

**State of Wisconsin
Court of Appeals
District IV
Appeal No. 2015AP001176**

City of Madison,
Plaintiff-Respondent,
v.
Jacob Ong,
Defendant-Appellant.

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**Appeal from a Judgment Entered in
the Dane County Circuit Court,
The Honorable Stephen E. Ehlke, presiding**

Defendant-Appellant's Brief and Appendix

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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.”

Statement on Oral Argument and Publication

Oral argument is requested as the appellant does not have any law training and there is a paucity of cases in Wisconsin involving some of the issues presented, such as the defense of mistake. By speaking to the reviewing Judge, the appellant may better clarify certain arguments presented in this brief. Publication is not requested, but left to the discretion of the appellate Judge.

Statutes Presented

The issues presented by this appeal primarily relates to Madison Code of Ordinances 23.58 which provides:

23.58 Theft.

(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.
- (3) In an action or proceeding for a violation of this section, a party may use duly identified and authenticated photographs of property which was

the subject of the violation in lieu of producing the property.

- (4) Any person convicted of a violation of this section shall be subject to penalty of not less than two hundred dollars (\$200) nor more than one thousand dollars (\$1000).

Statement of the Issues

- I. Was the real controversy of mistake of fact tried?

Answer by the trial court: Not applicable.

- II. In the interest of justice, should the instruction on the theory of defense be given to the jury? Did the trial court err in not doing so?

Answer by the trial court: No to both questions.

- III. Whether the evidence is sufficient to sustain the conviction?

Answer by the trial court: No.

Statement of the Case

I. Procedural Background

On August 9, 2014, the defendant-appellant, Ong, was given a Madison ordinance ticket for violation of the aforementioned Madison Code of Ordinance 23.58.

On November 14, 2014, the prosecutor offered a hold-open agreement, the terms of which are that the ticket will be dismissed if there was no other similar violation. The offer was rejected by Ong. The Madison Municipal Court trial occurred on November 20, 2014, with Ong appearing *pro se*.

Ong then appealed *de novo* the Municipal Court decision to the circuit court for a jury trial, which occurred on March 10, 2015. During the trial, the jury instructions were hastily changed and determined by the court despite Ong's concerns. Ong appeared *pro se* again.

Ong challenged the sufficiency of evidence on March 30, 2015 via a formal motion, which was denied on April 11, 2015. Ong then filed the notice of appeal to the circuit court and Court of Appeals on June 8, 2015.

II. Factual Background

The defendant-appellant, Ong, first established contact with Yun Dong, on July 29, 2014 over Facebook. (R: 37-109) Ong graduated from Amherst College and MIT, and moved to Madison for his first job on July 28, 2014. Dong drove Ong to the car dealership on July 31, 2014 to purchase a used car. (R: 37-125) Because Ong was living in Extended Stay America temporarily which was provided for by Ong's employer, Dong offered his permanent address in Madison to collect Ong's registration letter and license plates. (R: 37-101)

Shortly after the purchase of the car, Dong asked Ong to make a few payments for him online. (R: 37-127) Subsequently, Dong also requested that Ong purchase a Hermes wallet at a cost of \$2,560 on his behalf. These requests were eventually denied by Ong. (R: 37-122)

On August 9, 2014, Ong became eager to retrieve his letter and license plates from Dong's mailbox (R: 37-189), given Dong's multiple requests for favors. At 3.01 pm that day, Ong asked Dong whether his plates and letter had arrived. (R: 37-137) Dong first claimed he did not see any letter and license plates in his mailbox. (R: 37-136) Subsequently, Dong said, "mail is with office, not in my

mailbox.” (R: 37-140) At about 4.08 pm, Dong sent Ong a text and said, “and since you already asked the guy, ask the guy to open my mailbox,” (R: 37-147 and R: 7-9) suggesting that Ong could check out Dong’s mailbox. (R: 37-168)

Upon reading the text, Ong subsequently requested to access Dong’s mailbox to retrieve his plates and letter. The front desk representative and porter, who led Ong to Dong’s mailbox and guarded Ong during the retrieval, were somehow under the impression that Ong was Dong. (R: 37-87) Ong managed to retrieve his license plates from the mailbox in a few seconds. (R: 37-89) A few moments later, Ong realized he did not have his registration letter, and so asked the porter to allow him to access the mailbox again to retrieve the letter. (R: 37-89) Ong took a short time again to retrieve the letter (R: 37-89)

Before leaving the apartment complex, Ong was elated and flashed the license plates and registration letter at the front desk representative, who saw the plates. (R: 37-66)

At 4.36 pm that day, realizing the letter taken was not his, Ong sent a text to Dong saying that he had retrieved his plates successfully, but Ong’s registration letter was still missing. (R: 37-

149) Ong was the first person to inform Dong that he had accessed Dong's mailbox. (R: 37-150)

