COURT OF APPEALS
DECISION
DATED AND FILED

May 9, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1019-CR **Cir. Ct. No. 2003CF5809**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHNNY K. PINDER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 WEDEMEYER, P.J. Johnny K. Pinder appeals from a judgment entered after a jury found him guilty of eleven counts of forgery/uttering as party to a crime, and eleven counts of misappropriation of personal identification as

party to a crime, contrary to WIS. STAT. §§ 943.38(2), 943.201 and 939.05.[1] He also appeals from a postconviction order denying his motion alleging ineffective assistance of counsel. Pinder claims that: (1) the evidence was insufficient to support conviction on the forgery/uttering counts; (2) his right to a speedy trial was violated; (3) the trial court erred in summarily denying his ineffective assistance claim without conducting an evidentiary hearing; and (4) the trial court lacked subject matter jurisdiction over the misappropriation counts. Because the evidence was sufficient to support the forgery/uttering conviction; because his speedy trial right was not violated; because he failed to allege sufficient facts to warrant an evidentiary hearing on his ineffective assistance claim; and because the trial court had proper jurisdiction in this case, we affirm.

BACKGROUND

¶2 On September 9, 2003, at approximately 1:30 p.m., Greendale police officers responded to a call from St. Francis Bank regarding an attempt being made by the occupants in a car at the bank's drive-up window to deposit a check and receive cash back. The bank had received an advisory regarding potentially fraudulent activity relating to the account noted on the check. The police responded immediately and asked the three occupants to exit the vehicle. The driver was Laura Ramos, and the front-seat passenger was Anthony Edmond. Pinder was riding in the backseat of the car.

¶3 After conducting an investigation, the police charged Pinder with twelve counts—six forgery/uttering and six misappropriation of identification. An

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

amended information was subsequently filed adding ten additional counts—five forgery/uttering and five misappropriation of identification.

¶4 On the scheduled trial date, March 15, 2004, the State requested an adjournment due to an emergency proceeding. The defense objected. The trial court granted the motion and the trial was set for April 19. At the conclusion of the trial, the jury found Pinder guilty on all twenty-two counts. He was sentenced to ten years of initial confinement, followed by eight years of extended supervision. Judgment was entered. Pinder's postconviction motion alleging ineffective assistance of trial counsel was summarily denied. He now appeals.

DISCUSSION

A. Insufficient Evidence.

¶5 Pinder contends that the evidence was insufficient to support his convictions on the odd numbered counts of the complaint—that is, the forgery/uttering counts. We reject his contention. In reviewing a sufficiency of the evidence claim, we will "not reverse a conviction unless the evidence, viewed 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 fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Based on the evidence presented in this case, we must uphold the convictions.

¶6 Pinder's argument, in essence, is that the State needed to present evidence as to the forgery of the account holders' names on the subject checks. He argues that only forged signatures of the account holders, not those of subsequent endorsers, can support a forgery charge. Pinder is wrong.

¶7 In ***State v. Czarnecki***, 2000 WI App 155, 237 Wis. 2d 794, 615 N.W.2d 672, we held that the defendant's false endorsement of a check made to appear to be the endorsement of another person was sufficient to uphold his convictions for forgery/uttering. ***Id.***, ¶13. Here, Pinder was charged with uttering a forged instrument as a party to crime. This crime has four elements: (1) that the instrument is one that creates or transfers legal obligations; (2) that the instrument was falsely made to appear to have been made by another person; (3) that the defendant uttered the instrument, or presented it for payment; and (4) that the person presenting it knew the instrument was falsely made. WIS JI—CRIMINAL 1492.

¶8 All four elements were met in this case. It is undisputed that the checks involved here were instruments sufficient to satisfy the first element. Testimony at trial supported elements two, three and four. Ramos testified that Pinder bought checks from other people, asked her to drive through banks of his choosing to cash the checks, that Pinder typically handed the checks to another accomplice, who would complete the check and deposit slip and then Ramos would present it to the teller for deposit with cash back. She testified that Pinder was the one who provided the checks and decided what banks to go to. He also carried the checks and deposit slips in a blue pouch, which was seized by police from the back seat near where Pinder was sitting when he was arrested. The seized pouch contained checks, checkbooks and numerous bank deposit slips from different banks. Pinder's fingerprints were found on negotiated forged checks and deposit slips as well as other items found in the blue pouch.

¶9 Based on this evidence, there was clearly sufficient reason for the jury to find Pinder guilty, particularly because he was charged "as party to a crime." A person can be a party to crime either by directly committing it, by

aiding and abetting in the commission of the crime, or by conspiring with another to commit it. WIS. STAT. § 939.05. Thus, it was not necessary for the State to prove that Pinder actually forged the account holder's signature on the check. Rather, the State had to prove that he *uttered* a forged check by aiding in the commission of that crime. Here, the record demonstrates that there is sufficient evidence to support the jury's guilty verdict.

