COURT OF APPEALS
DECISION
DATED AND FILED

June 15, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 98-2811-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DALE R. PULTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: P. CHARLES JONES, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Vergeront, JJ.

¶1 PER CURIAM. Dale Pultz appeals from a judgment convicting him of criminal slander of title, and from an order denying him postconviction relief. He claims: (1) that his waiver of counsel was invalid; (2) that his failure to argue the defense of mistake to the jury resulted in the real controversy never

being tried; (3) that a blank UCC-1 form with instructions should have been provided to the jury upon its request; and (4) that the evidence was insufficient to support the verdict. For the reasons discussed below, we reject each of these contentions and affirm.

BACKGROUND

¶2 Pultz was an anti-abortion activist who was jailed for contempt of court after he violated a temporary injunction. In response, Pultz filed with the Wisconsin Secretary of State a UCC-1 document with attachments which purported to perfect non-existent security interests on Judge Jeffrey Wagner's property and attempted to have the judge arrested by a citizen's warrant. The State charged Pultz with slander of title, forgery, and simulating legal process, but eventually dropped the simulating legal process charge. Pultz ultimately represented himself at trial with standby counsel. The jury convicted Pultz of slander of title and acquitted him of forgery. Additional facts will be set forth as necessary.

ANALYSIS

Waiver of Counsel

¶3 A criminal defendant has a constitutional right to represent himself or herself at trial which must be balanced against his or her constitutional right to be represented by counsel. *See* U.S. CONST. amend. VI; WIS. CONST. art. I, § 7; ***Faretta v. California***, 422 U.S. 806, 832-34 (1975); ***State v. Klessig***, 211 Wis. 2d

194, 203, 564 N.W.2d 716 (1997).[1] Therefore, before allowing a criminal defendant to proceed pro se, the trial court must first determine that the defendant has knowingly, intelligently, and voluntarily waived the right to the assistance of counsel, and is competent to represent himself or herself. *See* ***Klessig***, 211 Wis. 2d at 203. In order to establish that a waiver of counsel was knowing, intelligent and voluntary, the record must show: (1) that the defendant made a deliberate choice to proceed without counsel; (2) that the defendant was aware of the difficulties and disadvantages of self-representation; (3) that the defendant understood the seriousness of the charges; and (4) that the defendant understood the general range of penalties which could be imposed. *See* ***Pickens v. State***, 96 Wis. 2d 549, 563, 292 N.W.2d 601 (1980) *overruled on other grounds by* ***Klessig***, 211 Wis. 2d 194. In order to determine whether the defendant is competent to proceed pro se, the trial court should consider "the defendant's education, literacy, fluency in English, and any physical or psychological disability which may significantly affect his [or her] ability to communicate a possible defense to the jury."[2] ***Klessig***, 211 Wis. 2d at 212 (quoting ***Pickens***, 96 Wis. 2d at 569).

¶4 Our standard of review for a waiver of counsel is mixed. We will independently determine whether the record establishes that the waiver was knowingly, intelligently and voluntarily made. *See* ***id.*** at 204. However, because the trial court is in the best position to observe the defendant, we will uphold its

[1] Contrary to Pultz's contention, we see nothing in ***Martinez v. Court of Appeal of California***, 120 S. Ct. 684 (2000), which would overrule the Supreme Court's holding in ***Faretta*** that the Sixth Amendment encompasses a right of self-representation at the trial level. ***Martinez*** deals with the separate issue of whether there is a constitutional right to self-representation on appeal.

[2] Pultz contends that a defendant's competency to represent himself also depends upon the complexity of the case. However, he offers no legal authority supporting that proposition and we could find none.

competency determination unless it is totally unsupported by the facts of record. ***Pickens***, 96 Wis. 2d at 568-70.

¶5 The Public Defender's office initially appointed counsel for Pultz. However, after Pultz expressed his dissatisfaction with the representation he had been afforded and indicated that he did not want successor counsel appointed from the Public Defender's office, the trial court allowed Pultz to proceed pro se with standby counsel appointed from the private bar.

¶6 The trial court's various colloquies with Pultz show that the defendant's decision to represent himself with the assistance of standby counsel was a deliberate choice which would enable to him to run his own case, making all arguments, objections, and final decisions.[3] With regard to his understanding of the difficulties of proceeding pro se, Pultz acknowledged that he would be responsible for complying with the rules of evidence and also noted that he had represented himself in the past on a disorderly conduct charge. He further stated that he was very aware of the seriousness of the charges, which he correctly noted carried potential penalties of ten and two years in prison. In sum, we are satisfied that the record establishes the voluntary, intelligent and knowing nature of Pultz's waiver of counsel.

