COURT OF APPEALS
DECISION
DATED AND FILED

November 5, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1403-CR **Cir. Ct. No. 2011CF133**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD P. SELENSKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Langlade County: FRED W. KAWALSKI, Judge. *Affirmed*.

¶1 MANGERSON, J.[1] Richard Selenske appeals a judgment of conviction for misdemeanor theft and an order for restitution. Selenske argues the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

circuit court erred by failing to admit certain evidence and by failing to give his proposed jury instructions. He asserts these errors prevented the jury from being able to determine who owned the bales of hay he was accused of stealing. Selenske also argues the circuit court erred in its restitution determination. We reject Selenske's arguments, and affirm.

BACKGROUND

¶2 We take the following facts from the jury trial. In 2011, Selenske asked Donald Kern to purchase standing hay from Selenske.[2] Kern agreed, and, on June 13, 2011, Selenske and Kern entered into a written contract for the purchase of the standing hay. Selenske drafted the contract, which provided:

> Purchased app 70 acres of Hay. From [sic]
>
> For $1800 for 2011 cutting
>
> Paid $1500. Bal $300. Due when done
>
> [signed] Dick Selenske
>
> [signed] Don Kern

¶3 Kern testified he paid Selenske $1500 on June 13. Selenske told Kern he wanted the hay cut in July, and Kern began cutting in mid-July. Kern cut the hay in four days, and then dried, raked, and baled it. Kern testified that, while he was baling the hay, Selenske told him Selenske needed hay for his cows. Kern agreed to give Selenske ten or fifteen bales in exchange for the remaining $300 on the contract. Kern moved some bales "across the irrigation pipe" for Selenske, and Selenske fed those bales to his cows.

[2] Kern explained standing hay is hay that is growing and "ready to be cut and baled, [and] put away."

¶4 Except for twelve bales, Kern moved the remaining bales to the edge of the field and stacked them for pickup. Kern then transported his equipment to another property, but would return at night to pick up a load of bales. Kern and Selenske never had an agreement as to when the bales would be removed from Selenske's property and, by August 12, 2011, Kern had picked up and taken home over two hundred bales.

¶5 On August 12, seventy bales of hay remained on Selenske's property: thirty-seven bales near the highway; twenty-one bales near Selenske's cows;[3] and twelve bales in the field. When Kern arrived on August 12 to pick up the bales, Selenske appeared, blocked Kern with his vehicle, and refused to allow Kern to take any more bales. Kern testified he did not give Selenske permission or consent to keep his bales, and wanted his bales.

¶6 Officer Michael Brayton was dispatched to respond to the situation between Kern and Selenske. Brayton testified Selenske told him Kern could not take the bales because Selenske "believed the hay was no longer [Kern's] due to the fact that [Selenske] was unable to get a good second crop out of the hay." Brayton told Selenske that, pursuant to the contract, the bales belonged to Kern and, if Selenske did not let Kern take the bales, Selenske would be committing the crime of theft. Selenske responded that Kern still owed him $300 on the contract. When Kern offered to pay the $300 so he could take his bales, Selenske refused and stated he was keeping the bales. Eventually, Selenske told Kern he could

[3] Kern testified that Selenske began moving Kern's bales.

come back the next day and take the twelve bales in the field. Kern, however, never returned to pick up those bales.[4]

¶7 Selenske testified he and Kern agreed Kern would have the bales removed by July 1 or July 15. Selenske believed if Kern did not remove the bales in time, Selenske would own the bales. Selenske conceded the contract said nothing about when the bales needed to be removed; however, he explained that he, not Kern, moved the bales off the field, and he believed he was entitled to the remaining bales because "I worked hard in order to get help to put the bales off the field so that I had a second crop[.]"

