STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2012AP2309-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GREG LAPEAN,

Defendant-Appellant.

ON APPEAL FROM JUDGMENT OF CONVICTION AND SENTENCE AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR DUNN COUNTY, THE HONORABLE WILLIAM C. STEWART, JR. PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED[1]

1. Defendant-appellant Greg LaPean's trial counsel did not request a special jury instruction on the terms of the security agreement.

[1]The State addresses the issues presented in a different order from LaPean's. LaPean's Issue 1 is the State's Issue 1.b.; LaPean's Issue 2 is the State's Issue 3; LaPean's Issue 3.a. is the State's Issue 1.a.; and LaPean's Issue 3.b. is the State's Issue 2.

a. Did trial counsel provide ineffective assistance by failing to request a jury instruction on the terms of the security agreement? (The circuit court answered: no.)

b. Was the real controversy "not fully tried" because of the absence of a jury instruction on the terms of the security agreement? (Not presented to the trial court.)

2. Was trial counsel ineffective for not moving to dismiss at the end of the State's case? (The circuit court answered: no.)

3. Was the evidence at trial sufficient to prove LaPean's intent to defraud? (The circuit court answered: yes.)

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are unnecessary because the issues presented are fully briefed and may be resolved by applying well-established legal principles to undisputed facts.

ARGUMENT

I. TRIAL COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE BY NOT REQUESTING A JURY INSTRUCTION ON THE SECURITY AGREEMENT'S TERMS; THE REAL CONTROVERSY WAS FULLY TRIED DESPITE THE ABSENCE OF SUCH AN INSTRUCTION.

A. Wisconsin's Secured Transactions Law.

Under Wisconsin law, a "security interest" is an interest in personal property that "secures payment or

performance of an obligation." Wis. Stat. § 401.201(2)(t). A creditor with a security interest in a debtor's property is "'a secured party and thus enjoys all the rights that [Wisconsin Statutes] chapter [409] accords secured parties with respect to their collateral.'" *American Wood Dryers, Inc. v. Bombardier Capital, Inc.*, 305 F.Supp.2d 966, 973 (W.D. Wis. 2002). A security interest attaches when: (1) the debtor receives value in exchange for the security interest; (2) "the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party"; and (3) the debtor has authenticated a security agreement that describes the collateral.[2] Wis. Stat. § 409.203(2); *National Exchange Bank of Fond du Lac v. Mann*, 81 Wis.2d 352, 357-58, 260 N.W.2d 716 (1978).

"Collateral" is the "the property subject to a security interest." Wis. Stat. § 409.102(1)(cs). "A security interest attaches to any identifiable proceeds of collateral." Wis. Stat. § 409.315(1)(b); *Commercial Discount Corp. v. Milwaukee Western Bank*, 61 Wis.2d 671, 683-84, 214 N.W.2d 33 (1974). "Proceeds" include "[w]hatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral." Wis. Stat. § 409.102(1)(ps)1.

> There is no requirement that the security agreement state that the secured creditor has a security interest in proceeds of the collateral. When the transaction gives rise to a security interest in the collateral, and the collateral is disposed of by the debtor by way of "sale, exchange, or other disposition," the original security interest in the collateral "continues in any identifiable proceeds" arising from the disposition.

8A LARY LAWRENCE, LAWRENCE'S ANDERSON ON THE UNIFORM COMMERCIAL CODE § 9-203:98 (3d ed. 2007) (citations omitted).

A secured party may "perfect" its security interest by filing a financing statement with the State of Wisconsin

[2]The third criterion may be satisfied in other ways not pertinent to this case. *See* Wis. Stat. § 409.203(2)(c).

Department of Financial Institutions ("DFI") or other "office duly authorized by the department." Wis. Stat. § 409.501(1)(b). "[P]erfection … is usually necessary to preserve the secured party's rights against third parties." *Hanley Implement Co., Inc. v. Riesterer Equipment, Inc.*, 150 Wis.2d 161, 166, 441 N.W.2d 304 (Ct. App. 1989).

A security interest is "not invalid or fraudulent" if it allows the debtor to use, commingle, or dispose of the collateral or proceeds from the collateral. Wis. Stat. § 409.205(1)(a)1. Thus, a bank-creditor may allow the debtor "unfettered control" over the collateral "without losing its security interest." *Miracle Feeds, Inc. v. Attica Dairy Farm*, 129 Wis.2d 377, 381, 385 N.W.2d 208 (Ct. App. 1986); *accord Burlington Nat'l Bank v. Strauss*, 50 Wis.2d 270, 274, 184 N.W.2d 122 (1971).

A purchase-money security interest ("PMSI") is a specific type of security interest. According to the Wisconsin Uniform Commercial Code ("UCC") provision defining PMSI:

> (a) "Purchase-money collateral" means goods or software that secures a purchase-money obligation incurred with respect to that collateral.
>
> (b) "Purchase-money obligation" means an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used.

Wis. Stat. § 409.103(1).

The UCC ensures that the status of a PMSI in collateral is robust, and does not disappear or diminish if the parties restructure their financial arrangements:

> In a transaction other than a consumer-goods transaction, a purchase-money security interest does not lose its status as such, even if:
>
> (a) The purchase-money collateral also secures an obligation that is not a purchase-money obligation;

> (b) Collateral that is not purchase-money collateral also secures the purchase-money obligation; or
>
> (c) The purchase-money obligation has been renewed, refinanced, consolidated, or restructured.

Wis. Stat. § 409.103(6).

B. Facts.

Defendant-appellant Gregory LaPean was the president of LaPean Implement, Inc. (71:93). In an Amended Information filed September 7, 2011, LaPean was charged with one count of violating Wis. Stat. § 943.84(2)(a) (10). Specifically, he was accused of concealing, removing or transferring personal property in which he knew Security Bank had a security interest between June 5, 2007 and March 6, 2009 (1:2; 10:1). The personal property consisted of eighteen pieces of large farm equipment (10:2).

In a series of commercial loans, Security provided LaPean Implement, Inc. with the financing it needed to purchase the farm equipment (73:Exhs.9, 13, 113, 115-20, R-Ap. 101-40; 71:13). In each agreement, the equipment being purchased was listed as the collateral for the loan (R-Ap. 101, 103, 106, 108, 111, 113, 116, 118, 121, 123, 126, 128, 131, 133, 136, 138; 71:57). Security's Vice President Karen Smith testified that "they're specific purchase money, which means … he borrowed the funds to purchase those specific items of equipment" (71:13). "[M]any times [Security] would wire the money [from the PMSI loans] to where they were purchasing it from" (71:20). LaPean acknowledged that he used the money from those loans to purchase the specified equipment (71:107). Accordingly, the specified collateral was designated as "Purchase Money Security Interest" or "PMSI" (R-Ap. 103, 113, 118, 123, 128, 133, 138; 71:13).[3]

[3]The April 1, 2005 loan agreement is an exception to this rule (R-Ap. 108). However, despite the fact that the paperwork does

Security and LaPean used a form loan document entitled "Selective Business Security Agreement" ("SBSA"). The same form was used for each of the loans, which were dated: March 17, 2005, April 1, 2005, April 5, 2005, April 18, 2005, April 27, 2005, May 5, 2005, July 27, 2006, and August 28, 2006 (R-Ap. 103-06, 108-10, 113-15, 118-20, 123-25, 128-30, 133-35, 138-40). On all the 2005 agreements, the parties checked the "Specific Collateral" box to indicate the collateral supporting the loan, *i.e.*, the equipment being purchased (R-Ap. 103, 108, 113, 118, 123, 128). The 2006 agreements also listed the equipment being purchased as "Specific Collateral" (R-Ap. 133, 138). However, in these agreements, the parties also checked the "All Collateral" box:

> If checked here, all equipment, fixtures, inventory, documents, general intangibles, accounts, deposit accounts (unless a security interest would render a nontaxable account taxable), contract rights, chattel paper, patents, trademarks and copyrights (and the good will associated with and registrations and licenses of any of them), instruments, letter of credit rights and investment property, now owned or hereafter acquired by Debtor (or by Debtor with spouse)[.]

