

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 24, 2012

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. 2011AP2234-CR

Cir. Ct. No. 2011CF331

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

AMIEE L. KIZIOR,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Reversed and cause remanded with directions.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. The State appeals a judgment dismissing the special prosecutor's second criminal complaint against Amiee L. Kizior. None of

the reasons the circuit court gave for dismissing the complaint withstand appellate scrutiny. We therefore reverse.

¶2 The State charged Kizior with two counts of forgery and one count each of uttering a forgery, attempted theft, and obstruction. The latter two are misdemeanors. Kizior allegedly forged the signature of her ex-boyfriend, Michael Kmecheck, on documents purporting to transfer to her the ownership of Kmecheck's vehicle and then filed the fraudulent title with the Department of Motor Vehicles (DMV).

¶3 According to the criminal complaint, Kizior told Winnebago County Deputy Sheriff Bryan Kaye that Kmecheck stole her 1998 Jeep Grand Cherokee. She said the vehicle used to be Kmecheck's and still was registered to him, but that he had signed title to it over to her. Kizior gave Kaye copies of an agreement supposedly transferring ownership and of the title document she claimed Kmecheck signed over to her. Kmecheck denied that he signed the documents or transferred the vehicle to Kizior or anyone else and said it appeared that Kizior had forged his signature. A detective obtained handwriting exemplars from Kmecheck and Kizior and submitted them and the signed documents for forensic analysis at the state crime lab. The crime lab report indicated that the signatures on the documents were not genuine signatures of Kmecheck but "simulations"; that a simulation is an attempt to copy or draw from memory or a model, a signature that approximates the overall form and appearance of the real thing; and that it seldom is possible to identify the writer of a simulation.

¶4 Kizior moved to dismiss the complaint for lack of probable cause. The circuit court, the Honorable Thomas J. Gritton presiding, denied the motion. At the ensuing preliminary hearing, however, the court found probable cause to

support only the misdemeanors. It dismissed the felonies, concluding that the State failed to present sufficient evidence to support a bindover. Six weeks later, the special prosecutor advised the court that the State had failed to submit the crime lab report into evidence and thus wanted to dismiss the misdemeanor case and file another complaint. The court granted the motion over Kizior's objection that the crime lab report was not "new evidence."

¶5 The State's second complaint was virtually identical to the first. Kizior once again moved to dismiss for lack of probable cause. At the hearing on the motion, the special prosecutor argued that, taken with the other facts and reasonable inferences, the heretofore unused crime lab report clearly established probable cause. The circuit court, the Honorable Scott C. Woldt presiding, granted Kizior's motion, dismissing all five counts. The State appeals.

¶6 The circuit court rejected the second complaint for several reasons. One explanation was that, if it did not grant the motion, "on every single case where these things happen, [the State would] do the same thing over and just keep on doing it over and over and over and over again." The court viewed the State's position as an inappropriate request for "another kick at the cat."

¶7 WISCONSIN STAT. § 970.04 (2009-10) plainly authorizes a second "kick at the cat."¹ Section 970.04 provides: "If a preliminary examination has been had and the defendant has been discharged, the district attorney may file another complaint if the district attorney has or discovers additional evidence." The State argued that the crime lab report was unused at the preliminary hearing

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

because it had not been introduced into evidence. Whether evidence is new or unused requires applying § 970.04 to the facts, which presents a question of law that we review independently. *See State v. Manthey*, 169 Wis. 2d 673, 683, 487 N.W.2d 44 (Ct. App. 1992).

¶8 The crime lab report clearly stated that the signature was a simulation. Without the report, the allegations in the complaint largely fall into “she said, he said” territory. The report compellingly supports a reasonable inference that Kizior forged Kmecheck’s signature. We conclude that the State was entitled under WIS. STAT. § 970.04 to reissue the complaint. *See State v. Twaite*, 110 Wis. 2d 214, 220, 327 N.W.2d 700 (1983).

¶9 The circuit court also rejected the refiled complaint for failing to specifically identify or “reference[]” what constituted the unused evidence. WISCONSIN STAT. § 970.04 does not impose additional pleading requirements on a second complaint beyond those specified for any satisfactory criminal complaint. *See* WIS. STAT. § 968.01(2).

¶10 Third, the circuit court commented that filing a second complaint after Kizior’s discharge following the preliminary examination had double-jeopardy implications. This is incorrect. Kizior herself appears to concede the point. “The prohibition against double jeopardy is not triggered until ‘jeopardy attaches.’” *State v. Comstock*, 168 Wis. 2d 915, 937, 485 N.W.2d 354 (1992). In a bench trial, jeopardy attaches when a witness is sworn; in a jury trial, jeopardy attaches when the jury is sworn. *See State v. Seefeldt*, 2002 WI App 149, ¶12, 256 Wis. 2d 410, 647 N.W.2d 894; *see also* WIS. STAT. § 972.07.

