

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 2006AP2095-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SCOTT R. JENSEN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION
AND SENTENCE ENTERED IN THE
CIRCUIT COURT OF DANE COUNTY,
HONORABLE STEVEN D. EBERT, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT
AND PUBLICATION

The State does not request oral argument or publication because the issues presented can be resolved by application of established legal principles to the facts of record.

ARGUMENT

I. THE JURY INSTRUCTION ON THE SPECIFIC INTENT ELEMENT DID NOT CONTAIN OR OPERATE AS A MANDATORY PRESUMPTION, IT WAS A CORRECT STATEMENT OF SUBSTANTIVE LAW, IT WAS NOT FUNDAMENTALLY FLAWED AND IT DID NOT DEPRIVE JENSEN OF A FAIR TRIAL.

A. Misconduct in public office is a specific intent crime.

The State agrees that the crime set forth in Wis. Stat. § 946.12(3) is a specific intent crime rather than a general intent crime.

To convict Jensen of felony misconduct in public office in violation of § 946.12(3), the State had to prove beyond a reasonable doubt that Jensen exercised a discretionary power in a manner inconsistent with the duties of his office AND that he exercised such discretionary power with intent to obtain a dishonest advantage for himself or another.

The jury was specifically instructed that in order to find Jensen guilty, it must be satisfied beyond a reasonable doubt that Jensen exercised his discretionary power in a manner inconsistent with the duties of his office and with the intent to obtain a dishonest advantage for himself or another, and that "with intent to" means he must have had the purpose to obtain a dishonest advantage or he must have been aware that his conduct was practically certain to cause that result (223:47-48).

B. Intent was a contested issue in this case.

Jensen exercised his right to a jury trial and he did not stipulate to any element of the offense. Accordingly,

whether Jensen acted with intent to obtain a dishonest advantage was a contested issue in this case.

C. The jury instruction on the specific intent element was not unconstitutional and did not violate Wis. Stat. § 903.03 because it did not contain or operate as a mandatory presumption.¹

1. The jury instruction on the specific intent element was not unconstitutional because it did not remove the issue of intent from the jury or require the jury to find intent based on proof of other facts.

The State has the burden to prove every element of the offense beyond a reasonable doubt and a criminal defendant has the right to have the jury, rather than the judge, determine whether the State has proved every element of the offense beyond a reasonable doubt.

A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate or basic facts. A mandatory conclusive presumption removes the presumed element from the case once the State has proved the predicate facts; a mandatory rebuttable presumption requires the jury to find the presumed fact, unless the defendant disproves it. Mandatory presumptions violate the constitution because they relieve the State of the burden of proving every element of the offense beyond a reasonable doubt by removing an element or shifting the burden of persuasion on an element to the defendant and they allow the judge, rather than the

¹In order to avoid unnecessary repetition, the State will address Jensen's constitutional claims in subsections I.C.1. and 2. of this brief; it will address Jensen's § 903.03 argument in subsection I.C.3. of this brief.

jury, to decide whether the State has proved every element of the offense. See *Francis v. Franklin*, 471 U.S. 307, 314-15 (1985); *State v. Harvey*, 2002 WI 93, ¶¶19-23, 254 Wis. 2d 442, 647 N.W.2d 189.

Jensen cites a line of United States Supreme Court cases that held jury instructions unconstitutional because they removed the issue of intent from the jury or required the jury to find intent if the State proved certain facts unless the defense proved otherwise. Jensen claims the jury instruction on the intent element had the same fatal flaw. He is wrong.

Contrary to Jensen's claim, the language in this instruction did not contain a mandatory presumption. The instruction did not tell the jury that if it found Jensen used state resources to promote a candidate in a political campaign or if it found he used state resources to raise money for a candidate, it must find he intended to obtain a dishonest advantage. The instruction did not remove the issue of intent from the jury. The instruction did not direct the jury to find intent unless Jensen disproved intent. Under the instruction, the jury was free to find that Jensen did not intend to obtain a dishonest advantage, even if it found that he used state resources to promote a candidate in a political campaign or if it found he used state resources to raise money for a candidate. The jury instructions as a whole could not have been understood by a reasonable jury as requiring it to accept a fact as proven, or as shifting the burden of persuasion to the defense. See *Franklin*, 471 U.S. at 318-27.

Whether a jury instruction is unconstitutional because it contains or operates as a mandatory presumption is a question of law the appellate court determines *de novo*. *State v. Kuntz*, 160 Wis. 2d 722, 735, 467 N.W.2d 531 (1991).

The trial court in Jensen's case instructed the jury on specific intent as follows:

The fourth element requires that the defendant exercised such discretionary power with intent to obtain a dishonest advantage for himself or herself or another. The use of a state resource to promote a candidate in a political campaign or to raise money for a candidate provides to that candidate a dishonest advantage. The phrase "with intent to" means that the defendant must have had the purpose to obtain a dishonest advantage or have been aware that his conduct was practically certain to cause that result. You cannot look into a person's mind to find intent. While this intent to obtain a dishonest advantage must be found as a fact before you can find the defendant guilty, it must be found, if found at all, from his words and acts and statements, if any, bearing upon his intent.

(223:47-48.)

This instruction does not contain the fatal flaws identified in *Morissette v. United States*, 342 U.S. 246 (1952). In *Morissette*, the United States Supreme Court held that criminal intent to steal or wrongfully deprive another of possession of property is an element of the offense and *Morissette's* intent was a question of fact for the jury. *Id.* at 274. The trial court told the jury:

"And I instruct you to this effect: That if this young man took this property (and he says he did), without any permission (he says he did), that was on the property of the United States Government (he says it was), that it was of the value of one cent or more (and evidently it was), that he is guilty of the offense charged here. If you believe the government, he is guilty. * * * The question on intent is whether or not he intended to take the property. He says he did. Therefore, if you believe either side, he is guilty."

Morissette, 342 U.S. at 249. The United States Supreme Court held this instruction constituted an impermissible conclusive presumption. *Id.* at 274-76.

In *Jensen's* case, in contrast, the trial court specifically told the jury that, in order to convict *Jensen*, the jury must find beyond a reasonable doubt that *Jensen* exercised a discretionary power "with intent to obtain a

dishonest advantage" for himself or another. Unlike the *Morissette* trial court, the trial court in Jensen's case did not deprive the jury of the ability to decide the criminal intent element based on all of the evidence presented. Unlike the jury in *Morissette*, Jensen's jury was never told that, if Jensen intended to do certain acts, he was guilty. Unlike the jury in *Morissette*, Jensen's jury was never told that, if it believed either the prosecution side or the defense side, he was guilty. The instruction given to Jensen's jury did not suffer the fatal flaws identified in *Morissette*.

