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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2015AP1176

CITY OF MADISON,

Plaintiff-Respondent,

v.

JACOB ONG,

Defendant-Appellant.

On Appeal from the Honorable Stephen E. Ehlke
Dane County Circuit Court Judge
Dane County Circuit Court Case No. 2015CV000035
Order and Judgment dated March 10, 2015

BRIEF OF PLAINTIFF-RESPONDENT, CITY OF MADISON

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STATEMENT OF ISSUES

1. Should the Court exercise discretionary reversal based on arguments which Ong waived by not presenting them in the trial court?

   Circuit Court Answer: Not answered as Ong did not raise these issues below.

2. Did the City present sufficient evidence to sustain Ong's conviction for theft?

   Circuit Court Answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument because it would not add to the arguments presented by the parties in their briefs. The opinion should not be published in this case, which has been designated a one-judge appeal of a municipal ordinance violation. Wis. Stat. §§ 752.31(2), (3); 809.23(1)(b) 4.

STATEMENT OF THE CASE

This is an appeal of a municipal ordinance violation for theft. On August 9, 2014 a City of Madison police officer issued a citation to Jacob Ong for theft, in violation of Madison General Ordinance 23.58. R.1; City's App. 1. On November 20, 2014, the Madison Municipal Court found Ong guilty of theft. R.7-1. Ong appealed the municipal court

decision and requested a trial de novo with a jury in the Dane County Circuit Court. R.10. On March 10, 2015, a jury unanimously found Ong guilty of theft and the court entered judgment on the verdict. R.29-1; R. 25-4. On March 30, 2015, Ong filed a "Motion to Set Aside Verdict/Motion to Change Answer" with the circuit court which the court denied on April 14, 2015. R. 33, 35. Ong now appeals the jury's verdict to this Court.

STATEMENT OF THE FACTS

On August 9, 2014, a woman named Chen Zhu was expecting an immigration letter from the United States Department of Homeland Security. R. 37 at 30, 31. At that time, Chen Zhu lived with her boyfriend Yun Dong, and three other roommates in apartment 1434 of 777 University Avenue in Madison, Wisconsin (the "Lucky Apartments"). *Id*. at 99-100. Defendant Jacob Ong did not live in the Lucky Apartments. *Id*. at 101. Since Ong had a temporary address, Yun Dong allowed Ong to use his address to receive license plates and registration for a new car. *Id*.

On the afternoon of August 9, 2014, Ong entered the Lucky Apartments. *Id*. at 197. Ong interacted with two Lucky employees: the concierge, Adam Derkaoui and the

doorman, Richard Remington. *Id*. at 41, 70. Ong claimed to be a resident of the Lucky Apartments, specifically Yun Dong, in order to gain access to the mailbox for apartment 1434. *Id*. at 42, 71-72. Ong entered the mailbox for apartment 1434. *Id*. at 198. In addition to taking his own license plates from the mailbox, Ong also took Chen Zhu's immigration letter from Homeland Security. *Id*. at 163, 164, 179, 198. Chen Zhu did not give Ong consent to take her immigration letter. *Id*. at 31. Ong had never met Chen Zhu and he knew that Chen Zhu had not given him consent to take her letter. *Id*. at 198. Despite reading that the letter did not belong to him, Ong opened Chen Zhu's letter. *Id*. at 199.

After removing Chen Zhu's immigration letter from the mailbox of apartment 1434, Ong left the Lucky Apartments with her letter and drove home to his temporary residence at the Extended Stay America on Old Sauk Road. *Id*. at 192-193. After Ong admitted to Yun Dong that he entered the apartment 1434 mailbox, Yun Dong became concerned about what else Ong could have taken from the mailbox, prompting him to contact the Lucky Apartments front office and the Madison Police Department. *Id*. at 102-103.

Madison Police Officer Shawn Kelly interviewed witnesses and contacted Ong, who admitted taking Chen Zhu's letter. *Id*. at 161-162. Ong admitted that he knew the letter did not belong to him. *Id*. at 162. Ong gave the officer conflicting stories about what he had done with the letter. *Id*. About an hour later, Ong called the officer back and admitted that he still had possession of the letter. *Id*. At trial, the officer testified that Ong admitted that he took the letter, removed it after he noticed it was not his, and threw it away. *Id*. at 186. Ong only returned it after the officer confronted him. *Id*. As a result, the officer issued Ong a citation for violating Madison General Ordinance 23.58 for theft. *Id*. at 164; R. 1.

