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February 1, 2022

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

2020AP2018-CR

State of Wisconsin v. Eddie Lamont Virgil (L.C. # 2018CF1593)

Before Brash, C.J., Donald, P.J., and Dugan, J.

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).

Eddie Lamont Virgil, *pro se*, appeals a judgment of conviction, following a jury trial, for multiple offenses. Virgil also appeals from the order denying his motion for postconviction relief. Virgil argues that his trial counsel was ineffective, that the trial court erred in allowing the jury to view certain exhibits, and that there was insufficient evidence to support his conviction. Upon our review of the briefs and record, we conclude at conference that this matter is

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).¹ We summarily affirm.

In April 2018, Virgil was charged with six counts of felony bail jumping, six counts of knowingly violating a domestic abuse injunction, two counts of disorderly conduct, and one count each of stalking, criminal trespass, battery, and criminal damage to property. The charges related to the violation of a domestic abuse injunction. According to the facts in the record, Virgil and J.B. dated for about six months when J.B. ended the relationship. J.B. sought a restraining order against Virgil, and on December 26, 2017, the Milwaukee County Circuit Court issued a temporary restraining order (TRO) requiring Virgil to refrain from making threats against J.B., coming to J.B.'s residence, or contacting J.B. in any manner. Virgil failed to abide by the terms of the TRO. On January 2, 2018, the Milwaukee County Circuit Court issued an injunction requiring Virgil to refrain from threatening J.B., contacting her, or going to her home for a period of four years. Over the next three months, J.B. contacted police numerous times to report violations of the injunction. Virgil was ultimately charged with the crimes underlying this appeal.

The matter proceeded to trial. At the beginning of trial, the parties stipulated to the existence of facts satisfying the first and second elements of the bail jumping offenses. Specifically, the parties drafted a written stipulation which read, "On every date between May 6, 2017 and March 15, 2018, the Defendant, Eddie Virgil, having been charged with a felony

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

offense, had been released from custody under Chapter 946.49(1)(b), with a condition that he not commit any crime.” The State, Virgil’s attorney, and Virgil all signed the stipulation.

Officer Wayne Young testified that he and his partner, Officer Gary Inman, responded to J.B.’s home on the morning of December 27, 2017. Young testified that Inman personally served Virgil and signed the TRO, but that he was present at the time and instructed Virgil to leave.

J.B. also testified, telling the jury about the multiple threats she received from Virgil and Virgil’s repeated attempts to contact her. During J.B.’s testimony, the State introduced two exhibits—exhibits six and seven—which contained over 100 pages of screenshots from J.B.’s phone showing messages from Virgil. J.B. explained that she knew the messages came from Virgil because they were from numbers that Virgil had used in the past. She confirmed that the messages contained in the exhibits were messages that she received on her phone.

Following the close of the State’s evidence, Virgil informed the court that he would not testify. During Virgil’s colloquy waiving his right to testify, the parties discussed the bail jumping stipulation. Virgil told the court that he did not like the wording of the stipulation, specifically the use of the word “every,” telling the court that the wording implied that he was charged with a felony on every day between the listed dates. The parties agreed to remove the word “every” from the stipulation. This stipulation was redrafted and signed by all the parties. The revised stipulation was then included as a part of the jury instructions.

During deliberations, the trial court asked the parties whether they would object to any jury requests to view exhibits. Trial counsel objected, arguing that supplying the exhibits to the jury would be inappropriate because none of the exhibits were published to the jury when

introduced, but counsel acknowledged that the decision was a matter of trial court discretion. The trial court then ruled that if the jury requested any or all of the exhibits, the exhibits would be supplied. The jury ultimately did request the exhibits during deliberations, and they were supplied.

The jury found Virgil guilty of the stalking charge, five of the six bail jumping charges, and five of the six charges for knowingly violating a domestic abuse injunction. The trial court sentenced Virgil to a total of six years of initial confinement and eight years of extended supervision.

Postconviction, Virgil moved to proceed in his appeal *pro se*. The postconviction court granted his request. Virgil then filed a motion for postconviction relief, alleging that his trial counsel had been ineffective in multiple respects, that there was insufficient evidence to support his conviction, and that the trial court erred by allowing the jury to view exhibits six and seven during deliberations. The postconviction court denied the motion without a hearing. This appeal follows.

