COURT OF APPEALS
DECISION
DATED AND FILED

May 17, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 01-0479-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

EDWARD F. TOPPING,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sauk County: VIRGINIA WOLFE, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

¶1 VERGERONT, J.[1] Edward Topping appeals a judgment of conviction and sentence for disorderly conduct as a repeater and the order denying

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated.

his motions for postconviction relief. He makes these claims on appeal: (1) the trial court erroneously exercised its discretion in admitting other acts evidence; (2) the State did not properly prove his prior convictions as required by WIS. STAT. §§ 939.62 and 973.12 for application of the repeater penalty enhancement; and (3) the presence of a hearing-impaired juror constituted a denial of his constitutional right to a fair trial by an impartial jury, or, alternatively, the trial court erroneously denied him an evidentiary hearing that would have shown he was erroneously denied a fair and impartial jury because the juror was hearing impaired. We conclude: (1) the trial court did not erroneously exercise its discretion in making the evidentiary ruling; (2) the State did not prove Topping's prior convictions as required by statute and case law, and the repeater-enhanced portion of his sentence is therefore void; and (3) Topping has not shown that his right to a fair and impartial jury was violated and is not entitled to an evidentiary hearing at which he may attempt to establish that.

¶2 Accordingly, we affirm the judgment of conviction for disorderly conduct and the order denying the postconviction motions regarding the court's evidentiary ruling and the juror issue. We reverse the enhanced sentencing provision of the judgment and the court's denial of the postconviction motion regarding the penalty enhancement. We commute Topping's sentence to the maximum permitted for the offense of disorderly conduct, WIS. STAT. § 947.01. We remand with instructions for the trial court to enter an amended order in accord with this decision.

BACKGROUND

¶3 The complaint charged that on May 16, 1999, Topping engaged in disorderly conduct contrary to WIS. STAT. § 947.01 when he entered the residence

of Lisa Topping, his estranged wife, without knocking, refused to leave at her request, spat, yelled and cursed at her, and pushed her with his body and again with some boxes he was holding. The complaint invoked WIS. STAT. § 939.62,[2] and alleged that Topping was convicted on June 19, 1997, of misdemeanor battery and two misdemeanor convictions of criminal damage to property; the convictions remained of record and unreversed; and upon conviction of the charged offense and proof of repeater status, Topping could be imprisoned not more than three years.[3]

¶4 At trial, Lisa testified, as did the officer who arrived at Lisa's residence in response to her call. Lisa had signed a written statement just after the

[2] WISCONSIN STAT. § 939.62 provides in part:

> Increased penalty for habitual criminality. (1) If the actor is a repeater, as that term is defined in sub. (2), and the present conviction is for any crime for which imprisonment may be imposed, except for an escape under s. 946.42 or a failure to report under s. 946.425, the maximum term of imprisonment prescribed by law for that crime may be increased as follows:
>
> (a) A maximum term of one year or less may be increased to not more than 3 years.
>
> ….
>
> (2) The actor is a repeater if the actor was convicted of a felony during the 5-year period immediately preceding the commission of the crime for which the actor presently is being sentenced, or if the actor was convicted of a misdemeanor on 3 separate occasions during that same period, which convictions remain of record and unreversed. It is immaterial that sentence was stayed, withheld or suspended, or that the actor was pardoned, unless such pardon was granted on the ground of innocence. In computing the preceding 5-year period, time which the actor spent in actual confinement serving a criminal sentence shall be excluded.

[3] The penalty for disorderly conduct without the repeater penalty enhancement is a fine not to exceed $1,000 or imprisonment not to exceed ninety days or both. WIS. STAT. §§ 947.01 and 939.51(3)(b).

incident, which was consistent with the allegations in the complaint; but at trial she gave a version of the incident that was more favorable to Topping. The State impeached her with her written statement, which was entered into evidence.