ARGUMENT

I. THE COURT SHOULD NOT EXERCISE DISCRETIONARY REVERSAL IN THIS CASE.

Ong is not entitled to a new trial based on discretionary reversal because he failed to raise objections in the trial court on the issues he now presents. Ong's jury instruction argument is waived because he failed to request the jury instruction he now believes the court should have given. The court had no duty to *sua sponte* add jury

instructions on Ong's behalf, and the lack of the instruction is not reversible error. Ong has failed to meet his burden to demonstrate that during his trial on an ordinance violation the real controversy was not tried or that justice was miscarried.

A. *Ong waived arguments regarding jury instructions because he failed to raise them in the trial court.*

Ong has waived his argument requesting an additional jury instruction as he did not present it at trial. Although he did not request it, Ong argues that an instruction on "mistake of fact" should have been given to the jury. Ong's Br. at 11-15. It is a fundamental principle of appellate review that issues must be preserved at the circuit court to be considered on appeal. *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 492, 611 N.W.2d 727, 730. Even an alleged constitutional error will be deemed waived unless timely raised in the circuit court. *State v. Caban,* 210 Wis.2d 597, 604, 563 N.W.2d 501 (1997). The party raising the issue on appeal has the burden of establishing, by reference to the record, that the issue was raised before the circuit court. *Id*. The *Caban* court explains the policy behind the "waiver rule":

> The reasons for the waiver rule go to the heart of the common law tradition and the adversary system. By limiting the scope of appellate review to those issues that were first raised before the circuit court, this court gives deference to the factual expertise of the trier of fact, encourages litigation of all issues at one time, simplifies the appellate task, and discourages a flood of appeals. Thus, when a party seeks review of an issue that it failed to raise before the circuit court, issues of fairness and notice, and judicial economy are raised.

Id. (citation omitted).

Failure to object to jury instructions at trial and state the grounds for the objection with particularity on the record, constitutes a waiver of any error in the instructions pursuant to Wis. Stat. § 805.13(3). *See State v. Paulson*, 106 Wis.2d 96, 104, 315 N.W.2d 350, 354 (1982). A jury instruction on a theory of defense is only warranted when a request is timely made. *See State v. Coleman*, 206 Wis. 2d 199, 212, 556 N.W.2d 701, 706 (1996). A circuit court does not have a duty to *sua sponte* give a particular instruction in the absence of a timely and specific request for one. *See Bergeron v. State*, 85 Wis.2d 595, 604, 271 N.W.2d 386 (1978).

In this case, Ong failed to preserve the right to appeal concerns he now has with the jury instructions. Ong's claim to this Court that "jury instructions prior to the conference had not been formally requested" is false. Ong's Br. at 14. On the contrary, at a pre-trial conference on March 4, 2015,

the court ordered the parties to file proposed jury instructions by March 6, 2015. R. 17-1. The City filed proposed jury instructions on March 5, 2015. R.20. Ong never filed proposed jury instructions with the court.

Before beginning the jury instruction conference on the day of the trial, the court provided packets of the instructions and some time to review them. R. 37 at 219. Then, the parties and the court reviewed the jury instructions together on the record, engaging in the common practice of making edits to best fit the case. *Id*. at 220-38. The judge explained the jury instruction conference process to Ong, and Ong indicated he understood. *Id*. at 220, 229-30.

Being unfamiliar with jury instructions or jury instruction conferences as a *pro se* defendant does not provide Ong with a reason to reverse or remand his case. *Pro se* defendants are bound by the same rules that apply to attorneys on appeal. *Waushara Cty. v. Graf*, 166 Wis. 2d 442, 452, 480 N.W.2d 16, 20 (1992). The right to self-representation is "[not] a license not to comply with relevant rules of procedural and substantive law." *Id*. (citation omitted). While some leniency may be allowed, neither a

trial court nor a reviewing court has a duty to walk *pro se* litigants through the procedural requirements or to point them to the proper substantive law. *Id*.

