STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2012AP2309

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GREG LAPEAN,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

MILLER APPELLATE PRACTICE, LLC
Attorneys for the Defendant-Appellant
By Steven L. Miller #01005582
P.O. Box 655
River Falls, WI 54022
(715) 425-9780

On appeal from the Circuit Court
of Dunn County, Hon. William C. Stewart, Jr.,
Circuit Judge, presiding.

TABLE OF CONTENTS

CASES CITED

WISCONSIN STATUTES CITED

OTHER AUTHORITY

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2012AP2309

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GREG LAPEAN,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

ISSUES FOR REVIEW

1. Was the real controversy fully tried when the jury was not instructed on the terms of the security agreement?

The Trial Court Answered: "Yes."

2. Was the evidence sufficient to prove intent to defraud?

The Trial Court Answered: "Yes."

3. Was trial counsel ineffective when he: a) failed to seek jury instructions explaining the terms of the security agreement; or b) when he failed to move to dismiss at the close of the State's case?

The Trial Court Answered: "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are not requested.

STATEMENT OF THE CASE

Greg LaPean owned and operated a farm implement dealership. Starting in 2002, sales and revenues began to decline due to economic circumstances. By 2008, LaPean was unable to keep current with his debt load and eventually went bankrupt. In 2009 and 2010, LaPean was charged with 4 counts of transferring encumbered property with intent to defraud in three separate cases.[1] These cases were consolidated and tried to a jury on September 21-23, 2011.

The jury acquitted LaPean in 10 CF 342, and was hung on both counts in 09 CF 178. The sole guilty verdict it returned was on the single count in 10 CF 343. This appeal, therefore, pertains exclusively to the single count for which LaPean was convicted in 10 CF 343.

On February 17, 2012, LaPean was sentenced to 5 years of probation, with 6 months in jail and 250 hours of community service as a condition of probation. On April 10, 2012, the circuit court stayed the jail sentence pending appeal. On July 23, 2012, LaPean filed a motion for postconviction relief. (50). That motion was denied without a hearing in a written decision and order filed on September 25, 2012. (Appendix, pp. 3-12; 56). LaPean now appeals the judgment of conviction and the order denying his postconviction motion in a notice of appeal dated October 15, 2012.[2] (57)

---

1 LaPean was charged with two counts in case no. 09 CF178, one count in case no. 10 CF 342, and one count in case no. 10 CF 343.

2 Restitution litigation is still ongoing.

STATEMENT OF FACTS[3]

Greg LaPean, age 54, took over the family's farm implement dealership in Menomonie, Wisconsin, sometime in the late 1980's or early 1990's. (71:93) The business was started by LaPean's parents in 1956. (71:92-93). The implement dealership peaked in the late 1990's, with 19 employees and gross annual sales of $10 million. New and used inventory reached nearly $4 million. (71:95). Beginning in 2002, however, sales began to decline due to low milk prices and drought-like conditions that reduced grain and feed harvests. (71:96). More and more employees were laid off and in 2004, LaPean lost his dealership status from Case International due to various disagreements over dealership location, warranty coverage, and trade-in values. (71:96, 99) As a result, revenues dropped further. (71:99). By late 2004, LaPean believed the drop in sales had bottomed out. (71:107). He had already pared back operations considerably, and was working as a full-time police officer for the City of Colfax as well as part-time for the Dunn County Sheriff's Department reserves to make ends meet. (71:94).

In February of 2005, LaPean approached Security Bank with an application for a $950,000 floor plan loan. (71:105-106). He negotiated with Karen Smith, a VP at Security. The purpose of the floor plan was to consolidate debt, finance ongoing operations, maintain a parts inventory, and replenish equipment inventory as it was sold. (71:106). Before the floor plan was implemented, however, Security Bank agreed to provide six, short-term notes, totaling approximately $895,000, so LaPean could buy farm equipment he needed for spring sales. (71:61, 159-160; 73:Exhibits 115-121). These loans were each secured by specifically identified equipment. (*Id.*; 71:57). The

---

3 The Statement of Facts will be limited to those facts relevant to 10 CF 343.

spring was high season for equipment sales, and LaPean needed equipment to sell. (73:116).

The short term notes were consolidated in June of 2005 as part of a larger refinancing plan. The new, longer term loans incorporated the existing balances as well as other debts, and provided operating capital in a revolving credit, "floor-plan" type arrangement. (71:9-10, 62, 63, 110). See 73:Exhibit 9 ($650,000); 73: Exhibit 10 ($86,500); 73:Exhibit 11 ($245,000); and 73: Exhibit 12 ($775,000) (71:9-10, 16, 17, 18). Two additional notes were issued in 2006. (71:64). See 73:Exhibit 113 (7/27/2006: $118,799); and 73: Exhibit 13 (8/28/06: $29,010). The new loans were payable on a monthly, quarterly, or even yearly basis, typically with a balloon. *Id.* Security Bank also assumed the mortgages on the business real estate as well as LaPean's residence.

All the new notes were cross-collateralized. (71:16). Rather than each being secured by specific property, security for all the new loans came from a single pool of collateral, including: all LaPean's business real estate, assets, and inventory; LaPean's personal property and real estate; personal guarantees from LaPean, his wife Amy, as well as his parents, Tom and Faye LaPean; assignment of LaPean's life insurance policy; and several large certificates of deposit pledged by LaPean's parents. (71:10-13, 110-111). Inventory collateral was not fixed, moreover, but "revolved" as parts and equipment were bought and sold. (71:157). (See e.g. Wis. Stat. § 409.205.) All the security agreements contained the following clause:

> (a) Sale of inventory. So long as no default exists under any of the Obligations or this Agreement, *Debtor may (a) sell inventory in the ordinary course of Debtor's business for cash or on terms customary in the trade*, at prices not less than any minimum sale price on the instruments evidencing Obligations and describing inventory, *or (b) lease or license inventory on terms customary in the trade.*

(Emphasis added) (See e.g. 73: Exhibit 9; 71:66-67). As long as inventory was sold "in the ordinary course of...business," the security agreements did not require permission from the bank prior to sale; did not require notification to the bank upon sale (71:155, 167); and did not require that proceeds be paid directly to the bank once the sale was made. (73: Exhibit 9).