¶5 When Lisa denied that she was afraid Topping was going to hit her, the prosecutor read this sentence from her statement: "I could tell he wanted to hit me." In cross-examination, defense counsel referred to that sentence and asked if Lisa knew Topping wanted to hit her or if she was just speculating:

> A. I just speculated that, and as I wrote in the report, I wrote it after the fact. I mean, I wrote it in little tiny print so that I could fit it in there.
>
> Q. And is this statement that you gave the police completely accurate?
>
> A. No, there's parts here that I exaggerated on. I admit that. At the time we weren't the best of friends.
>
> Q. He didn't pull his hand back or make a fist or anything like he was going to strike you or slap you in any way, did he?
>
> A. No, no.

¶6 On redirect, the prosecutor asked Lisa if she had any reason to believe from anything that happened in the past that Topping would hit her. When Lisa answered yes, the prosecutor asked, "and, in fact, you've reported that before, haven't you; is that correct?" At this point, defense counsel objected and the court heard argument outside the presence of the jury. The prosecutor asserted that defense counsel had "opened the door" by asking whether Lisa knew Topping was going to hit her or was just speculating. Defense counsel disagreed, and argued that the State was attempting to introduce evidence of a prior bad act, had not disclosed that before trial and had a duty to do so, and he had "no idea what other prior acts that may be here."

¶7 The court overruled the objection. The court agreed with the prosecutor that defense counsel had opened the door by asking Lisa if she was speculating when she wrote that she knew Topping was going to hit her, and the State could therefore "proceed as far as clarification and what was her basis for either saying it, or what was her basis for speculating it." The prosecutor thereafter elicited from Lisa that Topping had hit her and pushed her so that she fell down in one incident about five years before. However, Lisa denied the prosecutor's suggestion that she knew Topping was going to hit her this time because she knew from the previous incident what it was like when he was ready to hit her; she said that she assumed he wanted to hit her because "he was like in my face."

¶8 The jury found Topping guilty. The court sentenced Topping as a repeater to two years in prison. Topping filed post-verdict motions in which he challenged the trial court's overruling of his objection, requested a new trial based on the inability of a juror to hear the proceedings in their entirety, and contended that the sentence beyond ninety days was void as a matter of law because the State had not proved the prior convictions necessary for an enhanced penalty. The trial court denied these motions.

EVIDENTIARY RULING

¶9 Topping contends the trial court erroneously exercised its discretion when it overruled his objection and permitted the State to inquire into whether Lisa was just speculating when she wrote that she knew Topping was going to hit her. Topping contends the trial court did not follow the analysis required by ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), for the admission of prior

bad acts under WIS. STAT. § 904.04(2).[4] More specifically, he argues that the evidence of the prior incident to which Lisa testified was not admissible because it was not for a permissible purpose under § 904.04(2). He also argues that even if the evidence were offered for a permissible purpose, its probative value was outweighed by the danger of unfair prejudice.

¶10 The admissibility of evidence is generally a matter within the trial court's discretion, and we do not reverse discretionary rulings if the trial court applied the correct law to the facts of record and reached a reasonable result through a rational process. ***Sullivan***, 216 Wis. 2d at 780-81.

¶11 We do not address the merits of Topping's ***Sullivan*** argument because we conclude that Topping's objection to the trial court did not sufficiently alert the court that this was the basis for his objection. An objection to the admission of evidence must state the ground of the objection in a manner that is sufficient for the trial court to understand. ***State v. Agnello***, 226 Wis. 2d 164, 173-74, 593 N.W.2d 427 (1999). Topping's counsel objected because he had not had advance notice that the State intended to introduce evidence of Topping's prior conduct with his wife. He did not object because the purpose was not permissible under WIS. STAT. § 904.04(2) or because it was unfairly prejudicial when compared to its probative value.

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[4] WISCONSIN STAT. § 904.04(2) provides:

> (2) OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

¶12 Since advance notice was the only stated basis for defense counsel's objection, it was reasonable for the court to consider only that basis. The record supports the trial court's conclusion that the prosecutor had not breached a duty to disclose this line of questioning in advance because the prosecutor could not have anticipated that defense counsel would cross-examine Lisa in the way he did about her written statement that she knew Topping was going to hit her. Topping has identified no error of law the court made in rejecting his argument that lack of advance notice barred the State's line of questioning. Once the court made that ruling, it was incumbent on Topping to explain any other basis he wanted the court to consider for excluding that line of questioning, but he did not do that. Therefore, he has not preserved for appellate review the objection based on impermissible purpose under WIS. STAT. § 904.04(2) and unfair prejudice.

