COURT OF APPEALS
DECISION
DATED AND FILED

September 26, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2309-CR **Cir. Ct. No. 2010CF343**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREG LAPEAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dunn County: WILLIAM C. STEWART, JR., Judge. *Affirmed*.

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 SHERMAN, J. Greg LaPean appeals a judgment of conviction for transferring encumbered property with the intent to defraud, in violation of

WIS. STAT. § 943.84(2)(a) (2011-12),[1] and an order denying his motion for postconviction relief. LaPean asks us for any one of three forms of relief: (1) reverse his conviction because the evidence was insufficient to support it; (2) reverse his conviction and grant him a new trial because the real controversy was not tried; or (3) remand his case for a ***Machner***[2] hearing because he alleges that his postconviction motion set forth a sufficient factual basis to demonstrate that his trial counsel was ineffective. We affirm.

BACKGROUND

¶2 The following facts are not disputed on appeal. LaPean was the owner and operator of LaPean Implement, Inc., a farm implement dealership. LaPean Implement faced financial difficulties and throughout 2005 and 2006, LePean Implement obtained multiple commercial loans from Security State Bank to finance the company's operation.

¶3 Among the loans obtained by LaPean Implement were six short-term loans obtained between March 2005 and May 2005, which were used to purchase farm equipment for resale. These loans were individually secured by specifically identified pieces of farm equipment. In June 2005, the six short-term loans were consolidated into a new, longer term loan, which incorporated the existing balances of the six short-term loans along with other debts. This loan was secured

[1] All reference to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] "Under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), a hearing may be held when a criminal defendant's trial counsel is challenged for allegedly providing ineffective assistance. At the hearing, trial counsel testifies as to his or her reasoning on [the] challenged action or inaction." ***State v. Thiel***, 2003 WI 111, ¶2 n.3, 264 Wis. 2d 571, 665 N.W.2d 305.

by "all collateral … owned or hereafter acquired by" LaPean Implement, and UCC financing statements were filed giving Security purchase money security interests in the equipment originally identified as collateral for the six short-term loans, as well as in a number of other specifically identified pieces of farm equipment.

¶4 After December 2006, LaPean ceased making regular payments to Security on its indebtedness and eventually collateral securing LaPean's indebtedness was liquidated to satisfy the Security loans. During the liquidation of collateral securing LaPean Implement's indebtedness to Security, it was discovered that eighteen pieces of equipment, which included the equipment originally identified as collateral in the six short-term loans and other equipment Security obtained security interests in at the time of the June 2005 refinancing, were unaccounted for.

¶5 In September 2011, the State filed an amended information charging LaPean with one count of transferring encumbered property valued at more than $100,000 with intent to defraud, contrary to WIS. STAT. § 943.84(2)(a). The State alleged that between June 5, 2007 and March 6, 2009, LaPean sold or transferred, with the intent to defraud Security, the missing eighteen pieces of equipment in which Security held security interests. LaPean's case was tried before a jury, which found him guilty. LaPean moved the circuit court for postconviction relief, which the court denied without a ***Machner*** hearing. LaPean appeals.

DISCUSSION

¶6 LaPean asks this court to: (1) reverse his conviction because the evidence was insufficient to support it; (2) order him a new trial because the real controversy was not tried; or (3) remand for a ***Machner*** hearing on his

postconviction motion claim that his trial counsel was ineffective.[3] We address each of these arguments in turn below.

A. Sufficiency of the Evidence

¶7 LaPean contends the State did not present sufficient evidence at trial to support his conviction for transferring encumbered property with the intent to defraud.

¶8 When reviewing a sufficiency of the evidence challenge, we employ a highly deferential standard of review. *See* ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659. We will not overturn a verdict if there is any credible evidence, under any reasonable view, that leads to an inference supporting the verdict, and we consider the evidence in the light most favorable to the verdict. ***Id.***, ¶¶38-39.

