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IN THE
COURT OF APPEALS OF INDIANA

MARK SINGER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1102-CR-90
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila A. Carlisle, Judge
Cause No. 49G03-0807-FC-167038

August 26, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Mark Singer ("Singer") appeals from his convictions for five counts of Theft, each as a Class C felony, arising from his role in the use of funeral- and cemetery-related trust and escrow funds for purposes other than the maintenance and care of cemeteries and the provision of funeral services and merchandise to bereaved families.

We affirm.

Issue

Singer raises one issue on appeal, which we restate as whether there was sufficient evidence as to the owner of the trust funds to support his convictions.

Facts and Procedural History

Background

In early 2004, Singer was employed as an investment advisor for Deutsche Bank. Through a mutual business contact, Singer was placed in touch with Robert Nelms ("Nelms"), who owned several funeral homes in New Jersey and New York and wanted to expand his business holdings but lacked the financial ability to do so. Singer discussed with Nelms a financing approach he claimed to have used with other funeral businesses. The approach, a swap derivative, entailed use of the funeral business's trust assets as investment capital and as security for a loan to allow Nelms to acquire a business.

Under Singer's plan, the trust assets would be placed into investment accounts he managed; those investment accounts would then serve as collateral for the loan. To replace the funds from the trust accounts, the funeral business would issue debentures to the trusts as

investment assets. The debentures would provide a promise to repay the principal invested by the trust fund on a fixed date in the future, and would require the business to pay regular interest to provide the trusts with operating capital for regular funeral and cemetery business. Nelms was excited by the prospect of being able to expand his business holdings, and Singer told Nelms to contact him once a promising acquisition target was identified.

From prior experience in the funeral home industry, Nelms knew that the owners of an Indiana-based company, Memory Gardens Management Corporation ("MGMC"), had previously been interested in selling their business holdings. MGMC was largely managed by Jim and Tom Meyer, who, together with their father, Fred Meyer, Sr., and a sister, Dr. Nancy Cade, owned MGMC. MGMC owned numerous funeral homes and cemetery properties in Indiana, Michigan, and Ohio, and maintained its headquarters in Indianapolis.

Nelms approached Jim Meyer about acquiring MGMC, and the two parties began to negotiate terms of the sale. The terms of the purchase agreement for MGMC required Nelms to pay approximately $27 million for the business, with a $13.5 million down payment, $8 million in seller financing (secured by a first mortgage on the real estate holdings of MGMC), and $4 million in consideration of a non-compete to be executed by Jim and Tom Meyer. Nelms also agreed to purchase Jim Meyer's home and attached real estate for $1.1 million.

Nelms contacted Singer to arrange financing. By this point, in August or September 2004, when negotiations for the purchase of MGMC were under way and an initial closing date was approaching, Singer was employed by Smith Barney, then a division of CitiCorp, as

an investment advisor. Singer attempted to arrange financing for Nelms through CitiBank, a Smith Barney sister company. This would ultimately be unsuccessful.

During this period, Nelms placed Singer in contact with Forethought Federal Savings Bank ("Forethought"). Forethought managed MGMC's funeral and cemetery trust assets, which totaled $23,371,145.00 on September 30, 2004, and which continued to appreciate in value in the period leading up to the sale of MGMC to Nelms. Singer proposed the derivative swap financing plan to Forethought as trustee for MGMC; Forethought was concerned that the investment scheme was not in keeping with its duties as a trustee, and declined to participate in the arrangement. Singer told Nelms to find a new trustee to administer the trusts and directed Nelms to look for a smaller trust company.

After some research, Nelms settled on Community Trust & Investment ("CTI"), a small corporate trustee located in Noblesville. Nelms placed Singer in contact with David Becher ("Becher"), CTI's Vice President for Institutional Clients and Business Development. Singer and Nelms told Becher that Singer would arrange for the transfer of funds from Forethought to CTI upon Nelms's conclusion of the purchase of MGMC and that Singer would handle all investment decisions for the trust funds.

