

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 27, 2007

A. John Voelker
Acting 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. 2006AP1599-CR

Cir. Ct. No. 2004CF863

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

GARY A. SCHUMACHER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Marathon County:
VINCENT K. HOWARD, Judge. *Reversed and cause remanded for further
proceedings.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The State of Wisconsin appeals an order dismissing its criminal complaint against Gary Schumacher for two felony counts of theft by fraud under WIS. STAT. § 943.20(1)(d).¹ The State contends the court erred in concluding Schumacher had to be charged under a more specific misdemeanor statute rather than the general theft statute. The State also argues there is sufficient probable cause to support a bind over on the felony counts of theft by false representation. We agree with the State and reverse the order.

BACKGROUND

¶2 The State charged Schumacher with two felony counts of theft by false representation as a party to a crime for mixing milk samples in cooperation with David Searer to defraud Mullins Cheese.² At the preliminary hearing, Searer testified he switched samples of Schumacher's milk with milk samples from another dairy in order to achieve a higher quality rating from the State. Milk producers such as Schumacher are paid based on the weight and quality of the milk delivered. Searer further testified that Schumacher knew about the sample mixing and he spoke with Schumacher about the mixing. Don Mullins, an owner of Mullins Cheese, calculated that Schumacher had been overpaid approximately \$158,000 from June 2003 to June 2004. Mullins further testified he was unaware of Schumacher's false representation of the quality of milk being delivered.

¹ All references to the Wisconsin statutes are to the 2003-04 version unless otherwise noted.

² Under WIS. STAT. § 943.20(1)(d), the degree of the charge is based on the amount of the loss; where, as here, the amount exceeds \$10,000, the crime is a Class G felony. *See* WIS. STAT. § 943.20(3)(c).

¶3 On February 13, 2006, the court bound Schumacher over for trial. However, on May 17, 2006, the court dismissed the felony charges stating:

A rule of statutory construction holds that when two statutes that relate to the same subject matter are in conflict, the specific statute controls over the general statute. *State v. Larson*, 2003 WI App 235, ¶6, 268 Wis. 2d 162, 672 N.W.2d 322. Here, the general statute [WIS. STAT. § 943.20(1)(d)] is a felony while the specific statute [WIS. STAT. § 98.26(1)(e)] imposes, at most a misdemeanor.

The State appeals.

DISCUSSION

¶4 The first issue is whether the State could charge Schumacher with felonies under WIS. STAT. § 943.20(1)(d), or only misdemeanors under WIS. STAT. § 98.26(1)(e).³ This involves questions of statutory interpretation. We review such questions de novo. *Hutson v. State of Wis. Personnel Comm’n*, 2003 WI 97, ¶31, 263 Wis. 2d 612, 665 N.W.2d 212.

¶5 The trial court referred to a rule of statutory construction, which states that when two statutes relating to the same subject matter conflict, the specific statute controls over the general statute. *See Larson*, 268 Wis. 2d 162, ¶6. However, *Larson* presents different facts than this case. *Larson* dealt with an

³ WISCONSIN STAT. § 98.26 (1)(e) makes a violation of WIS. STAT. § 98.15(1) a misdemeanor and provides:

(1) A person who does any of the following acts shall forfeit not less than \$100 nor more than \$500 for the first offense and not less than \$200 nor more than \$1,000 for a subsequent offense. A person who intentionally does any of the following acts shall be fined not more than \$10,000 or imprisoned not more than 9 months or both:

....
(e) Violates s. 98.15(1).

ambiguous statute whereas the issue of whether to charge under the general felony fraud statute or the specific misdemeanor milk tampering statute does not present an issue of statutory ambiguity. *State v. Ploeckelman*, 2007 WI App 31, ¶¶10-12, No. 2006AP1180. “[I]f an act forms the basis for a crime punishable under more than one statutory provision, prosecution may proceed under any or all such provisions.” *Id.*, ¶12. Thus, the prosecutor in this case was free to charge Schumacher under either the general fraud statute or the misdemeanor statute.

¶6 The second issue is whether there was sufficient probable cause at the preliminary hearing to support a bind over on theft by fraud under WIS. STAT. § 943.20. Schumacher asserts his awareness that Searer mixed samples of Mullins’ milk “cannot and does not inculcate Schumacher in any criminal activity....” Thus, Schumacher argues the State cannot prove he made false representations as required by § 943.20. Likewise, the defendant in *Ploeckelman*, another milk fraud case involving Mullins Cheese, argued his conduct in permitting the milk hauler to alter the milk samples did not constitute a representation because he made no affirmative statement or act. *Ploeckelman*, 2007 WI App 31, ¶15. In *Ploeckelman*, we noted that the purpose of § 943.20 is to prohibit fraudulent transactions. *Id.*, ¶16. We stated “[i]t is consistent with the purpose of prohibiting fraudulent transactions to hold that a representation could include a farmer passively permitting a milk hauler to misrepresent a transaction to the party purchasing the farmer’s milk.” *Id.*

¶7 Further, the supreme court held that failure to disclose can constitute a representation where:

- (1) the fact is material to the transaction; (2) the party with knowledge of that fact knows that the other party is about to enter into the transaction under a mistake as to the fact;
- (3) the fact is peculiarly and exclusively within the

knowledge of one party, and the mistaken party could not reasonably be expected to discover it; and (4) on account of the objective circumstances, the mistaken party would reasonably expect disclosure of the fact.

Kaloti Enters., Inc. v. Kellogg Sales Co., 2005 WI 111, ¶20, 283 Wis. 2d 555, 699 N.W.2d 205. In this case, Schumacher's conduct constitutes a representation because Searer's actions in tampering with the milk samples was material to the transaction as it affected the price that Mullins Cheese would pay Schumacher for the milk. Additionally, Schumacher knew Mullins Cheese would enter into the transaction under a misconception as to the milk's quality because he knew the state sample, upon which the price of his milk was based, was altered. Further, Searer surreptitiously altered samples given to both the State and Mullins Cheese, so Mullins Cheese could not reasonably have been expected to discover the tampering. Finally, Mullins Cheese would reasonably expect disclosure of the tampering because it affected the price it would pay for Schumacher's milk and the quality of its cheese. Therefore, Schumacher's conduct in permitting Searer to alter the milk samples constituted a representation.

¶8 Finally, we conclude there is sufficient evidence to support the felony charge. Under WIS. STAT. § 943.20(1)(d), the State must show, in this case, that: (1) Mullins Cheese owned property—in this case, money; (2) Schumacher made false representations to Mullins Cheese; (3) Schumacher knew the representations were false; (4) Schumacher made the representations with the intent to defraud or deceive Mullins Cheese; (5) Schumacher obtained the title to Mullins Cheese's property by the false representations; (6) Mullins was deceived; (7) Mullins Cheese was defrauded. WIS JI—CRIMINAL 1453A (2006).

¶9 Here, there was evidence presented at the preliminary hearing that Schumacher implicitly endorsed the quality of the milk and he knew the samples were being falsified. While intent is ultimately a jury question, the amount of the overpayments arguably demonstrates a motive. Additionally, in this case, there is evidence that Schumacher obtained title to Mullins Cheese's property, money. *See* WIS JI—CRIMINAL 1453A (2006). Finally, Mullins Cheese claims it was unaware of Schumacher's false representations; thus Mullins Cheese was deceived and defrauded. Therefore, there was sufficient evidence to bind Schumacher over for trial.

By the Court.—Order reversed and cause remanded for further proceedings.

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

