

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 3, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP1490-CR

Cir. Ct. No. 2004CF149

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TYLER N. MILLS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: MICHAEL A. SCHUMACHER, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Tyler Mills appeals a judgment of conviction for attempted child enticement. Mills argues he: (1) was denied due process because he was not present during the individual voir dire of jurors; (2) was denied due process because he did not waive his right to testify during the second phase of his

bifurcated trial; (3) was denied the right to present a defense because he was denied the benefit of expert testimony regarding the intent element during the first phase; and (4) could not have been found guilty because the jury deadlocked on an attempted sexual assault of a child charge, which he contends shares three elements with the enticement charge. We reject Mills' first argument on the merits and reject the remaining three arguments because he forfeited and/or conceded them.

BACKGROUND

¶2 Tyler Mills, who has fetal alcohol syndrome, was charged with attempted child enticement and attempted child sexual assault following an arranged meeting with a person who he thought was a fourteen-year-old girl. In fact, it was a police officer posing as a young girl in an online chat room. Mills pled not guilty and not guilty by reason of mental disease or defect and a bifurcated trial was held.

¶3 Prior to trial, Mills' attorney requested individual voir dire of the jurors. At the commencement of the trial and with Mills present, the court and counsel engaged in a lengthy discussion of the topic. The court agreed to the individual voir dire in chambers, to follow a general voir dire in court. Mills expressly waived his right to be present during the individual voir dire.

¶4 At the guilt phase, the jury convicted Mills on the attempted enticement charge, but deadlocked on the attempted assault charge. At the mental responsibility phase, the jury found Mills responsible. Mills filed three postconviction motions, which the circuit court denied. Mills now appeals.

DISCUSSION

¶5 Mills argues he was denied his right to be present during a portion of the individual jury voir dire. *See* WIS. STAT. § 971.04(1)(c);¹ *State v. David J.K.*, 190 Wis. 2d 726, 736, 528 N.W.2d 434 (Ct. App. 1994). While Mills concedes he knowingly and voluntarily waived his right to be present during part of the individual voir dire, he asserts he believed the only questions that would be asked in his absence would pertain to jurors' past exposure to instances of sexual assault. Mills contends he desired to be present during any questions regarding fetal alcohol syndrome.

¶6 Mills raised this argument in a postconviction motion and the circuit court held an evidentiary hearing in which both Mills and his counsel testified. Rejecting Mills' argument, the court wrote:

Mills acknowledged that the reason he waived his right to be present was to enhance the likelihood that jurors would be candid. The transcript of the trial reveals that moments after indicating he would waive his right to be present during questions about sexual assault, Mills' attorney advised there were a couple more topics that he wanted to cover while his client was absent, including Fetal Alcohol Syndrome. Mills was present for this discussion.

Indeed, Mr. Thompson testified at the post-trial motions hearing that he and Mr. Mills had agreed Mills should be absent during questions about FAS, for the same reasons he would not be present for questions about sexual assault. Thompson testified that he discussed all this with his client and that Mills had actually given him questions to be asked during individual voir dire. The court finds Thompson's testimony to be credible. Mills['] testimony on the topic was not.

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

....

Mr. Mills specifically waived his right to be present during questions about sexual assault. He understood that questions about FAS would also be asked of prospective jurors outside of his presence because he was in the room when his own lawyer indicated as much.

¶7 The court’s credibility and factual findings are supported by the record and not clearly erroneous. *See David J.K.*, 190 Wis. 2d at 738. Relying on those findings as we must, we discern no error in Mills’ absence from the individual voir dire.

¶8 Moreover, we agree with the circuit court that any error would have been harmless. Mills has not suggested that any member of his jury was biased, which is the measure of prejudice in jury selection cases. *See, e.g., State v. Mendoza*, 227 Wis. 2d 838, 863, 596 N.W.2d 736 (1999). Mills’ attorney was present at the voir dire to protect his interests and Mills “does not advance on appeal any specific contribution he would have made had he been present.” *See State v. Peterson*, 220 Wis. 2d 474, 489-90, 584 N.W.2d 144 (Ct. App. 1998). Having had an opportunity to review the individual voir dire transcript, Mills identifies nothing in the answers of the impaneled jury members that should have led to any of them being stricken or questioned further.

¶9 Mills next argues he was deprived of his right to testify during the second phase of his bifurcated trial. The State argues Mills forfeited this argument by failing to set forth an offer of proof as to what his testimony would be. *See State v. Winters*, 2009 WI App 48, ¶¶16, 24, 317 Wis. 2d 401, 766 N.W.2d 754. We agree. Further, Mills concedes this argument by his failure to file a reply brief. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97,

109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶10 Mills also argues he was improperly barred from presenting expert testimony at the guilt phase of his trial. The State argues Mills forfeited this argument because he never requested that the experts testify, *see Schonscheck v. Paccar, Inc.*, 2003 WI App 79, ¶11, 261 Wis. 2d 769, 661 N.W.2d 476, and never set forth an offer of proof as to what their testimony would be, *see State v. Mendoza*, 80 Wis. 2d 122, 164-65, 258 N.W.2d 260 (1977). We agree. Further, Mills concedes this argument by his failure to file a reply brief. *See Charolais*, 90 Wis. 2d at 109.

¶11 Finally, Mills contends he could not have been found guilty on the enticement charge because the jury deadlocked on the sexual assault charge, resulting in inconsistent verdicts. The State responds that “inconsistency in criminal verdicts is not *per se* grounds for reversal,” *State v. Thomas*, 2004 WI App 115, ¶41, 274 Wis. 2d 513, 683 N.W.2d 497, and that, as long as sufficient evidence supported the count on which the jury found the defendant guilty, there is no basis for reversal. *State v. Rice*, 2008 WI App 10, ¶¶26-28, 307 Wis. 2d 335, 743 N.W.2d 517. Mills concedes this argument by his failure to file a reply brief. *See Charolais*, 90 Wis. 2d at 109.

By the Court.—Judgment and order affirmed.

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