B. Jury Instructions.

¶10 Pinder argues briefly that the jury was not properly instructed on the forgery/uttering counts. We reject this contention. In reviewing jury instructions, our review is deferential to the trial court. *See* ***White v. Leeder***, 149 Wis. 2d 948, 954, 440 N.W.2d 557 (1989).

¶11 Pinder argues that the instruction was ambiguous and should have contained an explanation of what it means to prove that the checks were improperly "made" by the defendant. Our review of the instructions does not demonstrate any ambiguity or lack of adequate instruction. Pinder was convicted of uttering a forged document, not having forged the instrument himself. The instruction correctly stated:

> If you are satisfied beyond a reasonable doubt that some person committed all of the elements of uttering a forged writing as to a particular count and that the defendant intentionally aided and abetted the commission of that crime, you should find the defendant guilty. If you are not so satisfied, you must find the defendant not guilty.

The jury instruction was proper and not ambiguous.

C. Multiplicity.

¶12 Pinder next claims that the charges were multiplicitous. This argument is wholly undeveloped and unsupported by authority. Therefore, we reject it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

D. Speedy Trial.

¶13 Pinder argues that his right to a speedy trial was violated. We disagree. In determining whether his speedy trial right was violated, we use the balancing test the United States Supreme Court established in ***Barker v. Wingo***, 407 U.S. 514 (1972). In ***Day v. State***, 61 Wis. 2d 236, 244, 212 N.W.2d 489 (1973), the Wisconsin Supreme Court adopted the ***Barker*** test. In ***Barker***, the Court identified four factors to be used in a speedy trial inquiry: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *See* ***Barker***, 407 U.S. at 530 (footnote omitted). ***Barker*** requires that we first determine whether the length of delay is presumptively prejudicial. If it is, then we must balance the four ***Barker*** factors under the totality of the circumstances. ***Id.*** at 530-31. If it is not presumptively prejudicial, there is no violation of the speedy trial right and we need not proceed to the balancing of the four factors. *See* ***id.***

¶14 The United States Supreme Court has noted that, "[d]epending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year." ***Doggett v. United States***, 505 U.S. 647, 652 n.1 (1992). Our Wisconsin Supreme Court has similarly determined that a twelve-month delay between a preliminary exam and

trial was presumptively prejudicial. *See* ***Green v. State***, 75 Wis. 2d 631, 636, 250 N.W.2d 305 (1977).

¶15 Pinder was charged on October 8, 2003, and a preliminary examination was conducted on October 17, 2003. The trial was originally set for January 26, 2004. On January 26, 2004, the trial was adjourned until March 15, 2004. The docket entries do not explain the reason for the adjournment. However, at a hearing held on March 15, the record indicates that both sides were ready to go to trial on the earlier date, but the court had two firm trials scheduled and, due to circumstances involving an elderly victim in the other case, the court decided to adjourn Pinder's case.

¶16 On March 15, the State requested an adjournment because the prosecutor handling this case was required to attend an emergency proceeding that had arisen. Because of the complexity of Pinder's case, assigning a different prosecutor was not an option. The court was advised that Pinder was in custody due to revocation of parole on a previous conviction and would be serving eighteen months. The court found good cause for the adjournment and set the case for trial on April 19, 2004, and the case was, in fact, tried on that date.

¶17 Based on the foregoing, the time delay in this case was six months from the date Pinder was charged until the date he was tried. This time period is well short of the presumptively prejudicial one-year mark. We conclude that the delay here was not presumptively prejudicial based both on the fact that it was only six months in length, and that Pinder was in custody for another offense. Because we have not concluded that presumptive prejudice exists, our review stops here and we need not proceed to the other factors of the ***Barker*** test.

E. Ineffective Assistance.

¶18 Pinder next contends the trial court erred in summarily denying his claim that he received ineffective assistance of counsel without conducting a ***Machner*** hearing.[2] We reject his contention.

¶19 In order to succeed on an ineffective assistance claim, Pinder must prove that counsel's performance constituted deficient conduct, and that such conduct prejudiced the outcome. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. ***Id.*** at 697.