Id.

On June 20, 2005, Security made four additional agreements with LaPean. In the Business Note creating the first of these agreements, Security lent LaPean $650,000 for the purpose of refinancing a pre-existing loan agreement with Bremer Bank (73:Exh.9, R-Ap. 141; 71:61). Security required "additional collateral" (71:61). On the SBSA form attached to this note, the parties checked only the "All Collateral" box to indicate the collateral securing the agreement (R-Ap. 143). It was further secured by a real estate mortgage, an assignment of leases and rents, "Continuing Guaranty[s]" signed by

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not identify the collateral as purchase-money, it meets the statutory definition of purchase-money collateral. *See* Wis. Stat. § 409.103(2)(a).

LaPean, his wife and parents, a certificate of deposit owned by LaPean's parents, and an assignment of LaPean's life insurance policy (73:Exh.9). That same day, LaPean took out two smaller loans for the purpose of refinancing the pre-existing loan agreement with Bremer Bank (73:Exhs.10-11). Only the "All Collateral" box was checked on the SBSA form for those loans (*id.*).

Security's final agreement with LaPean that day was for a "revolving line of credit to LaPean Implement, Incorporated, in the amount of $775,000" (71:18). Again, on the SBSA form for that agreement only the "All Collateral" box was checked (73:Exh.12). The line of credit was further secured by the assignment of LaPean's (and his wife's) life insurance policies, their continuing guaranties, real estate, and several enumerated vehicles (*id.*).

At trial, defense counsel Brian Wright asked Security V.P. Smith about the June 2005 agreements: "from an internal banking standpoint, what was really happening in June is that those initial notes were being paid off?" (71:63). Smith answered: "No, they were never paid off. They were renewed but never paid" (*id.*). Smith explained that the "six initial notes" "were renewed into" the later notes (71:68). Smith accepted Wright's characterization of some or all of the June 2005 agreements as "the restructure" (71:67-69). She agreed that the previously financed farm equipment was collateral on all of the subsequent "restructured notes" (71:10, 15-16, 18, 83). To Smith's knowledge, that collateral "still existed [at the time of] the restructuring" (71:83).

Security was never informed that any of the purchase-money collateral was sold (71:82-83). Smith explained that, despite the "restructure," LaPean was not free to dispose of this collateral at his own discretion. "The specific pieces we had specific filings[4] on, like a car title, you can't just sell your car and not release your lien

[4]Security filed financing statements with DFI (71:81-82; 73:Exhs.106-11).

or pay off your lienholder" (71:84). "Our liens are purchase money security interest, which takes precedence over any filing, any other filings" (71:85). Furthermore, LaPean was required to give Security any proceeds from the sale of the purchase-money collateral to pay off the very loans that enabled him to buy that collateral in the first place (*id.*).

The following provisions of the SBSA[5] are relevant to the present argument:

> **1. SECURITY INTEREST**
>
> The undersigned … grants Security Bank ("Lender") a security interest in property, wherever located, checked in Section 2 ("Collateral") to secure all debts, obligations and liabilities of any Debtor to Lender arising out of credit previously granted, credit contemporaneously granted and credit granted in the future by Lender to any Debtor, to any Debtor and another, or to another guaranteed or indorsed by any Debtor ("Obligations").
>
> ….
>
> **3. DEBTOR'S WARRANTIES**
>
> Debtor warrants that while any of the Obligations are unpaid:
>
> **(a) Ownership and use.** Debtor owns (or with spouse owns) the Collateral free of all encumbrances and security interests (except Lender's security interest)….
>
> ….
>
> **(j) Name and Address.** Debtor's exact legal name is as set forth below Section 10…. If Debtor is an organization that has only one place of business, the address of Debtor's place of business … is as set forth below Section 10.

[5]The form varied slightly over the years, but remained identical in all subsections quoted in this brief.

(k) Location. The address where the Collateral will be kept, if different from that appearing below Section 10, is _____. Such location shall not be changed without prior written consent of Lender, but the parties intend that the Collateral, wherever located, is covered by this Agreement.

….

5. SALE AND COLLECTIONS

(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 shown on instruments evidencing Obligations and describing inventory, or (b) lease or license inventory on terms customary in the trade.

….

(c) Deposit with Lender. At any time Lender may require that all proceeds of Collateral received by Debtor shall be held by Debtor upon an express trust for Lender, shall not be commingled with any other funds or property of Debtor and shall be turned over to Lender in precisely the form received (but indorsed by Debtor if necessary for collection) not later than the business day following the day of their receipt. Except as provided in Section 5(d) below, all proceeds of Collateral received by Lender directly or from Debtor shall be applied against the Obligations in such order and at such times as Lender shall determine.

6. DEBTOR'S COVENANTS

….

(f) Inspection of Collateral. At reasonable times Lender may examine the Collateral and Debtor's records pertaining to it, wherever located, and make copies of records, and Debtor shall assist Lender in so doing.

9. INTERPRETATION

The validity, construction and enforcement of this Agreement are governed by the internal laws of Wisconsin. All terms not otherwise defined have the meanings assigned to them by the Wisconsin Uniform Commercial Code ….

10. PERSONS BOUND AND OTHER PROVISIONS.

… ___ If checked here, this Agreement amends and replaces in their entirety the provisions of all existing Selective Business Security Agreements between Debtor and Lender, provided, however, that all security interests granted to Lender under those existing agreements shall remain in full force and effect, subject to the provisions of this Agreement.

Address: 5913 3M Drive LaPean Implement, Inc.
SEE SECTIONS 3(j) AND (k)

Menomonie, WI 54751 A Wisconsin Corporation
TYPE OF ORGANIZATION

WISCONSIN
STATE OF ORGANIZATION

(R-Ap. 103-05, 108-10, 113-15, 118-20, 123-25, 128-30, 133-35, 138-40).

The parties did not check the box indicating that "this Agreement amends and replaces in their entirety the provisions of all Selective Business Security Business Agreements" in any of the agreements (R-Ap. 105, 110, 115, 120, 125, 130, 135, 140).

LaPean stopped making regular payments on his loans at the end of 2006 (71:29). When Security V.P. Karen Smith "would call for the past due status every week, many times I was told that the equipment was being sent out … somebody was renting it, or … testing it out" (71:30), "or it was in storage off-site" (71:37) Smith was never told that the collateral had been sold (71:169). Security filed a writ of replevin and received a judgment against LaPean. When "the sheriff went to issue the writ

of replevin," the "specific items of collateral … couldn't be found" (71:36, 38). Only then did Security learn definitively that the purchase-money collateral was gone (71:38). At the time of trial, the PMSI collateral on the 2005 and 2006 loans had not been paid for, and Security did not know where it was located (71:13-14, 21, 36).