The intent instruction given in Jensen's case did not contain language comparable to that found unconstitutional in *Sandstrom v. Montana*, 442 U.S. 510 (1979). In *Sandstrom*, the trial court instructed the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." *Sandstrom*, 442 U.S. at 515. The instruction was unconstitutional because it contained or operated as a conclusive presumption, directing the jury that it must find intent upon proof of Sandstrom's voluntary actions and their ordinary consequences. It also contained or operated as a rebuttable presumption that shifted the burden of proof to Sandstrom by directing the jury that it must find intent upon proof of Sandstrom's voluntary acts and their ordinary consequences, unless Sandstrom proved the contrary. *Sandstrom*, 442 U.S. at 517.

Similarly, in *Francis v. Franklin*, the challenged instruction stated: "The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted." *Franklin*, 471 U.S. at 315. The Court held this instruction was an impermissible mandatory rebuttable presumption that shifted the burden of persuasion on the element of intent once the State had proved the predicate acts. *Franklin*, 471 U.S. at 316.

Likewise, in *Carella v. California*, 491 U.S. 263, 264-65 (1989), the Court held the jury instructions unconstitutionally imposed conclusive presumptions by stating: "Intent to commit theft by fraud is presumed if one who has leased or rented the personal property of another pursuant to a written contract fails to return the personal property to its owner within 20 days" after written demand and "Whenever any person who has leased or rented a vehicle wilfully and intentionally fails to return the vehicle to its owner within five days after the lease or rental agreement has expired, that person shall be presumed to have embezzled the vehicle."

Unlike *Morissette*, *Sandstrom*, *Franklin*, and *Carella*, the jury instruction on specific intent given in Jensen's case never told the jury that if the State proved certain facts, the jury must infer or find that Jensen intended to obtain a dishonest advantage. The jury was never told it must find such intent based on certain facts, unless Jensen proved otherwise. Indeed, unlike *Sandstrom*, *Franklin*, and *Carella*, the jury instruction in Jensen's case never used the word "presumption" or "presumed" at all, nor did it operate as a presumption.

The jury instruction on intent given in Jensen's case did not contain the flaws held unconstitutional in *Morissette*, *Sandstrom*, *Franklin*, and *Carella*.

2. The jury instruction properly instructed the jury on a matter of substantive law, and it allowed the jury to find the facts, apply the facts to the law and make the determination of guilt or innocence.

Mandatory instructions are instructions that direct the jury to find certain facts based upon proof of other facts. A jury instruction operates as a mandatory presumption if it makes a finding of fact, applies the facts to the law, or makes a determination of guilt or innocence.

Such an instruction is unconstitutional because a defendant is constitutionally entitled to have the jury, rather than the court, make findings of fact, apply the facts to the law and make the determination of guilt or innocence. Although the trial court must not determine the facts, it must inform the jury of the substantive law applicable to the case, define terms for the jury when necessary, inform the jury of the operable rules of law, and direct the jury to apply the law. *State v. Leist*, 141 Wis. 2d 34, 37-38, 414 N.W.2d 45 (Ct. App. 1987); *State v. Bjerkaas*, 163 Wis. 2d 949, 959-63, 472 N.W.2d 615 (Ct. App. 1991).

Jensen challenges the sentence in the jury instruction that states: "The use of a state resource to promote a candidate in a political campaign or to raise money for a candidate provides to that candidate a dishonest advantage" (223:48). Jensen claims this sentence required the jury to accept as true the fact that using a state resource to promote a candidate in a political campaign or to raise money for a candidate provides a dishonest advantage to that candidate. Jensen claims that by telling the jury to accept this fact as true, the trial court unconstitutionally made a finding of fact or applied the facts to the law.

Jensen is wrong because the challenged statement did not tell the jury that it must accept a certain fact as true. Rather, the instruction informed the jury that as a matter of substantive law, the use of a state resource to promote a candidate in a political campaign or to raise money for a candidate provides that candidate with a dishonest advantage. When, as here, a trial court instructs the jury on a principle of law, the court is not impermissibly instructing the jury to find a certain fact. The challenged instruction did not operate as a presumption at all, and it did not operate as a mandatory presumption, because it did not instruct the jury on an issue of fact; rather, it informed the jury of the applicable law that the jury was required to follow. The trial court has the duty and responsibility 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." *State v.*

Turner, 114 Wis. 2d 544, 551, 339 N.W.2d 134 (Ct. App. 1983).

It is instructive to compare cases in which the Wisconsin courts have held that a jury instruction impermissibly removed a fact from the jury or required the jury to find a certain fact with cases in which the Wisconsin courts have held that a jury instruction properly instructed the jury on the applicable law that the jury must apply. This comparison reveals that the substantive law involved in the case dictates whether a jury instruction in a particular case is constitutional because it defines a statutory term or instructs the jury on the operable rules of law, or whether it is unconstitutional because it determines a fact in the case or applies the facts of the case to the law. The substantive law governs whether an issue is one of law for the court to determine or one of fact for the jury to find and apply.

In *State v. Leist*, Leist was charged with criminal slander of title, contrary to Wis. Stat. § 943.60(1). Under that statute, the State was required to prove the documents filed by Leist were frivolous. This court held that it was proper for the trial court to define the statutory term for the jury by telling the jury that a frivolous document is one "without legal significance." *Leist*, 141 Wis. 2d at 37. The trial court, however, erred when it instructed the jury that the documents filed by Leist were frivolous as a matter of law. *Leist*, 141 Wis. 2d at 37-38. The trial court erred because whether the particular documents at issue had legal significance was not a matter of law for the court to determine, but was a fact the jury had to determine by applying the definition to the evidence presented. *Leist*, 141 Wis. 2d at 37-39.

In *State v. Draughon*, 2005 WI App 162, ¶10, 285 Wis. 2d 633, 702 N.W.2d 412, pursuant to Wis. Stat. § 940.22(2), Draughon was charged with sexual exploitation by a therapist, which required the State to prove that Draughon was a therapist or held himself out to be a therapist. The statute provides that a therapist is "a phy-

sician, psychologist, social worker, marriage and family therapist, professional counselor, nurse, chemical dependency counselor, member of the clergy or other person, whether or not licensed or certified by the state, who performs or purports to perform psychotherapy." *Id.* This court held the jury instruction given in *Draughon* was unconstitutional because:

The jury instruction, in syllogistic fashion, presents two propositions: (1) therapists perform psychotherapy, and (2) therapists include members of the clergy. These propositions lead to the faulty conclusion that by definition, clergy members perform psychotherapy. . . .

Here, the instruction given never directed the jury to make an independent, beyond-a-reasonable-doubt decision as to whether Draughon performed or purported to perform psychotherapy. Because this finding was a required element of the charge, its omission is constitutional error. See *Harvey*, 254 Wis. 2d 442, ¶ 33.

