

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 16, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP896-CR

Cir. Ct. No. 2011CF78

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID L. WHITE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dunn County: WILLIAM C. STEWART, JR., and ROD W. SMELTZER, Judges.
Reversed and cause remanded for further proceedings.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. David White appeals a judgment convicting him of theft of movable property whose value exceeds \$2500 but does not exceed \$5000

and an order denying postconviction relief.¹ White argues the circuit court erred by denying his motion to dismiss at the close of the State's case. He also argues the court erroneously exercised its discretion by excluding attorney Terry Moore's testimony regarding legal advice he provided to White.

¶2 We conclude the circuit court properly denied White's motion to dismiss at the close of the State's case. However, we agree with White that the court erroneously exercised its discretion by excluding Moore's testimony. We therefore reverse the judgment of conviction and the order denying postconviction relief and remand for a new trial.²

BACKGROUND

¶3 A criminal complaint charged White with one count of theft in a business setting of property whose value exceeds \$2500 but does not exceed \$5000. The complaint alleged White was the owner of a business named J & J Electric. It further alleged that, in May 2010, White made an agreement with Randy Peterson and Mike Hahner, the owners of Dakota Electric, for Dakota to hire White and all of J & J's employees. The complaint alleged that two businesses—Holiday Retirement Corporation and Cardinal Glass—subsequently made payments to J & J in June and July 2010 for work performed by Dakota, but

¹ The Honorable William C. Stewart, Jr., presided over White's trial and entered the judgment of conviction. The Honorable Conrad A. Richards denied White's postconviction motion in an oral ruling, and the Honorable Rod W. Smeltzer signed the written order denying postconviction relief.

² In addition, White contends the circuit court's exclusion of Moore's testimony violated his constitutional right to present a defense, and he also argues his trial attorney was ineffective in several respects. Because we reverse and remand for a new trial on other grounds, we need not address these additional arguments. See *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (“[C]ases should be decided on the narrowest possible ground.”).

White failed to remit those payments to Dakota. The charge against White was later amended to theft of movable property whose value exceeds \$2500 but does not exceed \$5000.

¶4 The case proceeded to trial in June 2013. At trial, Peterson testified White contacted Dakota and stated he “needed help on a job, wanted us to come and take over that job and hire him and all of his employees.” They reached an agreement that Dakota would hire J & J’s employees and immediately take over J & J’s existing contracts. They also agreed that White would work for Dakota as a project manager for two years and would then “bow out of the business ... to pursue other endeavors.” Peterson characterized White as an employee of Dakota.

¶5 Peterson further testified that, as of June 1, 2010, J & J had existing contracts to complete jobs for Cardinal Glass and Holiday Retirement. According to Peterson, Dakota performed work on those jobs and sent invoices to the companies for payment. However, both companies sent their payments to J & J, instead of Dakota. Peterson testified White remitted one of Holiday Retirement’s payments to Dakota, but he retained the rest of the payments. Peterson confronted White about the missing payments, but White “kept saying, well, we need to discuss this.” They discussed the matter several times but could not reach a resolution.

¶6 Hahner similarly testified that Dakota agreed to hire White and take over the Cardinal Glass and Holiday Retirement jobs. Hahner confirmed that Dakota supplied the materials and labor for those projects. He also confirmed that Dakota billed Cardinal Glass and Holiday Retirement, but they remitted their payments to J & J. Hahner testified White was supposed to transfer the payments from Cardinal Glass and Holiday Retirement to Dakota, but he failed to do so.

Hahner stated he and Peterson had “numerous” conversations with White about the missing payments, and White “really didn’t have [an explanation]” for failing to remit the payments to Dakota.

¶7 Dakota’s office manager, Amy Weber, testified she made sure White completed the necessary paperwork to become an employee of Dakota, including tax withholding and employment verification forms. Weber testified White was added to Dakota’s payroll, and he received a paycheck for each week he worked for Dakota. Weber conceded White was not required to provide her with time cards showing the hours he worked, unlike the other J & J employees Dakota hired. However, she attributed this difference to the fact that White was a project manager.

¶8 Richard Klinner testified he was one of the former J & J employees hired by Dakota. According to Klinner, at the time Dakota hired him, White told him the Cardinal Glass and Holiday Retirement projects “would become Dakota Electric jobs.” Klinner further testified Dakota completed the Cardinal Glass and Holiday Retirement projects.

¶9 On cross-examination, Klinner conceded he continued to work out of J & J’s office in Menomonie between June 1 and August 1, 2010. During that time, he continued to use a fax machine, computer, and e-mail account provided by J & J. Customers continued to call J & J’s landline, and Klinner would answer, “Dakota J & J.” He and the other former J & J employees continued to drive vehicles owned by J & J, and White drove his personal vehicle. The former J & J employees also continued to use gasoline credit cards provided by J & J. In addition, some of the parts Dakota used in projects completed after June 1, 2010, came from J & J’s inventory, and Klinner sent Dakota invoices for those parts.