The trial court instructed the jury using Wisconsin JI-Criminal 1470, the model instruction for Wis. Stat. § 943.84 (71:184-85). The model instruction includes an optional "presumption" paragraph, which allows the jury to presume the defendant's fraudulent intent if the State satisfies certain factual conditions. Wis. JI-Criminal 1470. The State asked the court to include this paragraph in the instruction (71:144). Defense counsel Wright argued that the State's evidence did not satisfy the factual predicate (71:145). The court agreed and refused to give the instruction (71:175-76).

In the course of discussing the presumption language, Wright mentioned "express language in the security agreements … that Lapean Implement could sell the equipment on the list that is going to be presented in the normal and ordinary course of business" (70:212). He did not, however, ask for any specific instruction on this ground (*id.*). Wright had cross-examined Smith about this language (71:66-67). He also alluded to it in his opening and closing statements (70:120; 71:198). In closing, he asked the jury "to look at the security agreements," which the judge sent to the jury room along with all the other exhibits (71:198, 211). Nevertheless, as the court noted during the instruction conference, neither counsel "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" (71:175).

During deliberations, the jury asked: "what are the differences in liability between a business loan and a personal" (72:3). The court concluded that it would not answer that question "because they're bound by the evidence that they received at trial. And if they didn't

hear what that difference is at trial, then they can't consider it" (*id.*).

In his postconviction motion, LaPean argued, *inter alia*, that defense counsel provided ineffective assistance by failing to request special jury instructions regarding the terms of the SBSA (50:9-12). The court rejected the argument.

> First, the Defendant does not provide any evidence that requesting these instructions is within prevailing professional norms. It is this Court's determination that based on other trials in this county, asking for these specific, unique jury instructions is not within the "prevailing professional norms." Finally, this Court is not persuaded that had trial counsel requested these unique instructions, and had this Court determined that the inclusions [sic] of these instructions were appropriate, that there is any reason to believe that the outcome would be different. Repeatedly trial counsel made the three points that the Defendant argues should have been included in the jury instructions in trial. The jury was cognizant of Defendant's argument, yet still requested clarification on the "difference in liability between a business loan and a personal" loan. Including Defendant's argument in the jury instruction would not have prevented this question or confusion. Furthermore, putting the jury's possible confusion aside, the Court is not persuaded that including the proposed instructions would have changed the jury's ultimate finding that the Defendant was guilty of transfer of encumbered personal property with intent to defraud.

(56:9).

C. Analysis.

1. LaPean's argument; the State's theory of the case; the SBSA interpreted.

On appeal, LaPean argues that the jury should have been instructed on the terms of the SBSA. Because "[t]he

only contested element in this case was intent to defraud," the jury needed to know the terms in the SBSA giving LaPean the freedom to sell the collateral. LaPean's Brief at 17. According to LaPean:

> 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.

Id. at 18.

The paper record of LaPean's relationship with Security is very large. The court received into evidence the substantial documentation of this relationship, primarily consisting of business notes, SBSAs, and other contractual documents (73:Exhs.9-13, 113-23). The court sent all of those exhibits to the jury room for the jury to consider during deliberations (71:211).

LaPean emphasizes a single paragraph from the SBSA, paragraph (5)(a), to support his contention that he "had a right to sell or lease collateral without the consent of, and without notice to" Security. (For the text of paragraph (5)(a), *see supra* at 9.) LaPean takes paragraph (5)(a) out of context, ignoring the rest of the SBSA as well as applicable Wisconsin law, incorporated into the SBSA by reference. *See supra* at 10.

Paragraph (5)(a) provides that, in the absence of default, LaPean was permitted to "sell inventory in the ordinary course of [his] business … or … lease or license inventory." *See supra* at 9. LaPean's counsel presented this fact to the jury (70:120; 71:66-67, 198). The State never suggested that LaPean lacked this authority. On the contrary, the State's theory of the case was that LaPean committed fraud because he failed to pay the sales proceeds to Security. "The bank did not receive payment from the sale of this equipment" (70:115). "[Security] did not receive proceeds from the sale of this equipment"

(70:116). "I'm saying it was fraud because he did not turn over the proceeds" to Security (71:205).

LaPean's right to "sell inventory" did not defeat Security's security interest. *See* Wis. Stat. § 409.205; *Miracle Feeds*, 129 Wis.2d at 381. Regardless of his right to sell any given piece of collateral, LaPean still had an obligation to pay his debt to Security on that same piece of collateral.

LaPean claims that he had a right to sell the specified PMSI collateral "without notice" to Security. LaPean's Brief at 18. That is not true. Paragraph (3)(a) of the SBSA contains LaPean's warranty that, as long as "any of the Obligations are unpaid," he "*owns* … the Collateral free of all encumbrances and security interests." *See supra* at 8 (emphasis added). As soon as LaPean sold a piece of collateral, he no longer owned it. Therefore, the warranty required him to inform Security about this change in ownership. The SBSA also contains LaPean's warranty (in paragraph (3)(k)) that the "location [of the collateral] shall not be changed without prior written consent of the Lender." *See supra* at 8-9. In other words, LaPean was required to inform Security of any change of address made during the term of the loan. *See Fulton v. Anchor Savings Bank*, 452 S.E.2d 208, 216 (Ga. 1994). When LaPean sold any piece of collateral and its location thereby changed, this warranty required him to obtain Security's written consent. LaPean did not comply with either of these contractual provisions.

LaPean also claims that he had "no contractual or legal obligation" to pay the proceeds of the collateral sales directly to Security. LaPean's Brief at 18. The UCC specifically provides that Security has a security interest in the proceeds of the collateral. *See* Wis. Stat. § 409.315. Security V.P. Smith testified that LaPean *was* required to turn over any proceeds to Security from the sale of the collateral (71:85). Paragraph (5)(c) of the SBSA provides that "Lender *may require* that all proceeds of Collateral received by Debtor upon an express trust for Lender, shall not be commingled with any other funds or property of

Debtor and shall be turned over to Lender in precisely the form received … not later than the business day following the day of their receipt." (emphasis added). *See supra* at 9. Without notice from LaPean that he had sold any given piece of collateral, Security was unable to act on its contractual right to "require" LaPean to take any of the specified actions with respect to the collateral sale proceeds, including turning them over to Security "the day after their receipt" (*id.*).

LaPean finally argues that he had "a right to use sale proceeds to pay legitimate business expenses." LaPean's Brief at 18. He cites no provision in the SBSA that supports this contention. As shown above, LaPean was required to notify Security of any sale of collateral, Security had a security interest in the proceeds from the sale of collateral, and Security had a right to require immediate payment to Security of those proceeds. The State cannot divine where in this arrangement LaPean finds the right asserted above. Because he fails to support the argument either factually or legally, this court should not consider it. *See Keplin v. Hardware Mut. Cas. Co.*, 24 Wis.2d 319, 324, 129 N.W.2d 321 (1964); *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992):

Security had a purchase-money security interest in eighteen specific pieces of farm equipment collateral. *See supra* at 5. Those individual PMSIs survived the "restructure" of June 2005 under the statutes. *See* Wis. Stat. § 409.103(6). And, by the terms of the SBSA, the first six contracts remained in force even as the parties entered subsequent contracts. None of those contracts "amend[ed or] replace[d] in their entirety the provisions of all existing Selective Business Security Agreements between Debtor and Lender." *See supra* at 10.