PROOF OF REPEATER STATUS

¶13 Topping is a repeater under WIS. STAT. § 939.62(2) if he was convicted of three separate misdemeanors within the five years immediately preceding May 16, 1999.[5] Since the compliant charged him as a repeater, alleging convictions of three misdemeanors on July 19, 1997, he is subject to the enhanced sentence of three years under § 939.62(1)(a) "[i]f the prior convictions are admitted by the defendant or proved by the state." WIS. STAT. § 973.12(1). An admission within the meaning of § 973.12(1) may not be inferred nor made by a defendant's attorney but must be a "direct and specific admission by the

[5] There need not be three separate court appearances, as long as there are convictions for three misdemeanors. ***State v. Koeppen***, 195 Wis. 2d 117, 126 n.4, 536 N.W.2d 386 (Ct. App. 1995).

defendant." ***State v. Koeppen***, 195 Wis. 2d 117, 127, 536 N.W.2d 386 (Ct. App. 1995) ("***Koeppen I***") (citation omitted).

¶14 Topping contends the court erred in sentencing him to more than the ninety days penalty for disorderly conduct because he did not admit the prior convictions necessary to establish his repeater status, and the State did not prove them. Topping asserts, first, that the State may not prove the prior convictions by means of judicial notice and, second, even if it may, the proof in this case is deficient. The State responds that it may prove prior convictions by judicial notice and that the record as a whole establishes Topping's admission of the prior convictions.

¶15 The application of WIS. STAT. §§ 939.62(2) and 973.12 to the undisputed facts of this case presents a question of law, which we review de novo. ***Koeppen I***, 195 Wis. 2d at 126.

¶16 We conclude Topping did not admit the prior convictions. We also conclude the State may prove prior convictions for purposes of the repeater penalty enhancement by means of judicial notice as provided in WIS. STAT. ch. 902. However, we conclude that the appellate record does not show the State presented the information to the trial court necessary for the court to properly take judicial notice of the prior convictions. We therefore hold that the State has not proved the prior convictions.

¶17 The record reveals the following with respect to Topping's prior convictions. The morning of the trial, before the court heard various pretrial motions, the prosecutor informed the court that there was a "housekeeping matter" to address and this exchange followed:

> [PROSECUTOR]: The housekeeping matter is this has been charged as a habitual criminality, and I would ask that the Court take judicial notice of his conviction in Sauk County in 95 CM 398.
>
> THE COURT: Any objection?
>
> [DEFENSE COUNSEL]: There's no objection, Your Honor.
>
> THE COURT: All right. The Court will take judicial notice of that conviction.
>
> [DEFENSE COUNSEL]: Your Honor, I believe that would go to – it doesn't go to the underlying crime.
>
> THE COURT: That's correct. It doesn't get mentioned to the jury.

After ruling on the pretrial motions, the court referred again to the matter of the sentence enhancer:

> THE COURT: I think [defense counsel's] motions I've already indicated that in taking judicial notice of the prior conviction, that goes to the elements for sentencing as an enhancer.
>
> [PROSECUTOR]: Your Honor, there may be more to that. If the defendant intends to testify, then the State believes that we need to inquire into the number of prior convictions.
>
> THE COURT: Yes, that would be correct. If there is that testimony, we do need to set that; so if, [defense counsel], you wish to call him before you do that, we'll have to take a recess and –
>
> [DEFENSE COUNSEL]: Uh-huh.
>
> THE COURT: -- determine that.
>
> I don't know if you want to go over that during a break. So if that matter does arise before the Court, the two of you have discussed your positions regarding prior convictions.

Topping did not testify at trial, so the question of the number of his prior convictions for that purpose was not further discussed.