Draughon, 285 Wis. 2d 633, ¶¶12, 14.

The role of the substantive law of the crime charged and the distinction between fact and law also dictated the result in *State v. Tomlinson*, 2002 WI 91, 254 Wis. 2d 502, 648 N.W.2d 367. Tomlinson was charged with being party to a crime of first-degree reckless homicide while using a dangerous weapon. *Tomlinson*, 254 Wis. 2d 502, ¶1. Evidence was presented that the crime was committed with a baseball bat. *Tomlinson*, 254 Wis. 2d 502, ¶¶4-8. The term "dangerous weapon" is defined in Wis. Stat. § 939.22(10) as:

"Dangerous weapon" means any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any electric weapon, as defined in s. 941.295 (4); or any other device or instrumentality which, in the manner it is used or intended to be

used, is calculated or likely to produce death or great bodily harm.

In its instructions to the jury, the trial court stated "Dangerous weapon means a baseball bat." *Tomlinson*, 254 Wis. 2d 502, ¶15. The Wisconsin Supreme Court held this instruction was unconstitutional because it operated as a mandatory conclusive presumption. *Tomlinson*, 254 Wis. 2d 502, ¶¶53, 54, 57.

The Wisconsin Supreme Court's holding in *Tomlinson* was dictated by the relevant substantive law. The substantive statutory definition of dangerous weapon does not provide that a baseball bat is a dangerous weapon as a matter of law. Rather, the substantive law provides that a "device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm" is a dangerous weapon. Thus, under the substantive law, a baseball bat is a dangerous weapon only if it meets that statutory description. Whether, under the facts of the particular case, a baseball bat meets that description is a question of fact for the jury.

In *State v. Kuntz*, 160 Wis. 2d at 730-31, Kuntz was charged with arson, contrary to Wis. Stat. § 943.02(1)(a), which requires the State to prove that a defendant by means of a fire intentionally damages any building of another without that person's consent. The State presented evidence from which the jury could find that Kuntz, by fire, intentionally damaged the mobile home of his estranged wife, without her consent. The Wisconsin Supreme Court held that the trial court's instruction to the jury that "a mobile home is a building" constituted an unconstitutional mandatory conclusive presumption. *Kuntz*, 160 Wis. 2d at 734-38. The substantive law of arson does not state that certain structures, including a mobile home, constitute a building. Therefore, although the trial court could have given the jury a definition of "building," the court could not tell the jury what types of structures are buildings. Rather, "[w]hether a certain structure is a 'building' is a question

of fact that the jury alone must decide." *Kuntz*, 160 Wis. 2d at 738.

In *State v. Harvey*, 254 Wis. 2d 442, ¶¶2, 26, Harvey was charged with possession of cocaine with intent to deliver, with a penalty enhancer that required the State to prove Harvey possessed the cocaine within 1,000 feet of a city park. The State presented evidence that Harvey possessed the cocaine within 1,000 feet of Penn Park in the City of Madison, Wisconsin. *Harvey*, 254 Wis. 2d 442, ¶9. The trial court took judicial notice that Penn Park is a city park. The trial court told the jury that it had taken judicial notice and it instructed the jury that therefore "you are directed to accept the following as true: Penn Park is a city park located in the City of Madison, Dane County, Wisconsin." *Harvey*, 254 Wis. 2d 442, ¶12. The Wisconsin Supreme Court held that this instruction was unconstitutional because it had the same effect as a mandatory conclusive presumption on an element of the offense. *Harvey*, 254 Wis. 2d 442, ¶29. The instruction was improper because whether a particular park is a city park is a fact for the jury to determine. *Harvey*, 254 Wis. 2d 442, ¶¶31-33.

The key to understanding these cases is understanding the distinction between fact and law as dictated by the relevant substantive law involved in each case. In *Leist* whether a particular document had legal significance was a question of fact for the jury; in *Draughon*, whether Draughon performed or purported to perform psychotherapy was a question of fact for the jury; in *Tomlinson* whether a baseball bat was a dangerous weapon was a question of fact for the jury; in *Kuntz* whether a particular structure was a building was a question of fact for the jury; in *Harvey* whether a particular park was a city park was a question of fact for the jury. If the instructions at issue in those cases had involved issues of law that were for the court, rather than issues of fact for the jury, the results necessarily would have been different.

This critical distinction is illustrated by the following cases, in which the jury instructions were held constitutional. In the following cases, the jury instructions were constitutional because the instructions stated the operable law that the jury must apply. The instructions did not apply the facts to the law, determine facts or tell the jury that it must find a presumed fact if it found a basic fact had been proven.

In *State v. Schwarze*, 120 Wis. 2d 453, 455, 355 N.W.2d 842 (Ct. App. 1984), Schwarze was a public employee, an accounts receivable clerk for a school district. Schwarze, like Jensen, was charged with felony misconduct in public office contrary to § 946.12(3). *Schwarze*, 120 Wis. 2d at 454. Schwarze claimed it was unconstitutional for the trial court to instruct the jury that she had a duty to disclose shortages of money to her employer. *Id.* at 455. This court held that the trial court properly instructed the jury because the question of legal duty is an issue of law and as a matter of law an employee has a duty to disclose shortages of money to her supervisor; therefore, the trial court properly instructed the jury as to the duty that existed. *Schwarze*, 120 Wis. 2d at 455-56. See *State v. Jensen*, 2004 WI App 89, ¶14, 272 Wis. 2d 707, 681 N.W.2d 230; *State v. Chvala*, 2004 WI App 53, ¶11, 271 Wis. 2d 115, 678 N.W.2d 880. If the question of legal duty presented an issue of fact, rather than an issue of law, it would not have been proper for the trial court to instruct the jury on the duty that existed.

The substantive law distinction between fact and law also dictated the result in this court's decision in *State v. Curtis*, 144 Wis. 2d 691, 424 N.W.2d 719 (Ct. App. 1988). Curtis was charged with second degree sexual assault, and this court explained:

Section 940.225(2)(d), Stats., defines second degree sexual assault as "sexual contact or sexual intercourse with a person who the defendant knows is unconscious." The trial court instructed the jury that "unconscious includes the loss of awareness caused by sleep." Curtis contends that this instruc-

tion withdrew the issue of whether S.L. was unconscious at the time of the offense from the jury and directed a verdict against him on the element of unconsciousness.

....

In the present case, the trial court instructed the jury that "unconscious includes the loss of awareness caused by sleep." Curtis argues that the legal definition of "unconscious" does not include loss of awareness due to sleep, and that by so instructing the jury, the trial court applied the facts of the case to the law, invading the province of the jury.

