

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 4

DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 02 CF 2453

COPY

SCOTT R. JENSEN,

Defendant.

**THE STATE'S RESPONSE IN OPPOSITION TO THE DEFENDANT'S MOTION FOR
RELEASE PENDING APPEAL**

The State of Wisconsin, by and through Dane County District Attorney Brian W. Blanchard and Special Dane County Assistant District Attorney Roy R. Korte, opposes Jensen's Motion For Bond Pending Appeal (hereafter "Jensen Mtn."), and respectfully submits the following in support of its position.

DISCUSSION**I. JENSEN HAS FAILED TO DEMONSTRATE THAT HE IS
LIKELY TO SUFFER IRREPARABLE INJURY BECAUSE HE
HAS FAILED TO SHOW HE IS LIKELY TO SUCCEED ON THE
MERITS OF HIS APPEAL.**

Jensen contends that "[a]ll that need be shown is that [his] appeal is not taken simply for purposes of delay." Jensen Mtn. at 23. Jensen is wrong; that showing is not enough to justify release pending appeal. The defendant's conviction rebuts the prior presumption of innocence and justifies requiring the defendant to bear the burden of convincing the court that the circumstances support granting an appeal bond, which he has not done.

Jensen is a convicted and sentenced felon who, as the court noted at the time of sentencing, was convicted based on overwhelming evidence of guilt, including his own testimony at trial. He no longer enjoys the presumption of innocence. Rather, when a convicted defendant elects to appeal, he assumes the burden of convincing the appellate court that error warranting reversal occurred at his trial. Although Wis. Stat. § 809.31 permits this court to grant release pending appeal, a convicted felon has no entitlement to release pending appeal. Release of convicted felons sentenced to prison terms pending appeal is not the norm.

Jensen asserts that if he is not granted release pending appeal, he may serve all or most of his sentence before his appeal is resolved and, if his conviction is reversed, the result will be "an irreparable and needless injustice" to him and his family. Jensen Mtn. at 2. In determining whether to grant or deny release, this court must assess whether there is a genuine and significant risk, or only a possibility, that Jensen will be vindicated on appeal, and that the predicted vindication would come too late to spare him from serving his prison sentence for an allegedly illegal conviction. Consideration of the likelihood of success on the merits of an underlying appeal is necessary to this determination, as the court of appeals explained in *State v. Salmon*, 163 Wis. 2d 369, 374-75, 471 N.W.2d 286 (Ct. App. 1991):

We agree with the state's position that Rule 809.31 implicitly approves the consideration of the merits of the underlying appeal.

In deciding whether to grant a motion for release on bail pending appeal, the trial court may consider those "factors relevant to pretrial release." Rule 809.31(4), Stats. The factors relevant to pretrial release are set forth in sec. 969.01(4), Stats., and include "the character and strength of the evidence which has been presented to the judge." In the postconviction context, that factor permits the court to consider the strength of the evidence against the defendant or, viewed conversely, the merits of the defendant's challenge to his conviction.

That conclusion is further supported by an examination of the rationale underlying release on bail pending appeal. A person convicted of a felony has lost the presumption of innocence and, if imprisoned, his right to unfettered

liberty. The possibility of release on bail pending appeal exists to protect against the risk that a defendant whose conviction is ultimately reversed will have been irreparably injured by imprisonment pending appeal. That injury only occurs, however, if the defendant's conviction is reversed. The likelihood that an appeal will be successful is, therefore, a necessary consideration in determining whether a defendant should be released on bail pending appeal. If the defendant is not likely to succeed on the merits of the appeal, the risk of irreparable injury is minimal and the justification for release on bail pending appeal is not present.

Jensen fails to demonstrate that there is a significant risk of irreparable injury because he fails to demonstrate that his appeal is likely to succeed.

Jensen contends this court gave the jury an erroneous instruction on the intent element of Wis. Stat. § 946.12(3). In his motion, Jensen spends many pages establishing that criminal jury instructions that contain or operate as mandatory conclusive presumptions on the elements of an offense are unconstitutional, and also that the court must accurately describe the *mens rea* requirement in jury instructions. His motion fails to establish a likelihood of success, however, because the question is not whether a circuit court can instruct a criminal jury on a mandatory conclusive presumption, or whether the correct *mens rea* is described to the jury. The question is whether the jury instruction given in this case contained or operated as an unconstitutional mandatory conclusive presumption or described the wrong mental state. Jensen's motion sheds little light on those questions.

Indeed, Jensen never even describes in his motion the terms in which he challenged the jury instruction at trial on the same grounds he asserts in the instant motion. As acknowledged below, he did make some argument in this area at trial, but Jensen does not now articulate why the specific ruling of this court rejecting a clearly articulated challenge to the instruction was error. He simply ignores his burden.

