COURT OF APPEALS
DECISION
DATED AND FILED

July 13, 2000

Cornelia G. Clark
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.

Nos. 99-1364-CR
99-2034-CR
99-2059-CR

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

99-1364-CR
STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAURIE A. KOCH,

DEFENDANT-APPELLANT.

99-2034-CR
STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT KOCH,

DEFENDANT-APPELLANT.

99-2059-CR
STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH KOCH,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Richland County: WILLIAM D. DYKE, Judge. *Reversed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

¶1 VERGERONT, J. After a preliminary hearing the trial court ordered that Joseph Koch, Laurie Koch and Robert Koch each be bound over for trial on the charge of theft by fraud, as party to the crime, in violation of WIS. STAT. §§ 943.20(1)(d), (3)(c) and 939.05(2) (1997-98).[1] The charges arose out of

[1] WISCONSIN STAT. § 943.20 provides in part:

> (1) ACTS. Whoever does any of the following may be penalized as provided in sub. (3):
>
> ….
>
> (d) Obtains title to property of another person by intentionally deceiving the person with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made. "False representation" includes a promise made with intent not to perform it if it is a part of a false and fraudulent scheme.
>
> ….
>
> (3) PENALTIES. Whoever violates sub. (1):

(continued)

a transaction in which Joseph and Laurie, his wife, purchased real estate from the Unites States Department of Agriculture—Farm Service Agency (FSA)[2] with a loan they obtained from that agency. On appeal the three each contend that the trial court erred in determining the evidence was sufficient to establish probable cause to believe that each committed theft by fraud as party to the crime.[3] We

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> ….
>
> (c) If the value of the property exceeds $2,500, is guilty of a Class C felony.

WIS. STAT. § 939.05(2) provides:

> (2) A person is concerned in the commission of the crime if the person:
>
> (a) Directly commits the crime; or
>
> (b) Intentionally aids and abets the commission of it; or
>
> (c) Is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it. Such a party is also concerned in the commission of any other crime which is committed in pursuance of the intended crime and which under the circumstances is a natural and probable consequence of the intended crime. This paragraph does not apply to a person who voluntarily changes his or her mind and no longer desires that the crime be committed and notifies the other parties concerned of his or her withdrawal within a reasonable time before the commission of the crime so as to allow the others also to withdraw.

All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] The United States Department of Agriculture—Farm Service Agency was known as Farmers Home Administration (FmHA) at the time the events giving rise to the charges occurred. We will use the current name in this opinion, even though the testimony and the documents refer to FmHA.

[3] We granted the petitions of Laurie, Robert and Joseph for leave to appeal the trial court's non-final orders denying their motions for reconsideration of its orders binding them over for trial after a joint preliminary hearing. *See* WIS. STAT. § 808.03. We then ordered the appeals consolidated.

conclude the evidence presented at the preliminary hearing was not sufficient to establish that the crime of theft by fraud had probably been committed, and we therefore reverse each bindover order.

BACKGROUND

¶2 The complaints filed against each of the defendants charge that Joseph and Laurie obtained title to the Ronald Straight farm by the false representation that they would farm the land, when in fact they had no intention of doing so, but rather acquired it for Robert, Joseph's father, to farm.

¶3 The only witness at the preliminary hearing was Brad Montgomery, special agent with the Wisconsin Department of Justice, Division of Criminal Investigation, who investigated a fire that occurred on August 17, 1997, in the barn on the property, after Joseph and Laurie obtained title. As part of that investigation on September 19, 1997, he interviewed Robert and Joseph under oath, and the transcripts of those interviews were admitted into evidence at the preliminary hearing. The relevant statements of Robert and Joseph from the transcripts are as follows.

¶4 Robert is self-employed as a farmer. Joseph is employed full time in another occupation. Robert saw the property, which was inventory property of FSA, advertised for sale in the *Shopper News* in the spring of 1996. He told Joseph about it,[4] and Joseph bid on the property, purchased it and took possession on February 24, 1997. However, Joseph never moved into the farmhouse because,

[4] Joseph stated that he and his father both saw the advertisement for the property in the *Shopper News* and were both interested, but it is not relevant to this appeal who saw the advertisement first.

after he viewed the property, the water pipes froze and burst and the house needed a lot of work as a result. Robert farms the property and owns the equipment on the property and pays the mortgage; he began farming the property right away. Joseph has mowed the lawn and kept up the buildings. Robert considers himself to have an interest in the property because he signed the note with Joseph. According to Robert, because he pays the mortgage, cosigned the note and farms the property, he exercises more control over the property and operation than does Joseph. Robert and Joseph have a verbal agreement that, from the income the farm generates, Robert gets his expenses and then he and Joseph split evenly what is left.