Curtis, 144 Wis. 2d at 694-95. This court looked to the appropriate definitions of "unconscious" and then held:

We conclude that "unconscious," as used in sec. 940.225(2)(d), Stats., is a loss of awareness which *may* be caused by sleep. We also conclude that the trial court properly defined the element of unconsciousness and did not invade the jury's fact-finding function. The question of whether S.L. was in fact "unconscious" remained for the jury's determination.

Curtis, 144 Wis. 2d at 695-96 (footnote omitted; emphasis in original).

It is the duty of the trial court to define statutory terms for the jury in appropriate cases, and the proper definition of a term is necessarily a matter of law. Thus, when the trial court informed the jury that "unconscious," as used in the sexual assault statute, is a loss of awareness which may be caused by sleep, the trial court was informing the jury of a matter of law. It was not the jury's prerogative to decide whether the term "unconscious" in the sexual assault statute includes loss of awareness caused by sleep. A jury is not entitled to determine what the law is; a jury is only entitled to determine the facts and to apply the facts to the law. Thus, in *Curtis*, it was the court's duty to determine whether "unconscious" included loss of awareness caused by sleep, and then it was the jury's duty to determine, based on the evidence, whether

the victim was in fact "unconscious" as that term had been defined for them by the court.

Similarly, the distinction between an issue of law for the court and an issue of fact for the jury explains the result in *State v. Childs*, 146 Wis. 2d 116, 430 N.W.2d 353 (Ct. App. 1988). Childs was charged with having sexual intercourse with another person without consent of that person by use or threat of force or violence. *Childs*, 146 Wis. 2d at 119. The sexual assault statute states in relevant part that sexual intercourse includes cunnilingus and fellatio.

Childs complained because the trial court failed to instruct the jury that the State was required to prove intrusion of his penis into the victim's mouth and because the court instructed the jury that "[f]ellatio, the oral stimulation of the penis, is sexual intercourse." *Childs*, 146 Wis. 2d at 120.

This court held that the trial court properly instructed the jury that fellatio is intercourse, and it properly instructed the jury on the ordinary and common meaning of the term fellatio. *Childs*, 146 Wis. 2d at 120.

It was proper for the trial court to instruct the jury that fellatio is sexual intercourse because the statute provides as a matter of law that fellatio is sexual intercourse. A jury is not entitled to determine what the law is, but is only entitled to determine facts and apply the facts to the law. The jury in *Childs*, therefore, was entitled to determine whether Childs had committed an act of fellatio, but the jury was not entitled to decide whether fellatio is sexual intercourse. If the issue of whether fellatio is sexual intercourse had been an issue of fact rather than an issue of law, it would have been unconstitutional for the trial court to instruct the jury that fellatio is sexual intercourse.

The substantive law distinction between fact and law also dictated the result in this court's decision in *State*

v. *Block*, 170 Wis. 2d 676, 489 N.W.2d 715 (Ct. App. 1992). *Block* was tried for the second-degree murder of his seventy-three year old grandmother, Perlcan Stewart, whom he stabbed. Between the day *Block* stabbed Stewart in early October 1987 and the day she died in late December 1987, "Stewart was hospitalized three times and underwent three operations. She died from a pulmonary embolism. According to surgeons who treated her, the stabbing was a substantial factor in causing Stewart's death. *Block*, however, argued that negligence by Stewart's treating physicians caused her death." *Block*, 170 Wis. 2d at 678-79. *Block* proffered a theory of defense that the stabbing was not a substantial factor in causing Stewart's death because she would not have died but for the negligence of medical personnel. *Block*, 170 Wis. 2d at 682.

Block claimed the trial court erred by instructing the jury:

In Wisconsin, if the defendant inflicts a wound of potentially mortal or life threatening nature on another and negligence, if any, of the doctor contributes to the victim's death, such negligence does not break the chain of causation between the acts of the defendant and the subsequent death. The State is only required to prove beyond a reasonable doubt that the defendant's acts were a substantial factor in producing the death.

Id. at 682.

This court held the instruction was proper because it was warranted by the evidence and because it

accurately stated the law. The prosecution is required to prove beyond a reasonable doubt only that defendant's acts were a "substantial factor" in causing the victim's death not that they were the sole cause. Thus, any medical negligence in connection with procedures undertaken in response to a life-threatening situation created by the defendant does "not break the chain of causation" even though that negligence may have "contributed" to the victim's death.

Block, 170 Wis. 2d at 683 (citations omitted)

This court held the instruction did not direct the jury to conclude that Block's stabbing of Stewart in fact caused her death. *Id.* at 683.

The trial court in *Block* properly instructed the jury on the substantive law regarding causation. Because a jury is not entitled to determine what the law is, but is only entitled to determine facts and apply the facts to the law as it has been given to them, the jury in *Block* was not authorized to conclude that any medical negligence taken in response to a life threatening situation caused by Block broke the chain of causation between Block's stabbing of his grandmother and her death. The jury was not entitled to determine that Block's act of stabbing his grandmother must be the sole cause of death in order for Block to be guilty. Rather, the jury was required to take the law as the trial court gave it to them, and to apply the facts to that law.

If the issue of whether a defendant's act must be the sole cause of death had been an issue of fact, rather than law, the instructions given by the trial court in *Block* would have been unconstitutional.

As the preceding discussion of the case law demonstrates, whether a jury instruction constitutionally directs the jury on an issue of law that the jury is required to follow, or whether it unconstitutionally directs the jury how to resolve a fact or apply the facts to the law depends on the substantive law involved in the case. The substantive law is contained in the relevant statutes and case law.

For example, the sexual assault statute provides that fellatio is sexual intercourse. Fellatio, therefore, is sexual intercourse as a matter of substantive law. In a trial for sexual assault, the jury has the authority to decide whether the defendant committed the act of fellatio because that is a fact, but the jury does not have the authority to decide that fellatio is not sexual intercourse because the substantive law, which the jury must follow,

declares that fellatio is sexual intercourse. *See State v. Childs*, 146 Wis. 2d at 119-20.

Similarly, case law provides that as a matter of substantive law a defendant's act is the cause of death if it is a substantial factor in causing the death; the defendant's act need not be the sole factor in causing death. In a homicide trial, the jury has the authority to decide whether the defendant committed the act alleged and whether that act was a substantial factor in causing the victim's death. The jury, however, does not have the authority to decide that the defendant should be found guilty only if his act was the sole factor causing death. *See State v. Block*, 170 Wis. 2d at 683.

Likewise, the substantive law of the crime of misconduct in public office provides that the existence of a public employee or public officer's duty is a matter of law for the court to decide. The jury has the authority to decide whether the employee or officer violated that duty in a manner proscribed by the statute. The jury, however, does not have the authority to define the public employee's or officer's duty. *See State v. Jensen*, 272 Wis. 2d 707, ¶14; *State v. Chvala*, 271 Wis. 2d 115, ¶11; *State v. Schwarze*, 120 Wis. 2d at 455-56.