On appeal, as best as we can discern, Virgil raises a number of issues. He alleges that his trial counsel was ineffective for (1) failing to object to, or otherwise raise an issue with, the stipulation that involved Virgil waiving his right to a jury trial on certain elements of the felony bail jumping offenses; (2) failing to object to an allegedly improper jury instruction; (3) failing to object to certain testimony that was allegedly hearsay; and (4) failing to object to the introduction of exhibits six and seven. Virgil also contends that the trial court erred in allowing

the jury to view exhibits during deliberations, particularly exhibits six and seven. He also contends that there was insufficient evidence to support the jury's verdicts.²

A. Ineffective Assistance of Counsel

To substantiate a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's errors were prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* A defendant proves prejudice by demonstrating there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *See id.* at 697. This court's review of an ineffective assistance of counsel claim is a mixed question of fact and law. *See State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The trial court's findings of fact will not be disturbed unless they are clearly erroneous. *Id.* However, the ultimate determination of whether counsel's performance falls below the constitutional minimum is a question of law that this court reviews independently. *See id.*

² We note that Virgil's reply brief fails to address a majority of the State's arguments, effectively conceding those arguments. *See United Coop. v. Frontier FS Coop.*, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (stating that appellant's failure to respond in reply brief to an argument made in response brief may be taken as a concession). However, for the purposes of completeness, we address what we construe to be Virgil's arguments on appeal.

Virgil first argues that counsel was ineffective for failing to object to the inclusion of the stipulation in the jury instructions, which he claims was a new and separate stipulation that he had not signed or agreed to. Virgil is incorrect. The stipulation provided to the jury was simply a reprint of the stipulation that Virgil did sign and agree to. It was not a separate stipulation; rather, it was an instruction to inform the jury of the stipulation that had been reached by the parties. Because the inclusion of the stipulation in the jury instructions was proper, counsel did not render deficient performance for failing to object to its inclusion.

Virgil next contends that counsel was ineffective for failing to object to the jury instruction for bail jumping as it was presented to the jury.

The trial court “has broad discretion in deciding whether to give a requested jury instruction.” *State v. Anderson*, 2014 WI 93, ¶16, 357 Wis. 2d 337, 851 N.W.2d 760 (citations omitted). While we will not overturn its decision regarding a requested jury instruction absent an erroneous exercise of discretion, we independently review whether the given instruction accurately states the law as applied to the facts of the case. *See id.* In determining whether a jury instruction accurately stated the law, this court must “review the jury instructions as a whole to determine whether the overall meaning communicated by the instructions was a correct statement of the law.” *See State v. Langlois*, 2018 WI 73, ¶38, 382 Wis. 2d 414, 913 N.W.2d 812 (citation omitted).

Here, the circuit court read WIS JI—CRIMINAL 1795 (2018), the pattern jury instruction for bail jumping. The jury instructions explained that there were three elements to each bail jumping offense: (1) Virgil “was charged with a felony,” (2) Virgil “was released from custody on bond,” and (3) Virgil “intentionally failed to comply with the terms of the bond.” The

instructions further explained that, because the State’s theory of the bail jumping offenses was that Virgil had committed a separate offense in violation of the terms of his bond, the jury must be convinced beyond a reasonable doubt that Virgil did commit that separate offense in order to convict him of bail jumping. Because this is an accurate description of the law, *see* WIS. STAT. § 946.49(1), counsel was not deficient for failing to object to the issuance of WIS JI—CRIMINAL 1795.

Virgil next contends that counsel was ineffective for failing to object to Young’s alleged hearsay testimony, claiming that the lack of objections violated his right to confrontation.³ Young testified that on December 27, 2017, he and his partner served Virgil with a TRO prohibiting contact with J.B. Virgil argues that counsel should have objected to the admission of the affidavit of service, and claims that the affidavit was not properly authenticated because Young did not sign it. We agree with the State that Virgil’s argument “largely misses the point.” Young testified that he was present when his partner served Virgil with the TRO and could attest to the fact that the TRO presented at trial was a true and correct copy. Young thus had personal knowledge that the TRO was served on Virgil and his testimony to that effect was not hearsay and did not violate Virgil’s right to confrontation. Young’s testimony was sufficient to allow the jury to find that Virgil knew about the TRO. Counsel therefore did not render deficient performance by failing to object to Young’s testimony. Moreover, Virgil’s argument about proper authentication and the identification of the documents as affidavits is irrelevant. The

³ Virgil also claims that counsel was ineffective for failing to object to J.B.’s alleged hearsay testimony; however, it is unclear from his brief which testimony he is referring to. Accordingly, we do not address that argument. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (holding that the court may decline to review issues that are inadequately briefed and supported only by general statements).

