COURT OF APPEALS
DECISION
DATED AND FILED

June 21, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2840-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RONALD K. KEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Crawford County: ROBERT P. VAN DE HEY, Judge. *Affirmed.*

Before Vergeront, Roggensack and Lundsten, JJ.

¶1 ROGGENSACK, J. Ronald K. Key appeals his conviction for theft contrary to WIS. STAT. § 943.20(1)(b) (1999-2000)[1] and an order denying his

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

postconviction motions. He claims that his conviction should be overturned because the State failed to give him sufficient notice of what conduct violated § 943.20(1)(b) and because he was denied his right to a unanimous jury verdict. Assuming, *arguendo*, that the State failed to give him sufficient notice, we nevertheless conclude that the failure was harmless error because no reasonable possibility exists that the error contributed to his conviction. Furthermore, we conclude that Key was not denied his right to a unanimous jury verdict because the jury could have found him guilty based on only one method of committing theft as proscribed by § 943.20(1)(b). Therefore, we affirm the judgment and order of the circuit court.

BACKGROUND

¶2 Key, a Prairie du Chien real estate broker and business consultant, was charged in a seventeen-count complaint with various violations of the law. Count X, the only one relevant to this appeal, charged Key with theft contrary to WIS. STAT. § 943.20(1)(b).[2] As a factual basis for this count, the complaint alleged that, over a twenty-month period, Key received fourteen checks totaling $49,837.90 from William and Joan Kraemer to set up a corporation, make tax payments and file amended tax returns, but that he did not make the tax payments

[2] WISCONSIN STAT. § 943.20(1)(b) states in relevant part:

> **Theft. (1)** ACTS. Whoever does any of the following may be penalized as provided in sub. (3):
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> …
>
> (b) By virtue of his or her … business or employment … having possession or custody of money … of another, intentionally uses, transfers, conceals, or retains possession of such money … without the owner's consent, contrary to his or her authority, and with intent to convert to his or her own use ….

or perform the services agreed upon. It also detailed the amount and date of each payment the Kraemers made.

¶3 Key waived his preliminary hearing. An information was filed; he was arraigned, pled not guilty to each count and was bound over for trial. Count X[3] of the information also charged Key with violating WIS. STAT. § 943.20(1)(b), but it did not list the date and amount of each check the Kraemers had paid to Key and it did not list the Kraemers' reasons for making the payments. It simply alleged that, by virtue of his business, Key had possession of money belonging to the Kraemers which he had used or retained without their consent and that he had converted more than $2,500 of it to his own use. Before trial, Key filed a motion to make the complaint more definite and certain and moved to dismiss Count X for vagueness. The circuit court concluded that he had stipulated that the complaint was legally sufficient by waiving the preliminary hearing. Nevertheless, it stated, "I am ordering that you receive whatever discovery the State has which would help you answer the questions that you are raising."

¶4 At trial, Joan Kraemer testified in detail about her payments to Key, and she submitted her check ledger and cancelled checks to support her testimony. Kraemer testified that Key frequently telephoned her saying that quarterly tax

[3] Count X of the information alleges:

> Count X: From June 13, 1994 through February 2, 1996 in the City of Prairie du Chien, Crawford County, Wisconsin the defendant did by virtue of his office, business, employment, or as trustee or bailee, take possession of money from William and Joan Kraemer in the amount of $49,837.90, and intentionally used or retained possession in excess of $2,500.00, without the owners consent contrary to his authority and with intent to convert to his own use in violation of Section 943.20(1)(b) of the Wisconsin Statutes.

payments were due and instructing her to write checks payable to him to cover payments due the taxing authority. She also testified that Key had requested money to set up a Pennsylvania corporation but that he had never done so. Key admitted that he had received all the checks, but he claimed that all the money was intended for his fees. He also testified that he had an arrangement with the Kraemers that they would pay him $2,000/month to provide them with business services and that he averaged between fifty and sixty hours of work for the Kraemers per month. However, he said he had no invoices, billings or other documents to support that testimony.

¶5 The court instructed the jury on the elements of a violation of WIS. STAT. § 943.20(1)(b) employing only one *actus reus*[4] of the four listed in § 943.20(1)(b), that of using the money of another without the owner's consent. The jury convicted Key. He filed a postconviction motion claiming, among other things, that he was denied due process of law because of inadequate notice of the charges and that he was denied his right to a unanimous jury verdict. The circuit court denied the postconviction motion. Key appeals.

DISCUSSION

¶6 Key's arguments arise from a claim that the charging in this case was duplicitous. Duplicity is joining two or more separate crimes in a single count. ***State v. George***, 69 Wis. 2d 92, 99, 230 N.W.2d 253, 257 (1975). Two of the concerns which underlie the prohibition against duplicity are the possibility of insufficient notice to the defendant of the crime with which he has been charged

[4] *Actus reus* refers to the wrongful act that comprises the physical component of a crime. ***State v. Gustafson***, 119 Wis. 2d 676, 695, 350 N.W.2d 653, 662 (1984).

and the possibility of a jury verdict that is not unanimous. ***State v. Lomagro***, 113 Wis. 2d 582, 586-87, 335 N.W.2d 583, 587 (1983).

