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COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT I

Case No. 2017AP2292-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONAVINN D. COFFEE,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN
ORDER DENYING A MOTION FOR POSTCONVICTION
RELIEF, ENTERED IN THE CIRCUIT COURT FOR
MILWAUKEE COUNTY, THE HONORABLE
FREDERICK C. ROSA, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Is Defendant-Appellant Donavinn C. Coffee entitled to a new sentencing hearing because the circuit court relied on inaccurate information about his 2011 arrest for robbery when it sentenced him?

The circuit concluded that the information was inaccurate, but its reliance on it was harmless error.

This Court should conclude that Coffee forfeited this claim by not objecting to the information at sentencing.

Alternatively, this Court should conclude that any error by the circuit court was harmless.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither. The parties' briefs will fully develop the issues presented, which can be resolved by applying well-established precedent.

INTRODUCTION

Coffee contends that the circuit court, when sentencing him on armed robbery and recklessly endangering safety charges, relied on inaccurate information that he had a previous arrest for armed robbery. The truth is that Coffee's arrest was for allegedly robbing someone and punching that person in the face; no weapon was involved. He asks this Court to grant him a new sentencing hearing based on this error.

This Court should deny Coffee relief. His claim is forfeited because he did not object to or otherwise challenge at sentencing the information about the arrest. In addition, any error by the circuit court in relying on the information was harmless. The court's discussion of Coffee's prior arrest played a minor role in its sentencing decision. And whether

Coffee was arrested for robbing someone with or without a weapon would not have changed the court's point that it was making about Coffee's escalating criminal behavior when it discussed the arrest. Coffee's sentence would have been the same had the court known that Coffee was arrested for robbery instead of armed robbery.

STATEMENT OF THE CASE

Coffee and Antonio Hazelwood went on a robbery spree in Milwaukee on the morning of November 10, 2015. (R. 1:2–4.) The men robbed their first victim after blocking his car in an alley with the SUV they were driving. (R. 1:2.) Coffee demanded the victim's money and other possessions while pointing a shotgun at him. (R. 1:2.) Coffee took \$50 from the victim, along with his wallet and cell phone. (R. 1:2.)

Minutes later, Coffee and Hazelwood attempted to rob their second victim, who was walking on the street. (R. 1:2–3.) Coffee got out of the SUV with the shotgun and told the victim that he "better not run." (R. 1:2.) The victim ran, and Coffee shot him. (R. 1:3.) The victim had six shotgun pellet wounds to his head and upper back. (R. 1:3.)

Milwaukee Police Officer Joseph Goggins was in the area at the time of the crimes. (R. 1:3.) He heard about the SUV over his radio and then saw it. (R. 1:3.) Goggins turned on his squad's lights and siren to try to stop the SUV, but it sped away. (R. 1:3.) The SUV stopped in a parking lot, and Coffee and Hazelwood fled on foot. (R. 1:3.) Police later arrested them, and they both confessed. (R. 1:3–4.)

Coffee pleaded guilty to one count each of armed robbery, attempted armed robbery, and first-degree recklessly endangering safety. (R. 41:2–8.)

At sentencing, the State noted that Coffee had prior convictions for “contact after [a] domestic abuse arrest” and carrying a concealed weapon. (R. 42:9.) It also said that Coffee had been arrested in October 2014 for a battery and in December 2011 for an armed robbery, neither of which the State prosecuted. (R. 42:9.)

The court started its sentencing decision by discussing the severity of the crimes. (R. 42:20–22.) It described the robbery that led to the shooting as “terrible,” and the other robbery as “bad too.” (R. 42:20.) The court noted the effect being robbed has on victims, saying that “they are never the same,” and that “[i]t’s something like apprehension that’s always on your mind.” (R. 42:20.) And, it added, those feelings were “really amplified” for the victim Coffee had shot. (R. 42:20–21.) Coffee’s robberies, the court said, seemed “like it was just as much for kicks, fun, enjoyment, thrill, whatever it was, for actually taking property from these particular individuals.” (R. 42:22.)

Addressing Coffee’s criminal record, the court noted:

So you have got some misdemeanor cases; one successful probation, one unsuccessful probation. You have got a couple of police contacts; one significant concern because it sounds like it was an armed robbery which is what these offenses are.

So you basically are engaging in behavior that is kind of getting more serious. Domestic violence by itself is natured as assaultive behavior, meaning violence against another human being.

