COURT OF APPEALS
DECISION
DATED AND FILED

June 10, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3087-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH L. HOOVERSON, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

PER CURIAM. Kenneth L. Hooverson, Jr. appeals from a judgment convicting him of being party to the crime of felony theft, contrary to §§ 943.20(1)(b) and 939.05, STATS., and from an order denying his motion for postconviction relief. Hooverson claims there is insufficient evidence to support the jury's verdict. For the reasons discussed below, we disagree and affirm.

BACKGROUND

When Irvin Johnson died in April 1996, he left behind a farm containing a vast amount of personal property, including approximately fifty or more junked vehicles filled with assorted items. Dale Pedretti was appointed as the special administrator of the Johnson estate, and he in turn hired Hooverson, a recycling contractor, to assist him in liquidating some of the personal property.

Hooverson and Pedretti signed a contract authorizing Hooverson to sell scrap metal, automobiles and other personal property located on the outside premises of the Johnson farm. Hooverson would be entitled to fifty percent of the proceeds he obtained upon turning them over to the estate. The contract further provided that items considered more valuable than recycle or scrap value were to be set aside and reported to Pedretti for other liquidation methods. Two weeks after the recycling contract was signed, Pedretti found a buyer for the entire lot, and directed Hooverson to terminate his efforts.

The following spring, the police received an anonymous tip that Hooverson and others had found and kept a large sum of money on the Johnson farm without reporting it to Pedretti. When questioned by police, Hooverson stated that when he, Brad Stafslien, Carl Schmidt and Shane Evenson were combing through the vehicles on the Johnson farm one day, Stafslien discovered a tin containing in excess of $16,000 in an old delivery truck. Hooverson said Pedretti had left him with the impression that he could keep any money found

hidden on the property,[1] so he took about $4,800, Schmidt and Evenson each took about $1,800, and Stafslien kept the rest.

At trial, Hooverson testified that on the day in question, Stafslien was rummaging through the vehicles on the farm looking for antiques, and offered to buy the delivery truck and its contents for $100 after seeing a chest, a quilt, and an antique coffee pot inside it. Hooverson said he accepted the offer and wrote Stafslien a receipt, and that it was not until after this transaction was completed that Stafslien discovered the tin full of cash. Hooverson claimed that he had not reported the discovery of the money to Pedretti because he had already sold the contents of the truck, and did not report the sale of the truck and its contents because he felt that Pedretti owed him money on their agreement. Several of Hooverson's friends and companions, including Stafslien, gave trial testimony tending to corroborate Hooverson's story.

STANDARD OF REVIEW

As the appellant recognizes, when reviewing the sufficiency of the evidence to support a conviction, this court will not substitute its judgment for that of the trier of fact "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting

[1] When the investigating officer asked Hooverson what Pedretti had told him to do if he ran across money, Hooverson said, "He didn't. He just says 'if you find it, you find it,' more or less I got the assumption of." The officer then asked, "so it was your opinion that if we find it, its ours?" and Hooverson answered in the affirmative. Hooverson now contends that his statement to the police is not inconsistent with his trial testimony that he understood that he could keep fifty percent of any money found, because the question he was asked was in the plural. However, viewing the evidence most favorably to the state, the terms "we" and "ours" referred to Hooverson and his friends, not Hooverson and Pedretti.

reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990).

ANALYSIS

In order to meet its burden of proof, the State needed to show that Hooverson: (1) had possession of another's money because of his employment; (2) intentionally retained possession of that money without the owner's consent and contrary to his own authority; (3) knew that he lacked the owner's consent or his own authority to retain possession; and (4) intended to convert the money to his own use. Section 943.20(1)(b), STATS. Both parties agree that felony theft could not be established if, in fact, Hooverson had sold the delivery truck before the tin of money was discovered inside of it. However, our review of the record satisfies us that there was sufficient evidence before the jury for it to reasonably conclude that the sale did not occur and that all of the elements of the offense had been proved.

Although Hooverson's claim that he sold the delivery truck was corroborated by other testimony at trial, it conflicted with his prior account to police that he and his friends simply kept the money because they had found it. Furthermore, Hooverson never gave any accounting of the alleged sale to Pedretti. The jury was not required to accept Hooverson's conveniently proffered explanation of the sale, absent any contemporaneous evidence that it had occurred and contrary to his earlier statement to police. *See* ***State v. Walls***, 190 Wis.2d 65, 72, 526 N.W.2d 765 (Ct. App. 1994) (jury may weigh evidence and resolve conflicts in the testimony). Absent the sale, there was more than sufficient evidence to show that Hooverson retained possession of the tin of money through his employment without the owner's consent or his own authority (since he was to

report items more valuable than recycle or scrap value), with the intent to convert it to his own use.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.