COURT OF APPEALS
DECISION
DATED AND FILED

September 30, 2014

Diane M. Fremgen
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. 2013AP2254-CR **Cir. Ct. No. 2009CF49**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KIMBERLY M. ECKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Langlade County: FRED W. KAWALSKI, Judge. *Affirmed*.

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Kimberly Ecker, the guardian of Bryan Wolf's estate, appeals a judgment of conviction following a court trial for theft of greater than $10,000 in a business setting. She argues trial counsel rendered ineffective assistance. She also challenges the exclusion of hearsay evidence, the circuit

court's findings regarding the incapacity of the ward to consent, the sufficiency of the evidence, venue, and the offense date identified in the Information. We reject all of Ecker's arguments and affirm.

BACKGROUND

¶2 Ecker was charged with one count of theft of property exceeding $10,000, contrary to WIS. STAT. § 943.20(1)(b) and (3)(c).[1] The charge included a penalty enhancer under WIS. STAT. § 939.645(1). The complaint alleged Ecker petitioned for guardianship of her father, Bryan Wolf's, estate after he suffered a stroke. Ecker was temporarily appointed as guardian on August 30, 2006. That appointment became permanent by letters of guardianship issued on October 23, 2006. Bryan and his estranged wife Carol Wolf had begun divorce proceedings during that time that were voluntarily dismissed after Bryan recovered. Ecker voluntarily resigned as guardian in July 2007, although it appears she continued some administrative functions after that time.

¶3 Carol told police approximately $40,000 had disappeared while Ecker was administering Bryan's estate. A police investigation revealed discrepancies in the guardianship accountings related to money designated for spousal support that Carol said she never received. Also at issue were a significant number of checks made out to cash; the transfer of a truck to a relative and payments on the vehicle loan and for tires and repairs; divorce expenditures; and gifts and personal expenses.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶4 Ecker's case was tried to the court, after which it issued a written decision finding Ecker guilty. Based on the letters of guardianship introduced at trial, the court concluded Bryan Wolf had been deemed incompetent and was incapable of consenting to the disbursements as a matter of law. It also concluded the ward's funds had been disbursed contrary to Ecker's authority as guardian. The court determined Ecker had stolen over $25,000, including money designated in the accountings as spousal support and cash to the ward. It also determined Ecker misappropriated the truck and corresponding loan and repair payments that had been gifted to a relative without court approval, as well as a payment to a divorce attorney that had been issued after Ecker's resignation. However, the court determined the State had not shown beyond a reasonable doubt that Ecker converted money designated for clothing and administrative expenses, including travel.

¶5 Ecker filed a postconviction motion for a new trial, asserting the court made evidentiary and other errors and she received ineffective assistance of trial counsel. A ***Machner*** hearing was held on July 19, 2011, after which the trial court denied the motion.[2] Ecker raised two additional grounds for a new trial in a motion to amend and reconsider on June 1, 2012. She argued that the jury waiver colloquy was ineffective and, secondarily, that trial counsel was ineffective for failing to inform her of a settlement offer.

¶6 The trial court agreed the jury waiver colloquy was insufficient and granted the motion for reconsideration. The court conducted a second postconviction evidentiary hearing on January 31, 2013, after which it concluded

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

Ecker had validly waived her constitutional right to a trial by jury. Ecker appeals from the judgment of conviction and from the orders denying postconviction relief.

DISCUSSION

¶7 Ecker's appellate arguments generally fall in two categories. First she argues she received ineffective assistance of trial counsel, for a number of reasons. Second, she challenges certain aspects of her trial, such as evidentiary rulings, the sufficiency of the evidence, and venue. In all events, she seeks a new trial.[3]

I. Ineffective assistance of trial counsel

¶8 Ecker argues she was denied the effective assistance of trial counsel for five reasons. She claims: first, that her attorney failed to inform her of a pretrial settlement offer; second, that counsel was ineffective for failing to secure a valid waiver of her right to a jury trial; third, that counsel failed to call important defense witnesses; fourth, that counsel failed to seek dismissal of the Information based on the offense date or require the State to elect a prosecution theory; and fifth, that counsel failed to object to the circuit court's finding that the victim was incapable of giving consent as a matter of law.

