COURT OF APPEALS
DECISION
DATED AND FILED

December 17, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1603 **Cir. Ct. No. 2012FO80**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WAYNE M. LAUTENBACH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Door County: D. T. EHLERS, Judge. *Affirmed*.

¶1 STARK, J.[1] Wayne Lautenbach appeals a forfeiture judgment for unlawfully leasing property enrolled in the managed forest land (MFL) program

[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.

for recreational purposes, contrary to WIS. STAT. § 77.83(2)(am). Lautenbach argues that statute's prohibition against leasing MFL property applies only to "open" MFL property and does not apply to his "closed" MFL property; therefore, he cannot be guilty of violating § 77.83(2)(am). Alternatively, Lautenbach contends the statutory prohibition against leasing MFL property is unconstitutionally vague, the State cited the wrong person, and his right to due process was violated when the terms of his contract with the DNR were unilaterally changed without notice. Finally, he objects to the circuit court's factual determination that he leased MFL property to another. We reject Lautenbach's arguments and affirm.

BACKGROUND

¶2 The MFL program was established in 1985 to "encourage the management of private forest lands for the production of future forest crops for commercial use through sound forestry practices." WIS. STAT. § 77.80. A landowner who enrolls his or her land in the program pays reduced property taxes as an incentive to manage the land in a sustainable fashion.[2] *See* WIS. STAT. § 77.84. At the time of enrollment, the owner must designate his or her land as open or closed to the public for recreational purposes. WIS. STAT. § 77.83(1)-(2). A landowner may designate up to a maximum of 160 acres as closed to the public.

[2] WISCONSIN STAT. § 77.84(1) provides that "except as provided in this subchapter, no tax may be levied on managed forest land …." WISCONSIN STAT. § 77.84(2) establishes the tax rate per acre for property in the MFL program. The tax rate per acre is calculated based on the date the property was entered into the program and whether the land has been designated closed or open to public recreation. According to the DNR, the current tax rate ranges from $0.79 to $2.14 per acre for open MFL property and $1.87 to $10.68 per acre for closed MFL property. *See* Wisconsin Department of Natural Resources, Division of Forestry, *Wisconsin's Managed Forest Law: A Program Summary*, Jan. 2013, at 5, *available at* http://dnr.wi.gov/files/pdf/pubs/fr/fr0295.pdf (last visited Dec. 11, 2013).

Id. The landowner must also commit to keeping the property in the MFL program for either twenty-five or fifty years. *See* WIS. STAT. § 77.82(2)(h). If the landowner withdraws his or her property from the program early, the landowner must pay a withdrawal tax and fee. *See* WIS. STAT. § 77.88(5).

¶3 In this case, the property at issue is enrolled in the MFL program and designated closed to the public. The property is owned by Wayne Logcrafters, LLP, and is managed by Lautenbach. In 2012, the State cited Lautenbach for leasing land enrolled in the MFL program for recreational purposes, contrary to WIS. STAT. § 77.83(2)(am).[3] Lautenbach moved to dismiss, arguing § 77.83(2)(am)'s prohibition against leasing MFL property applied only to open MFL property and, accordingly, he did not run afoul of § 77.83(2)(am) by allegedly leasing closed MFL property. The circuit court denied Lautenbach's motion, reasoning § 77.83(2)(am) applied to all MFL property, regardless of its open or closed designation.

¶4 Lautenbach also moved to dismiss the citation on the ground that he was not the owner of the land at issue and therefore could not be prosecuted for violating WIS. STAT. § 77.83(2)(am). The circuit court disagreed, reasoning § 77.83(2)(am)(1) did not refer to a "property owner" but instead provided "no person" may enter into a lease for MFL property for recreational purposes.

[3] WISCONSIN STAT. § 77.83(2)(am) provides:

> 1. For land designated as managed forest land under an order that takes effect on or after October 27, 2007, no person may enter into a lease or other agreement for consideration if the purpose of the lease or agreement is to permit persons to engage in a recreational activity.

¶5 Finally, Lautenbach moved to dismiss on the ground that WIS. STAT. § 77.83(2)(am) did not apply to the MFL property at issue because the property was enrolled in the MFL program before § 77.83(2)(am) was enacted. The circuit court concluded § 77.83(2)(am) applied to the MFL property at issue because § 77.83(2)(am) was enacted in 2007 and the most recent MFL order regarding the property was dated February 25, 2008.