Under the SBSA and Wisconsin's UCC, LaPean did not act within his rights by selling the purchase-money collateral without notifying Security and without paying Security the proceeds from those sales. Therefore, as will be shown in the next three subsections, he did not receive ineffective assistance of counsel and is not entitled to a

new trial in the interest of justice because the jury was not instructed on the terms of the SBSA.

2. LaPean has not shown that a special jury instruction was warranted.

A party may ask the trial court to give the jury a special instruction. *See* Wis. Stat. § 972.10(5). Opposing counsel must be given the opportunity to review and object to such an instruction.

> Counsel … shall specify and state the particular ground on which the instruction is objected to, and it shall not be sufficient to object generally that the instruction does not state the law, or is against the law, but the objection shall specify with particularity how the instruction is insufficient or does not state the law or to what particular language there is an objection….

Id.

A trial court has broad discretion in deciding whether to give a particular jury instruction. *State v. Hemphill*, 2006 WI App 185, ¶8, 296 Wis.2d 198, 722 N.W.2d 393 (citation omitted). Absent prejudice, the refusal of a special instruction does not warrant a new trial. *See State v. Peterson*, 220 Wis.2d 474, 482, 584 N.W.2d 144 (Ct. App. 1998).

LaPean complains that the jury "was not instructed on the parties' rights and responsibilities under the security agreement," and that there was "no mention of the security agreement … in the jury instructions." LaPean's Brief at 17-18. He concludes that "[t]he lack of a jury instruction explaining the nature of the security agreement severely prejudiced" him, and that "[w]ithout instruction as to what was allowed under the security agreement, the real controversy was not fully tried." *Id.* at 20, 22.

LaPean does not tell this court precisely how the jury should have been instructed with regard to the parties' rights and responsibilities under the SBSA. He provides no language to enable the State to "specify with particularity how the instruction is insufficient or does not state the law or to what particular language there is an objection." Wis. Stat. § 972.10(5).

LaPean makes two general points: that the jury should have been instructed about the terms of the SBSA and that paragraph (5)(a) of the SBSA proves that he did nothing wrong. However, the State has shown in the previous section that reading paragraph (5)(a) together with paragraphs (3)(a), (3)(k), and (5)(c)—as well as the relevant UCC provisions—reveals that paragraph (5)(a) did not permit LaPean's sale of the PMSI collateral without notifying or paying Security or enabling it to collect the proceeds. *See supra* at 13-15. Therefore, the State can imagine no *legally correct* jury instruction that would have supported LaPean's theory of the case.

Should the jury have been instructed on the terms of paragraph (5)(a) only? The State would have objected to such an instruction because, taken out of context, paragraph (5)(a) distorts LaPean's rights and responsibilities under the SBSA. Should the jury have been instructed on *all* of the terms of the contract? The State would have objected to such an instruction as so excessive as to be totally useless to the jury. Should the jury have been instructed on the terms of paragraphs (3)(a), (3)(k), and (5)(c) as well as paragraph (5)(a)? Perhaps, but as these provisions support the State's position rather than LaPean's, the absence of such an instruction did not prejudice LaPean. If the court had instructed the jury on one or all of the SBSA provisions, what would the instruction have looked like? Would it simply recite the language of the contract? Or would it include an interpretation of the contract language with or without reference to other sections of the contract, the UCC, and applicable case law?

The State believes that the circuit court would have refused the instruction desired by LaPean. Because LaPean has suggested no legally correct instruction the absence of which was prejudicial to his defense, the refusal of such an instruction would have been an appropriate exercise of the court's discretion. *See Hemphill*, 296 Wis.2d 198, ¶8. It is LaPean's duty on appeal to articulate the terms of the jury instruction he believes should have been given. By failing to do so he fails to develop his argument adequately for appeal. *See Pettit*, 171 Wis.2d at 646. This court should not address such an undeveloped argument. *See id.*

3. Ineffective assistance of counsel.

To prove an ineffective assistance of counsel claim, the defendant must show that counsel's performance was deficient and prejudicial to the defense. *See Strickland v. Washington*, 466 U.S. 668, 692 (1984). The defendant must prove both elements. *State v. Liukonen*, 2004 WI App 157, ¶18, 276 Wis.2d 64, 686 N.W.2d 689. If the defendant fails on one prong, the court need not address the other. *See Strickland*, 466 U.S. at 697.

To establish deficient performance, the defendant must identify serious attorney errors that cannot be justified under an objective standard of reasonable professional judgment. *See id.* at 688. An attorney does not perform deficiently by foregoing a meritless argument. *State v. Toliver*, 187 Wis.2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). Further, "the rule that an attorney is not liable for an error of judgment on an unsettled proposition of law is universally recognized…." *State v. Maloney*, 2005 WI 74, ¶23, 281 Wis.2d 595, 698 N.W.2d 583 (citations and quotation marks omitted). Instead, counsel can be ineffective only "where the law or duty is clear such that reasonable counsel should know enough to raise the issue." *State v. McMahon*, 186 Wis.2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994). This rule is consistent with *Strickland*'s objective standard of performance. *State v.*

Van Buren, 2008 WI App 26, ¶19, 307 Wis.2d 447, 746 N.W.2d 545.

The defendant must "offer more than rank speculation to satisfy the prejudice prong." *State v. Erickson*, 227 Wis.2d 758, 774, 596 N.W.2d 749 (1999). The test is whether "counsel's errors were so serious as to deprive the [client] of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. The client must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "The defendant cannot meet this burden by simply showing that an error had *some conceivable effect* on the outcome." *State v. Koller*, 2001 WI App 253, ¶9, 248 Wis.2d 259, 635 N.W.2d 838 (emphasis added).

A postconviction "*Machner* hearing" is a prerequisite to appellate review of an ineffective assistance of counsel claim. *State v. Curtis*, 218 Wis.2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998) (explaining *State v. Machner*, 92 Wis.2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979)). If a postconviction motion "alleges sufficient material facts that, if true, would entitle the defendant to relief . . . the circuit court *must* hold an evidentiary hearing." *State v. Allen*, 2004 WI 106, ¶9, 274 Wis.2d 568, 682 N.W.2d 433 (emphasis added). A circuit court, in its discretion, *may* deny the motion without a hearing

> "if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing."

State v. Bentley, 201 Wis.2d 303, 309-10, 548 N.W.2d 50 (1996) (quoting *Nelson v. State*, 54 Wis.2d 489, 497-98, 195 N.W.2d 629 (1972)).

On appeal, an ineffective assistance of counsel claim presents a mixed question of law and fact. *State v.*

Mayo, 2007 WI 78, ¶32, 301 Wis.2d 642, 734 N.W.2d 115 (citations omitted). The circuit court's factual findings are upheld unless clearly erroneous; whether counsel's performance was deficient and prejudicial to the defense is a question of law reviewable de novo. *Id.* The court's decision to resolve the motion without a hearing is reviewed for erroneous exercise of discretion. *See Allen*, 274 Wis.2d 568, ¶34.

Wright did not request special jury instructions based on the terms of the SBSA. LaPean argues that he thereby provided ineffective assistance.

LaPean has failed to prove that Wright performed deficiently. First, as the circuit court noted, LaPean provided no "evidence that requesting these instructions is within 'prevailing professional norms'" (56:9). Thus, LaPean fails to prove deficient performance because counsel can be ineffective only "where the law or duty is clear such that reasonable counsel should know enough to raise the issue." *McMahon*, 186 Wis.2d at 85. Second, as the State has set forth above, LaPean has failed to articulate legally correct instructions not requested by Wright. Without the text of foregone instructions, we simply cannot tell whether Wright's failure to request them was deficient performance. For this additional reason, LaPean fails to prove deficient performance.

