

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

June 11, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

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

No. 95-2262-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TERRY V. ANDERSON,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Brown County: PETER J. NAZE, Judge. *Affirmed.*

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

MYSE, J. Terry Anderson appeals a judgment of conviction for nine counts of securities fraud contrary to § 551.41(2), STATS., one count of theft by a bailee contrary to § 943.20(1)(b), STATS., and one count of forgery contrary to § 943.38(1)(a), STATS., and an order denying postconviction relief.¹ Anderson contends that: (1) the trial court erred by permitting an expert to testify whether the partnership agreement in this case was in fact a security subject to

¹ Anderson does not contest the conviction for one count of forgery.

Wisconsin securities law; (2) the trial court improperly instructed the jury regarding the definition of an investment contract; (3) the partnership agreement was a general partnership agreement and therefore not a security as a matter of law; (4) the conviction for theft by a bailee cannot stand because as a matter of law he was not a bailee. We reject Anderson's arguments and therefore affirm the judgment and order.

Anderson had been an accountant and owned and operated a horse training business that was incorporated as "Impressive Arabians". The corporation, of which Anderson was a two-thirds shareholder, owned the real estate upon which the business was located. Anderson devised a plan to sell the real estate to a group of investors and then have the corporation lease the property back from the investors. Anderson created an entity that was labeled as a general partnership called IVC Rental. Under the agreement, Anderson was designated the "operating partner" and given substantial control over the partnership's operation. Partnership shares were sold to others based upon Anderson's claim that the investors would obtain the benefits of a tax shelter and receive a twelve percent per year return on their investment. Anderson also gave a personal guarantee to some of the investors that he would repurchase the investment of any investor upon demand.

The corporation failed to produce sufficient income to make its lease payments. As a result, the partnership failed to meet its mortgage and tax obligations, and the bank foreclosed on the property. The State subsequently filed a criminal complaint charging Anderson with securities fraud and theft by a bailee. The State alleged in the securities fraud counts that Anderson made untrue statements of material fact or omitted to state material facts necessary to the investors, including the fact that the corporation, Impressive Arabians, had been operating at a substantial loss over the previous several years.

At trial, Anderson's primary defense to the securities fraud charges was that the partnership shares were not securities and therefore not subject to the state securities law. The disputed issue was whether the agreement was an investment contract subject to the securities law as contended by the State, or a general partnership agreement not subject to the securities law. Both the State and Anderson had expert witnesses testify as to the nature of the business entity known as IVC Rental.

The trial court instructed the jury on the definition of an investment contract in a manner that closely paralleled the administrative code definition. *See* WIS. ADMIN. CODE § SEC 1.02(6)(a).² The instruction given was consistent with the first paragraph of Anderson's requested instruction. The trial court, however, rejected the final two paragraphs of Anderson's proposed instruction which addressed the presumption that general partnership agreements are not securities. The jury convicted Anderson on all counts and the trial court denied Anderson's postconviction motion for a new trial.

Anderson first contends that the trial court erred by permitting the State's expert witness to express his opinion whether the partnership agreement was an investment contract or a general partnership agreement. The State argues that Anderson waived this issue because he failed to object to the testimony during the trial and actually adopted a trial strategy of presenting expert testimony on the same issue.

The record reveals that Anderson's trial counsel failed to object to the expert's testimony. A defendant may not predicate error upon a ruling which admits evidence unless a substantial right of the defendant is affected and a timely objection appears on the record stating the specific ground of objection. Section 901.03, STATS. Failure to object to the admissibility of the opinion evidence in a timely fashion precludes Anderson from raising this objection on appeal. *See State v. Peotter*, 108 Wis.2d 359, 366, 321 N.W.2d 265, 268 (1982). The defendant must raise a timely objection to give the trial court a fair opportunity to address the objection and give the opposing party an opportunity to submit alternate means of proof if the objection is sustained. *See*

² WIS. ADMIN. CODE § SEC 1.02(6) provides in relevant part:

"Investment contract" as used in s. 551.02(13)(a), STATS., includes:

- (a) Any investment in a common enterprise with the expectation of profit to be derived through the essential managerial efforts of someone other than the investor. In this subsection, a "common enterprise" means an enterprise in which the fortunes of the investor are tied to the efficacy of the efforts of those seeking the investment or of a 3rd party[.]

State v. Schumacher, 144 Wis.2d 388, 397, 424 N.W.2d 672, 675 (1988); *Arsand v. Franklin*, 83 Wis.2d 40, 54-55, 264 N.W.2d 579, 586 (1978).

Further, the decision not to object to the State's expert was trial strategy adopted by Anderson and his trial counsel. At the postconviction hearing, Anderson's trial counsel testified that the defense strategy was to allow the State to present the expert testimony and then present expert testimony of their own that the partnership agreement was not a security. Anderson's trial counsel determined that the expert testimony would help the jury understand securities more fully and create a reasonable doubt whether the partnership agreement was a security. A defendant cannot create his own error by deliberate choice of strategy and then ask to receive benefit from that error on appeal. *Murray v. State*, 83 Wis.2d 621, 628, 266 N.W.2d 288, 291 (1978). Because Anderson has waived his objections to the expert testimony and adopted a trial strategy allowing the expert to testify, we will not address the issue whether the expert testimony was properly admitted. See *State v. Kircher*, 189 Wis.2d 392, 404, 525 N.W.2d 788, 793 (Ct. App. 1994).