¶9 A defendant claiming ineffective assistance of counsel must make a two-part showing under ***Strickland v. Washington***, 466 U.S. 668 (1984). The defendant must show that counsel performed deficiently, and that the deficient

[3] We observe that if successful on her sufficiency of the evidence claim, Ecker would be entitled to acquittal rather than a new trial.

performance caused prejudice. ***State v. Jenkins***, 2014 WI 59, ¶35, 355 Wis. 2d 180, 848 N.W.2d 786. We indulge a strong presumption that counsel acted reasonably and within professional norms. *See* ***State v. Wanta***, 224 Wis. 2d 679, 700, 592 N.W.2d 645 (Ct. App. 1999).

¶10 To prove deficient performance, the defendant must "show that … counsel's representation fell below an objective standard of reasonableness considering all the circumstances." ***Jenkins***, 355 Wis. 2d 180, ¶36. Trial counsel is permitted significant latitude in representing the defendant, and our review of his or her efforts is highly deferential. *See* ***id.*** "A court must make every effort to reconstruct the circumstances of counsel's challenged conduct, to evaluate the conduct from counsel's perspective at the time, and to eliminate the distorting effects of hindsight." ***Id.*** Strategic choices made after a thorough investigation of the law and facts are virtually unchallengeable, *see* ***State v. Jorgensen***, 2013 WI App 94, ¶15, 349 Wis. 2d 525, 835 N.W.2d 290, *review denied*, 2014 WI 3, 352 Wis. 2d 353, 842 N.W.2d 361, and strategic decisions made after a less than complete investigation of the law and facts may still be adjudged reasonable, *see* ***Jenkins***, 355 Wis. 2d 180, ¶36.

¶11 Even if counsel's performance was deficient, a defendant must also show prejudice by demonstrating a reasonable probability that the errors adversely affected the defense. ***Id.***, ¶37. The test is whether "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Id.*** (quoting ***State v. Burton***, 2013 WI 61, ¶49, 349 Wis. 2d 1, 832 N.W.2d 611). If prejudice is not established, we need not consider whether counsel performed deficiently. ***State v. Carlson***, 2014 WI App 83, ¶8, 355 Wis. 2d 579, 851 N.W.2d 472.

¶12 Both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of fact and law. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). Under that standard, we will not reverse the circuit court's findings of historical fact—that is, the court's underlying findings of what happened—unless they are clearly erroneous. ***Id.*** However, whether counsel performed deficiently and whether the performance caused prejudice are questions of law that we decide independently of the circuit court. ***Id.***

A. Failure to inform of pretrial settlement offer

¶13 "As a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." ***Missouri v. Frye***, 132 S.Ct. 1399, 1408 (2012). Defense counsel's failure to communicate a formal offer to the defendant is deficient performance. ***Id.*** at 1409. To show prejudice, defendants must demonstrate "a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." ***Id.***

¶14 On July 30, 2010, the district attorney advised trial counsel by letter that the criminal charges would be dismissed if Ecker returned certain property and paid $10,000 restitution. At the July 19, 2011, evidentiary hearing, counsel testified he was sure he communicated the offer to Ecker and it was his practice to do so.

¶15 It was not until June 1, 2012, that Ecker filed a postconviction motion alleging trial counsel was ineffective for failing to inform her of the settlement offer. However, the motion made clear the settlement issue was secondary to Ecker's contemporaneous assertion that her jury waiver was invalid.

Indeed, Ecker acknowledged that "further ground work" was necessary for her claim, and that she wished only to "preserve the [settlement offer] issue for further proceedings if required." Consistent with this, the circuit court indicated it would only consider or take evidence on Ecker's settlement offer claim if it denied her jury waiver claim.