LaPean has also failed to prove prejudice. He fails to show that the circuit court would have given the jury special instructions on the SBSA had Wright requested them. The State explored above the possible form special jury instructions might have taken. *See supra* at 17. The State believes that, for the reasons given above, the prosecution would have objected to such proposed instructions, and the court would have refused to give them. *See id.* Further, as the court below observed, such instructions would not have "changed the jury's ultimate finding that the Defendant was guilty of transfer of encumbered personal property with intent to defraud" (56:9). This is because LaPean has offered no legally correct instructions that would have relieved him of

criminal liability. Under the State's analysis of the relevant provisions of the SBSA and the UCC, LaPean's general theory of this case is simply wrong.

LaPean invokes the jury's question about "the differences in liability between a business loan and a personal" (72:3). Without citation to the record or any legal authority, LaPean purports to explain that:

> 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).

LaPean's Brief at 22. The State questions the source of LaPean's definitions, and further questions the relevance of "revolving credit with floating collateral" here. More important than those unanswered questions is the following: how does this jury question relate to the special instructions LaPean wishes the jury had been given? The State has no idea how those ungiven non-articulated instructions would have prevented the jury's "obvious confusion" or answered the jury's question. LaPean does not connect the dots.

LaPean has failed to prove either deficient performance or prejudice. Therefore, he has failed to prove ineffective assistance of counsel. *See Liukonen*, 276 Wis.2d 64, ¶18. The judgment of the court below should be affirmed.

4. Wis. Stat. § 752.35.

This court may grant a new trial in the interest of justice "if it appears from the record that the real controversy has not been fully tried." Wis. Stat. § 752.35. A "real controversy" claim may be based on erroneous jury instructions. *See State v. Grobstick*, 200 Wis.2d 242, 253, 546 N.W.2d 187 (Ct. App. 1996). Where a "real controversy" claim is based on errors by counsel, "the

Strickland test is the proper test to apply." *Mayo*, 301 Wis.2d 642, ¶60.

The State has shown above that Wright was not ineffective for "failing" to request a special jury instruction. Therefore, LaPean is not entitled to a new trial in the interest of justice on this ground. *See Mayo*, 301 Wis.2d 642, ¶60.

Moreover, LaPean has failed to show that the "real controversy" was not fully tried. Citing relevant provisions of the SBSA and the UCC, the State has shown that LaPean's theory of the case—that he was free to do the very things that led to this criminal prosecution—is wrong. *See supra* at 13-15. The real controversy here was whether LaPean transferred personal property encumbered by Security's security interest with the intent to defraud (71:184-85). That controversy was fully tried. LaPean's isolated emphasis on paragraph (5)(a) and his misapprehension of its significance do not alter that fact.

II. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR NOT MOVING TO DISMISS AT THE END OF THE STATE'S CASE.

A. Facts.

The State's prima facie case on the Security count was wholly based on the testimony of Security V.P. Smith and exhibits introduced in connection with her testimony.

Between March and May 2005, Security and LaPean entered six PMSI agreements enabling LaPean to purchase eighteen pieces of farm equipment. *See supra* at 5. In June 2005, the parties made four additional security agreements, collectively referred to as the "restructure." *See supra* at 6-7. The June 2005 loans were collateralized by a great deal of property, including LaPean's entire inventory, real estate holdings, and his parents' certificates of deposit. *See id.* Smith testified that the previously financed farm equipment was also collateral on the

"restructured notes" (71:10, 15-16, 18, 83). The two loan agreements made in 2006 were PMSI loans that were also secured by LaPean's entire inventory (R-Ap. 133, 138).

Smith testified that all the loan agreements between Security and LaPean were "cross-collateralized, which means regardless of the loan this is still our security … everything is secured by everything" (71:16).

Smith testified that the purchase-money collateral financed in 2005 "still existed [at the time of] the restructuring" in June 2005 (71:83). Those loans "were never paid off. They were renewed [into the later notes] but never paid" (71:63).

LaPean stopped making regular payments on his loans at the "tail end" of December 2006 (71:29). Some "sporadic payments" followed (*id.*). At this point, Smith began weekly loan meetings with LaPean. "[A]s soon as somebody becomes 15 days past due the loan officer calls them" (71:29). She called on a weekly basis (71:38).

> [W]hen I would call for the past due status every week, many times I was told that the equipment was being sent out … somebody was renting it, or somebody was testing it out. And the times we went there I didn't check specific serial numbers. What was there was there.

(71:30). She saw some of the purchase-money collateral on the premises during this period (*id.*).

LaPean held an auction on June 5, 2007 to reduce inventory and get rid of unneeded property (71:24, 37). Smith recalled that LaPean gave various explanations for the absence of the PMSI collateral from his premises during the auction.

> [He would say that] somebody was using it; they had rented it out, or it was in storage off-site. That's what we were told the day of the auction that was held, the first auction, that we were a bit alarmed because there wasn't a lot of equipment on the lot during this auction. And we were told it was

> moved off-site so nothing would inadvertently get sold at the auction or that somebody would think it was part of the auction.

(71:37). Smith went to LaPean's premises again after that auction. She saw some of Security's collateral there at those times, but not all of it (71:38).

Smith recalled an aborted transaction on or around March 6, 2009.

> [W]e had a customer [Craig Brown] that came in to borrow money to purchase two tractors from Lapean Implement. We … have pictures of the two tractors he was intending to purchase, gave him a cashiers check made payable to Lapean Implement and Security Bank since … the monies were owed to us for these two tractors.
>
> ….
>
> When our customer went to deliver the check and pick up the tractors, since our check was made out to Lapean Implement and Security Bank, Greg refused the sale. And our customer returned the check to us, and the sale was void because Greg wanted cash.

(71:34; 73:Exh.20). Smith inferred that LaPean wanted to avoid paying Security for the collateral (71:35). She also deduced that someone must have come along and bought the tractors with cash, "[b]ecause the tractors are gone" (*id.*).

On July 1, 2009, Security received a judgment against LaPean for the return of its secured collateral (73:Exh.24:1). A writ of replevin was issued, which listed the eighteen pieces of collateral underlying the present case as well as several other pieces of equipment and vehicles (*id.*:2). The property was supposed to "be seized immediately and delivered to us," but when "the sheriff went to issue the writ of replevin," the "specific items of collateral … couldn't be found" (71:36, 38). LaPean offered no explanation (71:39).

Only then did Security learn definitively that the purchase-money collateral was gone (71:38). "[W]e had indications that things were missing. But until there was a court order, that's when we really determined … they didn't have it" (*id.*). Security had never been informed that any of the purchase-money collateral had been sold (71:82-83, 169).

Security did not receive the proceeds from the sale of the PMSI collateral (71:45). However, Smith admitted that LaPean might have made *some* payments on these loans. "I have said the payments that they've made or the monies that we received were not sufficient to pay off their debt" (71:68).

At the time of trial, the eighteen pieces of farm equipment serving as collateral on the 2005 and 2006 loans had not been paid for, and Security still did not know where they were located (71:13-14, 21, 36). "The monies are still owed on [the loans], but we don't have the tractors or the equipment" (71:14). The total value of the purchase-money collateral on those loans was $1,195,000 (71:14). As of December 31, 2009, LaPean still owed Security $1,136,709.78 on the various loan agreements (71:22). At the time of trial, in September 2011, Smith estimated Security's total loss to be "in the neighborhood of $800,000" (71:167).