But these other things are violence and property crimes, and I don’t know what else to call it. So that pattern or your behavior or undesirable behavior is escalating. I don’t know what’s going on in your head causing you to make these decisions.

(R. 42:22–23.)

The court also considered the need to protect the public. It placed Coffee's crimes within the greater problem of gun violence in Milwaukee. (R. 42:21.) It told Coffee that Milwaukee was Coffee and his family's community, and that "they suffer consequences too" because they have to live with the violence. (R. 42:22.) And it discussed law enforcement's role in investigating gun crimes and protecting the public. (R. 42:24–25.)

The court also considered Coffee's personal characteristics. (R. 42:23–24.) It noted his family support, that he had a high school diploma, and some work history. (R. 42:23–24.) It mentioned Coffee's son, and concluded that he also would be a victim while Coffee was in prison and unable to take care of him. (R. 42:24.)

The court gave Coffee consecutive sentences totaling 13 years of initial confinement and nine years of extended supervision. (R. 42:26–27.)

Coffee filed a postconviction motion seeking resentencing. (R. 27.)¹ He claimed that the court had sentenced him based on inaccurate information because his Criminal Information Bureau report did not list an arrest for armed robbery or any other crime in December 2011. (R. 27:1–7.)

With its response to Coffee's motion, the State submitted police reports showing that Coffee had been arrested for "strong arm robbery" in December 2011. (R. 31:4–11.) The report indicated that the victim told police that Coffee, or "suspect # 1," had taken his cell phone and punched him in the face. (R. 31:5–8.) Another person,

¹ Coffee also sought sentence modification in his motion. (R. 27:8–9.) The circuit court denied his request. (R. 35:4–5.) Coffee does not renew this claim on appeal.

“suspect # 2,” then took money from the victim’s pants. (R. 31:5–8.) While he was with police, the victim saw the men who robbed him go into a house. (R. 31:5–8.) Police entered the house, found Coffee and the other man, and arrested them both for the robbery. (R. 31:5–8.) The victim saw the men’s faces as police brought them out of the house. (R. 31:9–10.) Later that day, the victim told police that he no longer thought that the men were the men who robbed him. (R. 31:9–10.) The victim’s brother, who had been with him during the robbery, told police that Coffee and the other man were not the robbers. (R. 31:8, 10.) Neither the victim nor his brother identified Coffee or the other man in a photo array. (R. 31:9–11.) Police released Coffee from custody, and the State did not file charges against him. (R. 31:10–11.)

The circuit court denied Coffee’s motion. (R. 35:3–5.) The court concluded that the information about Coffee’s arrest was inaccurate. (R. 35:3–4.) It said that the State’s description of Coffee’s arrest being for armed robbery was “problematic” because the report showed that no weapon was alleged to have been used. (R. 35:3.) It added that “more significantly, [Coffee] apparently was not involved in the offense.” (R. 35:3–4.) The court also acknowledged that it had considered Coffee’s arrest when it sentenced him. (R. 35:4.)

Ultimately, though, the court concluded that its reliance on the information about the arrest was harmless error. (R. 35:4.) The court noted that its decision had “focused primarily on the defendant’s conduct in this case, his contribution to the prevalence of gun violence that is threatening the fabric of our community, the impact of his crimes upon the victims and the greater community, his background and rehabilitative needs, and the need to protect the public.” (R. 35:4.) It concluded:

Even without information about the December 2011 police contact, the fact that the defendant used a

weapon in the commission of the offenses in this case and that he shot one of his victims would have led the court to the same conclusion that he was “engaging in behavior that is getting more serious” and that his “pattern . . . of undesirable behavior is escalating.”

(R. 35:4.)

Coffee appeals. (R. 36.)

STANDARD OF REVIEW

Whether a defendant has adequately preserved a claim for appeal, whether a circuit court has sentenced a defendant based on inaccurate information, and whether an error is harmless are questions of law that this Court reviews de novo. *State v. Tiepelman*, 2006 WI 66, ¶ 9, 291 Wis. 2d 179, 717 N.W.2d 1; *State v. Corey J.G.*, 215 Wis. 2d 395, 405, 572 N.W.2d 845 (1998); *State v. Ziebart*, 2003 WI App 258, ¶ 26, 268 Wis. 2d 468, 673 N.W.2d 369.

ARGUMENT

Coffee is not entitled to resentencing because he failed to object to the information about his 2011 arrest, and any error by the court in relying on the information was harmless.