¶7 The trial court did not specifically inquire about the defendant's level of education (although trial testimony revealed that he had completed high school). However, it was able to observe for itself that Pultz was fluent in English,

[3] We are not persuaded that the defendant's use of the term "assistance of counsel" indicated any confusion over the role standby counsel would perform, given his explanation to the trial court of standby counsel's role and his repeated and emphatic refusals to accept representation which would impair his own decision-making authority over his case.

that he had "an excellent understanding" of the basic concepts involved in legal proceedings, and that he had no apparent difficulty communicating to the court. Pultz also informed the court that the prosecutor from the last case in which he had represented himself commented that he had done an excellent job. In the postconviction proceedings, Pultz alleged that he suffered from attention deficit disorder and paranoia.[4] However, notwithstanding these problems, the court observed that Pultz was in fact able to present a coherent defense to the jury by denying that he had the requisite intent to commit the offenses charged. In fact, he managed to obtain an acquittal on the forgery charge despite the undisputed fact that he had signed his name under the judge's printed name in the column designated for the debtor's signature on the UCC-1 form. We cannot say that either the trial court's initial or subsequent determination that Pultz was competent to represent himself was unsupported by the record. We therefore conclude that the trial court's decisions to allow Pultz to proceed with standby counsel and to deny a new trial on that basis were proper.

Real Controversy

¶8 WISCONSIN STAT. § 752.35 (1997-98)[5] vests this court with the discretionary authority to order a new trial when "it appears from the record that the real controversy has not been fully tried." Pultz asks us to exercise this

[4] The trial court took evidence to determine whether Pultz was competent to proceed with this appeal, and determined that he was. However, we directed that the evidence submitted on that point was not to be used in support of a "backwards extrapolation" that Pultz was incompetent at the time of trial.

[5] All references in this opinion to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

authority on his behalf because he was not sophisticated enough to present the defense of mistake of civil law to the jury.[6]

¶9 We are skeptical, in the first instance, that advising the jury of the mistake-of-law theory Pultz now advances would have had any impact on the outcome of the trial. WIS. STAT. § 939.43(1) provides, "An honest error, whether of fact or of law other than criminal law, is a defense if it negatives the existence of a state of mind essential to the crime." Pultz claims that if the jury had been informed about this defense, he would have been acquitted based on his testimony that he was ignorant of the fact that a consensual security agreement was a prerequisite for filing a financing statement. His contention is flawed in several respects, however.

¶10 First of all, we note that the jury was not required to accept Pultz's word that he believed it was legitimate to file a "common law lien" on the judge's property in anticipation of a subsequent lawsuit for damages based on an alleged procedural irregularity in his contempt proceeding. For one thing, Pultz testified that he knew filing the financing statement would impair the judge's ability to dispose of his property, and admitted that he wanted to cause the judge financial difficulties. For another, Pultz failed to mention his contention that he was sentenced to jail from a pretrial hearing in his writ for habeas corpus relief from the contempt ruling. Pultz also testified that he did not prepare the financing statement himself, but refused to name the person who helped him. From all of

[6] Pultz also argues that the real controversy was not tried because he failed to present evidence that there are several circumstances under which a debtor's signature is not required on the UCC-1 form. It appears to us, however, that this point related to the forgery charge. Because Pultz has not adequately explained the relevance of this issue to the slander of title charge, we will not address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633, 642 (Ct. App. 1992).

this, the jury could have concluded that Pultz knew more about what he was doing than he let on.

¶11 Moreover, even if the jury found that Pultz truly misunderstood the proper use of a financing statement, the misrepresentation about the existence of a valid underlying security agreement was not the only way in which the financing statement could be said to be false. Among the laundry list of items which Pultz listed as collateral on the UCC-1 form were artwork, boats, aircraft, crops and livestock, which Judge Wagner testified he did not even own. Pultz did not claim any reason to have believed that the judge owned such items. Even more tellingly, Pultz conceded on cross-examination that he had absolutely no reason to believe that Judge Wagner had committed murder, mayhem, rape, treason, sabotage, or any other crimes against life and bodily security as alleged in the citizen's arrest warrant Pultz attached to the UCC-1 form. And nowhere on the document did Pultz explain that the basis for his purported lien was anticipated damages from a lawsuit which had not even been filed. The document therefore contained false statements even based upon what Pultz testified he believed to be true.

¶12 In any event, we are not inclined to exercise our discretionary reversal power where the failure to fully present a defense is attributable to deficiencies in the defendant's own pro se performance. As we recently noted in ***State v. Clutter***, 230 Wis. 2d 472, 477-78, 602 N.W.2d 324 (Ct. App. 1999), *review denied*, 607 N.W.2d 292 (Wis. Nov. 17, 1999) (No. 99-0705-CR):

> Inherent in a defendant's decision to represent himself is the risk that a defense not known to him will not be presented during trial. When a defendant undertakes pro se representation that is the risk he knowingly assumes. If his strategy in proceeding pro se results in a valid defense being waived, it reflects the hazards of his decision to waive counsel. To rescue this defendant from the folly of

> his choice to represent himself would diminish the serious consequences of the decision he made when he elected to waive counsel. Moreover, ordering a new trial would encourage defendants to proceed pro se believing that they would have an opportunity to have a second trial with counsel if they were dissatisfied with the first verdict. Multiple trials would strain our limited judicial resources and would compromise the finality of judgments.