LaPean was able to meet his financial obligations in 2005 and 2006. Smith conceded LaPean was making regular payments on the loans at least through December of 2006. (71: 20-21, 29, 43). By early 2007, however, things got tougher. When the recession hit in 2007, sales dropped further and faster. (71:102). Equipment values also dropped precipitously. (71:154). In 2007, LaPean's payments to the bank were "sporadic." (71:29)

To cope with lost revenue and reduce expenses, LaPean decided to end most implement sales and focus instead on parts and service. (71:113). In June of 2007, with Security Bank's approval, LaPean had an auction where he sold his remaining used inventory, his business trucks, forklifts and any other equipment he wasn't going to need anymore. (71:113). Some of the equipment he sold were trade-ins from the equipment sold in the spring of 2005. (71:152). The net proceeds went to Security Bank. (71:113) Security Bank concedes it got $108,000 from the June 10th auction after paying the auction house and other lien holders. (71:153).

The total amount LaPean borrowed from Security Bank, including the real estate, was approximately $2,124,000. LaPean made payments from general revenues of approximately $680,000. (71:120, 159). Liquidation of LaPean's collateral yielded an additional $1,273,000, for a total of $1,850,000. (73: Exhibit C; 71:125, 126, 128, 129). The deficiency against the principal borrowed was approximately $274,000. Unpaid interest, however, was over $500,000. (71:75, 131). According to Smith, the loss to Security Bank including unpaid interest and

collection expenses was approximately $800,000. (71:167).

The crux of the state's case was a list of equipment (Exhibit 8) which were financed under the original short-term notes issued in early 2005.[4] (71:13; 73:Exhibits 115-121). The state alleges that between June 5, 2007, and March 6, 2009, LaPean sold or transferred these items with intent to defraud, contrary to Wis. Stat. 943.84(2)(a). (6).

The state based its case on Smith's testimony which was, in essence: 1) that the items listed on Exhibit 8 were missing and unaccounted for; 2) the loans remained unpaid in full; and 3) LaPean never disclosed to her where the collateral items originally financed in 2005 are. (71:13, 14).

Smith repeatedly contradicted herself, however, as to the status of the Exhibit 8 collateral. When asked whether anyone had "visually and physically check[ed] on the collateral as to its existence" at the time the loans were consolidated in June of 2005, she answered: "Yes. We had an appraisal done." (71:168). When asked whether the appraiser would have checked to make sure the collateral was there, she answered: "Yes." (71:169). When asked whether the appraiser was looking for the "specific collateral on Exhibit 8", however, she answered: "No." Smith then conceded the appraisal in June of 2005 was an appraisal of the real estate, not farm implements. (71:169).

Smith further testified that once the loans were past due in early 2007, she went to LaPean Implement to check on the Exhibit 8 collateral. When specifically asked by the prosecutor if she found collateral listed on Exhibit 8, she answered: "Yes." (71:30). Smith also testified she made visits to LaPean Implement after the June auction as well and saw "some" equipment on the lot, but not "all" the collateral. (71:38). She

---

4 Three items listed were financed in 2006. (73:exhibits 13, 113).

testified she did not know any of the equipment was "missing" until a writ of replevin was served in July of 2009 and none of it could be found. (71:38, 39).

Smith later admitted, however, that "the times we went there I didn't check specific serial numbers." (71:30). She admitted that none of the equipment listed on Exhibit 8 were present at the June 2007 auction. (71:31). In fact, Smith ultimately conceded she had no knowledge of when any of the property listed on Exhibit 8 was ever at LaPean Implement. (71:43, 168). She had no idea when any of the equipment may have been sold. (71:82).

Smith also claims that once the loan was past due, "...I was told [by phone] that *the equipment* was being sent out on -- somebody was renting it, or somebody was testing it out." (Emphasis added) (71:30). She claims to have had a similar conversation with LaPean at the time of the June 2007 auction. (71:37). Smith later admitted, however, that "a lot" of her conversations were not with Greg LaPean, but with his wife Amy; and "many" were with his mother Faye. (71:76). Smith also conceded she never "specifically" told Greg LaPean that he needed to notify her when secured equipment was sold. (71:167).

Early spring is when LaPean sold farm equipment. (71:116). LaPean testified that all of the equipment purchased in early 2005 was sold before the restructuring in June of 2005 ever occurred. (71:114, 115). By June, most of the equipment on the property would have been trade-ins. (71:114, 171). In fact, most large equipment sales or leases involved trade-ins. (71:97). The profit from these sales--usually the difference between the trade-in value and the price of the new equipment--was used for operating expenses and to make payments on the loans. (71:108, 114, 115, 116).

LaPean could not recall precisely what happened to each of the Exhibit 8 implements. (71:150-151). Between early 2005 until the close of business in 2009, LaPean conducted thousands of transactions with hundreds if not thousands of customers. (71:142, 150-151). Nor could he find specific records. The dealership's paper records were initially seized by Security Bank. (71:133). LaPean made repeated requests to the Bank for records documenting the 2005 sales, to no avail. (71:158). When the records were returned to LaPean a month or so later, he "just started pitching stuff into boxes" and ended up filling two storage units and a semi-trailer. (71:104, 133, 149). LaPean later spent nearly three weeks looking for any records there may be of the Exhibit 8 collateral transactions but he could not find anything. (71:133-134, 149). Whether the records were taken by Security Bank, were missing, or were simply misplaced he did not know. (71:133). LaPean offered all his records to law enforcement and for a time, in fact, they placed their own padlocks on the storage units. (71:104-105). To LaPean's knowledge, however, law enforcement made no attempt to review his records. (71:134).

The dealership also had a single computer with financial records. As with the paper records, Security Bank seized the computer and did not allow LaPean access. (71:153). LaPean ended up buying the computer back at the final 2009 auction but found to his dismay that the hard-drive was missing. (71:149, 153-154). Smith testified in rebuttal, however, that the hard-drive was missing when the Bank got the computer. (71:162). There was also evidence of a back-up tape. LaPean presented an exhibit (Exhibit 128) showing loan payments LaPean had made to the bank. (71:147). According to LaPean, he believed this information came from a computer "tape-backup" that "the computer company had." (148). LaPean had never seen the back-up tape, however, and did not know what records it actually contained. (71:154-155).

ARGUMENT

I. THE REAL CONTROVERSY WAS NOT FULLY TRIED BECAUSE THE JURY HAD NO INSTRUCTION ON THE TERMS OF THE SECURITY AGREEMENT.

A. Legal Standards

An unobjected-to jury instruction may be reviewed under Wis. Stat. §752.35 (discretionary reversal when the defendant claims that the real controversy has not been fully tried.) *State v. Marcum*, 166 Wis.2d 908, 916, 480 N.W.2d 545 (Ct.App.1992). See also *State v. Cockrell*, 2007 WI App 217, ¶36, n.12, 306 Wis.2d 52, 741 N.W.2d 267 (court may exercise its discretionary power of reversal under Wis. Stat. § 752.35 when a waived error regarding a jury instruction results in the real controversy not being tried.)

