issue he presents and reverse in the interest of justice under WIS. STAT. § 752.35. However, Steiner does not develop an argument specific to the § 752.35 standards, and our own review does not suggest that this case involves the sort of unusual circumstances that warrant the application of a doctrine that we apply only in exceptional circumstances. *See* ***State v. Jackson***, 2011 WI App 63, ¶37, 333 Wis. 2d 665, 799 N.W.2d 461 ("We are reluctant to grant new trials in the interests of justice and exercise our discretion to do so 'only in exceptional cases.'" (quoted source omitted)).

Conclusion

¶17 In sum, for the reasons stated, we affirm the judgment convicting Steiner of abandonment and the order denying Steiner's motion for postconviction relief.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.