Dong then called Ong shortly after receiving the text (R: 37-150), from the number 608-886-7376 (R: 28-56). In the call, Dong threatened to call the police. (R: 37-151) Ong and Dong had multiple heated phone conversations, one of which started at 4.39 pm and lasted for slightly more than 6 minutes and 16 seconds (R: 7-14), in which Ong told Dong about the letter mistakenly taken (R: 37:193) – a fact Dong denied. (R: 37-155) Dong then called the police at 5.12 pm, around 45 minutes from when Ong had sent the text and about 25 minutes from Dong's and Ong's last phone conversation. (R: 37-152 and R: 7-16)

Dong told police officer Shawn Kelly that he was missing an immigration letter that belonged to his girlfriend, Chen Zhu. (R: 37-155) The letter is the subject of the violation and a document from the United States Citizenship and Immigration Services (USCIS) denying for the second time Zhu's application to stay in the US. (R: 37-34) Chen Zhu was not a legal resident at the address which her mail was sent to (R: 37-34), and Ong did not know of Zhu prior to this incident (R: 37-38).

Later that night, Officer Shawn Kelly then called Ong to inquire about the letter. (R: 37-173) Ong readily admitted that he took the letter from Dong's mailbox. (R: 37-174) Officer Kelly requested that Ong drove to Madison to return the letter. Within about an hour of the call, Ong met Officer Kelly to return the letter, which was in a "clean" condition. (R: 37-178) Office Kelly then issued Ong with a Municipal Ordinance Citation for violation of Madison Ordinance Code 23.58 on the same night of August 9, 2014.

Arguments

I. The real controversy of mistake of fact was not tried.

In a charge of theft, establishing Mens Rea is critical in establishing guilt. Ong was mistaken when he thought that Zhu's letter was his when he eagerly took the letter out of the mailbox in short amount of time. (R: 37-90) The circumstances surrounding Ong's mistaken belief fits Jerome Hall's analysis of true mistake of fact mentioned in *State v. Bougneit*, 97 Wis. 2d 687, 294 N.W.2d 675 (1980): In Hall's analysis, a mistake of fact exists if: (1) The facts exist; (2) The sense impressions of facts are different from the real facts; (3)

The impressions fit the facts, and (4) The erroneous impressions are accepted as true.

In this case, the facts are that Ong had his registration letter and license plates sent to Dong's mailbox with Dong's permission and Ong was there on August 9 eager to retrieve his belongings. It was Ong's impression that the letter belonging to Zhu Chen was his own. The impression fits the fact because Ong was eager to retrieve his belongings from Dong (R: 37-191 and R: 37-166) and Chen's letter, being a government agency letter, looked similar to what a letter from the Division of Motor Vehicles, also a government agency, would look like and was in Dong's mailbox. (R: 37-192) There were other letters in the mailbox (R: 37-90), but only this particular letter was retrieved by Ong. The impressions were accepted as true by Ong because of the fact that he expect and own a similar letter and had it sent to where he subsequently took the wrong one. Moreover, Ong did not know Zhu's existence prior to August 9, 2014 (R: 37-38), and Zhu was not a legal resident whose letter is expected by Ong to be found in Dong's mailbox (R: 37-33 and R: 37-34).

However, the City wrongly focused the jury's attention on whether the appellant, Ong, had permission to enter the mailbox of Dong, and whether Ong had entered Dong's mailbox under false premises (R: 37-20 and R: 37-164) so as to steal a letter of no value

to Ong (R: 37-38), and whose owner and Ong do not remotely know each other prior to the incident. (R: 37-34)

The City called 5 witnesses in total – Zhu, Derkaoui, Remington, Dong and Kelly. Adam Derkaoui and Richard Remington focused on how they thought Ong was Dong when he first came to the apartment complex to retrieve his registration letter and license plates. On the other hand, Dong and Zhu focused on how they did not give Ong permission to enter his mailbox and to remove Zhu's letter accordingly. Officer Shawn Kelly merely corroborated the testimonies of the aforementioned witnesses and added the testimony that Ong was confused about what happened to the letter afterwards but was able to retrieve it quickly and the letter was in a "clean" condition.

The City did not focus the jury's attention on why Ong did not have the mistaken belief that Ong thought Zhu's letter was his registration letter when he removed the letter from Dong's mailbox. (R: 37-245) The City did not even have a copy of the letter and envelope for the jury to examine (R: 37-35) for example, the likeness of the letter to that of another governmental letter. Therefore, the jury did not try the real controversy of the mistake of fact as specified in *WI Stat § 939.43(1)* – that whether a person under Ong's circumstances and eager to retrieve his or her letters (R: 37-166) would make an honest mistake in removing a wrong letter from a mailbox? This error is also

manifested in the fact that instruction for mistake of fact was not provided to the jury.

II. In the interest of justice, the instruction on the theory of defense should be given to the jury and the trial court erred in not doing so.

