STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP354-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY L. ELVERMAN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE THOMAS P. DONEGAN, THE HONORABLE JEFFREY A. CONEN AND THE HONORABLE DENNIS P. MORONEY, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar No. 1009170

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

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STATE OF WISCONSIN

C O U R T O F A P P E A L S

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BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication of the court's decision may be warranted because there are no published Wisconsin cases addressing the relationship between Wis. Stat. § 971.36 and the continuing offense doctrine in a theft prosecution and the unpublished cases addressing that issue are not citable under Wis. Stat. § (Rule) 809.23(3).

STATEMENT OF THE CASE

Given the nature of the arguments raised in the brief of defendant-appellant Jeffrey L. Elverman, the State exercises its option not to present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a). The relevant facts and procedural history will be discussed in the argument section of this brief.[1]

ARGUMENT

Elverman was charged in Milwaukee County Circuit court with one count of theft of movable property having a value exceeding $10,000, in violation of Wis. Stat. §§ 943.30(1)(a) and (3)(c) (2:1; A-Ap. 3(2)). The victim was eighty-six year old D.P., who suffered from Alzheimer's dementia (2:1-2; A-Ap. 3(2-3)).

The complaint alleged that on March 23, 2003, D.P.'s physician determined that she was incapacitated and unable to manage her day-to-day affairs because of Alzheimer's dementia (2:2; A-Ap. 3(3)). The complaint further alleged that between March 25, 2003, and September 23, 2004, after D.P. had been determined to be incapacitated and Elverman had been notified of that determination, Elverman received fifty-six

[1]The Honorable Thomas P. Donegan entered the order denying Elverman's pretrial motion to dismiss the case. The Honorable Jeffrey A. Conen presided at trial and entered the judgment of conviction. The Honorable Dennis P. Moroney entered the orders denying Elverman's motion for postconviction relief and supplemental motion for postconviction relief.

checks from D.P. totaling $374,800 (2:2-3; A-Ap. 3(3-4)).

Elverman was convicted of the charged theft following a jury trial (26:1;39:1-3; A-Ap. 1(1-3)). He argues on appeal that there was insufficient evidence to support his conviction, that the prosecution was barred by the statute of limitations, that the case was improperly venued in Milwaukee County, that the trial court erred when it denied his request for a unanimity instruction, and that the charging documents failed to provide adequate notice. *See* Elverman's brief at xi-xii. He also argues that if trial counsel failed to properly raise or develop any or all of those claims, his counsel was ineffective. *See id*. at xii, 36-37.

None of those claims has merit. Accordingly, the court should affirm the judgment of conviction and the orders denying Elverman's motions for postconviction relief.

I. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION.

Elverman argues that the evidence was insufficient to support his conviction of theft of greater than $10,000. He offers two theories to support that claim. The first is that the State "erroneously expanded" the theory of prosecution when it obtained a conviction based on the aggregate value of the checks, no single one of which exceeded $10,000. The second is that there was insufficient evidence to proved that he knew that D.P. did not consent to his taking her money. The court should reject both arguments.

A. There was sufficient evidence to support Elverman's conviction for the charged theft.

Elverman argues that there was insufficient evidence to convict him of the theft with which he was charged. He does not argue, nor could he plausibly argue, that there was insufficient evidence that he stole more than $10,000 in the aggregate from D.P. Rather, he argues that the "theory of prosecution" was "erroneously expanded," Elverman's brief at 6 (capitalization omitted) because the charging documents did not cite the statute, Wis. Stat. § 971.36, that permits the State to aggregate thefts from the same owner committed pursuant to a single intent and design. *See* Elverman's brief at 7-8.

Section 971.36 provides in relevant part:

> (3) In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if:
>
> (a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme;
>
> * * *
>
> (4) In any case of theft involving more than one theft but prosecuted as a single crime, it is sufficient to allege generally a theft of property to a certain value committed between certain dates, without specifying any particulars. On the trial, evidence may be given of any such theft committed on or between the dates alleged; and it is sufficient to maintain the charge and is not a variance

> if it is proved that any property was stolen during such period. . . .

Wis. Stat. § 971.36(3)(a), (4) (2009-10).[2]

The court of appeals recently observed that "the legislature has explicitly provided prosecutors with discretion to charge multiple thefts as a single crime when '[t]he property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme.'" *State v. Jacobsen*, 2014 WI App 13, ¶20, 352 Wis. 2d 409, 842 N.W.2d 365 (quoting Wis. Stat. § 971.36(3)(a)). "Section 971.36(3) unambiguously states that, in a case involving more than one theft, 'all thefts may be prosecuted as a single crime' if certain conditions are met." *Id.*, ¶21.

Consistent with the statute, the court in this case instructed the jury that "[i]n determining the value of the property stolen, you may consider all thefts that you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design" (84:27-28). Although, as discussed below, Elverman erroneously claims that "the State at trial argued Mr. Elverman possessed more than a single intent," Elverman's brief at 8 (emphasis omitted), he does not argue that the evidence was insufficient to permit the jury to find that he stole more than $10,000 from D.P. pursuant to a single intent and design. Rather, he argues only that the evidence was insufficient because the charging documents did not cite Wis. Stat. § 971.36 or

[2]All statutory citations are to the 2009-10 version of the statutes unless otherwise indicated.

expressly allege that his acts shared a single intent and design. *See id*. at 6-10.

A criminal complaint must set forth facts or reasonable inferences that are sufficient to allow a reasonable person to conclude that a crime was committed and the defendant probably committed it. *State v. Adams,* 152 Wis. 2d 68, 73, 447 N.W.2d 90 (Ct.App.1989). A complaint should answer the following questions: (1) Who is charged?; (2) What is the person charged with?; (3) When and where did the alleged offense take place?; (4) Why is this particular person being charged?; and (5) Who says so? *Id*. at 73-74. A complaint is evaluated in a common sense rather than hypertechnical manner. *Id.* at 73.

In this case, the complaint charged Elverman with one count of theft of movable property having a value exceeding $10,000, in violation of Wis. Stat. §§ 943.30(1)(a) and (3)(c) (2:1; A-Ap. 3(2)). As previously noted, the victim was eighty-six year old D.P., who suffered from Alzheimer's dementia (2:1-2; A-Ap. 3(2-3)). The complaint alleged that between March 25, 2003, and September 23, 2004, after D.P. had been determined to be mentally incapacitated and Elverman had been informed of that determination, Elverman "continue to receive large amounts of funds" from D.P. (2:2; A-Ap 3(3)).

The complaint alleged that Elverman received fifty-six checks from D.P. totaling $374,800 after he had been informed of her incapacity (2:2-3; A-Ap. 3(3-4)). According to the complaint, the checks that Elverman received were for amounts between $4,750 and $9,500 and were written in multiples of $250, including three checks for $9,500, three checks for $8,500, two

checks for $5,500, two checks for $4,750, and checks for $7,750, $6,500, $5,750 (*id*.).

