COURT OF APPEALS
DECISION
DATED AND FILED

June 16, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-0155-CR-NM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KIRK BINTZLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

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

PER CURIAM. Kirk Bintzler appeals his felony convictions for one count of theft by fraud and two counts of filing false title applications for motor vehicles. According to the complaint, Bintzler (1) took a red 1987 Porsche 924F owned by his now deceased landlord-employer, Abdelsalam Hamad, (2) applied for a duplicate vehicle title in Hamad's name, (3) reregistered the vehicle

from Hamad's name to a name Bintzler used as an alias, and (4) sold the car under the alias for $4625 in cash to a local strip-club bartender and co-worker, Robin LaMarre. Bintzler defended himself at trial, with advice of standby counsel at public expense. Bintzler's appellate counsel has filed a no merit report under ***Anders v. California***, 386 U.S. 738 (1967). Bintzler received a copy of the report and has filed a response. Counsel's no merit report raises three possible arguments: (1) Bintzler's fear for his own safety warranted a coercion instruction; (2) Bintzler had a right under the deadman's statute to exclude from evidence some out-of-court statements Hamad made before his death; and (3) the trial court should not have barred Bintzler from contacting jurors after the trial. Upon review of the record, we are satisfied that the no merit report properly analyzes these issues. We will not discuss them further, except to the extent Bintzler addresses them in his response.

In his pro se response, Bintzler raises several additional arguments: (1) the evidence warranted a jury instruction on the defenses of necessity and coercion; (2) the deadman's statute required the exclusion of out-of-court statements Hamad made before his death; (3) the trial court erroneously barred Bintzler's investigation into a statement a juror made in the courthouse hallway; (4) the trial court should have reduced the criminal false-title-application charges to civil-forfeiture false-statement charges, or at least should have included the false-statement charges as lesser included offenses; (5) the trial court wrongly limited Bintzler's cross-examination of LaMarre; and (6) the trial court unlawfully discharged prosecution witnesses before Bintzler could call them in his defense-in-chief. Bintzler also raises multiple issues "without argument" for our independent ***Anders*** review. In supplemental responses, he elaborates on some issues and raises new matters. He also asks for a copy of LaMarre's confidential informant

report and a "body wire" audio recording. We have examined the lengthy transcripts and conclude that none of Bintzler's numerous pro se issues have merit. We therefore adopt counsel's no merit report, affirm Bintzler's conviction, and discharge Bintzler's appellate counsel of his obligation to represent Bintzler further in this appeal.

The following evidence of Bintzler's crimes unfolded at trial. Bintzler worked for Hamad in Hamad's grocery store; Bintzler also worked part-time at a strip club that he frequented as a customer. Bintzler reported Hamad to the FBI or ATF for firearm and food-stamp violations, causing Hamad's incarceration. During Hamad's incarceration, Bintzler took Hamad's Porsche, applied for a duplicate title in Hamad's name, reregistered the vehicle in the name of Thomas Lui—an alias Bintzler used from time to time—and sold the vehicle to LaMarre. Bintzler applied for the duplicate Hamad title at one Department of Transportation (DOT) station and reregistered the vehicle in Lui's name at another. Bintzler told LaMarre that he was selling her the car on behalf of someone named Lui for a commission; she testified that she was unaware of Bintzler's occasional use of the Lui alias. After taking possession, LaMarre did not reregister the vehicle in her name; three months after the sale, after hearing rumors in a bar that the Porsche was stolen, she reported the matter to the police. Due to illnesses and scheduling conflicts by witnesses, counsel, and the trial judge, the trial court postponed Bintzler's trial several times over his strong objections, and it did not commence until approximately one year after his arrest. Hamad died before trial, murdered in an incident evidently unrelated to his dealings with Bintzler. Though still alive at the time, Hamad did not testify at the preliminary hearing.

