COURT OF APPEALS
DECISION
DATED AND RELEASED

November 9, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-0244-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD WOLFGRAM,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Wood County: JAMES EVENSON, Judge. *Affirmed*.

Before Eich, C.J., Dykman and Vergeront, JJ.

PER CURIAM. Donald Wolfgram appeals from a judgment convicting him of one count of racketeering, contrary to § 946.83(3), STATS., seven counts of theft, contrary to § 943.20(1)(d), STATS., and one count of perjury, contrary to § 946.31(1)(c), STATS. He raises numerous issues concerning his prosecution. We reject his arguments and affirm.

FACTS

Wolfgram served as the director of buildings and grounds at St. Joseph's Hospital in Marshfield, Wisconsin, for a number of years. He was charged and tried with Clark M. Barry for allegedly defrauding the hospital of about $1.3 million between 1983 and 1990. According to the State's evidence, Barry formed several shell companies which billed the hospital for nonexistent goods and services. In his official capacity, Wolfgram approved payment of those bills, and Barry and he shared the proceeds.

In 1974, Wolfgram pleaded guilty to a misdemeanor charge, stemming from his involvement in a virtually identical scheme that targeted his former employer, the City of Mayville. By pretrial motion, the State moved to introduce evidence of that scheme to show Wolfgram's intent, plan, knowledge, motive and absence of mistake. The trial court granted the motion and, at trial, the State introduced the testimony of four witnesses to prove the similarity of Wolfgram's conduct in the Mayville incident with this case. In another pretrial motion, Barry unsuccessfully sought to sever the defendants' trial. Wolfgram did not join the motion.

At trial, the State introduced evidence that Wolfgram received substantial sums between 1983 and 1990 from the illegal enterprise. Wolfgram introduced evidence that he received those sums from legitimate sources such as gifts from family members. He did not, however, introduce expert testimony from an accountant to trace those funds back to their allegedly legitimate source.

On the perjury charge, the State introduced evidence of five allegedly false answers Wolfgram gave under oath at a John Doe hearing addressing two issues of concern: whether he knew that Barry submitted false invoices to the hospital and whether he ever prepared false invoices for Barry to submit. During deliberations, the jury asked the trial court, "[d]o all statements have to be false? If a statement is thought to be truthful, does this mean that the defendant should be found not guilty?" In response, over Wolfgram's objection, the court instructed the jury "[i]n order to find the defendant guilty, all jurors must agree that defendant had made a false material statement under oath." At

sentencing, the court imposed prison terms on both defendants and a $1.3 million restitution order on both of them jointly.

Wolfgram's postconviction motion alleged ineffective assistance of trial counsel, including counsel's failure to: (1) present an accountant's testimony regarding his finances; (2) call certain witnesses; (3) investigate and discover Barry's theory of defense; (4) file a severance motion; (5) move to strike objectionable jurors; and (6) request a restitution hearing. Other issues he raised included whether the trial court erred by failing to strike certain jurors for cause, by refusing to dismiss the racketeering count, by allowing the State to overemphasize the Mayville other acts evidence, and by erroneously instructing the jury on the perjury charge. The court denied the motion in its entirety. Wolfgram raises these issues on appeal and demands a new trial in the interest of justice.

COUNSEL'S ALLEGED INEFFECTIVENESS

To prove ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that counsel's errors or omissions prejudiced the defense. ***State v. Pitsch***, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). Deficient performance falls outside the range of professionally competent representation and is measured by an objective standard of reasonably competent professional judgment. ***Id***. at 636-37, 369 N.W.2d at 716. Prejudice results when counsel's errors deprive the defendant of a fair trial with a reliable result. ***Id***. at 640-41, 369 N.W.2d at 718. Whether counsel's behavior was deficient and whether it was prejudicial to the defendant are questions of law. ***Id***. at 634, 369 N.W.2d at 715.

Counsel's failure to retain and call an expert accountant was not unreasonable. Counsel testified that Wolfgram knowingly and voluntarily made that decision. The trial court believed that testimony and we must accept its credibility finding. ***Turner v. State***, 76 Wis.2d 1, 18, 250 N.W.2d 706, 715 (1977). The decision being Wolfgram's, counsel was not responsible for it. Additionally, Wolfgram has not shown that the decision was prejudicial because Wolfgram lacked the financial documents that would have allowed an accountant to corroborate his testimony.