By December 20, 2004, Nelms and the Meyers had still not closed on the sale of MGMC, largely because CitiBank had not made a decision on Nelms's loan. In the absence of funding from CitiBank, Singer secured a bridge loan for Nelms from Craig Bush ("Bush"), another of Singer's clients. The loan principal was $13,511,590.33, with a $250,000 commitment fee and an interest rate of 18%, or nearly $7,500 per day. Once the loan was

agreed to, Singer arranged for funds to be wired from Bush's Smith Barney account on December 21, 2004; Nelms and the Meyers closed on the sale of MGMC the same day.

Disposition of the Trust Funds

Once Nelms closed on the purchase of MGMC from the Meyers, Singer immediately began work to transfer the trust funds from Forethought to CTI. In conformance with the responsibilities attendant to transferring MGMC's trusts to CTI, Forethought liquidated the various investments into which it had placed the MGMC trust funds and transferred the bulk of the trust monies to CTI on December 29, 2004, sending a wire transfer with a total value of $23,310,258.76. On December 30, 2004, Forethought made two additional wire transfers to CTI, one for $208,976.13, the other for $707,815.12, for a total value of $916,791.25. On December 31, 2004, Forethought wired an additional $101,742.50 to CTI.

Upon CTI's receipt of the first wires on December 29, Singer arranged for Bush to be repaid from the trust funds. Singer thus instructed Becher to wire $13,758,253.58 (representing the principal amount of the loan, the commitment fee, and accrued interest) from CTI to an account Bush maintained with Smith Barney. Though he did not know who Bush was or why the funds were being transferred, Becher complied. Singer told Bush that the funds came from the CitiBank loan for which Nelms had applied, and told Nelms that once the CitiBank loan came through, the cash from the loan would be invested as agreed on behalf of the MGMC trusts.

Singer ordered, and Becher performed, two other wire transfers on December 29, 2004: $3,000,000 was wired to an investment account at CitiBank, referencing Nelms, and

$4,210,258 was wired to an account held by Indiana Investment Corporation, LLC, at JP Morgan Chase. Under Singer's financing scheme, Indiana Investment Corporation was the corporate entity that would issue debentures in exchange for the trust funds, but by this point no debentures had been received. On December 30, 2004, Nelms, continuing to follow through on the financing plan developed by Singer, instructed Becher to wire an additional $1,241,747.42 to an Indiana Investment Corporation account at JP Morgan Chase; Becher complied that day, but was still awaiting an issue of debentures. Thus, by December 31, 2004—ten days after Nelms and the Meyers closed on the sale of MGMC—funds totaling $22,210,259 had been wired out of MGMC's trust accounts, with no debentures provided to the MGMC trust in return.

On January 11, 2005, Forethought wired to CTI an additional $97,888.32, which represented accrued but previously unpaid gains on some of the investments Forethought had liquidated after Nelms purchased MGMC.

On January 10, 2005, Singer and Nelms communicated by e-mail regarding CitiBank's discovery of Nelms's 1998 Chapter 13 Bankruptcy filing, which Nelms had failed to disclose but which CitiBank had discovered through its due diligence efforts. It eventually became clear that Nelms would be unable to obtain a loan through CitiBank. Nevertheless, with Bush having been repaid for the bridge loan from trust assets and much of the remaining trust assets having been used for Nelms's benefit or to pay other obligations, Nelms did not seek other financing sources.

At the same time, Nelms began discussing with Singer the prospect of purchasing a

group of funeral homes, Corinthian Services of Iowa ("Corinthian"). Nelms and two others would eventually purchase Corinthian, with Nelms contributing $1.1 million. Nelms's contribution came, again, from the trust funds. To fund the acquisition of Corinthian, Singer and Becher worked together to wire the $1.1 million in trust monies to Smith Barney on April 15, 2005, and then to Corinthian on May 10, 2005.