¶6 At a court trial, Michael Lueck testified that, in 2011, he placed an advertisement in the Peninsula Pulse newspaper, stating, "Responsible party is looking to lease hunting land for this season, and possibly long term. Call …." Lueck testified Lautenbach called him in response to the advertisement, and Lueck met Lautenbach at Lautenbach's property to view the land. Lueck explained that, after they walked the property, he told Lautenbach, "I had leased property the prior year. I had lost a long-term lease here due to a sale and that I had $750 cash in my pocket that if he was – and was just basically a handshake." Lueck testified Lautenbach accepted the $750 and, based on the handshake, Lueck believed he had exclusive hunting rights to the property.

¶7 To access the property, Lueck needed to use an easement that was restricted to foot traffic. Lueck wrote a letter to the Town of Liberty Grove, explaining he had leased Lautenbach's property for the hunting season and seeking permission to use an all-terrain vehicle to access the property.

¶8 The local forester for the Town of Liberty Grove contacted DNR conservation warden Michael Neal and advised Neal that Lautenbach had leased MFL property to Lueck. Neal testified he contacted Lueck, who confirmed Lautenbach leased him the property for $750. Neal also testified he then contacted Lautenbach, who told Neal he did not lease the property and there was no

exchange of money. Rather, Lautenbach told Neal he granted Lueck permission to use his land but did not receive any compensation for doing so and the $750 was a gift.

¶9 The circuit court found Lautenbach leased MFL property for recreational purposes, contrary to WIS. STAT. § 77.83(2)(am)(1). It entered judgment against Lautenbach. Lautenbach appeals.

DISCUSSION

I. Application of WIS. STAT. § 77.83(2)(am)

¶10 Lautenbach first renews his argument that WIS. STAT. § 77.83(2)(am) only prohibits leasing for recreational purposes MFL property that is open to the public. As a result, Lautenbach asserts he cannot be guilty of entering into any alleged agreement to lease *closed* MFL property for recreational purposes.

¶11 Statutory interpretation is a question of law, which we review de novo. ***Zwiefelhofer v. Town of Cooks Valley***, 2012 WI 7, ¶20, 338 Wis. 2d 488, 809 N.W.2d 362. Statutory interpretation begins with examining the statute's language. ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. If the meaning of the statute is plain, we ordinarily stop the inquiry. ***Id.*** When interpreting a statute, "[s]tatutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." ***Id.*** We also interpret statutory language "in the context in which it is used; not in isolation but as part of a whole; in relation to the language of

surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Id.***, ¶46.

¶12 Lautenbach does not advance any argument that the plain language of WIS. STAT. § 77.83(2)(am), by itself, indicates the prohibition against leasing MFL property for recreational purposes applies only to open MFL property. Indeed, the plain language of § 77.83(2)(am) prohibits leasing MFL property without distinction as to the property's open or closed designation. Instead, Lautenbach argues § 77.83(2)(am)'s location in the statutory scheme indicates it applies only to open MFL property.

¶13 WISCONSIN STAT. § 77.83 is entitled, "Closed, open and restricted areas," and provides, in relevant part:

> (1) CLOSED AREAS. (a) An owner may designate land subject to a managed forest land order as closed to public access. The closed area may consist of either: [describing areas that may be closed] ….
>
> (1m) MODIFICATION OF DESIGNATION ….
>
> (2) OPEN AREAS; RESTRICTIONS. (a) Except as provided in sub. (1) and pars. (b) and (c), each owner of managed forest land shall permit public access to the land for hunting, fishing, hiking, sight-seeing and cross-country skiing.
>
> (am) 1. For land designated as managed forest land under an order that takes effect on or after October 27, 2007, no person may enter into a lease or other agreement for consideration if the purpose of the lease or agreement is to permit persons to engage in a recreational activity.
>
> 2. For land designated as managed forest land under an order that took effect before October 27, 2007, all of the following apply:
>
> a. An owner of managed forest land may enter into a lease or other agreement for consideration that permits persons to engage in a recreational activity if the lease or agreement terminates before the January 1 immediately following October 27, 2007.

> b. A lease or other agreement for consideration that permits persons to engage in a recreational activity and that is in effect on October 27, 2007 shall be void beginning on the January 1 immediately following October 27, 2007.

¶14 Specifically, Lautenbach relies on the titles of WIS. STAT. § 77.83(1) and (2), which are entitled "Closed areas" and "Open areas; restrictions," respectively. He argues § 77.83(2)(am)'s prohibition against leasing MFL property for recreational purposes applies only to open MFL property because the prohibition falls under the title in subsection (2) "Open areas; restrictions." Lautenbach argues the use of the semi-colon between "Open areas" and "restrictions" in the title of subsection (2) means "restrictions" modifies "Open areas," such that the prohibition against leasing MFL property applies only to open areas.

