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DISTRICT III

July 15, 2025

To:

Hon. Leon D. Stenz
Circuit Court Judge
Electronic Notice

Penny Carter
Clerk of Circuit Court
Forest County Courthouse
Electronic Notice

Eliot M. Held
Electronic Notice

Robert A. Kennedy, Jr.
Electronic Notice

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

2024AP376-CR State of Wisconsin v. Jed J. Flannery (L. C. No. 2020CF177)

Before Stark, P.J., Hruz, and Gill, 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).

Jed Flannery appeals from a judgment convicting him of two felonies and five misdemeanors arising out of a bar fight and subsequent attempts by law enforcement to apprehend him. 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 (2023-24).[1] We affirm.

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[1] All references to the Wisconsin Statutes are to the 2023-24 version.

Flannery first contends that the circuit court erred by refusing to strike for cause a potential juror who stated that it was "kind of stupid" to provide a presumption of innocence when a criminal act is "seen by millions of eyes." That juror was not empaneled, however. Any potential error was therefore harmless. *See* ***State v. Lindell***, 2001 WI 108, ¶113, 245 Wis. 2d 689, 629 N.W.2d 223 ("The substantial rights of a party are not affected or impaired when a defendant chooses to exercise a single peremptory strike to correct a circuit court error.").

Flannery next asserts that the circuit court erroneously exercised its discretion when it instructed the jury, consistent with a pattern jury instruction that was then in effect: "If you can reconcile the evidence upon any reasonable hypothesis consistent with the [d]efendant's innocence, you should do so and return a verdict of not guilty." Flannery had asked the court to instruct the jury that it *must*, rather than should, return a verdict of not guilty if it could reconcile the evidence upon any reasonable hypothesis of innocence. The modified language Flannery requested is consistent with an update to the pattern jury instruction that went into effect after Flannery's trial. *See* WIS JI—CRIMINAL 140 (2024). Flannery argues that it was not reasonable for the court to wait to use what he deems to be the "improved" language.

However, "[a] circuit court appropriately exercises its discretion in administering a jury instruction so long as the instructions as a whole correctly stat[e] the law and compor[t] with the facts of the case." ***State v. Langlois***, 2018 WI 73, ¶34, 382 Wis. 2d 414, 913 N.W.2d 812 (citation omitted). This court will independently determine as a question of law whether a jury instruction correctly states the law. ***Id.*** Flannery does not assert that the instruction given actually misstated the law. Nor could he reasonably do so, given that the old pattern instruction was upheld on appeal multiple times. *See generally* ***State v. Trammell***, 2019 WI 59, ¶¶26-59, 387 Wis. 2d 156, 928 N.W.2d 564 (discussing the history and constitutionality of the

instruction). Moreover, there is no requirement that a court employ the pattern instructions, which are merely advisory. ***Leibl v. St. Mary's Hosp. of Milwaukee***, 57 Wis. 2d 227, 233, 203 N.W.2d 715 (1973). Therefore, the court did not erroneously exercise its discretion by giving the old pattern instruction.

Finally, Flannery challenges the sufficiency of the evidence to support one of his misdemeanor convictions for battery because the victim of that count did not personally testify that she never consented to have Flannery cut her or that she experienced pain when he did so. Instead, the State introduced statements the victim made to a law enforcement officer to satisfy those elements. Specifically, the victim told the law enforcement officer that Flannery had thrown a phone at her and shattered a glass mug she was holding in her hand, which cut her and caused her pain without her consent.

Whether the State presented sufficient evidence to support a verdict is a question of law subject to our independent review. ***State v. Booker***, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676. We will affirm "unless the evidence, viewed most favorably to the verdict, is so lacking in probative value and force that no reasonable fact-finder could have found guilt beyond a reasonable doubt." ***State v. Routon***, 2007 WI App 178, ¶17, 304 Wis. 2d 480, 736 N.W.2d 530. We consider all of the evidence produced at trial, including evidence that the defendant challenges as being improperly admitted. ***State v. LaCount***, 2007 WI App 116, ¶22, 301 Wis. 2d 472, 732 N.W.2d 29. Here, we conclude that the law enforcement officer's testimony about statements the victim made was sufficient to satisfy the elements of misdemeanor battery. *See* WIS. STAT. §§ 940.19(1), 939.22(4).

Embedded in his sufficiency of the evidence argument, Flannery also raises ancillary claims that the victim's statements to the law enforcement officer were hearsay and inadmissible under the Confrontation Clause. Aside from failing to adequately develop these claims on appeal, Flannery forfeited them by failing to raise contemporaneous hearsay or confrontation objections in the circuit court when the law enforcement officer testified. *See* WIS. STAT. § 901.03(1)(a). We will not address Flannery's additional request that we review his hearsay and confrontation claims under the plain error doctrine because he did not raise the possibility of plain error until his reply brief. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661.

Upon the foregoing,

IT IS ORDERED that the judgment of conviction is summarily affirmed. 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