During the jury instruction conference, the court pointed out that Ong did not file any requested jury instructions. R. 37 at 233. Even though he failed to file proposed instructions, the court specifically asked Ong during the conference, "do you think there's any areas of law or any instructions that we haven't covered here?" *Id*. at 233-4. At this time, Ong asked the court to add the words "with intent" after the term "intentionally" in the jury instruction listing the elements of theft. *Id*. at 234-6. The City did not object to Ong's request, and the court added in the words Ong requested. *Id*. at 235. At no time during the conference did Ong mention the word "mistake" let alone ask for a jury instruction on a mistake theory of defense. *Id*. at 220-38.

Ong should not be allowed a new trial based on his failure to ask for a jury instruction he now realizes he wants. Ong made a choice to not have an attorney and he made a choice not to submit proposed jury instructions. After making such choices and being found guilty by a jury, Ong cannot now decide on a theory of defense and claim that the

court should have *sua sponte* included an additional jury instruction based on that defense. Since Ong did not request a jury instruction on the theory of defense of mistake, he has waived his right to have this Court review the issue on appeal.

B. *Lack of a "mistake" instruction is not reversible error.*

Appellate courts will not find error in the failure of a trial court to give a particular instruction in the absence of a timely and specific request. *See Bergeron v. State*, 85 Wis. 2d 595, 604, 271 N.W.2d 386, 388 (1978). A trial court "has broad discretion in deciding whether to give a particular jury instruction." *State v. Hemphill*, 2006 WI App 185, ¶ 8, 296 Wis. 2d 198, 205, 722 N.W.2d 393, 396 (citation omitted). The court must exercise discretion to fully and fairly inform the jury of the applicable rules of law and assist the jury in making a reasonable analysis of the evidence. *Id.* An appellate court will reverse and order a new trial "only if the jury instructions, as a whole, misled the jury or communicated an incorrect statement of law." *Id.* If the overall meaning communicated by the instructions is a correct statement of the law, there are no grounds for reversal. *Id.*

The instructions the court gave to the jury in Ong's trial are not confusing and they correctly state the law on the City's municipal ordinance for theft. In addition to several standard jury instructions, the trial court gave the following instruction specific to the City's theft ordinance:

> Theft, as defined in Madison General Ordinance 23.58, is committed by one who intentionally takes and carries away movable property of another without consent and with intent to deprive the owner permanently of possession of the property.
>
> Before you may find the defendant guilty of this offense, the City must prove by evidence that is clear, satisfactory, and convincing, that the following four elements were present:
>
> First, that the defendant intentionally took and carried away movable property of another.
>
> The term "intentionally" or "with intent" means that the defendant must have had a purpose to take and carry away property or was aware that his conduct was practically certain to cause that result.
>
> "Moveable property" means property whose physical location can be changed.
> Second, that the owner of the property did not consent to taking and carrying away the property.
>
> Third, that the defendant knew that the owner did not consent.

> Fourth, that the defendant intended to deprive the owner permanently of the possession of the property.
>
> You cannot look into a person's mind to find knowledge and intent. Knowledge and intent must be found, if found at all, from the defendant's acts and words and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and intent.
>
> If you are satisfied by clear, satisfactory, and convincing evidence, that all four elements of theft have been proved, you should find the defendant guilty.
>
> If you are not so satisfied, you must find the defendant not guilty. R. 37 at 239-41.

This instruction was based on the model criminal jury instruction for theft adapted to make the language appropriate for a non-criminal City ordinance violation and track the language specific to the ordinance. Madison General Ordinance 23.58 (2011); Wis. J.I.-Criminal 1441(2009). City's App. 1, 2. The court explained this to the defendant during the conference. R. 37 at 221. The instruction makes it clear that the burden of proof was on the City to prove all four elements of theft by clear, satisfactory, and convincing evidence in order for the jury to find Ong guilty of violating the ordinance. Nothing in the instructions is confusing or

incorrect. Since the court did not have a duty to *sua sponte* add unrequested jury instructions, and the instructions correctly stated the law, lack of a "mistake" instruction is harmless error and would not be cause for this Court to exercise discretionary reversal. *See Bergeron*, 85 Wis.2d at 604; *Hemphill*, 2006 WI App 185, ¶ 8.