¶16 We conclude Ecker abandoned the issue below and has forfeited her right to appellate review. After the circuit court rejected Ecker's jury waiver argument, Ecker did not request that the court consider the settlement offer issue, nor did she seek an evidentiary hearing on that issue. In her postconviction motion, Ecker acknowledged such a hearing would be necessary.[4] It is a prerequisite to a claim of ineffective assistance of counsel on appeal to preserve the testimony of trial counsel. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Further, when an appellant is provided an opportunity to renew an objection, but fails to do so, he or she has forfeited the right to challenge the ruling on appeal. ***State v. Joseph P.***, 200 Wis. 2d 227, 233, 546 N.W.2d 494 (Ct. App. 1996).

¶17 In any event, Ecker has failed to establish a reasonable probability she would have accepted the State's offer. Trial counsel's uncontroverted testimony at the July 19, 2011, evidentiary hearing established that Ecker maintained her innocence and wished to go to trial. Ecker believed she "didn't do anything wrong and [she] wasn't going to pay the ten thousand dollars …."

[4] The motion stated that once Ecker filed an affidavit, either trial counsel or the district attorney would be permitted to introduce evidence that "(a) no offer was made to the defendant; or (b) that such offer was properly conveyed to the defendant before said offer was to expire."

¶18 Ecker requests that we consider her affidavit to the contrary, which she includes in her brief's appendix. Ecker fails to provide any record citation to the affidavit, in violation of WIS. STAT. RULE 809.19(1)(e). Further, she does not respond to the State's contention that the affidavit is not in the appellate record. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted are deemed conceded). Although we have no duty to scour the record to review arguments unaccompanied by adequate record citation, our independent search has not yielded the affidavit either. *See* ***Roy v. St. Lukes Med. Ctr.***, 2007 WI App 218, ¶10 n.1, 305 Wis. 2d 658, 741 N.W.2d 256. We will not consider any materials in an appendix that are not in the record. ***Id.***

B. Failure to ensure adequate waiver of jury trial

¶19 "A defendant's right to a jury trial is guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution." ***State v. Anderson***, 2002 WI 7, ¶10, 249 Wis. 2d 586, 638 N.W.2d 301. A defendant is permitted to waive this right. *See* WIS. STAT. § 972.02.

¶20 In ***Anderson***, 249 Wis. 2d 586, ¶¶23-24, our supreme court held that a circuit court must conduct a personal colloquy in every case where a criminal defendant seeks to waive his or her right to a jury trial. The colloquy must be designed to ensure that the defendant:

> (1) made a deliberate choice, absent threats or promises, to proceed without a jury trial; (2) was aware of the nature of a jury trial, such that it consists of a panel of 12 people that must agree on all elements of the crime charged; (3) was aware of the nature of a court trial, such that the judge will make a decision on whether or not he or she is guilty of the

> crime charged; and (4) had enough time to discuss the decision with his or her attorney.

Id., ¶24.

¶21 Here, the circuit court concluded the jury waiver colloquy did not comply with ***Anderson***. The State concedes the colloquy was deficient. However, a defective jury waiver colloquy does not automatically entitle a defendant to a new trial. If the defendant makes a prima facie showing that the waiver was defective, the burden shifts to the State to show by clear and convincing evidence that the defendant in fact voluntarily and intelligently waived his or her right to a jury trial. ***State v. Grant***, 230 Wis. 2d 90, 99, 601 N.W.2d 8 (Ct. App. 1999).

¶22 A defendant's waiver of the right to a trial by jury is valid if he or she understands the "basic 'purpose and function' of a jury trial." ***State v. Resio***, 148 Wis. 2d 687, 695, 436 N.W.2d 603 (1989) (quoting ***United States ex rel. Williams v. DeRobertis***, 715 F.2d 1174, 1180 (7th Cir. 1983)). Trial counsel testified that after a jury trial had been scheduled, he discussed with Ecker the nature of the jury trial, explaining that a jury is composed of twelve people selected at random from the community who would have to reach a unanimous decision. Counsel also discussed the "pros and consequences" of having a court trial with Ecker. Ecker was concerned she would not receive a fair trial from members of the Antigo community, and believed Judge Kawalski was a fair man.

