

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 9, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See WIS. STAT. § 808.10 and RULE 809.62.*

Appeal No. 2012AP1199

Cir. Ct. No. 2012FO3

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

CITY OF WEST ALLIS,

PLAINTIFF-APPELLANT,

v.

ROBERT C. BRAUN,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY L. VOCKE, Reserve Judge. *Reversed and remanded with directions.*

¶1 KESSLER, J.¹ The City of West Allis (the City) appeals a circuit court judgment, following a jury trial, finding Robert C. Braun not guilty of a

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12).

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

municipal violation for disorderly conduct. Because we conclude that the circuit court issued a criminal jury instruction, rather than the instruction dealing with civil forfeitures, we reverse.

BACKGROUND

¶2 On September 3, 2011, Braun was issued a municipal citation by the West Allis Police Department for allegedly crossing a police-created barrier during a rally at West Allis City Hall. Braun was convicted after a trial in the West Allis Municipal Court and subsequently appealed to the circuit court for a new trial.

¶3 In preparation for the jury trial, the City filed a proposed list of jury instructions, including WIS JI—CRIMINAL 140A,² the instruction on the burden of proof in municipal forfeitures.

¶4 Braun's trial began on May 9, 2012. At a jury instruction conference the following day, the circuit court stated that it would instruct the jurors on the burden of proof, but did not specify which instruction it would be reading. The circuit court then told the jury:

Defendants are not required to prove their innocence. The law presumes every person charged with the commission of an offense to be innocent.

This presumption requires a finding of not guilty unless in your deliberations you find it overcome by evidence which satisfies you to a reasonable certainty by clear and convincing evidence that the defendant is guilty.

² The parties refer to the jury instruction as WIS JI—CRIMINAL 140.1, however the instruction is WIS JI—CRIMINAL 140A, the burden of proof in municipal forfeitures.

¶5 Outside of the presence of the jury, the City expressed concern with the instruction, stating:

Your Honor, I know that you said at the preliminary instructions you mentioned something about the defendant is presumed innocent. In civil cases, in civil forfeiture actions, there is no presumption of innocence.

¶6 After the City provided the circuit court with relevant case law, the circuit court responded, “[a]nd I was kind of thinking when I did [WIS JI—CRIMINAL] 140, I found [WIS JI—CRIMINAL] 145. There is no presumption.” The circuit court, however, did not correct the instruction in the presence of the jury.

¶7 The jury found Braun not guilty of disorderly conduct. The City appeals, arguing that the circuit court provided the jury with an incorrect burden, and therefore, the City is entitled to a new trial.

DISCUSSION

¶8 The City contends that the circuit court’s jury instruction that Braun was presumed innocent constitutes prejudicial error and warrants a reversal of the verdict and a new trial. We agree.

¶9 “Selecting jury instructions is the [circuit] court’s role.” *Root v. Saul*, 2006 WI App 106, ¶19, 293 Wis. 2d 364, 718 N.W.2d 197. “As a general matter, if we determine ‘that the overall meaning communicated by the instruction as a whole was a correct statement of the law, and the instruction comported with the facts of the case at hand, no grounds for reversal exists.’” *Nommensen v. American Cont’l Ins. Co.*, 2001 WI 112, ¶50, 246 Wis. 2d 132, 629 N.W.2d 301 (citation omitted). “Even if we determine that a circuit court has committed an

error in administering a jury instruction, we must assess whether the miscue constitutes reversible error, that is, whether the ‘substantial rights’ of a litigant have been affected.” *Id.*, ¶51. A determination of whether a party’s substantial rights have been affected depends on whether the administration of an improper instruction affected the outcome of the trial. *Id.*, ¶52.

¶10 The presumption of innocence is addressed by WIS JI—CRIMINAL 140, which states in relevant part:

Defendants are not required to prove their innocence. The law presumes every person charged with the commission of an offense to be innocent. This presumption requires a finding of not guilty unless in your deliberations, you find it is overcome by evidence which satisfies you beyond a reasonable doubt that the defendant is guilty.

¶11 Braun’s trial resulted from an ordinance violation—a civil forfeiture—to which the presumption of innocence described in WIS JI—CRIMINAL 140 does not apply. Rather, the relevant jury instruction was WIS JI—CRIMINAL 140A, which states in relevant part:

Burden of Proof: Forfeiture Actions. The burden of establishing every fact necessary to constitute guilt is upon the (State) (City) (County) of _____. Before you can return a verdict of guilty, you must be satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the defendant is guilty.

¶12 Here, the circuit court seemed to combine both instructions by informing the jury that Braun was presumed innocent and that the City had the burden of proving, by clear and convincing evidence, that Braun’s actions constituted disorderly conduct. However, because Braun’s trial concerned a civil forfeiture, he was not entitled to a presumption of innocence, and thus, the jury was incorrectly instructed. *See Village of Sister Bay v. Hockers*, 106 Wis. 2d 474, 480, 317 N.W.2d 505 (Ct. App. 1982). Because we assume that the jury follows

instructions, *see Sommers v. Friedman*, 172 Wis. 2d 459, 468, 493 N.W.2d 393 (Ct. App. 1992), the jury presumed Braun was innocent, effectively imposing an extra burden of proof on the City.

¶13 We must determine whether the City's "substantial rights" have been affected. *See Nommensen*, 246 Wis. 2d 132, ¶51. At trial, both Braun and West Allis Police Captain Tom Kukowski testified as to the events surrounding Braun's citation. Their testimony conflicted. Kukowski testified that he issued several warnings to Braun concerning Braun's crossing of police barriers. Braun testified that he did not cross police lines and protested in a lawful, peaceful manner. Because the jury considered the conflicting testimony with the presumption that Braun was innocent, we conclude that the outcome of Braun's trial could have been different had the jury been given the proper instruction. We therefore conclude that giving the incorrect instruction was reversible error and that the City is entitled to a new trial.

By the Court.—Judgment reversed and remanded with directions.

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

