

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 6, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP1179-CR

Cir. Ct. No. 2004CF864

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

TOMMY J. PLOECKELMAN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Marathon County:
VINCENT K. HOWARD, Judge. *Reversed and cause remanded for further proceedings.*

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

¶1 PER CURIAM. This is yet another “milk fraud” case involving dairy farmers and Mullins Cheese, Inc. Here, Tommy Ploeckelman allegedly defrauded Mullins Cheese by “adding water to [his] milk to increase weight and

by switching milk samples with better quality milk to improve [his] milk's quality; both which caused [him] to be paid more for [his] milk than its true value." The State of Wisconsin appeals an order dismissing four felony counts of theft by false misrepresentation against Ploeckelman. The State contends the court erred in concluding Ploeckelman had to be charged under a more "specific" statute than the general theft statute, WIS. STAT. § 943.20.¹ We agree with the State and, therefore, reverse and remand so the court may reinstate the felony charges.

Background

¶2 During a July 13, 2004 interview with detective William Millhausen, Ploeckelman admitted that either Dave Searer or Kevin Mews, both milk haulers, approached him about "fixing" his milk samples because of high cell counts. Cell counts are an indicator of the milk's quality, which ultimately impacts the price Ploeckelman receives for his milk. Ploeckelman told them to "do whatever they needed to do," but thought the haulers would only do this when samples were sent to the State laboratory.² When asked about the high volume of water in his milk, Ploeckelman stated it was his fault because of excessive flushing of his milking system. Water in the milk increases its weight, also a basis for payment.

¶3 But Millhausen noted that during his investigation, when Mullins Cheese began picking up milk itself, Ploeckelman's very first delivery dropped 952 pounds from his "normal" production. Ploeckelman explained he had sold

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

² Searer admitted switching samples daily for at least a year, amounting to \$67,680 in overpayment by Mullins Cheese.

four cows and had also improperly hooked up his milking system on that occasion.³

¶4 Ultimately, the State charged Ploeckelman with two counts of theft of an amount greater than \$10,000 by false representations as party to a crime for “mixing samples to fix high cell counts” in cooperation with Searer. Two other charges of theft of an amount greater than \$10,000 by false representation were brought because of the water in the milk.⁴

¶5 However, the statutes also prohibit manipulation of samples used to determine the value of milk and manipulation of weight determinations. *See* WIS. STAT. §§ 98.15 and 98.26(1)(b). Both are misdemeanors. WIS. STAT. §§ 98.26 (1)(a) and (e). Ploeckelman moved to dismiss the felony charges against him, claiming they were not supported by evidence adduced at the preliminary hearing. The trial court agreed, holding there was only probable cause to believe that a misdemeanor had been committed. The court wrote:

Under [these] facts, felony charges of Theft by False Representation in violation of *Wis. Stat. § 943.20(1)(d)* appeared to be appropriate. However, in deciding the challenges to the bind over, the court became aware of specific criminal penalties for misrepresentation, “in any manner,” of milk’s weight under *Wis. Stat. § 98.26(1)(b)* and the manipulation of test results used to determine the value of milk under *Wis. Stat. § 98.15(1)*.... These are the same acts that Ploeckelman is charged with here. Under

³ It is not clear from the Information or Millhausen’s report exactly how much Mullins Cheese lost from Ploeckelman’s alleged adding of water. It appears it might have been approximately \$5,640 per month for each of two six-month periods. However, the exact amount of the loss is not at issue on appeal.

⁴ Under WIS. STAT. § 943.20(1)(d), the degree of the charge is based on the amount of the loss; where, as here, the amount exceeds \$10,000, the crime is a Class G felony. *See* WIS. STAT. § 943.20(3)(c)

Wis. Stat. § 970.03(8), if the court finds probable cause for only a misdemeanor following a preliminary examination, the court is to amend the complaint accordingly.

The State appeals.