¶5 Robert wanted to purchase the property but did not, he stated, because "[FSA] had a rule … you couldn't be farming any longer than ten years to bid on the property," and he had been farming since 1965 or 1966. Joseph's explanation of why Robert did not put in a bid was, "That was one of the stipulations … on the thing that you had to be a first time farmer."

¶6 The various statements of Robert and Joseph on their intentions when the property was purchased are internally inconsistent and conflict on some points with statements of the other. Robert stated that Joseph planned on using his (Robert's) equipment to farm the property; but in approximately June of 1997 Joseph decided not to do so because it was going to cost a lot to fix the house. However, Robert also gave the following answers:

> MONTGOMERY: So when you originally put in the for the, the farm did Joe decide that he was just going to live on the land and have you farm it?
>
> R. KOCH: Right.
>
> MONTGOMERY: Ok, and this was decided between the two of you?

R. KOCH: Yes

Robert also described the intent when the farm was purchased as: "Joe was going to farm it, but I would basically do the work … he would help me for me doing different things for him." He then agreed that the intent was that he would do the farming, Joseph would not do any farming, but Joseph would do other work for him, such as "chisel plowing, discing, field finishing, whatever we had to do"

¶7 Robert stated that he decided to purchase the property from Joseph—all but the house and a few acres. Some of his testimony indicates he decided to do this after Joseph decided not to move into the house, but he also said he had the idea of "fund[ing]" the property for Joseph even before Joseph purchased it, because there was animosity on the part of FmHA toward Joseph.

¶8 Joseph answered the question whether he intended to farm at all when he purchased the property in this way: "Yeah, we kind of, me and my wife talked about it." Joseph decided sometime in the middle of the summer that he was not going to farm; nothing had changed he said, but he just decided he did not want to farm. However, Joseph also acknowledged that, from the beginning, his intention was "basically" to buy the land to live in the house and to sell the land to his father. When asked when the idea first came up that he would sell part of the property to his father, he answered: "Basically when I saw that property advertised. He was interested in the land and, and I was interested in the house too…. So it was a good opportunity for both of us." He acknowledged that these discussions took place before he put the applications in. At the time of the interview, he and his wife had not taken the courses that FSA requires for purchasers because, he said, they decided they were not going to farm the property.

¶9 Also admitted into evidence at the preliminary hearing was a copy of an "Application for [FSA] Services" and a copy of a promissory note to FSA in the amount of $156,000. The application, dated June 19, 1996, and apparently signed by Joseph and Laurie, requests a loan in the amount of $156,000 and states that the loan will be used for the purpose of purchasing real estate for that amount. The application contains the following pertinent questions and answers:

> 9. "Are you farming or ranching now?" [ANSWER] "Yes" "part-time hired man;"
>
> 9b "Number of years operating a farm" [ANSWER] "raised on a farm—2 yrs;"
>
> 10 "Do you own or rent the farm you plan to operate" [ANSWER] "own" "Do you live on the farm you plan to operate?" [ANSWER] "No"

¶10 The promissory note, dated February 24, 1997, states that it is a loan pursuant to Consolidated Farm & Rural Development Act, "Type: FO." Although only Joseph's and Laurie's names are listed on the first line of the note, their names and Robert's name are written on the signature lines, each preceded by a /s/ and each described as "Borrower." The note states that "Unless the Government consents otherwise in writing, Borrower will operate such property as a farm if this is a Farm Operation loan."

¶11 The trial court described the evidence as "thin soup" and expressed concern that the FSA appeared to be claiming it was unaware of Robert's involvement when his name was on the note as a borrower. However, the court concluded the evidence was sufficient to support a bindover of all three for a violation of WIS. STAT. § 943.20(1)(d) as party to the crime.