TRO statute does not require service—formal or otherwise—on the defendant in order for the TRO to be valid. *See* WIS. STAT. § 813.12(3)(b) (“Notice need not be given to the respondent before issuing a temporary restraining order under this subsection.”).

Virgil’s last ineffective assistance of counsel argument, as understood by this court, is that counsel failed to object to the admission of exhibits six and seven because they constituted inadmissible other acts evidence. Virgil is mistaken.

The exhibits consisted of multiple messages Virgil sent to J.B. during the time period prohibited by the TRO and the injunction. The exhibits, therefore, were not other-acts evidence. They were relevant to the charged offenses. Specifically, count one of the information charged Virgil with stalking and alleged a course of conduct taking place from December 27, 2017, to March 15, 2018. The messages entered into evidence were sent to J.B. within that time period and are direct proof of Virgil’s course of conduct.

Finally, Virgil argues that there is no evidence that the messages actually came from him. J.B. testified that the messages shown in exhibits six and seven were from Virgil and stated that she recognized the phone numbers as belonging to Virgil. The jury, as fact finders, were entitled to believe J.B.’s testimony. Because exhibits six and seven were not other-acts evidence and were direct evidence of the charged offenses, counsel was not deficient for failing to object to their introduction.

B. Trial Court Error

Virgil contends that the trial court erred in allowing the jurors to view the trial exhibits, particularly exhibits six and seven, alleging a violation of his due process rights. He also alleges

that the trial court engaged in *ex parte* communications with the jury outside of his presence when deciding to allow the jury to view the exhibits. Virgil argues that his right to be present was violated.

The decision whether to provide an exhibit to the jury during deliberations is committed to the trial court's discretion. See *State v. Anderson*, 2006 WI 77, ¶27, 291 Wis. 2d 673, 717 N.W.2d 74, *overruled on other grounds by State v. Alexander*, 2013 WI 70, ¶28, 349 Wis. 2d 327, 833 N.W.2d 126. We will uphold discretionary decisions as long as the trial court “examined the relevant facts, applied a proper standard of law, used a demonstrated rational process and reached a conclusion that a reasonable judge could reach.” See *State v. Dorsey*, 2018 WI 10, ¶37, 379 Wis. 2d 386, 906 N.W.2d 158 (citation omitted). When determining whether to allow the jury to view an exhibit during deliberations, a trial court is to consider: “(1) whether the exhibit will aid the jury in proper consideration of the case; (2) whether a party will be unduly prejudiced by submission of the exhibit; and (3) whether the exhibit could be subjected to improper use by the jury.” *State v. Hines*, 173 Wis. 2d 850, 860, 496 N.W.2d 720 (Ct. App. 1993).

Here, the record does not support Virgil's claim that the trial court engaged in *ex parte* communications with the jury outside of his presence. The trial court and the parties engaged in a discussion about providing the exhibits to the jury. The court determined that because the exhibits were properly admitted, it would provide the exhibits to the jury if the jury made a request to view them. The court determined that in the interest of time, if the jury requested to see a specific exhibit, the court would provide all of the exhibits so as to prevent multiple requests. Virgil was present during the discussion. When the jury requested the exhibits, the court provided them, as was the understanding between all of the parties. This does not mean

that the court inappropriately communicated with the jury. Accordingly, Virgil fails to demonstrate that any trial court errors or constitutional violations occurred.

C. Sufficiency of the Evidence

Finally, Virgil contends that there was insufficient evidence to convict him of bail jumping. We agree with the State that “[w]hen coupled with the stipulation ... the State established all three elements of every bail jumping offense of which Virgil was convicted.” The evidence presented at trial was sufficient to establish that during the relevant time period, Virgil violated the terms of the TRO and injunction by constantly contacting and threatening J.B. The jury heard testimony from J.B. and viewed numerous graphic and threatening messages from Virgil to J.B. Thus, Virgil’s claim that there was insufficient evidence to sustain the verdicts on these counts fails.

For the foregoing reasons, we affirm the judgment of conviction and the order denying postconviction relief.⁴

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals

⁴ To the extent Virgil raises issues we have not addressed, we deem those arguments rejected as inadequately briefed and decline to address them. *See Pettit*, 171 Wis. 2d at 646.