COURT OF APPEALS
DECISION
DATED AND FILED

December 29, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP737-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. *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, and an order denying his motion for postconviction relief. Bosman argues his counsel was ineffective for failing to

investigate and present certain witnesses.[1] We agree. Bosman is therefore entitled to a new trial.

BACKGROUND

¶2 This case is before us for the second time. Bosman previously appealed his convictions following the denial of his postconviction motion without a hearing. The motion had been denied as a matter of law due to the circuit court's failure to address Bosman's motion within sixty days. *See* WIS. STAT. RULE 809.30(2)(i).[2] In the first appeal, we rejected some of Bosman's arguments, but concluded he was entitled to a ***Machner***[3] hearing on the issues presented again in this appeal. *See* ***State v. Bosman***, No. 2007AP2138, unpublished slip op. (WI App May 20, 2008). Thus, the background, and most of the necessary analysis, was set forth in our previous decision. All that has changed since our remand is that Bosman presented the very witness testimony alleged in his first appeal. We already concluded the alleged evidence would sustain an ineffective assistance of counsel claim. Nonetheless, the circuit court disagreed and denied Bosman's postconviction motion. In this decision, we borrow liberally, often verbatim, from our first decision.

¶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

[1] Bosman further argues for a new trial in the interest of justice. We do not reach that argument. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (cases should be decided on the narrowest possible grounds).

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

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

managed the tribe's loan department. 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 purported loan applicants who, in fact, had not applied for loans. Mohawk had the checks made out to Bosman, a building contractor, because she believed no one would question checks made out to a contractor.

¶4 At Mohawk's request, Bosman cashed the checks and returned most of the money to Mohawk. Bosman testified 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 for Mohawk's own purported home loan, and Bosman testified he had performed work for Mohawk. Bosman also testified he performed work for the borrower who Mohawk identified for the second and third checks.

¶5 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.

¶6 Bosman testified that Mohawk told him to keep a fee after cashing the checks, typically around $1,000. He testified that Mohawk told him the

homeowners were glad to pay him for helping them get their money. As for the money Bosman returned to Mohawk, Bosman stated he believed she was giving it to borrowers. However, Mohawk was instead using the money 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." The jury found Bosman guilty as party to the crime of eight theft counts. Bosman faced twelve counts, one for each check he cashed, but the jury rendered not guilty verdicts on four counts.

DISCUSSION

¶7 When a defendant claims ineffective assistance of counsel in a postconviction motion, the circuit court must hold a ***Machner*** hearing if the defendant alleges facts that, *if true, would entitle the defendant to relief.* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (emphasis added). Whether a motion alleges facts that, if true, would entitle a defendant to relief is a question of law that we review independently of the circuit court. ***Id.***

¶8 We now recite our relevant analysis from the first decision:

> Bosman's ... 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.

> 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.
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> 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.
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> 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.
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> 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* [***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994)].

Bosman, slip op., ¶¶17-21.

¶9 At the ***Machner*** hearing, Richard Lindsley, tribal comptroller, explained the tribal home loan program was created because ordinary lenders would not provide loans to tribal members because the properties were trust lands, which meant they could not be used as collateral. Lindsley testified Mohawk "was very highly regarded by the tribal counsel and ... her superiors" in her position as the loan officer. He also testified that borrowers in the home loan program could not cash their own checks because, as a matter of policy, the checks were made out to the vendors and contractors.

¶10 Melody Malone testified she received a home loan through the tribal loan program and, at Mohawk's suggestion, obtained an inflated property appraisal from another tribal member. Malone received $30,000 back from the home vendor, on the purchase of a $55,000 home. Malone testified her sister also received money back on a home loan to pay for a truck, and she "kn[e]w there was lots of people on the res[ervation who] would get additional money on their house loan."

¶11 Denise Klemmer,[4] Mohawk's direct supervisor, also testified. She stated Mohawk "did everything that she could to assist people to get the loans and to improve their lives in whatever way, whatever manner that she thought was fitting." Klemmer agreed that in Mohawk's position of total control over the loan program, "she acted as a facilitator for eligibility." She further agreed that if Mohawk told somebody it was okay to do something, she would expect that it was true.

[4] The parties refer to Denise Klemmer as Denise Pommer, with Bosman indicating the ***Machner*** transcript "mistakenly" refers to her as Klemmer. However, because the record demonstrates she self-identified as Denise Klemmer, we refer to her by that name.

¶12 Klemmer also explained the tribe was "a very small, tight-knit community. A lot of people are related to a lot of relatives. We all seem to know one another's business." Klemmer believed Mohwawk was well-liked in the community and was viewed as a very honest person. Klemmer elaborated:

> [Mohawk] bent over backwards to try to assist people, and that is the feeling people had. They could call [Mohawk], and basically she would do what she could to get them the assistance they needed. I never heard anybody ever suggest that she was anything outside of honest. It was my opinion, if I may add as her supervisor, that I viewed her as very honest.