With the exception of cash-equivalent instruments worth less than $1 million, the remaining MGMC trust assets were invested exclusively in the debentures issued by Indiana Investment Corporation, Nelms Investment XI, and Nelms Investment XII, with those instruments bearing a face value far greater than what had been paid to Indiana Investment Corporation. Thus, the bulk of the trust assets from MGMC's trust accounts were used to pay obligations associated with Nelms's purchase of the MGMC business or to add to Nelms's own personal wealth, with Singer receiving commissions from any assets invested with Smith Barney. By the time an independent financial report on MGMC's trust assets was sought, it was impossible for the appraiser, Brian Zucker ("Zucker"), to assess their value. Based upon MGMC's business and trust records, Zucker expected to see around $22 million in trust assets but there were assets of only a few million dollars in the various trusts. Nelms explained this by telling Zucker that Singer had stolen the funds.

Numerous civil and criminal cases have been filed in several states regarding this and other series of transactions involving, among others, Nelms, Singer, and Bush.[1] On July 8,

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[1] Among these are two civil suits currently on appeal before this Court, Farno v. Ansure Mortuaries of Indiana, LLC, Case No. 41A05-1002-PL-00104, and Goldberg v. Farno, Case No. 41A01-1007-MF-00348.

2008, the Marion County Grand Jury indicted Singer, Becher, and others for five counts of theft in an amount greater than $100,000. The State dismissed the charges against Becher in exchange for his cooperation with prosecution efforts in this case.

A jury trial was conducted from November 29, 2010, to December 7, 2010. During the trial, Singer filed a motion for judgment on the evidence, contending, among other things, that there was no evidence that MGMC owned the funds alleged to have been stolen. The trial court denied this motion, and at the trial's conclusion the jury found Singer guilty of all five counts of theft.

On January 19, 2011, the trial court entered its Order of Judgment of Conviction against Singer for all five counts of Theft. The trial court sentenced Singer to four years imprisonment for each count, running four of the sentences concurrent with one another and ordering those sentences executed and running the fifth consecutive to the others, with one year executed and three suspended, for an aggregate executed sentence of five years. Singer was ordered to serve three of the five years at the Department of Correction, with two years to be served through community corrections.

This appeal followed.

Discussion and Decision

Singer appeals his convictions for theft as unsupported by sufficient evidence. Our standard of review in such cases is well-settled. When reviewing the sufficiency of the evidence, we consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess the credibility of

witnesses or reweigh evidence. Id. We will affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." Id. (quoting Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000)). "The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict." Id. (quoting Pickens v. State, 751 N.E.2d 331, 334 (Ind. Ct. App. 2001)).

To convict Singer of theft in each count, the State was required to prove beyond a reasonable doubt that Singer knowingly exerted unauthorized control over the perpetual care trust and/or pre-need trust money of MGMC with the intent to deprive MGMC of any part of the value or use of that money, where the funds over which Singer exercised unauthorized control amounted to more than $100,000 for each act charged. Ind. Code § 35-43-4-2(a)(1); App. 75-77. Five such acts were charged, four of which were alleged to have occurred on or around December 29, 2004[2], and one of which was alleged to have occurred on or around April 14, 2005.[3]

Indiana's theft statute includes within it crimes previously classified as embezzlement. Shindler v. State, 166 Ind. App. 258, 266, 335 N.E.2d 638 (1975). The former offense of embezzlement, as differentiated from larceny, occurred when the initial taking control of funds or property was lawful, but the disposition of those assets was not consented to or authorized. Id. at 265; also State v. Ensley, 177 Ind. 483, 97 N.E. 113, 115 (1912) (stating

[2] The charges are based upon the following transactions: the December 29, 2004 wire transfers to Bush ($13,758,253.58), CitiBank on Nelms's behalf ($3,000,000), and JP Morgan Chase on IIC's behalf ($4,210,258), and the December 30, 2004 wire transfer to JP Morgan Chase on IIC's behalf ($1,241,747.42).

[3] This charge is based upon the April 15, 2005 wire transfer of $1,100,000 to Smith Barney, which Singer later ordered transferred to Corinthian on May 10, 2005.

that "[e]mbezzlement is the fraudulent conversion of property by a person to whom it has been intrusted … [t]here must be a conversion, but this may be either actual or constructive").

