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DISTRICT II

September 11, 2024

To:

Hon. Steven M. Cain
Circuit Court Judge
Electronic Notice

Sonya Bice
Electronic Notice

Connie Mueller
Clerk of Circuit Court
Ozaukee County Justice Center
Electronic Notice

Daniel J. Fouliard
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Oconomowoc, WI 53066

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

2022AP314-CR	State of Wisconsin v. Daniel J. Fouliard (L.C. #2019CF331)
2022AP315-CR	State of Wisconsin v. Daniel J. Fouliard (L.C. #2020CF92)

Before Gundrum, P.J., Grogan and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Daniel J. Fouliard, *pro se*, appeals judgments convicting him of false imprisonment, intimidating a victim, disorderly conduct, stalking and three counts of bail jumping. He also appeals an order denying his postconviction motion. He argues: (1) he received ineffective assistance of counsel during his preliminary hearing; (2) there was insufficient evidence to support two of his convictions for bail jumping; (3) the bail jumping statute is unconstitutional; (4) the circuit court improperly allowed pastor testimony that was subject to privilege; (5) he received ineffective assistance of standby counsel; (6) he was improperly forced to allow standby counsel to cross-examine a witness; and (7) the circuit court improperly excluded evidence about events attended by the victim, M.S. 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 (2021-22).¹ We summarily affirm.

This case arises from a series of events involving Fouliard and his then-wife, M.S., which began mid-November 2019. The initial incident involved a confrontation at M.S.'s home where Fouliard cornered her in a bedroom, refused to let her leave, took her phone to prevent her from calling the police, and intimidated her with aggressive behavior. Following this incident, Fouliard was arrested and charged with false imprisonment, victim intimidation and disorderly conduct, all classified as domestic abuse. After his release on bail, Fouliard violated his bail conditions by contacting several people connected to M.S., including her pastor, her former employer, and her son's employer, to gather information about her. As a result, additional charges, including stalking and three counts of bail jumping, were brought against him in March 2020.

The two criminal cases were consolidated for trial. Fouliard chose to represent himself with standby counsel. He was convicted of all charges. Fouliard moved for postconviction relief. After an evidentiary hearing, the circuit court denied Fouliard's postconviction motions, and this appeal follows.

Fouliard first argues that he received ineffective assistance of counsel during the preliminary hearing. This claim is untimely. Claims of constitutional error at the preliminary hearing are waived unless raised before trial. *See State v. Webb*, 160 Wis.2d 622, 636, 467

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

N.W.2d 108 (1991). Because Fouliard did not raise this issue before trial, he has waived his right to appellate review.

Fouliard next argues that there was insufficient evidence adduced at trial to support his conviction for bail jumping by violating his bond, which “require[d] that he not directly or indirectly threaten, harass, intimidate or otherwise interfere with a victim.” We will uphold a jury verdict if any reasonable view of the evidence supports it. *See State v. Beamon*, 2013 WI 47, ¶21, 347 Wis. 2d 559, 830 N.W.2d 681. Multiple witnesses testified that Fouliard contacted them seeking detailed information about M.S. and sharing disparaging accusations about her. Fouliard admitted that he contacted these witnesses. This evidence was more than sufficient to meet the legal standard for conviction as to this charge.

Fouliard next argues that there was insufficient evidence to support his conviction for bail jumping by violating his bond, which “require[d] that he not directly or indirectly threaten, harass, intimidate or otherwise interfere with a witness.” Fouliard went to the home of his daughter’s former teacher, gave her a letter stating that his children were being manipulated and asked her to contact his child. The teacher testified at trial to these facts and Fouliard’s letter was read to the jury. Fouliard contends that no reasonable jury could find him guilty of bail jumping for these actions because the teacher did not, in fact, contact Fouliard’s daughter. Whether the teacher contacted Fouliard’s daughter is not relevant to whether Fouliard had the intent to influence his daughter, who was a potential witness to his criminal actions. Based on the letter and the teacher’s testimony, the jury could reasonably conclude that Fouliard committed the crime of bail jumping.

Fouliard next argues that the bail jumping statute, WIS. STAT. § 946.49(1), is unconstitutional. He contends the statute is unconstitutionally vague, violates due process and is overly broad. Although Fouliard discusses these constitutional claims in his brief, his arguments are undeveloped. He does not cogently explain why he believes the statute fails constitutional muster. We cannot serve as both advocate and court; therefore, we do not consider these arguments further. See *Cemetery Servs., Inc. v. DRL*, 221 Wis. 2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998).

Fouliard next argues that the circuit court improperly allowed his pastor to testify about information that was subject to privilege. “A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a member of the clergy in the member’s professional character as a spiritual advisor.” WIS. STAT. § 905.06(2). We narrowly interpret statutes creating evidentiary privileges. *Braverman v. Columbia Hosp., Inc.*, 2001 WI App 106, ¶13, 244 Wis. 2d 98, 629 N.W.2d 66. “A party asserting a privilege carries the burden to establish the privilege.” *Id.* The circuit court ruled in favor of Fouliard, prohibiting his pastor from testifying about any confidential conversations between them. At trial, the pastor testified about Fouliard’s attendance at church and the fact that she received some texts from him, without addressing the contents of the texts. She did not discuss the contents of any confidential conversations she had with Fouliard. Therefore, the pastor’s testimony did not violate § 905.06(2).

Fouliard next argues that he received ineffective assistance of standby counsel. Where, as here, a defendant asserts his right to represent himself, “the inadequacy of standby counsel’s performance ... cannot give rise to an ineffective assistance of counsel claim under the Sixth Amendment.” See *Simpson v. Battaglia*, 458 F.3d 585, 597 (7th Cir. 2006). Fouliard cannot

claim ineffective assistance of counsel after waiving his right to counsel and electing to represent himself.

Fouliard next contends that he was forced to allow standby counsel to cross-examine a witness. At the postconviction motion hearing, the circuit court made a factual finding that Fouliard voluntarily allowed standby counsel to cross-examine the witness. “The circuit court’s factual findings ... will be upheld unless they are clearly erroneous.” *State v. Gutierrez*, 2020 WI 52, ¶19, 391 Wis. 2d 799, 943 N.W.2d 870. Based on our review of the transcript, this factual finding is not clearly erroneous. Therefore, we reject this argument.

Finally, Fouliard argues that the circuit court improperly excluded evidence at trial about work conferences that M.S. attended. “Evidence which is not relevant is not admissible.” WIS. STAT. § 904.02. Evidence of work conferences M.S. attended had no bearing on the criminal charges against Fouliard. The circuit court properly exercised its discretion in excluding the evidence because it was not relevant.

IT IS ORDERED that the judgments and order of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals