COURT OF APPEALS
DECISION
DATED AND FILED

April 24, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 00-3234-CR
00-3235-CR
01-0158-CR
01-0159-CR

Cir. Ct. No. 98-CF-304
99-CF-21
98-CF-304
99-CF-21

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN A. SCHULTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

Before Nettesheim, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Brian A. Schultz appeals from a judgment convicting him of conspiracy to commit burglary, four counts of felony bail

jumping, and solicitation to commit perjury, and from an order denying his postconviction motion. We reject Schultz's challenges to the circuit court's evidentiary ruling. We conclude that the bail jumping charges were not multiplicitous or violative of double jeopardy, that the circuit court properly instructed the jury on conspiracy and burglary, and that the prosecutor's closing argument did not impermissibly vouch for the credibility of several witnesses. We will discuss the facts as they relate to each appellate issue.

¶2 In connection with the 1997 burglary of the Brockwell home, Schultz was charged with conspiracy to commit burglary, solicitation to commit perjury and four counts of bail jumping. He was convicted after a jury trial.[1]

¶3 On appeal, Schultz argues that the circuit court erroneously permitted the homeowner, Dawn Brockwell, to testify that her daughters told her that they learned from Jeffrey Spotz that Schultz had burglarized their home. Schultz objected on hearsay grounds, and the prosecutor responded that the daughters would testify later. The court admitted Brockwell's testimony on this basis. Thereafter, the promised witnesses testified in the manner suggested by the prosecutor. Even if Brockwell's testimony should have been disallowed at the time it was offered, the condition attached to Schultz's objection was ultimately satisfied. Therefore, Schultz was not harmed by the decision to permit Brockwell to testify about her daughters' statements to her. The error was harmless. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1984).

[1] The jury acquitted Schultz of two conspiracy counts relating to the burglary of the Hellen home.

¶4 Schultz complains that Detective Fladten was permitted to testify that Christopher Krerowicz apologized to Mrs. Hellen and that everyone at school knew what David Wenzel and Schultz had been doing. Schultz objected on hearsay grounds, and the prosecutor countered that the evidence was offered to show Krerowicz's state of mind. We do not find reversible error here because the challenged testimony related to crimes at the Hellen residence, for which Schultz was acquitted. Therefore, any error was harmless. *See* ***id***.

¶5 We conclude that Schultz's other evidentiary objections are waived for appeal. Trial counsel did not object when Juan Contreras, David Wenzel and Jeffrey Spotz testified about statements each made to others about Schultz's involvement in the Brockwell burglary.[2] Because trial counsel did not object, the claims are waived. ***State v. Hartman***, 145 Wis. 2d 1, 9-10, 426 N.W.2d 320 (1988).[3]

¶6 Schultz next argues that three of his four bail jumping convictions are multiplicitous. Schultz's bail bond prohibited him from committing any crimes, engaging in criminal activity, directly or indirectly threatening, harassing, intimidating or otherwise interfering with victims or witnesses in the case, and

[2] Although Schultz litigated a postconviction ineffective assistance of counsel claim, he did not challenge counsel's failure to object to these statements. Schultz limited himself to a challenge to counsel's performance regarding the jury instruction on conspiracy. At the postconviction motion hearing, Schultz's trial counsel testified that there were instances when he did not object to testimony because he wanted the information before the jury for another reason. It was within trial counsel's discretion to decide when to invoke the rules of evidence in a given instance. The rules of evidence do not exist in a vacuum, free from the thought processes and strategy of counsel.

[3] To the extent we have not addressed an argument made on appeal, the argument is deemed rejected. ***State v. Waste Mgmt., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

having contact with Wenzel. Wenzel testified that Schultz approached him at a high school football game and asked Wenzel to lie for him. The bail jumping charges arose from this contact with Wenzel.