¶9 A defendant is guilty of transferring encumbered property with the intent to defraud if: (1) the defendant removed, transferred, or concealed personal property; (2) another person held a security interest in the property; (3) the defendant knew that another person held a security interest in the property; and (4)

[3] In addition, LaPean asserts that each of the eighteen pieces of secured equipment "would support a separate charge" and that charging them as a single count "creates a duplicity problem." LaPean did not raise his duplicity argument until his postconviction motion, after the trial resulted in a verdict against him. A failure to raise a timely objection at trial forfeits the right to appellate review. ***State v. Saunders***, 2011 WI App 156, ¶29 & n.5, 338 Wis. 2d 160, 807 N.W.2d 679. Furthermore, even if LaPean had not forfeited his right to raise the issue of duplicity by failing to raise that objection at trial, LaPean's duplicity argument in his postconviction motion and on appeal is insufficient to warrant a response. LaPean cites legal authority explaining the basics of duplicity in his motion and briefs on appeal, but fails to develop an argument as to why his particular charge was duplicitous. Accordingly, we decline to address LaPean's duplicity argument for this reason as well. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not address arguments insufficiently developed).

the defendant removed, transferred, or concealed the property with the intent to defraud. WIS. STAT. § 943.84(2)(a); WIS JI—CRIMINAL 1470. LaPean's challenge of the sufficiency of the evidence is limited to the fourth element—whether he transferred the property with the intent to defraud Security.

¶10 LaPean argues that there was no credible evidence that he transferred the collateral with the intent to defraud because the evidence failed to establish that the equipment that originally secured the six short-term loans was in LaPean Implement's possession when those loans were restructured and incorporated into the June 2005 refinancing and, therefore, LaPean could not have had an intent to defraud after that date. However, at trial, Karen Smith, the vice president and senior lender at Security in New Auburn, Wisconsin, testified that at the time of the 2005 loan restructuring, the missing collateral secured by the March thru May 2005 short-term loans and later by the June 2005 loans, "still existed," which we conclude the jury could reasonably have inferred to mean that the collateral was still in the possession of LaPean Implement. Smith testified that after December 2006 when LaPean Implement ceased making regular payments on its indebtedness, she was informed by LaPean that the secured collateral "was being sent out … somebody was renting it, or somebody was testing it," and that she observed some of the collateral on the premises. In sharp contrast, LaPean testified that all of the secured equipment had been sold between February and May 2005; however he was unable to recall who purchased the equipment and was unable to produce any records verifying the purchases. The discrepancies between Smith's and LaPean's testimony could be resolved only by credibility determinations by the jury. We conclude that there was evidence from which the jury could have reasonably inferred that all of the equipment was in LaPean Implement's possession in June 2005.

¶11 LaPean argues that there was no credible evidence of his intent to defraud because the evidence failed to establish that the missing collateral was transferred by LaPean during the time period charged by the State—June 5, 2007 thru March 6, 2009. However, to prove that LaPean transferred property with the intent to defraud contrary to WIS. STAT. § 943.84(2)(a), the State did not need to establish the specific dates on which the property was transferred. *See* WIS JI—CRIMINAL 1470. Because there was sufficient evidence for the jury to conclude that the offense occurred during the time period alleged, we reject this argument.

¶12 LaPean next argues that there was no credible evidence of his intent to defraud because the evidence failed to establish that when he sold the secured equipment, he was required to see that payment of the proceeds of the sales of the collateral were paid over to Security and not used "to pay legitimate business expenses" of LaPean Implement.[4] LaPean points out that the terms of the June 2005 finance agreement obligated LaPean Implement to make twelve scheduled payments to Security between July 20, 2005 and June 20, 2006, but did not contain a provision obligating him to pay the proceeds from any collateral to Security upon sale. WISCONSIN STAT. § 409.315(1)(b)[5] provides that a security interest in collateral that is sold "attaches to any identifiable proceeds of

[4] LaPean also argues that there was no credible evidence of his intent to defraud Security because the evidence failed to establish that the collateral could not be sold without prior notice to Security. However, the State asserts that it did not maintain at trial that LaPean evidenced an intent to defraud Security by selling the collateralized equipment without Security's consent. LaPean did not dispute this in his reply brief and, therefore, we do not address this issue further. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant's failure to respond in reply brief to an argument made in response brief may be taken as a concession).