In the same way, the substantive law provides the basis for this court to conclude that the instruction Jensen challenges was constitutional because the instruction informed the jury of the substantive law the jury must apply; the instruction did not direct the jury on a matter of fact that was for the jury to decide.

Jensen assumes that whether the use of a state resource to promote a candidate in a political campaign or to raise money for a candidate provides a dishonest advantage to that candidate is an issue of fact for the jury to decide. Jensen is wrong.

The relevant substantive law provides that the use of a state resource to promote a candidate in a political

campaign or to raise money for a candidate provides a dishonest advantage to that candidate. The substantive law upon which the trial court based the challenged instruction is found in *State v. Jensen* and *State v. Chvala*. *Jensen* and *Chvala* held that § 946.12(3) is not unconstitutionally vague or overbroad, but in so doing those cases necessarily also established the substantive law of the crime of felony misconduct in office. *Jensen*, 272 Wis. 2d 707, ¶¶19-40; *Chvala*, 271 Wis. 2d 115, ¶¶14-28.

The cornerstone of the arguments *Chvala* and *Jensen* presented was that political campaigning using state resources on state time is permissible legislative activity that is not and cannot be prohibited by § 946.12(3). This court soundly rejected those claims. Specifically, this court stated:

[A] reasonable person would be aware that 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.

Jensen, 272 Wis. 2d 707, ¶29.

This court also declared in *Chvala*, 271 Wis. 2d 115, ¶19, that a reasonable legislator has sufficient notice upon which he could easily conclude that directing caucus "staff to engage in political campaign activity with state resources is inconsistent with the rights of others and is intended to obtain a dishonest advantage."

This court's unequivocal rejection of the claim that political campaigning using state resources on state time is permissible legislative activity which is not prohibited by § 946.12(3) must necessarily be read as a declaration of the substantive law of the crime of misconduct in public office. In order to reject the claim that the conduct did not constitute a crime under § 946.12(3), this court necessarily declared what the law is. This court declared as a matter of substantive law that use of a state resource to promote a candidate in a political campaign or to raise money for a

candidate provides a dishonest advantage to that candidate. *Jensen*, 272 Wis. 2d 707, ¶¶25, 32, 34, 38-40; *Chvala*, 271 Wis. 2d 115, ¶¶16, 22, 24.

Any other reading of *Chvala* and *Jensen* would be unreasonable and illogical.

This court must reject Jensen's challenge to the jury instruction on the element of specific intent. The instruction did not contain or operate as a mandatory conclusive or rebuttable presumption, or any kind of presumption at all. Rather, the instruction properly informed the jury of the controlling law, which the jury was required to follow: the use of a state resource to promote a candidate in a political campaign or to raise money for a candidate as a matter of law provides to that candidate a dishonest advantage.

This statement of the law must be followed by the jury; it is not an issue of fact to be decided by the jury. Accordingly, the jury did not have the authority to decide whether the use of a state resource to promote a candidate in a political campaign or to raise money for a candidate provides a dishonest advantage to that candidate. The jury, however, retained the authority to decide whether Jensen engaged in the conduct alleged. The jury also retained the authority to decide whether Jensen had the intent to obtain a dishonest advantage for himself or another.

In order to find Jensen guilty, the jury was not required to find that Jensen, in fact, actually obtained a dishonest advantage. The jury was required to find that he exercised his discretionary power in a manner inconsistent with the duties of his office and that he did so with the intent to obtain a dishonest advantage. It was appropriate for the court to instruct the jury that as a matter of law the use of state resources to promote or raise money for a candidate in a political campaign provides a dishonest advantage to the candidate because otherwise the jury

would not understand the term "dishonest advantage" as used in this statute.

The instruction, however, did not require the jury to find that Jensen intended to obtain a dishonest advantage if he used a state resource to promote or raise money for a candidate in a political campaign, it did not instruct the jury that it must find Jensen intended to obtain a dishonest advantage if it found he intended to use a state resource to promote or raise money for a candidate in a political campaign, and it did not instruct the jury that it must find that Jensen in fact obtained a dishonest advantage for himself or another.

The jury instruction properly instructed the jury on the law, and properly allocated the finding of facts, the application of facts to the law and the determination of guilt or innocence to the jury. This court must uphold the instruction as valid and constitutional.

3. The jury instruction did not violate Wis. Stat. § 903.03.

In sole support of his assertion that the jury instruction violated § 903.03, Jensen relies on *State v. Dyess*, 124 Wis. 2d 525, 370 N.W.2d 222 (1985). *Dyess* is not controlling because it involved a type of error that did not occur in Jensen's case.

Dyess was tried by a jury for the crime of homicide by negligent use of a vehicle. The instructions given by the trial court erroneously incorporated a civil jury instruction. *State v. Dyess*, 124 Wis. 2d at 530-31 & n.5.

The Wisconsin Supreme Court held that this incorporation of the civil jury instruction in a criminal case resulted in a violation of Wis. Stat. § 903.03(3). The court explained the gravamen of the error in *Dyess*:

No one in the instant case finds fault with Civil Jury Instruction No. 1290 as used in civil

cases, but the authority to direct a jury in a criminal case that speed in excess of the posted limit, regardless of other conditions, is negligence, is specifically prohibited by sec. 903.03(3), Stats.

124 Wis. 2d at 536.

No error comparable to that in *Dyess* occurred in Jensen's case. The trial court did not erroneously incorporate a civil law presumption into a criminal law case.

The *Dyess* court held that § 903.03 applies to evidentiary presumptions, whether they are established by common law or by statute. *Dyess*, 124 Wis. 2d at 536-37. That holding does not undercut the fundamental principle that it is the duty of the trial court to instruct the jury on the law that the jury must apply and the jury has no right to disregard the law. As the United States Supreme Court stated in *United States v. Gaudin*, 515 U.S. 506, 513 (1995), in both criminal and civil cases "the judge must be permitted to instruct the jury on the law and to insist that the jury follow his instructions."

For the reasons explained in the preceding section, the language Jensen challenges in the jury instruction does not contain or operate as a mandatory presumption at all: it constitutes a correct statement of substantive law that the jury is required to follow. Therefore, it could not and did not violate § 903.03.

D. The instruction did not impermissibly alter the statutory requirement of specific intent.

As the State demonstrated above, contrary to Jensen's assertion, the challenged sentence in the specific intent instruction did not contain or operate as a presumption at all. The challenged sentence was a statement of law that the trial court was authorized to provide and the jury was obligated to follow. Therefore, Jensen errs in claiming "the presumption impermissibly altered the statu-

tory specific intent requirement." Jensen's brief at 18 (initial capitalization and boldface omitted).

