COURT OF APPEALS
DECISION
DATED AND FILED

October 23, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0276-CR **Cir. Ct. No. 01-CF-221**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL JAMES LAST,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: WAYNE J. MARIK, Judge. *Affirmed*.

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Michael James Last appeals from a judgment of conviction of uttering as a habitual offender. The sole issue on appeal is whether a requested instruction on knowledge should have been given in support of the theory of defense. We affirm the judgment.

¶2 Last attempted to cash a check for over $6,000 at a supermarket. The check was drawn on the account of American Metal Technology of Racine and signed by the company's president. The store clerk called American Metal Technology to verify the check and was told that the check was missing and had not been issued by the business. The police were called to the supermarket. Last told the police that while visiting a friend, the friend's cousin, known to Last as "Bob," asked Last if he had any identification. When Last said he did, Bob asked him to cash a check for him and promised Last $50 for doing so. Bob left and returned with the check, which he then completed by adding Last's name and address to the check. Bob said he worked for the business but could not cash the check himself because he did not have identification. Later Last identified Andrea Ashford as the man who had given him the check. Ashford was a cleaning person at the business who had access to the desk where the check had been kept.[1]

¶3 Last asked that the jury be instructed on how to determine knowledge that the check was stolen by the giving of WIS JI—CRIMINAL 923A, as modified to reference knowledge.[2] Last's theory of defense was that he did not

[1] The accounting manager of American Metal Technology had kept five pre-signed checks in her desk drawer.

[2] The proposed instruction was:

> "Knowledge" means that the defendant must have acted with the knowledge that the check was stolen. You cannot look into a person's mind to determine his knowledge. You may determine such knowledge directly or indirectly from all the facts in evidence concerning this offense. You may consider any statements or conduct of the defendant which indicate state of mind. You may find he had knowledge from such statements or conduct, but you are not required to do so. You are sole judges of the facts, and you must not find the defendant guilty unless you are satisfied beyond a reasonable doubt that the defendant knew the check was stolen.

know the check was stolen or falsely made. As proof that he had no knowledge, he wanted to emphasize evidence that he did not attempt to leave the store when it took a long time for the clerk to cash the check and that he was calm and collected when the police arrived. He wanted the jury to be told that it could look at his actions, statements and other factors to determine knowledge. The trial court refused to give the requested instruction.

¶4 The trial court exercises broad discretion in deciding whether to give a requested jury instruction. ***State v. Coleman***, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996). "The court's discretion should be exercised to 'fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence.'" ***State v. McCoy***, 143 Wis. 2d 274, 289, 421 N.W.2d 107 (1988) (citing ***State v. Dix***, 86 Wis. 2d 474, 486, 273 N.W.2d 250 (1979)). The ultimate question of whether the trial court correctly instructed the jury is one of law which this court reviews de novo. *See* ***State v. Wilson***, 149 Wis. 2d 878, 898, 440 N.W.2d 534 (1989).

¶5 Last characterizes the requested instruction as a theory of defense instruction.[3] "[A] criminal defendant is entitled to a jury instruction on a theory of defense if: (1) the defense relates to a legal theory of a defense, as opposed to an interpretation of evidence; (2) the request is timely made; (3) the defense is not adequately covered by other instructions; and (4) the defense is supported by

[3] The State argues that the requested instruction misstated the law because it confined the determination to whether Last had knowledge that the check was stolen when the State only needed to show knowledge that the check was falsely made. We agree that the proposed instruction was a misstatement. However, defense counsel was willing to modify the instruction to conform to the element of uttering. The trial court refused the instruction even if modified to properly state the law.

sufficient evidence." ***Coleman***, 206 Wis. 2d at 212-13 (citations omitted). We deem the third consideration to be determinative here since other instructions conveyed to the jury the point that Last wanted to get across—that his conduct, demeanor and statements were appropriate considerations in determining intent or knowledge.

¶6 The jury was instructed that the fourth element of the offense of uttering required the State to prove that Last knew the check was falsely made when he presented it as genuine. Specifically, the jury was told that "[i]n weighing the evidence, you may take into account matters of your common knowledge and your observations and experience in the affairs of life." Instructions were given on applicable factors in determining the credibility of the witnesses and assigning weight to the testimony. Finally the jury was told: "There is no magic way for you to evaluate the testimony. Instead, you should use your common sense and your experience. In everyday life, you determine for yourselves the reliability of things people say to you. You should do the same thing here." Judging knowledge and intent from people's conduct and statements is a matter of common experience for jurors, something they do every day. So the jury was informed that knowledge could be determined by Last's conduct and statements. While the amended requested instruction would have been proper, the refusal to give it was not error because other instructions adequately covered the theory of defense.[4]

[4] We need not address Last's contention that the trial court's comment that intent was not an element of the offense of uttering reflects an exercise of discretion based on an erroneous view of the law. However, we believe the trial court's comment to be merely an inartful statement of its reason for refusing the instruction.

¶7 In support of his claim that the failure to give the requested instruction was error contributing to his conviction, Last looks to the question from the jury during deliberations as demonstrating the jury's confusion about the knowledge element. The jury asked, "On the fourth element, does knowledge of any mistake or falsehood on the check qualify, *e.g.*, wrong date or wrong reason on bottom of check for false services provided, or rather does it have to be knowledge that the signer had no intent to make out check to payee?" We disagree with Last's contention that the question was an indication that the jury did not know how to determine knowledge. The jury questioned what part of the check Last had to know to be falsely made for a determination of guilt. Information about using Last's conduct or statements to determine knowledge would not have assisted the jury in answering its inquiry. We do not separately consider Last's suggestions that the answer given to the jury was not sufficiently specific to clarify the jury's problem and that the answer communicated a misleading and inaccurate statement of the law.[5] No objection was made to the trial court's answer and the issue is waived. *See* ***State v. Divanovic***, 200 Wis. 2d 210, 226, 546 N.W.2d 501 (Ct. App. 1996).

[5] The trial court's response was:

> As explained in the jury instruction which was submitted to you, the fourth element requires that the defendant knew the check was falsely made at the time it was presented. The second element explains the meaning of "falsely made" to include that it was falsely made to appear to have been made by the authority of someone who really did not give such authority. This would include filling in blanks over the signature of another either without authority or with unauthorized terms.

By the Court.—Judgment affirmed.

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