

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 21, 2000

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Acting Clerk, Court of Appeals
of Wisconsin

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.

No. 98-3516-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

HENRY BOWLES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Henry Bowles appeals from a judgment of conviction entered after a jury found him guilty of five counts of theft. See WIS.

STAT. § 943.20(1)(b) (1997-98).¹ He asserts that the trial court erroneously exercised its discretion in excluding evidence that, he argues, would have supported his theory of defense. We affirm.

BACKGROUND

¶2 Bowles owned a road construction company called Lakeside Pavers, Inc. Between 1990 and 1993, Lakeside entered into a series of joint ventures with another company, Payne and Dolan, to work on several road construction projects. Bowles opened checking accounts for each of the joint ventures, and handled the respective checkbooks. Throughout the course of five of the joint ventures, Bowles and his wife co-signed 48 checks that transferred money from the joint-venture accounts to Bowles's company, Lakeside. Those 48 checks were written for an aggregate amount of over \$616,000. Bowles and his wife also co-signed several checks that transferred money among the five joint ventures to cover expenses of the various joint ventures when they came due. All of the checks co-signed by Bowles and his wife were either checks that were numbered far beyond

¹ WISCONSIN STAT. § 943.20(1)(b) (1997-98) provides:

Theft. (1) ACTS. Whoever does any of the following may be penalized as provided in sub. (3):

....
 (b) By virtue of his or her office, business or employment, or as trustee or bailee, having possession or custody of money or of a negotiable security, instrument, paper or other negotiable writing of another, intentionally uses, transfers, conceals, or retains possession of such money, security, instrument, paper or writing without the owner's consent, contrary to his or her authority, and with intent to convert to his or her own use or to the use of any other person except the owner. A refusal to deliver any money or a negotiable security, instrument, paper or other negotiable writing, which is in his or her possession or custody by virtue of his or her office, business or employment, or as trustee or bailee, upon demand of the person entitled to receive it, or as required by law, is prima facie evidence of an intent to convert to his or her own use within the meaning of this paragraph.

the sequence then in use or temporary checks that had been issued before the joint ventures received preprinted checks. Bowles did not record those checks in the joint-venture checkbook ledgers, and did not disclose to Payne and Dolan that those checks had been issued.

¶3 By April of 1993, subcontractors of the joint ventures were no longer being paid, and Bowles was no longer attending the regular accounting meetings of the joint ventures. Payne and Dolan contacted the bank to review the transactions of the joint-venture accounts. Payne and Dolan then discovered the several checks that Bowles and his wife had issued to Lakeside, and those that they had issued to transfer money among the five joint ventures.

¶4 Each of the five checking accounts required two signatures on the joint-venture checks. According to Richard Schmidt, the vice president of Payne and Dolan, and Michael Wickler, the chief financial officer of Payne and Dolan, the only two people authorized to sign checks on behalf of the joint venture were Bowles and Wickler. The signature cards that Bowles had filed with the bank, however, listed Bowles's wife as an additional authorized signatory of the joint-venture checks.

¶5 At trial, Bowles admitted that he transferred the money to Lakeside by using late-sequence and temporary checks because he did not want Payne and Dolan to know that he was transferring the money. He admitted that Payne and Dolan did not consent to the transfers, but he asserted that Lakeside was entitled to the money for work Lakeside had done on the projects, and as a share of the profits of the joint venture. Contrary to Bowles's testimony, however, Wickler testified that the checks that Bowles and his wife issued to Lakeside were not related to work that Lakeside had done on the road construction projects, and

Schmidt testified that the checks were not issued “for any legitimate business of the joint venture.” Wickler and Schmidt further testified that the checks issued to Lakeside exceeded by nearly \$400,000 the amount to which Lakeside was entitled for the work it had done on the five projects.

¶6 Additionally, Wickler testified that when he confronted Bowles about the money he had transferred to Lakeside, Bowles said that he had made the transfers because Lakeside was undercapitalized and needed the money. Bowles told Wickler that he did not know where else to get the money, and that he did not know how he was going to repay the money. Similarly, Kurt Bechthold, the son of Payne and Dolan’s owner, Ned Bechthold, testified that when his father confronted Bowles about the checks and told him that he was going to have to tell the authorities, Bowles responded that he understood.

¶7 The jury convicted Bowles of five counts of theft based on the checks he and his wife had issued from the five joint-venture accounts. The trial court entered judgment accordingly.

DISCUSSION

¶8 Bowles argues that the trial court erroneously exercised its discretion in excluding evidence that he and Ned Bechtold, the owner of Payne and Dolan, had agreed on an interpretation of the joint-venture contracts that would have given Lakeside a greater share of the profits of the five joint ventures than it had received for past projects. He asserts that this evidence would have supported his contention that Lakeside was entitled to the money that he transferred to it, and would have shown that he was authorized to transfer the money. We conclude, however, that the alleged error was harmless. *See State v. Dyess*, 124 Wis. 2d 525, 543–545, 370 N.W.2d 222, 231–232 (1985) (a conviction will be upheld

despite trial court error if the State can demonstrate beyond a reasonable doubt that there is no reasonable possibility, i.e., no possibility sufficient to undermine confidence in the outcome of the proceeding, that the error contributed to the conviction).

¶9 There is no evidence in the record that any particular amount of the money that Bowles transferred from the joint ventures to Lakeside represented joint-venture profits to which Bowles was asserting a claim. Indeed, after Bowles asserted that Lakeside was entitled to the money from the joint ventures, the prosecutor asked Bowles if he was claiming that some of the money represented profits, and Bowles responded, “There were probably profits, sure.” Absent a clear indication that a specific amount of the money that Bowles transferred to Lakeside represented Lakeside’s share of the profits under the agreement, and there is none in the record, the alleged agreement as to how to determine the respective shares of the profits is of no consequence. Therefore, there is no reasonable possibility that evidence of an agreement that Lakeside was to receive a larger share of the profits would have changed the outcome of the trial.

¶10 Moreover, the evidence established that Bowles transferred to Lakeside money that was needed to pay subcontractors and other expenses of the joint ventures, and that he shuffled money between the joint-venture accounts to attempt to cover those expenses when they came due. The money needed to pay joint-venture expenses clearly did not constitute profits of the joint venture. Additionally, insofar as the evidence of the alleged agreement might have been relevant to Bowles’s intent to steal, he admitted that he covered his tracks to prevent Payne and Dolan from discovering what he and his wife were doing—steps that would not have been necessary if, in fact, Payne and Dolan had agreed to let him have the money irrespective of the written contracts. *Cf. State v.*

Kennedy, 105 Wis. 2d 625, 637–640, 314 N.W.2d 884, 890–891 (Ct. App. 1981) (claim of entitlement does not justify theft).

¶11 Bowles also asserts that the trial court erroneously exercised its discretion in excluding evidence that, after Bowles issued temporary checks to Lakeside, Payne and Dolan continued to use temporary checks throughout the course of another road-construction project. Bowles sought to present this evidence to impeach testimony that he had no legitimate reason to use the temporary checks after he had received preprinted checks for the five joint-venture accounts. Again, we conclude that the alleged error is harmless.

¶12 As noted, Bowles admitted that he did not have consent to transfer the money from the joint venture to Lakeside, and he admitted that he used the temporary checks to prevent Payne and Dolan from discovering that he wrote the checks. There is no reasonable possibility that the excluded evidence would have changed the outcome of the trial.

By the Court.—Judgment affirmed.

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