A proper jury instruction is a crucial component of the fact-finding process. *State v. Perkins*, 2001 WI 46, ¶41, 243 Wis.2d 141, 626 N.W.2d 762. Jury instructions must do more than simply state the elements of the crime. They must accurately convey the meaning of the statute *as applied to the facts of the case. State v. Ferguson*, 2009 WI 50, ¶¶14, 31, 317 Wis.2d 586, 767 N.W.2d 187. When jury instructions fail to provide a necessary explanation regarding an element of the offense, they effectively preclude a jury from rendering a verdict on that element. *Perkins,* at ¶55 (Wilcox, concurring). A court should reverse when the jury instruction "obfuscates the real issue or arguably caused the real controversy not to be fully tried." *Id.* at ¶12. See also *State v. Gonzalez*, 2011 WI 63, ¶ 23-24 335 Wis.2d 270, 802 N.W.2d 454 (defendant entitled to a new trial when jury likely applied the instruction in a way that denied the defendant "a meaningful opportunity for consideration by the jury of his defense ... to the detriment of the defendant's due process rights.") The jury instructions must be

viewed "in light of the proceedings as a whole, instead of viewing a single instruction in artificial isolation." *State v. Lohmeier*, 205 Wis.2d 183, 194, 556 N.W.2d 90 (1996).

In addition, when a jury "makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *State v. Hubbard*, 2007 WI App 240, 306 Wis.2d 356, ¶14, 742 N.W.2d 893, *reversed*[5] *on other grounds*, 2008 WI 92, 313 Wis.2d 1, 752 N.W.2d 839, citing *Bollenbach v. U.S.*, 326 U.S. 607, 612-13 (1946). See also *State v. Anderson*, 2006 WI 77, ¶ 109, 291 Wis.2d 673, 717 N.W.2d 74 ("In gauging the circuit court's exercise of discretion in responding to the jury's request, we also apply the legal standard that a circuit court is obligated to respond to a jury inquiry with sufficient specificity to clarify the jury's problem.") (Emphasis added). As the *Hubbard* court notes: "Jury instructions must have two key characteristics in order to protect the integrity of our jury system: (1) legal accuracy, and (2) comprehensibility." *Id.*, at ¶19. Jurors "cannot follow instructions that they do not comprehend." *Id.* Unclear instructions, moreover, "lead to uncertainty about how to apply the law to the facts, which may invite the jury to decide the case without regard to the facts or the law." *Id.* While jury instructions may be legally accurate, the real controversy is not fully tried when the jury admits in its questions to the court it did not understand a key legal concept of the charge before it. *Id.*

---

5 The Court of Appeals' decision in *Hubbard* was reversed by the Wisconsin Supreme Court because the defendant requested a response to the jury's question that was not an accurate statement of law. The reversal did not have any impact on the legal standards articulated in that case, which are also consistent with another Wisconsin Supreme Court case. See *State v. Anderson*, 2006 WI 77, ¶ 109, 291 Wis.2d 673, 717 N.W.2d 74.

B. Without knowing whether LaPean's actions were consistent with the security agreement, the jury had no basis for judging whether LaPean transferred, removed or concealed secured property with intent to defraud.

The only contested element in this case was intent to defraud. The jury was instructed in relevant part:

> Fraudulent transfer of encumbered personal property as defined in Section 943.25(2)(a) is committed by *one who with intent to defraud* conceals, removes or transfers any personal property in which he knows another has a security interest.
>
> Before you may find the Defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements are present: ....;
>
> The *second element* is that another party held a secured interest in the property. A security interest is an interest in property which secures payment or other performance of an obligation. ....and the *fourth element*, that the Defendant transferred, removed or concealed the property with intent to defraud.
>
> Again, this requires that ***when*** *the Defendant transferred, removed or concealed the property* that he had a purpose to cause someone pecuniary loss, or was aware that his conduct was practically certain to cause that result.

(Emphasis added) (71:184-185).

The jury instruction was accurate in the sense that it correctly portrayed the generic elements of Wis. Stat. § 943.84(2)(a). The jury, however, was not instructed on the parties' rights and responsibilities under the security agreement. The trial court recognized the relevance of the security agreement at the instructions conference:

> There is a lot of exhibits in this record, including loan documents, with lots of what I would call fine print. *Neither counsel* – and this is not a criticism, simply an observation –

> *has reviewed with the Court or with the jury all the language in those exhibits that would set forth the duties of the parties in this case, the LaPeans versus the lenders.* Now I cannot presume some of the things that you may be arguing, because I haven't [176] reviewed those documents, nor has the jury.
>
> *So if there was a duty, for example, Mr. Maki, for some kind of notice, I haven't heard that yet;* there may in fact be in one of the exhibits that's been received. I don't know that, Again, there was no need for counsel to go and read to the jury every line and every one of those loan documents. It wasn't necessary. And I understand that. But I'm not going to give this presumptive instruction when I don't know the full contents, i.e., the duties of the parties to those contracts without knowing more.

(71:175-176). Despite the trial court's comments, no mention of the security agreement was made in the jury instructions.

Under the terms of the security agreement, LaPean: (1) had a right to sell or lease collateral without the consent of, and without notice to, the lender; (2) had no contractual or legal obligation to provide the proceeds of the sale directly to the lender; and, (3) had a right to use sale proceeds to pay legitimate business expenses. Each of these are addressed in turn.

The security agreement gave LaPean the express right to sell and lease collateral. It specifically states:

> (a) Sale of inventory. So long as no default exists under any of the Obligations or this Agreement, *Debtor may (a) sell inventory in the ordinary course of Debtor's business for cash or on terms customary in the trade*, at prices not less than any minimum sale price on the instruments evidencing Obligations and describing inventory, *or (b) lease or license inventory on terms customary in the trade.*

(Emphasis added) (See e.g. Exhibit 9; 71:66-67).

In addition, LaPean had no obligation to notify the bank when collateral was sold. (71:176). Although Smith implied in her testimony that notification was required, no such contractual obligation actually exists. (see e.g. 73:Ex. 9, security agreements, pp. 3-28). When pressed on this point, she eventually conceded LaPean was never told he had to notify the bank when he sold collateral. (71:167).