We therefore decline to order a new trial on the basis that the real controversy was not fully tried.

Refusal to Submit UCC-1 form to Jury

¶13 Pultz contends the trial court committed reversible error when it refused to submit to the jury a blank UCC-1 form with instructions upon the jury's request. However, Pultz concedes that he never offered the form into evidence, and offers no authority that he should have been able to reopen his case simply because he was proceeding pro se.[7] Indeed, Pultz specifically acknowledged that he would be responsible for complying with the rules of evidence before the trial court allowed him to proceed with standby counsel. We see no error here.

Sufficiency of the Evidence

¶14 Pultz moved for a directed verdict at the end of the State's case, but did not present any grounds to support his motion. He now claims that the trial court should have granted the motion because the state failed to prove that he filed an instrument relating to title, and failed to prove that the financing statement was frivolous.

[7] Furthermore, since the only testimony about the instructions to the UCC-1 form related to whether they gave any indication that the debtor was required to sign the form—a point which we indicated in note 6, *supra*, would have been relevant to Pultz's intent on the forgery charge—we again fail to see the relevance of the defendant's argument to the slander of title charge which is the subject of this appeal.

¶15 The State argues that Pultz waived these issues by failing to articulate the basis for his motion for acquittal and by presenting evidence following the close of the State's case. The rule in such circumstances is not complete waiver, however. Rather, when the defendant has presented evidence following the close of the State's case, we will examine the entire record to determine whether the evidence was sufficient to sustain the verdict. *See* ***State v. Simplot***, 180 Wis. 2d 383, 399-400, 509 N.W.2d 338 (Ct. App. 1993).[8] The specificity of the defendant's objection is not relevant because a challenge to the sufficiency of the evidence need not be presented to the trial court prior to appeal. *See* WIS. STAT. § 974.02(2).

¶16 Our general standard for reviewing the sufficiency of the evidence in a criminal case is whether "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). We will review whether the evidence was sufficient to show that the financing statement was frivolous under this standard. However, Pultz's contention that the evidence was insufficient to show that he filed an instrument relating to title requires an analysis of the proper interpretation of the statute to an undisputed fact. We will therefore independently consider whether a financing statement falls outside the scope of WIS. STAT. § 943.60(1) (1993-94). *See* ***State v. Perry***, 215 Wis. 2d 696, 707-08, 573 N.W.2d 876 (Ct. App. 1997).

[8] In essence, the only thing waived is the right to have the sufficiency of the State's case examined on its own, without reference to any of the evidence presented by the defense.

¶17 At the time Pultz filed the financing statement, WIS. STAT. § 943.60(1) (1993-94) (emphasis added) provided:

> Any person who submits for filing, docketing or recording any lien, claim of lien, lis pendens, writ of attachment, *or any other instrument relating to title in real or personal property*, knowing the contents or any part of the contents to be false, sham or frivolous, is guilty of a Class E felony.

However, 1997 Wis. Act 27, § 5336m, modified the statute to read:

> Any person who submits for filing, entering or recording any lien, claim of lien, lis pendens, writ of attachment, *financing statement, or any other instrument relating to a security interest in* or title to real or personal property, and who knows or should have known that the contents or any part of the contents of the instrument are false, a sham or frivolous, is guilty of a Class D felony.

(Emphasis added.) Pultz contends that the subsequent addition of financing statements and instruments relating to security interests in the list of documents to which § 943.60(1) applies signifies that those documents were not covered by the earlier statute. Thus, he claims, the State failed to submit any proof that he had filed an "instrument relating to title in real or personal property."

¶18 We note, however, that WIS. STAT. § 990.001(7) provides, "A revised statute is to be understood in the same sense as the original unless the change in language indicates a different meaning so clearly as to preclude judicial construction." We are not persuaded that the new statute clearly precludes judicial construction of the old statute to relate to financing statements. A financing statement indicates the existence of a security interest in an item of personal property. Such an interest clouds the personal property owner's title to the personal property, making it more difficult for the owner to sell the personal

property or use it for collateral. A document which clouds title could be said to relate to title. Thus, we view the amendment to WIS. STAT. § 943.60(1) as clarifying rather than adding to the types of documents to which the statute applies. Because the language of the statute could properly be applied to financing statements and there was no dispute that Pultz had in fact filed the financing statement at issue, we conclude that the State met its burden of proving this element.

¶19 Pultz's argument that the State failed to prove that the financing statement was frivolous is completely without merit because WIS. STAT. § 943.60(1) (1993-94) plainly required the State to prove only that the document was frivolous *or* false *or* a sham. As discussed above, the evidence was sufficient to show numerous ways in which the financing statement was false.

By the Court.—Judgment and order affirmed.

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