COURT OF APPEALS
DECISION
DATED AND FILED

June 16, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2953-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DEBORAH A. NEAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Deborah A. Neas appeals a judgment entered after a jury found her guilty of theft by employee, as a party to a crime. *See* §§ 943.20(1)(b) and 939.05, STATS. Neas claims: (1) the complaint filed against her failed to allege facts sufficient to establish probable cause; and (2) the trial court erred in admitting financial records of her employer. We affirm.

I. BACKGROUND

Neas was the executive director of the Task Force on Battered Women from 1979 to 1992. As the executive director, Neas was responsible for the daily operations of the Task Force, and she was a signatory of the Task Force checking account. While working for the Task Force, Neas obtained a corporate American Express card for the Task Force, which was issued in Neas's name. During 1990 and 1991, Neas frequently used the card to pay for personal expenses that were not related to legitimate business purposes. Neas did not have authority to charge her personal expenses to the Task Force. The American Express bills were paid from the Task Force checking account. Based upon this evidence, a jury found Neas guilty of theft by employee, and the trial court entered judgment accordingly.

II. DISCUSSION

Neas argues that the complaint filed against her failed to allege facts sufficient to establish probable cause. In Wisconsin, a criminal complaint must set forth grounds to establish probable cause. *See* ***Evanow v. Seraphim***, 40 Wis.2d 223, 226, 161 N.W.2d 369, 370 (1968); § 968.01, STATS. The complaint must allege facts sufficient to lead a reasonable person to believe that a crime has probably been committed and that the defendant is probably the culpable party. *See* ***State v. Haugen***, 52 Wis.2d 791, 793, 191 N.W.2d 12, 13 (1971). A complaint is sufficient if the alleged facts and reasonable inferences from those facts allow a fair-minded magistrate to conclude that the charges are not simply capricious and that further proceedings against the defendant are justified. *See* ***Cornellier v. Black***, 144 Wis.2d 745, 761, 425 N.W.2d 21, 27 (Ct. App. 1988). The complaint need only be minimally adequate, *see* ***id.***, and is to be evaluated in

a common-sense, rather than a hypertechnical, manner, *see* ***Evanow***, 40 Wis.2d at 226, 161 N.W.2d at 370. The sufficiency of a complaint is a matter of law, which we review *de novo*. *See* ***State v. Adams***, 152 Wis.2d 68, 74, 447 N.W.2d 90, 92 (Ct. App. 1989).

Neas argues that the complaint failed to allege facts sufficient to establish probable cause that a crime had been committed. She argues that the complaint lacks an allegation that she did not have authority to make charges on the American Express card, and that such an allegation is a necessary element to establish probable cause for the crime of theft by employee.

Section 943.20, STATS., provides:

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

The complaint alleges that Neas, by virtue of her employment with the Task Force, had possession of an American Express card issued to the Task Force in her name, and that Neas intentionally used the card contrary to her authority and without the consent of the Task Force, and with the intent to convert Task Force money to her own use. In support of this charge, the complaint alleges the following facts relating to Neas's lack of authority to use the card: the treasurer of the Task Force said that he was unaware that the Task Force had an American Express card that Neas was using; a member of the Task Force Board of Directors

said that she did not recall the board authorizing Neas to obtain the card, that Neas was not authorized to make specific personal purchases that she had made with the card, and that the specific purchases did not relate to any legitimate business of the Task Force.

Taken together, these alleged facts, along with the reasonable inferences drawn therefrom, are sufficient to lead a reasonable person to believe that Neas probably used the American Express card contrary to her authority. The board member is quoted in the complaint as saying that Neas had used the card to make purchases that Neas was not authorized to make because the purchases were not related to legitimate Task Force business. Further, the allegations that the treasurer was not aware of the fact that Neas had obtained the card and that the board member did not recall the board authorizing Neas to obtain the card support the inference that Neas had acted beyond her authority in obtaining and using the card, and that Neas was therefore concealing her use of the card. We therefore reject Neas's contention that the complaint failed to allege facts sufficient to establish probable cause.

Neas next argues that the trial court erred in admitting financial records of the Task Force. She argues that the records are hearsay and do not meet the exception for records of regularly conducted activity under § 908.03(6), STATS.[1] Neas fails, however, to explain how she was prejudiced by the admission

[1] Section 908.03(6) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> ….
>
> **(6)** RECORDS OF REGULARLY CONDUCTED ACTIVITY. A memorandum, report, record, or data compilation, in any form,

(continued)

of the financial records. The State contends on appeal that the admission of these challenged documents was harmless. Neas does not refute this argument, thus we accept the State's contention. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (arguments that are not refuted are deemed admitted). Further, after reviewing the record, we conclude that Neas was not prejudiced by the admission of the financial records, and that she is not entitled to relief on this ground. *See* § 805.18, STATS. (no judgment shall be reversed based on the improper admission of evidence unless, after an examination of the entire action or proceeding, it appears that the alleged error has affected the substantial rights of the complaining party); § 901.03(1), STATS. (error may not be predicated upon a ruling that admits evidence unless a substantial right of the party is affected).

Specifically, Neas challenges the admission of Exhibit 1, a document showing account numbers that the Task Force assigned to its different categories of expenses and revenues; the admission of Exhibit 2, Task Force records of some American Express charges and a carbon of a Task Force check issued to pay those charges; and the admission of Exhibit 4, documents reflecting the amounts of the checks that the Task Force had issued to Neas in 1991. The State used Exhibit 1 to show that some of the charges on the American Express bills had numbers written next to them to designate a specific expense account to which those charges would be attributed, whereas other charges were not attributed to any expense account but had Neas's initials written next to them.

> of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances indicate lack of trustworthiness.

Neas admitted at trial that she had charged personal expenses on the American Express card and that the Task Force had paid the bills for those charges; her defense was that she believed that she had the authority to charge personal expenses on the card as long as she reimbursed the Task Force, and that she had intended to reimburse the Task Force for all of the personal charges that she made. Therefore, the only facts in issue were whether or not Neas had authority and consent to make personal purchases with the card, and the admission of the challenged financial records was thus harmless.[2] The financial records, which established that Neas had charged personal expenses on the card and that the Task Force had paid for those charges, were merely cumulative of Neas's own testimony, and the allegedly erroneous admission of those documents does not undermine our confidence in Neas's conviction. *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 that the error contributed to the conviction).

Further, with respect to Exhibit 2, Neas stipulated to the admission of Exhibits 47 and 48, which contained all of the records of her 1991 and 1992 American Express charges; thus the records of the charges in Exhibit 2 were

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[2] The trial court instructed the jury as follows:

> The second element requires the defendant intentionally used such money without the owner's consent and contrary to the defendant's authority. Intentionally means the defendant must have had a purpose to use such money without the owner's consent. The phrase, quote, without the owner's consent, end of quote, means that there was no consent, in fact, by the owner of such property or by his authorized agent to its use.
>
> An intent to pay back money or restore the property at a later time is not a defense even though such intent may have existed contemporaneously with the act of conversion.

cumulative of other unchallenged evidence. Neas is not entitled to relief based on the admission of the challenged financial records.

By the Court.—Judgment affirmed.

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