¶20 Whether counsel's actions constitute ineffective assistance is a mixed question of fact and law. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). "'The trial court's determinations of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous.'" ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987) (citation omitted). The ultimate conclusion, however, of whether the conduct resulted in a violation of defendant's right to effective assistance of counsel is a question of law for which no deference to the trial court need be given. ***Id.***

¶21 If a defendant wishes to have an evidentiary hearing on an ineffective assistance of counsel claim, he or she may not rely on conclusory allegations. If the claim is conclusory in nature, or if the record conclusively shows the appellant is not entitled to relief, the trial court may deny the motion

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

without an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). To obtain an evidentiary hearing on the ineffective assistance of counsel claim, the appellant must allege with specificity both deficient performance and prejudice in the postconviction motion. ***Id.*** at 313-18. Whether the motion sufficiently alleges facts which, if true, would entitle the appellant to relief is a question of law to be reviewed independently by this court. ***Id.*** at 310. If the trial court refuses to hold a hearing based on its finding that the record as a whole conclusively demonstrates that the defendant is not entitled to relief, our review of this determination is limited to whether the court erroneously exercised its discretion in making this determination. ***Id.*** at 310-11.

¶22 Here, Pinder alleges that his trial counsel was ineffective for failing to: (1) call the bank tellers as witnesses; (2) obtain handwriting analyses on certain documents; and (3) call as a witness a person by the name of Carl Wesley, who owned one of the cars used in the scheme. In reviewing the record, we conclude that Pinder failed to allege sufficient facts to warrant a hearing.

¶23 Pinder suggested that his counsel could have called bank tellers from different banks who may have testified that they did not see Pinder in the back seat of the vehicles involved in the check-cashing scheme. This is insufficient to warrant a hearing. Pinder does not identify specifically the particular bank tellers or submit affidavits from them attesting to what they would say. His allegations are pure speculation and do not warrant an evidentiary hearing on this claim, particularly in light of the Ramos testimony that it was Pinder's usual procedure to lie down in the back seat specifically so the bank tellers could not see him.

¶24 With respect to the handwriting analyses, he submits that if this had been done, evidence would have been generated showing that the writing on the

proffered checks was not his and that it would show that Ramos had written many more of the checks than she testified to, thus impeaching her. Again, Pinder's allegations are speculative and are not supported by any specific factual allegations to warrant a hearing. Moreover, the testimony at trial indicated that Pinder did not typically write on the checks or deposit slips, but had another accomplice do so. Thus, the jury knew that Pinder was not the person actually forging the documents. Likewise, Pinder was not charged with committing the actual forgery, but with uttering the forged instruments. Thus, a handwriting analysis would not have made any difference in the outcome of this case.

¶25 Finally, Pinder suggests that Wesley, who owned a station wagon used in some of the transactions, should have been called to testify. Pinder theorizes that Wesley's testimony may have impeached the testimony of Edmond. In addition, he suggests that Wesley's mother and brother had been interviewed by the police, but there is no mention in the police report that the Wesleys mentioned or knew Pinder. Pinder argues that testimony from the Wesley family may have undermined Edmond's credibility. Again, these allegations are not the type of specific factual statements required in order to justify an evidentiary hearing. Pinder does not provide affidavits from any of the Wesleys supporting his speculation. Accordingly, we hold that the trial court's decision summarily denying Pinder's ineffective assistance claim was correct. Nothing submitted by Pinder warrants an evidentiary hearing in this matter.

F. Jurisdiction.

¶26 Pinder's final claim is that the trial court lacked subject matter jurisdiction regarding the even numbered counts—the misappropriation of identity charges. His claim is based on his contention that the information did not charge

"each and every element" of the offense under WIS. STAT. § 943.201(2). That is, the element that Pinder was using the information of "an individual" as opposed to "an entity" was not included in the information. His claim is without merit.

¶27 An information is sufficient when it provides the defendant with the ability to understand the offense with which he is charged and the ability to permit him to prepare a defense. *See* ***State v. Chambers***, 173 Wis. 2d 237, 251, 496 N.W.2d 191 (Ct. App. 1992). The information confers jurisdiction to the court if it alleges an offense known to law. ***State v. Copening***, 103 Wis. 2d 564, 577, 309 N.W.2d 850 (Ct. App. 1981). A reference to the statute that the defendant has allegedly violated is sufficient if the statute contains all the elements of the crime. ***Id.***

¶28 In this case, each count cites the correct statute and also alleges every element of the offense. The information inserts the specific name of an individual, rather than the words "an individual." For example, the information charges that Pinder used the "personal identifying information of Cheryl Seefeld." Using the specific name of the individual, instead of stating that the writing was made by "another person" is sufficient. *See* ***State v. Lampe***, 26 Wis. 2d 646, 651, 133 N.W.2d 349 (1965). Thus, the information in the case properly conferred jurisdiction upon the court.

¶29 Pinder also argues that the information was deficient because it failed to identify the penalty provision of the offense. Pinder's argument in this regard is without citation to authority and is not sufficiently developed to warrant

further consideration by this court. *See* ***Pettit***, 171 Wis. 2d at 646-47. Based on the foregoing, we conclude that the information in this case was sufficient.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.