COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP233-CR **Cir. Ct. No. 2013CF5168**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES ADRIN SCHMEISSER,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. James Schmeisser appeals judgments of conviction and an order denying his postconviction motion. He makes the following arguments: first, that the evidence was insufficient to support his three

convictions; second, that the circuit court erred in permitting the jury to hear a 911 call; and third, that his sentence is unduly harsh. We affirm.

BACKGROUND

¶2 In 2012, a citizen called 911 in the middle of the night when he heard a woman screaming for help and saw someone beating her in a parked car. Police arrived on the scene within five minutes of the 911 call. They found Schmeisser with the woman, who was bleeding profusely and partly undressed. When an officer asked the woman if Schmeisser was the one who had beaten her, she said yes. Schmeisser was charged with substantial battery and, because he was out on bail on a pending charge at the time, he was also charged with bail jumping. Conditions for Schmeisser's bail on these charges included that he appear on all court dates and not commit any crimes. Schmeisser was required to wear an electronic monitoring device on his ankle (the ankle bracelet).

¶3 The case proceeded to trial in 2013. On the day set for trial, Schmeisser was present in the courtroom in the morning when the parties agreed that the case was ready to proceed to trial. The circuit court said the trial would begin after a break for lunch. After the lunch break, Schmeisser did not return to the courtroom. That day, the ankle bracelet Schmeisser wore, which was owned and monitored by Justice Point, was tracked to Schmeisser's home. At his home, the ankle bracelet emitted a "strap tamper alert" and was tracked to a second location. At the second location, at about 2 p.m., the bracelet ceased transmitting a signal.[1] Police searched for the ankle bracelet for two hours near the second

[1] As explained at trial by a Justice Point employee, fiber optics run through the strap that attaches the ankle bracelet to a person's ankle and send a beam of light through it. If the strap is cut, an alert is sent to the GPS case manager at the monitoring organization.

location, but did not find it. Schmeisser remained at large for over eight months. Based on these events, Schmeisser was charged with theft of the ankle bracelet and two bail jumping counts, one for failing to appear at his trial and one for committing the bracelet theft.

¶4 The original battery and bail jumping charges and the new bail jumping related charges were joined for trial without objection and were tried to a jury. The victim and the 911 caller, who had appeared for the first attempt to try Schmeisser, were not present at this trial. Schmeisser was acquitted on both counts in the original battery and bail jumping case. The jury convicted Schmeisser of the remaining charges: theft of the ankle bracelet, the new-crime-theft bail jumping, and the failure-to-appear bail jumping. Schmeisser was sentenced to a total of five years of initial confinement and four years of extended supervision on the bail jumping counts, with a nine-month jail sentence on the theft count to run concurrent to the prison time. Additional facts will be set forth as required.

DISCUSSION

Sufficiency Of The Evidence

¶5 Schmeisser argues that the trial evidence was insufficient to support his three convictions. A challenge to the sufficiency of the evidence on appeal results in a vacated conviction only if "the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We "must accept and follow the inference drawn by the trier

of fact unless the evidence on which that inference is based is incredible as a matter of law." ***Id.*** at 507.

¶6 Schmeisser first argues that the evidence is insufficient to support his conviction for theft of the ankle bracelet and, therefore, also insufficient to support his new-crime bail jumping conviction based on that theft. Two of the elements of theft that the State needed to prove under WIS. STAT. § 943.20(1)(a) (2011-12)[2] were that "the defendant intentionally took and carried away movable property of another" and that "the owner of the property did not consent to taking and carrying away the property." *See* WIS JI—CRIMINAL 1441. Schmeisser argues that the act of taking the ankle bracelet from the monitoring agency and carrying it away to various places was part of "the very nature" of the ankle bracelet. As to the allegation that he cut the ankle bracelet off and failed to return it, Schmeisser argues that "[n]o evidence was presented as to what ultimately happened to the [ankle bracelet]" and, therefore, the jury had no basis for a conviction on this count. We disagree.

¶7 The jury heard evidence that Schmeisser was ordered to use the ankle bracelet and that the only authorized place for it was on Schmeisser's ankle. The jury also heard that the monitoring agency, Justice Point, was the owner of the ankle bracelet, and did not consent to having it taken to an unauthorized place. There was evidence that the GPS tracking system showed that, on the day set for trial, after Schmeisser failed to return to court after lunch, the ankle bracelet moved from the courthouse to Schmeisser's home and the bracelet sent a "strap

[2] All further references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

tamper alert." The ankle bracelet was tracked to a second location and then, about 2 p.m., stopped working. The bracelet was not recovered.

¶8 A jury could infer from this evidence that Schmeisser removed the ankle bracelet from its authorized location, his ankle, and "carried [it] away" to another location without the owner's consent, with the intention of depriving the owner of its property. Thus, the evidence supports the theft conviction and, therefore, the new-crime-theft bail jumping conviction.

¶9 Schmeisser also argues that the evidence is insufficient to support his conviction on a bail jumping charge based on his failure to return for the remainder of the court proceedings. He acknowledges that he was not present when the proceedings resumed after lunch, but he contends that, to satisfy his obligations under the terms of his bond, all he had to do was appear in court when the case was first called that morning. Therefore, according to Schmeisser, no trier of fact acting reasonably could have convicted him of bail jumping for his failure to appear. Again, we disagree.