A circuit court has the duty, indeed the obligation, to instruct the jury on the law. *See State v. Schwarze*, 120 Wis. 2d 453, 455-56, 355 N.W.2d 842 (Ct. App. 1984). Jensen's motion

does not address why he believes the instruction here constituted an erroneous instruction on a fact, rather than a proper instruction on the law. Jensen has not articulated sufficient basis for this court to conclude that it is likely the court of appeals will hold that the instruction given in this case was unconstitutional.

A circuit court may exercise broad discretion in giving jury instructions based on the facts and circumstances of the particular case. *State v. Vick*, 104 Wis. 2d 678, 690-91, 312 N.W.2d 489 (1981).

We note at the outset that a trial judge may exercise wide discretion in issuing jury instructions based on the facts and circumstances of the case. *State v. Pruitt*, 95 Wis. 2d 69, 80-81, 289 N.W.2d 343 (Ct. App. 1980) (no error to refuse special instructions even when they are not erroneous). This discretion extends to both choice of language and emphasis. *State v. Dix*, 86 Wis. 2d 474, 273 N.W.2d 250 (1979). A trial judge should exercise discretion in order "to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence." *Id.* at 486. Furthermore, "[u]ltimate resolution of the issue of the appropriateness of giving particular instruction turns on a case-by-case review of the evidence, with each case necessarily standing on its own factual ground." *Johnson v. State*, 85 Wis. 2d 22, 28, 270 N.W.2d 153 (1978).

Jensen has offered no reason to believe the court of appeals will find the instruction given in this case constituted reversible error, particularly in a case in which this court had the benefit of a detailed Court of Appeals decision to use as a reference through the course of pre-trial motion practice and during trial.

Jensen's motion also indicates that he will also appeal this court's exclusion of certain evidence he offered at trial. Again, his motion fails to demonstrate a likelihood of success on appeal on this issue.

Upon review of evidentiary issues, "[t]he question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record." *State v. Wollman*, 86 Wis. 2d 459, 464, 273 N.W.2d 225 (1979). Thus,

the test is not whether this court agrees with the ruling of the trial court, but whether appropriate discretion was in fact exercised. *Id.* This court will not find an abuse of discretion if there is a reasonable basis for the trial court's determination. *Boodry v. Byrne*, 22 Wis. 2d 585, 589, 126 N.W.2d 503 (1964). For a discretionary decision of this nature to be upheld, however, "there should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth." *State v. Hutnik*, 39 Wis. 2d 754, 764, 159 N.W.2d 733 (1968).

State v. Pharr, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983).

The appellate court gives deference to the circuit court's determination regarding relevancy. *Pharr*, 115 Wis. 2d at 345. A circuit court may exclude even relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury or considerations of undue delay, waste of time or needless presentation of cumulative evidence. Wis. Stat. § 904.03. The appellate court will uphold a circuit court's exclusion of evidence under § 940.03 under a deferential standard of review. *State v. Hubanks*, 173 Wis. 2d 1, 21, 496 N.W.2d 96 (Ct. App. 1992).

Jensen's motion does not demonstrate that he is likely to meet the high standard necessary to overturn this court's evidentiary rulings on appeal in a case in which this court had the benefit of a detailed opinion addressing the nature of the case by the Court of Appeals in advance of trial. The short preview provided of the defendant's appellate argument on evidentiary "errors" is not impressive. Jensen argues that this court erred in failing to permit evidence related to the defendant's purported desire for a "level playing field," one on which both major party "teams" agree to cheat to the same degree in the same way at the same time. *Jensen Mtn.* at 22. Jensen will be unlikely to convince the Court of Appeals that it was wrong when it rejected this view of the requirements of the law in its decision on interlocutory appeal.

Jensen will suffer irreparable injury from the denial of release pending appeal only if he serves all or most of his prison sentence while the appeal is pending, and also the appeal

ultimately results in reversal of his conviction. *Salmon*, 163 Wis. 2d at 374-75. Jensen has failed to show it is likely he will suffer irreparable injury because he has failed to show it is likely he will succeed on appeal.

In advance of trial, Jensen argued that the jury must be instructed on a definition of “corruptness” to define the level of intent necessary, and the state responded to these arguments. *See* Trans. of Motion Hearing of 2/3/06 at 41-52. The court addressed these arguments in detail. *See id.* at 62-68. In doing so, this court quoted directly from the Court of Appeals decision in this case: “Using discretionary powers to obtain a dishonest advantage over others by waging partisan political campaigns with state resources on state time violates one’s duty as a public official.” *Id.* at 64-65 (quoting *State v. Jensen, Foti, Schultz*, 2004 WI App 89, para. 29, 272 Wis. 2d 707, 728-729, affirmed by 2005 WI 31, 279 Wis. 2d 220, 694 N.W.2d 56; *see also State v. Chvala*, 2004 WI App 53, 271 Wis. 2d 115, 678 N.W.2d 880.) The court noted that the term “corrupt,” which was a focus of Jensen’s pre-trial motions, is not “found anywhere in the statute or in the jury instruction and I’m not going to include the language of corrupt.” *Id.* at 66.

