

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 5, 2009

David R. Schanker
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. 2008AP1197-CR

Cir. Ct. No. 2007CM0630

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CARSON DARNELL COMBS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Monroe County:
MICHAEL J. McALPINE, Judge. *Affirmed.*

¶1 DYKMAN, J.¹ Carson Darnell Combs appeals pro se from a judgment entered after a jury found him guilty of one count of misdemeanor theft

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

(embezzlement), contrary to WIS. STAT. § 943.20(1)(b) and (3)(a) (2005-06),² for embezzling funds while serving as secretary-treasurer of Local Lodge 1771 of the International Association of Machinists and Aerospace Workers' Union (Local 1771). We affirm.

Background

¶2 The following facts are undisputed. In May 2005, Combs was appointed secretary-treasurer of Local 1771. As secretary-treasurer, Combs was responsible for collecting a \$25 initiation fee from new union members and depositing the fees into the local's account. Combs was also required to record these transactions in a per capita report for quarterly tax purposes. Under the

² WISCONSIN STAT. § 943.20 (2005-06) provides, as pertinent:

(1) ACTS. Whoever does any of the following may be penalized as provided in sub. (3):

....

(b) By virtue of his or her office, business or employment, or as trustee or bailee, having possession or custody of money or of a negotiable security, instrument, paper or other negotiable writing of another, intentionally uses, transfers, conceals, or retains possession of such money, security, instrument, paper or writing without the owner's consent, contrary to his or her authority, and with intent to convert to his or her own use or to the use of any other person except the owner....

....

(3) PENALTIES. Whoever violates sub. (1):

(a) If the value of the property does not exceed \$2,500, is guilty of a Class A misdemeanor.

bylaws of Local 1771, the secretary-treasurer was paid at a rate of \$.30 for each per capita entry, or a minimum of \$50 per month.

¶3 In June 2005, Combs discussed raising the salary of the secretary-treasurer with Local 1771 President Adam Adams, who informed Combs that such a change would require amending the bylaws. The secretary-treasurer's salary was discussed at an August 2005 union meeting but no official action was taken on the matter.

¶4 Combs did not file tax reports for the second quarter of 2005 when due at the end of June. In August 2005, Rick Fischer, the grand lodge auditor for the International Association of Machinists and Aerospace Workers' Union, scheduled a meeting with Combs to review the books. Combs did not show up at the meeting, instead resigning his position as secretary-treasurer.

¶5 Fischer audited the records and discovered that Combs had not deposited \$500 he had collected in initiation fees. Combs accounted for the missing funds in a letter to Fischer, explaining that he used \$258.88 of the \$500 in undeposited fees to supplement his salary. Instead of paying himself the bylaws rate of \$.30 per capita entry, Combs paid himself \$.90 per entry because, as Combs explained, his effective hourly salary under the bylaws rate was less than the state minimum wage given the number of hours he worked on secretary-treasurer business in June and July. Combs also admitted that he spent another \$151.42 of the \$500 on personal items, including gas and a tire for his car.

¶6 The Department of Labor (DOL) investigated the matter. Combs gave a signed statement to DOL investigators admitting that he used the undeposited fees for personal expenses, and that he "did not pay [him]self in the proper way" by taking money from the undeposited fees to supplement the salary

set in the bylaws. In August 2007, Combs was charged with one count of misdemeanor theft. His case was tried to a jury in February 2008. The jury found Combs guilty, and the trial court denied Combs' motion for a new trial. Combs appeals.

Discussion

¶7 During the trial, the court excluded from evidence a copy of a state bulletin about Wisconsin's minimum wage law and precluded Combs from examining Fischer about his knowledge of the minimum wage law. Combs contends that the trial court erroneously excluded this evidence, which he argues was necessary to prove that his conduct was "justified," and thereby abridged his constitutional right to present a complete defense. We disagree.

¶8 We review a trial court's decision to admit or exclude evidence under an erroneous exercise of discretion standard. *State v. Ford*, 2007 WI 138, ¶30, 306 Wis. 2d 1, 742 N.W.2d 61. We will affirm an evidentiary ruling if the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record. *Id.* Whether the exclusion of evidence denied the constitutional right to present a complete defense is a question of constitutional fact, which we review de novo. *State v. Jensen*, 2007 WI App 256, ¶9, 306 Wis. 2d 572, 743 N.W.2d 468.

¶9 The trial court sustained the State's objections to Combs' attempts to present evidence regarding the state minimum wage on relevance grounds. "Relevant evidence" is defined in WIS. STAT. § 904.01 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Combs contends that the evidence was relevant under this

standard because it would have supported an inference that he used a portion of the undeposited fees to ensure that he was paid at least the minimum wage. We reject this argument.

