State of Wisconsin
Court of Appeals
District I
Appeal No. 2008AP002664 -CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Garrett Huff,

Defendant-Appellant.

Appeal from a Judgment of Conviction and Sentence Entered in the Milwaukee County Circuit Court, The Honorable Dennis Moroney, presiding

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Defendant-Appellant's Brief and Appendix

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Table of Authority

Table of Contents

Statement on Oral Argument and Publication

The issues presented by this appeal are complex. The issue of impossibility as a defense to conspiracy has not been addressed by the appellate courts for many years and, therefore, both oral argument and publication are recommended.

Statutes Presented

The issues presented by this appeal pertain primarily to the election bribery statute. Sec. 12.11, Wis. Stats., provides:

> **12.11 Election bribery.**
>
> (1) In this section, "anything of value" includes any amount of money, or any object which has utility independent of any political message it contains and the value of which exceeds $1. The prohibitions of this section apply to the distribution of material printed at public expense and available for free distribution if such materials are accompanied by a political message.
>
> (1m) Any person who does any of the following violates this chapter:
>
> (a) Offers, gives, lends or promises to give or lend, or endeavors to procure, anything of value, or any office or employment or any privilege or immunity to, or for, any elector, or to or for any other person, in order to induce any elector to:
>
> 1. Go to or refrain from going to the polls.
>
> 2. Vote or refrain from voting.
>
> 3. Vote or refrain from voting for or against a particular person.
>
> 4. Vote or refrain from voting for or against a particular referendum; or on account of any elector having done any of the above.
>
> (b) Receives, agrees or contracts to receive or accept any money, gift, loan, valuable consideration, office or employment personally or for any other person, in consideration that the person or any elector will, so act or has so acted.

> (c) Advances, pays or causes to be paid any money to or for the use of any person with the intent that such money or any part thereof will be used to bribe electors at any election.

Huff was charged with the crime of conspiracy. Sec. 939.31, Stats., provides:

> 939.31 **Conspiracy** . Except as provided in ss. 940.43 (4), 940.45 (4) and 961.41 (1x), whoever, with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime may, if one or more of the parties to the conspiracy does an act to effect its object, be fined or imprisoned or both not to exceed the maximum provided for the completed crime; except that for a conspiracy to commit a crime for which the penalty is life imprisonment, the actor is guilty of a Class B felony.

Statement of the Issues

I. Whether the trial court erred in instructing the jury that "police officers may pretend to be electors" while instructing on the elements of conspiracy to commit election bribery contrary to Sec. 12.11, Stats.?

Answered by the trial court: No.

II. Did the trial court err in failing to have the court reporter record the statements made on audio recordings that were played for the jury?

Answered by the trial court: No.

III. Whether the evidence was sufficient as a matter of law to convict the appellant, Huff, of conspiracy to commit election bribery where the undercover police officers with whom Huff dealt were not legal "electors", and Huff did not give the undercover police officer anything, nor did Huff promise to give the undercover officer

anything, to *induce* the undercover officer to go to the polls.

Answered by the trial court Yes.

Summary of the Arguments

I. The trial court's instruction that police officers may pretend to be electors. Huff was charged with conspiracy to commit election bribery. He attempted to defend the charges on the grounds that the undercover police officers were not electors under the statute and, therefore, it was impossible for Huff to have committed the crime of election bribery. The trial court, though, over Huff's objection, instructed the jury that police officers may "pretend" to be electors while investigating election fraud. This instruction is not the law in Wisconsin. "Impossibility" is a defense to a charge of conspiracy. Furthermore, the instruction created a mandatory presumption of fact that violated Huff's due process right to a jury trial on all material issues of fact.

II. Failure to Record the Statements Made on Audio Recordings. As part of its investigation the undercover police officers wore a "body wire" that permitted the police to record the conversations that the officer had with Huff and others. The state sought to introduce portions of those audio recordings. The trial court permitted the state to do so; however, the court refused to have the court reporter record the statements made on those portions of the audio tape that were in fact played to the jury. As will be set forth in more detail below, the trial court's obligation to record

all proceedings in a criminal case is mandatory. Thus, it was plain error for the trial court to fail to record the statements from the audio tapes. The error cannot be remedied by a remand to the trial court with instructions that the reporter record the statements from the records. This is because the record is ambiguous as to exactly what portions of the recordings were being played

III. Sufficiency of the Evidence. Huff was charged with conspiracy to commit election bribery. A person is guilty of the crime of conspiracy if he agrees or combines with another to commit a crime and either of them takes a step in furtherance of the crime. Where the criminal objection of the conspiracy, though, is impossible, no crime has been committed. Here, the uncontroverted evidence was that the undercover officers who dealt with Huff were not "electors" as that term is defined in the statute. Therefore, regardless of what promises were made to the officers by Huff, the crime of election fraud could not be committed. Additionally, there was no evidence that Huff did anything, or said anything, that was intended by him to *induce* the undercover officers to go to the polls. There is no doubt that in each of the counts the officers had an *expectation* that he would be paid if he went to the polls. However, unless this expectation was created by Huff's behavior it is virtually irrelevant. Plainly, the officers' expectation that they would be paid if they went to vote was primarily created by the complaint that the police department received about Mother's Foods. Huff did nothing, prior to taking the officers to the polls, that could fairly be characterized as an offer or a promise to pay the men if they voted. The fact that Huff paid the officers on the way back from the polls does not violate Sec. 12.11, Stats. It is relevant only insofar as

it is circumstantial evidence of Huff's intent. Unless Huff did something to manifest his intent prior to taking the officers to the poll, though, the statute is not violated.