Contrary to Jensen's assertions, the instruction did not alter the specific intent element, dilute the State's burden to prove the specific intent element or collapse the third and fourth elements of the offense.²

Jensen asserts that as a result of the challenged jury instruction, the jury was only required to find that Jensen intended to use a state resource to promote a candidate in a political campaign or to raise money for a candidate, but the jury was not required to find that he intended to obtain a dishonest advantage. In making this argument, Jensen completely ignores the entire jury instructions the jury was given on the elements of the offense. The jury instructions on all of the elements, read together as they must be, disprove Jensen's assertions.

The jury was instructed:

Misconduct in public office, as defined in Sec. 946.12(3) of the Criminal Code of Wisconsin, is committed by one who is a public officer or public employee and who, in his or her capacity as such officer or employee, exercises a discretionary power in a manner inconsistent with the duties of his or her office or employment and with intent to obtain a dishonest advantage for himself or another. Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present for each offense charged.

The first element requires that at the time of the alleged offense, the defendant was a public officer or public employee. A Wisconsin state rep-

²In a sentence, Jensen asserts that the jury instructions "contained impermissible presumptions with respect to *each* element of the crime. (R.223:46-48.)" Jensen's brief at 19. This bald assertion is completely undeveloped and this court should refuse to address it. *State v. Pettit*, 171 Wis. 2d 627, 645-47, 492 N.W.2d 633 (Ct. App. 1992).

representative is a public officer; an employee of a state representative is a public employee.

The second element requires that the defendant, in his capacity as such officer or employee, exercised the discretionary power of his or her office. The defendant may exercise discretionary power either by doing something or by failing to do something. The work performed by a state employee as part of his or her state employment is a state resource. State-owned facilities, office equipment and supplies are state resources. A public officer who directs the use of a state resource to assist in a political campaign exercises a discretionary power in his capacity as a public officer.

A public employee who directs the use of or uses a state resource to assist in a political campaign exercises a discretionary power in his or her capacity as a state or as a public employee.

The third element requires that the defendant exercised a discretionary power in a manner inconsistent with the duties of his or her office or employment. It is a state representative's duty to refrain from directing state employees to manage political campaigns and to engage in political activity with state resources. It is a state employee's duty not to use, or direct the use of, state resources for political campaigns. A campaign for the Wisconsin State Assembly is a political campaign. Political activity includes any of the following: Campaign fundraising, the preparation and maintenance of campaign finance reports, and candidate recruitment.

The fourth element requires that the defendant exercised such discretionary power with intent to obtain a dishonest advantage for himself or herself or another. The use of a state resource to promote a candidate in a political campaign or to raise money for a candidate provides to that candidate a dishonest advantage. The phrase "with intent to" means that the defendant must have had the purpose to obtain a dishonest advantage or have been aware that his conduct was practically certain to cause that result. You cannot look into a person's mind to find intent. While this intent to obtain a dishonest advantage must be found as a fact before you can find the defendant guilty, it must be found, if found at all,

from his words and acts and statements, if any, bearing upon his intent.

If you are satisfied beyond a reasonable doubt that the defendant was a state representative or state employee and in his or her capacity as such officer or employee the defendant exercised the discretionary power in a manner inconsistent with the duties of his or her office or employment and with the intent to obtain a dishonest advantage for himself or herself or another, you should find the defendant guilty. If you are not so satisfied, you must find the defendant not guilty.

(223:46-48.)

Jensen's claim that the jury was not told that it needed to find Jensen intended to obtain a dishonest advantage is inexplicable in light of this entire instruction on that very element. The substantive instruction on dishonest advantage did not eliminate, reduce or dilute the separate requirement that the jury had to find that Jensen intended to obtain a dishonest advantage for himself or another.³

Jensen misstates the record when he writes that the State "*specifically argued*" to the trial court that Jensen and his co-defendants "could *only* attempt to show that they did not intend to use state employees or resources to engage in the campaign activity defined by the Court of Appeals." (App. 61.)" Jensen's brief at 19. Jensen cites to page 61 of his appendix. Page 61 of Jensen's appendix is a page in the State's Reply to Defendant's Brief on State's Motions In Limine, which is Document 140 in the record. The page cited by Jensen contains the State's opposition to Jensen's argument that the crime of misconduct in public office contains an element of "corrupt" (140:8). The State

³Jensen's attempt to analogize his case to *United States v. Sawyer*, 85 F.3d 713 (1st Cir. 1996), and *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), fails. In those cases, the trial court failed to instruct the jury on a requisite element of the offense. Here, the trial court fully and correctly instructed the jury on all the elements of the offense.

has never taken the position that it did not have to prove or the jury did not have to find that Jensen had the intent to obtain a dishonest advantage for himself or another.

Jensen also asserts that the challenged instruction "collapsed" the third and fourth elements of the crime and directed the jury to find that he acted with intent to obtain a dishonest advantage if he knowingly committed an act inconsistent with his duties or office. Jensen's brief at 19. Again, Jensen's assertion is disproven by the record of the instructions the jury received on the elements of the crime. The jury was expressly instructed on both the third and fourth elements of the offense, and it was expressly instructed that it could not find Jensen guilty unless it found all of the elements of the offense beyond a reasonable doubt (223:47-48).

- E. The jury instruction did not misstate the law and it did not render the application of the statute unconstitutional.

This court should decline to review Jensen's claim that the jury instruction misstated the law and rendered the application of the statute unconstitutionally vague because it used the word "promote."

On November 30, 2005, the State filed its proposed jury instructions, which included the instruction with the word "promote" (112:6). Trial was held February 21, 2006 through March 11, 2006 (199-226). By both written and oral arguments, the parties presented and the trial court considered which instructions to give the jury on several occasions before and during trial (111; 112; 126; 138; 140; 141; 166; 198; 199; 223). In all that time, Jensen never challenged the use of the word "promote." He raised his challenge to the word "promote" for the first time in his motion for release pending appeal (183).

His objection to the word "promote" comes too late. There is no justification to allow Jensen to sandbag

the State and the trial court by failing to raise this specific objection in a timely manner before or during trial. This situation warrants enforcement of the long-standing contemporaneous objection rule. See *State v. Davis*, 199 Wis. 2d 513, 518-19, 545 N.W.2d 244 (Ct. App. 1996).

Jensen's objection is without merit. The instruction correctly states the law because in Jensen's pretrial appeal, this court held that, under § 946.12(3), Assembly leaders may not "actively promote the election of 'like-minded legislators' so as to advance their political legislative agenda . . . on state time with state resources." *Jensen*, 272 Wis. 2d 707, ¶32 (emphasis added).

