COURT OF APPEALS
DECISION
DATED AND FILED

January 13, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP420-CR **Cir. Ct. No. 2006CF218**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDY S. SCHULTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Snyder, J.

¶1 PER CURIAM. Randy Schultz appeals from a judgment of conviction of five counts of being a felon in possession of a firearm and from an order denying his postconviction motion. He argues that there was no proof that he possessed the firearms on the date stated in the information because he had

been taken into custody the day before and that his trial counsel's performance was constitutionally ineffective because counsel called Schultz's brother as a witness despite Schultz's instruction not to do so. We affirm the judgment and order.

¶2 Schultz was arrested on April 16, 2006, on a child support commitment warrant. The arrest took place at a storage unit rented in Schultz's name. The arresting officers observed Schultz loading or unloading a van at the unit. A search warrant was obtained and executed on April 17, 2006. Five different firearms were found in the van. Schultz was charged with five counts of being a felon in possession of a firearm on April 17, 2006. A jury found Schultz guilty on all five counts.

¶3 We may not reverse a conviction on the basis of insufficient evidence "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). In reviewing the sufficiency of circumstantial evidence, an appellate court need not concern itself in any way with evidence which might support other theories of the crime. ***Id.*** at 507-08. An appellate court need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence. ***Id.*** at 508. It is the function of the jury to decide issues of credibility, to weigh the evidence and resolve conflicts in the testimony. ***Id.*** at 506.

¶4 Schultz contends that the jury could not find that he possessed the five firearms on April 17, 2006, because he was then in police custody and not

physically capable of possession on that day. "[T]he term 'possession' includes both actual and constructive possession." ***State v. Peete***, 185 Wis. 2d 4, 14-15, 517 N.W.2d 149 (1994). A person is in possession if an item is in an area over which the person has control and the person intends to exercise control over the item. WIS JI—CRIMINAL 1343.

¶5 The evidence established that Schultz was utilizing the storage unit and van on April 16, 2006. In ***State v. Kueny***, 2006 WI App 197, ¶9, 296 Wis. 2d 658, 724 N.W.2d 399, the defendant was found in possession of firearms he had placed in a storage unit even though he had no contact with the weapons since putting them in storage years before and did not have keys to the storage unit. The firearms were in the defendant's possession because they were in an area over which he had control and he intended to exercise control over them. ***Id.*** "He need not have them literally in his hands or on premises that he occupies but he must have the right ... to possess them, [just] as the owner of a safe deposit box has legal possession of the contents even though the bank has actual custody." ***Id.*** (quoting ***United States v. Manzella***, 791 F.2d 1263, 1266 (7th Cir. 1986)).

¶6 It follows that even though Schultz was not physically present at the unit and van when the firearms were discovered, he was in possession of them because they were found in an area of which he had control. Schultz retained his possessory interest and right to privacy as to the personal property at the storage unit. Otherwise there was no need for the police to obtain a search warrant.[1]

[1] It is illogical to suggest that because the police seized the firearms pursuant to a warrant that the police, and not Schultz, possessed them at that very moment. That would mean that whenever a search warrant is obtained and executed there would be no possession by the criminal defendant.

Moreover, nothing suggests that there had been any changes to the personal property stored in the unit and van after Schultz was taken into custody. The jury could conclude that firearms were at the storage unit and van when Schultz was there and he possessed them at that time.[2] *See* ***State v. Loukota***, 180 Wis. 2d 191, 200-01, 508 N.W.2d 896 (Ct. App. 1993) (because the defendant possessed the gun at the end of his flight, "it is disingenuous for him to argue that the jury could not reasonably conclude that he possessed the gun during the sixty-five to ninety mile per hour chase through the streets of La Crosse."). We conclude that the evidence is sufficient to support the convictions.

¶7 At the postconviction motion hearing, Schultz testified that he told his trial counsel on multiple occasions, including at the start of the trial, that he did not want his brother, Steve Schultz, to testify at trial. Schultz's trial counsel called Steve as a witness. Steve testified that years earlier Schultz had given his firearms to Steve for storage, that Steve stored the firearms in his basement, and that Steve last saw the firearms in his basement in the middle of January 2006. Steve admitted that Schultz lived with him from October 2005 until April 2006, a period when the firearms were stored in the basement. The van was parked at Steve's