A. Coffee forfeited his inaccurate information claim by not objecting at sentencing to the information about his arrest.

This Court should decline to reach the merits of Coffee’s claim that the circuit court sentenced him based on inaccurate information. Coffee forfeited appellate review of this claim by not objecting when the information was discussed at sentencing.

The failure to object to an alleged error when it occurs forfeits a party’s right to raise that error on appeal. *See State*

v. Pinno, 2014 WI 74, ¶ 56, 356 Wis. 2d 106, 850 N.W.2d 207; *State v. Torkelson*, 2007 WI App 272, ¶ 25, 306 Wis. 2d 673, 743 N.W.2d 511. The forfeiture rule applies to claims that a court considered improper matters at sentencing. See *State v. Leitner*, 2001 WI App 172, ¶ 41, 247 Wis. 2d 195, 633 N.W.2d 207, *aff'd*, 2002 WI 77, 253 Wis. 2d 449, 646 N.W.2d 341.

The forfeiture doctrine “facilitates fair and orderly administration of justice and encourages parties to be vigilant lest they lose a right by failing to object to its denial.” *Pinno*, 356 Wis. 2d 106, ¶ 56. A timely objection enables the circuit court “to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal.” *State v. Ndina*, 2009 WI 21, ¶ 30, 315 Wis. 2d 653, 761 N.W.2d 612.

Coffee forfeited his claim that the circuit court relied on inaccurate information about his 2011 arrest. Coffee did not object to or correct this information at sentencing. He had at least three opportunities to do so. First, he or his attorney could have corrected the State when it mentioned the arrest. (R. 42:9). Second, Coffee could have said something when he had a chance to address the court personally before it pronounced sentence. (R. 42:18.) Third, Coffee could have objected when the court discussed the arrest when explaining its sentence or at some point after. (R. 42:22.) Coffee did not do any of these things. He thus forfeited appellate review of his claim.

Further, while this Court can overlook the forfeiture rule, enforcing it here is appropriate. See *State v. Long*, 2009 WI 36, ¶ 44, 317 Wis. 2d 92, 765 N.W.2d 557. Defendants have the right to rebut evidence presented to and considered by a sentencing court. See *State v. Spears*, 227 Wis. 2d 495, 508, 596 N.W.2d 375 (1999); *State v. Damaske*, 212 Wis. 2d 169, 196, 567 N.W.2d 905 (Ct. App. 1997). And it is well-

established law that a court does not err by relying on information at sentencing that a defendant does not object to. *See State v. Benson*, 2012 WI App 101, ¶ 17, 344 Wis. 2d 126, 822 N.W.2d 484; *State v. Mosley*, 201 Wis. 2d 36, 45–46, 547 N.W.2d 806 (Ct. App. 1996); *Handel v. State*, 74 Wis. 2d 699, 704, 247 N.W.2d 711 (1976).

Coffee could have easily told the circuit court that the robbery he was arrested for in 2011 did not involve the use of a weapon. This would have allowed the court to correct any error immediately. Instead, Coffee let the court believe that the State was correctly relaying the details about the arrest. Coffee failed to alert the court that it was relying on inaccurate information. This Court should not address his claim.

This Court can address forfeited claims in the context of ineffective assistance of counsel. *See State v. Carprue*, 2004 WI 111, ¶ 47, 274 Wis. 2d 656, 683 N.W.2d 31. But Coffee did not assert in his postconviction motion that his counsel was ineffective for not challenging the information about the 2011 arrest. (R. 27.) He also does not raise an ineffective assistance claim on appeal. This Court should thus not reach the merits of Coffee’s inaccurate information claim.

B. The circuit court’s reliance on Coffee’s 2011 arrest, if error, was harmless.

If this Court reaches the merits of Coffee’s claim, it should conclude that any erroneous reliance by the circuit court on Coffee’s 2011 arrest was harmless error.

A defendant has a due process right to be sentenced upon materially accurate information. *Tiepelman*, 291 Wis. 2d 179, ¶ 9. A defendant seeking resentencing on the grounds that the circuit court used inaccurate information at

sentencing must show, first, that the information was inaccurate, and second, that the court actually relied on that information in forming its sentence. *Id.* ¶ 26.

If the defendant satisfies those requirements, the burden shifts to the State to prove that the error was harmless. *Tiepelman*, 291 Wis. 2d 179, ¶ 26. The State meets this burden by demonstrating that the court would have imposed the same sentence absent the error. *State v. Travis*, 2013 WI 38, ¶ 73, 347 Wis. 2d 142, 832 N.W.2d 491.