Nor was LaPean required to pay the sale "proceeds" directly to the bank. Neither the security agreement nor the promissory notes had any provision for payment upon sale. Rather, they required periodic payments with a balloon.[6]

Finally, nothing in the security agreement prohibited LaPean from using sale proceeds to pay legitimate business expenses. Under similar circumstances, federal bankruptcy cases consistently hold that using sale proceeds to pay business operating expenses, or to reinvest in the business, does not constitute, nor provide evidence of, intent to defraud the lender. These courts reason that trying to stay in business is not a willful targeting of the bank, but rather, in most cases, consistent with an intent to pay the loans back in full by surviving long enough to do so. See e.g. *In re Hartman*, 254 B.R. 669, 674, (2000) (No fraudulent intent shown when debtor reinvested proceeds from sale of collateral into business rather than pay secured creditor. No showing debtor acted deliberately to produce injury to lender); *In re Littleton*, 942 F.2d 551, 554 (1991) (Debtor's use of proceeds from sale of collateral to pay other business debts while inventory financier remained unpaid, even

---

6 For example, the floor plan executed on June 20, 2005, for $650,000.00, required "11 equal payment(s) consisting of principal and interest in the amount of $4,980.58 each, beginning on July 20, 2005 and continuing monthly thereafter, and one (1) final payment consisting of the unpaid principal and all accrued interest remaining due on June 20, 2006" (Exhibit 9; 71:10)

in violation of security agreement, was not malicious, where debtors acted at all times with sincere hope and expectation that they could keep the business going. Bank was not the target); *Ford Motor Credit Company v. Rose*, 183 B.R. 742, 746-747 (1995) (debtor's intentional failure to remit sale proceeds to creditor as required by security agreement not necessarily malicious when unremitted income was applied to normal operating expenses and not used for personal benefit).

The lack of a jury instruction explaining the nature of the security agreement severely prejudiced LaPean, as the State's theory of liability relied heavily on the very conduct the security agreement allowed.

As the state noted in its opening statement:

> The Defendant was the president of the corporation LaPean Implement. LaPean implement borrowed, again, over a million dollars from Security Bank and Westconsin Credit Union. These loans were secured by farm equipment, tractors and combines. .... *There is no business exception for collateral. It was collateral attached to these loans.* There were UCC filings. ***The documents talk about if the equipment is sold the proceeds must go to the bank. That's how collateral works.***
>
> The loans were defaulted on. The tractors and combines are all gone. Again, these were large pieces of equipment. They were never reported stolen. The *bank did not receive payment from the sale of this equipment.*

(Emphasis added) (70:115).

The state stayed on the same theme in its closing:

> Fifteen large pieces of equipment which were collateral are gone. They don't disappear. Sure Security was able to recover money from these CDs, the building and the auction of parts. ***But that doesn't change the fact the Defendant got rid of collateral. Again, you cannot do that. It's against the law.***

> And sure, the Defendant was – ***he wanted to keep the business afloat.*** You know, maybe he's an optimist to the point where if I just break the law and I don't pay off these loans, ***I just sell the property and keep this money, and keep my money, and my business afloat, I'll eventually turn it around. We'll you can't do that.*** And Security Bank is the one left holding the bag.
> ....
> Even in bad times you can't break the law. You have to honor your contracts. *If you are going under, call the bank and tell them, I'm going under. They'll come and get their collateral.* Then it would have been a civil matter. But, no, he was – he knew better. ***He was going to stiff the banks if he could just have another shot to save his business. This is transfer of encumbered property.***
> ...the Defendant removed, transferred or concealed this property. There is not a lot of other options. Another party held the security interest in the property. ...the Defendant knew another held the security interest in the property and he admits that. And that the Defendant removed or transferred the property with intent to defraud. And he did.

(Emphasis added) (71: 193-194).

> Again, I'm not saying it was fraud because he didn't notify the banks of these sales. ***I'm saying it was fraud because he did not turn over the proceeds.***

(Emphasis added) (71:205).

In short, the state argued liability under Wis. Stat. § 943.84(2)(a) based primarily on the very conduct allowed by the security agreement: a) LaPean sold collateral without the bank's knowledge or consent; b) LaPean did not pay all sale proceeds directly to the bank; and, most importantly, c) LaPean diverted sale proceeds to keep his "business afloat." (71: 193).

The lack of guidance on this issue was not missed by the jury. While deliberating, the jury asked the trial court whether there was a "difference in liability between a business loan and a personal" loan. (72:2-3). The trial court refused to give an

answer. (72:3). The jury's question goes directly to the nature of the security agreement. The jury was obviously confused between a consumer loan (where the collateral remains in the debtor's possession and is subject to recovery by the lender until the loan is paid) and revolving credit with floating collateral (where inventory is continually bought and sold). The State caused this confusion starting with voir dire when it compared LaPean's commercial loans to a personal car loan. (70:93). Consistent with that analogy, the State maintained the same theme in opening and closing statements, and throughout the trial: LaPean was guilty because he used the sale proceeds to prop up the business rather than pay the loans off. (71:193-194, 205).

Without instruction as to what was allowed under the security agreement, the real controversy was not fully tried. The jury was unable to distinguish between fixed collateral typical of a consumer loan and revolving collateral in a commercial loan. It had no basis for judging whether LaPean's "conduct" evidenced an intent to defraud or was entirely innocent. If the jury believed the State argument, LaPean was convicted for conduct that was not even criminal.

II. THE EVIDENCE WAS INSUFFICIENT TO PROVE INTENT TO DEFRAUD.

A. Introduction

LaPean was charged with violating Wis. Stat. § 943.84(2)(a), "Transfer of encumbered property." Liability under this statute requires proof of four elements: (1) the defendant concealed, removed, or transferred personal property; (2) that another has a security interest in such personal property; (3) the defendant knew that another held a security interest, and (4) the defendant concealed, removed, or transferred personal property with intent to defraud. See JI-WIS 1470.

The sole contested issue was the fourth element, "intent to defraud." "Intent to defraud" requires "that ***when*** the defendant (transferred) (removed) (concealed) the property, he had a purpose to cause someone pecuniary loss or was aware that his conduct was practically certain to cause that result." (Emphasis added). JI-WIS 1470.

While brought as a single count, the charge was based on eighteen separate pieces of equipment:

> The above named defendant, between June 5, 2007 and March 6, 2009, in Dunn County, Wisconsin, concealed, removed, or transferred any personal property in which he knew another had a security interest in, *to wit: see attached list*, contrary to sec. 943.84(2)(a) Wis. Stats., a Class G felony....