Provisions of Indiana Law Governing the Perpetual Care and Funeral Merchandise and Services Trusts

Before addressing the merits of Singer's argument, we turn our attention first to the law governing perpetual care and funeral merchandise and services trusts. Indiana Code Title 23, Article 14 sets forth the provisions of Indiana law that pertain to the operation of cemeteries. Among the duties of cemetery owners such as MGMC are "the creation and establishment of an irrevocable perpetual care fund." I.C. § 23-14-48-2(a). The amounts that must be paid into the fund are determined by statute. I.C. § 23-14-48-3 to -5. The principal of each such fund—that is, the monies paid into the fund as required by Indiana law or by donation—"shall permanently remain intact." I.C. § 23-14-48-2(b). All money or other trust assets held in the perpetual care fund must be invested "in property or securities that qualify for trust investments under IC 30-4-3-3(c)." I.C. 23-14-51-2.

Though the principal of the trust must be left intact, 50% of the appreciation of the principal of a perpetual care fund "may be withdrawn annually not more than forty-five (45) days after the end of the fund's fiscal year," I.C. § 23-14-48-2(c), and any income earned upon the principal of the fund may be withdrawn quarterly. I.C. § 23-14-48-2(d). Funds thus withdrawn may only be used for care of the cemetery itself. I.C. § 23-14-48-2(e). Loans or pledges of money to benefit the owner of the cemetery or any shareholder, officer, director,

or employee of the cemetery are prohibited. I.C. § 23-14-51-3. When a cemetery is sold to a new owner, the new owner is required to adhere to the same statutory provisions as the former owner. Violation of these laws—whether as to the establishment and use of perpetual care funds or their proper investment—may result in criminal liability. I.C. § 23-14-48-9 (establishing a Class A misdemeanor for knowing violation of Chapter 48, and a Class C infraction for fraudulent representations as to the existence of a perpetual care fund); I.C. § 23-14-51-5 (establishing a Class A misdemeanor for violation of the provisions of Chapter 51, including investment and loans).

Sellers, such as funeral homes, of "floral tributes, vaults, memorials of any type, or services … installed or provided in a cemetery" but which will not "be delivered or provided until the death of the person for whom" the goods or services will be provided must place the proceeds from such pre-need contracts into an escrow or trust. I.C. § 23-14-49-1. Where funds are given in trust to cemetery owners, they may hold in trust such funds and apply those funds according to the terms of the devise, bequest, grant, or gift. I.C. § 23-14-49-2. Violation of these provisions is a Class A misdemeanor. I.C. § 23-14-49-3.

Singer's Claims

For each charge, Singer addresses only one element of the offense, whether the State proved that the funds stolen belonged to MGMC. Singer does not contend that he did not commit the thefts. Rather, he argues that the funds did not belong to MGMC, but rather belonged to the trusts themselves or to CTI. Because the State charged him with theft of funds from MGMC and not the actual owner of the trusts, the argument goes, his conviction

cannot be sustained for failure of proof of a material element of the offense of theft, namely, the identity of the person or entity from whom assets were stolen.[4]

In advancing his argument, Singer draws our attention to Indiana cases holding that "the name of the owner of the property alleged to have been stolen is a material allegation and must be proved beyond a reasonable doubt in order to sustain a conviction." Smith v. State, 167 Ind. App. 428, 436, 339 N.E.2d 118 (1975). Absolute ownership need not be proved; rather, it is enough that the alleged victim have possession over the property. Id. at 437. "[I]t is not essential that the absolute ownership of property be in the person alleged to be owner. It is sufficient if the evidence shows him to be in possession of the property as bailee, trustee, executor or administrator." Bryant v. State, 252 Ind. 17, 19-20, 245 N.E.2d 156 (1969). The name of the owner or possessor of stolen property may be proved by circumstantial evidence, and ownership or possession may be inferred. Pryor v. State, 889 N.E.2d 369, 372 (Ind. Ct. App. 2008).

