COURT OF APPEALS
DECISION
DATED AND FILED

October 20, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1176 **Cir. Ct. No. 2015CV35**

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

CITY OF MADISON,

PLAINTIFF-RESPONDENT,

V.

JACOB ONG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STEPHEN E. EHLKE, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Jacob Ong appeals, pro se, the circuit court's judgment convicting him, after a jury trial, of an ordinance violation for theft of a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b). All references to the Wisconsin Statutes are to the 2013-14 version.

letter. Ong also appeals a post-judgment order denying his motion to set aside the jury's verdict. Ong challenges the sufficiency of the evidence. He also makes other arguments, most of which relate to his defense theory that he mistakenly took the letter. For the reasons below, I affirm.

Background

¶2 A City of Madison police officer cited Ong for an ordinance violation for theft after Ong admitted that he took a letter that did not belong to him from a Madison apartment building mailbox. Ong returned the letter to the officer.

¶3 Ong pled not guilty to the citation and asserted a defense of mistake. More specifically, Ong asserted that he mistakenly took the letter because he thought it was his and that he never intended to permanently deprive the letter's owner of possession. The jury found Ong guilty of the ordinance violation. I reference additional facts in the discussion below.

Discussion

A. Sufficiency Of The Evidence

¶4 Although Ong's sufficiency of the evidence argument comes at the end of his briefing, I begin with that issue. *See* ***State v. Ivy***, 119 Wis. 2d 591, 610, 350 N.W.2d 622 (1984) ("[W]here a defendant claims on appeal ... that the evidence is insufficient to sustain the conviction, the appellate court is required to decide the sufficiency issue even though there may be other grounds for reversing the conviction that would not preclude retrial."). For the reasons that follow, I

agree with the circuit court and the respondent City of Madison that the evidence was sufficient.

¶5 The test for sufficiency of the evidence is well established:

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the … conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt …. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citations omitted). Further, "'[t]he credibility of the witnesses and the weight of the evidence is for the trier of fact.'" ***Id.*** at 504 (quoted source omitted).

¶6 Here, consistent with the City ordinance under which Ong was cited, the jury was instructed on the theft elements as follows:

> First, that the defendant intentionally took and carried away movable property of another.
>
> ….
>
> 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.

See Madison General Ordinances § 23.58.

¶7 It is difficult to tell whether Ong's insufficient evidence argument targets particular elements. It appears that Ong's focus is on whether there was sufficient evidence to show that he had the requisite intent and, in particular, the intent to permanently deprive the letter's owner of possession. Regardless what Ong has in mind, I conclude that the evidence was sufficient as to all four elements. The evidence shows:

- Ong gained access to the apartment building mailbox by impersonating an apartment resident who shared the mailbox with other residents in that apartment.
- The apartment resident gave Ong permission to have mail sent to the mailbox but did not give Ong permission to access the mailbox.
- The letter that Ong took from the mailbox was addressed to someone other than Ong whose name was dissimilar to Ong's name.
- The letter's owner did not give Ong permission to take the letter.
- Ong drove away with the letter and opened it.
- Although Ong testified that he thought the letter contained his Wisconsin vehicle registration, the letter was from the federal Department of Homeland Security.
- After Ong drove away with the letter, he contacted the apartment resident he had impersonated but did not tell the apartment resident that he took someone else's letter from the mailbox; instead, Ong accused the resident of taking Ong's vehicle registration from the mailbox.
- Because the apartment resident had not given Ong permission to access the mailbox, the resident became concerned that Ong had taken mail that did not belong to Ong, and called police.

- When a police officer contacted Ong, Ong gave conflicting accounts of what he had done with the letter, but ultimately agreed to return it.

¶8 Taken together, this evidence supported findings that Ong intentionally took and carried away the movable property of another (element 1); that the letter owner did not consent (element 2); that Ong knew that the letter owner did not consent (element 3); and that Ong intended to permanently deprive the owner of the letter's possession (element 4). More specifically as to Ong's intent, several parts of the testimony supported a reasonable inference that Ong intentionally took the letter of another and intended to permanently deprive the letter's owner of possession. That testimony included that the letter was plainly addressed to someone other than Ong; that Ong opened the letter; that Ong engaged in dishonest actions both before and after taking the letter; and that Ong returned the letter only after being caught by police.

