COURT OF APPEALS
DECISION
DATED AND FILED

January 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1412-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

STEVE B. TRACY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Iron County: PATRICK J. MADDEN, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Steve Tracy appeals a judgment convicting him as party to a crime of five counts of theft of property valued at more than $2,500, contrary to § 943.20(1)(a), STATS. Tracy argues: (1) the trial court erroneously admitted telephonic testimony at trial; (2) the trial court erroneously admitted preliminary hearing testimony of an accomplice; (3) the State violated discovery

rules and (4) newly-discovered evidence entitles him to a new trial. We affirm the judgment.

Gary Gundy testified that on January 22, 1997, he, Steve Tracy, and James Amborn drove to Hurley in Tracy's truck and entered a bar.[1] At approximately 8:30 p.m., upon leaving the bar, the three drove up alongside a snowmobile trailer containing five snowmobiles. They unhitched the trailer from the back of the truck, hitched it to Tracy's truck and drove away. Gundy testified that they did not have permission to take the snowmobiles.

After traveling about ten miles, they saw a police car approaching. The squad car pursued them approximately sixty miles. Gundy testified that other squads joined in the chase. He testified that Tracy was driving and swerved around a few of the police vehicles. The three were eventually caught when they ran out of gas.

Darryl Jansma testified that he was with a group of five who went to Hurley to snowmobile. They parked their pickup and trailer with their snowmobiles and went into a restaurant to eat. When they left the restaurant, they noticed that the trailer and snowmobiles were gone. He testified that none of his group had given anyone permission to take their snowmobiles. Jansma testified that he owned a 1992 Arctic Cat EXT snowmobile, valued at $2,970, which was on the stolen trailer.

Other members of the snowmobiling group also took the stand. Steve Bousema testified that his stolen 1995 Ski-Doo Summit snowmobile was

[1] Although Gundy did not testify at trial, his preliminary hearing testimony was admitted.

new and valued it at $4,500. Todd Poppema valued his stolen 1991 Polaris Indy Classic at $2,520. He testified that his brother, Tim Poppema, had a 1994 Polaris XLT stolen that was valued at $2,860. Also, officer Kenneth Colassaco testified, without objection, that he had personally observed the snowmobiles and that they were all worth more than $2,500.

Two additional witnesses testified by telephone over defense counsel's objection. Colleen Jansma, Darryl's wife, testified that she had borrowed her nephew's 1995 Arctic Cat 440Z, which was stolen off the trailer, and that it was worth approximately $2,750. Tim Poppema testified by telephone that his stolen snowmobile was a 1994 Polaris XLT with a value of $2,860.

Tracy testified at trial that he was inebriated and fell asleep in the truck. He explained that Gundy had asked him if it was all right to pull some snowmobiles home for some friends. Tracy testified that when he woke up, he demanded that Gundy pull over and was subsequently apprehended by pursuing officers. Although he conceded that he fled into the woods after they pulled over, he claimed he did so only to chase and attack Gundy.

1. Telephone Testimony

Tracy argues that the trial court erroneously admitted the telephone testimony. We agree, and the State does not dispute, that under § 967.08, STATS., the trial court's authority to permit telephone testimony does not extend to trial.[2]

[2] Section 967.08, STATS., provides:

> (1) Unless good cause to the contrary is shown, proceedings referred to in this section may be conducted by telephone or live audio-visual means, if available. …
> (2) The court may permit the following proceedings to be conducted under sub. (1) on the request of either party. The

(continued)

The State contends, and we agree, that the error is harmless beyond a reasonable doubt.

Even errors of constitutional proportion are subject to the harmless error rule. *See* ***State v. Sheehan***, 65 Wis.2d 757, 767, 223 N.W.2d 600, 605 (1974).

> The test of harmless error is not whether some harm has resulted, but, rather, whether the appellate court in its independent determination can conclude there is sufficient evidence, other than and uninfluenced by the inadmissible evidence, which would convict the defendant beyond a reasonable doubt. See *Harrington v. California* (1969), 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284. This test is based on reasonable probabilities.

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request and the opposing party's showing of good cause for not conducting the proceeding under sub. (1) may be made by telephone.

