COURT OF APPEALS
DECISION
DATED AND RELEASED

April 30, 1996

No. 95-2212-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS J. PATERS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

MYSE, J. Thomas J. Paters appeals a judgment of conviction for eight counts of theft by fraud contrary to § 943.20(1)(d), STATS., and one count of racketeering contrary to § 946.82(4), STATS.[1] Paters alleges that: (1) the trial court erred when it admitted summaries of voluminous documents without a proper foundation; (2) the trial court erred when it admitted the summaries because they were based in part on oral representations; (3) the

[1] Paters seeks reversal and a new trial on all counts except count two.

admission of the summaries denied Paters his constitutional right of confrontation; and (4) the trial court erred in setting restitution because the State presented no additional evidence at the restitution hearing and the State failed to prove that each of the alleged victims sustained a loss in the ordered amounts. Because we conclude that the trial court properly admitted the summaries, the admission of the summaries did not deny Paters his constitutional right of confrontation and there was sufficient evidence to support the trial court's restitution order, the judgment of conviction is affirmed.

Paters and Patrick LeSage owned and operated an excavation business doing environmental cleanup called Enex, Inc., also known as Environmental Excavators. Enex submitted bills for soil cleanup to site owners, who in turn sought reimbursement for the bills from a government funded program known as the Petroleum Environmental Cleanup Fund Act (PECFA). Paters allegedly billed for non-existent work and material, marked up or falsified subcontractor bills and intentionally contaminated soils to increase job size. Paters was charged with one count of theft by fraud for each of eight sites as a party to a crime with LeSage. Paters was also charged with one count of racketeering, alleging the eight theft by fraud counts as predicate acts.

At trial, the court allowed the State to introduce four types of summaries of voluminous documents: (1) summaries of Enex's checking account activity; (2) summaries comparing costs billed to Enex by three subcontractors with Enex's bills to the landowners for the three subcontractors' work; (3) summaries comparing costs billed to Enex by twelve subcontractors with amounts paid by Enex to the twelve subcontractors for work performed on various projects; and (4) summaries for each job site comparing costs billed to Enex by the subcontractors with costs ultimately billed by Enex to the landowners and from the landowners to PECFA. A jury convicted Paters on all eight counts of theft by fraud and the count of racketeering.

The trial court sentenced Paters to a total of 180 months in prison for the nine counts and imposed probation consecutive to the prison term, a condition being the payment of restitution in the amounts to be determined. The trial court held a restitution hearing approximately 120 days after sentencing and received no additional evidence at the hearing. The trial court instead relied upon the evidence received during the trial in making its

determination of the amount of restitution due. The trial court ordered restitution of $230,096.95 to be paid to PECFA and three banks that made loans to the property owners.

Paters first contends that the trial court erred by admitting the summaries. The admission of evidence is addressed to the sound discretion of the trial court. ***State v. Jenkins***, 168 Wis.2d 175, 186, 483 N.W.2d 262, 265 (Ct. App. 1992). We will affirm the trial court's exercise of discretion if it has a reasonable basis and was made in accordance with accepted legal standards and the facts of record. ***Id.*** Where the trial court fails to set forth its reasoning in exercising its discretion to admit evidence, we "independently review the record to determine whether it provides a basis for the trial court's exercise of discretion." ***State v. Pharr***, 115 Wis.2d 334, 343, 340 N.W.2d 498, 502 (1983).

Paters argues that the trial court erred by admitting the summaries because the State failed to lay a foundation sufficient to show that the underlying documents were admissible in evidence. Section 910.06, STATS., which is identical to FED. R. EVID. 1006, provides:

> Summaries. The contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The judge may order that they be produced in court.

Summaries of voluminous documents may be made only upon original documents that would themselves be admissible. ***United States v. Johnson***, 594 F.2d 1253, 1255 (9th Cir. 1979); *see also* ***Tri-Motors Sales, Inc. v. Travelers Indemnity Co.***, 19 Wis.2d 99, 107-09, 119 N.W.2d 327, 331-33 (1963). While the underlying documents do not have to be admitted into evidence, the proponent of the summaries must lay a foundation showing the underlying documents would be admissible. ***Johnson***, 594 F.2d at 1255; *see also* ***Tri-Motors Sales, Inc.***, 19 Wis.2d at 107-09, 119 N.W.2d at 331-33.

We first address the nature and scope of the objection asserted by Paters before the trial court. The State argues that Paters' objections lacked sufficient specificity to advise the trial court of their true basis and thus were waived. An objection must be sufficiently specific to apprise the trial court of the basis of the objection. ***State v. Peters***, 166 Wis.2d 168, 174, 479 N.W.2d 198, 200 (Ct. App. 1991).

