COURT OF APPEALS
DECISION
DATED AND FILED

August 20, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3303-CR **Cir. Ct. No. 00-CF-58**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN K. NORMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oneida County: DOUGLAS T. FOX, Judge. *Affirmed*.

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

¶1 PER CURIAM. John K. Norman appeals a judgment convicting him of six counts of feloniously falsifying corporate documents and two counts of felony theft, contrary to WIS. STAT. §§ 943.39(1), 943.20(1)(a) and

(b) respectively.[1] Norman argues that the trial court erred by precluding him from impeaching a witness with prior inconsistent statements and admitting the preliminary hearing testimony of a witness who was not present at trial. Norman also contends that the trial court failed to properly instruct the jury and that the evidence at trial was insufficient to support his convictions. We reject these arguments and affirm the judgment.

BACKGROUND

¶2 In March 2000, Norman, the general manager of Shoeder's Marine and Sports Center in Rhinelander, was charged with six counts of feloniously falsifying corporate documents, three counts of felony theft and one count of misdemeanor theft.[2] The charges arose out of allegations that Norman had altered sales documents in a way that suggested some customers had purchased more products than they actually purchased. Norman was also charged with theft in connection with a commission-splitting scheme with another Shoeder's Marine employee. Following a jury trial, Norman was convicted of six counts of falsifying documents and two counts of felony theft. This appeal followed.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] Norman was initially charged with five counts of feloniously falsifying corporate documents, two counts of felony theft and one count of misdemeanor theft. After Norman was bound over for trial, an information was filed that included the eight counts charged in the complaint and added one count each of felony theft and feloniously falsifying corporate documents.

ANALYSIS

I. PRIOR INCONSISTENT STATEMENTS

¶3 Norman argues that the trial court erred by precluding him from impeaching Daniel Krehmeyer with prior inconsistent statements. Krehmeyer, a Shoeder's Marine salesperson, testified at trial that he and Norman entered into a commission-splitting scheme in 1999 and that prior to that time, he had not given Norman money in return for help in closing sales. Defense counsel attempted to impeach Krehmeyer based on a police report that had been prepared by Rhinelander police detective Ronald Lueneburg. According to Lueneburg's report, Krehmeyer stated that he had written three checks to Norman in 1997. The report further noted Krehmeyer's belief that the checks represented legitimate payments to Norman for his assistance in helping Krehmeyer close some sales.

¶4 Defense counsel asked Lueneburg what Krehmeyer had said to him about paying Norman part of his commissions before 1999. The trial court sustained the State's hearsay objection. Norman argues that the question to Lueneburg was intended to elicit Krehmeyer's prior inconsistent statement pursuant to WIS. STAT. § 908.01(4)(a).[3] The State concedes that Krehmeyer's statement to Lueneburg qualifies as a prior inconsistent statement. The State argues, however, that any error was harmless as a matter of law. We agree.

¶5 In determining whether an error is harmless, the quantum of evidence properly admitted is relevant. ***Virgil v. State***, 84 Wis. 2d 166, 192, 267

[3] WISCONSIN STAT. § 908.01(4)(a) provides: "A statement is not hearsay if … the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is … [i]nconsistent with the declarant's testimony."

N.W.2d. 852 (1978). Error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. ***State v. Harvey***, 2002 WI 93, ¶49, ___ Wis. 2d ___, 647 N.W.2d 189.

¶6 Here, despite the court's ruling, defense counsel was able to effectively communicate to the jury that Krehmeyer told Lueneburg that he had written legitimate checks to Norman in 1997. As part of his trial testimony, Krehmeyer was asked to read the police report that included his prior statements. Defense counsel asked if Krehmeyer remembered making the statements ascribed to him, and Krehmeyer answered that he did not recall making the statements regarding the three checks. Because the jury heard the evidence regarding Krehmeyer's prior inconsistent statements, Norman was not harmed by the trial court's refusal to admit the statements through Lueneburg's testimony.[4]

II. ADMISSION OF A WITNESS'S PRELIMINARY HEARING TESTIMONY

¶7 At the preliminary hearing, Barbara Park identified the purchase agreement for a Glastar boat she purchased from Shoeder's Marine in May of 1998. Park further testified that in June 1999, she traded the Glastar boat and purchased a Tracker Topper rowboat. Park identified the purchase agreement for the latter transaction and stated that her only cash outlay on the second transaction was $11 for a license. Ultimately, Park testified that she had not received three

[4] In addition, we conclude there was abundant evidence to support his conviction for theft arising from the commission-splitting scheme. Krehmeyer testified that he and Norman entered into a commission-splitting scheme in 1999. Whether Krehmeyer wrote checks to Norman in 1997 has no direct bearing on whether he and Norman agreed to a commission-splitting scheme two years later. Krehmeyer's testimony was supported by evidence of nine checks Norman admitted receiving from Krehmeyer in 1999. Finally, while Norman denied a formal commission-splitting agreement, he offered no explanation for the checks.

documents that had been prepared by Norman, including a June 1999 purchase agreement purporting to show that she purchased the Tracker Topper for $1,004.81, with no trade-in.