Discussion

¶6 The first issue is whether the State could charge Ploeckelman with felonies under WIS. STAT. § 943.20, or only the misdemeanors under WIS. STAT. §§ 98.15 and 98.26. This involves questions of statutory interpretation. We review such questions de novo. *Hutson v. State of Wis. Personnel Comm’n*, 2003 WI 97, ¶31, 263 Wis. 2d 612, 665 N.W.2d 212.

¶7 The trial court referred to a rule of statutory construction, which states that when two statutes relating to the same subject matter conflict, the specific statute controls over the general statute. See *State v. Larson*, 2003 WI App 235, ¶6, 268 Wis. 2d 162, 672 N.W.2d 322. Ploeckelman relies on language from *State ex rel. Gutbrod v. Wolke*, 49 Wis. 2d 736, 183 N.W.2d 161 (1971), to support the court’s determination. That case states: “The general rule is that a specific penalty prescribed by a special statute for a particular offense takes precedence over a general provision in a penal code.” *Id.* at 747. Indeed, the court in this case wrote that it “became aware of specific criminal penalties for misrepresentation” of milk’s weight and quality when it dismissed the felonies.

¶8 However, *Gutbrod* presents different facts than this case. In *Gutbrod*, the defendant violated WIS. STAT. § 161.30 (1969). At the time, § 161.30(12) (1969) provided a possible sentence of one year to life for a violation of § 161.30. But WIS. STAT. § 161.20 (1969) provided a penalty of no more than three years for a violation of any crime in WIS. STAT. ch. 161 (1969). Thus, the

statute creating the crime and under which Gutbrod was charged, § 161.30 (1969), was not at issue. Rather, the question was which of two conflicting statutes would dictate the penalty. That is not the same situation here. Here, we have a question of which of three statutes, each of which arguably address Ploeckelman's actions, the State could use to charge him. The answer is: whichever statute or statutes the State, in its discretion, prefers.

¶19 “[W]hen an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants.” *United States v. Batchelder*, 442 U.S. 114, 123-24 (1979). “[T]he prosecuting attorney is afforded great latitude in determining which of several related crimes he chooses to file against the defendant.” *Sears v. State*, 94 Wis. 2d 128, 133, 287 N.W.2d 785 (1980). “[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision ... [of] what charge to file ... generally rests entirely in his discretion.” *Id.* (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)). Thus, although the trial court seemed to believe the legislature only intended for this type of milk fraud to be prosecuted as a misdemeanor under WIS. STAT. §§ 98.15 or 98.26, the overriding legislative intent is found in WIS. STAT. § 939.65, which formalizes this prosecutorial discretion.⁵

⁵ The trial court noted the legislature “could have also created both misdemeanor and felony crimes based upon the amount of loss caused by the misrepresentation but did not.” Neither WIS. STAT. §§ 98.15 nor 98.26 mentions misrepresentations or a dollar value of loss. WIS. STAT. § 943.20(1)(d) only uses the phrase false representation. However, that statute does distinguish the degree of the crime based on dollar value, ranging from a Class A misdemeanor to a Class G, H, or I felony. WIS. STAT. § 943.20(3).

(continued)

¶10 WISCONSIN STAT. §§ 98.15(2) and 98.26(1)(b) and (e) do not conflict with WIS. STAT. § 943.20(1)(d). Enforcement of one does not automatically preclude enforcement of the others. The choice of charge is committed to prosecutorial discretion by virtue of WIS. STAT. § 939.65. It was error for the court to dismiss the felony counts based on its conclusion that §§ 98.15 and 98.26 are simply more specific than § 943.20.

¶11 This does not end our inquiry. Ploeckelman asserts the State cannot prevail on the felony charges under WIS. STAT. § 943.20 because it cannot prove he made false representations; thus, there is no probable cause to support the felonies and he could not have been bound over for trial. Ploeckelman asserts a representation must be an oral or written statement, not an action. However, we conclude a representation can be made through acts, without words.

