10.AB

State of Wisconsin

Court of Appeals

District IV

Appeal No. 2015AP001176

City of Madison,

Plaintiff-Respondent,

v.

Jacob Ong,

Defendant-Appellant.

Appeal from a Judgment Entered in

the Dane County Circuit Court,

The Honorable Stephen E. Ehlke, presiding

Reply Brief

Jacob Ong

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Preface

In this brief, the appellant "Jacob Ong" will be referred to as "Ong," and the respondent "City of Madison" will be referred to as "the City."

Arguments

I. Ong was not given the opportunity to fully object to the jury instructions.

Ong's claim that jury instructions were not formally requested from him is not false, contrary to what the respondent asserted. The circuit court requested jury instructions only from the City during the pre-trial conference. Ong had made this known to the court shortly before the jury instruction conference on the day of trial, when he requested the court to check the pre-trial conference record. (R: 37-210, Appendix B). Unfortunately, the court did not seem to have that part of the pre-trial conference on record.

Nevertheless, this fact is not inconceivable given that the instructions proposed during the jury instruction conference had erroneous definitions and wrong words. For example, words such as "crime" and "criminal acts" had to be replaced. (R: 37-222, Appendix D, R: 37-227). Ong also had to request the court to include the

wording from Madison Ordinance 23.58 to define the violation in question. (R: 37-226, Appendix C).

Instead of concluding the jury instruction conference by asking whether both parties had any objections to the finalized jury instructions, the circuit court chided Ong for "repeating ourselves" and then hurriedly moved to conclude the conference. (R: 37-237, Appendix A). This came after Ong's discussion with the court when Ong was asked by the court, "do you think there's any areas of law or any instructions that we haven't covered here?" (R: 37-233). Ong did not say no to that question and raised a topic regarding "with intent." (R: 37-234). Ong was not given the opportunity to object further. As a *pro se* without law training, Ong's hands were unfairly tied.

II. The issue of waiver does not restrict the powers of discretionary reversal.

The respondent asserted that the jury instruction on a "theory of defense is only warranted when a request is timely made." (Respondent's Brief, page 6). However, the issue in question is the theory of mistake and not the theory of defense.

Regardless, the power of discretionary reversal vested in the Court of Appeals is not limited to the issue of waiver, despite the fact that Ong was not giving the opportunity to fully object to the jury instructions.

The issue of waiver is of little significance in this appeal as the Court of Appeals have the discretionary power to reverse judgments where unobjected-to errors result in either a real controversy not having been fully tried or for any reason justice is miscarried. *See Vollmer v. Luety, 156 Wis.2d 1, 456 N.W.2d 797 (1990).*

III. The real controversy was not fully tried.

Jurors are presumed to follow jury instructions. See *State v. Johnston, 178 Wis. 2d 20, 503 N.W.2d 346 (Ct. App. 1993).* Therefore, the instruction on mistake of fact when given must be expected to control how jurors deliberate on their verdict. If the jurors do not have the jury instruction on a theory of mistake, then they cannot deliberate on or try the matter of mistake of fact, which is key to addressing the *Mens Rea* aspect of the violation in question. Consequently, the omission of the jury instruction on the theory of mistake resulted in deficient jury instructions that caused the real

controversy to not be tried. Therefore, discretionary reversal should be exercised.

To establish that the real controversy has not been tried, a defendant need not only demonstrate that "a jury was precluded from hearing evidence bearing on an important issue and when jury considered erroneously admitted evidence that clouded a crucial issue." *See State v. McKellips, 361 Wis.2d 773, 864 N.W.2d 106 (App. 2015).* Other situations such as a deficient or erroneous jury instruction would be grounds for a discretionary reversal. *See State v. Perkins, 2001 WI 46, ¶ 49, 243 Wis.2d 141, 626 N.W.2d 762.* The jury instructions should fully and fairly inform the jury of the applicable rules of law. See *Estate of Kriefall v. Sizzler USA, 2011 WI App. 101, 335 Wis. 2d 151, 801 N.W.2d 781*. Since the law on mistake is applicable to this case and yet was excluded from the jury instructions, the jury was not fully informed of the applicable rules of law and so could not and did not try the real controversy of the case.