¶18 At sentencing, the prosecutor argued to the court that Topping should receive a sentence of thirty months in prison. The prosecutor began her argument by giving Topping's criminal history, starting with two convictions in 1983 cases and concluding with a 1997 case. During the recitation of Topping's criminal history, the prosecutor discussed four 1995 cases:

> In 1995, 95-CM-57, he had a disorderly conduct, which was domestic abuse related. This one actually became a Sauk County ordinance. Also in '95 there were two additional – actually three additional cases, 95-CT-235, which was a OAR third; 95-CM-719, which was a bailjumping; 95-CM-398, which included battery and a bunch of additional charges. He eventually pled to a battery and two criminal damages, again domestic abuse related.
>
> He was given a chance to reinstate his license, and the OAR third and the bailjumping were dismissed. The battery, criminal damage – two criminal damages, he ended up entering a plea on; and a new case 96-CM-10 which was disorderly conduct, domestic abuse was rolled into that package and dismissed. He was given three years probation. But within the year of that sentence being issued he had already been revoked and he was given six months concurrent on each of those three counts.

¶19 The prosecutor referred again to case no. 95-CM-398:

> Certainly it's not been the same victim during all this time, although the 95-CM-398 charge which were the battery and the criminal damage are in fact the same victim as this particular crime.

¶20 At the conclusion of her remarks, the prosecutor stated that all the matters but one were of record in Sauk County. The prosecutor offered a certified copy of the judgment of conviction from outside Sauk County—for a misdemeanor battery entered in Columbia County on November 5, 1992—and the court received it into evidence.

¶21 Topping's counsel argued that Topping should be sentenced to jail with Huber privileges. During the course of his argument, he stated:

> I think obviously one of the major factors here is the gravity of the offense. We are dealing with a disorderly conduct which is a Class B misdemeanor. Normally has a maximum sentence here of ninety days in the county jail, but the penalties were enhanced because of some offenses that occurred back in 1995.

He then focused on certain of Topping's prior convictions, and apparently was referring to the 1995 cases when he said:

> And the other three offenses which I asked Mr. Topping, his recollection isn't real clear. The last time he was here in Sauk County three offenses out of the same event. So he's had two criminal arrests here in the last ten years which resulted in four misdemeanor convictions.

¶22 The court gave Topping the opportunity to speak. He contended the prosecutor was trying to "resentence [him] again on everything from [his] past," but he did not refer specifically to any prior convictions and he was not asked about any prior convictions.

¶23 The court began its sentencing remarks with this comment:

> THE COURT: Were we just dealing with a disorderly conduct charge that there was no other prior history to I don't think any of us would be here under these circumstances. But back when the complaint was filed in July of 1999, it stated right there that the penalty was a fine of $1,000, and/or imprisonment not more than three years based on the prior convictions that are outlined in the complaint.

The court then discussed a number of the prior charges against Topping and their dispositions, making the point that since various dispositions in the past had not

been successful in changing Topping's behavior, there was a significant need for rehabilitation and protection of the public. Topping interrupted at one point, stating: "I'm not trying to blame anybody else. It's like that probation; I revoked myself. I didn't get revoked. I revoked myself."

¶24 We address first the State's contention that the totality of the record establishes that Topping admitted the three prior convictions alleged in the complaint. The State relies on ***State v. Rachwal***, 159 Wis. 2d 494, 508-09, 465 N.W.2d 490 (1991), for the proposition that the trial court may determine that an admission has taken place based on the totality of the circumstances. The State points to the following circumstances, which, it contends, establishes Topping's admission: the allegations in the complaint, which Topping acknowledged he received at his initial appearance; the review by the prosecutor of his criminal history at sentencing; his attorney's comments on his prior history at sentencing; Topping's objection to being "resentenced" for everything he did in his past; the court's reference at sentencing to the repeater allegations in the complaint; and Topping's reference to "that probation [he] revoked [him]self" which, the State contends, must mean the probation the prosecutor earlier referred to as imposed in 95-CM-398.

¶25 The State's reliance on ***Rachwal*** is in error, as is its conclusion that this record establishes Topping's admission. In ***Rachwal***, the defendant entered a no contest plea. Before accepting that plea, the trial court engaged him in a colloquy that included drawing his attention to the factual repeater allegations in the complaint, explaining to the defendant their impact on the penalties he faced if he entered a plea, and ascertaining that the defendant understood. ***Id.*** at 502-03. Although the trial court did not directly ask the defendant whether the specified prior convictions existed and the defendant did not specifically acknowledge them,

the supreme court concluded the defendant made a direct, specific, and affirmative admission of the prior convictions when he entered the plea after having been fully informed of the repeater allegations and their effect on his penalty should he enter the plea. ***Id.*** at 511.