(a) Initial appearance under s. 970.01.

(b) Waiver of preliminary examination under s. 970.03, competency hearing under s. 971.14 (4) or jury trial under s. 972.02 (1).

(c) Motions for extension of time under ss. 970.03 (2), 971.10 or other statutes.

(d) Arraignment under s. 971.05, if the defendant intends to plead not guilty or to refuse to plead.

(3) Non-evidentiary proceedings on the following matters may be conducted under sub. (1) on request of either party. The request and the opposing party's showing of good cause for not conducting the proceeding under sub. (1) may be made by telephone.

(a) Setting, review and modification of bail and other conditions of release under ch. 969.

(b) Motions for severance under s. 971.12 (3) or consolidation under s. 971.12 (4).

(c) Motions for testing of physical evidence under s. 971.23 (5) or for protective orders under s. 971.23 (6).

(d) Motions under s. 971.31 directed to the sufficiency of the complaint or the affidavits supporting the issuance of a warrant for arrest or search.

(e) Motions in limine, including those under s. 972.11 (2) (b).

(f) Motions to postpone, including those under s. 971.29.

Novitzke v. State, 92 Wis.2d 302, 308, 284 N.W.2d 904, 907-08 (1979). "Other formulations of the harmless error test would require reviewing courts to set aside the verdict and judgment unless sure that the error did not influence the jury, or had but only slight effect." ***Id***. at 308, 284 N.W.2d at 908.

The evidence here supports the conclusion under any test that the error committed was harmless beyond a reasonable doubt. Gundy, Tracy's accomplice, provided testimony as to the details of the theft. He testified that they did not have permission to take the snowmobiles. His testimony would be competent to support a guilty verdict if the jury believed it. *See* ***Sheehan***, 65 Wis.2d at 767, 223 N.W.2d at 606. The police chief testified without objection that given his knowledge of snowmobiles, they were all worth more than $2,500. In addition, both Gundy's and the police chief's testimony were corroborated in important respects by the snowmobile owners who appeared at trial and other officers who participated in the chase and apprehension of Tracy. Because the telephonic testimony was cumulative, we are unpersuaded that it influenced the verdict.[3]

Without setting it forth as a separate argument, Tracy further contends that the snowmobiles described at trial vary from the descriptions given in the information. We are unpersuaded Tracy's argument merits reversal. He

[3] The trial court also admitted, over defense counsel's objection, an exhibit from Worthington Sports Center valuing four of the snowmobiles as follows: Darryl's, $2,970; Colleen's nephew's, $2,750; Tim's, $2,860; and Todd's, $2,520. In his reply brief, Tracy argues that Exhibit I was "a hearsay document not authenticated and nothing more than a handwritten note." This one-sentence characterization does not constitute an argument and, in any event, is advanced without citation to authority. It is therefore inadequate to support a reversal of the trial court's evidentiary ruling admitting it. *See* ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980). In any event, the exhibit was also cumulative to other properly admitted testimony of value.

does not describe the inconsistencies or suggest how the minor, if any, deviations in snowmobile descriptions may have misled him. He does not suggest he raised this objection at the trial level. The argument lacks record citation. Finally, Tracy does not offer any legal authority that the precise vehicle description in the complaint and information must be exactly identical to the description at trial. Here, Gundy's and the officers' testimony establishes that the trailer containing five snowmobiles was taken from Hurley and, within ten miles, officers were in pursuit until the snowmobiles were recovered. There does not appear to be any question of identification of the stolen property raised at trial. Tracy's argument appears to be an undeveloped sufficiency of the evidence argument set forth in the guise of an evidentiary challenge and, as such, will not be considered. *See* ***State v. Waste Mgmt.***, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978).

2. Gundy's Testimony

The trial court ruled that Gundy's preliminary hearing testimony was admissible at trial. Tracy argues that he was denied his right to confront witnesses because the scope of cross-examination at the preliminary hearing was limited to exclude matters bearing on weight and credibility. We disagree.

