COURT OF APPEALS
DECISION
DATED AND FILED

October 23, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2011AP1491-CR
2011AP1492-CR
2011AP1493-CR

Cir. Ct. Nos. 2009CF45
2009CF165
2009CF169

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TONY D. WALKER,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Tony D. Walker, *pro se,* appeals judgments convicting him of four counts of armed robbery with threat of force and one count of fleeing an officer. He also appeals an order denying his motion for

postconviction relief. He argues that the complaint and information were invalid, that the jury was not properly instructed, that there was insufficient evidence to support two of the convictions, that the amended judgment of conviction ordering restitution is invalid, that the circuit court erred in assigning his bail to his trial attorney in payment of fees, and that the circuit court improperly refused to take judicial notice of some factual issues during the postconviction motion proceedings. We reject all of Walker's arguments and affirm the judgments and order.

¶2 Walker robbed two different pharmacies on three dates over a period of several months in order to obtain drugs. The cases were consolidated for jury trial. Walker was found guilty of all charges against him.

¶3 Walker first argues that the complaint in case No. 2009CF45, which charged him with the armed robbery of Aurora Pharmacy in the City of Greenfield, was invalid because it did not properly allege that he threatened imminent use of force against Robert Udhardt, the pharmacist from whom Walker took the drugs. *See* WIS. STAT. 943.32(1) (2009-10).[1] The charging portion of the complaint alleged:

> On December 29, 2008, … with intent to steal, by the use or threat of use of [a dangerous weapon] did take property from the presence of Robert Udhardt, the owner, by threatening the imminent use of force *against the person of another who was present* with intent thereby to compel … said owner to acquiesce in the taking or carrying away of said property.

(Emphasis added.)

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

This portion of the complaint incorrectly provided that Walker threatened force "against the person of another who was present" when, in fact, Walker threatened use of force against Udhardt. However, the probable cause portion of the complaint correctly explained the factual basis for the charge:

> [The] police spoke to Pharmacist Robert Udhardt who stated that he had been working as the pharmacist at [Aurora Pharmacy] on [December 29, 2008] when defendant Tony Walker, who he later identified in a line up, came into the pharmacy and showed him a black gun and stated, "Give me the Oxycontin." Mr. Udhardt stated that the defendant gave him a white bag and as he put Oxycontin bottles in it the defendant stated, "You have more. I've been here before." Mr. Udhardt stated that he responded by showing the defendant the empty drawer at which time the defendant told him to go in the back, which Mr. Udhardt did, and Mr. Udhardt had an employee then dial 911. The defendant left with the bag.

¶4 A complaint must contain "a written statement of the essential facts constituting the offense charged." WIS. STAT. § 968.01(2). A defect in the form of a complaint does not render the document invalid if the defect does not prejudice the defendant. WIS. STAT. § 971.26. Here, the charging portion of the complaint was incorrectly worded, but the probable cause portion of the complaint properly alleged that Walker took drugs from Udhardt after threatening Udhardt by brandishing a black gun. Walker was not prejudiced by the mistake because the complaint, when read in its entirety, clearly provided Walker notice of the crime with which he was charged and the factual basis for the charge. Therefore,

we reject Walker's appellate claims premised on the error in the complaint.[2]

¶5 Walker next challenges the validity of the information in case No. 2009CF45. The information repeated the same error as the charging portion of the complaint. As with the complaint, however, a defect in the form of an information does not render the document invalid if the defect does not prejudice the defendant. WIS. STAT. § 971.26. Walker has not shown that he was prejudiced by the defect in the information. Therefore, we reject Walker's claim that he is entitled to relief based on the mistake in the information.

¶6 Walker next contends that the circuit court erroneously instructed the jury on the armed robbery charge in case No. 2009CF45. The State summarizes Walker's argument as follows:

> Continuing with his flawed claim that he was charged in Case No. 2009CF45 with the armed taking of drugs from pharmacist Udhardt by threatening the use of force against another non-existent person who was present, and not against Udhardt, Walker argues that the jury was improperly instructed on the charge because it did not receive an instruction reflecting his flawed view of the charge.