¶12 Prior to the enactment of WIS. STAT. § 943.20, there were twenty-three various statutes prohibiting forms of misappropriation. Gordon Baldwin, *Criminal Misappropriation in Wisconsin—Part 1*, 44 MARQ. L. REV. 253, 253 (1960-61). Section 943.20(1)(d) embodies the common law crime of obtaining property by false pretenses. Baldwin, *supra*, at 279. The section’s purpose “is to protect unsuspecting citizens from swindlers who ... obtain the property of others with their consent but by means of willful misrepresentation.” *State v. Meado*,

Further, for a reported violation of WIS. STAT. § 98.15(1), a district attorney “shall cause appropriate actions or proceedings to be instituted for the collection of a forfeiture or a fine or for the enforcement of other remedies. ... If the violator is convicted of a crime, restitution shall be in accordance with s. 973.20.” WIS. STAT. § 98.15(2). If the legislature intended the sole punishment for a violation of § 98.15(1) to be a misdemeanor under WIS. STAT. § 98.26, the legislature would have so specified rather than allowing the State to pursue “other remedies.”

163 Wis. 2d 789, 797, 472 N.W.2d 567 (Ct. App. 1991). “The statute’s intention is to prohibit the wrongful appropriation of another’s property by nonviolent means.” *Id.* That is, the statute deals with theft by deceit rather than theft by stealth. Baldwin, *supra*, at 279-80.

¶13 For example, in *Meado*, the defendant obtained title to a van through a lease agreement. He gave a dealership a check for a down payment. The check was not honored by the bank. Subsequently, it was discovered that the checking account was closed before Meado even wrote the check. The subsequent legal question there focused on the meaning of obtaining title to property under the statute, but we noted Meado gained the lease through fraudulent representations. *Meado*, 163 Wis.2d at 799. Presenting the check was one of those representations—the check’s validity was implied by the act of presenting it as tender. Similarly, we can say that Ploeckelman shipping his milk and presenting it to Mullins Cheese with the expectation of payment implies his endorsement of the quality and weight of the milk.⁶

¶14 Moreover, the intent element of WIS. STAT. § 943.20(1)(d) can be inferred not only from the defendant’s words and statements but also from the defendant’s acts. WIS JI—CRIMINAL 1453A. It would be inconsistent to use acts to prove intent but to hold those acts can never be the representations. Individuals must be accountable for what they do as well as what they say, particularly when those actions are deceitful and result in loss to someone else. Ploeckelman knew that at least one hauler had asked about mixing the samples to alter the quality, and

⁶ We acknowledge this might not always be the case, as in the situation where a dairy farmer legitimately has no knowledge of sample switching or water in the milk supply.

he permitted the haulers to do so. He also evidently knew that his excessive flushing of the milking system might have resulted in water in the milk. Despite this knowledge, Ploeckelman continued to allow Mullins Cheese to pay him for his milk based on altered quality and weight results. Thus, it is fair to characterize Ploeckelman's actions as false representations, regardless whether he ever uttered a word.

¶15 As to whether there is sufficient evidence to support the felony charge, we conclude there is. Under WIS. STAT. § 943.20(1)(d), the State must show, in this case, that: (1) Mullins Cheese owned property—in this case, money; (2) Ploeckelman made false representations to Mullins Cheese; (3) Ploeckelman knew the representations were false; (4) Ploeckelman made the representations with the intent to defraud or deceive Mullins Cheese; (5) Ploeckelman obtained the title to Mullins Cheese's property by the false representations; (6) Mullins Cheese was deceived; and (7) Mullins Cheese was defrauded. WIS JI—CRIMINAL 1453A.

¶16 It is not disputed that Mullins Cheese “owned” the money before it paid Ploeckelman. Ploeckelman's alleged false representations were silently endorsing the quality and weight results and there is evidence he knew of the mixing of samples and water in the milk. Intent is ultimately a jury question, although the amount of the overpayments arguably demonstrates a motive. There is evidence that Ploeckelman obtained Mullins Cheese's property—money is property and title to money is obtained by gaining possession. *See* WIS JI—CRIMINAL 1453A. Finally, Mullins Cheese claims it was deceived and defrauded—hence, its complaint to the State. There is sufficient evidence to bind over Ploeckelman for trial. We note that the trial court apparently believed this as

well, dismissing the felony charges only because it concluded the State should have charged the misdemeanors.

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

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