¶10 David Pellett, a Menomonie police officer, testified he spoke to White on September 23, 2010. During that discussion, White acknowledged he became an employee of Dakota on about June 1, 2010. He also acknowledged receiving payments for the Cardinal Glass and Holiday Retirement jobs. White told Pellett he did not remit those payments to Dakota because “the contracts began as J & J contracts[,]” so J & J “was actually the general contractor for those jobs, and Dakota Electric were subcontractors.”

¶11 On cross-examination, defense counsel represented to Pellett that White’s wife, Amy, was actually the majority owner of J & J. Pellett stated he was not previously aware of that fact, and he had never spoken to Amy White. Pellett conceded he had not discovered any evidence that White received and cashed checks made payable to Dakota. He also conceded the checks J & J received from Cardinal Glass and Holiday Retirement were deposited into J & J’s business account, not White’s personal account.

¶12 During a break in the proceedings, the circuit court considered whether the defense would be allowed to call attorney Terry Moore as a witness. Defense counsel explained:

[W]e have just spent a morning here, part of yesterday, in which [the State] is beating the jury over the head with Dave White was an employee of that business. And this is my offer—one of the things that Mr. Moore is going to testify about, as I said in my opening statement, is that [White] came to him and said, “These guys want to put me on the payroll and call me an employee. Does that make any difference?” And he was advised it made no difference, and I think that is in the context of the case, because of all these questions from [the State about whether White was an employee].

The court rejected this argument, concluding Moore’s testimony was not relevant.

The court reasoned:

[Mr. Moore] may have given whatever advice he gave. Okay. This is about whether or not property alleged to belong to ... Dakota Electric was improperly retained by Mr. White. That's what this is about. Now, what Mr. Moore may have advised Mr. White about "it doesn't make any difference," well, that may or may not be true. That may not be the law. And I don't want to get into a position where Mr. Moore says, "Well, it doesn't really—doesn't make any difference whether he's an employee, if they call him that or not; he can take it as a salary in lieu of some lump sum to purchase whatever was purchased in this particular case[.]" [That] is irrelevant. The question is, was property improperly retained by Mr. White that didn't belong to him.

....

And there's no direct evidence that [Mr. Moore] was involved in any of these negotiations [between Mr. White and Dakota]. He obviously didn't draft any documents that would have memorialized some agreement between the parties. I think it's pretty clear there is no documentation that reflects what this agreement is.

¶13 The State then rested. Thereafter, White moved to dismiss, arguing the State had failed to prove the elements of the charged offense. The circuit court denied White's motion.

¶14 White then testified in his own defense. He stated J & J is an S-corporation, and he and his wife are the corporation's officers. He admitted receiving checks from Cardinal Glass and Holiday Retirement after June 1, 2010, and he admitted those checks were deposited into J & J's business account. He also conceded Dakota provided the labor for the Cardinal Glass and Holiday Retirement projects. However, he asserted Dakota was acting as a subcontractor for J & J. He admitted Dakota was entitled to compensation for the labor it provided, but he asserted the amount Dakota was owed remained unresolved. White denied that Dakota provided any materials or equipment for the Cardinal

Glass and Holiday Retirement projects. He also stated he did not intend to steal any property belonging to Dakota.

¶15 White confirmed that he, Hahner, and Peterson reached an agreement that Dakota would pay him \$1120 per week for two years. However, White's theory at trial was that the weekly payments were compensation for allowing Dakota to hire J & J's employees and take over its outstanding contracts. White testified it was Dakota's idea "that the weekly payments ... should be payroll[.]" He stated he discussed that suggestion with Moore, and as a result of their discussion, he agreed to sign documents placing him on Dakota's payroll. White denied telling Pellett he was an employee of Dakota.

¶16 Finally, White testified Dakota actually owed J & J more money than J & J owed Dakota. Specifically, he testified Dakota had failed to pay J & J for cell phone usage, gasoline, materials, and rent. White stated he had retained Moore in connection with a possible civil suit against Dakota, but they did not plan to initiate civil proceedings until the criminal case was resolved.

¶17 The State subsequently called Peterson as a rebuttal witness. Peterson denied that Dakota was acting as a subcontractor for J & J when it performed work on the Cardinal Glass and Holiday Retirement projects.

¶18 In its closing argument, the State argued the evidence showed White was an employee of Dakota. As such, the State argued White had "no right to retain possession of money that was due to Dakota Electric for work Dakota Electric did." In response, the defense highlighted White's testimony that he did not intend to steal any property from Dakota. The defense asserted White simply wanted "to get this ... business dispute worked out so that whoever was owed

something would get it”—a matter that would be more appropriately resolved in a civil proceeding.