DISCUSSION

¶12 A preliminary examination is a hearing before a court for the purpose of determining if there is probable cause to believe a felony has been committed by the defendant. *See* WIS. STAT. § 970.03(1). "A defendant may be bound over for trial when the evidence at the preliminary hearing is sufficient to establish probable cause that a crime has been committed and that the defendant has probably committed it." ***State v. Berby***, 81 Wis. 2d 677, 683, 260 N.W.2d 798 (1977). "The probable cause that is required for a bindover is greater than that required for arrest, but guilt beyond a reasonable doubt need not be proven." ***State v. Koch***, 175 Wis. 2d 684, 703-04, 499 N.W.2d 152 (1993). "The role of the … [court] at a preliminary examination is to determine whether the facts and reasonable inferences that may be drawn from them support the conclusion that the defendant probably committed a felony." ***Id.*** at 704. "The … [court] is not to choose between conflicting facts or inferences, or weigh the state's evidence against evidence favorable to the defendant." ***Id.*** A preliminary examination is not a trial, but "a summary proceeding in which the State must establish a plausible account on each of the required elements" of the crime. ***State v. Watson***, 227 Wis. 2d 167, 205, 595 N.W.2d 403 (1999).

¶13 Appellate review of a bindover decision is de novo. *See* ***State v. Moats***, 156 Wis. 2d 74, 84, 457 N.W.2d 299 (1990). "On review, this court will search the record for any substantial ground based on competent evidence to support the circuit court's bindover decision." ***Koch***, 175 Wis. 2d at 704.

¶14 The elements of the crime of theft by fraud, as applicable to this case, are:

> (1) a false representation was made to FSA;
>
> (2) the one who made the representation knew such representation was false;
>
> (3) the one who made the representation made it with intent to deceive and to defraud FSA;
>
> (4) the one who made the false representation obtained title to the property of FSA by such false representation;
>
> (5) FSA was deceived by such representation; and
>
> (6) FSA was defrauded by such representation.

See WIS. STAT. § 943.20(1)(d); WIS JI-CRIMINAL 1453 (1991).

¶15 A person is party to a crime and may be convicted of the commission of the crime if the person directly commits the crime; or intentionally aids and abets the commission of it; or is a party to a conspiracy with another to commit the crime. *See* WIS. STAT. § 939.05.

¶16 We consider first whether the evidence presented at the preliminary examination, together with reasonable inferences from that evidence, support the conclusion that the crime of theft by fraud was probably committed. For this purpose we need not find that probable cause is established for each element of that crime as to each of the three defendants, because each was charged as party to the crime. *See* ***Krueger v. State***, 84 Wis. 2d 272, 286, 267 N.W.2d 602 (1978).

¶17 We conclude that the evidence is sufficient to establish the first four elements of the crime. On the first element, there is a reasonable inference from the loan application that Joseph and Laurie are representing that they plan to operate as a farm the property they wish to purchase with the loan. While there is no explicit statement to that effect, it is a reasonable reading of their answer "own" to the question "Do you plan to own or rent the farm you plan to operate." On the second element, Joseph's statement on his intentions when he purchased the

property, while susceptible to different interpretations, does create a reasonable inference that when he applied for the loan, he did not intend to operate the farm but intended to live in the house and have Robert operate the farm, eventually selling all but a few acres to his father. That, coupled with the statements that Robert began farming right away and Joseph never farmed the property, is sufficient evidence that the representation that Joseph and Laurie planned to operate the property as a farm was false.

¶18 On the third element, there is Joseph's statement that he, not Robert, put in the bid because "you had to be a first time farmer" and Robert's statement that he did not purchase the property because FSA "had a rule … you couldn't be farming any longer than ten years to bid on the property." These are sufficient to create a reasonable inference that Joseph intended to deceive and defraud FSA in making the representation that he intended to operate the property as a farm. With respect to the fourth element, Joseph's and Robert's statements concerning Joseph's purchase of the property are sufficient evidence that Joseph obtained title to the property from FSA.

