

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 17, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP1741-CR

Cir. Ct. No. 2008CF346

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL L. KELLY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: JAMES D. BABBITT, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Paul Kelly appeals a judgment of conviction, entered on a jury verdict, for multiple counts of forgery, uttering a forged writing, unauthorized use of personal identifying information, and felony theft. He contends the trial court erroneously exercised its discretion when answering two

questions from the jury during its deliberations. He also seeks a new trial in the interest of justice. We affirm.

BACKGROUND

¶2 On May 21, 2009, the State charged Kelly with twelve counts of forgery, nine counts of unauthorized use of personal identifying information, eighteen counts of uttering a forged writing, one count of attempted theft, and three counts of felony theft. The charges stemmed from Kelly's use of his daughter Kori's identity to purchase an automobile, obtain loans, and file for bankruptcy. Kelly also signed Kori's name on three general powers of attorney between May and August 2002.

¶3 While cross-examining Kori during trial, Kelly revealed the existence of a general power of attorney signed by his daughter in 1996 when she was in the Air Force Reserve Officers' Training Corps (ROTC). The prosecutor objected to the questioning on the ground that no such power of attorney had been disclosed to the State. Nonetheless, the court permitted the line of questioning.

¶4 Kelly produced the 1996 power of attorney after the State rested. The court excused the jury for the day and held a hearing on its admissibility. The court found that Kelly possessed the power of attorney well before trial and considered barring the evidence as a sanction, but ultimately decided to admit the document and asked the prosecutor to draft a cautionary instruction on the law pertaining to powers of attorney. Kelly testified in his defense that he believed he had a legal right to sign his daughter's name to any document, including the three

2002 powers of attorney, based on the authority given to him in the 1996 power of attorney.¹

¶5 After the jury began deliberating, it sent three questions to the court:

- 1) For a POA to be legal does the signature need to be witnessed in the presence of the POA designee [and] person designating power of [attorney] to another? In other words do all parties need to be present (physically) for a POA to be valid and legal? Does it need to be notarized?
- 2) Is it legal to take an old valid POA and update it with current date [and] signatures?
- 3) Is it legal to sign someone's name as a POA without indicating that is not [sic] being signed by a POA [and] not the actual person?

¶6 The court asked the jury which powers of attorney it was concerned about. The jury replied that its questions related to the three 2002 powers of attorney, and asked two additional questions:

Does [the 1996 power of attorney] give [Kelly] permission to sign [Kori's] name [to the three 2002 powers of attorney?]

....

Does [the 1996 power of attorney] give [Kelly] any rights beyond the ROTC problems[?]

¶7 The court sought the parties' guidance on how to deal with the jury's questions. Kelly suggested not responding at all, arguing that "the law is in front of them, and the facts are in front of them, and it's their job to make the best ... of

¹ Kelly admitted he signed the three 2002 powers of attorney at the request of the banks from which he obtained loans, because they did not want to rely on an "old" power of attorney from 1996.

the porridge.” The court rejected that contention: “Problem is the law isn’t in front of them, Mr. Kelly, and that was entirely precipitated by the fact that you sat on the 1996 [power of attorney]” The court agreed with the prosecutor’s suggestion that the jury’s initial three questions called for statements of law. The court then stated, “With respect to the newest questions, I think my answer to the jury on that is basically that’s for you to decide based on the law already provided to you.” Kelly objected and argued the court should answer the jury’s final two questions, “yes.”

¶8 After providing short answers to the jury’s first three questions, the court informed the jury, “With respect to the additional two questions you asked regarding what [the 1996 power of attorney] does or doesn’t do, that is for you to decide based on the law already given to you. I’m not going to give you further legal instruction in that regard.” The jury then returned its guilty verdict on thirty-five of the counts.