¶19 The jury found White guilty of the charged offense. White moved for postconviction relief, and the circuit court denied his motion following a hearing. White now appeals.

DISCUSSION

I. Motion to dismiss

¶20 On appeal, White first argues the circuit court erred by denying his motion to dismiss at the close of the State’s case. When the circuit court denies a defendant’s motion to dismiss at the close of the State’s case, and the defendant proceeds to introduce evidence in his or her own defense, we must examine all the evidence before the jury to determine whether the evidence was sufficient to support the defendant’s conviction. *State v. Kelley*, 107 Wis. 2d 540, 544, 319 N.W.2d 869 (1982). In assessing the sufficiency of the evidence, we give deference to the jury’s determination and view the evidence in the light most favorable to the State. *State v. Long*, 2009 WI 36, ¶19, 317 Wis. 2d 92, 765 N.W.2d 557. “If more than one inference can be drawn from the evidence, we must adopt the inference that supports the conviction.” *Id.* “We will not substitute our own judgment for that of the jury unless the evidence is so lacking in probative value and force that no reasonable jury could have concluded, beyond a reasonable doubt, that the defendant was guilty.” *Id.*

¶21 White was charged with theft of movable property whose value exceeds \$2500 but does not exceed \$5000. *See* WIS. STAT. § 943.20(1)(a), (3)(bf).³ In order to convict White, the jury had to find, beyond a reasonable doubt, that: (1) White intentionally retained possession of movable property of another worth more than \$2500; (2) the owner did not consent to White retaining possession of the property; (3) White knew the owner did not consent; and (4) White intended to deprive the owner permanently of the possession of the property. *See* WIS JI—CRIMINAL 1441 (2009).

¶22 White challenges the sufficiency of the evidence regarding only the first element of the charged offense. Specifically, he asserts the evidence was insufficient to prove beyond a reasonable doubt that he, personally, retained possession of the money Cardinal Glass and Holiday Retirement paid to J & J. White notes that the checks were made payable to J & J and were deposited in J & J's business account. He asserts the State did not produce any evidence that the money was ever removed from J & J's account or converted to White's personal use.

¶23 White's one-paragraph argument that he did not retain possession of the money paid by Cardinal Glass and Holiday Retirement is conclusory. White does not provide any legal authority for the proposition that he—one of J & J's two officers—could not be deemed to possess the money because it was deposited in J & J's business account. He also fails to provide any authority for his assertion that the State needed to prove the money was converted to his personal use. We

³ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

need not consider arguments that are undeveloped or unsupported by legal authority. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).⁴

¶24 Viewing the evidence adduced at trial in the light most favorable to the State, we cannot say the evidence was so lacking in probative value and force that no reasonable jury could have concluded, beyond a reasonable doubt, that White retained possession of the money paid by Cardinal Glass and Holiday Retirement. See *Long*, 317 Wis. 2d 92, ¶19. Evidence established that White and his wife, Amy, were the sole officers of J & J. White entered into an agreement with Peterson and Hahner for Dakota to hire J & J's employees and take over J & J's outstanding contracts with Cardinal Glass and Holiday Retirement. Dakota completed the work on those projects and sent invoices to Cardinal Glass and Holiday Retirement, but they remitted their payments to J & J. Peterson and Hahner repeatedly asked White to transfer the payments to Dakota, but White refused to do so. There was no evidence that Amy White was involved in the dispute over the payments from Cardinal Glass and Holiday Retirement.

⁴ As part of his argument that he did not possess the payments from Cardinal Glass and Holiday Retirement, White asserts that his wife, Amy, was the majority owner of J & J. However, White does not provide any record citation in support of that assertion. Elsewhere in his brief, White cites the following question and answer from Pellett's testimony:

[Defense counsel]: And isn't it true that during this—during this trial is the first time that you learned that the majority owner of the business was Amy White?

[Pellett]: That is correct.

White does not cite any evidence supporting defense counsel's assertion that White's wife was the majority owner of J & J. A reviewing court need not sift the record for facts to support an appellant's contentions. *Keplin v. Hardware Mut. Cas. Co.*, 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964).

¶25 Based on this evidence, the jury could reasonably infer that, although the checks from Cardinal Glass and Holiday Retirement were deposited into J & J’s business account, White was the individual in actual possession and control of the money. While there may also have been evidence supporting a contrary inference, “[i]f more than one inference can be drawn from the evidence, we must adopt the inference that supports the conviction.” *See id.* Accordingly, we reject White’s argument that the circuit court erred by denying his motion to dismiss at the close of the State’s case.