¶10 Schmeisser's second sufficiency of the evidence argument rests on an unreasonable definition of the word "appear." He argues that "appear" simply means to show up initially, rather than to show up and appear for the entire proceeding. We reject the argument. Juries are instructed to apply common sense in considering whether the State has proven elements of a crime. Here, a reasonable trier of fact would have given a reasonable meaning to the word "appear," and the only reasonable meaning of "appear" is to appear for the duration of required proceedings.

Admission Of The 911 Call

¶11 Schmeisser contends that the 911 call "should not have been admitted as it unfairly prejudiced the jury against [him] and may have led to his convictions" for the theft and bail jumping charges. The battery related charges were joined with the later theft related charges without objection by trial counsel. At trial, Schmeisser objected to the admission of the 911 call on confrontation clause and hearsay grounds, but did not make the only significant argument he pursues on appeal, namely, that the evidence was unfairly prejudicial.[3]

¶12 Where "no objection was made at trial that the [evidence was] unfairly prejudicial, this alleged error has been waived and cannot be raised in this court" even if objections were made to the evidence on other grounds. ***Frankovis v. State***, 94 Wis. 2d 141, 152, 287 N.W.2d 791 (1980). Here, the prejudice argument made on appeal was not made before the circuit court and, therefore, was forfeited.

¶13 When a challenge to an evidentiary decision is not properly preserved, the topic may be addressed as a claim of ineffective assistance of counsel. *See* ***State v. Koller***, 2001 WI App 253, ¶25, 248 Wis. 2d 259, 635 N.W.2d 838. Viewed this way, we would still affirm Schmeisser's convictions.

¶14 Under an ineffective assistance of counsel analysis, Schmeisser must show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and that counsel's

[3] To the extent Schmeisser challenges the 911 call on appeal based on a suggestion that the circuit court erred in refusing to dismiss the battery charge or that joinder of the two cases was improper, those claims are abandoned and forfeited, respectively.

deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To show prejudice, "[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.*** at 694. "Under the *Strickland* test, we may reverse the order of the two tests and, if the defendant has failed to show prejudice, omit the inquiry into whether counsel's performance was deficient." ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶15 Assuming without deciding that trial counsel's failure to object on grounds of unfair prejudice was deficient performance, the question is whether that failure prejudiced Schmeisser within the meaning of ***Strickland***. After reviewing the trial record, and as further explained below, we are confident that the admission of the 911 call did not prejudice Schmeisser.

¶16 The jury ultimately acquitted on the battery related charges. But what is significant for our purposes is that the 911 call was not the only evidence that alleged that the man in the car, subsequently identified as Schmeisser, was the attacker of the bloodied and injured woman. The testimony from the responding police officers was that they found the injured woman in the car and she identified Schmeisser as the person who caused her injuries. Thus, the 911 call provided no significant information that the jury did not hear from other sources. Additionally, the State's evidence on the theft and failure-to-appear charges was overwhelming. For both of these reasons, we are confident that the admission of the 911 call, even if error, did not affect the guilty verdicts.

Challenge To The Sentence

¶17 Schmeisser argues that the circuit court erroneously exercised its discretion in sentencing him because it "predominantly relied" on the evidence of the battery charge for which he was not convicted. He acknowledges that courts are permitted to consider such conduct. *See* ***State v. Bobbitt***, 178 Wis. 2d 11, 16-18, 503 N.W.2d 11 (Ct. App. 1993). He argues, however, that the court "based [his] sentence more on the crimes for which he was acquitted as oppose[d] to those for which he was convicted" and that "there was so little evidence to act as a basis of those charges in the first place, it was not equitable for the Court to consider them at sentencing."

¶18 A sentencing decision is discretionary. *See* ***State v. Taylor***, 2006 WI 22, ¶35, 289 Wis. 2d 34, 710 N.W.2d 466. At sentencing, the circuit court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. "The weight which is to be attributed to each factor is a determination which appears to be particularly within the wide discretion of the sentencing judge." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶19 While acknowledging that the circuit court was permitted to consider the conduct underlying the battery related charges, which resulted in acquittal, Schmeisser argues that the circuit court gave too much weight to this factor. We disagree.

¶20 A circuit court erroneously exercises its discretion only when it bases its determination "upon factors not proper or irrelevant to sentencing or [when the court] was influenced by motives inconsistent with impartiality." *See*

id. In sentencing Schmeisser, the circuit court did not appear to place undue emphasis on the battery related conduct. Rather, the court focused on the aggravated nature of his failure to appear, which was the basis for a charge of which he was convicted, as well as a history of similar conduct and a lengthy criminal record. The court did not rely on impermissible factors, and it is settled law that the weight given to each factor is a determination which appears to be particularly within the wide discretion of the sentencing judge. *See* ***id.***

¶21 Schmeisser also contends that his sentence is unduly harsh and excessive. A sentence is unduly harsh "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances," ***id.***, and a sentence well within the limits of the maximum sentence is not such a sentence, ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983). The convictions carried a combined maximum exposure of twelve years and nine months. Schmeisser was sentenced to a total of nine years—which was one year less than the maximum initial confinement, and two years less than the maximum extended supervision, and a concurrent instead of consecutive nine-month jail term. His sentence is within the maximum and, in view of Schmeisser's conduct and history, it cannot reasonably be argued that his sentence would shock the judgment of reasonable people. *See* ***Ocanas***, 70 Wis. 2d at 185; ***Daniels***, 117 Wis. 2d at 22.

By the Court.— Judgments and order affirmed.

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