Bintzler presented a many-sided defense, without taking the witness stand on his own behalf. We briefly describe some of his defense theories. First, Bintzler sought to show that Hamad had turned his car over to Bintzler to repay a debt Hamad owed Bintzler and to buy Bintzler's silence as to the firearm charges then pending against Hamad; according to Bintzler, Hamad later implicated Bintzler as retribution for Bintzler's decision to provide federal agents information about Hamad's criminal activities. Second, Bintzler claimed that LaMarre similarly implicated him as retribution; according to Bintzler, LaMarre had stolen cash, liquor, and a coat from the strip club, which cost her her job. LaMarre denied this, testifying that she quit for other reasons. Nonetheless, Bintzler maintained that LaMarre framed him out of envy that he and his friend, one of the club's dancers, had kept their jobs. Bintzler also alleged that LaMarre framed him on the coaxing of an ATF agent, for reasons Bintzler never successfully explained or proved. Third, Bintzler claimed that he often signed documents for Hamad and had Hamad's power of attorney to apply for a duplicate title in Hamad's name; Bintzler, however, never produced this power of attorney. Bintzler also claimed that he retitled the vehicle in his Lui alias to protect his identity from unsavory criminal elements out to get him. Fourth, Bintzler claimed that the ATF agent and Milwaukee police had framed him.

Bintzler first argues that the trial court improperly barred him from arguing a legal justification defense, such as necessity or coercion. He argues that his fear of criminal elements out to get him forced him to assume an alias. Bintzler theorizes that this justified his fraud and false statements. To constitute a valid defense, the necessity or coercion must make the crime unavoidable. *See* ROLLIN M. PERKINS, CRIMINAL LAW 954, 956 (2d ed. 1969); WILLIAM L. CLARK & WILLIAM L. MARSHALL, A TREATISE ON THE LAW OF CRIMES § 5.15, at 360-

61, and § 5.16, at 364-65 (7th ed. 1967); s*ee also* ***State v. Brown***, 107 Wis.2d 44, 54-55, 318 N.W.2d 370, 376 (1982). Bintzler's argument is a red herring; it confuses his use of an alias, for which the State did not prosecute, with his operative misrepresentations that ultimately formed the factual basis for his guilt. Bintzler's use of an alias was not the fraud or false statements that constituted his criminal wrongdoing. Rather, the operative fraud and false statements were (1) Bintzler's misrepresentation to LaMarre that he had the lawful authority to sell the car, either on his own behalf or on behalf of someone named Thomas Lui, and (2) his misrepresentations to DOT that he was the lawful title applicant, regardless of the name he chose to assume in these misrepresentations. The fraud occurred when he claimed to have the power to exercise ownership or authority over the car, not when he used an assumed name to employ such power. Bintzler's claimed fear for his safety did not force him to defraud LaMarre and the DOT. In short, Bintzler's legal justification defenses lack merit.

Bintzler next makes an argument about the deadman's statute. The precise argument he is making is unclear. We assume he is arguing that the trial court should have used the deadman's statute to exclude Hamad's out-of-court assertions that Bintzler stole the Porsche. First, Bintzler never raised this objection to the trial court. He therefore waived the matter. *See* ***Mielke v. Nordeng***, 114 Wis.2d 20, 24, 337 N.W.2d 462, 465 (Ct. App. 1983). The fact that he represented himself does not excuse his noncompliance with basic rules of evidence. Second, the deadman's statute applies to civil proceedings, not criminal prosecutions. *See* § 885.16, STATS. Third, if Bintzler is actually trying to make a hearsay argument, he likewise waived that issue by not raising it in the trial court. He also opened the door for the evidence by announcing that Hamad had authorized his actions. *See* ***State v. Wulff***, 200 Wis.2d 318, 344, 546 N.W.2d 522,

532-33 (Ct. App. 1996) (holding defendant's trial tactics "opened the door" to prosecution's use of evidence), *rev'd on other grounds*, 207 Wis.2d 143, 557 N.W.2d 813 (1997). Bintzler even introduced his own evidence that Hamad gave him the vehicle to repay a debt and buy his silence.