[5] Article 9 of the Uniform Commercial Code, which governs secured transactions, was codified in WIS. STAT. ch. 409. *See* WIS. STAT. §§ 401.101 and 409.101.

collateral," and Smith testified at trial that when the collateral was sold, LaPean was "required to turn over the proceeds to pay off [the] loans." We conclude from this evidence the jury could reasonably infer that LaPean was obligated to pay the proceeds from the sale of the collateral to Security. *See* ***Morden***, 235 Wis. 2d 325, ¶¶38-39.

¶13 Finally, LaPean argues that there was no credible evidence of his intent to defraud because the evidence failed to provide even a reasonable inference as to the circumstances under which LaPean sold the collateral, and thus there was no evidence, either direct or circumstantial, from which a jury could infer that LaPean intended to defraud Security at the time the collateral was sold. We do not agree.

¶14 Smith testified at trial that after LaPean Implement ceased making regular payments on its indebtedness, she called LaPean weekly to check on the past due status of the loans and "many times … was told that the equipment was being sent out … somebody was renting it, or somebody was testing it out." Smith testified that in 2009, a customer sought to borrow money from Security to purchase two tractors from LaPean Implement, which were two of the secured tractors later unaccounted for. Smith testified that because LaPean Implement owed Security for the tractors, Security issued its customer a cashier's check made payable to LaPean Implement and Security. Smith further testified that the customer returned the check to Security because LaPean was not willing to accept a check made payable to both LaPean Implement and Security, and instead wanted cash. Smith testified that in June 2007, an auction was held to dispose of some of LaPean Implement's property and LaPean informed Smith that the unaccounted-for collateral was either being used by someone, rented by someone, or was in storage off-site. In addition, LaPean testified that he was unable to recall when

and to whom the collateral was sold and he was unable to produce any records of those sales. LaPean testified that he kept paper records of all of LaPean Implement's sale transactions, but was unable to locate any records specific to the collateral. LaPean also testified that he kept computer records of all sale transactions; however, the hard drive on the computer on which those records were kept was later found to be missing.

¶15 We conclude that from Smith's testimony regarding LaPean's reassurances as to the equipment and from LaPean's inability to produce records that he claims to have kept in the ordinary course of business, a jury could reasonably find that LaPean's disposal of the missing collateral occurred under deceitful circumstances, and that LaPean transferred the property with the intent to defraud Security.

B. Real Controversy Tried

¶16 LePean contends that the jury should have been instructed on his specific rights and responsibilities under the June 20, 2005 security agreement, which was secured by the collateral at issue. LaPean concedes he did not object at trial regarding the court's failure to provide such an instruction, and that as a result, he has forfeited the right of direct review of this alleged error. *See* ***Best Price Plumbing, Inc. v. Erie Ins. Exchange***, 2012 WI 44, ¶37 n.11, 340 Wis. 2d 307, 814 N.W.2d 419. LaPean argues, however, that we should exercise our discretionary power of reversal under WIS. STAT. § 752.35, because the failure to instruct the jury on his rights and obligations under the security agreement resulted in the real controversy not being tried. *See* ***State v. Cockrell***, 2007 WI App 217, ¶36 n.12, 306 Wis. 2d 52, 741 N.W.2d 267 (an appellate court "may exercise [its]

discretionary power of reversal under WIS. STAT. § 752.35 when a waived error regarding a jury instruction results in the real controversy not being tried.")

¶17 This court has discretionary authority to reverse a judgment of conviction and grant a new trial "if it appears from the record that the real controversy has not been fully tried." WIS. STAT. § 752.35. Appellate courts have exercised this discretionary power to reverse in a variety of situations, including when there was error in the jury instructions. *See* ***State v. Bannister***, 2007 WI 86, ¶41, 302 Wis. 2d 158, 734 N.W.2d 892; *see, e.g.,* ***Vollmer v. Luety***, 156 Wis. 2d 1, 456 N.W.2d 797 (1990). We exercise our discretionary power of reversal "only sparingly," ***State v. Prineas***, 2009 WI App 28, ¶11, 316 Wis. 2d 414, 766 N.W.2d 206, and "only in exceptional cases." ***State v. Armstrong***, 2005 WI 119, ¶114, 283 Wis. 2d 639, 700 N.W.2d 98.

