COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP411-CR **Cir. Ct. No. 2013CF318**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN W. TORGERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: MICHAEL A. SCHUMACHER, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. John Torgerson appeals a judgment of conviction for multiple violations of statutes making it a crime to offer or sell unlicensed

securities without an exemption and to omit to state material facts concerning the offering or sale of securities, as well as an order denying his motion for postconviction relief. He argues the evidence presented at trial was insufficient to support his convictions for these offenses, and he also challenges the circuit court's restitution order. We affirm.

BACKGROUND

¶2 An Amended Information charged Torgerson with fifty-seven violations of Wisconsin's securities laws. The alleged violations occurred between May 6, 2007, and February 7, 2010, and involved sales to numerous individuals and entities. Torgerson was charged with a total of twenty-nine violations of WIS. STAT. § 551.21(1)(a) (2005-06) and WIS. STAT. § 551.301(3) (2007-08), both of which prohibited the sale of unregistered securities.[1] He was also charged with twenty-eight violations of WIS. STAT. § 551.41(2) (2005-06) and WIS. STAT. § 551.501(2) (2007-08), both of which made it unlawful to omit to state a material fact necessary in order to make non-misleading statements concerning the offering or sale of securities, as judged in light of the circumstances under which the statements were made.

¶3 The trial evidence showed that Torgerson incorporated Preferred Acceptance Company ("PAC") in 1994. PAC was engaged in subprime lending in the Chippewa Valley. According to Torgerson, PAC used numerous banks to

[1] WISCONSIN STAT. § 551.21(1)(a) (2005-06) and WIS. STAT. § 551.301(3) (2007-08) are not materially different from the present version of the statute, WIS. STAT. § 551.301(3) (2015-16). Similarly, WIS. STAT. § 551.41(2) (2005-06) and WIS. STAT. § 551.501(2) (2007-08) contain, in relevant part, the same substantive prohibition as WIS. STAT. § 551.501(2) (2015-16). Accordingly, all future references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

finance its loans. In 2003, Torgerson began offering individual investments through PAC in the form of interest-bearing promissory notes that repaid principal after a designated time. The funds generated by the sale of these notes allowed PAC to make an occasional consumer loan and to finance occasional construction loans.

¶4 The State presented testimony and other evidence from Randall Schumann, chief legal counsel for the Wisconsin Division of Securities within the Department of Financial Institutions at all times relevant to this case. Schumann testified Torgerson, on PAC's behalf, applied for an administrative exemption from the securities registration requirement in 2003, which exemption was granted for a one-year period.[2] The Division renewed the exemption in 2004 and 2005, although Schumann had concerns about PAC's financial condition in the latter year.

¶5 Torgerson filed another application in 2006, requesting an additional one-year exemption. It appeared to Schumann that PAC's financial condition was "deteriorating," and he sent a letter on November 29, 2006, particularizing the nature of the Division's concerns and requesting additional information before it would act on the extension request. Torgerson responded by letter, indicating that additional information regarding the Division's request would be forthcoming. Torgerson submitted additional information in September 2007, which the Division also deemed insufficient to grant an exemption. In October 2007, the

[2] The relevant administrative exemption is WIS. ADMIN. CODE § DFI 2.028 (Sept. 2010). Only a one-year offering period is eligible for that exemption, although the issuer may extend the offering up to an additional one year by filing, among other things, amended and updated disclosure materials. *See* WIS. ADMIN. CODE § DFI 2.028(5) (Sept. 2010).

Division again requested that Torgerson provide a response to the items particularized in its November 29, 2006 letter.

¶6 Torgerson did not respond to the Division's October 2007 letter, and no exemption issued following the expiration of the 2005 extension on November 29, 2006. Despite PAC not having an exemption, Torgerson continued offering and issuing securities between 2006 and 2010, many of which were renewals of previously issued notes. He did this primarily through PAC, but also through other entities that he owned or controlled, including Elizabeth Hallie, LLC; Keith Street Office Plaza, LLC; American Title & Abstract Company; Fifth Street West, LLC; Division Street Project; and Dutchman Court, LLC. Torgerson testified that for each of the transactions, he had discussed with investors the existence of a bank judgment against PAC that resulted in his then-inability to repay promissory notes that had come due.