Bintzler next argues that the trial court should have permitted an investigator to contact jurors after the trial about a comment a juror made in the courthouse hallway during the trial. The juror told the bailiff that Bintzler looked familiar, and Bintzler evidently believes that the juror imparted this information to other jurors. This issue is nonmeritorious. First, the trial court questioned the juror and dismissed him from the jury midway through the trial. At that time, the juror gave no indication that he had imparted any extratrial information to other jurors. Further, when the dismissed juror testified, Bintzler did not inquire whether the juror had imparted extratrial information to other jurors. That was the time for Bintzler to object, not after trial. *See* ***State v. Deer***, 125 Wis.2d 357, 366, 372 N.W.2d 176, 181-82 (Ct. App. 1985). Instead, Bintzler told the trial court that he had no problem. Second, courts will declare a mistrial for jury irregularities only if they had a major prejudicial impact on the verdict. *See* ***State v. Shillcutt***, 119 Wis.2d 788, 793, 350 N.W.2d 686, 689 (1984). Bintzler has shown none, and we see no signs of any in the record. Third, Bintzler has not shown that he raised this point in the trial court at any time. Bintzler may not raise such matters for the first time on appeal. *See* ***Pangman & Assocs., S.C., v. Zellmer***, 163 Wis.2d 1070, 1085, 473 N.W.2d 538, 544 (Ct. App. 1991). Instead, Bintzler made unrelated postverdict arguments to the trial court about the jurors. Under these circumstances, this issue has no merit.

Bintzler next argues that the trial court wrongly failed to give the jury a lesser included offense predicated on § 345.17, STATS. Unlike the criminal

penalties of § 342.06(2), STATS., of which Bintzler stands convicted, § 345.17 imposes a civil forfeiture on anyone who makes false statements to DOT. Bintzler deserved a lesser included offense instruction only if the facts permitted acquittal on the greater charge and conviction on the lesser charge. *See* ***State v. Wilson***, 149 Wis.2d 878, 900, 440 N.W.2d 534, 542 (1989). This outcome was not possible. First, § 345.17 explicitly states that it is not operative if another law, such as § 342.06(2), prescribes a criminal penalty; this clear expression of legislative intent resolves the matter. Second, § 342.06(2) superseded § 345.17 on these facts. Section 342.06(2) addresses false statements made specifically in title applications. Section 345.17 addresses false statements made to DOT in general. Specific statutes like § 342.06(2) control over general ones like § 345.17. *See* ***Gottsacker Real Estate Co., Inc. v. DOT***, 121 Wis.2d 264, 269, 359 N.W.2d 164, 167 (Ct. App. 1984) Here, the prosecution's false-statement evidence solely concerned Bintzler's title applications; the prosecution did not charge Bintzler for any false statements that could have implicated the civil-forfeiture statute, and Bintzler put in no evidence to invoke it. In short, the trial court correctly declined the requested lesser included offense.

Bintzler next argues that the trial court wrongly limited his cross-examination of prosecution witness and co-worker LaMarre. Bintzler wanted to show that LaMarre had either entrapped or falsely implicated him in the Porsche sale. He hypothesized that LaMarre acted as a confidential informant for an ATF agent, who gave her money to buy the Porsche and entrap Bintzler. The trial court found this theory dubious and required Bintzler to make a threshold showing of how and why the ATF agent would have LaMarre entrap Bintzler into a car sale or falsify her testimony. The trial court could reasonably bar this line of likely irrelevant inquiry in the absence of a threshold showing of relevancy. *See*

§ 904.02, STATS.; ***State v. Hungerford***, 84 Wis.2d 236, 257, 267 N.W.2d 258, 269 (1978). This prevented waste of time and confusion of issues. *See* ***State v. Flattum***, 122 Wis.2d 282, 306, 361 N.W.2d 705, 717 (1985). Bintzler had no right to engage in an evidentiary fishing expedition. *See* ***State v. Cassel***, 48 Wis.2d 619, 622, 180 N.W.2d 607, 610 (1970). Bintzler had no direct evidence of an ATF connection; he relied exclusively on the implication he felt left by other facts. He pointed out that the ATF agent, together with Milwaukee police, interviewed his dancer friend a week after his arrest. He claimed that Hamad's federal firearm charges were dismissed the same day as Bintzler's arrest. Bintzler also alluded to unspecified animosity between himself and the ATF agent, and he claimed to have federal documents to support the ATF's role. He never, however, produced these documents for the trial court.