In his postconviction motion, LaPean argued, *inter alia*, that defense counsel provided ineffective assistance for failing to move to dismiss at the close of the State's case (50:8-9). The court rejected the argument. The court found no deficient performance. Because "the State presented a prima facie case against LaPean in its case-in-chief, it is within professional norms to opt against making a motion to dismiss" (56:8). The court also found no prejudice. Because the State had made a prima facie case, the court would have denied a motion to dismiss (*id.*).

> The State provided evidence that items at LaPean's business had been used as collateral for the

> restructuring of a loan. The State further provided evidence that LaPean became elusive and would not show the bank the collateral. When it came time to repossess the collateral, there was testimony that a number of items of collateral could not be found or located and LaPean did not disclose where these items were. This evidence, in addition to other evidence in the record, made a prima facie case against the Defendant.

(*Id.*).

B. Analysis.

1. Defense counsel did not provide ineffective assistance by not moving to dismiss at the end of the State's case.

As this court recently stated:

> The test for the sufficiency of the evidence on a motion to dismiss is whether "considering the [S]tate's evidence in the most favorable light, the evidence adduced, believed and rationally considered, is sufficient to prove the defendant's guilt beyond a reasonable doubt." Accordingly, we will not reverse the circuit court's denial of [the defendant's] motion to dismiss as long as the jury reasonably could have found [him] guilty beyond a reasonable doubt.

State v. Henning, 2013 WI App 15, ¶19, 346 Wis.2d 246, 828 N.W.2d 235 (citation omitted).

LaPean contends that defense counsel provided ineffective assistance because he did not move to dismiss the Security count at the close of the State's evidence. The circuit court correctly rejected this argument.

LaPean concedes that the State satisfied the first three elements of Wis. Stat. § 943.84(2)(a), but failed to satisfy the fourth element, *i.e.*, that LaPean "concealed, removed, or transferred" the secured collateral "with intent to defraud" Security. LaPean's Brief at 23. LaPean

makes two principal arguments: (1) LaPean acted in accordance with the SBSA; and (2) there is no evidence that LaPean "transferred, removed or concealed [the] encumbered property between June 5, 2007 and March 6, 2009, as alleged in the information." LaPean's Brief at 25. LaPean's arguments fail.

The State has already addressed LaPean's theory that he acted in accordance with the terms of the SBSA. *See supra* at 13-15. As discussed above, LaPean had no contractual right to sell the PMSI collateral without notifying Security, which had a security interest in any proceeds from the sale of the PMSI collateral. *See id*. The fact that he made some payments on his various loan agreements with Security does not alter this analysis. *See* LaPean's Brief at 28-29.

LaPean's second point is that there was no evidence that the encumbered property was "transferred, removed or concealed" during the period alleged in the Amended Information. According to LaPean, all of the PMSI collateral securing the first six notes was sold "prior to the loan restructuring in June of 2005." LaPean's Brief at 34. This factual allegation is drawn from the defense case, so it is not relevant to the present question, *i.e.*, whether defense counsel provided ineffective assistance by not moving to dismiss at the end of the State's case. The State will address this issue below, in its argument that the jury's verdict was supported by sufficient evidence. *See infra* at 34-39.

The State did present evidence that the encumbered property was "transferred, removed or concealed" after June 2005. Smith specifically testified that the PMSI collateral financed prior to June 2005 "still existed [at the time of] the restructuring" in June 2005 (71:83). After December 2006, when LaPean first started sliding into default, and June 2007, Smith saw some of the PMSI collateral on LaPean's premises (71:30). After the June 5, 2007 auction, she again saw some of the collateral there (71:30). Smith did not learn definitively that the PMSI collateral was all gone until sometime after July 1, 2009,

when the sheriff executing the writ of replevin discovered that LaPean no longer had it (71:36, 38).

The jury had sufficient evidence of LaPean's fraudulent intent from Smith's testimony. The PMSI collateral supporting LaPean's loans disappeared without notification, explanation, or full payment to Security. That LaPean's intent was fraudulent was shown by his constant evasion about the whereabouts of the collateral from the beginning of 2007 until the day the sheriff unsuccessfully attempted to repossess it. When Smith started making her regular "past due status" calls to LaPean, he told her "that the equipment was being sent out … somebody was renting it, or somebody was testing it out" (71:30). When she expressed alarm at the absence of the collateral on the day of the auction, LaPean again said that it had been rented out, or was being stored "off-site" for safety reasons (71:37). Smith interpreted LaPean's refusal to sell two tractors to Craig Brown as a deliberate move to avoid paying Security the money he owed (71:35).

The State was not required to prove the circumstances of LaPean's disposal of the collateral. LaPean cites no legal authority expounding such a requirement and the State knows of none. LaPean's assumption that such proof is required depends on his position that he was free to "transfer[] [the collateral] in the course of ordinary business." LaPean's Brief at 29-30. The State has already shown that this position is unfounded and contrary to LaPean's obligations under the SBSA and the UCC. *See supra* at 13-15. It doesn't matter how LaPean transferred the collateral, whom he sold it to (assuming he sold it), or how much he sold it for. All that matters is that he transferred encumbered property in which he knew that Security held a security interest and that he did so with fraudulent intent. His failure to notify and pay Security as required and his repeated evasions in his dealings with Smith from 2007 and 2009 amply support a jury finding of fraudulent intent.

LaPean asserts that "a defendant's mental state must be contemporaneous with the transfer of encumbered property." LaPean's Brief at 32. It's true that the State did not prove what LaPean was thinking at each transfer of collateral. However, such individualized proof was unnecessary. The transfer of *all* the PMSI collateral contrary to the terms of the SBSA and the rules of the UCC combined with LaPean's consistent evasions and failure to explain the collateral's disappearance was sufficient to support a factual finding that LaPean disposed of all the collateral with fraudulent intent. The jury was instructed to find LaPean's intent from his "acts, words and statements if any, and from all the facts and circumstances in this case bearing upon intent" (71:184-85). *See State v. Alles*, 106 Wis.2d 368, 382, 316 N.W.2d 378 (1982) ("The jury may infer intent to defraud from the defendant's overt acts and from inferences fairly deducible from the circumstances."). Smith's testimony provided ample evidence to support the jury's finding of fraudulent intent.

Considered in the light most favorable to the State, "'the evidence adduced, believed and rationally considered, [was] sufficient to prove [LaPean's] guilt beyond a reasonable doubt.'" *Henning*, 346 Wis.2d 246, ¶19. As the circuit court observed, defense counsel's decision *not* to make an unmeritorious motion to dismiss at the close of the State's evidence was "within reasonable professional norms" and thus not deficient performance (56:8). *See Strickland*, 466 U.S. at 688. The court further noted that it would have denied such a motion had one been brought (*id.*). Obviously, then, counsel's failure to make such a motion was not prejudicial (*id.*). LaPean has failed to prove that counsel provided ineffective assistance. *See Liukonen*, 276 Wis. 2d 64, ¶18.

2. Duplicity.

In his brief to this court, LaPean does and does not make a duplicity argument. He asserts that because "each of these items [*i.e.*, the eighteen pieces of PMSI collateral] would support a separate charge, combining them into a

single count creates a duplicity problem." LaPean's Brief at 24. Of course, the State did combine LaPean's transfer of the eighteen pieces of PMSI collateral into a single charge (10). Nevertheless, LaPean does not make a formal duplicity argument, but promises to develop one only if "the state takes the position it need not prove intent to defraud as to each of the items." Lapean's Brief at 24 n.7.