¶7 Regarding the WIS. STAT. § 551.501(2) violations, the State presented evidence regarding three additional items it believed Torgerson was required but failed to disclose to investors in his companies following the expiration of PAC's exemption. First, Torgerson admitted at trial he did not tell his investors about the registration problems he was experiencing with the Division. Second, the State presented evidence that Torgerson had failed to disclose an audit by the accounting firm Wipfli for the 2007 year, in which Wipfli observed serious financial issues with PAC and included a "going concern" statement indicating that the company may not be able to continue. Although the audit was dated June 19, 2008, there was evidence Torgerson knew the substantive

contents of the audit as early as May 2008.[3] Third, the parties stipulated at trial that an investor had filed a lawsuit against Torgerson and PAC on July 16, 2009, based on a promissory note that had not been repaid when due on March 15, 2009. On September 9, 2009, the investor received a judgment against Torgerson personally, as well as PAC, for the value of the note plus interest.

¶8 The jury acquitted Torgerson of ten charges but found him guilty of the remainder of the counts, consisting of twenty-four counts of selling securities without a registration or exemption and twenty-three counts of making omissions of material fact in the sale of securities. Torgerson was sentenced to a total of four years' initial confinement and two years' extended supervision. He was also ordered to pay $440,000 in restitution to the victims.

DISCUSSION

¶9 Torgerson generally challenges the sufficiency of the evidence supporting his convictions. Our standard for reviewing the sufficiency of the evidence is highly deferential to the jury's verdict. ***State v. Beamon***, 2013 WI 47, ¶21, 347 Wis. 2d 559, 830 N.W.2d 681. We will not overturn the verdict unless the evidence, viewed most favorably to the prosecution, is so insufficient in probative value and force that, as a matter of law, no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***Id.*** Whether the evidence is sufficient to support a conviction is a question we review de novo. ***State v. Miller***, 2009 WI App 111, ¶31, 320 Wis. 2d 724, 772 N.W.2d 188.

[3] In closing argument, Torgerson's counsel attempted to pass off this testimony regarding the timing of Torgerson's knowledge as a mistake. However, we must view all evidence in the light most favorable to sustaining the verdict. *See* ***State v. Beamon***, 2013 WI 47, ¶21, 347 Wis. 2d 559, 830 N.W.2d 681.

¶10 Torgerson first challenges the sufficiency of the evidence supporting his convictions for offering or selling unregistered securities. The broad public policy underlying the Wisconsin Uniform Securities Law is "the protection of the public from the sale of worthless and fraudulent securities." ***Hardtke v. Love Tree Corp.***, 386 F. Supp. 1085, 1092 (E.D. Wis. 1975). To that end, it is unlawful in this state to offer or sell a security unless it is registered or exempt from registration. *See* WIS. STAT. § 551.301.

¶11 Although Torgerson presents a sufficiency of the evidence challenge, he does not dispute he was dealing in unregistered securities. Rather, he argues "the evidence presented at trial proves that the transactions underlying … [the] convictions were exempt from registration." Torgerson invokes the "limited offering exemption" provided for in WIS. STAT. § 551.202. Under this exemption, registration is not required for "any transaction pursuant to an offer directed by the offeror to not more than 25 persons in this state … during any period of 12 consecutive months," as long as certain conditions are met.[4] WIS. STAT. § 551.202(14). The exemption is self-executing, meaning that as long as one's offerings qualify, no filing need be made with the State.

