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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

November 30, 2015

To:

Hon. Kenneth W. Forbeck
Circuit Court Judge
51 S. Main Street
Janesville, WI 53545

Gerald A. Urbik
Asst. District Attorney
51 S. Main St.
Janesville, WI 53545

Jacki Gackstatter
Clerk of Circuit Court
Rock Co. Courthouse
51 S. Main Street
Janesville, WI 53545

Warren D. Weinstein
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Thomas Brady Aquino
Aquino Law LLC
131 W. Wilson Street, Ste. 1201
Madison, WI 53703

You are hereby notified that the Court has entered the following opinion and order:

2014AP2978-CR State of Wisconsin v. Johnnie Wade Ransom (L.C. # 2013CF1028)

Before Lundsten, Sherman, and Blanchard, JJ.

Johnnie Ransom appeals a judgment of conviction for false swearing and two counts of bail jumping. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We affirm, based on a complete failure of Ransom to preserve any of his arguments on appeal by presenting them first to the circuit court.

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

A jury convicted Ransom in 2014 of false swearing based on evidence that he had given false testimony at the 2012 criminal trial of another person. Because Ransom was on bail at the time of the 2012 trial, he was also charged with and convicted of two counts of bail jumping. Ransom filed a timely appeal.

Ransom first argues that the false swearing statute under which he was convicted, WIS. STAT. § 946.32(1)(a), does not apply to oral false statements because the prohibition in the false swearing statute against "mak[ing] or subscrib[ing]" a false statement refers exclusively to written, not oral, statements. As a result, Ransom asserts, the State erroneously charged him with false swearing rather than perjury. However, our review of the record reveals that Ransom never presented to the circuit court, nor even hinted at, the argument that the false swearing statute does not apply to oral trial testimony.

Ransom argues in the alternative that interpreting the false swearing statute to include oral false statements violates his substantive due process rights. Ransom argues that this interpretation allows the State to circumvent the materiality element of perjury that the State has the burden of proving, *see* WIS. STAT. § 946.31, because the false swearing statute does not require the State to prove materiality. Again on this issue, however, our review of the record reveals that Ransom never presented to the circuit court, nor even hinted at, the argument that it somehow violates his substantive due process rights to interpret the false swearing statute to apply to both oral and written false statements.

Ransom casts his first argument as a sufficiency of the evidence challenge. The general rule is that a party seeking reversal of a circuit court decision may not advance an argument that was not presented to the circuit court. *See* ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d

897 (Ct. App. 1995); *see also* ***State v. Ndina***, 2009 WI 21, ¶¶29-30, 315 Wis. 2d 653, 761 N.W.2d 612 (failure to timely raise an argument in the circuit court may forfeit the argument on appeal). An exception to the general rule of forfeiture applies to sufficiency of evidence challenges. ***State v. Hayes***, 2004 WI 80, ¶4, 273 Wis. 2d 1, 681 N.W.2d 203. However, this exception to the general forfeiture rule applies only if "there is a true sufficiency of the evidence issue." *See* ***State v. Steiner***, 2013AP2629-CR, unpublished slip op., ¶¶7-9 (WI App. Oct. 16, 2014). Otherwise, a defendant remains subject to the general forfeiture rule prohibiting a party from raising arguments on appeal that it did not present to the circuit court.

In ***Steiner***, the defendant argued on appeal that there was insufficient evidence to convict him of child abandonment. ***Id.*** at ¶1. The parties agreed that the sufficiency of the evidence was dependent on the interpretation of the "intent to abandon" element in the child abandonment statute and whether a defendant must intend to permanently leave a child. ***Id.*** Neither the child abandonment statute nor the pattern jury instruction on the abandonment charge defined "abandon," and at trial the defendant's "trial counsel did not request a different or additional jury instruction defining" the term "abandon." ***Id.*** at ¶3. Although the defendant framed his argument on appeal as a challenge to the sufficiency of the evidence, we concluded that he was in fact bringing "a novel statutory interpretation question first raised after trial" rather than a "true sufficiency of the evidence issue." ***Id.*** at ¶9. On this basis, we concluded that the defendant forfeited his ability to challenge the statutory interpretation on appeal. ***Id.*** at ¶1.

Here, like the defendant in ***Steiner***, Ransom raises a "novel statutory interpretation question" for the first time on appeal in asking us to interpret the phrase "makes or subscribes" in the false swearing statute to apply only to false written statements. *See* ***id.*** at ¶7. Ransom did not object to the pattern jury instruction on the false swearing charge. In fact, Ransom's trial counsel

submitted the pattern instruction to the circuit court in his proposed packet of instructions. Like the defendant in ***Steiner***, Ransom did not ask the circuit court for a different or additional instruction on the phrase "makes or subscribes," and never argued to the jury that the phrase applied only to false written statements. *See* ***id.*** at ¶3. Instead, as in ***Steiner***, "the jury was not instructed on any particular definition of '[makes or subscribes,]' thus leaving the jury free to decide what the term means in this context." *See* ***id.*** at ¶10. Therefore, as in ***Steiner***, we reject Ransom's attempt to cast a statutory interpretation argument as a challenge to the sufficiency of the evidence, because this is an attempt to advance "a novel statutory interpretation" argument on appeal that was never made in the circuit court. *See* ***id.*** at ¶9.

Ransom acknowledges in the statement of issues portion of his principal brief that the circuit court did not address any issue that he raises on appeal, and we conclude that Ransom has forfeited his appellate arguments by not raising them to the circuit court. Whether we address forfeited arguments is within our discretion, *see* ***State v. Kaczmarski***, 2009 WI App 117, ¶7, 320 Wis. 2d 811, 772 N.W.2d 702 ("Forfeiture is a rule of judicial administration, and whether we apply the rule is a matter addressed to our discretion."), and we see no good reason why we should not apply the forfeiture rule here.[2]

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[2] We also observe briefly that, were we to address Ransom's forfeited arguments, we would likely reject them and affirm the judgment of conviction. Regarding the meaning of "makes" in the false swearing statute, this topic was addressed by the court in ***State v. Devitt***, 82 Wis. 2d 262, 271-72, 262 N.W.2d 73 (1978), which defined "makes" to be a general term that includes both oral and written statements. While the court's interpretation in ***Devitt*** was based in part on a "scale in declining severity" involving the perjury and false swearing statutes and this "scale" has since been altered by the legislature, other evidence of the legislature's intent supports applying this interpretation to the felony offense contained in the current false swearing statute.

Regarding the due process argument, this is premised on the notion that felony false swearing would completely swallow the perjury statute if false swearing applies to oral statements. This premise is

(continued)

Therefore,

IT IS ORDERED that the circuit court's judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeal

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incorrect. There are situations in which the State could charge a person who falsely testified with perjury, but not with felony false swearing. For example, a court has authority to direct a person to take an oath prior to giving an oral statement even when there is no legal requirement or authorization for that oath. In such a situation, as long as the false statement was material to the proceeding, the perjury statute would apply, but the felony false swearing statute would not. Thus, felony false swearing does not encompass all offenses punishable under the perjury statute. In sum, we would likely conclude that Ransom's argument fails for at least the reason that it rests on a false premise.