C. *The real controversy was fully tried and justice was not miscarried.*

Ong has failed to demonstrate grounds which justify discretionary reversal in his case. An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." *State v. Cuyler*, 110 Wis.2d 133, 141, 327 N.W.2d 662 (1983). Discretionary reversal is a "formidable power" that should be "exercised sparingly and with great caution." *In re Commitment of Tainter*, 2002 WI App 296, ¶ 23, 259 Wis. 2d 387, 400, 655 N.W.2d 538, 544. Under Wis. Stat. § 752.35, this Court may reverse a judgment or grant a new trial on either of two grounds: "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." *See State v. Cleveland*, 2000 WI App 142, ¶ 21, 237 Wis. 2d 558, 572, 614 N.W.2d 543, 550. To establish that the real

controversy has not been fully tried, a defendant must demonstrate that "the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." *Id*. (citation omitted). To establish a miscarriage of justice, a defendant must convince this Court that "there is a substantial degree of probability that a new trial would produce a different result." *Id*. Ong has failed to demonstrate either of the grounds for discretionary reversal.

Ong has not pointed to specific instances where the jury was precluded from hearing testimony on an important issue or where the court received improper evidence. As demonstrated above, the jury received accurate and appropriate instructions for the case. Therefore, there is no basis for discretionary reversal on the grounds that the real controversy was not fully tried.

Ong has also failed to establish a miscarriage of justice. He has not demonstrated that there is a substantial degree of probability that a new trial would produce a different result. The jury heard the testimony of the City's witnesses, including two Lucky Apartment employees, two residents of apartment 1434, and a police officer. Then, Ong

was able to give his account of his version of the events to the jury. Some parts of the City's witnesses' and Ong's testimony differed significantly. For example, Ong testified that he thought the letter belonged to him when he took it. R. 37 at 192. However, the officer testified that Ong admitted that he noticed the letter did not belong to him when he took it from the mailbox and admitted to "removing it after he noticed it was not his". *Id*. at 162, 186. Ong testified that he told Yun Dong that he accidentally took Chen Zhu's letter and tried to return it. *Id*. at 193. Yun Dong testified that Ong never told him about the letter and did not attempt to return it. *Id*. at 106-7.

Because Ong's and the City's witnesses' testimony differed, the trial hinged on which version of facts the jury believed to be credible. Credibility is to be determined by the jury. *Bautista v. State*, 53 Wis. 2d 218, 223, 191 N.W.2d 725, 728 (1971). In this case, by finding him guilty, the jury indicated that they found the City's evidence more credible than Ong's. Any additional jury instruction on mistake would not have changed the jury's view of the witnesses' credibility or their verdict. There is no substantial degree of probability that this jury, or any future jury, would produce a different

result. Ong has failed to demonstrate that the real controversy was not tried or that justice was miscarried. This case is not "exceptional" and there are no grounds for discretionary reversal. *Cuyler*, 110 Wis.2d at 141.

II. THE CITY PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN ONG'S CONVICTION FOR THEFT.

When evaluating sufficiency of evidence, this Court must view the evidence in the light most favorable to the conviction. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752, 757-58 (1990). The Court must sustain the jury's verdict unless no reasonable fact-finder could have found the defendant guilty. *See Id*. If any possibility exists that the jury could have drawn the appropriate inferences from the evidence at trial to find the defendant guilty, an appellate court may not overturn a verdict even if it believes that the jury should not have found guilt based on the evidence before it. *Id*. An appellate court must "search the record to support the conclusion reached by the fact finder." *State v. Schulpius*, 2006 WI App 263, ¶ 11, 298 Wis.2d 155, 726 N.W.2d 706. In reviewing the sufficiency of circumstantial evidence to support a conviction, an appellate court need not concern itself in any way with evidence which

might support other theories of the offense. *See Poellinger*, 153 Wis. 2d at 507. Rather, an appellate court need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence to sustain the verdict rendered. *Id*. at 508.

The credibility of witnesses and the weight given to their testimony are matters left to the jury's judgment, and where more than one inference can be drawn from the evidence, an appellate court must accept the inference drawn by the jury. *See Richards v. Mendivil*, 200 Wis. 2d 665, 671, 548 N.W.2d 85, 88 (Ct. App. 1996)(citations omitted). If there are inconsistencies within a witness's testimony or between witnesses' testimonies, it is for the jury to determine the weight and credibility to be given to each. *See State v. Toy*, 125 Wis. 2d 216, 222, 371 N.W.2d 386, 389 (Ct. App. 1985).