[2] In his reply brief Schultz suggests that there was simply vagueness in the charging date and had the charging date been either April 16, 2006, or "on or about" April 17, 2006, no issue would exist. He argues for the first time that "sloppy draftsmanship," *see* ***State v. Becker***, 2009 WI App 59, ¶10, 318 Wis. 2d 97, 767 N.W.2d 585, requires reversal. We will not, as a general rule, consider arguments raised for the first time in a reply brief. ***Schaeffer v. State Personnel Comm.***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989). If alleged error is not discussed in the main brief, it may not be raised in the reply brief. The issue is waived. ***State v. Chu***, 2002 WI App 98, ¶42 n.5, 253 Wis. 2d 666, 643 N.W.2d 878. In any event reversal is not required as it would be proper to amend the information to conform to the evidence. *See* WIS. STAT. § 971.29(2) (2007-08). There is no prejudice to a defendant when an amendment to the charging document does not change the crime charged, and when the alleged offense is the same and results from the same transaction. ***State v. Koeppen***, 195 Wis. 2d 117, 123, 536 N.W.2d 386 (Ct. App. 1995).

house during that time. Steve also indicated that their brother Danny Schultz started coming around Steve's house in early April 2006 and that Danny knew the guns were stored in the basement. Steve began to lock his doors whenever he left the house because he did not want Danny inside his house.

¶8 Schultz claims that his trial counsel was ineffective for calling Steve as a witness against Schultz's directive not to call Steve. To support a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that this deficiency was prejudicial. ***State v. Maloney***, 2005 WI 74, ¶14, 281 Wis. 2d 595, 698 N.W.2d 583. The trial court found that trial counsel's performance was not deficient and that the decision to call Steve was within counsel's trial strategy. The trial court also concluded that even though Steve's testimony "may not have been what otherwise would have been anticipated," the testimony did not affect the overall outcome of the case because there was otherwise sufficient evidence to convict Schultz. Whether counsel's performance was ineffective presents a mixed question of fact and law. ***Id.***, ¶15. The trial court's determination of what counsel did or did not do, along with counsel's basis for the challenged conduct, are factual matters which we will not disturb unless clearly erroneous. *See* ***id.*** However, the ultimate determination of whether counsel's conduct constituted ineffective assistance is a question of law. ***Id.***

¶9 Schultz argues that trial counsel should have obeyed the directive not to call Steve as a witness because Schultz had reason for the directive. (Schultz testified that he did not want Steve to be called because Steve would place Schultz in the house where the firearms were stored.) Generally, "[o]nce counsel is appointed, the day-to-day conduct of the defense rests with the attorney." ***Wainwright v. Sykes***, 433 U.S. 72, 93 (1977) (Burger, C.J.,

concurring). This includes the responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. ***Id.*** We are not to second-guess trial counsel's selection of trial tactics or the exercise of professional judgment after weighing the alternatives. ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). However, we will examine counsel's conduct to be sure it is more than just acting upon a whim; there must be deliberateness, caution, and circumspection. *See* ***id.*** A strategic or tactical decision must be based upon rationality founded on the facts and law. ***Id.***

¶10 Trial counsel testified that in eight weeks before trial, Schultz agreed that Steve should testify. Counsel indicated that it was only shortly before trial that Schultz told counsel not to call Steve. By then counsel had prepped for trial with the notion that Steve would testify. Counsel was aware of Schultz's directive but weighed the competing interests. Counsel testified that he had strong reason to keep Steve on the witness list. The theory of defense was that Schultz did not know the firearms were in the van. Counsel called Steve as a witness to establish that Danny, who was at the storage unit when Schultz was arrested, had access to the firearms and knew that a fourth brother in Louisiana wanted the firearms. It was suggested that Schultz was planning to drive the van to Louisiana. Steve also admitted that on prior occasions Danny had taken things from his house without Steve knowing. Steve's testimony served the purpose of suggesting that Danny could have put the firearms in the van without Schultz knowing.[3] Although Steve said some unflattering things about Schultz, the defense closing argument used

[3] Schultz overstates that Steve's testimony established that in fact Danny did not have access to the house when the guns were there. Steve indicated that Danny had been in the house using the bathroom while Steve and his wife slept upstairs. That happened a week before Schultz moved out of Steve's house. Steve started locking the doors after that.

that to show that Steve was not simply tailoring his testimony to Schultz's benefit. Counsel's strategic choice was reasonable. Counsel's performance was not deficient simply because his strategy was contrary to Schultz's directive or unsuccessful.

¶11 Focusing on Steve's testimony that Schultz owned the firearms and had given them to Steve for storage, Schultz argues that "[c]onsidering the paucity of the evidence that the State had presented," the outcome would have been different if Steve had not been called as a witness. Not only do we disagree with Schultz's assessment of the evidence as "being of marginally viable strength," we need not address the prejudice prong of the ineffective assistance of counsel test because we conclude that counsel's performance was not deficient. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984) (the court need not address both components of the analysis if defendant makes an inadequate showing on one). Schultz was not denied the effective assistance of trial counsel.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2007-08).