A complaint is duplicitous if

> it joins two or more distinct and separate offenses in a single count. A duplicitous charge is defective because the jury may find the defendant guilty without the state proving each element of the offense beyond a reasonable doubt. However, "where an offense is composed of continuous acts it may be charged as one offense without rendering the charge duplicitous." The nature of the charge is a matter of election on the part of the state.

State v. Copening, 103 Wis.2d 564, 572, 309 N.W.2d 850 (Ct. App. 1981) (citations omitted). "[T]he State's discretion to charge a defendant's actions as one continuing offense is generally limited to those situations in which the separately chargeable offenses are committed by the same person at substantially the same time and relating to one continued transaction." *State v. Miller*, 2002 WI App 197, ¶23, 257 Wis.2d 124, 650 N.W.2d 850.

The State charged Roy Copening with one count of attempted theft by fraud on the basis of approximately six fraudulent transactions involving three checking accounts in a one-week period. *Copening*, 103 Wis.2d. at 568-69. The single count was not duplicitous because Copening demonstrated a "single criminal design to commit theft." *Id.* at 573.

> [W]hen a defendant is operating an ongoing fraudulent scheme, it may be necessary to allege several individual transactions which, considered together, reflect the fraudulent operation. We can conceive of no other manner in which a check kiting operation, such as involved here, can be alleged. Although each check passed represents a distinct

> taking, it is within the state's discretion to charge the entire scheme as a single offense. The single criminal design to commit theft is inferable from the complaint.

Id. at 572-73 (footnote omitted); *id.* at 573 n.3 (collecting cases); *see also United States v. Moyer*, 674 F.3d 192 (3rd Cir.), *cert. denied*, 133 S.Ct. 165 (2012); *United States v. Davis*, 471 F.3d 783 (7th Cir. 2006).

Moyer involved a duplicity challenge to a single falsifying documents charge, which "alleged multiple false statements in multiple police reports." *Moyer*, 674 F.3d at 204. The relevant statute was 18 U.S.C. § 1519, which penalizes "mak[ing] a false entry in *any record*," but does not state explicitly "whether each falsified *document* must be charged separately." *Id.* The court noted that "[c]ourts have consistently rejected duplicity arguments when the statute employs 'any' as a signifier regarding the 'allowable unit of prosecution.'" *Id.* That is because the word "any" expresses "'indifference as to the particular one or ones that may be selected.'" *Id.* (quoting OXFORD ENGLISH DICTIONARY (3d ed. 2009). Furthermore, "record" can be interpreted as composite of multiple individual reports. *Moyer*, 674 F.3d at 205. Thus, "[b]ecause Count Two alleges a continuing course, between July 12, 2008, and March 30, 2009, of falsifying the 'record' to obstruct a single federal investigation—and identifies multiple reports that were created to that singular end—the indictment is not duplicitous." *Id.* (citations omitted).

Davis involved a single count of health care fraud performed through three separate schemes, parts of which were performed at various times. *Davis*, 471 F.3d at 790.

> We are convinced that this indictment, fairly interpreted, … sets out an ongoing and continuous course of conduct, accomplished through three different methods, that were repeated on numerous (likely daily) occasions over several years. The indictment alleges only one crime: health care fraud…. [T]he crime charged here was fairly straightforward, involved only one defendant, one

> victim, and one criminal statute. It seems that the prosecution's decision to charge only one count falls well within its discretion … and that the dangers otherwise inherent in duplicitous indictments are not present here. If the indictment confused the defendant, the proper time to raise that objection was before trial, allowing the court an opportunity to correct the error and allowing the government to seek a superceding [sic] indictment.

Id. at 790-91 (citations omitted).

A duplicity challenge to a complaint or information must be made before trial. *See State v. Lomagro*, 113 Wis.2d 582, 590 n.3, 335 N.W.2d 583 (1983) (citing Wis. Stat. § 971.31(2)). Failure to do so waives the claim for appeal. *See McMahon*, 186 Wis.2d at 80.

Dismissal is not the appropriate remedy for a duplicitous charge. *State v. Brienzo*, 2003 WI App 203, 267 Wis.2d 349, ¶15, 671 N.W.2d 700. Instead, the State must be given the opportunity to "either elect the act upon which it will rely or separate the acts into separate counts." *Lomagro*, 113 Wis.2d at 589. Alternatively, a duplicity problem can be cured with limiting jury instructions. *See Miller*, 257 Wis.2d 124, ¶25.

LaPean did not raise duplicity before or during trial. He raised it for the first time in his postconviction motion (50:2). The issue is therefore waived. *See* Wis. Stat. § 971.31(2). The wisdom of the waiver rule is illustrated by the present case. If LaPean had made a duplicity challenge before or during trial that the court found meritorious, the State would have been able to take corrective action. *See Miller*, 257 Wis.2d 124, ¶25; *Lomagro*, 113 Wis.2d at 589. Without a timely challenge, the State lost that opportunity.

What's more, the duplicity challenge fails on the merits. The eighteen missing pieces of farm equipment were PMSI for eight separate loan agreements between LaPean and Security. *See supra* at 5. But they were also collateral on the other agreements between the parties. As

Smith explained, all the loan agreements were "cross-collateralized, which means regardless of the loan this is still our security … everything is secured by everything" in a single debtor-creditor relationship (71:16). In this context, LaPean's illegal transfer of collateral was a "continuing offense" permissibly charged as a single count. *Miller*, 257 Wis.2d 124, ¶23. Charging LaPean's "actions as one continuing offense" in this case is appropriate as "separately chargeable offenses" were "committed by the same person at substantially the same time and relating to one continued transaction." *Id.* As in *Copening*, *Moyer*, and *Davis*, each of LaPean's illegal transfers was an individual chapter in a single book of fraud. This was an "ongoing fraudulent scheme" comprising "several individual transactions which, considered together, reflect the fraudulent operation." *Copening*, 103 Wis.2d at 572. How to charge LaPean was a discretionary decision for the district attorney. *See id.*

Moyer provides an additional analytical approach to the question presented here. Similar to the statute involved in *Moyer*, Wis. Stat. § 943.84(2)(a) penalizes an actor who "[c]onceals, removes or transfers *any* personal property …." As observed by the *Moyer* court, "[c]ourts have consistently rejected duplicity arguments when the statute employs 'any' as a signifier regarding the 'allowable unit of prosecution.'" *Moyer*, 674 F.3d at 204. The legislature's use of the indeterminate word "any" in the present statute counsels against imposing a "separate charge for each discrete piece of property" requirement on the prosecution. Furthermore, *Moyer*'s discussion of the federal statute's use of the word "record" provides guidance on § 943.84(2)(a)'s use of the word "property." "Property" can refer to a single "possession," "[p]ossessions collectively," and anything in between. AMERICAN HERITAGE DICTIONARY 993 (2d college ed. 1985). In this case, the "property" transferred "could fairly be interpreted as the collection of" PMSI collateral. *Moyer*, 674 F.3d at 205.

The single charge based on LaPean's illegal transfer of eighteen individual pieces of collateral was not duplicitous. The State proved beyond a reasonable doubt that LaPean transferred Security's property with intent to defraud. The fraud here was "one continuing offense." *Miller*, 257 Wis.2d 124, ¶23. The State was not required to specifically prove LaPean's fraudulent intent with respect to each individual transfer.

