COURT OF APPEALS
DECISION
DATED AND RELEASED

January 7, 1997

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

NOTICE

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

No. 96-0590-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KERNEY WRIGHT,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed*.

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Kerney Wright appeals from a judgment of conviction for battery and kidnapping. *See* §§ 940.19(1) and 940.31(1)(b), STATS. He raises five issues. He claims: (1) that the trial court erred in admitting into evidence out-of-court statements of the victim under the excited-utterance hearsay exception; (2) that the trial court erred in admitting into evidence the victim's testimony at the preliminary hearing; (3) that the trial court erred in

excluding Wright's medical records; (4) that the verdict was not supported by the evidence; and (5) that the sentence imposed was excessive. We affirm.

Wright was charged with battery, second-degree sexual assault and kidnapping in connection with a dispute involving his girlfriend, the victim. During the dispute, Wright tied up the victim and assaulted her. The victim was able to escape, went to a neighbor's door, and the police were called. The victim made statements to the police regarding Wright's involvement in the crime while she was still very upset.

When the victim did not appear at trial, the State introduced "excited utterance" hearsay testimony through the police officer who was at the scene of the crime.[1] The State also introduced the victim's testimony at the preliminary hearing. During the trial, Wright sought to introduce his medical records. The trial court would not admit the records into evidence. The jury convicted Wright of kidnapping and battery but acquitted him of sexual assault.

Wright initially contends that error occurred when the trial court allowed a police officer to testify as to what the victim told him regarding the incident. Whether to admit evidence is within the trial court's discretion and we will uphold the trial court's determination if it is supportable by the record. ***State v. Patino***, 177 Wis.2d 348, 362, 502 N.W.2d 601, 606 (Ct. App. 1993). The first inquiry is whether the evidence fits within a recognized hearsay exception. If it does, confrontation clause implications must be considered. ***Id.***

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[1] RULE 908.03(2), STATS., provides:

> **Hearsay exceptions; availability of declarant immaterial.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
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> ....
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> **(2)** EXCITED UTTERANCE. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

The trial court did not err in allowing the police officer to testify as to what the victim told him because the victim's declarations qualify as an exception to the hearsay rule, namely, as an excited utterance under RULE 908.03(2), STATS. This exception to the hearsay rule "is based in the spontaneity of the statements and the stress of the incident which endow the statements with the requisite trustworthiness necessary to overcome the general rule against admitting hearsay evidence." ***State v. Moats***, 156 Wis.2d 74, 97, 457 N.W.2d 299, 309 (1990). "Statements made by a declarant will be admitted where indications are that he or she is still under shock of injuries or other stress due to special circumstances." ***Id.***

The declarant was the victim of a battery and was kidnapped by Wright. She was tied up, beaten and abused. After she was able to escape, a police officer arrived within minutes to interview her. While crying and still very upset, the victim told the police officer that her boyfriend, Wright, had hit her several times, forced her to remove her clothes, tied her up, sexually assaulted her, threw cold water on her, and put pieces of insulation in her shirt. There was hardly time for the victim to fabricate these declarations; therefore, the trial court did not err in finding the "requisite indicia of trustworthiness within this testimony." ***Id.***, 156 Wis.2d at 98, 457 N.W.2d at 310. This testimony properly falls within the excited utterance exception to the hearsay rule.

Wright also claims that admission of this testimony violated his right of confrontation. He claims the State did not establish that the victim was unavailable. ***White v. Illinois***, 502 U.S. 346 (1992), held that "where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the confrontation clause is satisfied." ***Id.***, 502 U.S. at 356. The excited utterance exception to the hearsay rule has been held to be "firmly rooted" for confrontation purposes. ***Patino***, 177 Wis.2d at 373-374, 502 N.W.2d at 611. The State, therefore, was not required to show that the victim was unavailable to testify at trial. *See* ***White***, 502 U.S. at 357.[2]

We next consider Wright's argument that the victim's preliminary hearing testimony is not admissible under the former-testimony exception to the hearsay rule. RULE 908.045(1), STATS., provides, in relevant part:

[2] As we show below, however, the State did make that showing.

> **Hearsay exceptions; declarant unavailable.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
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> > **(1)** FORMER TESTIMONY. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross-, or redirect examination, with motive and interest similar to those of the party against whom now offered.