¶18 It was undisputed at trial that the eighteen items of collateral were transferred by LaPean, that Security held a security interest in that property, and that LaPean knew that Security held a security interest in the property. *See* WIS. STAT. § 943.84(2)(a). The sole issue in dispute was whether LaPean intended to defraud Security when he transferred the secured property. The State maintained that LaPean was obligated under the security agreement to remit the proceeds from the sale of the collateral to Security. Part of LaPean's defense at trial was that he was under no such obligation—that he could use the proceeds from the sale of the collateral to pay other business expenses. We read LaPean's brief on appeal as arguing that because his obligations with respect to the proceeds from the sale of the collateral were integral to the issue of his intent, the jury "had no basis for judging whether [his] 'conduct' evidenced an intent to defraud or was entirely innocent" absent an instruction explaining those rights and obligations. We disagree.

¶19 LaPean was free to argue at trial, and did in fact argue, that under the terms of the security agreement he was under no obligation to pay the proceeds from the sale of the missing secured equipment directly to the bank but could instead use the proceeds to pay other business expenses. LaPean has not presented this court with a persuasive argument as to why the failure to provide the jury with an instruction that would emphasize LaPean's defense theory to the jury resulted in the real issue—in this case LaPean's intent—not being fully tried.

C. Ineffective Assistance of Counsel

¶20 LaPean contends that his postconviction motion raised sufficient facts to entitle him to a ***Machner*** hearing.

¶21 A postconviction hearing is necessary to sustain a claim of ineffective assistance of counsel. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App.1 979). However, a defendant's claim that counsel provided ineffective assistance does not automatically trigger a right to a ***Machner*** hearing. *See* ***State v. Curtis***, 218 Wis. 2d 550, 555 n.3, 582 N.W.2d 409 (Ct. App. 1998). A circuit court may deny a postconviction motion without a hearing "if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether a motion alleged sufficient material facts that, if true, would entitle a defendant to an evidentiary hearing presents a legal issue that we review de novo. *See* ***id.***

¶22 Our review of a circuit court's denial of an ineffective assistance of counsel claim presents a mixed question of fact and law. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845. We will affirm the court's factual findings if

they are not clearly erroneous, but determine counsel's performance independently. ***Id.***

¶23 To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Because a defendant must show both deficient performance and prejudice, we need not address both aspects of the ***Strickland*** test if the defendant has failed to make a sufficient showing on either one. *See* ***id.*** at 697. To prove deficient representation, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id***. at 694.

¶24 LaPean argues that his counsel's performance was deficient because counsel failed to propose a special jury instruction explaining LaPean's rights and obligations under the June 2005 security agreement. LaPean asserts that such an instruction would have assisted the jury in determining whether LaPean transferred the missing secured property with the intent to defraud Security. However, LaPean did not state in his postconviction motion, and does not state on appeal, how such an instruction would have read. We conclude that, without more than his broad assertions that a special jury instruction was necessary, LaPean has not set forth sufficient facts showing that counsel's performance was deficient.

¶25 LaPean also argues that his trial counsel's performance was deficient because counsel failed to move the circuit court for a directed verdict at the close of the State's evidence. LaPean claims that the State failed to prove under what

circumstances the missing secured collateral was transferred, and that his trial counsel did not have any strategic reason for not bringing the motion. LaPean argues that he was prejudiced because had his trial counsel moved for a directed verdict, the circuit court would have granted the motion. As explained above in ¶¶7-15, the evidence was sufficient to establish the circumstances under which the collateral was transferred by LaPean. Accordingly, we conclude that LaPean did not set forth sufficient facts showing that counsel's performance was either deficient or prejudicial.

CONCLUSION

¶26 For the reasons discussed above, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.