OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

July 25, 2023

To:

Hon. Yadira Rein
Circuit Court Judge
Electronic Notice

Barb Bocik
Clerk of Circuit Court
Outagamie County Courthouse
Electronic Notice

Kieran M. O'Day
Electronic Notice

Steven Roy
Electronic Notice

Charles M. Stertz
Electronic Notice

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

2022AP624-CR State of Wisconsin v. Spencer P. Peace (L. C. No. 2018CF191)

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

Spencer Peace appeals from a judgment convicting him of two felonies. He claims he is entitled to a new trial due to violations of his constitutional rights to a speedy trial and to confront the witnesses against 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 (2021-22).[1] We affirm on the basis that Peace has failed to preserve his issues for appellate review.

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

The State charged Peace with one count of first-degree reckless homicide by delivery of a controlled substance and one count of delivering heroin, each based on allegations that a man died from an overdose of fentanyl-laced heroin that Peace had supplied. Although Peace filed a series of speedy trial demands, he was in jail for over three years before his case came to trial. During that time, a series of attorneys appointed to represent Peace withdrew, requiring the appointment of new attorneys of whom Peace did not approve. At trial, the State presented the testimony of two forensic toxicologists remotely—with the agreement of Peace's trial counsel, but without any colloquy to ascertain whether Peace knowingly, voluntarily, and intelligently waived his right to confrontation.

Following his conviction on both charges, Peace filed a notice of appeal without first filing a postconviction motion. Peace now argues to this court for the first time that: (1) the balancing test for evaluating speedy trial claims set forth by the United States Supreme Court in ***Barker v. Wingo***, 407 U.S. 514 (1972), should be overturned; (2) Peace's right to a speedy trial was violated even under the ***Barker*** test; and (3) the relinquishment of a defendant's Sixth Amendment right to confrontation requires a personal colloquy.

The Rules of Appellate Procedure provide that a defendant in a criminal appeal "*shall* file a motion for postconviction or postdisposition relief before a notice of appeal is filed unless the grounds for seeking relief are sufficiency of the evidence or issues previously raised." WIS. STAT. RULE 809.30(2)(h) (emphasis added). This provision advances the policy that "it is better to give the circuit court, which is familiar with the facts and issues, an opportunity to correct any error it has made before requiring an appellate court to expend its resources in review." ***State v. Walker***, 2006 WI 82, ¶30, 292 Wis. 2d 326, 716 N.W.2d 498. Furthermore, raising an issue in the circuit court provides the opposing party with an opportunity to provide factual submissions

that may refute the claim. *See* ***Gruber v. Village of N. Fond du Lac***, 2003 WI App 217, ¶27, 267 Wis. 2d 368, 671 N.W.2d 692. Accordingly, this court will deem forfeited and need not address any issue other than the sufficiency of the evidence that has not been preserved in the circuit court. *See* ***State v. Hayes***, 167 Wis. 2d 423, 425-26, 481 N.W.2d 699 (Ct. App. 1992).

In order to preserve an issue, a party must raise it "with sufficient prominence such that the trial court understands that it is called upon to make a ruling." ***Schwittay v. Sheboygan Falls Mut. Ins. Co.***, 2001 WI App 140, ¶16 n.3, 246 Wis. 2d 385, 630 N.W.2d 772. Peace did not raise the speedy trial and confrontation issues he presents on appeal by either pretrial or postconviction motions in the circuit court. Merely making a speedy trial demand is not the same as requesting relief based upon an alleged constitutional violation. And, although Peace raised an initial objection to the State's request to present the testimony of the forensic toxicologists remotely, his trial counsel subsequently advised the court at the final pretrial conference that the parties had resolved the issue, so that the court was never called upon to make a ruling. We therefore deem Peace's asserted appellate issues to be forfeited.[2]

This court retains the authority to review forfeited claims under the framework of ineffective assistance of counsel or our discretionary reversal power under WIS. STAT. § 752.35. ***State v. Klapps***, 2021 WI App 5, ¶28, 395 Wis. 2d 743, 954 N.W.2d 38 (2020). Peace, however, has not advanced any claim of ineffective assistance of counsel. Nor could this court consider

[2] Peace cites several cases in his reply brief for the proposition that the waiver of a constitutional right requires an intentional relinquishment by the defendant. These cases are not on point because the procedural bar we are discussing is the forfeiture of the right to raise an issue on appeal, not a waiver of the underlying constitutional right.

such a claim absent the testimony of trial counsel at an evidentiary hearing. *See* ***State v. Machner***, 92 Wis 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

As to our discretionary reversal power, WIS. STAT. § 752.35 allows this court to reverse a judgment by the circuit court "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." In order to establish that the real controversy has not been fully tried, a party must show "that the jury was precluded from considering important testimony that bore on an important issue or that certain evidence which was improperly received clouded a crucial issue in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (citations omitted). To establish a miscarriage of justice, there must be "a substantial degree of probability that a new trial would produce a different result." ***Id.*** (citation omitted). In either case, however, we will exercise our discretionary reversal power only sparingly. ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990).

Peace asserts that this court should address the merits of his claim notwithstanding any forfeiture due to the "extraordinary circumstance" that he "lost his attorney [of choice] due to the State's delays." That allegation is completely undeveloped. At a minimum, Peace fails to show how that factor provides any basis for us to conclude that a substantial degree of probability exists that a new trial would produce a difference result. Nor does Peace explain why the alleged loss of his counsel of choice resulted in the real controversy not being fully tried. We therefore conclude that Peace's argument does not satisfy this court's criteria for discretionary reversal.

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