¶8 During the trial, Selenske's counsel moved for the admission of a contract Kern had with the Department of Natural Resources to cut hay. This contract provided that Kern needed to complete his work for the DNR by a specific date. Selenske wanted this contract admitted into evidence because he contended the jury was going to have to interpret the contract between Selenske and Kern and the DNR contract would aid the jury in its interpretation. The circuit court refused to admit the evidence, reasoning the DNR contract was not relevant because the DNR was not a party to the case and because the provisions in the DNR contract had no bearing on the provisions in the contract between Selenske and Kern. The court also determined the DNR contract would confuse the jury.

¶9 At the jury instruction conference, Selenske submitted a proposed instruction that provided:

[4] Kern testified that he never returned for those twelve bales because "I didn't know if I wanted them because I didn't know what he might have done to them." Brayton testified that Kern told him he was concerned that Selenske may have put something in those bales to make his livestock sick.

> A contract for the sale of hay may be partly written and partly oral. It is for the jury to determine whether the oral and written provisions were intended to be an integrated contract.
>
> There is a dispute as to the completion of the contract. If Donald Kern was supposed to have removed the hay before August 12, 2011; then you are instructed that Richard P. Selenske was the owner of all hay on the premises on August 12, 2011.

¶10 The court refused to give this instruction, reasoning Selenske was trying to incorporate civil law into a criminal case. The court observed Selenske's instruction ignored other contract principles, such as the fact that ambiguities would be construed against Selenske, who drafted the written contract. The court also concluded that, even assuming there was an agreement about when the bales were to be removed, no evidence was presented about any agreed upon consequences if Kern's bales were not removed. Because of the lack of evidence, the court refused to instruct the jury the bales belonged to Selenske.

¶11 Selenske then offered another proposed jury instruction, which provided: "When the parties disagree in their recollection concerning the provisions of a contract when the provision is unclear[,] the jury must determine what the provisions were." The court refused to give this instruction, reasoning it was "again" not applicable. The court stated Selenske's argument regarding the contract's completion date and who owned the property went to the issue of whether Selenske had the "mental status … sufficient to meet that requirement that he intentionally took property that belonged to someone else."

¶12 During closing arguments, Selenske's counsel argued Selenske did not steal Kern's bales. Specifically, counsel contended Selenske believed Kern had breached the contract by failing to timely remove the bales and believed the

bales belonged to him. Counsel emphasized the crime of theft required Selenske to know the property did not belong to him.

¶13 The jury found Selenske guilty. Selenske moved for judgment notwithstanding the verdict, and the court denied his motion.

¶14 At the restitution hearing, Kern testified that the value of one bale of hay in 2011 was $35 or $40, and that, on August 12, 2011, Selenske stole seventy-one of his bales. Selenske testified only seventy bales remained on his property on August 12; however, he asserted he prevented Kern from taking only thirty-seven bales. The circuit court found Selenske needed to compensate Kern for seventy bales and valued each bale at $35. It ordered restitution in the amount of $2450.

DISCUSSION

I. Ownership of the bales

¶15 On appeal, Selenske renews his argument that he owned the bales and cannot be guilty of theft. He asserts the determination of who owned the bales "needed to be, but was not, fully and fairly tried." (Capitalization and bolding omitted.) He contends to determine who owned the bales, the jury needed to make a factual finding about the completion date of Selenske and Kern's contract. Selenske argues the circuit court erroneously prevented the jury from making this finding because it refused to admit into evidence Kern's DNR[5] contract and it refused to instruct the jury that it needed to determine the contract's completion date. Selenske asserts that, "had the jury been properly instructed and the proper

[5] Selenske argues Kern's DNR contract would have established an "industry standard" for the completion date on hay cutting contracts.

evidence considered," it would have determined the contract was to be completed before August 12, 2011. According to Selenske, this determination would establish that, on August 12, he owned the bales of hay he was accused of stealing.

¶16 Selenske then advances two theories supporting his assertion that a contract completion date before August 12 would establish he owned the bales. First, he argues that, if the contract was to be completed before August 12, Kern breached the contract because the bales remained on Selenske's property. Selenske asserts that, if Kern breached the contract, Selenske, as seller of the standing hay Kern used to make his bales, had the right to cancel the contract with Kern. In support, he offers a citation to WIS. STAT. § 402.703(6).[6] Selenske then argues that, if he canceled the contract, he would be able to keep all of Kern's bales and cannot be guilty of stealing something he owns.