The "attached list" to the amended information (Exhibit 8) contained the following items:

-Case 1200-12R	(CBJ022800)
-Case 1200-12R	(CBJ022880)
-Case 1200-12R	(CBJ022888)
-Case IH 2208 Cornhead	(CBJ024022)

-Case IH MX230	(JA2135201)
-Case IH MX210	(JAX127282)
-Case IH MX210	(JAZ134020)
-Case IH MX285	(JAZ135135)
-Case IH MX210	(JAZ135141)
-Case IH MX210	(JAZ135977)
-Case IH 8930	(JJA0077154)
-Case IH MX270 MFD	(JJA0110807)
-Case IH MX210	(JJA0114654)
-Case IH 2388 COMBINE	(JJC0269973)
-Case IH 1020 20' Grainhead	(JJC0323544)
-Case IH MX200	(JJO117455)
-Case IH 8920	(JJA0077888)
-Case IH MX200	(JJA0117455)

As each of these items would support a separate charge, combining them into a single count creates a duplicity problem.[7] In order to meet unanimity requirements, the State must prove, and the jury must unanimously agree, that each and every one of these collateral items was "transferred," "removed," or "concealed" with intent to defraud.

The question of whether the evidence was sufficient to sustain a verdict of guilt in a criminal prosecution is a question of law. *State v. Booker*, 2006 WI 79, ¶ 12, 292 Wis.2d 43, 717 N.W.2d 676. When conducting such a review, the Court considers the evidence in the light most favorable to the State

---

7 "Duplicity" is the joining of two or more separate offenses in a single count. *State v. Lomagro*, 113 Wis.2d 582, 587, 335 N.W.2d 583 (1983). The prohibition against duplicity serves five goals: (1) to provide the defendant with sufficient notice of the charge, (2) to protect the defendant against double jeopardy, (3) to avoid prejudice and confusion arising from evidentiary rulings during trial, (4) to assure the defendant is appropriately sentenced for the crime charged, and (5) to guarantee jury unanimity. *State v. Miller*, 2002 WI App 197, ¶22, 257 Wis.2d 124, 650 N.W.2d 850. When the jury is presented with evidence of multiple crimes, unanimity is required as to each specific act. *Lomagro,* at 592. LaPean will not further develop a duplicity argument unless the state takes the position it need not prove intent to defraud as to each of the items listed on Exhibit 8.

and will reverse the conviction only where the evidence "is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis.2d 493, 507, 451 N.W.2d 752 (1990) (citation omitted).

The evidence presented at trial was insufficient to support a conviction.

First, the state failed to prove an intent to defraud. There is no evidence the security agreement was violated. LaPean had every right under the agreement to sell his inventory in the ordinary course of business, without prior notice to the bank, and use the sale proceeds for operating expenses and other legitimate business purposes. The state failed to produce any evidence that anything else occurred. In fact, the record is devoid of any evidence showing how even one item on the Exhibit list was sold, transferred, leased or removed.

Second, the bank concedes it had no knowledge of whether LaPean retained possession of any of the collateral listed in the information at the time the floor plan was established in June of 2005. Therefore the state's evidence is devoid of any evidence to support a determination that defendant transferred, removed or concealed encumbered property between June 5, 2007 and March 6, 2009, as alleged in the information.

Each of these will be addressed in turn.

B. The State failed to produce evidence as to any of the alleged fraudulent transactions.

As the Court instructed the jury, intent to defraud must be contemporaneous with the transaction. (71:185) (See e.g. JI-WIS 1470). The state, therefore, had the burden of proving LaPean transferred, removed or concealed encumbered property

with intent to defraud *at the time* the transaction or incident occurred. The State presented no evidence regarding the circumstances under which even one item of collateral listed in Exhibit 8 was transferred, removed, or concealed. There is no evidence as to when, or even if, any of these items were ever on LaPean Implement's property. There is no evidence as to when, where, and to whom they were delivered, and under what circumstances. Nor was there any evidence LaPean received an unexplained financial benefit.

The trial court denied LaPean's postconviction motion, however, reasoning as follows:

> LaPean consented to his inventory being used as collateral and that the inventory be appraised. The collateral was not recouped or located. LaPean testified that he did not have any memory or recollection of what happened to the collateral. The jury heard testimony that the hard drive from LaPean's business computer and related business records were missing. Based on this evidence a jury could conclude that LaPean concealed, removed, or transferred personal property with intent to defraud. The State was not required to present direct evidence of how each of these items was removed, transferred, or concealed. The Court in *Jameson v. State*, 74 Wis.2d 176 (1976), held that when the defendant's actions contributed to the lack of direct evidence regarding the location of the property in a trial for the transfer of encumbered property, the Defendant cannot then claim that the State did not do enough investigation. That conclusion is directly applicable to the instance (sic) case. Here, the jury may have concluded that LaPean intentionally concealed evidence. Therefore, the State did not have to prove where each item of property went to prove intent.

(Appendix, pp. 8-9; 56:6-7).

In essence, the trial court's reasoning is based on four things: 1) the bank had a secured interest in eighteen items; 2) in 2009, these eighteen items were "missing"; 3) the bank did not receive "payment" from these items; and 4) LaPean could not remember nor produce business records documenting what

happened to them. Each of these will be addressed in order.

1. The Bank's secured interest is subject to the terms of the security agreement.

LaPean does not dispute these 18 items were security for his initial, pre-June, 2005, loans. The State, however, produced no evidence whatsoever that any of the first 15 items on the list were owned by LaPean and in his possession at the time the initial loans were consolidated in June of 2005.[8] Nor did the State provide any proof whatsoever that *any* of these items were owned by LaPean and in his possession on June 5, 2007, which is the beginning of the charging period. LaPean, moreover, had every right to sell these items in the ordinary course of business. The State, therefore, has failed to satisfy this element as it has failed to prove Security Bank had a security interest in any of the listed items during the time period he was alleged to have acted to defraud the bank. See also argument, pp. 34-35.

Alternatively, the Bank's security interest is governed by a written agreement. The security agreement: a) expressly allowed LaPean to sell inventory he purchased with the loans in the ordinary course of business; b) did not require LaPean to notify the Bank when inventory was sold; and c) did not require payment to the Bank when inventory was sold. LaPean cannot be convicted of selling encumbered property with intent to defraud when there is no proof his actions were inconsistent with the security agreement.

2. LaPean's non-possession of inventory purchased for resale 4 years earlier does not provide evidence of intent to defraud.

