COURT OF APPEALS
DECISION
DATED AND FILED

December 5, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 99-1666-CR
00-0802-CR

Cir. Ct. No. 97-CF-234

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL ALAN LEROSE,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Racine County: MICHAEL GIBBS, Judge. *Affirmed.*

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Paul Alan LeRose appeals pro se from a judgment of conviction of two counts of theft by fraud and from an order denying his motion for postconviction relief. The conviction arises out of LeRose's billing practices for services rendered to the Office of the State Public Defender (SPD) as a

contract attorney. While LeRose identifies nine separate issues on appeal, only two predominant themes exist: that he is innocent because double billing was permitted under his contract with the SPD and that the evidence was insufficient to support the conviction because there was no direct evidence of legal work billed but not performed. He also claims that he was denied the effective assistance of trial counsel. We reject these and other arguments made by LeRose and affirm the judgment and order.

¶2 LeRose was a private practice attorney who handled cases for the SPD in Kenosha and Racine counties. He was charged with billing $13,743 for legal services not performed between January 9, 1992, and February 16, 1994, and $32,299.50 between January 4, 1993, and February 16, 1994. The State's proof focused on spread sheet analyses of LeRose's bills to the SPD which showed that he billed in excess of sixteen and twenty-four hours a day for numerous days in 1992 and 1993. The State also showed that LeRose billed for travel time to Racine when, after December 1992, although he maintained a Kenosha mailing address, he actually conducted the bulk of his work out of an office he maintained in Racine.

¶3 LeRose's theory of defense was that he doubled billed for periods of time spent waiting in court or making phone calls during travel or other waiting time. He argued that double billing was permissible under his contract with the SPD and as a recognized billing practice for attorneys. On appeal, LeRose goes through the various permutations of the written policy the SPD utilized during the time period for which he was charged. LeRose concludes that his contract with the SPD did not prohibit double billing in all forms and that only waiting time could not be double billed under a policy revision put in place in November 1993. He faults the trial court for not determining as a matter of law that he had a

contract with the SPD and that the contract did not prohibit double billing.[1] He argues that the State failed to prove its case because it did not offer any evidence of work billed but not actually performed.

¶4 LeRose is challenging the sufficiency of the evidence. 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.

¶5 LeRose attempts to recast the prosecution as a contract case. It is not. It is a criminal prosecution for theft by fraud and the elements of the offense are independent of a contractual prohibition of the conduct charged. Thus, whether LeRose had a contract with the SPD and whether that contract prohibited double billing was not relevant.[2] Even accepting LeRose's position that "[d]ouble billing, in and of itself," was not fraud, the jury could still find him guilty of

[1] LeRose argues that the trial court should have determined as a matter of law that the contract was ambiguous and permitted him to present extrinsic evidence as to its meaning.

[2] LeRose argues that it was error to permit the SPD's representative to testify about his understanding of the written policies provided to contract attorneys with respect to double billing and the definition of an attorney's principal office. No objection was made to the testimony and, in fact, some of the testimony was elicited during LeRose's cross-examination of the witness. The claim of error is waived. ***State v. Davis***, 199 Wis. 2d 513, 517-18, 545 N.W.2d 244 (Ct. App. 1996).

billing hours for which no legal services were performed. LeRose had extremely high billing totals; he billed in excess of sixteen and twenty-fours hours a day on many occasions. LeRose's description of the work performed for those days for each client was put into evidence. It is a reasonable inference that double billing would not overlap a sufficient number of hours to permit an attorney's workday to stretch to over sixteen or twenty-four hours. This is particularly true with respect to out-of-court time which exceeded sixteen hours because the described tasks for each client are usually unrelated and not subject to double billing. We must accept the reasonable inferences drawn from the evidence by the jury. ***Id.*** at 506-07.

¶6 The evidence was also sufficient with respect to fraud related to billing for travel time. It is undisputed that the SPD could be billed for travel time for travel outside the county of the attorney's principal office. In testimony given in 1993, LeRose indicated that he lived in Kenosha but had an office in Racine. Nearly all of the cases he handled for the SPD were in Racine county. LeRose billed 86.5 hours for travel time in 1992 and investigators determined that only 7.1 hours were actually for travel outside of Racine county. LeRose also told investigators that after moving to Racine in December 1992, he did not bill for travel time between Kenosha and Racine. However, LeRose billed 1002 hours for travel time in 1993 and investigators determined that approximately 85 hours were actually for travel outside of Racine county. LeRose's former fiancée testified that he conducted his law practice out of his Racine residence. An investigator's testimony noted that oftentimes LeRose made entries for .2, .3 or .4 hours of round-trip travel. Those entries were suggestive that LeRose was billing for local travel. Moreover, on days in which travel may have been double billed, the entries for travel to the same place were not consistent. The jury could conclude that

Racine was the place of LeRose's principal office and that the billed travel time was excessive and fraudulent.