In his ***Anders*** response, Bintzler has now provided a page from an ATF report indicating that the ATF agent did interview LaMarre the day of his arrest. Regardless, the facts as a whole still fail to make the required threshold showing on relevancy, and the trial court therefore properly barred LaMarre's cross-examination on the hypothesized ATF agent connection. *See* ***Flattum***, 122 Wis.2d at 306, 361 N.W.2d at 717. The ATF agent's alleged involvement followed the car sale by three months; it had no evident link to the sale in terms of time. The LaMarre interview mentioned in the ATF report also followed the car sale by three months and evidently concerned federal firearm violations. LaMarre's trial testimony itself gave no indication that she had been participating in an ATF-led entrapment scheme or fabrication of evidence. Last, the trial court had considerable discretion to set the boundaries of cross-examination. *See* ***State v. McCall***, 202 Wis.2d 29, 35, 549 N.W.2d 418, 420 (1996). It could limit LaMarre's cross-examination to prevent obfuscation of issues. *See* ***Delaware v.***

Van Arsdall, 475 U.S. 673, 679 (1986). The trial court permitted Bintzler to conduct wide-ranging cross-examinations of LaMarre and other witnesses. Bintzler often posed imprecise and compound questions that strayed into extraneous matters, and the trial court spent a good deal of time addressing Bintzler's unorthodox defense strategies and legal theories. Bintzler cannot seriously argue that the trial court unfairly impeded his questioning.

Bintzler next states that the trial court prematurely excused LaMarre and her husband from subpoenas after their cross-examination, before he could call them as adverse defense witnesses in his case-in-chief. As the victims of the crime, LaMarre and her husband supplied some key evidence for the prosecution. At the close of the cross-examination, the trial court excused them from the proceedings. The trial court made a discretionary decision. *Cf.* ***Parham v. State***, 53 Wis.2d 458, 464, 192 N.W.2d 838, 841 (1972). The trial court had listened to Bintzler's questions of these witnesses and evidently believed that Bintzler had exhausted the relevant avenues of inquiry. Bintzler conducted broad-based cross-examinations of these witnesses without success, and further questioning could have been counterproductive. Bintzler also has never identified what additional important inquiries he would have posed had the trial court permitted him to call them adversely in his case-in-chief. At some point, Bintzler had to make an offer of proof on the matter. *See* § 901.03(1)(b), STATS. Bintzler made none, either at the time that the trial court excused the witnesses or later in the trial. Further, the trial court had already reasonably ruled that it would not permit Bintzler to ask questions about LaMarre's alleged connection with the ATF agent. Under the circumstances, Bintzler has not shown that he suffered any prejudice from the trial court's ruling, and we see no abuse of discretion.

Bintzler next raises several issues without any argument, for the express purpose of preserving them for further proceedings in other state and federal courts. Among other matters, Bintzler alleges that the prosecutor and the police department concealed evidence and committed other forms of misconduct. He also claims violations of his speedy-trial and interstate-detainer rights. We may summarily reject issues raised without argument. *See* ***Reiman Assocs., Inc. v. R/A Adver. Inc.***, 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981). We do not believe that an ***Anders*** report gives Bintzler a license to pick and choose how he will present his appellate issues, leaving some for our review without any argument on his part. This court is not a performing bear that must dance to every tune Bintzler plays on appeal. *See* ***State v. Waste Management, Inc.***, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978). We likewise doubt that Bintzler's two-tiered approach preserves the unargued issues for other state and federal courts. Bintzler submitted an extensive response to counsel's no merit report, and this demonstrated his ability to argue any meritorious issues in full. His two-tiered approach represents a strategic choice that may have long-term issue-waiving consequences. In any event, we see no substantive merit to the unargued issues, and the following discussion disposes of them and other matters raised in his responses.