The complaint further alleged that Elverman claimed that all of the money had been paid to him for personal services at the rate of $150 an hour (2:3; A-Ap. 3(4)). The complaint alleged that at that hourly rate Elverman would have had to have provided about thirty-one hours of services a week to D.P. while being employed full time as a partner at Quarles & Brady (2:3; A-Ap. 3(4)). Elverman's caregiver, who kept a calendar that recorded Elverman's visits with D.P., reported that Elverman visited D.P. about once a week for an hour (*id*.).

The criminal complaint in this case, evaluated in a common-sense manner, alleged that Elverman's multiple thefts from D.P. were committed pursuant to a single intent and design even though the complaint did not cite Wis. Stat. § 971.36 or use the phrase "single intent and design." Indeed, it is difficult to read the complaint otherwise.

Although there are no reported Wisconsin cases discussing whether it is necessary for a criminal complaint or information to expressly cite to Wis. Stat. § 971.36, Wisconsin case law discussing Wisconsin's party-to-a-crime statute, Wis. Stat. § 939.05, is instructive.[3]

[3]Elverman includes in his appendix several criminal complaints that cite Wis. Stat. § 971.36 (A-Ap. 4(1-7)). That the State sometimes cites the statute in a criminal complaint does not mean that the State must, as a matter of law, cite the statute in the complaint for its provisions to apply.

In *State v. Charbarneau*, 82 Wis. 2d 644, 264 N.W.2d 227 (1978), the defendant was charged with burglary and theft. *Id.* at 646-47. The criminal complaint and information did not charge the defendant as a party to a crime, but the prosecutor became aware prior to trial that he would only be able to prove the defendant's guilt under a party-to-a-crime theory. *Id.* at 647. The prosecutor filed an amended information before trial that cited Wis. Stat. § 939.05, but withdrew the amended information when defense counsel objected. *Id.*

The case proceeded to trial on the original information and the defendant was convicted on both counts. *Id.* The defendant argued on appeal that the prosecutor waived reliance on the party-to-a-crime theory by withdrawing the amended information and that the evidence adduced at trial was insufficient to sustain the convictions. *Id.*

The supreme court noted that "[n]o contention is made in this case that the evidence was sufficient to convict the defendant on any other theory than party-to-a-crime." *Id.* Accordingly, the court held, "[i]f the prosecutor waived his reliance on that theory, the convictions must be reversed." *Id.*

The supreme court noted that it had "repeatedly commended the practice of referring to sec. 939.05, Stats., by number, in the information when the prosecutor knows that the proof is such that a conviction can only be based on a party-to-a-crime theory." *Id.* at 648. However, the court added, "[t]his practice is not . . . mandatory." *Id.* The court held that "[i]n the absence of a detrimental effect on the defendant, the failure to specifically refer to sec. 939.05 in the information

is harmless error." *Id.* (citing *Hardison v. State*, 61 Wis. 2d 262, 271, 212 N.W.2d 103 (1973); *Bethards v. State*, 45 Wis. 2d 606, 618, 173 N.W.2d 634 (1970)).

The supreme court concluded that the record did "not support a claim of detrimental effect on the defendant." *Id.* It noted that "[t]he criminal complaint in this case, which was quite lengthy, spelled out the crimes alleged, by reference to facts which lead to conviction only on a party-to-a-crime theory" and that "[t]hese facts are the same facts which were adduced at trial." *Id.*

The court found that even though the amended information had been withdrawn, the defendant had notice of the prosecution's theory. *Id.* at 648-49. The court held that even though the charging documents had not cited Wis. Stat. § 939.05 and that even though the evidence was sufficient to sustain the convictions only on a party-to-a-crime theory under § 939.05, there was sufficient evidence to sustain the convictions because the evidence supported convictions on either an aider-and-abettor theory or a conspiracy theory. *Id.* at 651-52. *See also Hardison*, 61 Wis. 2d at 267-68 (holding that there was sufficient evidence to support the defendant's conviction under an aiding-and-abetting or complicity theory even though the defendant was not charged under § 939.05).

The same rationale applies here. Even if it would have been better practice to cite Wis. Stat. § 971.36 in the charging documents, the criminal complaint alleged a single theft of greater than $10,000 and alleged facts could only lead to a conviction if Wis. Stat. § 971.36 were applicable. The complaint alleged that Elverman received

fifty-six checks from D.P. totaling $374,800 but did not allege that any single check exceeded $10,000 (2:2-3; A-Ap. 3(3-4)). The only basis for the State to proceed on a charge of theft of greater than $10,000, therefore, would be under the principle codified in Wis. Stat. § 971.36(3)(a) that multiple thefts may be prosecuted as a single theft if the property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme. And, as in *Charbarneau*, the record in this case demonstrates that Elverman had notice long before trial that the State was relying on Wis. Stat. § 971.36. *See infra*, pp. 38-40.

For those reasons, even if the complaint and information should have cited Wis. Stat. § 971.36, the omission of the statute from the charging documents was a technical charging error that did not prejudice Elverman. *See* Wis. Stat. § 971.26 ("No indictment, information, complaint or warrant shall be invalid, nor shall the trial, judgment or other proceedings be affected by reason of any defect or imperfection in matters of form which do not prejudice the defendant."); *State v. Wachsmuth*, 166 Wis. 2d 1014, 1027, 480 N.W.2d 842 (Ct. App. 1992).

In *Wachsmuth*, the State charged the defendant with a violation of Wis. Stat. § 948.02(1), a statute that did not exist at the time of the alleged incident, rather than Wis. Stat. § 940.225(1), the predecessor statute that defined the offense at that time. *Id.* at 1026. The court of appeals concluded that the charging error was harmless because "[b]oth statutes contain identical elements," "[t]he case was tried on the proper elements, and the jury was properly instructed as to the elements of the offense." *Id.* at

1027. "Hence," the court concluded, "the technical charging error made by the state was clearly harmless to Wachsmuth." *Id*.

In this case, as discussed above, the criminal complaint alleged a single theft of greater than $10,000 and alleged facts that could only lead to a conviction for the charged offense if Wis. Stat. § 971.36 were applicable. Elverman had actual notice long before trial that the State was relying on Wis. Stat. § 971.36 to prove a theft of greater than $10,000. *See infra*, pp. 38-40. Even if the State were required to plead Wis. Stat. § 971.36, therefore, the omission of that statute from the charging documents was a technical charging error that did not prejudice Elverman.