Standard of Review.

¶7 The sufficiency of a complaint or an information in a criminal case is a question of law that we review *de novo*. ***State v. Fawcett***, 145 Wis. 2d 244, 250, 426 N.W.2d 91, 94 (Ct. App. 1988). Whether a deprivation of the constitutional right to adequate notice of the charges the State asserts against a defendant has occurred is a question of constitutional fact that we independently review. ***Id.*** Whether a defendant is denied his constitutional right to a unanimous verdict in a criminal case is also a question of law which we review without deference to the circuit court. *See* ***Lomagro***, 113 Wis. 2d at 592, 335 N.W.2d at 589 (citing ***Manson v. State***, 101 Wis. 2d 413, 419, 428-30, 304 N.W.2d 729, 732, 736-37 (1981)).

Notice.

¶8 The Sixth Amendment to the United States Constitution guarantees an accused the right to be informed of "the nature and cause of the accusation." U.S. CONST. amend. VI. A similar right is guaranteed by the Wisconsin Constitution. WIS. CONST. art. I, § 7. To determine whether the charge was sufficient, we consider two factors: (1) whether the accusation provides the defendant with enough detail about the nature of the charge and the underlying conduct to allow him or her to prepare a defense; and (2) whether conviction or acquittal will bar another prosecution for the same offense. ***State v. Holesome***, 40 Wis. 2d 95, 102, 161 N.W.2d 283, 286-87 (1968). An allegation of insufficient notice is subject to a harmless error analysis which determines whether a reasonable possibility exists that the error contributed to the conviction. ***State v.***

Dyess, 124 Wis. 2d 525, 543, 370 N.W.2d 222, 231-32 (1985). We will not reverse Key's conviction if we conclude that "it was harmless beyond a reasonable doubt because there is no reasonable possibility that the error contributed to the conviction." ***State v. Stark***, 162 Wis. 2d 537, 548, 470 N.W.2d 317, 321 (Ct. App. 1991) (citation omitted).

¶9 Key argues that the prosecutor never provided him with (1) the factual basis for the claim that the Kraemers paid money as tax deposits for estimated tax liabilities instead of fees; (2) the reason each amount listed in the complaint was paid to Key; and (3) the factual basis for the allegation that Key used money paid to him without the owners' consent. As a result, he contends that he was unable to prepare a defense.

¶10 Assuming, *arguendo*, that Key was deprived of adequate notice of the charges against him, we nonetheless conclude that if there were error it was harmless beyond a reasonable doubt. Key testified that although he had received the Kraemers' payments, all of the money he used for his own purposes was due him for services he had provided to the Kraemers. He did not testify that any of that money was for any other purpose. Additionally, he presented no evidence or argument at his postconviction hearing that his defense would have been different had he received more specific notice of which checks the Kraemers believed they made for tax payments and which checks they believed they made to form a corporation.

¶11 This appeal has been limited in a similar fashion. For example, his reply brief asserts that "if Defendant knew before trial what specifically he was charged with he could have reconstructed documentation to show how much time he worked for the Kraemers on which projects and show that he was entitled to the

payments he received." However, the reply brief does not further describe the documents to which Key is referring or what the result of the reconstruction would have been. Additionally, his trial testimony revealed that he had no records to support what he said was his fee agreement with the Kraemers or the amount of time he had expended on their behalf, even though he said that he had averaged fifty to sixty hours per month working for them. Therefore, we conclude that Key's defense would not have been different if he had received additional information, and accordingly, there is no reasonable possibility that the alleged lack of notice contributed to his conviction.

Unanimous Jury Verdict.

¶12 The Wisconsin Constitution guarantees the right to a jury trial. WIS. CONST. art. I, §§ 5 and 7. In criminal cases, the right to a jury trial implies the right to a unanimous verdict on the ultimate issue of guilt or innocence. ***State v. Johnson***, 2001 WI 52, ¶11, ___ Wis. 2d ___, ___N.W.2d ___; ***Richardson v. United States***, 526 U.S. 813, 820 (1999). "The principal justification for the unanimity requirement is that it ensures that each juror is convinced beyond a reasonable doubt that the prosecution has proved each essential element of the offense." ***Johnson***, 2001 WI 52, ¶11 (citation omitted). A defendant may be denied the right to a unanimous jury verdict if (1) the prosecutor issues only one count but combines within it multiple crimes; or (2) the prosecutor issues only one count but introduces evidence of multiple acts that are not conceptually similar which constitute the criminal offense charged and with either alternative one or two above, the jurors do not unanimously agree which crime or acts the defendant committed. ***State v. McMahon***, 186 Wis. 2d 68, 81, 519 N.W.2d 621, 626 (Ct. App. 1994). The Supreme Court has constructed the following analysis to

determine whether a defendant has been denied the right to a unanimous jury verdict:

> The first step is to determine whether the jury has been presented with evidence of multiple crimes or evidence of alternate means of committing the *actus reus* element of one crime. If more than one crime is presented to the jury, unanimity is required as to each. If there is only one crime, jury unanimity on the particular alternative means of committing the crime is required only if the acts are conceptually distinct. Unanimity is not required if the acts are conceptually similar.