¶19 However, we conclude that the evidence is insufficient on the last two elements. The fifth element requires that FSA must have been misled by the representation that Joseph and Laurie were going to operate the farm, and the sixth element requires that FSA "did in fact part with title to property in reliance (at least in part) on such false representation." WIS JI-CRIMINAL 1453 (1991) (footnote omitted). Ordinarily, these elements would be satisfied by the testimony of the party allegedly defrauded—in this case, FSA personnel—on the reasons it decided to grant the loan to Joseph and Laurie and sell the property to them. No such testimony was presented here. The trial court apparently relied on a report

summarized in the complaint that was prepared by a special agent for the United States Department of Agriculture. According to the complaint, that report described the purpose and characteristics of this loan program and evaluated FSA records concerning this transaction, including the loan application and the promissory note, as well as other records not presented at the preliminary hearing. However, the statements in the complaint are not evidence for purposes of a preliminary examination because the rules of evidence apply. *See* ***Watson***, 227 Wis. 2d at 201-02; WIS. STAT. § 970.03(11), (12) (preliminary examinations are subject to certain statutory exceptions not applicable here).

¶20 We have carefully reviewed the loan application and the promissory note to determine if either gives rise to reasonable inferences that FSA was misled by the implicit representation in the application that Joseph and Laurie planned to operate the farm and that FSA relied on that in granting the loan and selling them the property. We conclude they do not. Considering first the loan application, there are no preprinted statements on the application that indicate what the requirements are in order to receive the loan, from which we might infer what representations FSA relied on in granting the loan. We conclude that the questions "Do you own or rent the farm you plan to operate?" and "Do you live on the farm you plan to operate?" do not give rise to a reasonable inference that if FSA knew that Robert rather than Joseph or Laurie planned to do the farming, FSA would not have given Joseph and Laurie the loan. The question about the number of years farming suggests that the answer is significant, but does not suggest how.

¶21 With respect to the promissory note, the State emphasizes the statement that "Unless the Government consents otherwise in writing, Borrower will operate such property as a farm if this is a Farm Operation loan." We agree

that it is reasonable to infer from this statement that it is significant to FSA both that the property be operated as a farm and that the Borrower operate the property as a farm. However, since Robert is identified as a "Borrower" on the signature line, it is not reasonable to infer that the FSA is relying on a representation that Joseph and Laurie rather than Robert is going to be operating the farm. We see nothing else in the promissory note that obligates Joseph or Laurie to have any particular role in the farming of the property, from which it might be reasonable to infer that FSA was relying on their undertaking that obligation.

¶22 On appeal, the State does not refer to the complaint as satisfying the fifth and sixth elements and does not specify the evidence that does satisfy those elements, beyond citing to Robert's statement that "[FSA] had a rule … you couldn't be farming any longer than ten years to bid on the property," Joseph's statements that "you had to be a first time farmer." We do not agree with the State's assumption that Robert's and Joseph's understanding of the FSA rules are evidence of those rules or provide a basis for reasonably inferring what FSA would have done had it known that Robert, rather than Joseph and Laurie, intended to do the farming.

¶23 We do not suggest that the only way for the State to satisfy the fifth and sixth elements for purposes of a bindover in this case is to present testimony from a FSA official. If the FSA requirements for the loan for which Joseph and Laurie applied and for the sale of FSA-owned property are contained in regulations or policy statements, it would be reasonable to infer that FSA followed those in this case. Therefore, if the State had presented citations that set forth regulations, or materials from which the trial court or this court could properly take judicial notice, *see* WIS. STAT. §§ 902.01, 902.03, it might be reasonable to

infer from those that FSA was misled by the representation that Joseph and Laurie planned to operate the farm and relied on that in granting the loan and selling the property. However, the State presented no such citations or materials to either the trial court or this court, and we decline to search for them on our own.

¶24 In summary, we conclude that the evidence presented at the preliminary hearing, considering all reasonable inferences from that evidence, is insufficient to establish probable cause to believe that FSA was deceived and defrauded by the implicit representation on the loan application that Joseph and Laurie planned to operate the farm. We reach this conclusion having searched the record for any evidence to show probable cause on these elements and having carefully considered every inference that might be drawn from the evidence to support a bindover. We are satisfied that the lack of testimony from FSA personnel and the lack of any evidence or legal material relating to the regulations or policies applicable to this loan program and sale is a deficiency that is not cured by the evidence presented. Therefore, the State has not established that there is probable cause to believe that the crime of theft by fraud has been committed. It follows that there is insufficient evidence to conclude that any one of these defendants has probably committed that crime, as party to the crime.

By the Court.—Orders reversed.

Not recommended for publication in the official reports.