COURT OF APPEALS
DECISION
DATED AND FILED

May 20, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2138-CR **Cir. Ct. No. 2005CF107**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOEL S. BOSMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Judgment affirmed; order reversed and cause remanded for further proceedings.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Joel Bosman appeals a judgment of conviction for eight counts of theft as party to the crime, contrary to WIS. STAT. §§ 943.20(1)(b)

and 939.05.[1] He also appeals an order denying his motion for postconviction relief without a hearing. Bosman contends the court erred by failing to properly instruct the jury as to the burden of proof on the value of the thefts. He also contends his counsel was ineffective for failing to object to the jury instructions and for failing to present certain witnesses.

¶2 We reject Bosman's claims regarding the jury instructions and therefore affirm the judgment. However, we conclude Bosman's postconviction motion alleged sufficient facts to require a ***Machner***[2] hearing on his ineffective assistance of counsel claim regarding additional witnesses. Therefore, we reverse the order denying Bosman's postconviction motion and remand for the circuit court to conduct a ***Machner*** hearing.

BACKGROUND

¶3 This case centered on Bosman's role in thefts from the Stockbridge-Munsee tribe. The primary figure in those thefts was Kathryn Mohawk, who managed the tribe's loan department. Bosman met Mohawk when he began dating Mohawk's sister.

¶4 Mohawk administered the tribe's home loan funds program. Over a period of twenty-six months, she requested twelve checks from the tribe's finance department totaling $194,840. These checks were for numerous purported loan applicants who, in fact, had not applied for loans. Mohawk had the checks made

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

out to Bosman, a building contractor, because she believed no one would question checks made out to a contractor.

¶5 At Mohawk's request, Bosman cashed the checks and returned most of the money to Mohawk. Bosman testified that Mohawk identified a borrower associated with each check to whom he believed Mohawk was giving the money after he cashed the checks. The first check was actually for Mohawk's own purported home loan, and Bosman testified that he had performed work for Mohawk. Bosman also testified he performed work for the borrower who Mohawk identified for the second and third checks.

¶6 According to Bosman, Mohawk then began asking him to cash checks for borrowers for whom he had not performed work. He testified that when asking Mohawk about the propriety of cashing the checks, she told him, "The checks just have to be cut through a vendor. That's the way the reservation works." In other words, Mohawk suggested the checks could not be made out directly to borrowers, but only to vendors. Despite his concerns, Bosman testified that Mohawk's reputation was, at that point, untarnished and, based on his experience, the tribes "do a lot of things that don't make sense." Bosman was familiar with working for tribes because he did most of his work for the Stockbridge-Munsee and Menomonie tribes.

¶7 Bosman testified that, after cashing the checks, Mohawk told him to keep a fee, typically around $1,000. He testified that, according to Mohawk, the homeowners were glad to pay Bosman for helping them get their money. Bosman returned the rest of the money to Mohawk, stating he believed she was giving it to borrowers.

¶8 However, Mohawk was not giving money to any borrowers, but was instead using it to finance a gambling problem. She testified that no one else, including Bosman, knew what she was doing with the money. Regarding his knowledge of Mohawk's scheme, Bosman testified that "until she took the plea bargain my belief was she didn't take the money and it was just an accounting screw up."

¶9 The jury found Bosman guilty as party to the crime of eight theft counts.[3] Bosman moved for postconviction relief, contending the jury instructions were erroneous and that his counsel was ineffective. The court denied the motion by failing to address it within sixty days, pursuant to WIS. STAT. 809.30(2)(i).

DISCUSSION

¶10 Bosman first argues the court erred by failing to instruct the jury that the State had to prove the value of the thefts beyond a reasonable doubt. Pursuant to WIS. STAT. § 943.20(3), the dollar value of a theft determines the penalty. The State was required to prove the values of the thefts beyond a reasonable doubt. *See* ***Apprendi v. New Jersey***, 530 U.S. 466, 490 (2000); *see also* WIS JI–CRIMINAL 1444 (2006). Here, the jury found the value of seven thefts exceeded $10,000, making them Class G felonies, and the value of the eighth theft exceeded $5,000, making it a Class H felony. *See* WIS. STAT. § 943.20(3)(bm)-(c).

¶11 In ***State v. McBride***, 187 Wis. 2d 409, 419, 523 N.W.2d 106 (Ct. App. 1994), as here, there was no specific instruction requiring the jury to find the

[3] Bosman faced twelve counts, one for each check he cashed, but the jury rendered not guilty verdicts on four counts.

value of the thefts beyond a reasonable doubt. Nonetheless, we concluded that, based on the totality of the trial court's instructions, "the jury would have reasonably understood that they were required to find the value of the property subject to the charge beyond a reasonable doubt." ***Id.*** at 421. In ***McBride***, the trial court repeatedly instructed the jury that the State had the burden of proving each element of the offenses charged beyond a reasonable doubt; the trial judge used the words "beyond a reasonable doubt" in the instructions on seventeen different occasions; and the trial court never mentioned any lesser standard of proof in the instructions. ***Id.***

¶12 As in ***McBride***, the trial court here repeatedly referenced the beyond a reasonable doubt standard and stated the jury must find all the elements of the thefts beyond a reasonable doubt. *See* ***id.*** at 421. The court also did not reference any lesser burden of proof. *See* ***id.*** Additionally, during jury selection, after identifying the theft charges, the circuit court told prospective jurors that the State "has to prove every part of [its] charge beyond a reasonable doubt.…" This broad statement about the applicable burden of proof makes the case for upholding the instructions here even stronger here than in ***McBride***. Thus, as in ***McBride***, we conclude the jury here would have reasonably understood that it was to find the thefts' values beyond a reasonable doubt. *See* ***id.***