Moreover, the evidence and background of the case strongly support the fact that Ong thought Chen Zhu's letter was his registration letter when he removed it from Yun Dong's mailbox. With the jury instruction on the theory of mistake, the jury would likely produce a different outcome. A likelihood of a different trial result is

not a requirement of discretionary reversal when a real controversy is not tried. *See Vollmer v. Luety, 156 Wis.2d 1, 456 N.W.2d 797 (1990).* Nevertheless, the high probability for a different trial outcome makes a strong case for discretionary reversal.

The principle behind the mistake of fact defense is that "no person should be subjected to criminal punishment where intent is necessary to constitute offense, unless that person has performed voluntary act while possessing guilty mind or *mens rea.*" See *State v. Olexa, 136 Wis.2d 475, 484, 402 N.W.2d 733, 737 (Ct.App.1987).* Without the instruction on mistake, the jury would not know that mistake of fact was a valid defense against a charge of theft and so lacked the legal framework to find Ong not guilty despite the evidence and background of the case. Therefore, Ong should be given the chance to be tried on the issue of mistake, as a theft civil violation conviction can be as damaging to his life as a theft criminal conviction.

IV. Justice has been miscarried.

Ong had text records that showed he had permission to enter Yun Dong's mailbox to retrieve his registration letter and license plates. (R: 37-147, 7-9, and Appendix E). He also possessed phone

records to show that he called Yun Dong before Yun Dong filed a complaint with the Madison police. (R: 37-151, 7-14)

When the City first saw the aforementioned evidence, the City granted Ong a hold open agreement that allowed the supposed violation to be dismissed, if there's not a similar alleged violation within the year. Ong rejected the agreement because he knew his innocence and asked for an immediate dismissal instead.

Nevertheless, the City and trial court did not allow the evidence to be admitted for the jury to peruse. In fact, the trial court has remarked, "so actually, there are no exhibits. So 155 can be out. I think that's the first time I've ever had that happen, but 155 is out." (R: 37-229).

The evidence was admitted in the municipal court trial and so exists in the record but objected as hearsay and deemed inadmissible during the circuit court trial. The City allowed the evidence in the municipal court but objected to them in the circuit court because the City knew that the evidence given to the jury would likely have resulted in a different outcome.

The evidence would likely be admissible if representatives from Ong's phone company and his telecommunications company were subpoenaed to prove the veracity of Ong's records. Ong did

not subpoenaed the representatives because he did not expect the evidence to be objected from admission.

In other words, the jury was precluded from considering important testimonies that bore on important issues such as the attempt by Ong to return the mistakenly taken letter. Within the same day of entering a dwelling, a thief with bona fide ill intentions would not willingly contact the owner and inform the owner that he wrongly removed an object, especially when a police report was not yet made. These testimonies and evidence when admitted will likely result in a different trial outcome, and therefore meets the definition of a miscarriage of justice. *See State v. Cleveland, 614 N.W.2d 543, 237 Wis.2d 558 (App. 2000).*

Equally important, the instruction on mistake of fact when administered to the jury will likely produce a different trial outcome as well. Therefore, discretionary reversal should be granted as justice has been miscarried.

V. The evidence is insufficient to sustain the conviction.

From the testimonies of the City's witnesses, the following facts are established:

(1) The Chen Zhu's letter was the object of the violation. (R: 37-30).

(2) Chen Zhu, the owner of the letter, and Ong did not know each other or interacted in any form prior to August 9, 2014, the date of alleged violation. (R: 37-38).

(3) Chen Zhu never told Ong she was expecting a letter from the United States Citizenship and Immigration Services. (R: 37-34).

(4) Chen Zhu was not the legal resident of the apartment to which the mailbox was assigned. (R: 37-33 and R: 37-34).

(5) Ong did not know Chen Zhu was the name of Yun Dong's girlfriend. (R: 37-135).

(6) Chen Zhu's letter, had no personally identifiable information of Zhu other than her name and Yun Dong's address. (R: 37-34).

(7) The letter had no financial value to Ong. (R: 37-38).

(8) Chen Zhu did not wish to pursue a case of theft against Ong. (R: 37-36).

(9) Yun Dong testified that he saw neither Ong's registration letter nor Chen Zhu's immigration letter on August 9, 2014 or before. (R: 37-136).

(10) Yun Dong testified that his roommate Austin Reuter told him about Chen Zhu's letter on August 9, 2014. (R: 37-155).