LaPean does not dispute the 18 listed items were not

---

8 Again, three items on the Exhibit 8 list were financed in 2006. (73:exhibits 13, 113).

found in his possession. In fact, he testified they were all sold prior to June of 2005 (with the exception of three items purchased in 2006). The absence of this equipment only proves one thing--LaPean was in the implement selling business. The State's position that farm equipment LaPean purchased for resale in early 2005 would still be on his lot two, three, even four years later exhibits a fundamental misunderstanding of LaPean's business and the security agreement. Again, the security agreement expressly allowed LaPean to sell inventory he purchased with these loans in the ordinary course of business. The loans would have been worthless otherwise. As a practical matter, no businessman would borrow money to buy expensive farm implements unless he expected to sell them quickly--at least within that season. Apart from the interest LaPean was paying, new farm machinery loses value quickly. LaPean's continued possession of these machines in 2007-2009 is what would have been highly unusual, not their absence.

3. The bank was "paid" for inventory it financed through scheduled periodic payments.

Neither the notes nor the security agreements[9] required that proceeds be paid to the bank in a lump sum upon sale. (71:51; see e.g. 73:Ex(s). 9, 10, 11, 12, 13, 113). The loans were serviced through periodic payments. (see e.g. 73: Ex. 9, p. 1; 71:10). The Bank conceded LaPean was current on his loans at least through 2006. (71:20-21, 29, 43). LaPean acted entirely within the terms of the security agreement when he sold the listed items and used the proceeds as he would any other business revenue. The fact that LaPean still owed money after the listed collateral was sold only proves he was in default on

9 The security agreements under the initial 30-day notes were the same. (71:67; 73: Ex. 9, pp. 13-28). If, as LaPean testified, the collateral listed on Exhibit 8 was sold before the loan consolidation took place in June of 2005, the same rules would have applied.

payments. It has no bearing on how the collateral itself was alienated.

4. The missing records do not provide a factual basis for the jury to infer an intent to defraud beyond a reasonable doubt.

LaPean concedes a jury *could* reasonably infer he may have "concealed evidence" based on the missing business records. The question that matters, however, is whether the record provides a factual basis for a jury to infer LaPean transferred, removed or concealed, between June 5, 2007, and March 6, 2009, with intent to defraud, some 18 items worth in excess of $1 million dollars. The answer is no.

An inference of intent to defraud may be proven circumstantially, or "inferred from a defendant's conduct." *State v. Blaisdell*, 85 Wis.2d 172, 179, 270 N.W.2d 69. It may not, however, be based on speculation and conjecture. *State v. Scheidell*, 227 Wis.2d 285, 305, 595 N.W.2d 661 (1999). A jury must be provided with "sufficient credible evidence to support a reasonable inference...." *State v. Abbott Laboratories,* 2012 WI 62, ¶62, 341 Wis.2d 510, 816 N.W.2d 145 Wis.,2012. The State must also prove a specific intent. *Tri-Tech Corp. of America v. Americomp Services, Inc.* 2002 WI 88, ¶ 29, 254 Wis.2d 418, 646 N.W.2d 822 Wis.,2002. A person acts intentionally when he or she "either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." Wis. Stat. § 939.23(3).

Even if the jury could reasonably infer LaPean concealed financial records, it cannot conclude LaPean transferred, removed, or concealed 18 items of collateral with intent to defraud. Without at least some evidence as to the circumstances under which each of these items was transferred, any inference LaPean transferred them other than in the course

of ordinary business is pure speculation. It would be as if the state based its case on evidence that someone ran from the police when accused of a crime, without producing any evidence of the crime itself.

In fact, the State's theory of liability had nothing to do with LaPean concealing records. LaPean defrauded the bank because he "got rid of the collateral" and used the proceeds "to keep his business afloat" rather than paying off the loans. (71:115, 193-195, 205). LaPean was "an optimist to the point where if I just break the law and I don't pay off these loans, I just sell the property and keep this money, and keep my money, and my business afloat, I'll eventually turn it around. Well, you can't do that." (71:193). "[LaPean] was going to stiff the banks if he could just have another shot to save his business. This is transfer of encumbered property." (71:195). It appears the jurors were at least considering the State's argument by their question asking what the difference was between a business loan and a personal loan. The bottom line is that whether LaPean concealed records or not, he was convicted for *conduct* that does not constitute a criminal act.

For similar reasons, the trial court's comparison to *Jameson v. State*, 74 Wis.2d 176, 246 N.W.2d 541 (1976), is completely misplaced. *Jameson* involved a new car purchase financed by a local bank. At the time, Jameson lived in Black River Falls. He made five payments on the sales contract and then stopped. A series of delinquency notices were sent to him without a response. During this time Jameson had moved to Pardeeville. A notice of right to cure was subsequently sent to Jameson and his co-signer. The co-signer informed the bank Jameson now had a Portage address. A loan officer from the bank made two trips to Portage to locate the defendant, without success. A replevin action was filed and a default judgment was entered when Jameson failed to appear. Jameson later mailed counsel for the bank a response to the replevin action. Counsel responded that a default judgment had been obtained, and

demanded return of the automobile, informed Jameson of a 15-day right of redemption, and warned of possible criminal law violations. The Bank later learned that Jameson had moved from Portage to Sun Prairie late at night using a U-Haul trailer. (*Id.* at 179-180). Jameson was charged with one count of violating Wis. Stat. 943.25(2)(a).

The question on appeal was whether Jameson had "removed" the vehicle as contemplated by the statute. Jameson knew he had defaulted on the loan and the bank wanted the car back. Under these circumstances, changing residences twice--once at midnight--without notice to the bank, was sufficient to support a finding he "removed" the vehicle for the purposes of Wis. Stat. § 943.25(2)(a). Jameson argued, nonetheless, that the bank had an affirmative legal duty to ascertain his whereabouts and failed to make a sufficient effort to do so. The Court disagreed, finding no such prerequisite to criminal prosecution on the basis of "removal." The Court noted that: "[k]nowledge or notice of whereabouts *would be relevant as to concealment*, but the statute does not permit a person to play hide-and-go-seek and later complain that the seeker did not try hard enough to locate the hiding place." (Emphasis added) *Id.* at 182.

The trial court somehow interpreted this holding to mean the State had no obligation "to present direct evidence of how each of the items was removed, transferred or concealed" because "when the defendant's actions contributed to the lack of direct evidence regarding the location of property in a trial for the transfer of encumbered personal property, the Defendant cannot claim that the State did not do enough investigation." (Appendix, p. 8; 56:6). The problem with the trial court's analysis is that, unlike *Jameson*, there is no evidence LaPean did anything suspicious with the machinery itself. There is no evidence, for example, that he moved equipment at midnight, met buyers surreptitiously, or hid the proceeds. LaPean's inability to recall or document the current location of the listed items does not, as the trial court implies, relieve the State from

meeting its burden of proof.