¶26 Because Topping did not enter a plea but was convicted by a jury, the trial court did not engage him in the type of colloquy that occurred in ***Rachwal***, nor did Topping enter a plea that we could consider to be an admission of everything the court explained to him. ***Rachwal*** does not support the proposition that a defendant who does not enter a plea admits the prior convictions simply because they are contained in the complaint of which he has notice and are pointed out to him before sentencing and he does not object. We also do not agree with the State that Topping's objection to being resentenced on his past history or his reference to the "revoked probation" constitute the specific, direct, and affirmative admission required by the case law. ***Id.*** at 507-08 (citing ***State v. Farr***, 119 Wis. 2d 651, 659-60, 350 N.W.2d 640 (1984)).

¶27 Since we conclude Topping did not admit to the prior convictions, we next consider whether the State has proved them. Before addressing the merits of Topping's argument that the State may not prove them by judicial notice, we observe that his trial counsel stated he had no objection to the court taking judicial notice. As the trial court at the postconviction hearing correctly recognized, this is not an admission of the prior convictions, which defense counsel may not make on behalf of his client, ***Koeppen I***, 195 Wis. 2d at 127, but is rather an agreement that the State could prove them by means of judicial notice. We conclude Topping has therefore waived the right to object on appeal to judicial notice as a method of proving the prior convictions. However, we address the merits of this argument in order to provide a more complete discussion of the issues both parties raise.

¶28 WISCONSIN STAT. ch. 902 governs the use of judicial notice to establish adjudicative facts. WISCONSIN STAT. § 902.01(1) provides in relevant part:

> (2) KINDS OF FACTS. A judicially noticed fact must be one not subject to reasonable dispute in that it is any of the following: (a) A fact generally known within the territorial jurisdiction of the trial court. (b) A fact capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
>
> (3) WHEN DISCRETIONARY. A judge or court may take judicial notice, whether requested or not.
>
> (4) WHEN MANDATORY. A judge or court shall take judicial notice if requested by a party and supplied with the necessary information.
>
> (5) OPPORTUNITY TO BE HEARD. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

We see nothing in the language of this rule that would categorically prevent its application to establish prior convictions for purposes of the repeater penalty enhancement. A prior conviction in a particular case may be a "fact capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" and, if it is, we see no reason that a court may not take judicial notice of the prior conviction under this statute.

¶29 Topping refers us to ***Perkins v. State***, 61 Wis. 2d 341, 212 N.W.2d 141 (1973), in which the supreme court held it could not take judicial notice of a prior conviction for the same conduct, which, the defendant asserted, made the conviction in the subsequent case double jeopardy. The prior conviction was not contained in the record before the supreme court. In reaching its conclusion, the court stated that, "While a court can take judicial notice of many facts that are

matters of indisputable common knowledge, it cannot take judicial notice of records that are not immediately accessible to it or are not under its immediate control." ***Id.*** at 346. The court reviewed its holding in earlier cases, observing it had "held that a circuit court cannot take judicial notice of its own records in another case. ***State v. LaPean*** (1945), 247 Wis. 302, 307, 19 N.W.2d 289; ***State ex rel. Mengel v. Steber*** (1914), 158 Wis. 309, 311, 149 N.W. 32." ***Perkins***, 61 Wis. 2d at 347. In ***Mengel***, the supreme court reversed the trial court because it took judicial notice of a judgment in another case without any evidence of that judgment. ***Mengel***, 158 Wis. 2d at 311. In ***LaPean***, the supreme court affirmed the trial court's refusal to take judicial notice that the defendant entered a guilty plea in a prior case for the same conduct when the documents offered by the defendant did not show the plea was accepted and the case was disposed of under the plea. ***LaPean***, 247 Wis. at 308.