(11) Chen Zhu testified as well that Austin Reuter was the one who informed her and Yun Dong about the letter on August 9, 2014. (R: 37-30).

(12) However, Austin Reuter testified that "I have never seen her letter", and that he did not inform Yun Dong about Chen Zhu's letter on August 9, 2014. (R: 37-217).

(13) Yun Dong offered Ong permission to enter Dong's mailbox to retrieve Ong's license plates and registration letter. (R: 37-147, R: 7-9, and Appendix E).

(14) Ong entered Yun Dong's mailbox and managed to retrieve his plates but not his letter.

(15) Ong was the first person to inform Yun Dong that Ong had accessed his mailbox (R: 37-150), even before Yun Dong called the police. (R: 37-151).

(16) When asked over a call, Ong readily told the police that he had taken a wrong letter (R: 37-174) and drove to Madison to return the letter in a "clean" condition shortly after the call. This all happened on the same day. (R: 37-178).

These facts showed that Ong had neither physical nor nonphysical gain from taking Chen Zhu's letter and Ong had no contact with Zhu whatsoever. While gain is not a requisite element of the Madison Ordinance 23.58, the lack of incentive or motive showed that Ong's mistake made in his eagerness to retrieve his letters (R: 37-166) was reasonable and honest.

These facts also showed that Yun Dong and Chen Zhu were dishonest in trial by insisting that Dong's roommate, Austin Reuter, told them about Chen Zhu's missing immigration letter. Since Austin had not seen the letter, then the only other possible candidate to inform Yun Dong about the letter must be Ong. The only possible reason Ong told Yun Dong about the letter during the call was to arrange for a return as the letter had no bargaining power to Ong and Yun Dong did not allege any blackmailing with the letter.

This fact is especially obvious since Ong made contact with Yun Dong prior to the police call and Ong was the first person to inform Yun Dong about Ong's accessing of Yun Dong's mailbox. (R: 37-150).

Most importantly, there is no clear, satisfying and convincing evidence, if any is given at all, proffered by the City in showing that Ong knew the letter he removed from Dong's mailbox was Zhu's.

Since the mistake of fact is a valid defense against cases involving *Mens Rea* such as this under *WI Stat § 939.43(1),* the evidence is not sufficient to sustain the conviction.

Moreover, Ong had the permission of Yun Dong – whether direct or indirect – to retrieve the letters from Yun Dong's mailbox, (R: 37-147, R: 7-9, and Appendix E) and Ong did retrieve his license plates from Yun Dong's mailbox.

There is no credible evidence given by the City to show that Ong did not tell Yun Dong during their call, which happened before the police call was made, of the mistake Ong made and Ong's attempt to return the letter. The only evidence provided by the City was in the form of Dong's testimony which have been shown multiple times to be dishonest and prejudiced against Ong. However, due to Ong's lack of training as a trial lawyer, Ong failed to impeach Dong in court.

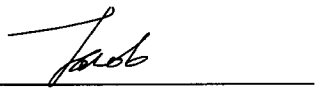
What the City did was to confuse the jury with issues not pertinent to the crux of the matter – which is can a man eager to retrieve his mail (R: 37-166) from a perceived conman make an honest mistake in taking a letter that does not belong to him? The answer is a resounding yes. The City offered no credible evidence, if at all, to answer this question, and so the evidence could not sustain

a conviction under a clear, satisfactory, and convincing standard of proof.

Conclusion

For the above reasons, as well as those set forth in the appellant's brief, the Court of Appeals should reverse the judgement of conviction and remand for a new trial pursuant to *WI Stat § 752.35.*

Dated on 7th day of September, 2016

By: 

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Certification as to Length and E-filing

I hereby certify that this brief conforms to the rules contained in *§ 809.19(8) (b)* and *(c)* for a brief and appendix produced with a proportional serif font. The length of this brief is 2,271 words and 12 pages. This brief was prepared using Open Office word processing software. The length of the brief was obtained by use of the Word Count function of the software.

I further certify that I have submitted an electronic copy of this brief and appendix which complies with the requirements of § 809.19 (12) and § 809.19 (13), and that the electronic brief and appendix are identical in content to the printed form of the brief and appendix filed as of this date.

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

Dated on 7th day of September, 2016

By: _____

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