Elverman relies on cases from Illinois and Texas to support his argument. *See* Elverman's brief at 8-9 (discussing *People v. Rowell*, 890 N.E.2d 487, 489 (2008), and *Woods v. State*, 2011 WL 2090271 (Tex. Ct. App. 2011)). "Although a Wisconsin court may consider case law from such other jurisdictions, obviously such case law is not binding precedent in Wisconsin, and a Wisconsin court is not required to follow it." *State v. Muckerheide*, 2007 WI 5, ¶7, 298 Wis. 2d 553, 725 N.W.2d 930. The court should decline to follow the non-Wisconsin cases because they are inconsistent with the Wisconsin case law discussed above.

Elverman also argues that "the State at trial argued Mr. Elverman possessed more than a single intent." Elverman's brief at 8 (emphasis omitted). Citing the State's rebuttal closing argument, he contends that the State presented his "receipt of a payment in April of 2004, that the State argued arose directly out of a new and independent impulse to pay his credit card bill

following a Florida family vacation." *Id*. (citing 84:44-45).

Elverman misses the point that the prosecutor was attempting to convey. The prosecutor was responding to Elverman's contention in the civil action against him that the money D.P. paid him was for personal services he provided at the rate of $150 per hour (83:18). To illustrate why the jury should not believe that explanation, the prosecutor noted that one of the trial exhibits showed that Elverman was on vacation from April 7 through April 20, 2014, and that he had received a check from D.P. for $4,750 on April 16, 2014, a check for $9,500 on April 23, 2004, and a third check on April 30, 2014 for $4,750 (84:44). The prosecutor argued that even if the jury were to assume that the first check represented payment for work that Elverman performed for D.P. before going on vacation, the check that Elverman received three days after returning from vacation would have represented eighty hours of work at a rate of $150 an hour (*id*.). The prosecutor then argued:

> So ask yourself, does any of this look like it ties to someone who is actually doing work, who is billing for actual dollars earned? Or does this look like, hey, I just got back from vacation. I spent a lot of money on vacation, I could use close to 10 grand to help pay for that nice vacation in Florida I had. Ask yourself what makes sense in that situation?

(84:44-45.)

Elverman's attempt to find significance in the prosecutor's closing argument also reflects a mistaken belief that if he had different uses in mind for the money at the time he received the

check, the jury could not have found that he acted pursuant to a single intent and design. But Elverman's act of intentionally taking D.P.'s money without consent is the crime, not his intended use for the money.

If Elverman were correct, an embezzler's multiple acts of embezzlement from her employer would not share a common intent if the money stolen on one occasion were used to buy a car and the money stolen a few weeks later were used to buy clothing. The flaw in Elverman's reasoning is that in either situation, the thief's criminal intent is the same. And in both an embezzlement case and this case, the multiple acts were pursuant to a common scheme of using a position of trust to steal from the unwitting victim.

Even though Elverman has framed his argument in terms of sufficiency of the evidence, the State has not discussed the trial evidence supporting the jury's finding that Elverman stole more than $10,000 from D.P. That is because Elverman has not argued that there was insufficient evidence for the jury to find that. Rather, Elverman has limited his argument to a claim that the evidence was insufficient because the charging documents did not permit a guilty finding under an aggregation theory based on Wis. Stat. § 971.36. For the reasons discussed above, that argument lacks merit.

B. There was sufficient evidence to prove that Elverman knew that he lacked the victim's consent.

Elverman argues that because he was D.P.'s agent under a power of attorney and because she

had consented to similar payments to him before her physician determined that she was mentally incapacitated, it is "factually impossible" for him to have known that he lacked D.P.'s consent. Elverman's brief at 11. That argument is a nonstarter.

The jury was instructed that "'[w]ithout consent' means there was no consent in fact, or that consent was given because [D.P.] did not understand the nature of the thing to which she consents by reason of defective mental condition, whether permanent or temporary" (84:26). Elverman does not challenge this instruction, which accurately incorporates the relevant portions of the definition of "without consent" in Wis. Stat. § 939.22(48) (intro.) and (c).

There was sufficient evidence for the jury to find that D.P. had a "defective mental condition" that rendered her unable to understand the nature of her payments to Elverman. Dr. Brian Hirano testified that he was D.P.'s physician in 2003 and 2004 and that he was treating her for Alzheimer's dementia, a condition that was present as far back as 2001 (82:16-17). Dr. Hirano testified that on March 24, 2003, he prepared a Certificate of Incapacitation that certified that D.P. was incapacitated and unable to make health care decisions or manage day to day affairs of life because of Alzheimer's dementia (82:18-19). Dr. Hirano testified that as of that date, D.P. would not have been able to make financial decisions for herself (82:19).

There also was sufficient evidence for the jury to find that Elverman was aware of D.P.'s mental condition. Dr. Hirano testified he received the certification form by fax sent from Quarles &

Brady (82:18). The fax cover sheet indicates that the fax was sent by Elverman (90:Exhibit 3). The message on the cover sheet says "As we discussed, please arrange to have Dr. Hirano sign the attached certification and mail it back to me" and requested that the completed form be sent to Elverman at Quarles & Brady (*id.*) (uppercasing omitted).

Elverman argues that he did not know he lacked consent because D.P. had authorized similar payments before she was declared incompetent to manage her financial affairs. But he fails to explain why that fact made it "factually impossible" for the jury to find that he knew that D.P. lacked the capacity to consent after he was informed in March, 2003, of her mental incapacity.[4]

Elverman's argument regarding the power of attorney is equally unavailing, for two reasons. First, the evidence allowed the jury to find that Elverman was not exercising his authority as D.P.'s agent. Elverman acknowledges that "[t]he

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[4]Moreover, Elverman's argument implies that the payments he received prior to March 24, 2003, were proper. The charge in this case of theft of $374,800 was based on checks Elverman received after that date, as the certification provided proof that Elverman knew of D.P.'s incapacity. But one of the counts in the disciplinary proceeding against Elverman was that "[b]y using his position of trust as [D.P.'s] lawyer, trustee, and financial power of attorney to take at least $604,000 from her *between December 2001 through September 2004* [Attorney] Elverman engaged in conduct involving dishonest, fraud, deceit or misrepresentation." *In re the Disciplinary Proceedings Against Elverman*, 2014 WI 15, ¶30, 353 Wis. 2d 98, 845 N.W.2d 653 (emphasis added). Elverman pled no contest to that charge. *Id.*, ¶35. Any suggestion that the payments he received prior to March 24, 2003, were proper is not only irrelevant but misleading.

uncontroverted trial evidence shows Mr. Elverman caused Ms. P[.] to sign her name to every check." Elverman's brief at 12.[5] He asserts that "this was the manner Mr. Elverman chose to act as her agent," *id*., but cites no evidence in the record to support that assertion. *See State v. Lass,* 194 Wis. 2d 591, 604-05, 535 N.W.2d 904 (Ct. App. 1995) (court of appeals "will not consider arguments that are not supported by appropriate references to the record").