¶13 Further, we conclude that even if the instructions were erroneous, any error would be harmless.[4] An error is harmless if it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict

[4] While Bosman initially argues that the court's instructional error constituted plain error not subject to a harmless error analysis, he concedes in his reply brief that the harmless error analysis applies. *See* ***Washington v. Recuenco***, 126 S.Ct. 2546, 2552-53 (2006).

obtained." ***Chapman v. California***, 386 U.S. 18, 24 (1967). When jury instructions are erroneous on an element that is uncontested and supported by overwhelming evidence at trial, an erroneous instruction is harmless. *See* ***Neder v. United States***, 527 U.S. 1, 17 (1999). Here, the evidence of the value of the thefts was overwhelming and uncontested at trial. Bosman suggests the value of the thefts was contested because the jury could have found that the value of the thefts was only the amount Bosman kept, rather than the total amount stolen. However, Bosman was charged as party to the thefts, which involved not only the money he kept, but also the money he gave to Mohawk. He points to no portion of the record suggesting this amount was actually contested at trial. Overall, it is clear that the jury's verdicts would have been the same regardless of the claimed instructional error. *See* ***Chapman***, 386 U.S. at 24.

¶14 Bosman next argues ineffective assistance of counsel. A defendant claiming ineffective assistance must show that counsel's performance was deficient, and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Counsel's performance was deficient if, under all the facts and circumstances, the acts or omissions of counsel were outside the range of professionally competent assistance. ***Id.*** at 690. Prejudice exists when there is a reasonable probability that, but for counsel's deficiencies, the result of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is a probability sufficient to undermine our confidence in the outcome. ***Id.***

¶15 Here, the circuit court did not grant a ***Machner*** hearing on Bosman's postconviction motion. To be entitled to a hearing, Bosman was required to allege sufficient facts in his motion to raise a question of fact for the court. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). Thus, the

question on review is whether the factual assertions in Bosman's motion raise a question of fact necessitating a ***Machner*** hearing. *See* ***id.*** We review this question de novo. ***Id.***

¶16 Bosman contends his counsel was ineffective for failing to object to the erroneous jury instructions and for failing to present certain witnesses. We first reject Bosman's claim that counsel was ineffective for failing to object to the jury instructions. As discussed above, a reasonable jury would have understood to find the values of the thefts beyond a reasonable doubt, and further, any error in failing to specifically instruct the jury on the burden of proof for the value of the thefts would be harmless. For these same reasons underlying these conclusions, we conclude Bosman fails to show he was prejudiced by counsel's failure to object to the instruction.

¶17 Bosman's other ineffective assistance argument is based upon counsel's failure to investigate and present witnesses that would have bolstered his defense that he was not aware of the thefts. The evidence of Bosman's knowledge was circumstantial, and the case against him was not overwhelming, as evidenced by jury's acquittal on four of the twelve counts. The State argued at trial that Bosman must have realized he was participating in the thefts because his practice of cashing checks for a fee was nonsensical. Particularly relevant here, the State repeatedly asserted that borrowers would not pay Bosman to cash checks that the borrowers could cash themselves.

¶18 Bosman's postconviction motion listed a number of witnesses who, he asserts, would have testified that: (1) the tribe had a policy of not issuing loan checks directly to borrowers, but instead to vendors and contractors; and (2) vendors and contractors had a practice of receiving loan funds in excess of the

amount due to them and then remitting the excess funds to the borrower. Bosman's motion asserted that he asked counsel to corroborate these facts and provided counsel with names of people to interview, but counsel failed to do so.

¶19 Given the circumstantial nature of the evidence at trial, the jury was required to determine Bosman's knowledge based largely on its assessment of Bosman's and Mohawk's credibility. Bosman and Mohawk alluded to the facts that checks were made out to vendors or contractors, instead of to borrowers, and that vendors and contractors remitted excess loan funds to borrowers. These facts were central to Bosman's defense. If corroborated, these facts would have significantly weakened the State's argument that borrowers would not pay Bosman to cash checks they could cash themselves. If borrowers were not able to cash their own loan checks, the jury could more reasonably infer that Bosman believed borrowers would pay a fee for cashing the checks. Therefore, these facts would undermine the State's assertion that Bosman must have known he was participating in the thefts.

¶20 Further, the fact that vendors and contractors accepted excess loan funds and provided them to borrowers would lend credence to Bosman's and Mohawk's testimony. While, here, Bosman was giving the excess loan funds to Mohawk, rather than borrowers directly, establishing the practice of vendors and contractors accepting and forwarding excess loan funds to borrowers would have made more plausible Bosman's belief that Mohawk, the tribe's loan officer, was providing the funds to borrowers.

¶21 If the witnesses would have testified as Bosman asserts in his postconviction motion, his counsel unnecessarily left critical facts resting solely on Bosman's and Mohawk's credibility. Given the importance of these facts to

Bosman's defense, we conclude Bosman's postconviction motion creates factual issues on his ineffective assistance of counsel claim, thereby entitling him to a ***Machner*** hearing. *See* ***Toliver***, 187 Wis. 2d at 360. Thus, while we affirm the judgment of conviction because we reject Bosman's claims regarding the jury instructions, we reverse the order denying Bosman's postconviction motion and remand for the circuit court to conduct a ***Machner*** hearing.

By the Court.—Judgment affirmed; order reversed and cause remanded for further proceedings.

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