The summaries were submitted in advance of trial and in accordance with the provisions of § 910.06, STATS., and objections to their admissibility were heard as part of pretrial motions. During those motions Paters objected on the grounds of authenticity and argued that custodians from each of the individual subcontractors were required to testify. In addition, Paters at trial objected on hearsay and confrontation grounds. We conclude that Paters' objections were sufficient to raise the questions of authenticity, hearsay and confrontation to the trial court. *See* ***Peters***, 166 Wis.2d at 174, 479 N.W.2d at 200. However, Paters' objections were not sufficient to raise the more specific and sophisticated hearsay objections that might be advanced in regard to these exhibits. For example, it may be argued that the back of the checks containing the proof of payment by the bank and the various processing information are hearsay assertions by the bank and, accordingly, inadmissible to prove that the check was presented for payment. Such an argument however was not within the scope of the objection asserted by Paters.

Accordingly, we address Paters' contention that the State failed to authenticate the underlying documents and therefore failed to meet this requirement of admissibility. The requirement of authenticity is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Section 909.01, STATS. The documents in question represent Enex checks and billing records, subcontractor billing records and bank records. Thomas J. Fassbender, a special agent for the Wisconsin Department of Justice, testified that Enex checks and billing records were seized from LeSage's apartment pursuant to a search warrant, subcontractor billing records were received from the subcontractors during the investigation and bank records were obtained by subpoena from a number of banks. The checks are self-authenticating under § 909.02(9), STATS., and the bank records were admitted into evidence without objection. Moreover, Paters raises no issue that each of the underlying documents are not what they purport to be, i.e., checks, statements, billing records and bank records. We conclude that the underlying documents were sufficiently authenticated by Fassbender's testimony

identifying their source and the circumstances by which they came into his possession.

Paters next contends that the State failed to lay a sufficient foundation showing that the underlying records meet an exception to the hearsay rule.[2] First, we address whether the checks are inadmissible hearsay rendering the summaries reflecting data from the checks inadmissible. The State contends the checks were seized pursuant to a search warrant during the search of LeSage's apartment and were written by LeSage in payment for services rendered to Enex by the named payee on the check. The State contends that the checks are therefore not hearsay but rather represent an assertion of a coconspirator during the course and in furtherance of the conspiracy. *See* § 908.01(4)(b)5, STATS.

There was sufficient evidence for the trial court to conclude that Paters and LeSage were part of a conspiracy as that term is used in § 908.01(4)(b)5, STATS. *See* ***State v. Whitaker***, 167 Wis.2d 247, 262, 481 N.W.2d 649, 655 (Ct. App. 1992) (requisite "conspiracy" is concerted action and neither party need be charged with conspiracy). Paters and LeSage were allegedly engaged in a conspiracy to submit fraudulent bills for work purported to have been done pursuant to the PECFA program. The checks are written assertions of the payments made by Enex for particular jobs that were issued in furtherance of the conspiracy so that inflated bills could be submitted for reimbursement from the PECFA fund. Accordingly, we conclude the checks represent admissible nonhearsay evidence of statements of a coconspirator during the course and in furtherance of a conspiracy under § 908.01(4)(b)5, STATS.

We note that an alternative argument for admissibility can be asserted. A check, like currency, is no more than a negotiable instrument which when presented and processed results in payment of the amount indicated to the payee or endorser. Is such a document an assertion of any fact made by the maker of the check? If the checks were introduced to prove a fact other than that the documents themselves were submitted to the payee, they might run afoul of the hearsay provisions. *See* § 908.01(3), STATS. However, it would seem

[2] Because the bank records were admitted into evidence without objection, we need not address whether the bank records meet an exception to the hearsay rule.

that the checks are making no assertion; each check is merely evidence of a negotiable instrument in the amount contained within the check prepared and made payable to the designated payee. In other words, it is proof only of the existence of the document itself. While the fact that payment was made as indicated by the information of the processing on the back of the check may be hearsay, no objection specifically addressing this issue was made by Paters.

Paters next contends that the invoices prepared by the subcontractors are inadmissible hearsay. The State argues that the invoices meet the exception to the hearsay rule for records of regularly conducted activity under § 908.03(6), STATS. Section 908.03(6) provides:

> RECORDS OF REGULARLY CONDUCTED ACTIVITY. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances indicate lack of trustworthiness.

Fassbender testified without objection that the invoices were prepared and maintained in the ordinary course of business by the subcontractors.[3] This unobjected-to testimony is sufficient to demonstrate several of the foundational requirements for the admission of records of regularly conducted activity.

We conclude that Fassbender was a qualified witness to testify regarding the invoices. The term "qualified witness" is given a broad interpretation by case law. *See* 4 JACK B. WEINSTEIN & MARGARET A. BERGER,

[3] We note that Fassbender said the invoices from the trucking companies were prepared and maintained in the ordinary course of business, and some subcontractor invoices were from non-trucking companies. However, in the absence of a more specific objection to the non-trucking subcontractor invoices and in view of the apparent general acceptance that all subcontractors were encompassed in Fassbender's response, we will treat the testimony as applicable to all subcontractors.