As RULE 908.045(1) expressly provides, the witness must be "unavailable." "Availability" is defined at RULE 908.04(1)(e), STATS.:

> **Hearsay exceptions; declarant unavailable; definition of unavailability. (1)** "Unavailability as a witness" includes situations in which the declarant:
>
> > ....
> >
> > (e) Is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means.

The trial court's decision to admit the former testimony rests within its sound discretion. ***State v. Barksdale***, 160 Wis.2d 284, 287, 466 N.W.2d 198, 199 (Ct. App. 1991). The trial court's decision in the present case will not be reversed unless the court erroneously exercised its discretion. ***Id.***

The State demonstrated that the victim was unavailable for trial. There is no dispute that the victim had been subpoenaed by the State for trial. Further, the State attempted to contact the victim in person and process servers were sent to three locations where the prosecution thought the victim might go. The trial court's finding that the State made a good-faith effort in attempting to

produce the victim for trial, *see* ***State v. Nelson***, 138 Wis.2d 418, 437, 406 N.W.2d 385, 393 (1987) (a witness's unavailability is not demonstrated unless the prosecution has shown that it "made a good-faith effort to obtain his presence at trial"), is not clearly erroneous. *See* RULE 805.17(2), STATS., made applicable to criminal proceedings by § 972.11(1), STATS.

We also conclude that Wright's right to confront the victim was not compromised because of the introduction into evidence of the victim's preliminary hearing testimony. Again, when evidence fits in a "firmly rooted" hearsay exception, the confrontation clause is satisfied, reliability can be inferred, and the evidence is generally admissible. ***State v. Jackson***, 187 Wis.2d 431, 436-437, 523 N.W.2d 126, 129 (Ct. App. 1994). The former testimony exception to the hearsay rule is "firmly rooted." ***State v. Bauer***, 109 Wis.2d 204, 216, 325 N.W.2d 857, 863-864 (Ct. App. 1982). Wright was not denied his constitutional right to confrontation.

Wright also asserts that the trial court erred in refusing to admit medical records offered by the defense. Wright asserts, without further explanation, that his medical records "were relevant to Mr. Wright's prior testimony and would have corroborated the statements to which Mr. Wright testified to." He does not explain this contention or develop his argument. "We do not consider undeveloped arguments." ***State v. O'Connell***, 179 Wis.2d 598, 609, 508 N.W.2d 23, 27 (Ct. App. 1993). Wright has not demonstrated an erroneous exercise of trial court discretion.

Wright also argues that the evidence was insufficient to support his convictions. Again, Wright does not develop his argument. He also fails to cite any authority in support of his position. We decline to address this undeveloped argument as well. *See* ***State v. Shaffer***, 96 Wis.2d 531, 545-546, 292 N.W.2d 370, 378 (Ct. App. 1980) (under § 809.19(1)(e) proper appellate argument requires an argument containing the contention of the party with citation of authorities and statutes).

Finally, Wright claims that his sentence was so excessive as to shock the consciousness of the public. Sentencing is a discretionary act and this court presumes that the sentencing court acted reasonably. ***State v. Scherreiks***, 153 Wis.2d 510, 517, 451 N.W.2d 759, 762 (Ct. App. 1989). "A strong policy

exists against interference with the discretion of a sentencing court." ***Id.*** A sentence may be excessive when it shocks the public sentiment and violates the judgment of reasonable people concerning what is right and proper under the circumstances. ***State v. Spears***, 147 Wis.2d 429, 446, 433 N.W.2d 595, 603 (Ct. App. 1988).

The sentence imposed does not meet the shock-the-public-sentiment standard. The kidnapping conviction carried a maximum sentence of forty years and the battery conviction carried a possible additional term of nine months. The trial court sentenced Wright to ten years for the kidnapping, far below the maximum, and nine months for the battery in order to give Wright an opportunity for rehabilitation. The trial court also noted that Wright had a fairly extensive criminal record, that the crime was extremely serious, and that it had an obligation to protect the public. The trial court considered the appropriate sentencing factors. *See* ***State v. Harris***, 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984) (in imposing a sentence, a trial court must consider: (1) the gravity of the offense; (2) the character of the offender; and (3) the need to protect the public). The sentence was not excessive.

By the Court.—Judgment affirmed.

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