Additionally, Wolfgram faults counsel for failing to call witnesses to attest to his modest lifestyle, and other witnesses to attest to his careless practice of approving invoices without even looking at them. Counsel reasonably chose not to call those witnesses because evidence existed that Wolfgram had substantial wealth, and Wolfgram testified that he did not carelessly sign invoices. Instead, he chose to defend against the charges with evidence that Barry provided the goods and services he billed for.

Counsel's failure to investigate Barry's defense or to file a motion to sever was not prejudicial. Barry's defense did not inculpate Wolfgram. As the trial court explained in its postconviction order, the motion to sever would not have been granted in any event.

A restitution hearing would not have benefited Wolfgram. The presentence investigator concluded that Wolfgram had the ability to pay the ordered restitution and the trial court relied on that conclusion. At his postconviction hearing, Wolfgram did not offer evidence to contradict that conclusion. Without it, a restitution hearing would have been pointless.

OTHER ACTS EVIDENCE

Wolfgram contends that the trial court exceeded its discretion and caused unfair prejudice by allowing the State to present an unnecessarily long "mini-trial" on the Mayville scheme. In fact, the record shows that the State briefly called four witnesses to establish the similarity between Wolfgram's conduct in Mayville and that alleged in this case. What Wolfgram labels the "mini-trial" dragged on to some extent only because counsel for Barry and Wolfgram conducted lengthy cross-examinations of those witnesses. Given the complexity of the schemes and Wolfgram's deep involvement in both, the court reasonably allowed the State its four witnesses.

THE RACKETEERING CONVICTION

The trial court properly allowed the jury to convict Wolfgram under § 946.83(3), STATS., of the Wisconsin Organized Crime Control Act

(WOCCA). That section provides that "[n]o person employed by, or associated with, any enterprise may conduct or participate, directly or indirectly, in the enterprise through a pattern of racketeering activity." Wolfgram contends that he committed no crime under this section because the only victim was the enterprise which, in this case, was the hospital. However, in construing the comparable federal statute, the Seventh Circuit has recognized that a defendant may be convicted where the enterprise used to conduct the criminal activity is also the victim. ***Haroco, Inc. v. American Nat'l Bank and Trust Co. of Chicago***, 747 F.2d 384, 401 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985). Federal case law is considered persuasive authority in interpreting WOCCA. ***State v. Judd***, 147 Wis.2d 398, 401, 433 N.W.2d 260, 262 (Ct. App. 1988). Although Wolfgram presents some conflicting federal case law, we accept the Seventh Circuit's interpretation.

SELECTION OF JURORS

Wolfgram contends that the trial court erred by refusing to strike two perspective jurors for cause, and that counsel should have moved for the removal of another juror for cause. Consequently, Wolfgram prematurely exhausted his preemptory strikes. However, the court's alleged error and counsel's alleged neglect are prejudicial only if they left Wolfgram with a biased jury. ***State v. Traylor***, 170 Wis.2d 393, 400, 489 N.W.2d 626, 629 (Ct. App. 1992). Wolfgram describes one juror as biased because she worked as a bank employee. Another juror had read a small newspaper article that suggested Wolfgram's and Barry's guilt. However, she also stated that she could put that impression aside, grant the defendants the presumption of innocence and decide the case on the evidence. Although Wolfgram describes those two jurors as "objectionable" he provides no other evidence of bias. We decline to speculate on the jurors biases in the absence of any further evidence.

THE PERJURY INSTRUCTION

Despite evidence of several false statements under oath, the State only charged one count of perjury, causing the jury some understandable confusion. Wolfgram contends that the trial court's subsequent clarifying instruction allowed the jury to convict despite disagreeing over which of Wolfgram's answers were false. While that is true, it is not grounds for reversal.

If evidence of different, although conceptually similar acts, are introduced at trial, the jury need not unanimously agree as to which specific act the defendant committed in order to convict. ***State v. Gustafson***, 119 Wis.2d 676, 695, 350 N.W.2d 653, 662-63 (1984), *modified*, 121 Wis.2d 459, 359 N.W.2d 920, *cert. denied*, 471 U.S. 1056 (1985).

NEW TRIAL IN THE INTEREST OF JUSTICE

Wolfgram requests that we order a new trial in the interest of justice. We may order a new trial under § 752.35, STATS., only if we believe a second trial will probably produce a different result, or the real controversy was not fully tried. ***Vollmer v. Luety***, 156 Wis.2d 1, 16, 456 N.W.2d 797, 804 (1990). Neither basis exists here. We therefore decline to order a new trial.

By the Court.—Judgment and order affirmed.

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