The circuit court's sentence would have been the same even had it not thought that Coffee's 2011 arrest was for armed robbery.

Initially, it was not error for the court to rely on Coffee's 2011 arrest when sentencing him. A sentencing court is allowed to consider uncharged and unproven offenses at sentencing. *State v. Allen*, 2017 WI 7, ¶ 30, 373 Wis. 2d 98, 890 N.W.2d 245. Prosecutors are not permitted to keep relevant information from the court. *Id.* Thus, as a general matter, the court properly relied on Coffee's arrest at sentencing.

Because the court could properly rely on Coffee's prior arrest, the only possible error that it made was by saying that the arrest was for armed robbery instead of robbery. And had the court known that Coffee was arrested for robbing someone without a weapon, its sentence would have been the same. The court still would have known that Coffee was arrested for a serious offense involving his taking another person's property without consent. The court also would have still known that Coffee was not prosecuted for this crime. It is unlikely that the Court would have given Coffee a different sentence had it known his previous arrest did not involve a weapon.

The absence of a weapon also would not have changed how the court specifically considered Coffee's 2011 arrest.

The court concluded that all Coffee's prior convictions and arrests showed that he was "engaging in behavior that is kind of getting more serious." (R. 42:22.) Similarly, it noted that his "behavior or undesirable behavior is escalating." (R. 42:23.) This all remains true whether police previously arrested Coffee for robbing someone with or without a weapon. Coffee has been convicted of a domestic violence crime and carrying a concealed weapon. He was arrested for battery and robbery. The court was sentencing him for robbing two people at gunpoint and shooting one of them. Coffee's behavior was "escalating" and "getting more serious" whether his previous arrest was for armed robbery or robbery.

And Coffee's arrest was a small part of the court's overall explanation of its sentence. The court focused on the crimes' severity and effect on the victims. (R. 42:20–21.) It also discussed Coffee's personal characteristics, including his family support, education, and work history. (R. 42:23–24.) Finally, the court discussed the need to protect the public. (R. 42:24–25.) That Coffee was arrested for an armed robbery, as opposed to a robbery without using a weapon, was not critical to the court's sentence. It would have been the same had the court known the correct details of Coffee's arrest.

This Court should also reject Coffee's arguments why the circuit court's discussion of the 2011 arrest was not harmless.

Coffee contends that the circuit court improperly reasoned that the error was harmless because there were other facts in the record that supported its sentence. (Coffee's Br. 8, 10–12.) This was not the court's rationale. Rather, it explained that the 2011 arrest played little role in its overall sentencing decision. (R. 35:4.) That is an appropriate consideration in evaluating whether an error is harmless. *Cf. State v. Jorgensen*, 2008 WI 60, ¶ 23, 310

Wis. 2d 138, 754 N.W.2d 77 (the importance of erroneously admitted evidence is a factor in considering harmlessness).

Moreover, even if the circuit court erred in its assessment of harmlessness, this Court owes that decision no deference because it is subject to de novo review. *Ziebart*, 268 Wis. 2d 468, ¶ 26. This Court can conclude on its own that any error was harmless, and for the reasons the State has given, it should do so.

Finally, the State responds to the statement in Coffee's brief that he did not commit the 2011 robbery because the victim and his brother later said that Coffee and his co-actor did not commit the crime. (Coffee's Br. 7.) It is unclear to the State whether Coffee is arguing that this means that any reliance on the 2011 arrest amounts to reliance on inaccurate information.

To the extent that Coffee is making that argument, though, this Court should reject it. As noted, a court may properly rely on a defendant's arrests and uncharged crimes when issuing a sentence. *Allen*, 373 Wis. 2d 98, ¶ 30. And the police reports from the arrest do not conclusively show Coffee's innocence. The victim told police shortly after the crime that he saw the two men who robbed him go into a house. (R. 31:5.) Police found Coffee in the house. (R. 31:5.) The victim and his brother later said that Coffee and the other man were not the people who had performed the robbery. (R. 31:9–10.) It is certainly possible to believe the victim's initial report that Coffee robbed him over his later retraction. The circuit court could thus properly rely on Coffee's 2011 arrest when it sentenced him. It erred only to the extent it thought the arrest was for armed, rather than unarmed, robbery. And that error was harmless.

CONCLUSION

This Court should affirm the circuit court's judgment of conviction and order denying Coffee's motion for postconviction relief.

Dated May 17, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,144 words.

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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 17th day of May, 2018.

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