

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 27, 2007

David R. Schanker
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. 2006AP1543-CR

Cir. Ct. No. 2003CF299

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EARL L. DIEHL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: JACQUELINE R. ERWIN, Judge. *Affirmed.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Earl Diehl appeals from a judgment convicting him of theft by contractor. He also appeals from an order denying his motion for postconviction relief. He argues: (1) that the complaint did not adequately allege all of the elements of the crime; (2) that the jury instructions did not address all of

the elements of the crime; (3) that he received ineffective assistance of counsel; (4) that the circuit court erred in allowing a police detective to testify by telephone; and (5) that the evidence was insufficient to support the conviction. We affirm.

¶2 Diehl first argues that the complaint does not adequately allege all of the elements of the crime of theft by contractor because it should have included an additional element—that the contractor intended to convert the funds for his own personal use. See *Tri-Tech Corp. v. Americomp Servs., Inc.*, 2002 WI 88, ¶26, 254 Wis. 2d 418, 646 N.W.2d 822 (listing six elements of the crime of theft by contractor, including the intent to convert the funds for personal use). We reject this argument.

¶3 In *State v. Sobkowiak*, 173 Wis. 2d 327, 337-38, 496 N.W.2d 620 (Ct. App. 1992), we approved the Wisconsin Criminal Jury Instructions Committee’s conclusion that the sixth element of the crime of theft by contractor listed in the instructions was redundant. The sixth element was “intent to convert [the funds] ... [for] personal use,” while the third element was intent to use “the money for a purpose other than the payment of claims due or to become due.” *Id.* at 336, 338. The sixth element was removed from the pattern jury instructions because the Committee concluded “that using the trust fund money for any purpose other than paying off the lienholders is ‘personal use.’” *Id.* at 337 (citation omitted).

¶4 The *Tri-Tech* court apparently overlooked our decision in *Sobkowiak* when it referred to six elements for the crime of theft by contractor. The court’s reference was made in the context of addressing an issue unrelated to the crime’s elements and there is no indication that the supreme court intended to

implicitly overrule *Sobkowiak* or, for that matter, that *Sobkowiak* or the changed pattern jury instructions had been brought to the court's attention. We conclude that *Tri-Tech* does not alter our conclusion in *Sobkowiak* that the crime of theft by contractor has five elements and that, therefore, the complaint adequately alleged the elements of the crime.

¶5 Diehl next challenges the jury instructions for failing to allege all six elements. We have no authority to address this issue because Diehl did not object to the jury instructions at the time they were given. See *State v. Schumacher*, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988) (failure to object at instruction conference waives any error in the proposed jury instructions or verdict).

¶6 Diehl next argues that he received ineffective assistance of counsel because his attorney did not object to the jury instructions. This argument simply recasts Diehl's prior claim that the jury instructions did not list all of the elements of the crime. Because we have rejected that argument, Diehl's claim of ineffective assistance of counsel fails.

¶7 Diehl next argues that the circuit court should not have allowed Detective Mark Hahn to testify by telephone. Diehl waived his right to raise this issue on appeal because he did not object to the telephonic testimony. See WIS. STAT. § 901.03(1)(a) (2005-06)¹ (failure to object to evidence offered waives any claim of error). Not only did Diehl fail to object, he stipulated to the testimony and, after the circuit court explained his right of confrontation to him, Diehl affirmatively agreed to the telephonic testimony.

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶8 Finally, Diehl argues that the evidence was insufficient to support the verdict. We decline to address this issue because it is inadequately briefed. *See Roehl v. American Family Mut. Ins. Co.*, 222 Wis. 2d 136, 149, 585 N.W.2d 893 (Ct. App. 1998).

By the Court.—Judgment and order affirmed.

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

