COURT OF APPEALS
DECISION
DATED AND FILED

March 20, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP319-CR **Cir. Ct. No. 2002CF6925**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL D. KING,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Daniel D. King, *pro se*, appeals from an order denying his motion for sentence modification. King was sentenced to thirty-five years' imprisonment for armed robbery. He argues that he is entitled to have his sentence commuted to fifteen years, the maximum time allowed for a conviction

of simple robbery, because the jury's verdict read that he was guilty of robbery and not armed robbery. We affirm because King did not object to the form of the verdict and he was not prejudiced by the scrivener's error in the verdict.

¶2 In 2003, King was charged as a party to the crime with eleven crimes: robbery, three counts of sexual assault, and substantial battery of one female victim; and kidnapping, three counts of sexual assault, substantial battery, and armed robbery of a second female victim, Chandra T. A jury trial was conducted on all the charges. The jury found King guilty of both counts of substantial battery and count eleven of the information, the armed robbery of Chandra T. The verdict form as to count eleven provided: "We the jury, duly empaneled and sworn, find the defendant, Daniel D. King, guilty of robbery, as a party to a crime, of Chandra T[.], as charged in Count 11 of the Information." King's conviction of the crimes against Chandra T. was affirmed on appeal.[1]

¶3 Five years after his appeal, King filed a *pro se* motion for sentence modification indicating that he sought relief pursuant to WIS. STAT. § 973.13 (2009-10).[2] Section 973.13 provides: "In any case where the court imposes a

[1] *See* ***State v. King***, 2005 WI App 224, 287 Wis. 2d 756, 706 N.W.2d 181. Before his appeal, King's conviction of substantial battery as to the first victim was vacated and he was granted a new trial on that charge.

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

The State argues that because King had a prior direct appeal, his claim is barred by rule in WIS. STAT. § 974.06, as interpreted in ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994) (all grounds for relief must be raised in a defendant's original, supplemental or amended motion). A motion under WIS. STAT. § 973.13 is not trumped by the procedural bar. *See* ***State v. Flowers***, 221 Wis. 2d 20, 22-23, 586 N.W.2d 175 (1998). Because of our resolution of the appeal on other grounds, we decline to address the State's contention that King's motion for sentence modification really raises a due process violation and is truly a second motion under § 974.06, not a motion under § 973.13.

maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings." King asserted that because the jury verdict read that he was guilty of only robbery, and not armed robbery, he was entitled to have his sentence commuted to the maximum time allowed for robbery. The circuit court found that as to count eleven, the verdict form inadvertently omitted the word "armed" before "robbery" and that there was no question that the jury actually convicted King of armed robbery. It concluded that King was properly sentenced for armed robbery and denied King's motion for sentence modification.

¶4 On appeal King does not challenge the circuit court's finding that a scrivener's error was made on the verdict form. Thus, King's claim is that a mere defect in the verdict form affects the sentence. WISCONSIN STAT. § 805.13(3) provides that the failure to object to the form of the verdict at the instruction and verdict conference "constitutes a waiver of any error in the proposed instructions or verdict." Section 805.13(3) is made applicable to criminal proceedings under WIS. STAT. § 972.11(1). ***State v. Paulson***, 106 Wis. 2d 96, 101-02, 315 N.W.2d 350 (1982). By virtue of his failure to object, King forfeited his claim based on the scrivener's error which omitted the word "armed" before "robbery" on the verdict for count eleven. *See* ***Hoff v. Wedin***, 170 Wis. 2d 443, 454, 489 N.W.2d 646 (Ct. App. 1992).

¶5 King's claim fails for the additional reason that he was not prejudiced by the omitted word in the verdict. A defect in the form of the verdict is a trial error subject to a harmless error analysis. *See* ***State v. Hansbrough***, 2011 WI App 79, ¶17, 334 Wis. 2d 237, 799 N.W.2d 887. Additionally, WIS. STAT. § 971.26 provides in part: "No … judgment or other proceedings [shall] be

affected by reason of any defect or imperfection in matters of form which do not prejudice the defendant." *See* ***State v. Coolidge***, 173 Wis. 2d 783, 792, 496 N.W.2d 701 (Ct. App. 1993), *modified on other grounds by* ***State v. Tiepelman***, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1 (recognizing that defendant was actually sentenced under a statute different from that stated in the judgment of conviction; scrivener's error is of no consequence where there is no prejudice to the defendant).

¶6 At the commencement of the trial the prospective jurors were informed that King was charged with the armed robbery of Chandra T. The testimony at trial was that King's accomplice used a box cutter razor on Chandra T., causing her to bleed, and that the razor was found in the accomplice's wallet. The information was read to the jury just before final instructions and count eleven of the information charged that King, "as a party to a crime, with intent to steal by the use or threat of use of a dangerous weapon, did take property from the person of Chandra T[.]…." The jury was instructed on armed robbery with respect to the crimes against Chandra T. The jury was given a set of instructions during deliberations. In closing argument the prosecutor outlined how the evidence satisfied the elements of armed robbery. No defense argument was made that King could be found guilty only of robbery against Chandra T. The verdict form itself referenced count eleven of the information, which charged armed robbery.

¶7 There is no possibility that the jury in fact adjudged King guilty of just robbery. The evidence supports the armed robbery conviction. The jury would have found King guilty even if the verdict form had labeled the crime as armed robbery. *See* ***Hansbrough***, 334 Wis. 2d 237, ¶23 (the mistake in not providing a not guilty verdict form was harmless when "beyond a reasonable

doubt" a rational jury would have found the defendant guilty even if it had been provided the proper verdict forms). Thus, King was not prejudiced by the omission in the verdict of the word "armed." We affirm the circuit court's determination that King was properly convicted of armed robbery and is not entitled to have his sentence commuted.

By the Court.—Order affirmed.

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