DISCUSSION

¶9 “Just as the initial jury instructions are within the trial court’s discretion, so, too, is the ‘necessity for, the extent of, and the form of re-instruction’ in response to requests or questions from the jury.” *State v. Simplot*, 180 Wis. 2d 383, 404, 509 N.W.2d 338 (Ct. App. 1993) (quoting *Hareng v. Blanke*, 90 Wis. 2d 158, 166, 279 N.W.2d 437 (1979)). Although a court is not obligated to provide a jury with information solely because the jury believes it is important to their decision, *State v. Hubbard*, 2008 WI 92, ¶57, 313 Wis. 2d 1, 752 N.W.2d 839, the court has a duty to respond to the jury’s inquiry with “sufficient specificity to clarify the jury’s problem[,]” *State v. Booth*, 147 Wis. 2d

208, 212-13, 432 N.W.2d 681 (Ct. App. 1988) (citing *Davis v. Greer*, 675 F.2d 141, 145 (7th Cir. 1982)).

¶10 Kelly contends the court erroneously exercised its discretion when answering the jury’s final two questions. Kelly argues the court’s instruction left the jury “without a correct statement of the law, which was that the 1996 power of attorney did permit (and authorize) Mr. Kelly to sign his daughter’s name to the later powers of attorney and ... [gave] him rights [beyond the ROTC problems, since it was a general power of attorney” Accordingly, Kelly argues the court should have answered “yes” to both questions. In support of his argument, Kelly cites unspecified “common law relating to powers of attorney” and RESTATEMENT (THIRD) OF AGENCY § 2.01 (2006).

¶11 The jury had sufficient instruction on the applicable law to make the necessary findings. In relevant part, the court’s instruction regarding the powers of attorney was as follows:

A Power of Attorney is a written instrument by which one person, as principal, authorizes another, as her agent, to perform certain specified acts on her behalf. A Power of Attorney document authorizes the agent to undertake actions for the benefit of the principal, not for the agent. The agent’s duty is to act solely for the benefit of the principal in all matters connected with the agency, even at the expense of the agent’s own interests.

Actions taken in claimed reliance on a Power of Attorney are authorized only if these requirements are satisfied. It is for you to decide whether these requirements have been satisfied. It is further for you to decide as to the charges of Unauthorized Use of Personal Identifying Information, Forgery and Uttering a Forged Writing whether the defendant’s actions are authorized based upon my instructions to you, these requirements and all other evidence in the case.

We therefore reject Kelly's assertions that the jury somehow lacked sufficient legal guidance to decide whether Kelly's conduct was authorized.²

¶12 The Restatement section Kelly cites did not require the court to answer as he proposed. RESTATEMENT (THIRD) OF AGENCY § 2.01 provides, "An agent acts with actual authority when, at the time of taking the action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act."

¶13 As the circuit court presumably recognized, whether an agent reasonably believed he or she was authorized to act is a question of fact. It was for the jury to decide whether Kelly reasonably believed each of his transactions were for Kori's benefit. Answering "yes" to both of the jury's final questions would have improperly removed those determinations from the jury and answered them as a matter of law.

¶14 Kelly also argues that he is entitled to a new trial in the interest of justice. He contends "the trial court's refusal to answer the two additional jury questions relating to the key piece of evidence in this case resulted in the real controversy ... —Mr. Kelly's authority to sign documents pursuant to the 1996 power of attorney—not being fully tried"

² The statement of facts in Kelly's brief suggests the circuit court erred by reading a portion of the quoted power of attorney instruction. Kelly notes that the instruction was "drafted by the prosecutor at the request of the court" and that its reading was objected to at the "beginning of the day," though not at the jury instruction conference. However, Kelly's brief does not include any argument on this point. Therefore, to the extent his brief raises the issue, we deem it abandoned. See *State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994).

¶15 Exercise of our discretionary reversal authority is not appropriate in this case. This court has authority to reverse a judgment and order a new trial “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” WIS. STAT. § 752.35.³ This authority is used “sparingly and with great caution.” *See State v. Watkins*, 2002 WI 101, ¶79, 255 Wis. 2d 265, 647 N.W.2d 244. As we have explained, the trial court’s instructions were proper. Any problems arising from Kelly’s late presentation of the 1996 power of attorney do not justify reversal.

By the Court.—Judgment affirmed.

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

³ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