But even if the trial evidence somehow compelled the conclusion that Elverman was acting as D.P.'s agent, that would not mean that it was "factually impossible" for him to have known that he lacked D.P.'s consent to pay himself for services he did not perform. An agent or attorney-in-fact under a power of attorney has a fiduciary obligation to the principal. *Praefke v. American Enterprise Life Insurance Company,* 2002 WI App 235, ¶9, 257 Wis. 2d 637, 655 N.W.2d 456. "The agent's duty is to act solely for the benefit of the principal in all matters connected with the agency, even at the expense of the agent's own interest." *Id*. A general authority to deal with assets "is not sufficient to exculpate an attorney-in-fact from a charge of self-dealing." *Id*., ¶10. "A fiduciary will not be allowed to feather his or her own nest unless the power of attorney specifically allows such conduct." *Id*., ¶12.

Elverman quotes a Wisconsin State Bar publication on durable powers of attorney that states that "[y]ou may yourself reasonable compensation for your services as agent unless the document specifically provides that you may not"

[5]D.P.'s geriatric care manager, Marion Whepley, testified that the signatures on the checks were D.P.'s (81:38, 47).

and notes that the power of attorney document "does not preclude payment to Mr. Elverman for acting as Ms. P[.]'s attorney in fact." Elverman's brief at 13. Elverman's argument ignores a crucial qualifier in the statement he quotes: the compensation must be "reasonable." The State presented evidence that Elverman's payments to himself were not reasonable but were grossly in excess of the value of any services he provided to D.P. (81:12-13 (Elverman could not provide documentation to support why he was paid the money); 83:18-19 (at Elverman's claimed rate of $150 an hour, he would have had to work thirty to thirty-five hours a week for D.P. to earn what she paid him); 81:19 (financial aspect of guardian services requires only a couple of hours a month); 81:57 (Elverman visited D.P. for lunch once a week for about an hour and a half to two hours); 81:64-65 (Elverman did not spend thirty hours a week with D.P. nor did she require thirty hours of work a week to handle her financial affairs); 82:78 (Elverman was employed as a partner at Quarles & Brady at the same time he was being paid by D.P.).

As the circuit court succinctly put it, "[a] power of attorney is not a license to steal" (83:34). Elverman's position as agent under D.P.'s power of attorney did not authorize him to pay himself for services he did not render.

II. THE PROSECUTION WAS NOT BARRED BY THE STATUTE OF LIMITATIONS

Elverman offers two distinct arguments why he believes that the statute of limitations bars this prosecution. In section II of his argument, he

argues that "larceny theft" under Wis. Stat. § 943.20(1)(a) is not a continuing offense and that he cannot, therefore, be prosecuted for any checks he received more than six years before he was charged. In section V, he argues that the State did not timely commence the action because no warrant or summons was issued and no information was filed before January 8, 2011, the date to which the parties agreed to extend the statute of limitations. The court should reject both arguments.

A. The prosecution was timely commenced under the continuing offense doctrine.

In *John v. State*, 96 Wis. 2d 183, 291 N.W.2d 502 (1980), the supreme court discussed how the statute of limitations is applied when the charged offense is a continuing offense.

> In contrast to the instantaneous nature of most crimes, a continuing offense is one which consists of a course of conduct enduring over an extended period of time. Even if the initial unlawful act may itself embody all of the elements of the crime, the criminal limitations period commences from the most recent act. Stated another way, the statute of limitations for a continuing offense does not begin to run until the last act is done which viewed by itself is a crime.

Id. at 188; *see also State v. Monarch*, 230 Wis. 2d 542, 547, 602 N.W.2d 179 (Ct. App. 1999) ("The statute of limitations for a continuing offense is when the last act is done, which, viewed by itself, is a crime."). An offense may be a continuing offense when "'the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is

such that . . . [the legislature] must assuredly have intended that it be treated as a continuing one.'" *John*, 96 Wis. 2d at 190 (quoting *Toussie v. United States*, 397 U.S. 112, 115 (1970)).

"[W]hether a particular criminal offense is continuing in nature is primarily one of statutory interpretation." *State v. Ramirez*, 2001 WI App 158, ¶8, 246 Wis. 2d 802, 633 N.W.2d 656. Statutory construction presents a question of law that is reviewed de novo. *Id*.

In *John*, the supreme court noted that "[t]he continuing offense doctrine is well established, and has been applied to encompass a wide variety of criminal activity including embezzlement, conspiracy, repeated failure to file reports, failure to report for induction, theft by receiving, and the failure to make and keep records of controlled substances, as well as others." *John*, 96 Wis. 2d at 189 (citations and footnote omitted); *see also Ramirez*, 246 Wis. 2d 802, ¶9 ("Citing to other jurisdictions, the [*John*] court noted that the continuing offense doctrine encompassed a wide variety of criminal activity including embezzlement, conspiracy, repeated failure to file reports, theft by receiving, and the failure to make and keep records of controlled substances.").

In *Ramirez*, the court of appeals held that identity theft under Wis. Stat. § 943.201(2) is a continuing offense. *Id*., ¶16. Although the court found the statute ambiguous in that regard, *see id*., ¶¶12-15, the court found that the legislative history of the statute revealed that it "was targeted at much more than the isolated act of misappropriating the personal identifying information of another or the initial receipt by the defendant of a thing of value as a result of the

misappropriation." *Id*., ¶16. The court concluded that "the legislature envisioned that the theft of a person's identity would, in many instances, produce recurring episodes in which the defendant would obtain things of value as a result of the original act of identity theft" and that the statute therefore creates a continuing offense. *Id*.

In this case, the relevant statutory language is found in Wis. Stat. § 971.36. As previously discussed, that statute provides that "[i]n any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if . . . [t]he property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme." Wis. Stat. § 971.36(3)(a). Under either of the *John/Toussie* alternatives – explicit statutory language or legislative intent – that statute makes theft a continuing offense when the defendant is charged with multiple thefts from the same owner pursuant to a single intent and design or in execution of a single deceptive scheme.

Elverman argues that Wis. Stat. § 971.36 does not create a continuing offense because it is not a substantive statute but "a procedural form of pleading statute." Elverman's brief at 25. This court rejected a similar argument in *Jacobsen*.

> Jacobsen dismisses Wis. Stat. § 971.36(3) on the ground that it is a "pleading statute and not a penal statute." This argument makes no sense. Section 971.36(3) unambiguously states that, in a case involving more than one theft, "all thefts may be prosecuted as a single crime" if certain conditions are met.

Jacobsen, 352 Wis. 2d 409, ¶21.

Elverman also argues that if the legislature had intended to extend the statute of limitations for repeated acts of thefts, it would have done so in Wis. Stat. § 939.74 rather than in Wis. Stat. § 971.36. *See* Elverman's brief at 17. He also argues that "[a]ny conclusion otherwise creates an obvious ambiguity" that must be resolved in his favor. *Id*. Both of those arguments are foreclosed by *Ramirez*, which found, without reference to Wis. Stat. § 939.74, that the identity theft statute created a continuing offense and that the identity theft statute did so even though it was ambiguous. *See Ramirez*, 246 Wis. 2d 802, ¶¶12-16.