Bintzler attacks the prosecution's failure to give him a copy of what he calls LaMarre's confidential informant report. If Bintzler made a timely request for her statement, he had a right to a copy. *See* § 971.23(1)(e), STATS. While Bintzler knew of the report and while his pretrial discovery demand generically requested witness statements, he never specifically pursued LaMarre's report later in the proceedings. Bintzler's remedy was to seek to suppress her testimony if the prosecution did not provide him with her statement. *See* §

971.23(7m), STATS.; *see also* ***State v. Ruiz***, 118 Wis.2d 177, 197, 347 N.W.2d 352, 361-62 (1984). He made no such request and thereby waived the issue. For the same reasons, Bintzler has waived any claim for her statement as exculpatory evidence under ***Brady v. Maryland***, 373 U.S. 83 (1963). Likewise, he has not shown that her statement's absence deprived him of a fair trial, despite having cross-examined her at trial. *See* ***United States v. Agurs***, 427 U.S. 97, 108-13 (1976). In the same vein, Bintzler asks for a copy of the "body wire" audio tape; the police equipped LaMarre with a battery-powered transmitter to secretly record a conversation she and Bintzler had in the strip-club parking lot. The prosecution told the trial court that the tape had poor audio quality but offered to get Bintzler a copy; the prosecution apparently overlooked this offer. Regardless, the prosecution never introduced the tape, and it did furnish Bintzler a transcript of its contents. Bintzler has not identified anything materially wrong in transcript, and this issue therefore furnishes no basis for a new trial.

Bintzler next accuses the prosecution of misconduct. According to Bintzler, the prosecution misrepresented to the trial court that a court commissioner had found LaMarre to have transferred title; Bintzler states that LaMarre never reregistered the title in her name and that the court commissioner never made such a finding. Bintzler also makes a general accusation of prosecutorial misconduct; he claims that the prosecution acted out of a zeal to convict, not out of the pursuit of justice. We see no evidence that Bintzler raised these arguments in the trial court. He has therefore waived these matters. *See* ***Mielke***, 114 Wis.2d at 24, 337 N.W.2d at 465. Regardless, reversal for prosecutorial misconduct is a drastic step; courts approach it with caution. *See* ***State v. Lettice***, 205 Wis.2d 347, 352-53, 556 N.W.2d 376, 378 (Ct. App. 1996). Such misconduct must prejudice the accused's right to a fair trial. ***Id.*** Here, we

see no evidence of any prosecutorial misconduct. The prosecution conducted the trial in a straightforward manner and presented its evidence in a fair-minded way. We see no instance of overreaching or misuse of office. We also see no evidence that the prosecution misrepresented a court commissioner's finding concerning the car's reregistration. If Bintzler is also seeking reversal on the ground that LaMarre never reregistered the car's title to her name, this had no bearing on his guilt. Bintzler completed his theft by fraud by accepting LaMarre's payment and delivering the car. *See* ***State v. Meado,*** 163 Wis.2d 789, 795-98, 472 N.W.2d 567, 569-71 (Ct. App. 1991).