WEINSTEIN'S EVIDENCE § 803(6)[2] at 803-197-98 (1994). Paters did not object to Fassbender testifying that the invoices were prepared and maintained in the ordinary course of business. From this testimony and the lack of objection to it, the trial court could reasonably conclude that Fassbender determined that the invoices were prepared in the ordinary course of each subcontractors' business. This is sufficient to make a government agent a qualified witness. *See* ***United States v. Franco***, 874 F.2d 1136, 1140 (7th Cir. 1989).[4]

Section 908.03(6), STATS., also requires that the record be made from information transmitted by a person with knowledge. The State asserts that because of the nature of the document this requirement is less compelling. The State argues that Fassbender's testimony that the invoices were prepared in the ordinary course of business is sufficient to satisfy the requirement that the invoices be prepared by someone with knowledge of the specifics reflected in the invoice. We conclude it is at least a permitted inference that the preparation of invoices in the ordinary course of business is done by one with knowledge. Therefore, the trial court did not erroneously exercise its discretion in concluding that this requirement was met.

Section 908.03(6), STATS., also requires the records be prepared "at or near the time." The State asserts that the "at or near the time" requirement does not apply because the purpose for which these invoices are submitted is not to prove the nature or extent of the work performed by the subcontractors. While the State does not explain how it proposes to write out one of the statutory requirements for admissibility of records of regularly conducted activity, there is some merit in the assertion that the timeliness requirement is addressed to the reliability of the contents of the invoice rather than the creation of the invoice itself. The "at or near the time" requirement is met as long as the invoice was reasonably related in time to the claimed work. The testimony that the invoices were prepared in the ordinary course of business is sufficient to satisfy this requirement. It is reasonable for the trial court to conclude that invoices that are prepared in the ordinary course of business are made at or near the time of the claimed work. We therefore conclude that the State made a

[4] The amount of proof necessary to demonstrate the foundation of admissibility would seem less stringent than the foundation required to admit the underlying documents themselves. The statutory scheme of advanced notice and an opportunity to pose objections is consistent with a lesser showing than is required in the admission of the documents themselves. Because this issue is not raised by either party, however, we do not address or rely on this theory.

sufficient showing that the invoices were admissible as records of regularly conducted activity. *See* ***United States v. Hayes***, 861 F.2d 1225, 1228 (10th Cir. 1988) (proper foundation laid for IRS computer records where IRS employees testified that the tax records were kept in the ordinary course of business and that it was the regular practice of the IRS to keep such records).

An alternative analysis to demonstrate the admissibility of the invoices requires a careful examination of the limited purpose for which the invoices were introduced. The purpose of the invoices was to show that the subcontractors submitted bills in a specific amount for work done. The invoice is not submitted as a written statement that the bill is accurate but is the bill itself. As such it is not offered as a declaration that that amount was properly due or that the work was properly done, but only that a demand for a specific amount of money is being made. Examined in this limited way it would appear that the invoice contains no assertion which the State is attempting to prove true. The State need show only that the bill itself was submitted. The invoice demonstrates only the fact of billing in a specific amount and as such is not hearsay but admissible nonhearsay documentary evidence. *See* § 908.01(3), STATS.

Whichever analysis may be employed, it is clear that invoices submitted for payment by the subcontractors and checks written by the defendant's business in payment of those invoices are properly admissible. Because no more specific objections were asserted by Paters, we have little difficulty in concluding that the trial court did not erroneously exercise its discretion by admitting the summaries based upon the State's showing that the underlying documents were themselves admissible in evidence.

Next, Paters contends that the summaries are inadmissible because they were based in part on oral information obtained from subcontractor employees to determine which companies did work on each job. We reject this argument. Fassbender did use interviews to locate the documentation supporting the summaries. However, there is no evidence that the summaries were not completely based on actual bills, invoices, checks and bank records. The summaries only show costs Fassbender was able to locate; Fassbender did not claim that the summaries contained all the costs Enex incurred. Therefore, we conclude the summaries were not based on inadmissible hearsay; they were based on the bills, invoices, checks and bank records that were admissible.

Paters next contends that the admission of the summaries violated his right of confrontation.[5] If the evidence has sufficient guarantees of reliability to come within a firmly rooted hearsay exception to the hearsay rule, the confrontation clause is satisfied. ***White v. Illinois***, 502 U.S. 346, 356 (1992). The exemption for statements made by a coconspirator is firmly rooted and thus sufficient to satisfy the confrontation clause. *See* ***Bourjaily v. United States***, 483 U.S. 171, 182 (1987); ***State v. Webster***, 156 Wis.2d 510, 517-18, 458 N.W.2d 373, 376 (Ct. App. 1990).