¶12 As the State points out, however, Torgerson changed defense tactics following his convictions. At trial, Torgerson argued he should be acquitted of the registration offenses related to PAC because he did not believe he had committed a crime. Torgerson claimed he believed he was still covered by the administrative

[4] To be eligible for the limited offering exception, there cannot have been any general solicitation or advertising in connection with the offer, nor any commission or remuneration paid or given to the offeror (with certain exceptions), and the offeror must reasonably believe all the purchasers in this state, with certain exceptions, are purchasing for investment. WIS. STAT. § 5551.202(14)(a)1.-3.

exemption because he was confused by the Division's November 29, 2006 letter, and he did not receive the Division's October 2007 letter. Torgerson relied on the limited offering exemption only with respect to the charges related to his selling securities in the non-PAC entities. Indeed, his attorney conceded during closing arguments—consistent with Torgerson's own trial testimony—that "the only company that had more than 25 [investors] in any one-year period was Preferred Acceptance Company."

¶13 On appeal, Torgerson asserts that *none* of his convictions for violating WIS. STAT. § 551.301 can stand because all the securities he sold qualified for the limited offering exemption. Torgerson's brief-in-chief presents a "Timeline of Notes Sales and Other Events Associated with Mr. Torgerson." The timeline generally shows when each of the charged offenses occurred, along with other relevant events that occurred between late 2006 and early 2010, such as Torgerson's personal bankruptcy and the date of the Wipfli audit. Torgerson reasons that "because the highest concentration of transactions occurred over the twelve-month period from February 8, 2009, to February 7, 2010," and during this period he was charged with selling promissory notes in four of his companies to only fifteen people, he qualified for the limited offering exemption—ostensibly as a matter of law, because he met all of the exemption's other conditions as well.

¶14 "We must review the case on the theory upon which it was submitted and apparently understood by the jury." ***Malco, Inc. v. Midwest Aluminum Sales, Inc.***, 14 Wis. 2d 57, 62, 109 N.W.2d 516 (1961). This is a slightly different rule than the one argued by the State here, which requires parties

to first raise appellate arguments in the circuit court.[5] *See* ***Schonscheck v. Paccar, Inc.***, 2003 WI App 79, ¶11, 261 Wis. 2d 769, 661 N.W.2d 476. Rather, this rule reflects this court's desire to maintain the integrity of the judicial system by refusing to allow a litigant to reargue his or her case following an unsuccessful trial using a different theory of defense. *See* ***State v. Maloney***, 2006 WI 15, ¶36, 288 Wis. 2d 551, 709 N.W.2d 436; *cf.* ***State v. Sarinske***, 91 Wis. 2d 14, 60, 280 N.W.2d 725 (1979) (declining to exercise power of discretionary reversal to "allow a party to try a case on one theory and losing on that theory to have a second trial on a different, valid theory"). We therefore deem Torgerson's appellate attempt to broaden the reach of his trial argument forfeited.

¶15 Even on the merits, we would deny Torgerson relief from his convictions for failure to register securities. No Wisconsin case appears to have considered which party bears the burden of proving the applicability of an exemption to the registration requirement in a prosecution for dealing in unregistered securities. However, case law interpreting the federal securities statutes is instructive to the proper interpretation of the Wisconsin Uniform Securities Act. *See* ***State v. McGuire***, 2007 WI App 139, ¶12, 302 Wis. 2d 688, 735 N.W.2d 555. Under federal law, the applicability of an exception to the registration requirement is an affirmative defense that the defendant must prove. *See* ***Doran v. Petroleum Mgmt. Corp.***, 545 F.2d 893, 899 (5th Cir. 1977); ***SEC v. Blackburn***, 156 F. Supp. 3d 778, 796 (E.D. La. 2015); *cf.* ***McGuire***, 302 Wis. 2d 688, ¶29 (defendant's argument that note should not be considered a "security"

[5] As Torgerson observes, before the circuit court he asserted (by virtue of his postconviction motion) that all the securities transactions were exempt from registration pursuant to the limited offering exemption.

under relevant exclusionary language of definitional statute constituted a defense for which the defendant was required to put forth evidence).

¶16 Despite claiming the evidence at trial conclusively showed he was entitled to the limited offering exemption, Torgerson fails to point to any record evidence showing that to be the case. Instead, he points solely to the commission dates of the charged offenses, asserting that the dates of these offenses never add up to show he had more than twenty-five securities sales in any twelve-month period.