¶30 Since ***Perkins*** was concerned with the authority of the appellate court to take judicial notice of documents not in the appellate record, it is not helpful in deciding the scope of the trial court's authority. ***LaPean*** and ***Mengel*** indicate only that a trial court may not take judicial notice of records in another case without an adequate basis. They do not preclude application of WIS. STAT. ch. 902, which was not in effect at the time, to records in another case.

¶31 We also do not agree with Topping that ***Koeppen I*** suggests a disapproval of taking judicial notice of prior convictions to prove repeater allegations for penalty enhancement purposes. In ***Koeppen I***, the defendant did not admit the prior convictions and, although the prosecutor made detailed reference to the defendant's prior criminal history at sentencing, he did not submit any proof of the prior convictions and did not ask the court to take judicial notice of them. ***Koeppen I***, 195 Wis. 2d at 127-28. At the postconviction hearing, the

State offered to file certified copies of the convictions, but the court did not permit that. However, the court stated that because the judgments of convictions in question were entered in the county in which the court sat, although in different branches, the court could take judicial notice of the convictions. ***Id.*** at 128. On appeal we expressly declined to address the State's argument that the trial court's action was sanctioned by WIS. STAT. § 902.01(6) because proof of the repeater allegation to support an enhanced sentence must be satisfied before the defendant is sentenced as a repeater. ***Id.*** at 129-30.

¶32 We did address the taking of judicial notice for this purpose in the later case, ***State v. Koeppen***, 2000 WI App. 121, 237 Wis. 2d 418, 614 N.W.2d 530, *review denied*, 2000 WI 121, 239 Wis. 2d 309, 619 N.W.2d 92 (Wis. Sept. 12, 2000) (No. 99-0418-CR) (***Koeppen II***). In ***Koeppen II***, the defendant at sentencing did not acknowledge his prior convictions and the State presented certified copies of the judgments of conviction. The judgments of conviction were not, however, in the appellate record, and the defendant argued on appeal that the record was therefore inadequate to establish the convictions because it contained only the defense counsel's admission, not the defendant's. We concluded:

> The record demonstrates that the State proved the habitual offender allegation at the sentencing hearing. The State offered certified judgments of conviction as permitted by WIS. STAT. § 973.12(1), the court took judicial notice of the judgments and Koeppen never objected to the documents or the procedure. Even if the trial court did not include these documents in the appellate record, the documents' existence at the time of sentencing is not negated because, as the appellant, Koeppen had the duty to ensure the completeness of the appellate record. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993). In such situations, we must assume that the missing material supports the trial court's ruling. *See* ***id.*** at 27.

Koeppen II, 2000 WI App at ¶37.

¶33 Topping argues that although we used the phrase "judicial notice" in ***Koeppen II***, the proof was not through judicial notice but through certified copies of the judgments of conviction, which is a separate method of proof under WIS. STAT. § 973.12(1) ("An official report … of this … state … shall be prima facie evidence of any conviction or sentence reported therein") and WIS. STAT. § 909.02(4) (Self-authentication–certified copies of public records).[6] We agree with Topping that judicial notice is a method of proving a judgment of conviction and it is unnecessary for the State to ask the court to take judicial notice of a judgment of conviction if the State has a document proving the judgment of conviction that is admissible in evidence. However, in ***Koeppen II***, the State apparently did not ask the trial court to receive the certified copy of the judgment of conviction in evidence, but instead offered the certified copy of the judgments as "the necessary information" it needed to supply the court under WIS. STAT. § 902.01(4) in order for the court to take judicial notice of the judgment of conviction. Therefore, in ***Koeppen II***, we sanctioned the use of judicial notice as a method of proving prior convictions for purposes of the repeater penalty enhancer.

¶34 It is true, as Topping points out, that we did so in the context of a certified judgment of conviction being presented to the court as the basis for taking judicial notice. However, nothing in ***Koeppen II*** suggests we established an exclusive method for taking judicial notice of judgments of conviction for

[6] Topping also refers us to WIS. STAT. § 908.03(22) (judgments of felony convictions not hearsay), § 908.03(23) (judgments as proof of matters of personal, family or general history or boundaries under certain conditions not hearsay), and WIS. STAT. § 889.07 (original court records when produced by custodian shall be receivable in evidence whenever relevant and a certified copy shall be received with like effect of original).

purposes of the repeater enhancement penalty. We therefore turn to the question whether in this case the State has properly proved the prior convictions by means of judicial notice.