The trial court's decision to admit former testimony is discretionary. ***State v. Burns***, 112 Wis.2d 131, 139, 332 N.W.2d 757, 762 (1983). In reviewing a discretionary decision, we "will look for reasons to sustain the trial court …." ***Looman's v. Milwaukee Mut. Ins. Co.***, 38 Wis.2d 656, 662, 158 N.W.2d 318, 320 (1968). If the record provides a rational basis for the trial court's decision, we will affirm. ***State v. Pharr***, 115 Wis.2d 334, 343, 340 N.W.2d 498, 501 (1983).

> The threshold question is whether the evidence sought to be introduced is admissible under the Rules of Evidence of Wisconsin, chs. 901-911, Stats. If the evidence does not fit

> within a recognized hearsay exception, it must be excluded. Only after it is established that the evidence is admissible under a hearsay exception does it become necessary to consider the confrontation clause.

State v. Bauer, 109 Wis.2d 204, 210, 325 N.W.2d 857, 860 (1982).

Section 908.045(1), STATS., provides that former testimony is not excluded by hearsay rules if the declarant is unavailable as a witness.[4] Preliminary hearing testimony falls within this firmly rooted hearsay exception. ***Bauer***, 109 Wis.2d at 215, 325 N.W.2d at 863. Here, Hurley's police chief testified that a bench warrant had been issued for Gundy's arrest and that he was a fugitive. After the preliminary hearing, Gundy failed to appear at scheduled hearings and a subpoena went unserved because he gave a false address. The record supports the trial court's determination that Gundy was unavailable and that the State made good faith efforts to locate him.

Tracy does not specifically challenge this finding in his main brief, but argues in his reply brief that ***Sheehan*** requires that a witness be "permanently

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[4] Section 908.045(1), STATS., provides:

> Hearsay exceptions; declarant unavailable. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) FORMER TESTIMONY. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross-, or redirect examination, with motive and interest similar to those of the party against whom now offered.

unavailable" to satisfy the confrontation clause.[5] Tracy misreads ***Sheehan***. In ***Sheehan***, our supreme court held a psychiatrist's opinion, that there was a significant chance that testifying in court would cause a witness to become psychiatrically ill, was insufficient to demonstrate unavailability. ***Id***. at 765, 223 N.W.2d at 604. The court observed that if a witness, "mentally or physically … in all probability … would never be able to attend the trial, former testimony is allowable at the trial." ***Id***. at 765, 223 N.W.2d at 604-05. It concluded that without a showing that the witness's infirmity was permanent, it was error to admit his deposition. ***Id.*** Here, there was no suggestion that Gundy was unavailable due to an infirmity and, consequently, ***Sheehan*** does not control.

Tracy's primary contention is that he was denied his right to confront witnesses because at the preliminary hearing he was not allowed to delve into matters of weight and credibility on cross-examination. Confrontation rights under the United States and Wisconsin Constitutions are identical. *See* ***State v. Ray***, 166 Wis.2d 855, 866 n.4, 481 N.W.2d 288, 293 n.4 (Ct. App. 1992). The confrontation clause is satisfied if the witness is unavailable and the evidence bears some indicia of reliability. ***Bauer***, 109 Wis.2d at 211, 325 N.W.2d at 861. Former testimony taken under oath will generally bear sufficient indicia of reliability. ***Id***. at 215-16, 325 N.W.2d at 863. The following features of preliminary hearing testimony provide assurances of trustworthiness: the declarant being under oath; the defendant's representation by counsel; the

[5] We note that Tracy's reply brief does not conform to RULE 809.19(1)(e), STATS., which requires that the "argument on each issue must be preceded by a one sentence summary of the argument …." Tracy's reply brief argument is entitled "LAW AND ARGUMENT" and proceeds to discuss harmless error, sufficiency of the evidence, hearsay, due process, equal protection, confrontation rights, discovery violations and newly-discovered evidence issues all within this heading. Counsel is reminded that violations of rules of appellate procedure may be sanctioned pursuant to RULE 809.83(2), STATS.

declarant being subjected to cross-examination; the proceedings being conducted before a judicial tribunal and the recording of the proceedings. *See* ***id***. at 219, 325 N.W.2d at 865.