III. THE TRIAL EVIDENCE WAS SUFFICIENT TO PROVE LAPEAN'S INTENT TO DEFRAUD.

A. Law.

The sufficiency of the evidence standard to support a guilty verdict tracks the motion to dismiss standard.

> In reviewing the evidence, we view it in the light most favorable to the verdict, and, if more than one reasonable inference can be drawn from the evidence, we adopt the inference that supports the verdict. The credibility of the witnesses and the weight of the evidence is for the trier of fact, as is the resolution of inconsistencies within a witness's testimony.

State v. Hahn, 221 Wis.2d 670, 683, 586 N.W.2d 5 (Ct. App. 1998) (citations omitted). "We may not reverse unless the evidence is so insufficient in probative value and force that as a matter of law, no reasonable fact finder could have determined guilt beyond a reasonable doubt." *State v. Kimbrough*, 2001 WI App 138, ¶12, 246 Wis.2d 648, 630 N.W.2d 752 (citation omitted).

"[A] finding of guilt may rest upon evidence that is entirely circumstantial and that circumstantial evidence is oftentimes stronger and more satisfactory than direct evidence." *State v. Poellinger*, 153 Wis.2d 493, 501-02, 451 N.W.2d 752 (1990).

B. Facts.

After the State rested, LaPean testified in his own defense.

LaPean testified that the PMSI collateral securing Security's first six loans to LaPean was all sold in "February, March, April, May of '05" (71:114). LaPean said he used the money from those sales to make payments on those loans (71:115). To the best of his knowledge, LaPean remitted all the proceeds he received from the sale of the collateral to Security in regular payments on his loans made "up until around 2007" (71:117).

Wright asked LaPean about Smith's testimony that "he had indicated to her [that the collateral was] somewhere off-site; you didn't want that equipment sold at the auction" (71:114). LaPean answered: "I do not recall that conversation at all. The conversation we had … before the auction was that we were going to have this auction and sell all of our used equipment" (*id.*). Furthermore, she never asked LaPean where the PMSI collateral was located (*id.*).

LaPean stated that he did not sell the PMSI collateral with the intent that Security not be paid (71:143).

On cross-examination, LaPean testified that he did not recall when the PMSI collateral was sold or to whom (71:149-51). He had no recollection of where any of the equipment went or who purchased it (71:150-51). He never told Security who had the collateral (71:151).

Furthermore, he had no records of those sales. He testified that he kept both paper and computer records of his business transactions (71:132). The paper records consisted of "purchase orders and … bank deposit slips" (*id.*). The paper records were in storage at three separate locations (71:133). LaPean spent two or three weeks looking through these records, but could find no evidence

"specific to any of these transactions" (71:132-33). "Whether some are missing or whether we can't find them … I can't say" (71:133). LaPean sold the computer that held the business records at an auction on January 30, 2010 (71:148). Security tried to check the business records on that computer, but when it got access to the computer, "the hard drive was missing" (*id.*). In short, LaPean was not able to "find a single record which shows when any of this collateral … was sold" (71:149).

However, LaPean did have a computer print-out dated February 25, 2010 listing his loan payments to Security (71:147-48; 73:Exh.128). The prosecutor asked LaPean how he got the print-out, since it was dated almost one month after the computer was sold at auction (71:148). LaPean said he "believe[d] it was done … from a backup tape that the computer company had" (71:148). Given that LaPean knew that Security wanted to check his computer records, the prosecutor asked LaPean whether he told "Security Bank that you had a … backup tape for that computer" (*id.*). LaPean answered: "I don't believe they ever asked" (*id.*).

The court gave the jury the opportunity to question LaPean. One juror asked: "If the equipment for which those [first six] loans were made … were sold, why were then those loans rolled over into your restructuring … [at the] end of June of '05" (71:157).

> And what it--the agreement--I guess verbally with the bank was is as we sold these pieces we remit what we collected from the customers; then the trade-ins were rolled into the operating loan, which was that revolving line of credit. And that's what that is used for is to buy and sell used equipment upon a revolving basis, so that those trading trade-ins were rolled into that revolving line.

(*Id.*).

The State called Smith as a rebuttal witness. The prosecutor asked her about the backup tape from LaPean's computer.

> Q And at some point you wanted to get … the business computer and seize that?
>
> A Yes, because it was one of the assets that we had as collateral.
>
> Q And was the hard drive missing from the computer?
>
> A Yes, it was.
>
> Q And when was that?
>
> A We sold all of the assets in January of 2010.
>
> Q And so were you ever notified by Lapean Implement that there was some backup tape to that computer record?
>
> A Not that I'm aware of.
>
> Q And this record that was printed out on February 25th of 2010, you hadn't seen that until just recently. Is that correct?
>
> A Yes.
>
> Q This week.
>
> A That's correct.
>
> Q As far as you know, you … were told that the computer records were gone?
>
> A That's correct. They didn't have them or the hard drive to their computer.

(71:163).

LaPean argued in his postconviction motion that the trial evidence was insufficient to support the jury's verdict. Again, the circuit court was not convinced. The court noted LaPean's inability to remember what had become of the collateral (56:6). It also noted that "[t]he jury heard testimony that the hard drive from LaPean's business computer and related business records were missing" (*id.*). The court concluded that this evidence supported the jury's verdict (*id.*). The court noted that

"[t]he State was not required to present direct evidence of how each of the items was removed, transferred or concealed" (*id.*). Based on LaPean's testimony about his lack of paper or computer records, "the jury may have concluded that LaPean intentionally concealed evidence" (56:6-7).

C. Analysis.

The evidence against LaPean was sufficient to support the verdict against him.

In the previous section, the State showed that the prosecution presented sufficient evidence in its case-in-chief to survive a defense motion to dismiss had one been brought. The case against LaPean became even stronger when he testified on his own behalf and Smith returned for rebuttal.

LaPean testified that he sold all the equipment securing the first six loans before June 2005 (71:114). Smith testified that the collateral still existed in June 2005, and that she saw at least some of the collateral on LaPean's premises as late as June 2007 (71:30, 38, 83). Obviously, the testimony of these two witnesses was inconsistent. It was up to the jury to resolve the differences in the testimony and decide who was telling the truth. *See Hahn*, 221 Wis.2d at 683. Presumably, the jury believed Smith rather than LaPean.

Consistent with this first conflict in their testimony, LaPean and Smith also disagreed that LaPean made evasive statements to Smith about the location of the collateral. Smith testified that, when she asked about the collateral, LaPean told her it was being rented out or stored off-site (71:30, 37). LaPean denied making these statements (71:114). Presumably, the jury believed Smith rather than LaPean.

The jury learned from LaPean's testimony that he had no records of his sales of the collateral, and no recollection of whom he sold it to (71:132-33). This

testimony, combined with that summarized above, supported an inference by the jury that LaPean lacked this information because his claim about when he sold the collateral was false. His inability to find any paper records and the destruction of his computer's hard drive also supported an inference by the jury that LaPean deliberately destroyed evidence to cover up the fact that he transferred Security's PMSI collateral with the intent to defraud.

The circuit court's conclusion that the trial evidence was sufficient to support the verdict should be affirmed.

CONCLUSION

For the reasons stated herein, the State of Wisconsin respectfully requests that this court affirm the judgment and order from which this appeal is taken.

Dated this 26th day of April, 2013.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,976 words.

Dated this 26th day of April, 2013.

_____

Maura FJ Whelan
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Dated this 26th day of April, 2013.

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