¶17 Torgerson's reliance on the quantity and timing of the charged offenses in this case does not establish that Torgerson complied with the limited offering exemption. Among other things, the exemption requires that Torgerson not have directed an offer to more than twenty-five persons during any twelve-month period. *See* WIS. STAT. § 551.202(14). The State charged Torgerson with offenses related to transactions that were actually consummated, but the limited offering exemption also counts the number of recipients of an offer. Notably, Torgerson fails to point to any record evidence regarding offers (including their dates and quantity) that supported his exemption defense. This omission is true as to offers for each of the investment entities at issue, and therefore the jury had no reasonable basis to conclude any of his companies qualified for the limited offering exemption. And even if such evidence existed—for example, if Torgerson had denied he made offers to more than twenty-five people in any

twelve-month period—it was within the province of the trier of fact to determine the weight to give that evidence.[6]

¶18 Torgerson also argues the "related issuer" rule does not apply to thwart his reliance on the limited offering exemption. The related issuer rule is an administrative regulation dictating that, under certain circumstances, "[i]ssuers affiliated by reason of direct or indirect control or persons affiliated by reason of direct or indirect control of any issuer are deemed to be a single issuer or person." WIS. ADMIN. CODE § DFI 2.02(5)(b) (Sept. 2010). Because we conclude Torgerson's argument regarding the applicability of the limited offering exemption fails with respect to each investment entity, it is not necessary for us to determine whether his reliance on the exemption also fails because the various issuers should be treated as a single entity under § DFI 2.02(5)(b). However, because the issue has been fully briefed, we elect to address Torgerson's argument. *See* ***Hull v. State Farm Mut. Auto. Ins. Co.***, 222 Wis. 2d 627, 640 n.7, 586 N.W.2d 863 (1998).

[6] Torgerson, who testified at trial, does not appear to have been asked about offers he made. Rather, the following exchange is representative of the questions asked of him by his attorney on direct examination with respect to each entity, and counts only the number of investors:

> Q. Did you [referring to Dutchman Court, LLC] have more or less than 25 investors in any 12-month period?
>
> A. Always less.
>
> Q. And, again, how were you sure of that?
>
> A. I reviewed financial literature and statements periodically and never got close to 25.

¶19 Although the related issuer rule treats affiliated entities as a single issuer, the regulation states the limited offering exemption "shall not be denied on account of such affiliation provided the offer and sale are not part of a common business purpose or plan of offering." WIS. ADMIN. CODE § DFI 2.02(5)(b) (Sept. 2010). The regulation presumes a common business purpose or plan of offering exists when "the offer or sale of securities is not separate and distinct from another offer and sale of securities with respect to (i) the application of proceeds, (ii) the physical proximity of real property or other assets, or (iii) the financial affairs of the business." ***Id.***

¶20 The State points to numerous instances of evidence showing that Torgerson's entities had a "common business purpose or plan of offering," as is required for the related issuer rule to apply. This evidence included: (1) Schumann's testimony that Torgerson would sometimes substitute notes from other entities for PAC-issued notes; (2) PAC offering circulars that documented loans to Torgerson's various companies and identified those companies as "related entities" and "related ventures"[7]; (3) Torgerson's admission that he was the president or controlling member of the non-PAC entities; and (4) a Division investigator's testimony that the primary place of business for each of these entities was a common location, 2142 Brackett Avenue in Eau Claire. It therefore appears that such evidence, viewed most favorably to the prosecution, is not so insufficient in probative value and force that, as a matter of law, no reasonable

[7] This evidence appears to have been particularly compelling to the jury. The jury acquitted Torgerson of the alleged offenses involving Elizabeth Hallie, LLC and Division Street Project. Unlike Fifth Street West, LLC, Keith Street Office Plaza, LLC, and Dutchman Court, LLC, the Elizabeth Hallie and Division Street entities were not identified as "related ventures" on the offering circulars.

trier of fact could have found guilt beyond a reasonable doubt by applying the "related issuer" rule. *See* ***Beamon***, 347 Wis. 2d 559, ¶21.