Lomagro, 113 Wis. 2d at 592, 335 N.W.2d at 589 (citations omitted).

¶13 Part of Key's contention on appeal is that he was tried for committing different crimes, but no unanimity instruction was given. He relies, in part, on the complaint for this contention. WISCONSIN STAT. § 943.20(1)(b), the statute he was convicted of violating, describes four alternate elements for the *actus reus*, i.*e.*, to use, to transfer, to conceal or to retain possession of it. ***State v. Seymour***, 183 Wis. 2d 683, 696, 515 N.W.2d 874, 880 (1994). It does not merely describe four means of committing a single offense. ***Id.*** at 686, 515 N.W.2d at 876. We have held that where a statute sets out alternate elements of committing the physical act of the crime, the circuit court may submit only one of these elements to the jury in the instruction, thereby avoiding any conflict with the defendant's right to a unanimous jury in regard to the offense. ***Jackson v. State***, 92 Wis. 2d 1, 11, 284 N.W.2d 685, 690 (Ct. App. 1979).

¶14 Here, Count X of the Information, the charge on which Key was tried, set out alternate elements for committing the crime of theft: the possession of the Kraemers' money with intent (1) to *use* it or (2) to *retain* it, all without their consent and with the intent to convert it to Key's own use. However, at trial the jury instructions given by the circuit court limited the physical act element of

committing theft to that of *using* the money of another without the owner's consent. The circuit court instructed:

> Theft, as defined in § 943.20(1)(b) of the Criminal Code of Wisconsin, is committed by one who, by virtue of his business, has possession of money belonging to another and intentionally uses such money without the owner's consent, contrary to his authority, and with intent to convert it to his own use.
>
> …
>
> The second element requires that the defendant intentionally used such money without the owner's consent and contrary to the defendant's authority. "Intentionally" means that the defendant must have had a purpose to use such money without the owner's consent. The phrase "without the owner's consent" means that there was no consent in fact by the owner of such property (or by his authorized agent) to its use.
>
> The third element requires that the defendant knew that such use of the money was without the owner's consent and contrary to the defendant's authority.
>
> The fourth element requires that the defendant used the money with intent to convert it to his own use. As used here, the phrase "intent to convert to his own use" means that the defendant must have had the mental purpose to use, appropriate, or convert such property to his own personal use.

¶15 For Key to have been denied his right to a unanimous verdict based on the first step in the ***Lomagro*** analysis, he must demonstrate that the jury could have found him guilty of more than one distinct offense under WIS. STAT. § 943.20(1)(b), given the jury instructions used at trial. He cannot do so because the circuit court's jury instructions limited the *actus reus* to one element, that of using the money, as we approved in ***Jackson***.

¶16 Key also argues that he was denied his right to a unanimous jury because, if he used money that the Kraemers paid him to form a corporation which

he never formed, that conduct would violate WIS. STAT. § 943.20(1)(d), not § 943.20(1)(b), which he admits would be contravened if he had used money paid to him to make the Kraemers' quarterly tax payments. Because both types of evidence were admitted at trial, as well as evidence of conduct which is not criminal (*i.e.*, overcharging for amending tax returns) he contends he was denied his right to a unanimous jury. He cites no authority for this novel theory that presenting evidence of a crime which was not charged or of noncriminal conduct results in a unanimity violation in regard to the crime actually charged, and we have found none. Furthermore, by claiming that using money given to him to form a corporation he never formed does not satisfy the elements of § 943.20(1)(b), he leaves only one means of theft for which the jury could have convicted him: using the Kraemers' money that they intended for quarterly tax payments contrary to the authority they imparted. Accordingly, our analysis leads us to conclude that Key was not denied his right to a unanimous jury verdict.

CONCLUSION

¶17 Assuming, *arguendo*, that the State failed to give him sufficient notice, we nevertheless conclude that the failure was harmless error because no reasonable possibility exists that the error contributed to his conviction. Furthermore, we conclude that Key was not denied his right to a unanimous jury verdict because the jury could have found him guilty based on only one method of committing theft as proscribed by WIS. STAT. § 943.20(1)(b). Therefore, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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