Elverman's argument that theft cannot be a continuing offense cannot be squared with the supreme court's statement in *John* that "[t]he continuing offense doctrine is well established, and has been applied to encompass a wide variety of criminal activity including embezzlement." *John*, 96 Wis. 2d at 189. Elverman's brief does not acknowledge that statement or attempt to argue that there is a significant analytic difference between his theft and embezzlement. Rather, he argues that the Seventh Circuit's decision in *United States v. Yashar*, 166 F.3d 873 (7th Cir. 1999), which "refus[ed] to find embezzlement to be a 'continuing offense,[']" is the case that is "most instructive." Elverman's brief at 18, 25.

But *Yashar* conflicts with our supreme court's statement in *John* that the continuing offense doctrine "has been applied to encompass a wide variety of criminal activity including embezzlement." *John*, 96 Wis. 2d at 189. And were Elverman to argue in his reply brief that the language in *John* is mere dictum, the supreme court has held that "the court of appeals may not dismiss a statement from an opinion by this court

by concluding that it is dictum." *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682.[6]

Elverman's multiple thefts from the same victim, charged as a single theft as authorized by Wis. Stat. § 971.36, constituted a continuing offense. The statute of limitations did not begin to run, therefore, until he committed the last of those acts. *See John*, 96 Wis. 2d at 188. Elverman concedes that the last two thefts occurred within the limitations period. *See* Elverman's brief at 5. This court should conclude, therefore, that this prosecution was not barred by the statute of limitations.

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[6]Elverman finds it highly significant – arguing the point in italics, bold face, underlining, and capital letters – that in a 1991 embezzlement case, the State's sentencing memorandum said that the statute of limitations barred prosecution for thefts that occurred more than six years before the action was commenced. *See* Elverman's brief at 16. He does not explain why this court should give any weight to the views expressed by a prosecutor in another case two decades ago. Even if the prosecutor in *this* case had at one point expressed that view, a court is "not bound by the parties' concessions of law, . . . particularly a concession based on an erroneous interpretation of the law." *Lloyd Frank Logging v. Healy,* 2007 WI App 249, ¶15 n. 5, 306 Wis.2d 385, 742 N.W.2d 337. As discussed above, *John* identifies embezzlement as a continuing offense for statute of limitations purposes, *see John*, 96 Wis. 2d at 189, so the prosecutor's statement was based on an erroneous interpretation of the law.

Elverman's assertion that the State's adoption of a position in this case that differs from the position it took twenty years ago in a sentencing memorandum "smacks of malice," Elverman's brief at 16, does not require a response.

B. The State did not need to cause a warrant or summons to issue before January 8, 2011, or to file an information before that date.

Elverman alternatively argues that the State failed to timely commence this case because it "needed to either (1) cause a warrant or summons to be issued before January 8, 2011 or (2) file an Information prior to such date" and "did neither." Elverman's brief at 31. He bases that argument on a plain reading of Wis. Stat. § 939.74(1). *See id.* at 31-33. That argument fails for two reasons.

First, the supreme court rejected Elverman's reading of § 939.74(1) in *State v. Jennings*, 2003 WI 10, 259 Wis. 2d 523, 657 N.W.2d 393. The court held in *Jennings* that "§ 939.74(1) does not trump Wis. Stat. §§ 967.05(1) and 968.02(2), which both provide that a prosecution may be commenced upon the filing of a complaint." *Id.*, ¶23.

In *Jennings*, the State filed a criminal complaint on December 4, 1998, that alleged that Jennings had committed a sexual assault on December 5, 1992. *Id.*, ¶¶2-5. The district attorney obtained an order to produce Jennings, who was already incarcerated, but Jennings did not make his initial appearance until December 6, 1998. *Id.*, ¶¶5, 6.

Jennings argued, and the court of appeals agreed, that the statute of limitations had run

because no warrant or summons had been issued as required by Wis. Stat. § 939.74(1) on or before December 5, 1998. *See Jennings*, 259 Wis. 2d 523, ¶10. The supreme court reversed.

The supreme court held that "the statute of limitations begins to toll with the earliest action to commence criminal proceedings." *Id*., ¶22. "In many cases," the court said, "the earliest action is the issuance of a warrant, as identified in § 939.74(1)." *Id*. "However, in a situation where the suspect is already in custody, the issuance of a warrant seems, at best, superfluous since the purpose of obtaining an arrest warrant is to take an individual into custody." *Id*. The court held that "The legislature could not have intended the absurd result of requiring the issuance of a warrant for statute of limitations purposes under Wis. Stat. § 939.74(1) for an individual who is already in custody." *Id*., ¶23.

The court concluded that "based on the totality of the circumstances in this case, it is clear that Jennings was in custody and in essence, under arrest, for the sexual assault charge when the police detectives questioned him while he was incarcerated. . . . A reasonable person in Jennings' position should have known that he or she would be charged, and was essentially arrested for, the sexual assault of M.K. based on the conclusive DNA evidence and the officers' interrogation." *Id*., ¶25. "Since Jennings was already physically in custody due to his incarceration, a warrant to bring him into custody was not necessary. Rather, the next logical procedural step would be to file a

criminal complaint, which is what the State did in this case." *Id.*[7]

Jennings' rationale applies in this case. The criminal complaint was filed on December 6, 2010 (2:4). Elverman voluntarily appeared at his initial appearance the next day (70:1-2; 100:4; R-Ap. 139). At the conclusion of the initial appearance, the court informed Elverman that because he had not yet been booked, he had to be booked before he could be released on bond (70:3). Elverman was booked and released from the county jail that day, December 7, 2010 (100:4; R-Ap. 139).

As in *Jennings*, it would be absurd to require that the State cause a warrant or summons to be issued before January 8, 2011, because Elverman, a month earlier, had appeared in court and had been booked on this charge.

A warrant or summons compels a person against whom a complaint is filed to appear in court. *See* Wis. Stat. § 968.04(3)(a)6. (warrant shall "[c]ommand that the person against whom the complaint was made be arrested and brought before the judge issuing the warrant, or . . . before some other judge in the same county"); Wis. Stat. § 968.04(3)(b)1. ("The summons shall command the defendant to appear before a court at a certain time and place."). "The purpose of the warrant is to give the accused person notice that he is charged with an offense and to bring him before

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[7]Elverman also complains that the circuit court "shockingly applies a 'totality of the circumstances' test in applying 939.74(1), yet fails to cite any legislative or judicial authority for such a test." Elverman's brief at 32. But the supreme court in *Jennings* looked to the totality of the circumstances in the passage quoted above. *See Jennings*, 259 Wis. 2d 523, ¶25.

the magistrate so that he acquires jurisdiction over the person of the accused." *Pillsbury v. State*, 31 Wis. 2d 87, 92, 142 N.W.2d 187 (1966). "Jurisdiction does not depend upon the warrant but upon the accused's physical presence before the magistrate. This jurisdiction over the accused may be obtained by his voluntary appearance or by use of a summons as well as by a warrant." *Id*.