¶23 The circuit court found trial counsel "was credible in his testimony regarding the communications he had with Ms. Ecker." That testimony established that Ecker understood the basic purpose and function of a jury trial. The credibility finding was within the circuit court's province as fact-finder. *See* ***Grayson v. State***, 35 Wis. 2d 360, 367, 151 N.W.2d 100 (1967). Because the

State established that Ecker voluntarily and intelligently waived her right to a jury trial, Ecker has failed to establish prejudice arising from the defective colloquy.[5]

C. Failure to call defense witnesses

¶24 Ecker next alleges trial counsel should have subpoenaed the testimony of the ward, Bryan Wolf. However, she concedes the decision not to do so was supported by counsel's reasonable belief that the State would have difficulty meeting its burden of proof without eliciting Bryan's testimony. We will avoid second-guessing such strategic decisions. ***State v. Westmoreland***, 2008 WI App 15, ¶20, 307 Wis. 2d 429, 744 N.W.2d 919 (WI App 2007).

¶25 Ecker has also failed to establish deficient performance because Bryan refused to speak with trial counsel before trial. Consequently, counsel could not be sure what Bryan would say on the stand. Counsel was not ineffective for failing to call a witness whose testimony was unknown and may have been highly unfavorable. In addition, Ecker does not explain what Bryan's testimony would have been or how it would have helped her case.

¶26 Ecker identifies a litany of other witnesses she believes trial counsel should have presented at trial. However, she fails to explain what exculpatory testimony they would have provided. The State correctly sums up the law: Ecker "needed to do more than point to witnesses that trial counsel did not call at trial. Ecker had to prove that failing to call the witnesses fell below an objective

[5] We need not consider Ecker's related arguments that her waiver was obtained under duress because she could not afford a jury trial, was told that a trial to the court would be much cheaper, and was not informed of her right to have an attorney appointed for her at public expense. She does not cite any case law establishing that compromised finances may render a valid waiver involuntary.

standard of reasonableness." *See* ***State v. Balliette***, 2011 WI 79, ¶67, 336 Wis. 2d 358, 805 N.W.2d 334. This she did not do.

D. Failure to seek dismissal/require the State to select prosecution theory

¶27 Ecker asserts trial counsel was ineffective for not moving to dismiss the information for "lack of proof as to evidence supporting the date of the offense charged." To the contrary, counsel testified the timeframe of the offenses had been disclosed during discovery, and he did not believe objecting to the information based on the offense date would serve Ecker's interests because the State would either amend or refile. Because Ecker was aware of the offense dates the State was relying on, Ecker cannot show prejudice.

¶28 Ecker also argues trial counsel was ineffective for failing to require the State to select a theory of prosecution. Citing ***State v. Seymour***, 183 Wis. 2d 683, 515 N.W.2d 874 (1994), Ecker argues the theft statute, WIS. STAT. § 943.20(1)(b), contains a disjunctive intent element that requires the State to prove either that she had intent to convert for her own use or for the use of any person except the owner. In essence, Ecker asserts the legislature created separate offenses that turn on the defendant's intent, and it was error not to instruct the fact-finder that it could not convict without unanimity as to the intent element.

¶29 Ecker's argument is insufficiently developed. To determine whether a statute creates multiple offenses or a separate offense with multiple modes of commission, we examine four factors: "1) the language of the statute, 2) the legislative history and context of the statute, 3) the nature of the proscribed conduct, and 4) the appropriateness of multiple punishment for the conduct." ***State v. Derango***, 2000 WI 89, ¶15, 236 Wis. 2d 721, 613 N.W.2d 833, *modified on other grounds by* ***State v. Davison***, 2003 WI 89, 263 Wis. 2d 145, 666 N.W.2d

1. Ecker does not analyze any of these factors in her approximately one-page argument. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988) (court of appeals will not consider undeveloped arguments).