In ***Bauer***, our supreme court noted that cross-examination during the preliminary examination is formally limited to the issue of probable cause. ***Id***. at 220-21, 325 N.W.2d at 866. Nonetheless, the court concluded that "inconsistencies in a witness's … cross-examination at the preliminary examination are not only relevant to plausibility but also work to discredit the witness." ***Id***. at 221, 325 N.W.2d at 866.

Here, the trial court noted:

> I find that there was a good deal of cross examination, far beyond what is normal in a Preliminary Examination. There were some instances where [defense counsel] was not permitted to go into discovery, however, there were several questions which … found some inconsistencies, and those will be questions of credibility which the jury can determine ….

The transcript reveals nearly ten pages of cross-examination, while the State's direct questioning covered fewer than eight pages. The State made eight objections; two were overruled and one was not ruled upon. The remaining five objections were sustained on the basis that they sought discovery. Gundy was subjected to competent cross-examination with respect to his testimony that Tracy participated in hitching the snowmobile trailer to the truck. For example, on direct, Gundy testified that Tracy participated in unhitching and hitching up the snowmobile trailer. On cross-examination, he testified:

> Q What did [Tracy] do when he was out of the vehicle?
>
> A Got out, went between the truck and the trailer, unhooked some wires and some cables.
>
> Q What were you doing at that time?
>
> A Sitting in the truck.
>
> Q So you're telling us that you could observe Mr. Tracy doing this while you were seated in the truck?
>
> A No. I could observe him between the truck and the trailer. I'm only assuming what he was doing there.
>
> Q So you are telling us now that you didn't or did observe him taking apparatus off the trailer hitch?
>
> A I did not.

We conclude that the features under ***Bauer*** necessary to provide sufficient indicia of reliability to satisfy the confrontation clause were present. Gundy testified under oath; Tracy was represented by counsel; Gundy was subjected to "a good deal of" cross-examination; the proceedings were conducted before a judicial tribunal and recorded. ***Id***. at 219, 325 N.W.2d at 865. The record supports the trial court's exercise of discretion in permitting the admission of Gundy's preliminary examination testimony.

3. Discovery Violations

Next, Tracy argues that the State's failure to disclose Gundy's criminal record and Amborn's inconsistent statement and plea violated his due process rights.[6] The prosecution's suppression of exculpatory evidence upon request violates due process when it is material either to guilt or punishment,

[6] Tracy separates his discovery violation claim into seven arguments; however, because they overlap, we characterize them as a single issue. *See* ***State v. Waste Mgmt.***, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978).

irrespective of the prosecution's good or bad faith. ***Brady v. Maryland***, 373 U.S. 83 (1963).

In his statement of the case, Tracy contends that he "moved the court for an order requiring the state to supplement any additional discovery it has obtained" and that the State failed to do so. Tracy's statement of the case and argument make blanket assertions with respect to the existence of exculpatory evidence and his requests for it, but fail to provide any record citation. Tracy's failure to provide record citation to facilitate review of his claim of error violates RULE 809.19(1), STATS., and permits this court to disregard his argument.

> [W]e decline to embark on our own search of the record, unguided by references and citations to specific testimony, to look for … evidence to support [the argument]. Section (Rule) 809.19(1)(e), Stats., requires parties' briefs to contain "citations to the … parts of the record relied on" and we have held that where a party fails to comply with the rule, "this court will refuse to consider such an argument …." "[I]t is not the duty of this court to sift and glean the record *in extenso* to find facts which will support an [argument]."

Tam v. Luk, 154 Wis.2d 282, 291 n.5, 453 N.W.2d 158, 162 n.5 (Ct. App. 1990) (citations omitted).

4. Newly-Discovered Evidence

Tracy offers a five-sentence argument that the trial court erroneously denied his motion for a new trial based on newly-discovered evidence. He offers no record citation or legal authority, other than "the 5th, 6th, 8th, and 14th Amendments to the United States Constitution; and Article 1, Sections 1, 3, 6, 7, 8, and 11 of the Wisconsin Constitution." Under § 809.19(1)(e), STATS., proper appellate argument requires the contention of the party, the reasons therefor, with

citation of authorities, statutes and that part of the record relied on; inadequate argument will not be considered. *See* ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980).

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.