¶7 During the investigation, LeRose gave inconsistent explanations of his billing totals. In response to a letter from the SPD that his billing practices would be audited, LeRose indicated that he typically worked between sixteen and nineteen hours a day and that he could produce affidavits from jailers, paralegals, and family that he worked late into the night. He also indicated that his computer would track the first day a file was worked on and assign all related work to that date even if it occurred over several days. In another letter, he indicated that he would put billing information onto a computer-generated billing for permanent record. LeRose also indicated that his legal assistant input billing for the day she was given the information and not for the day the work was actually performed. In contrast, LeRose told justice department investigators that he would keep a running list of tasks performed on a yellow legal pad with each case file and that he would destroy those records after receiving payment from the SPD. He did not indicate to investigators that he kept track of his hours via computer. The legal assistant LeRose named in his letter testified that she did not do any work with respect to billing. LeRose's fiancée testified that he would complete his SPD billing sheets away from his computer and did so based on his memory of who he saw and for how long. In his early letter responses to the SPD, LeRose acknowledged that on at least five occasions he billed for phone calls made while traveling and that travel time was also billed. LeRose did not know if that time was properly billed. In contrast, he told investigators that he double billed with the approval of the SPD. He admitted to investigators that court time would be double billed to avoid the impression that in-court time was minimal and to thwart claims of ineffective assistance of counsel.

¶8 The jury was free to reject any declarations by LeRose as incredible. ***State v. Fettig***, 172 Wis. 2d 428, 448, 493 N.W.2d 254 (Ct. App. 1992). Thus, the evidence supports the State's theory that LeRose's bills bore no relation to the actual amount of time spent for a particular case and that the hours billed were inflated. There was sufficient proof that LeRose billed for legal work not actually performed.

¶9 To further illustrate his contention that the prosecution produced no direct evidence of fraud, LeRose examines the prosecution's proof with respect to billing for services on Friday, June 26, 1992. LeRose indicated to the SPD that on June 26, 1992, he attended a SPD sponsored seminar in Green Bay which ran from 8:30 a.m. to 5:00 p.m. LeRose also billed 15.4 hours on thirteen SPD files that day, which included four court appearances, a two-hour conference with a client reviewing a probation packet, two conferences with clients in jail and more than one hour of legal research. LeRose argues that despite the compelling nature of this evidence, it was nothing more than insinuation because the prosecution did not demonstrate that he did not make the claimed court appearances on that day or that the hours billed were not representative of actual work performed. LeRose's position is nothing more than a refusal to accept that circumstantial evidence is often stronger than direct evidence. *See* ***Poellinger***, 153 Wis. 2d at 501-02.

¶10 LeRose asserts that prosecutorial misconduct surrounds the prosecution's proof of his billing for June 26, 1992. He claims that the prosecution failed to disclose court minutes reflecting that he had made an

appearance in a juvenile court matter on June 26, 1992.[3] This claim is undeveloped and we need not address it in any manner other than the conclusory fashion utilized by LeRose. ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). There is no evidence that the prosecution had the court minutes before the trial. While LeRose faults the prosecutor for not investigating before trial whether the court appearances on June 26, 1992 were made, nothing requires the prosecution to seek out exculpatory evidence.[4] Finally, even if armed with minutes sheets reflecting that LeRose made the billed court appearances on June 26, 1992, there would have still been conflicting evidence about his activities that day because of his certification of attendance at the SPD seminar. Any proof that he made the court appearances, even if in the early morning, amounts to a concession that he did not attend the seminar for the claimed eight hours required for continuing legal education credit. The evidence would not have demonstrated LeRose's innocence and he is not entitled to a new trial on the ground of the prosecution's failure to disclose exculpatory evidence. *See* ***State v. Garrity***, 161 Wis. 2d 842, 848, 469 N.W.2d 219, 221 (Ct. App. 1991) (a violation of the duty to disclose applies only when the evidence is both favorable to the accused and material to guilt or innocence and evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different).