Elverman made his initial appearance in court on December 7, 2010. He was booked that afternoon. No purpose would be served by requiring the State to cause a warrant or summons to issue by January 8, 2011, compelling Elverman's appearance in court when he already had done so.

Elverman urges the court "to note the strong dissent in *Jennings*," which "unequivocally follows" the court of appeals' reasoning in *Jennings*. But a dissent "is not the law. A dissent is what the law is not." *State v. Perry*, 181 Wis. 2d 43, 49, 510 N.W.2d 722 (Ct. App. 1993). Nor does the court of appeals' decision in *Jennings* provide guidance, as the supreme court reversed the court of appeals' decision on that point. *See Jennings*, 259 Wis. 2d 523, ¶¶21-23; *State v. Jackson*, 2011 WI App 63, ¶15 n.3, 333 Wis. 2d 665, 799 N.W.2d 461 (when the supreme court reverses a decision of the court of appeals, the holding of the court of appeals that has been reversed no longer has precedential value).

Second, as the postconviction court pointed out (100:4; R-Ap. 139), it was Elverman's own actions that prevented the State from filing an information before January 8, 2011. Elverman's preliminary hearing was scheduled for December 27, 2010 (70:3). On that date, however, Elverman's counsel moved to withdraw and Elverman waived

the time limit for the preliminary hearing (4:1; 5:1-2). The preliminary hearing was rescheduled for January 11, 2011 (71:3).

That was several days after the agreed upon January 8, 2011, date for extending the statute of limitations. But the State could not have filed an information before January 8 because an information may not be filed until the preliminary hearing has been held. *See* Wis. Stat. § 971.02(1) ("no information . . . shall be filed until the defendant has had a preliminary examination, unless the defendant waives such examination"). When Elverman was bound over at the end of the preliminary hearing, the State immediately filed an information (73:21).

"A defendant cannot create his own error by deliberate choice of strategy and then ask to receive benefit from that error on appeal." *Vanlue v. State,* 87 Wis. 2d 455, 460-61, 275 N.W.2d 115, 118 (Ct. App. 1978) (citation omitted), *rev'd on other grounds,* 96 Wis. 2d 81, 291 N.W.2d 467 (1980). It was Elverman's last-minute request for a new lawyer that prevented the preliminary hearing from being held in time for an information to be filed before January 8, 2011. He should not be heard to complain now that the information was not timely filed.

III. THE CASE WAS PROPERLY VENUED IN MILWAUKEE COUNTY.

Elverman argues that if the court agrees with his argument that this was not a continuing offense, Milwaukee County was not the proper venue for a charge limited to the two checks

written on September 8 and 22, 2004. *See* Elverman's brief at 25-26. That is so, he contends, because D.P. signed the checks in Ozaukee County and he deposited them in Waukesha County. *See id*. at 26.

Elverman does not argue that venue in Milwaukee County was improper if his theft was a continuing offense that encompassed all of the money he was charged with stealing from D.P. between March 25, 2003, and September 23, 2004.[8] Accordingly, this court need not address Elverman's venue claim unless it concludes that Elverman's continuing offense argument has merit and that the only relevant checks for venue purposes were the two written in September, 2004.

Even if those two checks were the only checks under consideration, venue was proper in Milwaukee County. An appellate court will not reverse a conviction based on the failure of the State to establish venue unless the evidence, viewed most favorably to the State and the conviction, is so insufficient that there is no basis upon which a trier of fact could determine venue beyond a reasonable doubt. *State v. Swinson*, 2003 WI App 45, ¶19, 261 Wis. 2d 633, 660 N.W.2d 12. Under the venue statute, Wis. Stat. § 971.19(2), if an offense requires two or more acts, venue is proper in a county if any element occurs in that

[8]The State presented evidence that Elverman deposited twenty-three of the checks in an M&I branch located in the city of Milwaukee (82:71-72). The jury was given a venue instruction directing it to find Elverman not guilty if it was not satisfied beyond a reasonable doubt that one of the acts required for the commission of the offense was committed in Milwaukee County (84:27).

county. *Id*., ¶21; *see also State v. Lippold*, 2008 WI App 130, ¶16, 313 Wis. 2d 699, 757 N.W.2d 825.

One of the elements that the State had to prove was that Elverman "intentionally transferred the moveable property of another" (84:26). One of the State's witnesses, an employee of M&I Bank, where Elverman maintained his account, testified that when an M&I customer deposited a check at any of its branches, those checks were sent to M&I's processing center in Brown Deer (82:67-69). The processing center then presents the check to the bank that the check is drawn on, and the latter bank then transfers the payer's funds to M&I (82:69). D.P.'s checks were written on her account at Bank One Milwaukee (84:70).

The evidence thus established that part of the process of transferring D.P.'s money occurred in Brown Deer in Milwaukee County.[9] Accordingly, even if this prosecution were limited to the last two checks, venue would be proper in Milwaukee County. *See Swinson*, 261 Wis. 2d 633, ¶¶21-23 (where victim company was located in Sheboygan County, venue in prosecution for theft by fraud was proper there even though State presented no evidence that defendant prepared the fraudulent invoices in Sheboygan County because other elements resulting from defendant's acts occurred in that county).

[9]The court may take judicial notice that Brown Deer is in Milwaukee County. *See* State of Wisconsin Blue Book 739 (2013-14 ed.).

IV. THE TRIAL COURT PROPERLY DECLINED THE DEFENSE REQUEST FOR A UNANIMITY INSTRUCTION.

Elverman next argues that the trial court erred when it denied his request for an instruction that would have required the jury to unanimously agree upon the checks upon which it based its finding of guilt (22:1-4; 79:4; R-Ap. 109). The court properly denied that request because Elverman was charged with a single offense based on a course of conduct.

A. The jury did not have to agree on the specific thefts because they were part of a continuing offense.

The Wisconsin Constitution's guarantee of the right to trial by jury includes the right to a unanimous verdict with respect to the ultimate issue of guilt. *State v. Johnson*, 2001 WI 52, ¶11, 243 Wis. 2d 365, 627 N.W.2d 455.

> To say that the jury must be unanimous, however, does not explain what the jury must be unanimous about. For this we look to the statutory language defining the crime and its elements. "The principal justification for the unanimity requirement is that it ensures that each juror is convinced beyond a reasonable doubt that the prosecution has proved each essential element of the offense." Thus, while jury unanimity is required on the essential elements of the offense, when the statute in question establishes different modes or means by which the offense may be committed, unanimity is generally not

> required on the alternate modes or means of commission.