¶15 We reject Lautenbach's interpretation of WIS. STAT. § 77.83(2)(am). First, as previously stated, the plain language of § 77.83(2)(am) provides that the prohibition against leasing MFL property for recreational purposes applies to "managed forest land" without further distinction. Because the legislature did not make a distinction between open and closed MFL property in § 77.83(2)(am), the plain language indicates the prohibition against leasing MFL property for recreational purposes applies to all MFL property. Moreover, we observe that elsewhere in WIS. STAT. § 77.83, the legislature expressly differentiates between open and closed MFL property. *See, e.g.*, WIS. STAT. § 77.83(1)(c) ("If all or any part of an owner's closed managed forest land …."); § 77.83(2)(b) ("An owner may restrict public access to any area of open managed forest land …."); § 77.83(2)(c) ("An owner may prohibit the use of motor vehicles … on any open managed forest land ….").

¶16 Second, Lautenbach's reliance on the subsection titles for his WIS. STAT. § 77.83(2)(am) interpretation is problematic. "[T]itles to subchapters, sections, subsections, paragraphs and subdivisions of the statutes and history notes are not part of the statutes." WIS. STAT. § 990.001(6). "A title may not be used to alter the meaning of a statute or create an ambiguity where no ambiguity existed." ***Noffke ex rel. Swenson v. Bakke***, 2009 WI 10, ¶25, 315 Wis. 2d 350, 760 N.W.2d 156.

¶17 Lautenbach's reliance on the subsection titles to argue the prohibition against leasing MFL property applies only to open property is an attempt to alter the plain language of the statute and create an ambiguity where no ambiguity exists. *See* ***id.*** After examining the plain language of WIS. STAT. § 77.83 without the subsection titles, it is clear that: subsection (1) describes which MFL property may be designated closed; paragraph (2)(a) states that all MFL property must be designated open to public access, except as provided in subsection (1) and two other paragraphs; and paragraph (2)(am) prohibits individuals from leasing MFL property, without distinction, to others for recreational purposes. We reject Lautenbach's argument that one can only determine whether the MFL property is open or closed by virtue of the subsection titles. We also decline to rely on the subsection titles to limit paragraph (2)(am)'s otherwise clear directive that MFL property cannot be leased for recreational purposes.

¶18 Further, because the subsection titles are not part of the statutes, *see* WIS. STAT. § 990.001(6), we need not determine whether the use of a semi-colon between "Open areas" and "restrictions" in the title of subsection (2) means that "restrictions" modifies "Open areas," such that the prohibition against leasing

MFL property applies only to open areas. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

¶19 Finally, we observe that logic dictates the legislature's prohibition against leasing MFL property applies to closed property. The statutory prohibition against leasing MFL property under WIS. STAT. § 77.83(2)(am) contemplates that, at the time the statute became effective, MFL property leases were in existence and would be phased out.[4] WISCONSIN STAT. § 77.83(2)(a) plainly states that open MFL property is freely available to the public for recreational purposes. It would be absurd to conclude that the legislature, through its enactment of § 77.83(2)(am), intended to phase out leases that required individuals to pay consideration for the use of property that was already open to them. Rather, it is more likely that the purpose of the phase out period was to phase out leases on closed MFL property.

¶20 In short, we conclude WIS. STAT. § 77.83(2)(am) plainly and unambiguously prohibits individuals from entering into leases for all MFL property. The property's open or closed designation is irrelevant.

[4] WISCONSIN STAT. § 77.83(2)(am) became effective October 27, 2007. *See* 2007 Wis. Act 20; *see also* WIS. STAT. § 991.11. WISCONSIN STAT. § 77.83(2)(am)2.a. expressly provides that individuals may continue to lease MFL property after October 27, 2007 for recreational purposes provided that any lease or agreement terminated before January 1, 2008. Then, after January 1, 2008, no person, except nonprofit organizations approved by the DNR, was permitted to enter into a recreational lease or agreement for consideration for MFL property. *See* WIS. STAT. § 77.83(2)(am)1.-3.

II. Unconstitutionally vague

¶21 Lautenbach next argues WIS. STAT. § 77.83(2)(am) is unconstitutionally vague. A statute is unconstitutionally vague "if it does not provide 'fair notice' of the prohibited conduct and also provide an objective standard for enforcement of violations." ***State v. Smith***, 215 Wis. 2d 84, 91, 572 N.W.2d 496 (Ct. App. 1997) (citation omitted). Statutes are presumed constitutional, and Lautenbach bears the burden of proving beyond a reasonable doubt that the statute is unconstitutional. *See* ***id.*** at 90.