¶9 I acknowledge that Ong submitted contrary evidence supporting other inferences consistent with his innocence, namely, evidence simultaneously supporting his mistake defense and tending to disprove that he had the requisite intent. In particular, Ong testified that he mistook the federal Department of Homeland Security letter for his Wisconsin vehicle registration because he thought the logo looked similar; that he was not paying close attention because he was eager to receive his vehicle registration; and that, when he opened the letter and realized it was not his, he promptly contacted the apartment resident. As already stated, however, I must view the evidence in a light most favorable to the verdict, not in a light most favorable to Ong. *See* ***Poellinger***, 153 Wis. 2d at 507.

¶10 Similarly, Ong fails to recognize that witness credibility was for the jury to decide. *See* ***id.*** at 504. Thus, Ong is not persuasive when he argues that

there was no credible evidence on a topic because, according to Ong, the witness who testified on that topic was "dishonest and prejudiced against Ong."

¶11 In sum, I conclude that the evidence was sufficient for the jury to find Ong guilty of the ordinance violation for theft.

B. Ong's Other Arguments

¶12 As noted, Ong makes other arguments, mainly relating to his mistake defense. I reject these arguments for the reasons below.[2]

¶13 Ong argues that the circuit court erred by not giving the jury an instruction on Ong's mistake defense. Ong appears to concede that he never requested such an instruction. He claims, however, that this was because the circuit court gave him an inadequate opportunity to request or object to jury instructions. I disagree, and instead agree with the City that the court gave Ong ample opportunity.

¶14 In particular, the trial transcript shows that the court gave Ong opportunities to request instructions both before and after the evidentiary phase of trial. It further shows that Ong made several assertions regarding the jury instructions, and the court even made some instructional changes at Ong's request.

[2] To the extent that Ong makes arguments that I do not expressly address in the text, I reject those arguments because they are undeveloped and, in some instances, made for the first time in Ong's reply brief. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not consider inadequately developed arguments); ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998) (court of appeals generally does not address arguments raised for the first time in a reply brief).

¶15 Ong argues that, without a mistake instruction, the real controversy was not fully tried and justice miscarried. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990) (summarizing discretionary reversal standards). As I understand it, Ong's arguments referencing these discretionary reversal standards boil down to the claim that the jury needed a mistake instruction in order to grasp that Ong's mistake defense, if believed, negated the requisite intent for a theft ordinance violation.[3]

¶16 Ong's arguments fall far short of demonstrating that this is an "exceptional case" which warrants discretionary reversal. *See* ***State v. McKellips***, 2016 WI 51, ¶52, 369 Wis. 2d 437, 881 N.W.2d 258. A mistake instruction was not necessary to bring the mistake controversy into focus. Indeed, it was the obvious issue for the jury based on Ong's testimony, and I see no possibility that the lack of a mistake instruction affected the verdict.

¶17 Apart from the mistake instruction, Ong appears to argue that the real controversy was not fully tried because the City's evidence and arguments wrongly focused the jury's attention on whether Ong accessed the mailbox under false pretenses. I disagree with Ong. It is true, as noted above, that the City introduced evidence that Ong accessed the mailbox by impersonating an apartment resident. But the jury would have understood that the evidence of how Ong accessed the mailbox was simply one of the factors relevant to Ong's intent and credibility.

[3] The mistake instruction that Ong appears to have wanted was this: "An honest error, whether of fact or of law other than criminal law, is a defense if it negatives the existence of a state of mind essential to the crime." *See* ***State v. Bougneit***, 97 Wis. 2d 687, 690, 294 N.W.2d 675 (Ct. App. 1980) (citing WIS. STAT. § 939.43(1)).

Conclusion

¶18 For the reasons stated above, I affirm the judgment convicting Ong of the ordinance violation for theft and the order denying his motion to set aside the verdict.

By the Court.—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.