The specific question being addressed on appeal in *Jameson*, moreover, was whether the State had to prove the creditor diligently searched for the car before Jameson could be charged with removal or concealment. LaPean, in contrast, has never claimed the Bank failed to diligently search for the equipment. Rather, LaPean contends he sold the collateral in the ordinary course of business. The trial court's postconviction ruling effectively placed an affirmative duty on LaPean to prove he sold these items in the ordinary course of business, rather than the state having to prove he sold them with intent to defraud.

In addition, *Jameson* has no factual or legal analogy to this case. *Jameson* did not involve revolving collateral. Jameson was required to maintain possession of the car until the loan was paid in full. The ever-changing location of the car, therefore, was directly relevant to proving the elements of the offense. In this case, on the other hand, LaPean had clear authority to sell or lease in the ordinary course of business.

The second critical difference was that in *Jameson*, the State produced evidence showing how, when, and under what circumstances Jameson changed his residence and moved his car, knowing he was in default on the loan. The State provided a solid evidentiary basis for the jury to determine *whether* Jameson had *moved* the vehicle *with intent to defraud.* See *Id.*, at 182-183. Here, in contrast, the State failed to produce any evidence showing any of the circumstances under which LaPean transferred the collateral. Its theory of liability was based primarily on LaPean's use of sale proceeds for business expenses rather than paying off the bank's loans.

Under Wis. Stat. § 943.25(2)(a), moreover, a defendant's mental state must be contemporaneous with the transfer of encumbered property. In this case, a transfer could have taken

place at any point between March of 2005 and March of 2009. Without some factual context, a *contemporaneous* mental state cannot possibly be established. The only evidence in the record was LaPean's testimony that these implements were sold prior to June of 2005, long before he would have had any motive or purpose in defrauding the Bank. Likewise, no records were demonstrably "concealed" until years later in 2009, near the time Security Bank seized LaPean's computer and paper records. Even if the jurors rejected LaPean's testimony on the 2005 sales as self-serving, they are left without a factual basis for any alternative timeframe.

An inference of intent to defraud is also undermined by the overall circumstances of this case. Greg LaPean, his wife, and his parents had all signed personal guarantees. (71:11-12) See e.g. *Ford Motor Credit Company v. Rose*, 183 B.R. 742, 747 (1995 W.D. Virginia) (personal guarantee rebuts inference of intent to defraud). Liquidation produced over $1.25 million from assets belonging to LaPean and his parents at auction prices. Apart from all his business assets, LaPean lost his home and other real estate, and his parents lost real estate and personal CDs worth over $130,000. (71:32, 77 125, 129; Ex. 9, pp. 29-31, 42-48; Ex. 15-17). If LaPean was holding 18 pieces of implement collateral on June 5, 2007, as the State alleges in the complaint, he would have been far better off surrendering it.[10] (71:14).

---

10 The Bank claims it was still due approximately $800,000 after the $1.25 million liquidation. (71:167) Assuming LaPean had surrendered the collateral and received credit for what the Bank claims it was worth ($1,195,000), he would have had to liquidate approximately $850,000, rather than $1.25 million in personal assets to pay the Bank in full. This would have left LaPean with at least $400,000 worth of assets free and clear. While, in theory, LaPean may have been able to sell 18 pieces of encumbered implements for more than $400,000 and hid the money, it would have been an extremely difficult thing to do undetected, and it's not likely he would have received anywhere near retail value.

In this case, the State failed to meet its burden. It produced no evidence with regard to any of the circumstances under which any of the collateral listed in Exhibit 8 was transferred, removed, or concealed. Nor was there any evidence showing the equipment was transferred or removed other than in the ordinary course of business. The State's theory of liability, moreover, was based on LaPean using sale proceeds for business expenses rather than paying back the loans--something LaPean was clearly entitled to do under the security agreement. Without at least some evidence showing what happened to the collateral listed in Exhibit 8, no trier of fact, acting reasonably, could have found an intent to defraud.

C. The State failed to produce any evidence LaPean possessed any of the collateral during the period charged.

Alternatively, the evidence is insufficient to convict as a matter of law as there was no evidence presented that any of the collateral listed in the amended information was in Greg LaPean's possession during the charged period. LaPean testified that everything listed on Exhibit 8 as collateral was sold prior to the loan restructuring in June of 2005.[11] Smith conceded she had no personal knowledge of when the property listed on Exhibit 8 was present at LaPean's dealership. (71:16). She also conceded she had no knowledge whether any of the specific collateral listed on Exhibit 8 was present at LaPean's dealership when the loan was restructured in June of 2005. (71: 168-170). She had no idea where any of the items listed on Exhibit 8 were, period. (71:43). Despite her repeatedly testifying the bank had not received any proceeds from the sale of collateral listed on Exhibit 8, she conceded LaPean was making regular payments on the loans at least through December of 2006. (71: 20-21, 29,

11 With the exception of the two heads and combine financed in 2006 at the bottom of the list. (71: 114-115).

43). She further admitted: "I've never said that they have never made a payment. I have said the payments that they've made or the monies received were not sufficient to pay off the debt." (71:12).

In short, there is nothing in the record to support the proposition that Greg LaPean transferred, removed or concealed any of the collateral listed on Exhibit 8 between June 5, 2007 and March 6, 2009. The collateral had long been sold.

Nor would changing the charging dates to an earlier time have made any difference. Security Bank had no legal right to the collateral until LaPean defaulted sometime in 2007. See e.g. *Miracle Feeds, Inc. v. Attica Dairy Farm*, 129 Wis.2d 377, 383, 385 N.W.2d 208 (1986) (Secured creditor may not enforce rights and remedies in floating collateral until debtor defaults). As long as payments were being made and the loans were being kept current, moreover, intent to defraud would be a near legal impossibility.

As the evidence is insufficient to convict under Wis. Stat. § 943.84(2)(a), the Court must enter a judgment of acquittal.

III. ALTERNATIVELY, TRIAL COUNSEL WAS INEFFECTIVE WHEN HE: A) FAILED TO SEEK JURY INSTRUCTIONS EXPLAINING THE TERMS OF THE SECURITY AGREEMENT; AND, 2) FAILED TO MOVE TO DISMISS AT THE CLOSE OF THE STATE'S CASE.

A. Legal Standards.

The defendant was denied his right to effective assistance of counsel under the 6th Amendment of the United States Constitution, and Article I, Section 7 of the Wisconsin Constitution. *Strickland v. Washington*, 466 U.S. 688 (1984); *State v. Pitsch*, 124 Wis.2d 628, 633, 369 N.W.2d 711 (1985).