¶17 Alternatively, Selenske argues that, because Kern never returned after August 12 to pick up any of the bales, including the twelve in the field Selenske subsequently offered to Kern, Kern's conduct "constitutes rejection of the hay." Selenske contends that, if Kern rejected the bales, title in the bales

[6] WISCONSIN STAT. § 402.703 provides, in relevant part:

> **Seller's remedies in general.** Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (s. 402.612), then also with respect to the whole undelivered balance, the aggrieved seller may:
>
> ….
>
> **(6)** Cancel.

"revests" in Selenske pursuant to WIS. STAT. § 402.401(4).[7] He then "question[s] … if section 402.401(4) is retroactive prior to the actual rejection." Selenske argues we should apply the rule of lenity and determine title to the bales "revested retroactively to June 13, 2011 [the date of the contract]." Selenske reasons that, if title revests retroactively, he would own the bales on the date he was alleged to have stolen them.

¶18 We reject Selenske's arguments. First, the underpinning of Selenske's arguments is that the circuit court erred by refusing to admit the DNR contract into evidence and by refusing to give Selenske's proposed jury instructions. A circuit court has broad discretion in deciding whether to admit certain evidence and deciding whether to give a proposed jury instruction. ***State v. Kandutsch***, 2011 WI 78, ¶23, 336 Wis. 2d 478, 799 N.W.2d 865 (broad discretion to admit or exclude evidence); ***State v. Hubbard***, 2008 WI 92, ¶28, 313 Wis. 2d 1, 752 N.W.2d 839 (broad discretion in instructing jury). We will not reverse a circuit court's discretionary decision absent an erroneous exercise of discretion.

[7] WISCONSIN STAT. § 402.401 provides, in relevant part:

> **Passing of title; reservation for security; limited application of this section.** Each provision of this chapter with regard to the rights, obligations, and remedies of the seller, the buyer, purchasers, or other 3rd parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this chapter and matters concerning title become material the following rules apply:
>
> ….
>
> **(4)** A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a "sale."

Kandutsch, 336 Wis. 2d 478, ¶23; ***Hubbard***, 313 Wis. 2d 1, ¶28. A circuit court has properly exercised its discretion when it has "examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion." ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698 (citations omitted).

¶19 Here, the circuit court reasoned it would not admit the DNR contract into evidence because the DNR was not a party to the case, the DNR contract had no bearing on the Selenske/Kern contract, and the DNR contract would confuse the jury. The circuit court also reasoned it would not give Selenske's proposed instructions because: any ambiguities concerning the written contract's completion date would need to be construed against Selenske; Selenske had not presented any evidence showing there was an agreement that Selenske would keep the bales if Kern failed to timely remove them; and the proposed instructions would improperly incorporate civil law into a criminal case.

¶20 On appeal, Selenske ignores the circuit court's reasoning and simply advances arguments concerning the importance of the DNR contract and why his proposed instructions should have been given to the jury. He does not explain why the reasons given by the circuit court for excluding the evidence and refusing to give the proposed instructions are erroneous. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (ignoring ground upon which circuit court ruled constitutes concession of the holding's validity).

¶21 In any event, Selenske's argument about the need for the jury to determine the contract's completion date overlooks the written contract itself. "The interpretation of a written contract, including the determination of whether its terms are ambiguous, is a legal matter that we decide independently." ***Town of***

Neenah Sanitary Dist. No. 2 v. City of Neenah, 2002 WI App 155, ¶9, 256 Wis. 2d 296, 647 N.W.2d 913. "[U]nambiguous contractual language must be enforced as it is written." ***Id.*** Here, the written contract explicitly stated it was for the "2011 cutting." Under this language, Kern was still within the terms of the contract on August 12, 2011. He had not breached the contract by failing to timely complete the contract. Because Kern did not breach the contract, Selenske's arguments about his purported right to cancel and assume ownership of Kern's bales fail.