¶8 Before the trial began, the State, contending that Park was an unavailable witness within the meaning of WIS. STAT. § 908.04, filed a motion in limine requesting that the court allow the reading of Park's preliminary hearing testimony at trial.[5] In support of its motion, the State attached the district attorney's affidavit stating that Park, who lived in Indiana, was suffering from what was described as a strangulated hernia and had been advised by her doctor not to drive to Rhinelander for the trial. The affidavit also noted that Park had declined the State's offer to fly her to Rhinelander. The court granted the State's motion.

¶9 Norman argues that the trial court improperly declared Barbara Park to be an unavailable witness, and that the trial court violated Norman's right to confrontation when it allowed the State to introduce Park's preliminary hearing testimony under the hearsay exception in WIS. STAT. § 908.045(1).[6] The admissibility of former testimony is a discretionary decision. ***La Barge v. State***,

[5] WISCONSIN STAT. § 908.04(1)(d) provides: "Unavailability as a witness includes situations in which the declarant … [i]s unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity."

[6] Pursuant to WIS. STAT. § 908.045(1), former testimony is not excluded by the hearsay rule if the declarant is unavailable as a witness. Former testimony is defined as:

> Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross-, or redirect examination, with motive and interest similar to those of the party against whom now offered.

74 Wis. 2d 327, 338, 246 N.W.2d 794 (1976). Our review of a discretionary ruling is limited to whether the trial court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). Whether a defendant's right to confrontation has been violated, however, is a question of constitutional fact. ***State v. Jackson***, 216 Wis. 2d 646, 655, 575 N.W.2d 475 (1998). When we review a question of constitutional fact, we adopt the trial court's findings of historical fact unless they are clearly erroneous, but we independently apply those facts to the constitutional standard. ***Id.***

¶10 Our supreme court has set forth a multi-step process for determining whether the admission of purported hearsay violates a defendant's constitutional right to confrontation. ***State v. Bauer***, 109 Wis. 2d 204, 325 N.W.2d 857 (1982).

> The threshold question is whether the evidence fits within a recognized hearsay exception. If not, the evidence must be excluded. If so, the confrontation clause must be considered. There are two requisites to satisfaction of the confrontation right. First, the witness must be unavailable. Second, the evidence must bear some indicia of reliability. If the evidence fits within a firmly rooted hearsay exception, reliability can be inferred and the evidence is generally admissible. This inference of reliability does not, however, make the evidence admissible per se. The trial court must still examine the case to determine whether there are unusual circumstances which may warrant exclusion of the evidence.

Id. at 215. Turning to the present case, we conclude that because preliminary hearing testimony is a recognized hearsay exception under WIS. STAT. § 908.045(1), the first part of the test is satisfied. ***Id.*** Next, we conclude that admission of the prior testimony is consistent with Norman's rights under the confrontation clause.

¶11 With respect to the first part of the confrontation clause inquiry, the trial court concluded that Park was unavailable for purposes of the rule because of her medical condition. Norman argues that the trial court's finding improperly relied on hearsay. However, pursuant to WIS. STAT. § 901.04, the trial court is not bound by the hearsay rules when considering preliminary questions regarding the admissibility of evidence. With respect to the second step, reliability of the preliminary hearing testimony may be inferred because it falls within a "firmly rooted" hearsay exception. ***Bauer***, 109 Wis. 2d at 216.

¶12 Turning to the final inquiry, Norman argues that the minimal cross-examination at the preliminary hearing constitutes an unusual circumstance warranting exclusion of the evidence. ***Id.*** at 215. Norman, however, was given the opportunity to cross-examine Park at the preliminary hearing. "Generally speaking, the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." ***State v. Kirschbaum***, 195 Wis. 2d 11, 35, 535 N.W.2d 462 (Ct. App. 1995). Because there were no unusual circumstances to warrant exclusion of the evidence, we conclude that the trial court properly admitted Park's preliminary hearing testimony.

III. JURY INSTRUCTION ON THE CRIME OF FALSIFYING CORPORATE DOCUMENTS

¶13 Norman challenged a portion of the jury instruction that set forth the elements of the crime of falsifying corporate documents. The challenged portion of the instruction provides:

> The third element [of the crime of falsifying corporate documents] requires that the defendant acted with intent to injure or defraud. Intent to injure means that the defendant intended to cause harm of any kind. Intent to defraud

> means that the defendant intended to obtain property that he was not entitled to receive.