II. Exclusion of Moore’s testimony

¶26 White next argues the circuit court erred by excluding Moore’s testimony. We will not disturb a circuit court’s decision to admit or exclude evidence unless the court erroneously exercised its discretion. *Weborg v. Jenny*, 2012 WI 67, ¶41, 341 Wis. 2d 668, 816 N.W.2d 191. “A circuit court erroneously exercises its discretion if it applies an improper legal standard or makes a decision not reasonably supported by the facts of record.” *Id.* (quoted source omitted).

¶27 To be admissible, evidence must be relevant. WIS. STAT. § 904.02. Evidence is relevant when it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” WIS. STAT. § 904.01. According to White’s offer of proof, Moore would have testified that White asked him whether signing Dakota’s payroll documents would make him an employee of Dakota, and he advised White signing the payroll documents would not make any difference. The circuit court concluded this testimony was not relevant to whether “property [was] improperly retained by Mr. White that didn’t belong to him[.]”

¶28 We agree with White that the circuit court erroneously exercised its discretion by excluding Moore's testimony. To convict White, the jury had to find that he intentionally retained possession of movable property belonging to Dakota and that he intended to deprive Dakota permanently of the possession of the property. *See* WIS JI—CRIMINAL 1441 (2009). White's intent in retaining the payments from Cardinal Glass and Holiday Retirement was therefore central to the jury's determination of his guilt.

¶29 At trial, the State attempted to persuade the jury that White was merely an employee of Dakota after June 1, 2010, and therefore had no legitimate claim to the payments made by Cardinal Glass and Holiday Retirement. To the contrary, White claimed he was not an employee of Dakota, and the weekly payments he received from Dakota were actually compensation for allowing Dakota to hire J & J's employees and take over its existing contracts. White also claimed the parties agreed that Dakota would perform the labor on the Cardinal Glass and Holiday Retirement projects as a subcontractor for J & J. White acknowledged that Dakota performed the labor on those projects, and he asserted he intended to pay Dakota for its labor once the parties resolved their dispute over the amount owed.

¶30 Moore's testimony would have corroborated White's claim that he did not believe he was an employee of Dakota. It also would have given the jury a basis to conclude that belief was reasonable. If White reasonably believed he was not an employee of Dakota, it follows he may have reasonably believed he had a legitimate claim to the payments made by Cardinal Glass and Holiday Retirement. If the jury concluded White believed he had a legitimate claim to the payments, it could not have found, beyond a reasonable doubt, that he intentionally retained

possession of movable property belonging to Dakota and intended to deprive Dakota permanently of the possession of the property.

¶31 The circuit court concluded Moore’s testimony was not relevant because Moore was not involved in the negotiations between White and Dakota. The court also stated Moore’s opinion that signing payroll documents did not make White an employee of Dakota “may or may not be true.” If Moore’s testimony had been offered solely to show that White was not an employee of Dakota, the circuit court’s reasoning would have merit. However, the defense also wanted to use Moore’s testimony to show that White reasonably believed he was not an employee of Dakota, and, as a result, he reasonably believed he had a valid claim to the disputed payments. Thus, even if Moore’s advice was incorrect, his testimony was relevant to establish White’s intent in retaining the payments.

¶32 Because Moore’s testimony was relevant to White’s intent, the circuit court erroneously exercised its discretion by excluding the testimony.⁵ However, the erroneous exclusion of testimony is subject to the harmless error rule. *See* WIS. STAT. § 901.03(1). An erroneous evidentiary ruling “is harmless if there is no reasonable possibility that the error contributed to the conviction.” *State v. Everett*, 231 Wis. 2d 616, 631, 605 N.W.2d 633 (Ct. App. 1999). A reasonable possibility is a probability sufficient to undermine confidence in the outcome of the proceedings. *Id.* The State bears the burden of proving that an

⁵ We acknowledge that relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” WIS. STAT. § 904.03. However, the circuit court did not rely on § 904.03 as the basis for excluding Moore’s testimony, and the State does not argue the testimony was properly excluded for any of the reasons listed in that statute.

error was harmless. *State v. Jackson*, 2014 WI 4, ¶86, 352 Wis. 2d 249, 841 N.W.2d 791.

¶33 White argues the exclusion of Moore’s testimony was not harmless because it “prevented the jury from hearing any evidence to corroborate White’s claim that he had a legitimate interest in retaining possession of the checks pending a resolution of the parties’ dispute.” The State does not respond to White’s harmless error argument, and we therefore deem it conceded. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). Accordingly, we reverse the judgment of conviction and the order denying postconviction relief, and we remand for a new trial.

By the Court.—Judgment and order reversed, and cause remanded for further proceedings.

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