¶22 Lautenbach argues WIS. STAT. § 77.83(2)(am) is unconstitutionally vague because it does not provide fair notice that individuals are prohibited from leasing closed MFL property for recreational purposes. In support, Lautenbach also cites 2011 S.B. 161, which never became law, and argues 2011 S.B. 161's proposed modification to § 77.83(2)(am) indicates the legislature knew the statute was ambiguous.

¶23 At the outset, we observe that when a party challenges the constitutionality of a state statute, that party must notify the Attorney General pursuant to WIS. STAT. § 806.04(11). *See* ***Kurtz v. City of Waukesha***, 91 Wis. 2d 103, 116-17, 280 N.W.2d 757 (1979). Although the State is a party, we find no indication in the record that Lautenbach has provided the statutorily required notice to the Attorney General. Accordingly, we reject Lautenbach's constitutional challenge to WIS. STAT. § 77.83(2)(am).

¶24 Regardless, even if we were to address Lautenbach's argument on the merits, we would reject it. As previously stated, WIS. STAT. § 77.83(2)(am) plainly and unambiguously prohibits leasing MFL property, without distinction, for recreational purposes. *See supra*, ¶20. Closed MFL property is MFL property.

Accordingly, § 77.83(2)(am) provides fair notice that individuals, such as Lautenbach, are prohibited from leasing closed MFL property for recreational purposes.

¶25 Further, ignoring the fact that 2011 S.B. 161 never became law, the proposed amendment to WIS. STAT. § 77.83(2)(am) contained in 2011 S.B. 161 was not a proposal to clarify an ambiguous statute. Rather, the proposed legislation completely changed the prohibition against leasing MFL property and permitted individuals to lease MFL property provided it did not interfere with sound forestry practices. *See* 2011 S.B. 161, at 4, 11. We conclude Lautenbach has not proven beyond a reasonable doubt that the statute is unconstitutionally vague.

III. Wrong person cited

¶26 Lautenbach next argues he cannot be guilty of leasing MFL property for recreational purposes because he is not the owner of the property. He contends the State should have issued the citation to Wayne Logcrafters because, as owner, Wayne Logcrafters is the only entity that had legal authority to enter into any alleged lease. He argues he should not have been cited because "person," as used in WIS. STAT. § 77.83(2)(am) includes limited liability partnerships, such as Wayne Logcrafters. *See* WIS. STAT. § 990.01(26) ("'Person' includes all partnerships, associations and bodies politic or corporate.").

¶27 Lautenbach's argument fails by the plain words of WIS. STAT. § 77.83(2)(am). The statute does not limit the prohibition against leases to property owners. Rather, § 77.83(2)(am)(1) simply provides that, in regard to MFL property, "no person may enter into a lease or other agreement for consideration if the purpose of the lease or agreement is to permit persons to

engage in a recreational activity." The State alleged Lautenbach was the "person" who entered into the illicit lease; the court found Lautenbach received the compensation for the lease; therefore, Lautenbach was properly cited.

IV. Due process and contractual violations

¶28 Lautenbach next argues the State failed to prove at trial the DNR notified him, or Wayne Logcrafters, of the 2007 enactment of WIS. STAT. § 77.83(2)(am). He contends the lack of notice about the change in the managed forest law violated his right to due process. Citing WIS. STAT. § 77.82(11), Lautenbach also asserts the enactment of § 77.83(2)(am) violates the contract he, or Wayne Logcrafters, has with the DNR regarding the MFL program. Finally, Lautenbach renews his argument that § 77.83(2)(am) does not apply to the MFL property at issue because § 77.83(2)(am) was enacted after the property was enrolled in the MFL program.

¶29 We reject Lautenbach's arguments.[5] First, it is unclear what "contract" Lautenbach believes he or Wayne Logcrafters has with the DNR. We observe that, pursuant to the managed forest law subchapter, the DNR issues an order designating the land as MFL and approves a management plan for the land. *See* WIS. STAT. § 77.82(3), (8). Based on Lautenbach's reliance on § 77.82(11), it appears that by "contract" Lautenbach is referring to the MFL order.

¶30 WISCONSIN STAT. § 77.82(11) provides that the terms of an MFL order may not be modified by an amendment to or a repeal of the managed forest

[5] The property owner, Wayne Logcrafters, is not a party to this case. We therefore question Lautenbach's ability to make arguments regarding Wayne Logcrafters' agreement with the DNR. However, because the State does not object to Lautenbach's arguments on that basis, we have decided to address Lautenbach's arguments on the merits.

law subchapter. Lautenbach, however, cites no terms in Wayne Logcrafters' MFL order that provide Wayne Logcrafters is permitted to lease closed MFL property for recreational purposes. Because there is no modification to Wayne Logcrafters' MFL order, § 77.82(11) does not prevent § 77.83(2)(am) from applying in this case.