¶30 Regardless, we note the case law distinguishes between acts and intent for unanimity purposes. Thus, in ***Seymour***, 183 Wis. 2d at 686, 689-90, the supreme court determined the theft statute's prohibition on the use, transfer, concealment, or retention of another's property was meant to "describe independent offenses rather than simply delineating methods by which the same offense may be committed." By contrast, in ***Derango***, 236 Wis. 2d 721, ¶17, the court concluded the child enticement statute, which prohibits individuals with certain enumerated intents from causing a child to enter a private area, "creates one offense with multiple modes of commission" because "[t]he act of enticement is the crime, not the underlying intended sexual or other misconduct."

¶31 For theft purposes, the act of taking another's property in any of the designated ways is the crime, not the thief's intended destination for the property. Thus, while the jury must agree on the manner in which the defendant committed theft—by use, transfer, etc.—it need not agree on whether the defendant intended to keep the property or give it to a person other than the owner. Where a statute creates one crime with alternate modes of commission, unanimity is not required unless the alternate modes of commission are conceptually distinct. ***Id.***, ¶22.

E. Failure to object to finding of incompetency

¶32 Ecker claims she is entitled to a new trial because trial counsel was ineffective for not seeking a mistrial when Bryan Wolf was deemed incapable of giving consent as a matter of law. However, Ecker does not explain why a mistrial was warranted, nor does she cite any legal authority in support of her

claim. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals will not consider inadequately briefed arguments or arguments unsupported by references to legal authority). The argument is vague and consists of approximately six sentences. *See* ***id.*** (court of appeals will not consider arguments supported by only general statements). In sum, Ecker has shown neither deficient performance nor prejudice entitling her to relief.

II. Evidentiary & other rulings

¶33 Trial counsel's performance aside, Ecker raises five direct challenges to other aspects of her trial. First, Ecker asserts the circuit court erroneously excluded hearsay evidence that Bryan Wolf consented to Ecker's use of his money and assets. Second, Ecker claims the circuit court relieved the State of its burden of proof on an essential element of theft when it concluded Bryan was incapable of giving consent as a matter of law. Third, Ecker challenges the sufficiency of the evidence. Fourth, Ecker asserts she was tried in an improper venue. Fifth, she claims the information should have been dismissed for lack of specificity as to the offense date.

A. Evidentiary error

¶34 A circuit court has broad discretion in making evidentiary rulings. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. We review a trial court's decision to exclude evidence for an erroneous exercise of that discretion. ***Id.*** We will uphold a decision to exclude evidence if the circuit court "examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion." ***Id.***

¶35 Ecker argues the trial court erroneously "excluded evidence of statements made by Bryan Wolf … to [Ecker and others], most importantly regarding whether he consented to the transfer of property …." She states the court "typically ruled" the statements constituted hearsay, but does not identify any specific rulings with record citations. The State, for its part, has identified six sustained hearsay objections during the testimony of Ecker and her husband. It believes Ecker is challenging those rulings.

¶36 Hearsay is generally inadmissible. *See* WIS. STAT. § 908.02. Hearsay is "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3). Ecker argues the challenged testimony was not offered to prove the truth of the matter asserted, but rather to show the effect of Bryan's statements on her state of mind—that the statements led her to believe she could take the property, regardless of whether she had legal authority to do so. *See* WIS JI—CRIMINAL 1444 (2006) (requiring as an element of offense that defendant "knew that the use of the money was without the owner's consent and contrary to the defendant's authority."). This would remove the testimony from the realm of hearsay. *See* ***State v. Wilson***, 160 Wis. 2d 774, 779, 467 N.W.2d 130 (Ct. App. 1991) (When a declarant's statement is offered for the fact that it was said, rather than for the truth of its content, it is not hearsay.).

¶37 The problem with Ecker's argument is that trial counsel never proposed that the testimony had a function other than to prove the truth of the matter asserted. The proponent of evidence has the burden of proving its admissibility. ***State v. Jenkins***, 168 Wis. 2d 175, 188, 483 N.W.2d 262 (Ct. App. 1992). Because Ecker never raised the effect on her state of mind as a basis for admissibility, we cannot conclude the circuit court erroneously exercised its

discretion. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (appellate courts will not address issues for the first time on appeal). "A fundamental appellate precept is that we 'will not … blindside trial courts with reversals based on theories which did not originate in their forum.'" ***Schonscheck v. Paccar, Inc.***, 2003 WI App 79, ¶11, 261 Wis. 2d 769, 661 N.W.2d 476 (quoting ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995)) (ellipsis in original).