Bintzler next claims that Milwaukee police were guilty of misconduct in his arrest and questioning. He wanted a hearing and dismissal of the charges. Bintzler claimed that the police had wrongly equipped LaMarre with the "body wire." He also claimed that the police set up Bintzler's and his dancer friend's joint arrest on a tip from LaMarre that the dancer would be carrying illegal pepper spray Bintzler had given her for self-protection. Bintzler theorized that the police did this to gain leverage on the dancer and thereby make her falsely implicate him. Bintzler further claimed the police threatened the dancer with baseless perjury charges if she refused to lie about Bintzler. We view Bintzler's police misconduct charge as a form of prosecutorial misconduct and will apply the same standard. Courts will dismiss charges for prosecutorial misconduct only if it prejudiced the accused's right to a fair trial. *See* ***Lettice***, 205 Wis.2d at 352-53, 556 N.W.2d at 378. Dismissal is an extraordinary sanction, reserved for highly prejudicial behavior that undercut the accused's substantial rights. *See* ***id***. Here, we see nothing warranting dismissal of the charges. The police had the power to use LaMarre for electronic surveillance, *see* ***Lopez v. United States***, 373 U.S. 427, 439 (1963), and to arrest Bintzler, together with the dancer, at any time they saw

fit. *See* ***United States v. Watson***, 423 U.S. 411, 416-24 (1976). Further, as the trial court noted, the police's actions followed Bintzler's crimes by several months. If any misconduct had occurred, we see no reason why it should exonerate him of his crimes.

Bintzler next claims that police coerced the statements he made at the police station, making them involuntary and inadmissible. As noted above, Bintzler believed that the police arrested him and his dancer friend on a tip by LaMarre that the dancer would be carrying illegal pepper spray; he claimed that the police did this in a scheme to get leverage on the dancer and thereby to force her to perjure herself against Bintzler. He also claimed that the police tried to cut a deal with him about the dancer and the pepper spray and that he talked with them to shield the dancer from criminal charges. Bintzler further claimed that he made the statements to police while in a weakened condition; he alleged to have driven 600 miles that day, to have had little sleep, and to have acted under the influence of alcohol. At a minimum, Bintzler needed to show coercive practices by the police. *See* ***State v. Clappes***, 136 Wis.2d 222, 239-40, 401 N.W.2d 759, 767 (1987). The trial court found no coercion and refused to suppress his statements. We have reviewed the transcript and agree with the trial court's analysis. The police officers denied any coercive practices. As the judge of the weight of the evidence and the credibility of witnesses, the trial court could reasonably accept the police officers' testimony and disbelieve Bintzler's testimony to the contrary. *See* ***State v. Poellinger***, 153 Wis.2d 493, 506, 451 N.W.2d 752, 757 (1990). Bintzler's statements were also not involuntary if he made them in a high-minded effort to secure the dancer's release.

Bintzler next claims that the police officers' tactics resulted in an obstruction of justice. Even if Bintzler had shown some misconduct, he has not

shown how it would have unfairly influenced the verdict. The prosecution provided enough evidence to prove his guilt beyond a reasonable doubt. *See* ***Poellinger***, 153 Wis.2d at 507, 451 N.W.2d at 757-58. The evidence of guilt came from LaMarre's testimony, her husband's testimony, Hamad's out-of-court statements, the documentary evidence, and the low probability of Bintzler's own hypotheses and defense theories. LaMarre, her husband, and Hamad's out-of-court statements supplied direct evidence of Bintzler's guilt. The two title applications spoke for themselves, and the totality of the circumstantial evidence pointed toward a criminal scheme by Bintzler: he had Hamad jailed, took his car in the interim, filed two title applications in two different names at two different DOT offices, and then sold the car to LaMarre under his Lui alias, all within a two-week time span. Further, the jury evidently rejected Bintzler's unorthodox defense theories and the low-probability inferences he drew from the material undisputed facts. The jury evidently was unwilling to accept Bintzler's inferences that Hamad, LaMarre, the Milwaukee police, and maybe even the ATF, whether by plan or chance, had all simultaneously framed an innocent man protecting himself with an alias. Bintzler's inferences were sufficiently improbable that the jury could inversely draw the more-probable opposite inferences. In short, we see no obstruction of justice.

