COURT OF APPEALS
DECISION
DATED AND FILED

July 27, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1360-CR **Cir. Ct. No. 2007CF457**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SARAH R. BLUEM, N/K/A SARAH R. PETERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Sarah Peterson[1] appeals a judgment of conviction for theft by employee of more than $10,000, and an order denying her motion for postconviction relief. She argues trial counsel was ineffective for failing to object to the admission of both expert testimony and hearsay evidence. She further contends counsel failed to present a defense because he told her it was unnecessary to explain where the money went, and failed to introduce into evidence some cancelled checks Peterson had provided. We reject Peterson's arguments and affirm.

BACKGROUND

¶2 Peterson worked as a personal care worker for Robert Fetvedt, who was blind, from late 2001 until his death in September 2003. Following Fetvedt's death, the successor trustee of his estate reported concerns with financial transactions occurring during the time Peterson worked for Fetvedt, including $61,000 in automated teller machine (ATM) cash withdrawals. Ultimately, Peterson was charged with theft contrary to WIS. STAT. § 943.20(1)(b).

¶3 At trial, Peterson's defense was that Fetvedt authorized her to spend or withdraw all of the disputed funds. However, she maintained Fetvedt never gave her any monetary gifts. Peterson testified Fetvedt paid her wages half by

[1] Peterson's brief refers throughout to "the defendant." This violates WIS. STAT. RULE 809.19(1)(i), which requires reference to the parties by name, rather than by party designation. Peterson's brief also suffers from repeated use of the term said. The use of said to refer back to objects, i.e., "said document," is unnecessary. Indeed, it is distracting and detracts from the forcefulness of one's argument.

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

check and half in cash, consisting of approximately $400 total per week. She admitted she did not report any cash payments as income on her taxes.

¶4 Peterson claimed Fetvedt requested her assistance with financial matters and authorized her to use his ATM card.[2] Prior to this, she asserted, she did not know what an ATM card was or how it worked. Peterson also testified Fetvedt purchased her car because it was easier to enter and exit than his own. She explained Fetvedt paid off the $17,000 loan balance on her car, but she retained title to it and paid the insurance. She transported Fetvedt "[n]ot every week, but every couple of weeks."

¶5 Peterson also testified that Fetvedt paid cash to remodel his unfinished basement so that she, her boyfriend, and her daughter could move in. Peterson, her boyfriend, and his father performed the remodeling work. In addition, Peterson entered into a land contract to purchase Fetvedt's home, requiring her to make $400 monthly payments. The agreement provided that upon Fetvedt's death, however, any remaining balance would be forgiven. Peterson claimed to have made four payments, but Fetvedt's bank account statements reflected only a single payment. Additionally, there were numerous wire transfers from Fetvedt's bank account to Peterson's, none of which Peterson could explain. Peterson further testified she did not track or keep any documentation of the spending pursuant to ATM withdrawals. Finally, regarding car repair payments for Peterson and her boyfriend, Peterson claimed she reimbursed Fetvedt via a reduction in the cash portion of her wages.

[2] Peterson referred to the ATM card as a "TYME card," which we note is a brand name of an ATM card.

¶6 A jury found Peterson guilty of theft over $10,000. Peterson moved for postconviction relief, arguing ineffective assistance of counsel. The circuit court held a ***Machner***[3] hearing and later denied the motion. Peterson appeals.

DISCUSSION

¶7 Peterson argues her trial counsel was ineffective, which requires she demonstrate both deficient performance and prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). She first contends counsel was ineffective for failing to object to purported expert testimony by Mary Beth Gardner and Captain John Vogler, neither of whom were disclosed as expert witnesses prior to trial. We conclude, as did the circuit court, that neither witness provided expert testimony.

¶8 Gardner was an attorney specializing in elder law who had assisted Fetvedt with trust, financial power of attorney, and land contract issues.[4] She had been in his home and testified it was "a modest home" and she did not notice any expensive personal property. Gardner also responded affirmatively when questioned whether she had seen situations of "financial exploitation of the elderly."[5] Regarding the ATM cash withdrawals, she was asked "based on your knowledge of what was taken care of by automatic deductions or checks written, can you see any justification for that figure, payment of bills, for Mr. Fetvedt's

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

[4] Gardner testified Fetvedt had executed a power of attorney for finances, but Peterson was not listed as the agent or alternate. The document was signed in February 2003.

[5] Peterson's trial counsel did, in fact, object to Gardner's response to this question, arguing it was irrelevant.

benefit?" Peterson responded, "Only if there were certain unexpected expenses that weren't covered by insurance or other resources, this would be extraordinary." The State also inquired whether there would be any reason not to pay expenses with an ATM card by debit, rather than with cash, to which Peterson responded, "I don't see one unless that it was periodically for convenience purposes or some other reason." Peterson similarly argues Vogler too provided expert testimony when he stated he did not see any reasonable explanation for the ATM withdrawals.