¶31 Further, as the State points out, WIS. STAT. § 77.82(3)(e) provides that a management plan "shall contain a statement that the owner agrees to comply with all of its terms and *with the conditions of this subchapter* and shall be signed by the owner and a representative of the department." (Emphasis added.) Lautenbach does not dispute the State's argument that he or Wayne Logcrafters agreed, by virtue of the management plan and § 77.82(3)(e), to comply with all of the conditions of the managed forest law subchapter, which includes WIS. STAT. § 77.83(2)(am)'s prohibition on leasing MFL property for recreational purposes. *See* ***Charolais Breeding Ranches v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed conceded).

¶32 As to Lautenbach's argument that WIS. STAT. § 77.83(2)(am) cannot apply to the MFL property at issue because it was enrolled in the program before § 77.83(2)(am) was enacted, we again conclude Lautenbach, or Wayne Logcrafters, has agreed, by virtue of § 77.82(3)(e), to comply with the conditions of the managed forest law, not just the conditions that were in effect when the property was enrolled. Moreover, the circuit court found § 77.83(2)(am) applied to the property at issue because the most recent MFL order regarding the property was entered February 25, 2008, which was after § 77.83(2)(am) came into effect. As part of the 2008 order, Wayne Logcrafters, LLP c/o Wayne M. Lautenbach "agreed to comply with the terms of the Managed Forest Law." Lautenbach does not address the circuit court's reasoning on appeal, and therefore he has conceded

the issue. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (ignoring grounds upon which circuit court ruled constitutes a concession of the validity of the court's ruling).

¶33 Finally, in regard to Lautenbach's argument that his due process right was violated because the State never proved the DNR notified him of WIS. STAT. § 77.83(2)(am)'s enactment, Lautenbach cites no legal authority for the proposition that the DNR is required to notify individuals of any change in the managed forest law. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (arguments unsupported by legal authority need not be considered). "As a general proposition, every person, sophisticated or otherwise, is presumed to know the law." ***Tri-State Mech., Inc. v. Northland College***, 2004 WI App 100, ¶10, 273 Wis. 2d 471, 681 N.W.2d 302. Accordingly, we presume Lautenbach was aware he was not permitted to lease MFL property and his right to due process was not violated for lack of notice.

IV. Agreement with Lueck

¶34 Lautenbach argues the evidence fails to support the circuit court's determination that he entered into a lease with Lueck. Specifically, Lautenbach contends that he never "specifically state[d] he had land available to lease," that he never told Lueck how much it would cost to lease the property, and that he never received or asked for consideration for any alleged lease. Lautenbach renews his argument that the $750 was a gift. He also argues the terms of any agreement were too indefinite and he points out Lueck never actually hunted the property because of access issues.

¶35 To have an enforceable contract, there must be a meeting of the minds upon all essential elements. ***Laney v. Ricardo***, 169 Wis. 267, 271, 172

N.W. 141 (1919). Whether there has been a meeting of the minds is a question of fact, which will not be overturned unless the finding was clearly erroneous. *See* ***Estate of Kobylski v. Hellstern***, 178 Wis. 2d 158, 189, 503 N.W.2d 369 (Ct. App. 1993); *see also* WIS. STAT. § 805.17(2). "[A] finding of fact is clearly erroneous when 'it is against the great weight and clear preponderance of the evidence.'" ***Phelps v. Physicians Ins. Co. of Wis.***, 2009 WI 74, ¶39, 319 Wis. 2d 1, 768 N.W.2d 615 (quoted source omitted).

¶36 We conclude the evidence sufficiently supports the circuit court's determination that Lautenbach leased MFL property to Lueck for hunting purposes. *See* WIS. STAT. § 77.83(2)(am)(1). Significantly, Lueck testified he placed an advertisement, indicating he wanted to lease hunting land for the upcoming season and possibly long term and Lautenbach contacted him in response to the advertisement. Lueck walked the property with Lautenbach. Lueck testified he told Lautenbach he paid $750 to lease hunting land for the previous season and was willing to pay that much for this season. Lautenbach then accepted the $750. Although Lautenbach highlights certain evidence from trial and essentially asks us to reweigh the evidence, it is the "trier of fact's function to decide issues of credibility, weigh the evidence and resolve conflicts in testimony." *See* ***State v. Owen***, 202 Wis. 2d 620, 630, 551 N.W.2d 50 (Ct. App. 1996). Because this evidence sufficiently supports the circuit court's determination, we affirm the circuit court's forfeiture judgment.

By the Court.—Judgment affirmed.

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