¶35 The State appears to take the position that the court need not be presented with any information on the prior judgments of convictions other than the allegations in the complaint in order to take judicial notice of them. We say this because the State does not assert it did provide the court with any documents or other information when it asked the court to take judicial notice, nor does it point to any place in the record where it did so, and we have found none. The State does note the record shows it provided a copy of the three prior judgments of convictions to defense counsel. The record shows that, in responding to defense counsel's objection that he had no notice the State would question Lisa on Topping's prior bad acts, the prosecutor explained she had given copies of the convictions alleged in the repeater provisions of the complaint to defense counsel, and they related to Topping's prior battery of Lisa. However, we cannot infer from this interchange that the trial court was ever presented with the copies of the judgments of convictions alleged in the repeater provisions in the complaint.[7]

¶36 We agree with the State that it is possible to glean from the entire record, including the prosecutor's recitation of Topping's criminal history at sentencing, that Sauk County case 95-CM-398, of which it asked the court to take judicial notice, ended in the three 1997 misdemeanor convictions alleged in the repeater provision of the complaint. However, this does not alter the fact that the

[7] The State also views this interchange as support of its argument that Topping admitted the prior convictions, but for the reasons we have already discussed, defense counsel's possession of copies of these judgments does not support a determination that Topping admitted them.

record does not indicate that the trial court was presented with any document or other information, other than the allegations in the complaint, as a basis for taking judicial notice of those convictions.

¶37 We are satisfied that a court may not properly take judicial notice of a specific judgment of conviction based only on the allegation of the conviction in the complaint.[8] Rather, the person requesting that the court take judicial notice of a "fact capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," WIS. STAT. § 902.01(2)(b), must supply the court with "the necessary information," § 902.01(4). Unless the court is presented with some source that establishes the judgments of convictions, it cannot know the allegations in the complaint are adequate. Because, as we have stated above, judicial notice is one method of proving certain facts, the necessary information provided to the court need not be independently admissible or admitted into evidence. Thus, for example, when the prior judgment was entered in the same circuit court, the State could show the trial court the case jacket itself.

¶38 We have considered the possibility that the prosecutor in this case did present to the court the case jackets or some other document that showed the three judgments of conviction alleged in the complaint when it asked the court to take judicial notice of the conviction in Sauk County case 95-CM-398. If that did occur, it is indeed unfortunate that is not reflected in the record. However, we must conclude it is not reflected in the record, and, therefore, we cannot conclude the trial court properly took judicial notice of the three 1997 convictions. Since

[8] Of course, quite apart from the requirements of WIS. STAT. ch. 902, if the State could satisfy its obligation to prove the prior convictions, in the absence of an admission by the defendant, by the mere formality of asking the court to "judicially notice" the repeater allegations in the complaint, the State would in reality not be proving them, but only pleading them.

there is no other proof of those convictions, and since Topping did not admit them, we must reverse the enhanced portion of Topping's sentence and the order denying him relief from the enhanced portion, and we must commute the sentence to the maximum permitted for the offense of disorderly conduct without the repeater enhancement. *See* ***Koeppen I***, 195 Wis. 2d at 131. This may seem to some an unnecessarily "technical" approach. However, we have previously pointed out the necessity for the State to adhere to the formal proof requirements for repeater enhancements, ***id.*** at 130-31, and those requirements compel our conclusion here.

RIGHT TO FAIR AND IMPARTIAL JURY

¶39 According to an affidavit Topping submitted with his postconviction motion, after the verdict a paralegal employed by his attorney's firm interviewed a juror, Beverly Gaffney, who said she had a hearing impairment. The paralegal averred that Gaffney told him the following before refusing to answer further questions and hanging up: her hearing problem is probably from old age; she was given a hearing aid prior to the trial after the jury pool was asked by a deputy if anyone had a hearing impairment; she does not ordinarily use a hearing aid; the first device given to her did not work well; it "squealed" and this "squealing" noise started "later" in the trial. The affidavit also related a conversation with another juror in which that juror said he recalled things had to be repeated during the trial for the benefit of the hearing-impaired juror. Another paralegal employed by Topping's attorney's law firm averred that in a conversation with a third juror, that juror said he recalled a juror with a hearing problem but did not remember "any incidents of difficulty with the equipment."