Id. (citations omitted); *see also State v. Lomagro*, 113 Wis. 2d 582, 592, 335 N.W.2d 583 (1983) ("If there is only one crime, jury unanimity on the particular alternative means of committing the crime is required only if the acts are conceptually distinct. Unanimity is not required if the acts are conceptually similar.").

Two Wisconsin cases address the need for unanimity as to each discrete act of unlawful conduct when, as in this case, a statute authorizes the State to charge as a single crime multiple acts that are a continuing course of conduct. Those cases discussed Wis. Stat. § 948.025, the statute criminalizing repeated acts of sexual assault with the same child.

In *State v. Molitor*, 210 Wis. 2d 415, 565 N.W.2d 248 (Ct. App. 1997), the court of appeals rejected the defendant's argument that the statute violated the right to a unanimous verdict because the statute provided that the jury need not agree on which specific acts constituted the requisite number of sexual assaults. The court of appeals "agree[d] that the right to a unanimous verdict includes the requirement that the 'jury must agree unanimously that the prosecution has proved each essential element of the offense beyond a reasonable doubt before a valid verdict of guilty can be returned.'" *Id*. at 420 (quoting *Holland v. State*, 91 Wis. 2d 134, 138, 280 N.W.2d 288 (1979)). The court "[did] not agree, however, that this requirement may not be fulfilled where, as here, unanimity is required as to the existence of a continuing course of conduct rather than as to each discrete act of which it is comprised." *Id*.

The court noted that "[t]he language of § 948.025, Stats., plainly shows that the legislature intended to create a single crime, the repeated sexual assault of the same child within a specified time period." *Id*. at 421. The question, the court said, "is whether the legislature may, like prosecutors, aggregate conceptually similar acts in a single 'course of conduct' crime, albeit for acts committed over an indefinite, and presumably longer, period of time." *Id*. The court held that jury unanimity is not required as to any particular act when the statute contemplates a continuous course of conduct over a period of time, even a substantial period of time, because "[t]he actus reus of such a crime is a series of acts occurring over a substantial period of time, generally on the same victim and generally resulting in cumulative injury." *Id*. at 422 (quoted source omitted).

In *Johnson*, our supreme court addressed *Molitor*'s continuing validity in light of a subsequent United States Supreme Court decision, *Richardson v. United States*, 526 U.S. 813 (1999), which had analyzed a jury unanimity claim under a due process analysis. *See Johnson*, 243 Wis. 2d 365, ¶¶2-3, 13. The supreme court concluded that *Molitor*'s analysis survives *Richardson*, *see id*. at ¶¶3, 14, and also held that the statute also is constitutional on due process grounds, *see id*. at ¶¶17-27. Because Elverman does not raise any due process argument on jury unanimity, *see* Elverman's brief at 27-30, the State will not discuss the *Johnson* court's due process analysis.

For the reasons the State has discussed above in connection with Elverman's statute of limitations argument, the single theft charge in this case was a continuing offense involving a

series of acts against one victim over a period of time. *See supra*, pp. 18-22. Under *Molitor*'s rationale, the jury need not have agreed on the specific instances of theft as long as it agreed upon the ultimate question of whether Elverman stole at least $10,000 from D.P. Consistent with that proposition, the jury was instructed that "[i]n determining the value of the property stolen, you may consider all thefts that you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design" (84:27-28). No additional instruction on unanimity was required.

B. Any error in instructing the jury was harmless.

Even if the trial court erred when it declined to give the requested unanimity instruction, reversal is not appropriate because any error was harmless. Errors in jury instruction are subject to a harmless error analysis. *See State v. Harvey*, 2002 WI 93, ¶¶35-49, 254 Wis. 2d 442, 647 N.W.2d 189 (jury instruction that omitted an element of the offense was harmless error); *Jackson v. State*, 92 Wis. 2d 1, 11-12, 284 N.W.2d 685, 690 (Ct. App. 1979) (instruction that violated the defendant's right to a unanimous verdict was harmless error). An error in a jury instruction is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *Harvey*, 254 Wis. 2d 442, ¶46.

Elverman posits a variety of reasons that the jury might not have been unanimous. He asks: Which checks did the jurors find to have been taken with D.P.'s consent where he knew she did not consent? Did the jurors find certain checks were negotiated pursuant to the power of attorney while others were not? Did the jurors only agree on those checks outside the statute of limitations? Did the jurors unanimously agree on any checks? *See* Elverman's brief at 29.

Elverman's argument ignores the State's theory of prosecution and the manner in which both parties framed their arguments. Neither party's opening argument focused on individual checks. The State's theory addressed all of the checks written to Elverman, with the prosecutor telling the jury that the evidence would show that after D.P. could not consent to any of the payments after her doctor signed the certificate of incapacity and that Elverman had not performed work to justify the large payments he received (80:85-98). Defense counsel's opening statement likewise did not address any specific check (80:98-105).

The State's closing argument also addressed the theft globally. The prosecutor began by asking the jury, "Who in their right mind would give somebody $374,000 for next to nothing" (84:33). The answer, he argued, was that no one in their right mind would do so, so Elverman had to steal it (*id.*). The prosecutor framed the State's argument in terms of the entire course of conduct: "From March of 2003 to September of 2004, the defendant stole over $300,000 from [D.P.] by having her sign checks to him when he did little or no work to justify those payments at a time that

she was suffering from Alzheimer's dementia and not capable of understanding what she was doing, and at a time when he knew that because he, in fact, requested the certificate of incapacity that you have seen in this case that establishes that she was not capable of handling her affairs" (84:34).

As discussed above, *see supra* pp. 11-12, the prosecutor did highlight the checks that Elverman received in April, 2004, in his closing argument. He did so, however, not to suggest that the jury could find Elverman guilty based on those checks alone but to illustrate why the jury should not believe Elverman's claim that the checks he received represented payment for work Elverman performed (84:44-45).

In his closing argument, the defense counsel highlighted the fact that the State's case had not focused on any particular check. Counsel argued:

> I just ask you to consider that the State of Wisconsin has not pointed to a single day and said, okay, here's a check on this day, we know that she was having a bad day, we know that she was hallucinating or couldn't remember some important fact, or in some other way we knew that there may be even a question about what she understood, and then later that check was deposited in Milwaukee. They tell you generally that all of this must be theft.

(84:68.)

This is not a case in which a juror reasonably could have doubted whether the State proved the necessary elements of theft with regard to some checks but not others. Accordingly, any error in refusing the requested unanimity

instruction was harmless. *See State v. Tulley*, 2001 WI App 236, ¶17, 248 Wis. 2d 505, 635 N.W.2d 807 (defense counsel was not ineffective for failing to object on unanimity grounds to jury instructions or verdict form where there was no basis for finding some of the sexual assaults occurred but others had not).