¶22 We also reject Selenske's arguments about Kern's alleged rejection of the bales and the "retroactive" revesting of title to Selenske. Irrespective of the fact that Kern never returned to collect the bales in the field and never tried a second time to collect any of the other bales, Selenske overlooks that, but for Selenske's interference on August 12, Kern would have taken all of his bales. Kern specifically testified at trial he wanted all of his bales on August 12, and Selenske impermissibly prevented him from taking them. Selenske has not established Kern rejected the bales.

¶23 Moreover, even if we somehow concluded there was a rejection, Selenske fails to recognize that he did not sell Kern the bales of hay—he sold only the standing hay, which Kern cut, dried, baled, and moved from the field. Selenske does not explain how title in something Kern created was able to "revest" in him. We will not consider it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court need not consider undeveloped arguments). Finally, the rule of lenity applies only to penal statutes and therefore would not apply to the Uniform Commercial Code. *See* ***State v. Kittilstad***, 231 Wis. 2d 245, 267, 603 N.W.2d 732 (1999) (Rule of lenity "holds that where a criminal statute is ambiguous, it should be interpreted in a defendant's favor.").

¶24 In sum, we conclude the circuit court's reasoning for excluding the DNR contract and refusing to give Selenske's proposed jury instructions amounted to an appropriate exercise of its discretion. Selenske was able to argue to the jury that he was not guilty of theft because he believed he owned the bales. The jury, however, rejected that argument and found him guilty. The evidence presented at trial sufficiently supports the jury's determination that Selenske stole Kern's bales.

II. Restitution award

¶25 Selenske next objects to the restitution award. His entire argument is:

> The court ordered restitution for 70 bales, but only 37 bales were stolen.
>
> The Circuit Court exceeded its powers because 33 bales were not stolen and outside the ambit of §[]973.20. ***State v. Storlie***[, 2002 WI App 163, 256 Wis. 2d 500, 647 N.W.2d 926.]
>
> If the conviction is not reversed, the restitution award must be reduced to 37 bales at 35 dollars each for $1,295.

Selenske's appendix citation in support of his assertion that only thirty-seven bales were stolen is to a side bar from the jury trial.[8]

¶26 Selenske's restitution argument is undeveloped and we will not consider it. *See* ***Pettit***, 171 Wis. 2d at 646. In any event, to the extent Selenske is

[8] The side bar occurred after the court sustained the State's objection to one of Selenske's questions. During the side bar, the court asked Selenske to explain his reasoning for why he believed the question was appropriate. Selenske argued the State accused him of stealing the twelve bales of hay in the field and he was trying to establish that he did not steal them. The court stated that it thought the State was not concerned with the bales in the field and was concerned with the other bales. The State agreed. It elaborated the focus at trial was on the thirty-seven bales near the highway.

asserting the State only charged him with stealing thirty-seven bales and therefore he is not responsible for his retention of the remaining bales, we emphasize that the "crime" considered at a restitution hearing "encompasses 'all facts and reasonable inferences concerning the defendant's activity related to the 'crime' for which the defendant was convicted, not just those facts necessary to support the elements of the specific charge of which the defendant was convicted." ***State v. Canady***, 2000 WI App 87, ¶10, 234 Wis. 2d 261, 610 N.W.2d 147. After all, the primary purpose of restitution "is not to punish the defendant, but to compensate the victim." ***Id.***, ¶8.

¶27 Here, it is undisputed that seventy bales remained on Selenske's property when Kern arrived to pick them up. Selenske appeared, blocked Kern with his vehicle, and refused to allow Kern to take any more bales. At the restitution hearing, Selenske argued he was only responsible for thirty-seven bales. Kern, however, testified he lost all seventy bales. The circuit court accepted Kern's testimony and concluded Selenske needed to compensate Kern for the seventy bales. Because the circuit court's determination is supported by the record, we affirm the court's restitution award. *See* ***id.***, ¶6.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.