The definition of "owner" which Smith cites and interprets is from a now-repealed provision of the Indiana Code that defined the term to mean "a person, other than the actor, who has possession of or any other interest in the property involved … and without whose consent the actor has no authority to obtain or exert the complained of control over the property." Smith, 167 Ind. App. at 437 (quoting then-effective I.C. § 35-17-5-13(12) (Burns. Supp. 1975, repealed by Acts 1976, P.L. 148, Sec. 24)) (emphasis added). The current enactment of our criminal statutes includes no such definition, though recent case law from

[4] Singer does not challenge the adequacy of the charging indictment.

this court in the context of motor vehicle theft has recognized that the name of the rightful owner or possessor of the property is a material allegation of the offense of theft. See, e.g., Pryor, 889 N.E.2d at 371.

Thus, MGMC can be an owner for the purposes of a theft charge where it held any of a range of interests in the trust funds placed with CTI. And it is clear that MGMC held several interests, some of which were statutorily prescribed. First, to the extent that assets were removed from the trust, there would be diminished growth in the trust principal and diminished income from the trust assets. Even though the trust assets could be distributed for no purposes other than to provide prepaid funeral services and cemetery maintenance, those monies were payable to MGMC or one of its wholly-owned subsidiary companies.

Thus, MGMC had an interest in the trust funds as their recipient—that is, as a beneficiary of the funds. The purpose of funeral merchandise, services, and perpetual care trusts is to provide assurance that the goods and services necessary for a funeral will be available and that cemeteries will be properly maintained and cared for. Each of MGMC's subsidiary businesses would, at various points, be entitled to disbursements of some funds from the trust accounts, all of which were held in MGMC's name, in order to provide those services. Because the statute sets a fixed percentage of the appreciation of trust assets that may be distributed for such use, the amount that could be paid to MGMC and used for the cemeteries would necessarily be lower in the event of a theft of a portion of the trust assets. This in turn could render MGMC unable to provide adequate maintenance and care for its cemeteries.

Moreover, under Indiana law MGMC had control of and ultimate responsibility for the proper placement and management of the trust funds. See I.C. § 23-14-48-2(a) (requiring cemetery owners to create perpetual care funds); I.C. § 23-14-48-3 to -5 (establishing the amounts to be placed into perpetual care trusts). Jim Meyer testified that the funds had not always been with Forethought, and that the Meyer family selected Forethought as its trustee because the prior trustee had changed its business model and would no longer administer trusts of the type MGMC had established for its funeral and cemetery businesses. When Nelms assumed control over MGMC, he ordered the trust assets transferred from Forethought to CTI.

Further, the name "Memory Gardens Management Corporation" appeared on each trust statement. Thus, it was clear that information on the status and growth of the trust assets was owed to MGMC to fulfill its statutory duties as the entity which established the trusts. This reporting enabled MGMC to know what income was generated by the trust principal so that it would know the size of the quarterly disbursements from the trust for its use in maintaining the various cemeteries, and to know whether and how much the principal had grown as a result of capital gains which could be taken for use by the end of the fiscal year.

While Singer argues that MGMC did not have an interest in the trust assets sufficient to prove theft, we find it abundantly clear that the interests MGMC had in the trust assets, as set forth above, are sufficient to sustain a conviction. As our supreme court noted in Bryant, we may affirm a conviction for theft so long as the victim of the theft named in the

indictment or charging information had some right to possess or manage the stolen property. Bryant, 252 Ind. at 19-20 (holding that "[i]t is sufficient if the evidence shows him to be in possession of the property as bailee, agent, trustee, executor or administrator"). Singer's repeated insistence that he "did not receive a nickel of this money" (Appellant's Br. 11), is nothing more than a request that we reweigh the evidence. It has no bearing upon our decision today because the offense of theft does not require proof that the thief benefitted from stolen assets to sustain a conviction. That said, it is disingenuous to suggest that Singer did not benefit by directing Becher to transfer millions of dollars from CTI to various brokerage accounts for which he controlled investments.

MGMC had several interests in the trust assets arising from its legal duty to assure proper management of the trusts and in its status as beneficiary of income and interest from the trusts. Each of these establishes MGMC as owner or possessor of the trusts in a manner sufficient to sustain Singer's convictions.

Affirmed.

FRIEDLANDER, J., and BROWN, J., concur.