COURT OF APPEALS
DECISION
DATED AND RELEASED

September 25, 1996

No. 95-2324-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER T. SEILER,

Defendant-Appellant.

APPEAL from judgments and an order of the circuit court for Ozaukee County: WALTER J. SWIETLIK, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. Christopher T. Seiler appeals from judgments of conviction for two counts of first-degree sexual assault and from an order denying his motion for postconviction relief. On appeal, Seiler raises a host of

issues, none of which we find persuasive. Accordingly, we affirm the judgments and the order of the circuit court.

Seiler was convicted of having intercourse with two young girls, aged twelve and thirteen, some ten days apart. Each of the victims testified at the trial, and the jury found Seiler guilty on both counts. Further facts will be set forth as necessary.

We first address Seiler's contention that trial counsel was ineffective. We deem this issue waived. In ***State v. Machner,*** 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979), we held that "it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel. We cannot otherwise determine whether trial counsel's actions were the result of incompetence or deliberate trial strategies." Here, although Seiler's appellate counsel argued ineffective assistance in her motion for a new trial, she points to nothing in the record which reflects any attempt to produce the testimony of either trial attorney. We therefore deem this issue waived.

We turn next to Seiler's claim that the trial court erred in not granting a new trial. Under this rubric, Seiler presents three subissues. First, Seiler challenges the sufficiency of the evidence. This court will reverse a conviction only when the evidence considered most favorably to the State and the conviction is so insufficient in probative value and force that it can be said as a matter of law that no trier of facts acting reasonably could be convinced beyond a reasonable doubt. *See* ***State v. Poellinger,*** 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). We cannot so conclude.

The first victim, C.M.B., testified that Seiler went into her mother's bedroom, C.M.B. came in as well, and they had intercourse. A friend of C.M.B.'s testified that she saw the two go into the bedroom and that when C.M.B. came out, her shorts were ripped. The second victim, G.A.W., testified that she and C.M.B. went to Seiler's residence some ten days later. The three sat on Seiler's bed and Seiler began kissing her. At some point, C.M.B. left the room, and G.A.W. and Seiler had intercourse. C.M.B. testified similarly.

Seiler marshals much trial testimony from other witnesses and from the victims themselves to show how each victim's story was inherently or patently incredible. While the victims' testimony was inconsistent and sometimes contradicted, it was not inherently incredible. Inherently or patently incredible evidence is that type of evidence which is in conflict with nature or fully established or conceded facts. *See* ***Day v. State,*** 92 Wis.2d 392, 400, 284 N.W.2d 666, 671 (1979). The victims' testimony did not rise to this level, and we accordingly reject Seiler's challenge to the sufficiency of the evidence.

Seiler's second subissue concerns the *falsus in uno* instruction. He contends that the jury was misled by the court's giving this instruction sua sponte. We cannot agree. While its use has generally fallen into disfavor, it remains appropriate where false testimony relates to a material fact and was willfully and intentionally made. *See* ***State v. Robinson,*** 145 Wis.2d 273, 281, 426 N.W.2d 606, 610 (Ct. App. 1988). Here, at the hearing on the motion for a new trial, the court stated that

> [t]he testimony was clearly contrary. The defendant testified that he did not have relations with either of these girls.

> The girls, unequivocally, testified that he did, and it wasn't a question of somebody being mistaken. It was clearly a question of somebody testifying falsely, and, as I say, I can't imagine a more appropriate situation for the giving of that instruction, although the court is reluctant to give it in most cases.

Because the trial court had the benefit of observing the actual testimony of the witnesses, its determination ought to be given much weight. ***Id.*** at 282, 426 N.W.2d at 611. We cannot, therefore, conclude that the trial court erred in giving the *falsus in uno* instruction.

Seiler's final subissue relating to the motion for a new trial concerns the trial court's sua sponte giving of the jury instruction on agreement. Seiler contends that the court gave the instruction prematurely, thereby coercing the jury. We cannot agree. In ***Quarles v. State,*** 70 Wis.2d 87, 90, 233 N.W.2d 401, 402 (1975), our supreme court discussed supplemental instructions such as the one given here and concluded that an argument that such a sua sponte instruction invaded the province of the jury was completely without merit. Moreover, the court went on to state that the trial judge can determine to give a supplemental instruction when the jury has deliberated for some time without reaching an agreement. *See* ***id.*** at 91, 233 N.W.2d at 403. Here, the jury had been out for more than two and one-half hours. We cannot conclude that the court erred in giving the supplemental instruction after that length of time.

We turn next to Seiler's claim that the trial court erred by failing to sever the two counts of sexual assault. Again, we cannot agree. A motion for severance is addressed to the trial court's discretion. ***State v. Locke,*** 177 Wis.2d

590, 597, 502 N.W.2d 891, 894 (Ct. App. 1993). The test for failure to sever turns to an analysis of other crimes evidence. *See* ***id.*** We are persuaded by the State's position that the crimes were similar in nature, close in time and relevant to demonstrate Seiler's plan. *See* § 904.04(2), STATS. Accordingly, we are unconvinced that the court misused its discretion in denying severance.

Seiler's next argument concerns prosecutorial misconduct. Although the argument heading alludes to a number of prosecutorial actions, the argument itself apparently details only one. On appeal, issues raised but not briefed or argued are deemed abandoned. ***State v. Johnson,*** 184 Wis.2d 324, 344, 516 N.W.2d 463, 470 (Ct. App. 1994). The only point properly preserved concerns the prosecutor withholding the address of a witness. However, the court ordered the prosecutor to give that address to the defense, and he apparently did. The defense elected not to call the witness. We therefore reject this argument.

Seiler also contends error in the court's quashing of a subpoena.[1] It is within the trial court's discretion to quash a subpoena. *See* ***State v. Horn,*** 126 Wis.2d 447, 456, 377 N.W.2d 176, 180 (Ct. App. 1985), *aff'd*, 139 Wis.2d 483, 407 N.W.2d 854 (1987). The court quashed the subpoena on the strength of § 885.205, STATS. The proper ground for quashing the subpoena, however, was § 905.04, STATS. An appellate court is concerned with whether a court decision being reviewed is correct rather than with the reasoning employed by the circuit

[1] Again, as in the last issue, the argument heading refers to far more than that which the argument actually covers. We here address only what Seiler actually argues.

court. *See* ***State v. Baudhuin,*** 141 Wis.2d 642, 648, 416 N.W.2d 60, 62 (1987). The court's quashing of the subpoena was correct and will be sustained. *See* ***id.***

Finally, Seiler broadly attacks the sentence. Much of that attack is unsupported by any reference to legal authority. We need not and do not consider such arguments. *See* ***State v. Pettit,*** 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). The only portion of this argument supported by authority contends that the prosecutor unfairly penalized Seiler for exercising his right against self-incrimination by referring to his lack of remorse. We cannot agree. In sentencing, the court made clear that it believed that Seiler testified falsely at trial. A sentencing court may consider a defendant's demeanor and failure to admit guilt without necessarily misusing its sentencing discretion. *See* ***State v. Baldwin,*** 101 Wis.2d 441, 459, 304 N.W.2d 742, 752 (1981). Our review of the sentencing transcript convinces us that the court did not give undue or overwhelming weight to any one factor. *See* ***id.*** We conclude that the sentence reflected a proper exercise of discretion.

By the Court.—Judgments and order affirmed.

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