---

[3] At sentencing, the minutes sheet from the juvenile court proceeding was discussed as it reflected that defense attorney "LeRay" or "LeRoy" appeared for an 8:30 a.m. pretrial conference.

[4] LeRose points out that due process prevents the prosecution from relying on testimony known to be false. ***State v. Nerison***, 136 Wis. 2d 37, 54, 401 N.W.2d 1 (1987). This proposition is not implicated here; there was no testimony that LeRose had not made the court appearances claimed on June 26, 1992.

¶11 Finally, as part of his challenge to the sufficiency of the evidence, LeRose contends that he was denied his constitutional right to present a defense. We summarily reject this claim. The trial court allowed LeRose considerable latitude with respect to the meaning of the written policies of the SPD, the doctrine of *expressio unius*, and the economies of effort promoted by double billing. In his closing argument, LeRose argued his permissible double billing theory of defense. While the trial court prevented LeRose from using his cross-examination of a fact witness to introduce supreme court decisions into evidence, it was not an erroneous exercise of discretion. The specific decisions LeRose sought to introduce had not been identified or relied on by the witness and inquiry about them went beyond the scope of cross-examination.

¶12 LeRose claims that his trial counsel was constitutionally deficient. To successfully maintain a claim of ineffective assistance of counsel a defendant must show deficient performance and prejudice. ***State v. Byrge***, 225 Wis. 2d 702, 718, 594 N.W.2d 388 (Ct. App. 1999), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477. "The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness." ***Id.*** at 719. A presumption exists that trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. ***Id.*** "As to prejudice, the defendant must show that 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.***

¶13 LeRose contends that trial counsel should have produced the court minutes demonstrating that he made the claimed appearances on June 26, 1992. He also claims that counsel was ineffective for not presenting at trial two expert

witnesses to explain the acceptance of double billing. The trial court found that LeRose was not prejudiced by either allegation of deficient performance. Whether counsel's performance prejudiced the defendant is a question of law which we review de novo without deference to the trial court's conclusion. ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). We need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. ***Id.***

¶14 Our previous discussion of the evidence regarding June 26, 1992, demonstrates that LeRose was not prejudiced by trial counsel's failure to determine if the claimed court appearances were made. Evidence that the appearances were made would not have explained how LeRose could have performed all the tasks billed for the day and still have attended the eight-hour SPD seminar. Moreover, as the trial court noted, June 26, 1992 was just one day out of many for which LeRose billed excessive hours. Counsel's failure to investigate and present that evidence does not undermine our confidence in the outcome.

¶15 Sharren Rose, then head of the Wisconsin Board of Attorneys Professional Responsibility, and law professor Robert Bennett were on the defense's witness list at trial. Counsel did not present these witnesses at trial.[5]

[5] LeRose indicates that at the postconviction hearing, trial counsel admitted that he had never contacted either witness. LeRose also discusses the potential testimony of Professor William Ross on the ethics of double billing. The record does not include a transcript of the entire postconviction motion hearing but only the trial court's ruling. It is the appellant's responsibility to assure that the record is complete. ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26, 496 N.W.2d 226 (Ct. App. 1993). In the absence of the transcript, this court will assume that the facts necessary to sustain the trial court's decision are supported by the record. ***Suburban State Bank v. Squires***, 145 Wis. 2d 445, 451, 427 N.W.2d 393 (Ct. App. 1988).

LeRose explains that Rose would have testified that double billing was not prohibited by the Wisconsin Supreme Court rules of professional responsibility and that it was not unethical. Professor Bennett would have been presented as an expert in the field of contract interpretation and would have served to rebut the testimony of the SPD's representative that double billing was not allowed under the SPD's contract.

¶16 We agree with the trial court's determination that LeRose was not prejudiced by trial counsel's failure to call the additional witnesses. As explained earlier in this opinion, the theory of prosecution was not that double billing was impermissible or unethical but that LeRose's bills were excessive and bore no relationship to actual work or travel performed. Whether there was contractual or ethical approval of double billing is not relevant. There is no prejudice when the suggested evidence is not relevant. ***State v. O'Brien***, 223 Wis. 2d 303, 325, 588 N.W.2d 8 (1999). LeRose was not denied the effective assistance of counsel.

By the Court.—Judgment and order affirmed.

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