Wisconsin uses a two-prong test to determine whether trial counsel's actions constitute ineffective assistance of counsel. *State v. Littrup*, 164 Wis.2d 120, 135, 473 N.W.2d 164, 170 (Ct.App. 1991). The first half of the test considers whether trial counsel's performance was deficient. *Id.* Trial counsel's performance is deficient if it falls outside "prevailing professional norms" and is not the result of "reasonable professional judgment." *Strickland*, 466 U.S. at 690. Trial counsel, for example, has a duty to be fully informed on the law pertinent to the action. *State v. Felton*, 110 Wis.2d 485, 506-507, 329 N.W.2d 161, 171 (1983). If counsel's performance is found to be deficient, the second half of the test considers whether the deficient performance prejudiced the defense. *Id.* The defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Harvey*, 139 Wis.2d 353, 375, 407 N.W.2d 235, 246 (1987). The *Strickland* test is not outcome determinative. The defendant need only demonstrate the outcome is suspect. He need not establish the final result of the proceeding would have been different. *State v. Smith*, 207 Wis.2d 258, 275-276, 558 N.W.2d 379, 386 (1997).

The trial court rejected LaPean's ineffective assistance of counsel claims without a hearing. The issue on appeal, therefore, is whether the factual allegations in LaPean's motion, *if true*, would establish both prongs of the *Strickland* test. *State v. Bentley*, 201 Wis.2d 303, 309, 313-318, 548 N.W.2d 50 (1996). If they would, LaPean is entitled to a *Machner* hearing. *Id.* Whether a motion alleges facts which would entitle a defendant to relief is a question of law the appellate court reviews de novo. *Id.* at 310.

B. Trial counsel was ineffective when he failed to request jury instructions explaining the parties' rights and responsibilities under the security agreement.

An unobjected-to jury instruction may be reviewed under a claim of ineffective assistance of counsel. *State v. Marcum*, 166 Wis.2d 908, 916, 480 N.W.2d 545 (Ct.App.1992); See also *State v. Krueger*, 2001 WI App 14, &1, 240 Wis.2d 644, 647, 623 N.W.2d 211, 212 (Trial counsel's failure to object to instruction which did not contain an element of the crime was prejudicial.).

For the same reasons argued above in Section I, trial counsel's performance was deficient when he failed to seek jury instructions consistent with the security agreement; and that deficiency prejudiced LaPean.

C. Trial Counsel was ineffective when he failed to move for dismissal at the end of the state's case.

Trial counsel failed to move for dismissal when the state rested its case. (71: 86). A motion to dismiss would have allowed the defendant to bring an insufficiency of the evidence claim based solely on the evidence presented by the state in its case-in-chief. *State v. Scott*, 2000 WI App 51, ¶10, 234 Wis.2d 129, 608 N.W.2d 753. While the argument in support of a motion to dismiss would be similar to the insufficiency of the evidence argument made above in Section II, the analysis would not include any evidence after the state rested (i.e. post 71:86 in the trial transcript). The trial court could not, for example, draw any inference from LaPean's testimony that he may have concealed evidence.

A motion to dismiss at the end of the state's case would have been meritorious. The state failed to prove any facts showing the circumstances under which even one piece of collateral was transferred, removed, or concealed, much less all

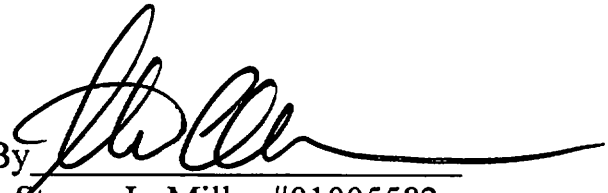
18. It had no factual basis from which a jury could infer LaPean "concealed" evidence--the primary source of inculpatory evidence according to the trial court. There was no conceivable strategic reason for omitting a motion to dismiss at the close of the state's case, moreover, as this is routinely done in nearly every criminal case. Consequently, trial counsel was deficit for failing to bring the motion to dismiss and LaPean was prejudiced because the motion should have been granted.

CONCLUSION

This Court should enter a judgment of acquittal based upon insufficient evidence to convict; or, alternatively, reverse the conviction and remand for a new trial with proper jury instructions; or alternatively, remand for a *Machner* hearing on the ineffective assistance of counsel claims.

Respectfully submitted this 6th day of January, 2013.

MILLER APPELLATE PRACTICE, LLC



By_____
Steven L. Miller #01005582
Attorney for the Defendant-Appellant
P.O. Box 655
River Falls, WI 54022
715-425-9780

CERTIFICATION
As to Form and Length

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b)&(c), as modified by the Court's Order, and that the text is:

Times Roman proportional serif font, printed at a resolution of 300 dots per inch, 14 point body text and 12 point text for quotes and footnotes, with a minimum leading of 2 points and a maximum of 60 characters per line.

The Statement of the Case; Statement of Facts; Argument; and Conclusion sections of this brief contain 9201words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12).
I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 6th day of January, 2013.

MILLER APPELLATE PRACTICE, LLC

By _____
Steven L. Miller #01005582
Attorney for the Defendant-Appellant
P.O. Box 655
River Falls, WI 54022
715-425-9780

CERTIFICATION

As to Compliance with Rule 809.19(2)(b)

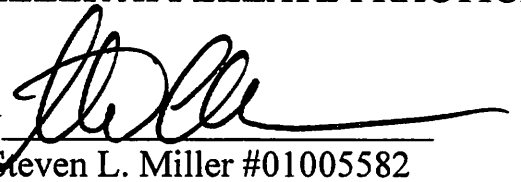
I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, to the extent required: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 6th day of January, 2013.

MILLER APPELLATE PRACTICE, LLC



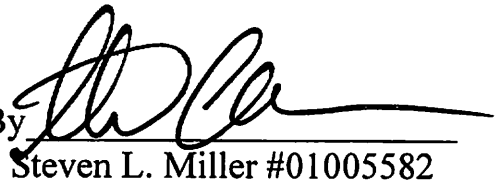
By_____
Steven L. Miller #01005582
Attorney for the Defendant-Appellant
P.O. Box 655
River Falls, WI 54022

CERTIFICATION OF MAILING

I certify that this brief or appendix was deposited in the United States Mail for delivery to the Clerk of the Court of Appeals by First Class Mail on January 7th, 2013. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

Dated this 7th day of January, 2013.

MILLER APPELLATE PRACTICE, LLC



By_____
Steven L. Miller #01005582
Attorney for the Defendant-Appellant
P.O. Box 655
River Falls, WI 54022
715-425-9780