¶11 Finally, the circuit court concluded that the second complaint did not “develop” probable cause because the crime lab report “doesn’t say [the simulation is] Kizior’s signature.” We reject that rationale.

¶12 A criminal complaint is legally sufficient if it contains facts that would lead a reasonable person to conclude a crime probably had been committed and the defendant named in the complaint probably was responsible. *State v. Stoehr*, 134 Wis. 2d 66, 74, 396 N.W.2d 177 (1986). That is, the complaint must answer the questions of who and what was charged, when and where the alleged offense took place, why the particular person was charged, and how reliable was the complainant or informant. *State v. Townsend*, 107 Wis. 2d 24, 26, 318 N.W.2d 361 (1982). Whether a criminal complaint is legally sufficient is a question of law subject to our independent review. *Manthey*, 169 Wis. 2d at 685. We consider not only the alleged facts but also the reasonable inferences fairly drawn from those facts. *State v. Becker*, 51 Wis. 2d 659, 662, 188 N.W.2d 449 (1971). The test of a complaint is one of “minimal adequacy,” calling for a commonsense, not hypertechnical, evaluation. *State v. Smaxwell*, 2000 WI App 112, ¶5, 235 Wis. 2d 230, 612 N.W.2d 756 (citation omitted).

¶13 The criminal complaint charged Kizior with forgery and uttering a forgery, in violation of WIS. STAT. § 943.38(1)(a) and (2), in Oshkosh in December 2009 or January 2010. Forgery and uttering a forgery both require proof that the document at issue was “a writing by which legal rights or obligations are created or transferred”; that Kizior forged the document by falsely making either the document or an endorsement on the document look like another person had made the document or endorsement; and that Kizior presented the document to another and represented the document as genuine. *See* WIS. JI-CRIMINAL 1491 and 1492. Uttering a forgery also requires proof that at the time

Kizior presented the document, she knew it was not genuine. *See* WIS. JI-CRIMINAL 1492.

¶14 The probable cause section of the second criminal complaint sets forth these facts. Kizior told Deputy Kaye that Kmecheck stole her Jeep, which Kmecheck used to own. She also said that Kmecheck had signed the transfer agreement and vehicle title and that she used the documents to have DMV title the Jeep in her name. Kizior gave Kaye a copy of the agreement and a copy of the vehicle's title, both purportedly signed by Kmecheck. Kmecheck told Kaye he still owned the Jeep, had not transferred ownership to Kizior and that it appeared Kizior had forged his signature on the paper saying he signed the Jeep over to her.

¶15 The lawyer who represented Kmecheck on a misdemeanor advised Detective Jennifer LeBelle of the Winnebago County Sheriff's Department that Kizior told Kmecheck before his sentencing that her statement to the judge could help or hurt him, so he should sign the Jeep over to her to ensure her cooperation; that Kizior arrived at Kmecheck's sentencing with the agreement already signed and with an unsigned title to the Jeep; that Kmecheck's signature on the contract "looked traced due to being shaky and inconsistent ... like it was made slowly rather than a real signature"; that Kmecheck denied the agreement's authenticity; and that Kmecheck thought Kizior might have obtained the unsigned title document from his papers that still were in her possession.² The lawyer also advised LeBelle that Kmecheck said he recently received a notice that his mailing address had been changed to Kizior's address; that he had not made the change; and that she fraudulently received his mail for the week it took to undo the change.

² Kmecheck testified at the preliminary hearing that he briefly lived with Kizior.

¶16 LeBelle obtained handwriting exemplars from Kizior and Kmecheck and sent them, along with the transfer agreement and the Jeep's original title document, which Kizior had filed with the DMV, to the state crime lab for forensic analysis. The lab report stated that the signatures on both the agreement and the title document were simulations of Kmecheck's signature.

¶17 We cannot agree with the circuit court's suggestion that direct evidence linking Kizior to the forged signatures was necessary to establish probable cause. The above facts and their reasonable inferences answer the necessary "who, what, when, where, why and how" to sufficiently allege probable cause for each felony count. A criminal complaint is sufficient where reasonable inferences may be drawn establishing probable cause. *Manthey*, 169 Wis. 2d at 688-89. The complaint, as it stands, clears the hurdle of "minimal adequacy"; it already has survived a motion to dismiss. It failed at the preliminary examination because the State failed to flesh out the allegations. Whether the crime lab report is enough to bolster the second complaint at a preliminary examination is not before us. We say only that the court erred in dismissing the refiled complaint.

¶18 Accordingly, we reverse the judgment of dismissal and remand with instructions that the circuit court reinstate the second criminal complaint and proceed to a preliminary examination.

By the Court.—Judgment reversed and cause remanded with directions.

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