V. ELVERMAN'S LAWYER WAS NOT INEFFECTIVE FOR FAILING TO ARGUE THAT THE COMPLAINT FAILED TO GIVE ADEQUATE NOTICE OF THE CHARGE.

Elverman's final challenge to his conviction is his claim that the charging documents failed to give him adequate notice that he needed to defend against an allegation under Wis. Stat. § 971.36 that he acted in furtherance of a single intent and design as permitted. *See* Elverman's brief at 33-34. Elverman does not assert that he timely raised this objection, however, and the first appearance in the record of such a claim appears to be in Elverman's pro se supplemental postconviction motion (96:9-18).

"It is a fundamental principle of appellate review that issues must be preserved at the circuit court." *State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. "Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." *Id.* "The party who raises an issue on appeal bears the burden of showing that the issue was raised before the circuit court." *Id.*

Because Elverman did not timely object to the alleged failure of the charging documents to provide adequate notice, his claim should be analyzed in an ineffective assistance of counsel framework. *See State v. Carprue*, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31 ("The absence of any objection warrants that we follow 'the normal procedure in criminal cases,' which 'is to address waiver within the rubric of the ineffective assistance of counsel.'") (quoted source omitted). However, Elverman's brief, like his postconviction motion (96:18-20), makes only a perfunctory, catch-all allegation that his counsel was ineffective. *See* Elverman's brief at 36-37.

To be entitled to a hearing on a claim of ineffective assistance of counsel, a postconviction motion "must have provided sufficient material facts – *e.g.,* who, what, where, when, why, and how – that, if true, would entitle him to the relief he seeks." *State v. Allen*, 2004 WI 106, ¶2, 274 Wis. 2d 568, 682 N.W.2d 433. If the allegations are conclusory in nature, the court may deny the motion without an evidentiary hearing. *See State v. Bentley*, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996).

Elverman's postconviction motion does not meet that standard. His allegation of prejudice states merely that "[t]o the extent counsel failed to fully develop his argument for such positions, counsel's failure prejudiced Mr. Elverman. Had counsel properly raised, preserved and/or properly developed the arguments set forth herein, there is a reasonable probability the court would have discharged this case" (96:19). Because the allegations in Elverman's postconviction motion were conclusory, the court should summarily

reject Elverman's claim that his trial lawyer was ineffective.

If the court were to reach the merits of Elverman's claim, it should reject it. A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If the court concludes that the defendant has not proven one prong of this test, it need not address the other. *Id.* at 697.

Elverman's ineffective assistance claim fails because he has not demonstrate that he was prejudiced by trial counsel's failure to move to dismiss the complaint for lack of adequate notice. That is so because the record demonstrates that Elverman had actual notice long before trial that the State intended to rely on Wis. Stat. § 971.36 to argue that Elverman stole more than $10,000 in the aggregate from D.P.

On January 25, 2011, at the conclusion of the preliminary hearing, Elverman orally moved to dismiss the complaint on the grounds that all but the last two checks fell outside the statute of limitations and because of improper venue (73:14-18). Addressing the prosecutor, the court commissioner asked if he was "going to address . . . the conglomerate theory plus venue" (73:18). The prosecutor responded that this was a continuing offense under *John* and that the statute of limitations had not begun to run until the last act (73:19-20).

On February 28, 2011, Elverman filed a motion challenging the sufficiency of the evidence adduced at the preliminary hearing (10:1-10). One of his arguments was that the continuing offense doctrine recognized in *John* does not apply to a charge of theft under Wis. Stat. § 943.20(1)(a) and that only the final two transactions, neither of which exceeded $10,000, were not barred by the statute of limitations (10:5-8).

In its response brief, filed on March 14, 2011 (11:1), nine months before the start of trial on December 12, 2011 (80:1), the State argued that Wis. Stat. § 971.36 establishes that Elverman's theft was a continuing offense because all of the funds were taken from the same owner as part of the same scheme (11:5).

At the hearing on Elverman's motion, held on April 14, 2011, eight months before trial, defense counsel argued that Wis. Stat. § 971.36 did not apply here, while the State argued that it did (75:3-8). In its oral ruling denying Elverman's motion, the court said that it agreed that Wis. Stat. § 971.36 applied to this case and allowed the State to charge the theft as a continuing offense (75:10; R-Ap. 104).

On August 11, 2011, four months before trial, Elverman filed a motion to dismiss, again arguing that the continuing offense doctrine does not apply to a charge of theft under Wis. Stat. § 943.(20)(1)(a) (18:1). Elverman acknowledged that the State had cited Wis. Stat. § 971.36 as authority for applying the continuing offense doctrine to theft (18:2). He also argued that "even if permitted by statute, a charge of continuing

offense is inappropriate in this case and should not be submitted to the jury" (18:4).

In his appellate brief, Elverman asserts in boldface type that his trial counsel "has acknowledged not being aware of the State's need to prove a single intent and design." Elverman's brief at 35 (emphasis omitted). The court should disregard that assertion because Elverman provides no record citation to support it. *See Lass,* 194 Wis. 2d at 604-05. Moreover, as the foregoing discussion explains, defense counsel was fully aware months before trial that the State was relying on Wis. Stat. § 971.36 as the basis for aggregating all of the checks paid to Elverman into a single charge of theft.

Because Elverman had actual notice long before trial that the State was relying on Wis. Stat. § 971.36, if his lawyer had moved to dismiss for lack of notice in the charging documents that the State was relying on that statute, the State could have cured that alleged deficiency by filing an amended information that cited the statute. *See State v. Bonds*, 2006 WI 83, ¶17, 292 Wis. 2d 344, 717 N.W.2d 133 (information may be amended with leave of the court if amendment is not prejudicial; amendment "would not be prejudicial if a defendant's right to notice, right to a speedy trial, and right to prepare and present a defense to the criminal charges were not affected"). Elverman has not shown, therefore, that he was prejudiced by counsel's failure to file a motion to dismiss based on an alleged lack of notice.

CONCLUSION

For the reasons stated above, the court should affirm the judgment of conviction and the orders denying postconviction relief.

Dated this 3rd day of February, 2015.

BRAD D. SCHIMEL
Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar No. 1009170

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10, 334 words.

_____
Jeffrey J. Kassel
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 3rd day of February, 2015.

_____
Jeffrey J. Kassel
Assistant Attorney General

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2014AP354-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY L. ELVERMAN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE THOMAS P. DONEGAN, THE HONORABLE JEFFREY A. CONEN AND THE HONORABLE DENNIS P. MORONEY, PRESIDING

SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar No. 1009170

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

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APPENDIX CERTIFICATION

I hereby certify pursuant to Wis. Stat. § (Rule) 809.19(3)(b) that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to

preserve confidentiality and with appropriate references to the record.

_____
Jeffrey J. Kassel
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix that complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 3rd day of February, 2015.

_____
Jeffrey J. Kassel
Assistant Attorney General