This court must not assess the jury instruction on the specific intent element, or the word "promote" in that jury instruction, "in artificial isolation," but rather jury instructions "must be viewed in the context of the overall charge." *State v. Pettit*, 171 Wis. 2d 627, 637, 492 N.W.2d 633 (Ct. App. 1992).

Before receiving the jury instruction on specific intent, the jury was instructed that a state representative is a public employee and an employee of a state representative is a public employee (223:46); work performed by a state employee as part of his or her employment is a state resource, as is a state owned facility, office equipment and supplies (223:46-47); a state representative has a duty to refrain from directing state employees to manage political campaigns and engage in political campaigns with state resources and a state employee has a duty not to use or direct the use of state resources for political campaigns (223:47); a campaign for the Wisconsin State Assembly is a political campaign (223:47) and political activity includes campaign fundraising, the preparation and maintenance of campaign finance reports and candidate recruitment (223:47).

In the context of all of the instructions it was given, the jury would have properly understood the phrase "promote a candidate in a political campaign." There is

no reasonable probability that the jury would have construed the word "promote" to cover conduct that would not be prohibited by § 946.12(3).⁴ Furthermore, Jensen cites no authority, and the State is aware of no authority, that holds that a particular instruction given to a jury at the close of trial can somehow render a constitutional statute unconstitutionally vague.

- F. The trial court did not err in refusing to define "dishonest advantage" to require corrupt intent.

Prior to trial Jensen asked the trial court to include the following language in the instruction on the specific intent element of § 946.12(3): "To act with the intent to obtain a dishonest advantage is to act 'corruptly'. The term 'corruptly' is normally associated with wrongful, immoral, depraved or evil. It is to act knowingly and dishonestly. . . . The state must prove that the accused acted with corrupt intent in both performing [sic] his duties and exercising a discretionary power" (109:4; bold-face omitted).

On appeal, Jensen claims only that the trial court "misstated the law when it refused to instruct the jury that '[t]o act with the intent to obtain a dishonest advantage is to act "corruptly."' (R.109:3)." Jensen's brief at 24. It is not clear whether Jensen is arguing that it was error for the trial court to refuse to give the entire requested instruction quoted above, or whether he is now claiming only that the trial court should have informed the jury that "to act with intent to obtain a dishonest advantage is to act corruptly."

⁴In footnote 5, page 24 of his brief, Jensen asserts that he is preserving all arguments regarding unconstitutionality of the statute as applied, including those upon which the supreme court was evenly divided. He has not preserved the arguments because he has not developed or addressed them in his brief. This court's prior decision was affirmed, *State v. Jensen*, 2005 WI 31, 279 Wis. 2d 220, 694 N.W.2d 56, and therefore constitutes binding authority on this court and the supreme court, and it is *res judicata* as to the claims addressed therein.

The trial court properly refused to give the requested instruction (198:62-66). Section 946.12(3), which defines the crime of felony misconduct in public office with which Jensen was charged and convicted, does not contain the words "corrupt," "corruptly," "corrupt intent," or any words indicating that the intent to obtain a dishonest advantage means to act "corruptly." The trial court properly refused to add an element that was not contained in the statute.

Contrary to Jensen's claim, his requested instruction was not required by *State v. Tronca*, 84 Wis. 2d 68, 267 N.W.2d 216 (1978). The language in *Tronca* upon which Jensen relies appears in the following context:

The question, then, is whether the power of aldermanic privilege which has been conferred upon an alderman by practice and usage in the City of Milwaukee is a discretionary power of office as that power is referred to in sec. 946.12(3), Stats.

When that statute was considered in 1953, the notes of the Judiciary Committee on the Criminal Code carried the following comment:

"Subsection (3) states in effect that an officer or employe must act honestly in performing duties or exercising powers which involve discretion. If any officer or employe has discretion as to the time or manner in which to perform a duty or discretion as to whether or not to perform a function of his office or employment, he is guilty of misconduct only if he acts in a manner inconsistent with the duties of his office or employment or the rights of others and with intent to obtain a dishonest advantage for himself or another, that is, 'corruptly.' Judicial or quasi-judicial functions call for the exercise of judgment, and if the officer acts honestly although with not the best of judgment, he is not guilty." *Judiciary Committee Report on the Criminal Code*, Wisconsin Legislative Council, February 1953, p. 176.

Tronca, 84 Wis. 2d at 76-77.

This passage in *Tronca* addresses duty and the exercise of discretionary power. It does not address the element of intent to obtain a dishonest advantage. Moreover, the context of the quote from the Judiciary Committee Report shows that "corruptly" is not an additional required element of the offense. *Id.* at 76-77. *Tronca* does not hold that in order to convict a defendant of a violation of § 946.12(3), in addition to finding that the defendant acted with the intent to obtain a dishonest advantage, the jury must find the defendant acted "corruptly."

Significantly, in the nearly 30 years since *Tronca* was decided, no appellate court in Wisconsin has held that "corruptly" is an element of the offense and that a jury must be instructed that "to act with intent to obtain a dishonest advantage is to act 'corruptly.'" Furthermore, the Wisconsin Criminal Jury Instructions Committee has never incorporated the word "corruptly" into the pattern jury instructions.

Jensen's requested instruction was properly refused because it was not a correct statement of the law. See *State v. Hemphil*, 2006 WI App 185, ¶¶1, 15, __ Wis. 2d __, 722 N.W.2d 393.

Jensen misplaces reliance on *Essex v. State*, 170 Wis. 512, 175 N.W. 795 (1920), in which a conviction for selling oleomargarine in imitation of yellow butter was reversed because the trial court failed to instruct the jury that the State had to "establish the fact that the article sold by the defendant was made with the intent that the product when completed should be in imitation of yellow butter." *Id.* at 514. Jensen also misplaces reliance on *State v. Alfonsi*, 33 Wis. 2d 469, 147 N.W.2d 550 (1967), in which the supreme court held that the crime of bribery is not a strict liability offense and Alfonsi's conviction was reversed because no jury instruction on intent was given. Here, the jury was specifically instructed on the specific intent element of the crime of misconduct in public office (223:47-48).

II. THE TRIAL COURT'S EXCLUSION OF IRRELEVANT EVIDENCE DID NOT VIOLATE JENSEN'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01. "Evidence which is not relevant is not admissible." Wis. Stat. § 904.02.

Jensen's proffered evidence was not relevant because it did not have a tendency to make it less likely that he had the intent to obtain a dishonest advantage and because it was offered in support of a defense that is not legally recognized as a defense to the crime of misconduct in public office.⁵

Jensen contends he did not have intent to obtain a dishonest advantage because of his belief that his activities were consistent with long-standing practices in the Assembly and the same activities were occurring in the Assembly Democratic Caucus. Jensen's brief at 27.