The jury instruction conference took place on the same day as the jury trial. Much was added in and taken out. For example, words such as "crime" had to be taken out. (R: 37-222) The conference was moving at such a fast pace that the presiding trial judge made a statement to Ong about this. (R: 37-230)

Ong was first asked to comment on whether there's any missing instruction when he was not even given a set of the finalized papers on paper. (R: 37-234) Ong was not given an opportunity to make any final objections before the judge concluded the jury instruction conference. (R: 37-237)

Moreover, jury instructions prior to the conference had not been formally requested, as evident in the last minute exclusions of part of and wrong terms used in the original set of jury instructions. (R: 37-227, R: 37-228, R: 37-229, R: 37-230 and R: 37-231)

In *State v. Mendoza*, 80 Wis. 2d 122, 258 N.W.2d 260 (1977), if a reasonable version of the evidence "viewed in the favorable light

it will 'reasonably admit from the standpoint of the accused.'", then the jury must decide on the issue of the mistake of fact under *W/ Stat* § 939.43(1). Consequently, instruction on the theory of defense must be given to the jury. Without this instruction, the jury would not be able to come to a verdict that is fair and pursuant to justice as they are disabled by their lack of instruction. The instruction if given may highly likely change the outcome of the trial or reverse the outcome in a new trial. As such, justice was miscarried as defined in *State v Wyss*, 124 *Wis. 2d* 681, 370 *N.W.2d* 745 (1985).

III. The evidence is insufficient to sustain the conviction.

It was established during trial the following facts:

- (1) Zhu, the owner of the letter, and Ong did not know each other or interacted in any form prior to August 9, 2014.
(R: 37-38)
- (2) Zhu never told Ong she was expecting a letter from the United States Citizenship and Immigration Services (R: 37-34)
- (3) Zhu was not the legal resident of the apartment whose address the mailbox belonged to (R: 37-33 and R: 37-34)

- (4) Ong did not know Chen Zhu was the name of Dong's girlfriend (R: 37-135)
- (5) The subject of violation, Zhu's letter, had no personally identifiable information of Zhu other than her name and address (R: 37-34)
- (6) The letter had no financial value to Ong (R: 37-38)
- (7) Zhu did not wish to pursue a legal case of theft against Ong (R: 37-36)
- (8) Dong testified that he saw neither Ong's registration letter nor Chen's immigration letter on August 9, 2014 or before. (R: 37-136)
- (9) Dong testified that his roommate Austin Reuter told him about the content of the letter on August 9, 2014. (R: 37-155)
- (10) Zhu testified as well that Austin Reuter was the one who informed Zhu and Dong about the letter, the subject of the violation, on August 9, 2014. (R: 37-30)
- (11) Nevertheless, Austin Reuter testified that "I have never seen her letter" (R: 37-217) and that he did not inform Dong about Zhu's letter on August 9, 2014. (R: 37-217).

- (12) Dong offered Ong permission to enter Dong's mailbox to retrieve Ong's license plates and registration letter.
(R: 37-147 and R: 7-9)
- (13) Ong entered Dong's mailbox and managed to retrieve his plates but not his letter.
- (14) Ong was the first person to inform Dong that Ong had accessed his mailbox (R: 37-150), even before Dong threatened to call the police. (R: 37-151)
- (15) 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 to the police on the same day (R: 37-178).

These facts showed that Ong had no gain from taking Zhu's letter and Ong had no contact with Zhu. While gain is not a requisite element of the Madison Ordinance 23.58, the lack of incentive showed that Ong's mistake made in his eagerness to retrieve his letters (R: 37-166) when he thought Zhu's letter was his registration letter was reasonable and honest.

These facts also showed that Dong and Zhu were dishonest in trial by insisting that Dong's roommate, Austin Reuter, told them about Zhu's missing immigration letter. Since Austin had not told

them, then the only other possible candidate to tell one of them is Ong. This is especially so since Ong made contact with Dong prior to the police call and Ong was the first person to inform Dong about his accessing of Dong's mailbox.

Most importantly, there is no credible evidence, if one 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 insufficient to sustain the conviction. Moreover, Ong had the permission of Dong – whether direct or indirect – to retrieve the letters from Dong's mailbox. (R: 37-147 and R: 7-9)


In addition, there is no credible evidence, if at all, given by the City to show that Ong did not tell 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. This evidence was provided for by the City 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 crux of the matter – that is whether a man eager to retrieve his mail (R: 37-166) from a perceived conman make an honest mistake in retrieving the wrong letter? 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, Ong's conviction must be reversed. Because the real controversy is not tried, justice was miscarried, and the evidence is insufficient, the Court of Appeals should remand the matter pursuant to *WI Stat § 752.35* with orders to have a retrial. This is an unfortunate case of a prosecutorial discretion gone wrong and a quintessential case of "making a mountain out of a molehill."

Dated on 15th day of March, 2016

By:  _____

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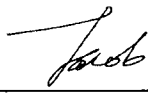
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Certification

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 3,570 words and 21 pages.

Dated on 15th day of March, 2016

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