Ong was charged with a City of Madison citation for theft. Madison General Ordinance 23.58 for theft reads in relevant part:

> (1) Definitions.

> "Intentionally" means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result.
>
> "Movable property" means property whose physical location can be changed, without limitation including electricity and gas, documents which represent or embody intangible rights and things growing on, affixed to or found in land.
>
> "With intent" means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result.
>
> (2) It shall be unlawful to intentionally take and carry away, use, transfer, conceal or retain possession of movable property of another without the other's consent and with intent to deprive the owner permanently of possession of such property. MGO 23.58(1),(2); City's App. 1.

Ong contends that there is insufficient evidence to convict him of a theft citation. Ong's Br. at 15-19. Much of Ong's argument focuses on how he believes the jury should have found his version of events more credible than that of the other witnesses. Although Ong disputes other witnesses' testimony and argues that they are incredible or "dishonest," credibility determinations are for the finder of fact. Ong's Br. at 17; *Bautista,* 53 Wis. 2d at 223. While Ong is unhappy

with the way the City presented its case, the City does not have the duty to prove or disprove facts based on a defendant's wishes. Instead, the City has the burden to prove each element of the ordinance violation by clear, satisfactory, and convincing evidence. The City met and exceeded its burden of proof and presented sufficient evidence to sustain the jury's verdict.

The City proved most of its case without dispute from Ong. There is no dispute that Ong took and carried away movable property of another. It is undisputed that the immigration letter belonged to Chen Zhu, not Ong. R. 37 at 192. Ong did not dispute that after taking the letter, Ong left the Lucky Apartments and drove away. *Id*. at 192. It is undisputed that the owner of the property did not give consent and that Ong knew he did not have consent to take the owner's property. *Id*. at 31, 198. The issues Ong disputes are whether he intentionally took the letter and whether he intended to deprive the owner permanently of the property.

On March 10, 2015, the jury heard the following evidence: Ong entered an apartment building where he did not live and accessed a mailbox that was not his. *Id*. at 197-98. Ong removed a letter that did not belong to him. *Id*. at

198-99. Ong left the apartment building with the letter and drove home. *Id*. at 192-93. Despite reading that the letter was not addressed to him, Ong opened the letter. *Id*. at 199. Ong gave the police officer inconsistent information about what he had done with the letter. *Id*. at 162. About an hour later, Ong called the officer back and admitted that he still had possession of the letter. *Id*. Although Ong claimed to have not opened the letter, when he eventually returned the letter to the officer, he returned it opened and removed from the envelope. *Id*. at 162, 199. The officer testified that on the date of the offense, Ong admitted that he took the letter, removed it after he noticed it was not his, threw it away, and that he only returned the letter after the officer confronted him. *Id*. at 186. During the trial, Ong admitted that he told the officer that he threw the letter away but then testified that he did not actually throw the letter away. *Id*. at 199.

By taking a letter that he knew was not his, opening the letter after reading that it did not belong to him, leaving the building and driving away with the letter, and not returning the letter until confronted by police, the jury heard evidence that was sufficient to find that Ong intentionally took the letter and intended to deprive the owner permanently

of her property. After hearing all of the evidence, the jury had the opportunity to decide which version of the facts they found credible. Looking at the evidence and inferences in the light most favorable to the conviction, there is sufficient evidence to support the jury's verdict. Therefore, the Court should sustain the verdict.

CONCLUSION

For the above reasons, the City of Madison asks this Court to affirm the Circuit Court jury trial verdict finding Jacob Ong guilty of theft.

Respectfully submitted this 11th day of May, 2016.

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CERTIFICATION

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief and appendix conforms to the rules contained in s. 809.19 (8)(b) and (c) for a brief produced in a proportional serif font.

The length of this brief is 4,097 words, exclusive of the caption, Table of Contents, Table of Authorities and the Certification page.

Dated this 11th day of May, 2016.

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ELECTRONIC FILING CERTIFICATION

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 11th day of May, 2016.

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