We agree with the State that this argument fails for a simple reason. The jury was properly instructed because the instruction it received was consistent with what the State alleged—that Walker had threatened force against Udhardt. The instruction did not allege that Walker threatened force against some other person because that

[2] Based on Walker's contention that the complaint was invalid, Walker also argues that the court commissioner erred in finding probable cause at his initial appearance, that he should not have been bound over on the charge, and that he received ineffective assistance of counsel because his attorney failed to challenge the sufficiency of the complaint and the legality of his bindover. We have rejected Walker's argument that the complaint was invalid, so we also reject these arguments.

was not the factual basis for the charge. The language referring to "force against the person of another who was present" was simply an error made in the charging portion of the complaint and replicated in the information. We reject Walker's argument that the jury was not properly instructed in case No. 2009CF45.

¶7 Walker next challenges the sufficiency of the evidence with regard to two of his convictions. First, he contends that the evidence was insufficient to support the conviction in case No. 2009CF45 because the State did not prove that he compelled Udhardt to turn over the drugs by threatening an unidentified third party. We agree with the State's analysis and conclusion that this issue is meritless:

> Walker's challenge to the sufficiency of the evidence supporting the Udhardt robbery conviction is merely a continuation of his persistent claim that he was charged in that case with taking drugs from Udhardt by threatening the use of force against another person who was present at the time. For the reasons already fully [explained], that was not the charge in the case, not the charge that the parties understood was being tried, and not the charge that the State proved. Clearly, the State did not attempt to prove a charge that it did not make. Instead, the State proved that Walker took drugs from Udhardt by threatening to use force against Udhardt. Walker advances no challenge to the sufficiency of the State's proof in that regard, and the matter need not be addressed further.

¶8 Walker next contends that the evidence was insufficient in case No. 2009CF165, which charged a second armed robbery of the same Aurora Pharmacy a month later, because pharmacy technician Valerie Marrari did see Walker with a weapon. While Marrari testified that Walker was "not obviously" holding a weapon during the robbery, she also testified that she assumed that he had a gun because she had seen him with a gun when he robbed the pharmacy a month earlier. In addition to Marrari's testimony, which provided a reasonable basis for

her belief that Walker was armed, Joan Zajac, another store employee, testified that she saw that Walker was carrying a firearm during the robbery, and Susan Baglien, a third store employee, testified that she assumed from the manner in which Walker moved his arm in a sweeping motion while holding a bag in his other hand that he was armed because she had seen him with a weapon during the prior robbery. The testimony of these three witnesses provided a sufficient basis for the jury to conclude that Walker was in fact armed when he committed the robbery and that Marrari's belief that he was armed, even though she did not actually observe the gun, was reasonable. We conclude that there was sufficient evidence to support the conviction.

¶9 Walker next argues that the restitution ordered in the amended judgments of conviction is invalid because the amended judgments of conviction were signed by the clerk, not a judge. The amended judgments of conviction are valid because WIS. STAT. § 972.13(4) permits judgments of conviction to be signed by either the clerk or a judge. Walker contends that the judgments of conviction are invalid because WIS. STAT. § 973.20(12)(a), provides that if a circuit court orders restitution in addition to other fines, costs, fees and surcharges, it shall "issue a single order, signed by the judge, covering all of the payments." Here, however, a separate restitution order was not entered, so the statute directing that the circuit court issue a single order, signed by the judge, covering all payments does not apply. Instead, the circuit court entered an amended judgment of conviction which did not need to be signed by the judge. The amended judgments of conviction were properly entered pursuant to § 972.13(4).

¶10 Walker next argues that the circuit court erred in granting Walker's attorney's motion to assign Walker's bail to her to pay Walker's legal bill. Walker has no standing to raise this issue because he did not post the bail. The party who posted bail agreed that the funds could be applied to Walker's attorney's fees. Therefore, we reject this argument.

¶11 Finally, Walker argues that he was harmed because the circuit court ignored his request to take judicial notice of facts he asserted in his postconviction motion. Many of the facts that Walker wanted the circuit court to take judicial notice of were already in the record, so there was no need for the circuit court to take judicial notice of them. Moreover, Walker has not shown that the circuit court's inaction affected him in any way. We reject this argument.

By the Court.—Judgments and order affirmed.

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