Further, we conclude that the hearsay exception for records of regularly conducted activity is also firmly rooted. The hearsay exception for records of regularly conducted activity under § 908.03(6), STATS., is identical to FED. R. EVID. 803.06, except that the federal rule refers to "regularly conducted business activity" and the exception under § 908.03(6), does not. The federal courts have concluded that RULE 803(6) is a firmly rooted exception. ***United States v. Johnson***, 971 F.2d 562, 573 (10th Cir. 1992); ***United States v. Jacoby***, 955 F.2d 1527, 1538 (11th Cir. 1992). Although the Wisconsin courts have not dealt explicitly with this issue, we conclude that like the federal rule dealing with regularly conducted activity, § 908.03(6), STATS., is sufficiently firmly rooted to satisfy the confrontation clause. Because the evidence comes within firmly rooted exceptions to the hearsay rule, we reject Paters' claim that he was denied his right of confrontation.

Paters' remaining claims relate to restitution. Restitution is committed to the sound discretion of the trial court. ***State v. Boffer***, 158 Wis.2d 655, 658, 462 N.W.2d 906, 907-08 (Ct. App. 1990). Section 973.20, STATS., provides in relevant part:

> (1) When imposing sentence or ordering probation for any crime, the court, in addition to any other penalty authorized by law, shall order the defendant to make full or partial restitution under this section to any victim of the crime ... unless the court finds substantial reason not to do so and states the reason on the record.

[5] Pater's right of confrontation comes from art. I, § 7, of the Wisconsin Constitution and the Sixth Amendment to the United States Constitution. A defendant's rights are the same under these two provisions. ***State v. Jenkins***, 168 Wis.2d 175, 185, 483 N.W.2d 262, 265 (Ct. App. 1992).

....
(13)(a) The court, in determining whether to order restitution and the amount thereof, shall consider all of the following:
1. The amount of loss suffered by any victim as a result of the crime.
2. The financial resources of the defendant.
3. The present and future earning ability of the defendant.
4. The needs and earning ability of the defendant's dependents.
5. Any other factors which the court deems appropriate.

The victim has the burden of demonstrating by the preponderance of the evidence the amount of loss sustained as a result of the crime. Section 973.20(14)(a), STATS. The defendant has the burden of proving by the preponderance of the evidence, his or her financial resources, his or her present and future earning ability and the needs and earning ability of his or her dependents. The trial court is not bound by the rules of evidence at the restitution hearing. ***State v. Stowers***, 177 Wis.2d 798, 807, 503 N.W.2d 8, 11 (Ct. App. 1993).

Paters contends that the victims failed to meet their burden of proof because the State failed to produce any evidence at the restitution hearing. The State did not provide any additional witnesses at the hearing, but did provide a restitution summary citing trial exhibits and trial testimony.[6] The trial court determined that the amount of fraud for each count was established by the evidence at trial and that the burden of establishing the amount of loss was met. Paters did not present any testimony or evidence at the hearing to contradict the proof submitted by the State on behalf of the victims. Paters only claimed that the amount should be zero because he committed no fraud and stated that he did not concede to the amounts provided by the State.

We conclude that the trial court does not have to take additional testimony at the hearing when there is sufficient evidence from the trial to meet the burden of establishing the amount of loss, the State provides a summary citing to the evidence at the trial, and the defendant does not present evidence

[6] While the State is not required to represent any victim, the State does have discretion to represent a victim in securing a restitution order. *See* § 973.20(14)(a), STATS.

to contradict the proof submitted by the State. The trial court in its discretion may consider evidence received during the trial to determine the amount of restitution without the evidence being readmitted at the restitution hearing; there is no reason to require the redundant introduction of evidence. Accordingly, we conclude that the trial court did not erroneously exercise its discretion when it did not hear any additional testimony at the hearing.

Finally, Paters contends that the State failed to produce evidence that each of the alleged victims sustained a loss in the ordered amounts. Paters suggests that the victims were the landowners, not PECFA and the banks. However, PECFA did reimburse the landowner fully on two of the sites and thus was the victim. Further, the banks had made bridge loans to landowners to pay for the work as it progressed. Once paid, the bank and landowner would submit a claim to the PECFA fund. The banks that had not been reimbursed also were victims. Accordingly, we conclude that the trial court did not erroneously exercise its discretion by awarding restitution to PECFA and the banks.

Because we conclude that the trial court properly admitted the summaries, the admission of the summaries did not deny Paters his right of confrontation and there was sufficient evidence to support the trial court's restitution order, the judgment is affirmed.

By the Court.—Judgment affirmed.

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