¶40 The transcript of the trial shows that at voir dire the prosecutor asked if anyone had difficulty hearing her, and no one indicated yes. During opening statement, the court asked Topping's counsel to either keep his voice level up or use a microphone, explaining that one of the jurors was using a hearing-assisted device. The court also asked the officer during his testimony to keep his voice level up. In addition, during Lisa's testimony the trial court announced a short break because "we're having some difficulties." After the break the court said "thank you," the prosecutor asked "Are you able to hear me now without screaming?" and the record reflects that "a juror … nods head."

¶41 Topping argues he was denied his right to a fair and impartial jury guaranteed by the Sixth Amendment to the U.S. CONST. and WIS. CONST. art. I, § 7 because Gaffney was hearing impaired.[9] He relies on ***State v. Turner***, 186 Wis. 2d 277, 285, 521 N.W.2d 148 (Ct. App. 1994), in which we held that these rights were violated when either one or two jurors were unable to hear the testimony of a material witness. Because the defendant in that case raised the issue during trial, the trial court there was able to voir dire the jurors and make factual findings about the jurors' hearing ability, which we accepted on appeal. In this case, Topping did not make any objection or move for a mistrial during the trial so we have no factual findings by the trial court. The transcript of the trial does not show Gaffney did not hear any testimony or argument; rather, it shows the court made efforts on three occasions to make sure she was able to hear.

[9] The application of this constitutional standard to a given set of facts—in this case, the trial record of references to the hearing-impaired juror and the affidavits, which we take to be true for purposes of our discussion—presents a question of law, which we review de novo. *See* ***State v. Turner***, 186 Wis. 2d 277, 284, 521 N.W.2d 148 (Ct. App. 1994).

¶42 Topping argues in the alternative that he is entitled to an evidentiary hearing postconviction to inquire whether Gaffney did in fact hear all the trial testimony and argument. He has not, however, provided us with any authority for the proposition that he is entitled to a postconviction evidentiary hearing on this issue when he raised no objection at trial on the juror's ability to hear, even though it is evident from the record that he knew at trial that one juror had a hearing device. In ***State v. Hampton***, 201 Wis. 2d 662, 673, 549 N.W.2d 756 (Ct. App. 1996), we did remand for an evidentiary hearing for the trial court to conduct a hearing to determine the length of time a juror was sleeping, the importance of the testimony missed, and whether such inattention prejudiced the defendant. However, in that case the defendant had moved for a mistrial based on the juror's sleeping, and the court denied the motion without conducting a voir dire of the juror. Our reasoning was that, since it was conceded a juror had been sleeping, the trial court erroneously exercised its discretion by summarily foreclosing further inquiry. ***Id.*** The ***Hampton*** situation is significantly different from that here—where the trial record does not show the juror with the hearing device was unable to hear, the defendant made no motion or objection during trial, and the defendant seeks an opportunity postconviction to question the juror to determine if she was able to hear during the trial.

¶43 Assuming without deciding that Topping would be entitled to a postconviction evidentiary hearing even in the absence of raising the issue at trial if he made a sufficient showing, we agree with the trial court that he has not done so. Neither the affidavits nor the trial transcript provide evidence that Gaffney was not able to hear any portion of the testimony or argument at Topping's trial.

CONCLUSION

¶44 We affirm the judgment of conviction for disorderly conduct and the order denying the postconviction motion regarding the court's evidentiary ruling and the juror issue. We reverse the enhanced sentencing provision of the judgment and the court's denial of the postconviction motion regarding proof that Topping is a repeater. We commute Topping's sentence to the maximum permitted for the misdemeanor offense of disorderly conduct. We remand with instructions for the trial court to enter an amended order in accord with this decision.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. WIS. STAT. Rule 809.23(1)(b)4.