¶38 The State persuasively argues any error in excluding the testimony was harmless. To assess whether an error is harmless, we focus on the effect of the error on the verdict, asking whether it appears beyond a reasonable doubt the error complained of did not contribute to the verdict obtained. ***State v. Weed***, 2003 WI 85, ¶29, 263 Wis. 2d 434, 666 N.W.2d 485. Relevant factors include the importance of the testimony, whether the testimony was cumulative, the presence or absence of corroborative or contradictory evidence, the extent of cross-examination permitted, and the overall strength of the prosecution's case. ***Delaware v. Van Arsdall***, 475 U.S. 673, 684 (1986).

¶39 We agree with the State that the excluded testimony had minimal probative value and did not undermine the State's case. Guardianship accountings indicated $23,505 had been paid in spousal support between 2006 and 2007. Carol Wolf stated she had received only $11,600 during those years, and no cash. In 2007, when Carol had supposedly been paid $11,705, the evidence showed four checks payable to Carol, totaling $3,300. During that same time period, a considerable number of checks had been made out to cash and signed by Ecker.

The circuit court specifically found Carol had received $11,905 less than was reported on the annual accountings for 2006 and 2007.[6]

¶40 The hearsay testimony would not have negated the State's evidence that Ecker took $11,905 designated as spousal support without authorization. The circuit court's findings were based on documentary evidence and its determination that Carol was more credible than Ecker. The hearsay testimony would not have changed the guardianship accountings, nor would it have made Carol's testimony less credible.

¶41 To the extent the challenged testimony would have been admissible to establish Ecker's belief that other transfers of guardianship property were made with Bryan Wolf's consent, we also conclude any error was harmless. With respect to cash payments to Bryan, the court, sitting as fact-finder, determined Bryan had not actually received the $6,885 cash payments identified in the guardianship accountings. The challenged testimony would not have affected this finding; Ecker could not believe Bryan had consented to be given what he did not receive. With respect to transfers other than the cash—a truck, gifts, and divorce expenses—the challenged testimony was either cumulative or paled in comparison to the evidence of guilt.

B. Incapacity to consent as a matter of law

¶42 Ecker next argues the circuit court impermissibly "aided the prosecution when it decided, as a matter of law, that the State need not prove lack

[6] After identifying the missing amount correctly as $11,905, the court's decision contains what we presume is a scrivener's error that incorrectly identifies the unaccounted-for amount as $11,095.

of consent by the victim to sustain a conviction." She again complains that Bryan Wolf was never subpoenaed, and posits that the State was legally prohibited from attempting to portray Carol Wolf as a victim because she was not subject to a guardianship.

¶43 We are uncertain precisely what legal framework Ecker wishes us to employ when reviewing these claims. Other than citing WIS JI—CRIMINAL 1444 for the elements of the offense, Ecker does not cite any legal authority to support her arguments. *See* ***Pettit***, 171 Wis. 2d at 646. She simply claims the alleged errors were "fundamentally unfair" to the defense. Nonetheless, as best we can discern Ecker's claims, we reject them.

¶44 To the extent Ecker wishes to argue the State was relieved of the burden of proof, we disagree. It is clear from the trial court's decision that it properly allocated the burden of proof on the lack-of-consent issue. It appears the court simply found the evidence introduced by the State—such as the letters of guardianship—established as a matter of law that Bryan was incapable of giving consent, and that Ecker had knowledge of his incompetency based on her appointment as guardian. Ecker does not present any argument as to why this finding was in error.

¶45 To the extent Ecker wishes to argue the evidence was insufficient to convict her of theft, we group that assertion with her direct challenge to the sufficiency of the evidence and address both in the following section.