¶7 The jury convicted Schultz of violating his bond conditions by having contact with Wenzel, interfering with Wenzel in his capacity as a witness, soliciting Wenzel to perjure himself, and committing the crime of soliciting Wenzel's perjury. Schultz argues that his one contact with Wenzel should not have yielded multiple bail jumping charges.

¶8 The circuit court denied Schultz's motion to dismiss the bail jumping charges as multiplicitous. The court held that although legally identical, each charge required proof of a different fact to show that Schultz intentionally failed to comply with terms of his bond.

¶9 "Multiple convictions for the same offense violate the double jeopardy protections of the state and federal constitutions." ***State v. Selmon***, 175 Wis. 2d 155, 161, 498 N.W.2d 876 (1993). Wisconsin employs a two-part test for multiplicity:

> The first part consists of an analysis under ***Blockburger v. United States***, 284 U.S. 299, 304 (1932), to determine whether the offenses are identical in law and fact.... The second part, which we reach if the offenses are not identical in law and fact, is an inquiry into legislative intent.
>
> If under the ***Blockburger*** test the offenses are different in law or fact, a presumption arises that the legislature intended to permit cumulative punishments for both offenses. This presumption can only be rebutted by clear legislative intent to the contrary.

State v. Derango, 2000 WI 89, ¶¶29-30, 236 Wis. 2d 721, 613 N.W.2d 833 (citations omitted).

¶10 All of the charges were made under the bail jumping statute, WIS. STAT. § 946.49(1) (1997-98).[4] During his prohibited contact with Wenzel, Schultz solicited Wenzel to commit perjury and interfered with Wenzel as a witness. Schultz's single contact with Wenzel provided a factual basis for multiple bond violations and required proof of different facts. The charges are not identical in fact.

¶11 Having determined that the charges are not identical in fact, we turn to the presumption that the legislature intended cumulative punishments. ***Derango***, 2000 WI 89 at ¶30. In ***State v. Anderson***, 219 Wis. 2d 739, 756, 580 N.W.2d 329 (1998), the court concluded that the legislature intended to permit separate punishments for violations of different conditions of bail. Under the two-part test for multiplicity, we conclude that the three bail jumping charges are not multiplicitous.

¶12 Schultz challenges the jury instructions. He first argues that the circuit court erroneously gave the pattern burglary instruction, WIS JI—CRIMINAL 1421 (1996).[5] Consistent with the pattern jury instruction, the court instructed the jury as follows:

> The crime of burglary is committed by one who intentionally enters a building without the consent of the person in lawful possession and with intent to steal.

This instruction tracked the burglary statute, WIS. STAT. § 943.10(1):

[4] All further statutory references are to the 1997-98 version.

[5] The pattern jury instruction for burglary was changed after the trial in this case. We review the instruction used at trial, not the replacement instruction.

> Whoever intentionally enters any of the following places without the consent of the person in lawful possession and with intent to steal or commit a felony in such place is guilty of a Class C felony….

¶13 Schulz objected to the burglary instruction, arguing that it did not inform the jury that a defendant must enter the building knowing that he or she does not have consent to do so. The circuit court rejected this argument.

¶14 We agree with the circuit court. It is well settled that a circuit court may use the language of the statute when instructing the jury. *See* ***State v. Gresens***, 40 Wis. 2d 179, 186, 161 N.W.2d 245 (1968) (not error to instruct jury by repeating the statutory definition). The court did so here. Furthermore, the instruction told the jury that the entry had to be intentional and without consent. We do not think the jury was confused about the elements of the crime or that the instruction omitted an element of the offense.[6]

¶15 Schultz also challenges the pattern instruction on perjury. He contends that the instruction should have stated that Schultz had to have known that the statement was false and did not merely believe that the statement was false. Schultz waived this issue by not objecting to the perjury instruction. ***State v. Koch***, 144 Wis. 2d 838, 850, 426 N.W.2d 586 (1988).