¶21 Torgerson also argues the evidence was insufficient to support his twenty-three convictions for omitting to state material facts when selling the securities at issue. As Torgerson points out, WIS. STAT. § 551.501(2) "does not require disclosure of every possible fact under every possible circumstance." *See* ***Cuene v. Hilliard***, 2008 WI App 85, ¶24, 312 Wis. 2d 506, 754 N.W.2d 509. The statute requires disclosure of "material" facts, and materiality is measured by an objective standard—"whether the omitted fact would have made a difference to a reasonable investor's decision to invest." ***Id.***, ¶26. Torgerson contends no reasonable trier of fact could conclude that failing to disclose the three matters presented by the State (PAC's registration issues, the negative Wipfli audit, and the investor lawsuit) would have had actual significance to a reasonable investor under the circumstances here, when the investors already knew the relevant entities could not repay the promissory notes.

¶22 We reject this argument. Although only certain transactions were affected by Torgerson's failure to disclose the negative Wipfli audit and the investor lawsuit given the timing of each of these events, Torgerson's duty to disclose PAC's registration issues, if material, affected all the transactions. Torgerson's argument against materiality is that all the transactions were automatically exempt from registration by virtue of the limited offering exemption, an argument we have already rejected. *See supra* ¶¶14-20. Thus,

there is no basis to overturn any of Torgerson's convictions under WIS. STAT. § 551.501(2).[8]

¶23 We also reject Torgerson's argument against the materiality of the negative Wipfli audit and the investor lawsuit to the transactions that occurred after Torgerson became aware of those events. Torgerson personally guaranteed repayment of virtually all the promissory notes at issue. As such, anything that could have a material adverse impact on Torgerson's personal finances (such as the failure of his principal company, or a judgment against Torgerson personally) would have been material to investors.

¶24 Additionally, Torgerson's assertion that the negative Wipfli audit would not have mattered because he had disclosed to investors that he could not repay their promissory notes at a particular point in time does not withstand scrutiny. The Wipfli audit revealed not just temporary financial difficulties, but rather substantial losses that cast significant doubt on PAC's ability to continue as a going concern. Particularly given Torgerson's past practice of loaning money between his businesses, the imminent collapse of Torgerson's primary business, if disclosed, may well have changed the calculus for a reasonable investor in a way that Torgerson's more guarded admission regarding his immediate ability to repay did not.

[8] Torgerson also appears to argue that the PAC registration issues would not have affected a reasonable investor's decision to enter into a transaction with a non-PAC entity. Torgerson does not attempt to explain why, under the circumstances present in this case, a reasonable investor would view a related real estate entity's dealing in unregistered securities as immaterial, and we will not abandon our neutrality to develop his argument for him. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82.

¶25 Finally, we disagree with Torgerson that the investor lawsuit was immaterial when considered in context with the more substantial bank judgment against PAC. An investor has a right to reasonably accurate information, and it is then up to the investor to determine whether he or she wishes to invest in light of that information. ***State v. Johnson***, 2002 WI App 224, ¶23, 257 Wis. 2d 736, 652 N.W.2d 642. The State persuasively argues that an investor, when deciding whether to enter into a transaction with Torgerson, might reasonably consider the experience of a fellow investor more relevant to its own interests than a bank judgment. The investors' testimonies at the trial here regarding their subjective experiences support our objective conclusions regarding what information a reasonable investor would expect to have.[9]

¶26 Torgerson alternatively argues that the eighteen convictions related to renewal transactions must be reversed because the transactions were not "sales." WISCONSIN STAT. § 551.02(11)(a) (2005-06), defined a "sale" as "every sale, disposition or exchange, and every contract of sale of, or contract to sell, a security or interest in a security for value." The present version of the statute contains a similar definition. *See* WIS. STAT. § 551.102(26). Torgerson asserts the renewals at issue here "functioned as mere modifications of [the] original exchange and do not constitute independent sales requisite to the charging statutes." The circuit court correctly concluded that the nature of the "renewal" transactions was a question of fact for the jury, on which the State bore the burden of proof.