Next, Anderson contends that the definition of an investment contract in the jury instruction given by the court was erroneous and so vague and limitless that it was virtually without meaning. The State argues that Anderson also waived this issue. "Failure to object at the [instruction] conference constitutes a waiver of any error in the proposed instructions or verdict." Section 805.13(3), STATS. An objection to jury instructions must be sufficiently specific so as to apprise the trial court of the specific nature of the objection. See *State v. Gomaz*, 141 Wis.2d 302, 319, 414 N.W.2d 626, 634 (1987).

In this case, the definition of an investment contract was taken almost without change from the administrative code. The definition is nearly identical to that proposed by Anderson as part of his requested jury instruction. While the trial court refused to give the balance of his requested instruction regarding a presumption that general partnership agreements are not securities, Anderson does not contend that the additional paragraphs of his proposed instruction would have cured the error he now contends exists. Instead, Anderson argues that the instruction given was so vague and limitless that it was virtually without meaning. There is little question that Anderson not only failed to object to the instruction defining an investment contract, but in fact proposed the jury instruction he now finds erroneous. We therefore conclude

that Anderson has waived his objection to the jury instruction regarding the definition of an investment contract.

Anderson next contends that as a matter of law the IVC Rental partnership agreement is a general partnership agreement and not a security subject to Wisconsin securities law. We agree that general partnerships are not within the many documents enumerated under Wisconsin's securities law. *See* § 551.02(13)(a), STATS.³ The State, however, contended that the partnership agreement was actually an investment contract and therefore a security under § 551.02(13)(a). Accordingly, the dispositive issue is whether, as a matter of law, the partnership agreement was a general partnership agreement and not an investment contract. This issue presents a question of law that we review de novo. *See Fore Way Express v. Bast*, 178 Wis.2d 693, 701, 505 N.W.2d 408, 411-12 (Ct. App. 1993).

A document labeled a general partnership agreement can be a security. *Banghart v. Hollywood Gen. Partnership*, 902 F.2d 805, 807 (10th Cir. 1990). When determining whether an instrument is a security, substance should rule over form and the emphasis should be on the economic realities underlying the transaction. *Fore Way Express*, 178 Wis.2d at 704, 505 N.W.2d at 413. In the partnership setting, our primary inquiry is on the powers possessed by the partners in the partnership agreement. *Banghart*, 902 F.2d at 808. In order for

³ Section 551.02(13)(a), STATS., provides:

"Security" means any stock; treasury stock; note; bond; debenture; evidence of indebtedness; share of beneficial interest in a business trust; certificate of interest or participation in any profit sharing agreement; collateral trust certificate; preorganization subscription; transferable share; investment contract; commodity futures contract; voting trust certificate; certificate of deposit for a security; limited partnership interest; certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease; or, in general, any interest or instrument commonly known as or having the incidents of a security or offered in the manner in which securities are offered; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of or option, warrant or right to subscribe to or purchase or sell, any of the foregoing.

the IVC Rental partnership agreement to be a general partnership agreement exempt from the securities law, there must be evidence that the agreement afforded the partners their customary powers and did not vest all power to a single partner. See *id.* at 807-08.

In the IVC Rental partnership agreement, Anderson was designated "operating partner" and was given exclusive control over the business operations. Anderson was also given exclusive control over withdrawals of partnership funds. Paragraph ten of the agreement provided as follows:

Although it is understood and agreed that this is a general partnership, for purposes of the business operation of the partnership, Terry Anderson shall be designated as the "operating partner". Terry Anderson shall manage and conduct all partnership business. It is understood and agreed that Terry Anderson shall be held harmless for all actions taken or decisions made while acting in this capacity, except for cases of fraud or gross mismanagement. Consequently, no partner hereto shall compromise or release any debt due the partnership, or engage in any transaction on behalf of the partnership. Nor shall any other partner hereto endorse in the name of the partnership any note, or act as an accommodation party or otherwise become surety for any person.

The only right reserved to the other partners in the agreement was the right to inspect the partnership books at any time.

Because Anderson had exclusive control over the business operations as operating partner and the remaining partners had virtually no right to direct, control or influence the business operations, we conclude there was substantial evidence supporting the jury's conclusion that the agreement, although labeled a general partnership, was in fact an investment contract. Therefore, we cannot conclude that the partnership agreement was, as a matter of law, a general partnership agreement and not a security.

Finally, Anderson contends that the conviction for theft by a bailee cannot stand because he was not a bailee as a matter of law. The theft by a bailee charge was based on a check delivered to Anderson by Nee Yee Kong. Kong testified that he gave Anderson a check for \$10,000, which Anderson promised to invest for Kong in IVC Rental. Anderson told Kong that the funds would be available for withdrawal in full with three days notice to Anderson. The evidence further showed that Anderson promptly deposited the check in his personal account and spent the money for personal purposes, rather than investing it as promised. In addition, Anderson did not return the money when Kong requested it.

Anderson argues that because the money was given to him by Kong for investment purposes, he was not a bailee of the funds. A bailment is defined as:

A delivery of goods or personal property, by one person (bailor) to another (bailee), in trust for the execution of a special object upon or in relation to such goods, beneficial either to the bailor or bailee or both, and upon a contract, express or implied, to perform the trust and carry out such object, and thereupon either to redeliver the goods to the bailor or otherwise dispose of the same in conformity with the purpose of the trust.

BLACK'S LAW DICTIONARY 141 (6th ed. 1990). Because the check was delivered to Anderson under specific conditions and Anderson accepted the check subject to those conditions, we conclude that Anderson accepted the funds as a bailee. When he applied the funds for his own purposes in violation of the terms of the trust imposed by the conditions upon which he accepted the funds, he breached his obligation as a bailee.

By the Court. – Judgment and order affirmed.

Not recommended for publication in the official reports.