Klemmer was then asked whether, in either her position as Mohawk's supervisor or as a member of the community, she was aware of the practice whereby borrowers were receiving loan money back from vendors or contractors. Klemmer responded:

> Yes, I have. It's my understanding that it would happen if I would—[f]or example, if I were the tribal member who got a home loan, I would ... be able to get additional money if I wanted to build a garage for example. I think that was happening. I have heard of home loans that were—the deals were made where people had received money back to names. In particular, I had heard one was Verna Malone. The other was Scott Vele. He had a loan transaction where he was reported to have received, like, $10,000 cash back. So, yes, the answer is I have heard that.

On cross-examination, Klemmer confirmed she had been aware of the lending practices, and explained, "It's very unconventional from lending outside of ... the reservation where—I mean things happen differently up there. Things that you wouldn't expect to ever happen ... [at] any financial lending institution off the reservation."

¶13 At the ***Machner*** hearing, Bosman's counsel acknowledged Bosman told him about the tribe's loan practices and provided names of people who could

corroborate the information. However, counsel testified he felt the information would not be helpful to the defense because Bosman's conduct was not identical and counsel thus did not want to focus the jury on the issue.

¶14 While matters of trial strategy are generally left to counsel's professional judgment, counsel may be found ineffective if the strategy was objectively unreasonable. *See* ***State v. Felton***, 110 Wis. 2d 485, 501-03, 329 N.W.2d 161 (1983). Here, we conclude any strategy of omitting the testimony was unreasonable because counsel already introduced the same evidence, central to the lack-of-knowledge defense strategy, that could also have been corroborated by the additional witnesses. Counsel's explanations defy the logic of the defense strategy.

¶15 In denying Bosman's postconviction motion, the circuit court dismissed as hearsay the testimony concerning the tribe's loan practices and Mohawk's reputation. We reject that characterization. Hearsay is a statement of another, admitted to prove the truth of the matter asserted. *See* WIS. STAT. § 908.01(3). The testimony, however, neither consisted of statements of others nor was it offered exclusively to prove the truth of the facts asserted. Rather, the testimony was offered to corroborate Bosman's *belief* that the loan practices existed; whether the practices actually existed was not central to Bosman's defense. In any event, Malone's testimony as to loan practices was not hearsay, but was based on personal knowledge. The precise source of Klemmer's knowledge is not clear from the record, but the State objected on neither hearsay

nor foundational grounds.[5] Further, as to the testimony about Mohawk's stellar reputation, even hearsay evidence is admissible when it concerns the "[r]eputation of a person's character among the person's associates or in the community." WIS. STAT. § 908.03(21).

¶16 For its part, the State props up a false argument on behalf of Bosman and then proceeds to topple it. The State argues the witness testimony concerning loan practices would not have assisted Bosman at trial because his conduct was not identical to the conduct of other contractors. The circuit court also adopted this position in denying the postconviction motion.[6] Bosman, however, never asserted the conduct was identical. Rather, as we have stated, the testimony was important because it would have supported the inference that Bosman reasonably believed Mohawk was returning the funds to loan applicants rather than retaining the funds for her own use.

¶17 The State fails to respond to Bosman's arguments that counsel was ineffective for not introducing the witness testimony that borrowers could not cash their own checks or the testimony concerning Mohawk's reputation.[7] Thus, those

[5] Indeed, the State does not significantly rely on the circuit court's hearsay conclusion. The State only mentions hearsay once in its brief in passing, without any analysis of why the referenced testimony constituted hearsay.

[6] We already made the legal determination, in the first appeal, that the evidence was critical to the defense strategy. While the circuit court may disagree, it is bound by our conclusions of law.

[7] The State does address whether a new trial is warranted in the interest of justice because the prosecuting attorney argued to the jury that borrowers would not have paid a check-cashing fee when they could have simply cashed the checks themselves. The State does not, however, deny knowing the checks were made out to the contractors, not the borrowers.

arguments may be deemed conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶18 Arguing that a more favorable trial outcome for Bosman is unlikely, the State emphasizes that other contractors or vendors did not get paid a fee to return excess funds to borrowers. However, they would, of course, benefit from the deal because they received the work or sale underlying the exchange. In Bosman's case, he would have had no incentive to help borrowers get their loan proceeds because he would not be receiving a paid job. Thus, the check-cashing fee is, perhaps, less sinister than the State suggests.

¶19 Bosman's trial strategy was to show he lacked knowledge of the thefts because he believed Mohawk was providing the check proceeds to loan applicants. Had trial counsel presented the witness testimony (1) indicating Mohawk was highly esteemed and trusted in her position as loan officer, (2) corroborating the unusual loan practices whereby contractors and others returned excess loan funds to borrowers, and (3) demonstrating borrowers could not cash their own checks, there is a reasonable probability Bosman would have been acquitted on more, or all, charges. Bosman is therefore entitled to a new trial.

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

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