C. Sufficiency of the evidence

¶46 Ecker argues the State failed to prove, beyond a reasonable doubt, all four elements of the crime charged. To prove theft in an employment setting, the

State must establish: (1) that the defendant had possession of money belonging to another because of her employment; (2) that the defendant intentionally used the money without the owner's consent and contrary to the defendant's authority; (3) that the defendant knew the use of the money was without the owner's consent and contrary to the defendant's authority; and (4) that the defendant intended to convert the money for her own use or the use of any person other than the owner. WIS JI—CRIMINAL 1444.

¶47 A significant portion of Ecker's argument is directed at issues we have already addressed. Namely, Ecker again asserts the court erroneously relieved the State of the burden of proof regarding lack of consent. We have concluded that is not so; the State introduced sufficient evidence that Bryan Wolf was incapable of consenting. Further, Ecker argues there was no evidence that gifting money and assets to Bryan and others was contrary to her authority. The fact of a guardianship and the duties of a guardian are established by the letters of guardianship, which were admitted into evidence at trial, and state statutes, of which knowledge is presumed. *See* ***Tri-State Mech., Inc. v. Northland Coll.***, 2004 WI App 100, ¶10, 273 Wis. 2d 471, 681 N.W.2d 302. Gifts are permitted from the ward's estate, but only with court approval, which was undisputedly lacking in this case. *See* WIS. STAT. § 54.20(2)(a).

¶48 Ecker also argues the State failed to prove that she knew her use of the money was without consent and contrary to her authority as a guardian. We disagree. An appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Hayes***, 2004 WI 80,

¶56, 273 Wis. 2d 1, 681 N.W.2d 203. "We give great deference to the determination of the trier of fact." ***Id.***, ¶57.

¶49 A rational trier of fact could have drawn the appropriate inferences based on the evidence introduced at trial. The evidence established that Ecker prepared accountings identifying certain outgoing sums as spousal support, which Carol Wolf credibly testified she did not receive. Based on the falsified accounting documents, a fact-finder could reasonably infer that the transfers were knowingly made without the ward's consent and with knowledge that the transfers were contrary to the guardian's authority.

¶50 Ecker also asserts the State failed to provide affirmative proof of conservation of any money for her own use. Again, the fact-finder could draw the requisite inference from the evidence adduced at trial. The trial court could reasonably find that Ecker had pocketed the missing money.

D. Venue

¶51 Although venue is not an element of a crime, it must nonetheless be proved beyond a reasonable doubt. ***State v. Schultz***, 2010 WI App 124, ¶12, 329 Wis. 2d 424, 791 N.W.2d 190. WISCONSIN STAT. § 971.19(1) requires criminal actions to be tried in the county where the crime was committed, except as otherwise provided. We will not reverse a conviction based on the State's failure to establish venue unless the evidence, viewed most favorably to the State and the conviction, is so insufficient that there is no basis upon which a trier of fact could determine venue beyond a reasonable doubt. ***State v. Swinson***, 2003 WI App 45, ¶19, 261 Wis. 2d 633, 660 N.W.2d 12.

¶52 Ecker argues venue in Langlade County—the location of the ward's bank account—was inappropriate. She believes Brown County was the appropriate venue, because the court determined that is where the checks made out to cash were presented. However, an offense requiring two or more acts may be tried in any county where one of the requisite acts occurred. *See* WIS. STAT. § 971.19(2). Among other things, the State was required to prove Ecker possessed money belonging to another. *See* WIS JI—CRIMINAL 1444. Because Ecker had possession of money located in Langlade County, venue there was appropriate.

E. Specificity of offense date

¶53 Ecker's final argument is a rehashing of one of her ineffective assistance claims. She argues the information should have been dismissed because it alleged crimes occurring "on or about … January 1, 2006," when the proof at trial established the crimes occurred between August 2006 and September 2007. Again, the undisputed testimony of trial counsel was that he had notice of the relevant time period during discovery. Because there has been no showing that Ecker was misled to her prejudice, the information is deemed amended in conformance with the proof. *See* ***State v. Bednarski***, 1 Wis. 2d 639, 642, 85 N.W.2d 396 (1957).

By the Court.—Judgment and orders affirmed.

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