Bintzler next claims that his pretrial incarceration violated his speedy-trial and interstate-detainer rights. The laws permit trial courts to defer criminal proceedings for cause. *See* ***Green v. State***, 75 Wis.2d 631, 636, 250 N.W.2d 305, 307 (1977); ***State v. Aukes***, 192 Wis.2d 338, 345, 531 N.W.2d 382, 385 (Ct. App. 1995). Violations merit dismissal only in extraordinary circumstances, depending on the scope of delay and degree of prejudice. *See* ***State v. LeMay***, 155 Wis.2d 202, 214, 455 N.W.2d 233, 238 (1990). Bintzler's

proceedings did incur a good amount of delay; illnesses and scheduling conflicts by various trial participants required the trial's postponement on three occasions. In response to Bintzler's repeated objections, the trial court reduced his bail to zero; Bintzler, however, stayed in custody, first pursuant to a federal warrant and later a federal conviction, awaiting federal sentencing. None of this warranted the charges' dismissal. Bintzler's confinement resulted from federal process, not his state trial's delay, and he therefore suffered no prejudice. *See* ***Foster v. State***, 70 Wis.2d 12, 14-15, 18, 233 N.W.2d 411, 412-13, 414 (1975). If, as Bintzler claimed, the federal process was initially a federal parole hold stemming solely from the State charges, the hold was still federal process, and Bintzler needed to have the federal court remedy it. Finally, inasmuch as Hamad died before Bintzler's speedy trial demand, the delay did not cause Bintzler's inability to make Hamad a witness.

Bintzler next argues that the trial court improperly allowed the prosecution to amend the information during the trial to conform to the prosecution's proof. The trial court made a discretionary decision, *see* ***State v. Flakes***, 140 Wis.2d 411, 416, 410 N.W.2d 614, 616 (Ct. App. 1987), and we see no erroneous exercise of discretion. The trial court should not allow the amendment if it would unfairly prejudice the accused. ***Id***. Here, the prosecution amended the information to indicate that Bintzler delivered the car at one address and accepted the money at a second address. The prosecution also amended the information to indicate that LaMarre's husband, in addition to LaMarre herself, was a victim of the crime. Neither of these amendments prejudiced Bintzler in any way. Bintzler already knew the addresses where the transactions took place and the persons whom he allegedly defrauded at those addresses; he was an admitted participant on the scene at both addresses and with both victims. Under

these circumstances, Bintzler has no basis to claim unfair surprise from the amendment. Further, he has not alleged that either of the amendments contained any inaccurate information that he could have refuted at trial with more notice; the prosecution made both amendments to conform to the prosecution's evidence.

Last, Bintzler argues that the trial court unlawfully sentenced him in absentia. The trial court held a sentencing hearing, at which the court set Bintzler's sentence to run consecutive to any sentence he would get on federal charges. Two days later, the trial court issued a written order requiring Bintzler's sentence to start immediately. Bintzler claims that ***State v. Koopmans***, 202 Wis.2d 385, 550 N.W.2d 715 (Ct. App. 1996), made the trial court's written order an unlawful sentence in absentia. Bintzler's argument is flawed. The ***Koopmans*** court did rule that Wisconsin courts cannot sentence defendants in absentia; *see* ***id.*** at 398, 550 N.W.2d at 721; the defendant there had absconded and did not attend the sentencing hearing. Here, however, the trial court complied with ***Koopmans***. Bintlzer attended the sentencing hearing and had a full chance to state his views on the sentencing question. The trial court was uncertain at the sentencing hearing as to when Bintzler's federal sentence would start. It made his State sentence consecutive to the federal sentence. Shortly thereafter, the trial court learned that the federal sentence would not start until after Bintzler served the State sentence, by operation of federal law. Viewed from this perspective, the trial court's written order was not a sentence in absentia. The trial court merely moved up the State sentence's starting date to comport with federal law; the State and federal sentences remained consecutive, with the State sentence, rather than the federal, now served first. ***Koopmans*** did not concern these kinds of technical sentence adjustments. Accordingly, we accept the ***Anders*** report and discharge Bintzler's appellate counsel of his obligation to represent Bintzler further in this appeal.

By the Court.—Judgment affirmed.

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