Jensen was not prevented from testifying about his own understanding. He testified to his experience and perception about how the Assembly Republican Caucus (ARC) operated, what was acceptable and permissible from the time he first worked in the legislature, what he learned from predecessor legislative leaders, and his understanding of his role as a legislative leader (220:31-100).⁶

⁵*United States v. Sheffield*, 992 F.2d 1164, 1170 (11th Cir. 1993), did not involve the type of irrelevant evidence offered by Jensen.

⁶The trial court properly refused to allow Jensen to testify regarding his concerns about Democratic staff conduct during the 2000 election cycle, which post-dated the time period of the criminal charges against Jensen (220:109-10).

Based on the summaries of expected testimony provided by Jensen (138; 139; 143), the trial court properly excluded testimony from former legislative leaders Joseph Strohl and David Prosser and portions of a book by former legislative leader Tom Loftus. To the extent the evidence might have had some tendency to corroborate Jensen's subjective belief about what his duties were, the evidence was not relevant because the existence of duty is a question of law. *Jensen*, 272 Wis. 2d 707, ¶14; *Chvala*, 271 Wis. 2d 115, ¶11; *Schwarze*, 120 Wis. 2d at 456.

Jensen asserts the testimony of the former legislative leaders would have shown Jensen's activities were consistent with long-standing practices within the Assembly, which would have made it more likely he did not have the intent to obtain a dishonest advantage because he did not believe his activities constituted a dishonest advantage. Jensen's brief at 27.

This theory of admissibility is fatally flawed because the proffered testimony from the former legislators did not show that Jensen's activities were consistent with past practice. Nowhere in the summaries of the expected testimony of Strohl and Prosser or the excerpts from the Loftus book is there any statement or admission from the former legislators that they engaged in the same conduct as Jensen: that they directed state employees to manage political campaigns and engage in political campaign fundraising, preparation and maintenance of campaign finance reports, and candidate recruitment using state facilities and equipment as part of their state employment on state time (139; 143). Accordingly, the proffered testimony had no tendency to show that the activity with which Jensen was charged was consistent with prior activity.

Jensen also offered investigative reports (136:25-69) in an attempt to show that the same activities he engaged in were undertaken by the Assembly Democratic Caucus. He claims the wrongdoing of others shows his intent was to maintain a level playing field and help his

political party, not to obtain a dishonest advantage. Jensen's brief at 27. Jensen's relevancy theory fails because a goal and motive to help his party and maintain a level playing field can co-exist with the intent to provide that help by conduct intended to obtain a dishonest advantage.

The defense evidence was properly excluded because it was offered in support of a defense that is not legally recognized by law. The excluded evidence was not really offered to show that Jensen lacked the intent to obtain a dishonest advantage. It was really offered to show that Jensen believed his activities were justified in light of long-standing practices in the Assembly on both sides of the political aisle. The theory that Jensen was entitled to engage in "self-help" because of the wrongdoing of others is not a legally recognized defense to the charge of misconduct in public office.

At root, Jensen's defense was that he did not believe his conduct was wrong. Jensen was not entitled to present evidence in support of this defense, however, because "[f]ailure to know that one's conduct is criminally punishable is not a defense" to a crime. *State v. Britzke*, 108 Wis. 2d 675, 683, 324 N.W.2d 289 (Ct. App. 1982), *aff'd*, 110 Wis. 2d 728, 329 N.W.2d 207 (1983).

The trial court properly excluded the defense evidence because it was not relevant. The exclusion of the evidence did not violate Jensen's constitutional right to present a defense because "[w]hen evidence is irrelevant or not offered for a proper purpose, the exclusion of that evidence does not violate a defendant's constitutional right to present a defense." *State v. Muckerheide*, 2007 WI 5, ¶40, ___ Wis. 2d ___, 725 N.W.2d 930. *Accord State v. Walker*, 154 Wis. 2d 158, 192, 453 N.W.2d 127 (1990); *State v. Robinson*, 146 Wis. 2d 315, 332, 431 N.W.2d 165 (1988).

III. THE ALLEGED ERRORS DO NOT WARRANT A NEW TRIAL.

- A. Any error in the jury instruction was harmless error beyond a reasonable doubt.

Even if the instruction contained an impermissible and unconstitutional presumption, the error was harmless because it is clear beyond a reasonable doubt that a rational jury would have found Jensen guilty absent the error. *Harvey*, 254 Wis. 2d 442, ¶49. As Jensen admits, the conduct evidence—that Jensen ran an extensive political campaign machine with state employees using state resources on the taxpayer's dollar for the benefit of himself and other chosen candidates—was largely undisputed. *See* Jensen's brief at 3, 6.

The elements of the offense do not require the jury to find that Jensen obtained a dishonest advantage. The elements only require the jury to find Jensen intended to obtain a dishonest advantage. The alleged error did not go to an element of the offense.

Based on the trial court record, if the jury had been instructed that it may, but need not, find that the use of a state resource to promote a candidate in a political campaign or to raise money for a candidate provides to that candidate a dishonest advantage, it is clear beyond a reasonable doubt that a rational jury would have found Jensen guilty. Any alleged error in the instruction, therefore, was harmless error. Reversal of Jensen's convictions is not warranted.

- B. The exclusion of evidence was harmless error beyond a reasonable doubt.

A trial court's erroneous refusal to admit evidence proffered by the defense is subject to the harmless error rule. *Crane v. Kentucky*, 476 U.S. 683, 691 (1986); *State v. Shomberg*, 2006 WI 9, ¶18, 288 Wis. 2d 1, 709 N.W.2d 370.

Based on all of the evidence presented, it is clear beyond a reasonable doubt that the jury would have found Jensen guilty even if the excluded evidence had been admitted. Evidence of what other people had done has little tendency to show what Jensen intended when he engaged in the criminal conduct. Even if the evidence had provided some slight corroboration, the jury heard Jensen's own testimony and his own prior statements, which provided the most direct evidence of his state of mind.

C. Jensen is not entitled to a new trial in the interest of justice.

Jensen is not entitled to a new trial because his claims of error are without merit and any error was harmless beyond a reasonable doubt. Under these circumstances, there is no justification for granting a new trial in the interest of justice. The real controversy was fully tried. See *Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976) (zero plus zero equals zero).

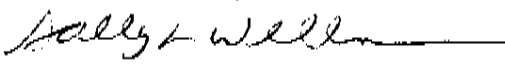
CONCLUSION

Based on the record and the theories and authorities presented, the State asks this court to affirm the judgment of conviction and sentence entered below.

Dated this 5th day of February, 2007.

Respectfully submitted,

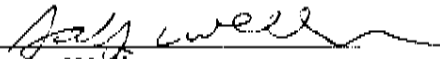
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CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font. The brief contains 10,876 words.


Sally L. Wellman