Then, during trial at the jury instruction conference, counsel for Jensen made the argument that the jury instruction on the elements of Misconduct in Office proposed by the court after the court reviewed the law and the submissions of the parties was defective because it would create “a strict liability offense.” Trans., JT, 3/8/06, at 69-70. The court addressed this objection and rejected it, based in part on the explicit language of the Court of Appeals in *Jensen*. *Id.* at 71-72. In addition, the state noted supporting language from the *Chvala* decision and also highlighted the fact that the instruction proposed by court included not only the challenged sentence, but one following it that includes the instruction that “‘with intent’ means

that the defendant must have had the purpose to obtain a dishonest advantage or been aware that his conduct was practically certain to cause that result.” *Id.* at 72-73.

Finally, given the strength of the evidence presented at trial, a fact noted by this court at the time of sentencing, there is every reason to believe that even assuming an error in the challenged instruction requiring a new trial, the defendant would be convicted again at a second trial, even with a slightly revised jury instruction redefining “dishonest advantage,” since the state would still have available the many witnesses and documents that readily prove the defendant’s guilt, as well as the new advantage of a transcript of the defendant’s false testimony from the first trial. The defendant presents no reason to believe that he would be sentenced, following a retrial, to a term of imprisonment any shorter than the pending term. Thus, the danger of irreparable injustice from imprisonment is doubly low. This presiding court is in a unique position to evaluate the factors relevant to a request for bail pending appeal, including the strength of the evidence and the lack of appellate issues of consequence. The defendant’s conduct was shown at trial to be intentionally dishonest, and intentionally for the benefit of himself and his associates.

II. THE OTHER FACTORS RELEVANT TO RELEASE PENDING APPEAL DO NOT ALL FAVOR RELEASE.

In determining whether to grant or deny release pending appeal, this court must also consider the nature of the crime, the length of sentence and other factors relevant to pretrial release. Wis. Stat. § 809.31(4). The state acknowledges the absence of strong factors supporting a substantial risk that the defendant will not appear at future court proceedings, given the defendant’s lack of criminal history, substantial family ties, and record of appearances in this case, although the odds, albeit still low, must have increased since a jury returned verdicts of guilty on all counts and this court has imposed a prison sentence.

Yet Jensen appears to believe that he is entitled to release because he was not convicted of an assaultive crime. Section 809.31, however, does not provide that felons convicted of nonviolent felonies are entitled to release pending appeal.

Jensen was convicted of Misconduct in Public Office on multiple counts, offenses that do serious harm to the public. Although he did not do personal violence to another person, he did do violence to the trust necessary to a democratic system of government, and did so in concert with others over a long period of time, increasing the harm to state government and the public. The impact of a crime is inextricably connected to the nature and circumstances of the offense, particularly in post-conviction analysis.

At trial, the defendant both lied about his knowledge of the misconduct that was charged, and also attempted to assert that even if he had committed various of the charged acts, it was not wrong for him to do so. He claimed, in part, that he was entitled to do what he did. Even at sentencing, he failed to recognize or acknowledge the wrongfulness of his conduct. While it is more difficult for him to facilitate or participate directly in official misconduct now that he is no longer a public official, his belief that he did nothing wrong represents a risk that he will engage in other fraudulent conduct, because he believes he is entitled to do so. One reason that demonstrated acceptance of responsibility, or the lack thereof, figures prominently in sentencing hearings is that the failure to acknowledge wrongdoing foreshadows a willingness to engage in or encourage similar wrongdoing in the future.

The defendant committed the widespread offenses of conviction when he was a mature, highly educated adult with the same social support network he now has. It is very surprising that he took the chances he did to commit the brazen crimes he committed; the court is entitled to protect the public from the possibility of his participation in any new crimes of fraud or

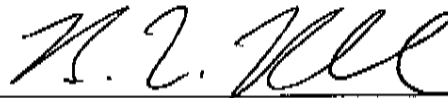
corruption. Jensen is not going to commit any new crimes as a member of the Assembly, but he has proven himself capable of committing long running and complicated crimes involving deception.

In addition, given the extraordinary degree of judicial attention by multiple courts given to this case during post-charging, pretrial briefing and hearings, including a full interlocutory trip to the state's highest court, the defense has had the fullest of opportunities to develop potential appellate arguments regarding the elements of sec. 946.12(3) over the course of four years. For this reason, counsel for Jensen should be able to obtain reasonably prompt relief for any appellate arguments that could have merit, even though counsel is still now unable to identify a strong appellate argument despite that advantage.

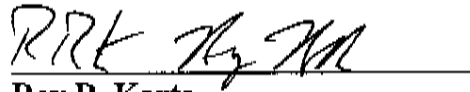
Conclusion

For all of these reasons, the State respectfully asks this court to deny Jensen's motion for release on bond pending appeal.

Respectfully Submitted,



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