¶9 We agree with the State that none of the foregoing was expert testimony. Gardner was a fact witness. She was Fetvedt's attorney and could thus explain her professional experience to the jury. She visited Fetvedt's home several times while preparing documents, and had a basis to testify to what she saw in his house. Gardner was also familiar with Fetvedt's finances and assets, knowing that Fetvedt's basic needs were paid either through direct withdrawal from his accounts or by check. Gardner's testimony that she saw no basis to justify the nearly $60,000[6] in ATM cash withdrawals by Peterson was based on her personal knowledge of the case. Gardner could offer her own opinion of the situation based on those perceptions. *See* WIS. STAT. § 907.01 (lay witness may give opinion testimony that is rationally based on witness's perceptions and that is helpful to an understanding of the witnesses' testimony or the determination of a fact in issue).

[6] There was a total of $61,527 in ATM withdrawals, but Gardner testified the $1,820 withdrawn during 2001 did not cause her concern.

¶10 Vogler was also a fact witness. He interviewed Peterson and others and reviewed Fetvedt's financial information. After conducting this investigation, Vogler offered his opinion whether he could see any reasonable explanation for Peterson's ATM withdrawals. His testimony was an opinion based on the investigation he conducted, not "scientific, technical, or other specialized knowledge." *See* WIS. STAT. § 907.02.

¶11 Because Peterson has not shown that any objection to Gardner's and Vogler's testimony would have been successful, she has not demonstrated counsel performed deficiently. *See* ***State v. Anderson***, 2005 WI App 238, ¶29, 288 Wis. 2d 83, 707 N.W.2d 159, *rev'd on other grounds*, 2006 WI 77, 291 Wis. 2d 673, 717 N.W.2d 74 (counsel not deficient for failing to raise objection that would have been unsuccessful). Moreover, Peterson's counsel testified he was not surprised by Gardner's or Vogler's testimony, because they both said in the complaint and at the preliminary hearing that they could not find a reasonable explanation for the ATM withdrawals. Thus, it would have been unnecessary to exclude their testimony. *See* ***State v. Pletz***, 2000 WI App 221, ¶26 n.3, 239 Wis. 2d 49, 619 N.W.2d 97 ("The penalty for breach of disclosure should fit the nature of the proffered evidence and remove any harmful effect on the defendant.").

¶12 Peterson next complains counsel failed to object to hearsay testimony consisting of charts summarizing bank account records and Vogler's testimony regarding bank telephone transfers. We reject the bank records argument because the parties stipulated there was no need to call an employee to authenticate Fetvedt's account information.

¶13 We reject the telephone transfers argument because Peterson fails to explain how the failure to object was deficient or prejudicial, except to assert the testimony would have been excluded. She merely states, in conclusory fashion, that the testimony was hearsay and counsel was deficient. Further, she does not address the prejudice inquiry, which requires that, absent the deficiency, there is a reasonable probability of a different outcome. We will not decide issues that are not, or inadequately, briefed. ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994). Regardless, the telephone transfers involved only about $3,500, which was minimal compared to the ATM withdrawals and other transactions. Further, while Peterson claimed Fetvedt authorized all of the telephone transfers, she was unable to explain what *any* of them were for.

¶14 Peterson next contends counsel was ineffective for failing to present evidence that she claims would have explained what she did with money taken from Fetvedt's accounts. Counsel testified at the postconviction hearing that Peterson offered to provide him with documentation about what happened to some of the money, but that he advised her it would not be helpful to her case. Counsel stated his trial strategy was to argue Fetvedt was aware Peterson was taking money from his accounts and that he approved. Counsel indicated he did not introduce Peterson's documentation because it would have explained where only a part of the money went. He felt it would therefore not benefit her defense.

¶15 As the circuit court recognized, this was a reasonable strategy, and counsel did not perform deficiently by pursuing it. Explaining what happened to only some of the money would not have assisted the strategy, and might have led the jury to question why Peterson could only partially account for the missing money. A circuit court's determination that counsel undertook a reasonable trial strategy is "virtually unassailable." ***State v. Maloney***, 2004 WI App 141, ¶23, 275

Wis. 2d 557, 685 N.W.2d 620 (citing ***State v. Nielsen***, 2001 WI App 192, ¶44, 247 Wis. 2d 466, 634 N.W.2d 325), *aff'd*, 2006 WI 15, 288 Wis. 2d 551, 709 N.W.2d 436. Yet, Peterson offers nothing more than conclusory assertions that counsel's strategy here was an unreasonable one. "Trial counsel is not ineffective simply because an otherwise reasonable trial strategy was unsuccessful." ***Id.***

¶16 Moreover, the evidence against Peterson was strong and, even had her trial counsel performed as Peterson argues he should have, there is not a reasonable probability of a different outcome. There were substantial amounts of missing money that Peterson simply could not account for. As detailed in the State's response brief, Peterson's documentation, which was not unassailable, only accounted for approximately $4,000.[7] Further, even the explained financial transactions, such as the purchase of her car and the land contract arrangement, were dubious on their face.

¶17 Finally, Peterson contends her credibility was undermined by trial counsel's failure to present originals of check copies that were introduced at trial. Peterson inaccurately represents the record and we therefore reject her argument. In any event, Peterson's credibility was not undermined, because she provided a reasonable explanation for not providing the originals; she had provided the State copies and "thought these were what you wanted."

By the Court.—Judgment and order affirmed.

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

[7] Peterson did not file a reply brief.