Norman contends that this portion of the instruction violated his right to a unanimous jury verdict because the members of the jury did not all have to agree on whether Norman had falsified corporate documents with an intent to injure or to defraud. We are not persuaded.

¶14 A trial court has "broad discretion when instructing a jury so long as it fully and fairly informs the jury of the rules and principles of law applicable to the particular case." ***Peplinski v. Fobe's Roofing, Inc.***, 193 Wis. 2d 6, 24, 531 N.W.2d 597 (1995). Challenges to jury instructions are reviewed for an erroneous exercise of discretion. ***State v. Pletz***, 2000 WI App 221, ¶17, 239 Wis. 2d 49, 619 N.W.2d 97.

¶15 Here, the instruction fully complied with the pattern jury instruction for "Fraudulent Writings: Falsifying a Corporate Record—§ 943.39(1)." *See* WIS JI—CRIMINAL 1485 (2001). The comment to the instruction explains:

> The offense is defined as engaging in one of the prohibited acts "with intent to injure or defraud." The instruction puts the alternative intents in parentheses on the assumption that one or the other is likely to apply. However, the Committee concluded that it would be permissible to instruct on both types of intent and that jury agreement on the intent involved would not be required. The Wisconsin Supreme Court has reached that conclusion with offenses under [WIS. STAT.] § 948.07, [c]hild enticement. ***State v. Derango***, 2000 WI 89, 236 Wis. 2d 721, 613 N.W.2d 833.

Criminal jury instructions are the product of painstaking effort by "an eminently qualified committee of trial judges, lawyers and legal scholars, designed to accurately state the law and afford a means of uniformity of instructions throughout the state." ***State v. Gilbert***, 115 Wis. 2d 371, 379, 340 N.W.2d 511

(1983). While jury instructions are not precedent, they are persuasive authority. ***State v. Olson***, 175 Wis. 2d 628, 642 n.10, 498 N.W.2d 661 (1993).

¶16 As our supreme court noted in ***Derango***, jury unanimity is required "only with respect to the ultimate issue of the defendant's guilt or innocence of the crime charged, and ... not ... with respect to the alternative means or ways in which the crime can be committed." ***Derango*** at ¶14. (citation omitted). Therefore, the threshold question in a unanimity challenge is whether the statute creates multiple offenses or a single offense with multiple modes of commission. ***Id.*** Where, as here, a statute creates one crime with alternate modes of commission, unanimity is not required unless the alternate modes of commission are conceptually distinct. ***Id.*** at ¶22. Because Norman has failed to explain how falsifying corporate documents with an intent to injure as opposed to an intent to defraud are conceptually distinct, we conclude that the trial court properly instructed the jury. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987) (We decline to abandon our neutrality in an attempt to develop an appellant's argument for him.)

IV. SUFFICIENCY OF THE EVIDENCE

¶17 Norman argues that the evidence at trial was insufficient to support his convictions. Appellate review of the sufficiency of the evidence to support a jury verdict is highly deferential. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990). The ***Poellinger*** court held:

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a

> reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

Id. at 507 (citation omitted). Under this standard of review, we conclude that the record is sufficient to uphold the convictions.

¶18 Norman specifies two arguments in support of his claim that the evidence at trial was insufficient to support his convictions. First, Norman argues that there was insufficient evidence of his intent to defraud or injure—one of the elements of the crime of falsifying corporate documents. Norman claims the evidence was lacking based on his testimony that Keith Shoeder knew and approved of Norman's acquisition of the products reflected in the falsified corporate documents. Shoeder, however, testified that he did not authorize Norman's transactions. The jury, as the ultimate arbiter of the witnesses' credibility, was entitled to reject Norman's testimony. *See* ***State v. Webster***, 196 Wis. 2d 308, 320, 538 N.W.2d 810 (Ct. App. 1995).

¶19 Norman also argues that "if one wanted to defraud a business, he would not add the items to receipts which would later be reviewed." In other words, Norman contends that the evidence supporting the verdict is somehow undermined by circumstantial evidence of Norman's actions that seem inconsistent with an intent to defraud. We are not persuaded.

¶20 Shoeder explained at trial that the false documents Norman generated had the effect of removing from the company's inventory records those items that Norman had taken. Shoeder's Marine bookkeepers rely on the purchase agreements to keep track of the business's sales. When a purchase agreement lists a product as sold, the bookkeepers remove it from their records of the business's

inventory. Thus, the only way the inventory would be discovered missing is if, as here, customer follow-up revealed that a customer's purchase agreement had been altered to reflect a purchase the customer never made. Because Norman has failed to meet the heavy burden of proving that the evidence was insufficient to support his convictions, we affirm the judgment.

By the Court.—Judgment affirmed.

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