[9] A substantial number of the investors at trial testified that the registration, audit, and investor lawsuit would have been material to their investment decisions.

¶27 Despite citing numerous cases in support of his argument, Torgerson concedes federal and state decisions treat renewals of promissory notes as independent sales. He contends the law of these jurisdictions is inconsistent with Wisconsin law, as established in ***Swan Sales Corp. v. Joseph Schlitz Brewing Co.***, 126 Wis. 2d 16, 374 N.W.2d 640 (Ct. App. 1985). In that case, this court was tasked with determining the applicability of the Wisconsin Fair Dealership Law to contracts that predated the legislation. *See* ***id.*** at 23. This determination, in turn, depended on whether the contract at issue was a new agreement, a renewal or amendment of an agreement, or a mere modification of an existing contract. ***Id.*** at 25-28. Answering this question depended on whether there was a "fresh decision" to invest or whether the parties intended to continue their relationship on the same terms as the prior agreement. ***Id.*** at 27.

¶28 We agree with the State that the evidence here supports a finding that the promissory notes in this case reflect "fresh decisions" to reinvest with Torgerson and his affiliated companies. On each note's maturity date, the investor had the legal right to full repayment of the note's principal. As Schumann testified at trial, the investors could have demanded repayment, and, failing that, could have sued Torgerson or forced his business into receivership or liquidation. The investors here surrendered the right to immediate repayment by entering into new notes, allowing Torgerson more time to pay. The renewal notes had new origination dates, new maturity dates, and most also had revised interest rates.

¶29 Torgerson also relies on ***Dairyland Greyhound Park, Inc. v. Doyle***, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408, but that decision undercuts his argument. Our supreme court remarked that "[c]ourts have found that renewal of a contract *that contains language which explicitly provides for automatic renewal, and does not, therefore, require an affirmative act by either party in order to*

renew, constitutes a continuation of the pre-existing contractual relationship and not a 'fresh decision' to continue." ***Id.***, ¶64 (emphasis added). Here, the State observes that none of the notes at issue were triggered by an automatic renewal provision. Torgerson's reply brief does not respond in any way to the State's arguments.

¶30 Finally, Torgerson challenges the restitution portion of his sentence, arguing it should be vacated because the State failed to establish a causal nexus between his crimes and the damages Torgerson's investors suffered. The restitution statute, WIS. STAT. § 973.20, requires that a victim show a "causal nexus" between the crime considered at sentencing and the alleged damages. ***State v. Canady***, 2000 WI App 87, ¶9, 234 Wis. 2d 261, 610 N.W.2d 147. Torgerson reasons that because any renewing investor would have recovered nothing had they instead chosen to enforce the original note, these investors cannot prove that any damage was caused by his dealing in unregistered securities or omitting material information when making those sales.

¶31 There are multiple problems with Torgerson's restitution argument. First, a similar argument appears to have been rejected in ***State v. Ross***, 2003 WI App 27, ¶¶52, 55, 260 Wis. 2d 291, 659 N.W.2d 122, a case which Torgerson fails to address in any of his briefs. Second, we review a circuit court's restitution decision for an erroneous exercise of discretion. ***Id.***, ¶53. The record on appeal does not contain a transcript of the restitution hearing, and we must therefore assume the missing material supported the circuit court's determination. *See* ***Manke v. Physicians Ins. Co. of Wis.***, 2006 WI App 50, ¶60, 289 Wis. 2d 750, 712 N.W.2d 40. Third and finally, we agree with the State that "the possibility that [investors] might have lost their money anyway under different circumstances is irrelevant." The applicable standard is whether the defendant's criminal activity

was a "substantial factor" in causing damage. ***State v. Madlock***, 230 Wis. 2d 324, 333, 602 N.W.2d 104 (Ct. App. 1999). Based on the record before us, the circuit court could reasonably conclude Torgerson's criminal violations were a substantial factor in the losses the investors sustained. To the extent Torgerson argues otherwise, we reject his argument as unduly speculative in the context of this case.

By the Court.—Judgment and order affirmed.

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