¶16 If the issue were not waived, we would note that the circuit court instructed the jury regarding the definition of perjury consistent with the language of the statute, WIS. STAT. § 946.31(1). Therefore, the instruction was sufficient.

[6] Even if the instruction were deficient as Schultz claims, he did not contend at trial that he believed or knew he had permission to enter the Brockwell home. Schultz denied participating in the burglary and the conspiracy and denied entering the Brockwell home or taking anything from the home without consent.

See ***Gresens***, 40 Wis. 2d at 186. Section 946.31(1) defines perjury as "a false material statement which the person does not believe to be true …." Schultz mistakenly relies on ***State v. Petrone***, 166 Wis. 2d 220, 479 N.W.2d 212 (Ct. App. 1991), for the proposition that the instruction had to tell the jury that Schultz knew his statement was false. ***Petrone*** does not depart from the statutory requirement that the defendant did not believe the statement was true. ***Id.*** at 226.

¶17 Finally, Schultz challenges the conspiracy instruction. Again, the court gave the pattern jury instruction. Schultz argues that this instruction is defective because it does not require an agreement among those who combined, formed with another, worked together or agreed to commit an offense.

¶18 The relevant portion of the conspiracy statute provides: "[W]hoever, with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime may, if one or more of the parties to the conspiracy does an act to effect its object, be fined or imprisoned …." WIS. STAT. § 939.31. The legislature clearly contemplated that parties could agree or combine with each other to commit a crime. The pattern jury instruction, WIS JI—CRIMINAL 570, reflects this statute.

¶19 Schultz discusses various Wisconsin cases. We think the analysis is controlled by ***State v. Moffett***, 2000 WI 130, 239 Wis. 2d 629, 619 N.W.2d 918. In ***Moffett***, the supreme court adopted an analysis of the court of appeals in which we stated that "conspiracy requires proof of an element—an agreement or combination for the purpose of committing a crime." ***Id.*** at App. ¶14. ***Moffett***'s view of the conspiracy statute is echoed in the jury instruction used in this case. The instruction was sufficient.

¶20 Schultz next argues that the circuit court should have instructed the jury that the conspiracy in this case ended with the commission of the burglary. Otherwise, Schultz argues, the jury could have determined that Schultz's subsequent solicitation of Wenzel to commit perjury was part of the conspiracy.

¶21 In its closing argument, the State argued that the conspiracy charge related solely to the burglaries, explained in detail the elements of conspiracy and how they pertained to the burglaries, and never suggested that Schultz's solicitation of Wenzel was part of the conspiracy. Additionally, when the circuit court read the jury instructions, it clarified that the conspiracy to commit burglary charges related to burglary counts one and three, "one at the Hellen home and one at the Brockwell home." The practical effect of the State's closing argument and the court's instruction was to clarify for the jury that the conspiracy charge related solely to the burglaries.

¶22 Schultz argues that in her closing argument, the prosecutor improperly vouched for the credibility of several witnesses. Schultz did not object. Failure to object to remarks in a closing argument is waiver for purposes of appeal. ***State v. Davidson***, 2000 WI 91, ¶86, 236 Wis. 2d 537, 613 N.W.2d 606.

¶23 Even if the issue were not waived, we would not rule in Schultz's favor. Although the prosecutor remarked on the credibility of various witnesses, she did so in the context of challenging Schultz's credibility as a witness, and her arguments were linked to the evidence in the case. We do not think that the prosecutor's argument went "beyond reasoning from the evidence and suggest[ing] that the jury should arrive at a verdict by considering factors other than the evidence." *See* ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App.

1995). The prosecutor fairly commented on the evidence and did not impermissibly vouch for the State's witnesses' credibility.

¶24 Having rejected all of Schultz's claims of error, we also reject his request for reversal in the interest of justice. *See* ***State v. Marhal***, 172 Wis. 2d 491, 507, 493 N.W.2d 758 (Ct. App. 1992).

By the Court.—Judgment and order affirmed.

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