¶10 The question of whether Combs was paid at least the minimum wage under the pay rate established in the bylaws is irrelevant to the question of whether Combs embezzled union funds. Evidence that Combs' pay was below the minimum wage does not tend to disprove that Combs possessed the money; intentionally used it without the consent of Local 1771 and contrary to his authority as secretary-treasurer; knew that his use of the money was without the local's consent and was contrary to his authority; and intended to convert the money to his own use. *See* WIS JI—CRIMINAL 1444.³ Nor does this evidence support a legitimate defense; "justification" is not a recognized defense to the crime of embezzlement. *See* WIS. STAT. § 939.42—.49 (statutory sections listing defenses to criminal liability). Thus, we conclude that the trial court's exclusion

³ The elements of misdemeanor theft (embezzlement), WIS. STAT. § 943.20(1)(b) are as follows:

1. The defendant had possession of money belonging to another because of (his) (her) employment.
2. The defendant intentionally used the money without the owner's consent and contrary to the defendant's authority.

The term "intentionally" means that the defendant must have had the mental purpose to use the money without the owner's consent and contrary to the defendant's authority.

3. The defendant knew that the use of the money was without the owner's consent and contrary to the defendant's authority.
4. The defendant intended to convert the money to [(his) (her) own use] [the use of any other person].

WIS. JI—CRIMINAL 1444.

of evidence regarding the state minimum wage was a proper exercise of its discretion. Moreover, because the evidence in question did not support a recognized defense, we further conclude that its exclusion did not abridge Combs' constitutional right to present a complete defense.

¶11 Combs next contends that his conduct was not illegal because it was authorized under the International Association of Machinists' (IAM) Constitution, which Combs has provided as an appendix to his brief-in-chief. But as the State observes, the IAM Constitution is not a part of the record before us on review. We therefore do not consider this argument. *Nelson v. Schreiner*, 161 Wis. 2d 798, 804, 469 N.W.2d 214 (Ct. App. 1991) (assertions made upon facts not contained in the record will not be considered on appeal).

¶12 Combs argues in the alternative that, even if he violated the union's internal rules regarding the management of union funds, his conduct was at most a "civil violation" and not criminal in nature. However, he fails to provide reasons why his violation did not constitute criminal conduct, and we conclude that the prosecutor had probable cause to believe that Combs embezzled money from Local 1771. *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶29, 271 Wis. 2d 633, 681 N.W.2d 110 ("[S]o long as a prosecutor has probable cause to believe that the accused has committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file ... generally rests entirely in his discretion.") (citation omitted).

¶13 Combs next calls our attention to 29 U.S.C. § 411(a)(5), which provides that "[n]o member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been ... afforded a

full and fair hearing.” Combs contends that Fischer violated his due process rights set forth in this section by “referring” his case to the State for criminal prosecution. However, the criminal proceeding against Combs was in no sense a disciplinary action within the meaning of 29 U.S.C. § 411(a)(5). The charges were brought by the prosecutor, not by Fischer nor any other representative of the union. We therefore conclude that this argument lacks merit.

¶14 Combs also asserts that the trial court erroneously excluded a recording of a phone message from Fischer and other evidence that Combs asserts was relevant to Fischer’s credibility. Combs fails, however, to explain how the recorded message, which Combs describes as “threatening” in nature, or the other evidence might have impeached Fischer’s credibility. Moreover, assuming for the sake of argument only that the evidence had bearing on the credibility of the witness, the exclusion of this evidence was harmless error. *State v. Harvey*, 2002 WI 93, ¶46, 254 Wis.2d 442, 647 N.W.2d 189 (an error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error) (citation omitted).

¶15 Finally, at various points in his briefs, Combs appears to suggest that the evidence at trial was insufficient to support a conviction for embezzlement because Local 1771’s bylaws do not explicitly address the scope of the secretary-treasurer’s authority. Thus, Combs contends, the State cannot prove that his actions exceeded his authority as secretary-treasurer. We disagree.

¶16 The bylaws need not define precisely the scope of the secretary-treasurer’s authority for a reasonable factfinder to determine that the conduct in this case exceeded Combs’ authority. As noted, the bylaws establish that the salary of the secretary-treasurer “shall be” \$.30 per capita entry with a minimum

of \$50.00 per month. Article V, Sec. 2 of the bylaws requires notice of at least forty-eight hours to the membership of any motion “to appropriate more than \$50.00 for any purpose, except ... per capita tax and ordinary bills which are generally in excess of \$10.00” Article V, Sec. 2 thus contemplates approval by motion and notification of the membership whenever a union member seeks to spend more than \$50 in union funds for any purpose except “ordinary bills.” Generally, payment of the secretary-treasurers’ monthly salary at the rate set in the bylaws would be an “ordinary bill.” However, payments in excess of \$50 to supplement the secretary-treasurer’s salary set in the bylaws and payments for personal expenses are not “ordinary bills” and would have required prior approval and notification of the membership. Combs’ appropriation of \$500 to himself without prior approval or notification of the membership therefore exceeded his authority as secretary-treasurer.⁴

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)(4).

⁴ Combs’ remaining arguments are vague or lack legal support. We decline to develop these arguments for him. See *Barakat v. DHSS*, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995).