Because Huff did nothing, nor did he say anything, that amounted to a precedent offer to give a thing of value if the officers went to the polls, the evidence is insufficient as a matter of law to support the jury's verdict.

Statement of the Case

I. Procedural Background

The defendant-appellant, Garrett Huff (hereinafter "Huff") was originally charged with one count of conspiracy to commit election bribery contrary to Sec. 12.11, Wis. Stats. and Sec. 939.31, Wis. Stats. (R:2) The criminal complaint alleged that Huff was working on the political campaign of Milwaukee alderman Michael McGee, Jr., and that Huff paid an undercover police officer, who was posing as a voter, $5 after the officer went to the polls and cast a ballot.

After a preliminary hearing Huff was bound over for trial and he entered a plea of not guilty.

Shortly before trial the state filed a motion to amend the information to allege two additional counts of election bribery. (R:13) Over Huff's objection, the court granted the state leave to file the amended information (R:48-13) and Huff entered not guilty pleas to all three charges.

Huff filed a pretrial motion seeking to have Sec. 12.11, Wis. Stats., declared unconstitutional for the reason that it is unduly vague and it is over-broad. (R:22, 23) The trial court denied the

motion. (R:49-15)

Prior to the start of the trial, the trial court and the parties discussed the substantive instructions that the court proposed to give to the jury. Among other instructions, the court proposed to tell the jury that "Police officers may pretend to be an elector while involved in the investigation of prohibited practices in the election process." Huff objected to the court so instructing the jury. (R:49-74)

Thereafter, the court gave the jury a preliminary instruction concerning the elements of the charges and the court included the instruction that police officers may pretend to be electors. (R:50-88)

The undercover police officers who were investigating the McGee campaign wore "body wires"[1] At various points during the trial the state played portions of these recordings to the jury; however, the reporter did not record the statements of the persons speaking on the recordings. The trial judge inquired as to whether the court reporter ought to be transcribing the statements made on the recordings (R:51-8); and Huff's attorney suggested that if any of the recordings are played to the jury that the whole recording should be played (R:51-17). Nonetheless, the state produced "transcripts" of the conversations on the recording; however these transcripts were not shown to the jury.

Huff challenged the sufficiency of the evidence at the close of the state's case. (R:53-3) The court denied Huff's motion to dismiss, finding the evidence sufficient. (R:53-19) Huff rested without presenting any evidence. (R:53-30)

Once again, in the court's final jury instructions, the court told

1 Digital recording devices that were capable of recording conversations between the undercover officer and others.

the jury that police officers may pretend to be electors while investigating prohibited election practices. (R:53-39) During the state's closing argument the prosecutor argued to the jury that they could not find Huff not guilty simply because the police officers were not actually electors under the statute. (R:53-54).

Thereafter, the jury returned verdicts finding Huff guilty on all three counts. (R:53-98)

The court sentenced Huff to to prison on each count but stayed the sentences and placed him on probation for three years.

Huff timely filed a notice of intent to pursue postconviction relief and also timely file a notice of appeal. There were no postconviction motions.

II. Factual Background

On March 15, 2007, embattled Milwaukee Alderman Michael McGee, Jr., was facing a recall election. Both the federal government and the State of Wisconsin were investigating McGee's tactics during the campaign. (R:51-24) Police had come into possession of a campaign flier that advertised a McGee "Election Party" that offered free food and a free ride to vote at Mother's Foods in Milwaukee. (R:52-32) As part of the investigation the Milwaukee Police Department developed a lead that, in reality, at Mother's Foods voters were being taken to the polls and paid to cast a vote. (R:51-27) Wardell Dodds was a Milwaukee police officer of some eleven years experience (R:51-22), who, on March 15, 2007 was sent to Mother's Foods posing as a voter in the Sixth Aldermanic District (McGee's district) (R:51-29) Dodds was not a legal voter in the Sixth District. (R:61-53)

When Dodds, who was accompanied by undercover

Milwaukee Police Officer Dwayne Barnes (R:52-32), got to the food store he encountered several people there, including Huff. (R:51-31). According to Dodds, Huff asked whether he (Dodds) was there to vote and, when Dodds confirmed that he was there to vote, Huff said, "I'll go to get a -- I'll be back to take you downtown to vote." (R:51-31) True to his word, several minutes later Huff returned and drove Dodds to Milwaukee City Hall and instructed him to go inside and vote. (R:51-32, 33) Huff never told Dodds whom he should vote for. (R:51-61) Dodds told the jury that on the return trip Huff paid him five dollars (R:51-44). Barnes told Huff that he (Barnes) was a convicted felon and could not vote; however, Huff paid Barnes fives dollars for brining Dodds. (R:52-50)

Similarly, on March 27, 2007 Special Agent Willie Brantley, of the Wisconsin Department of Justice, went to Mother's Foods posing as a Sixth District voter. (R:51-76) Brantley was not a legal Sixth District voter. (R:51-96) Brantley, also, was accompanied by Barnes (R:51-76) Brantley encountered Huff and told Huff that he (Brantley) was there to vote, "[I]f my change was right." (R:51-79). According to Brantley's trial testimony, this meant that he (Brantley) wanted to get paid for voting. *Ibid.* Huff only said, "I think so" and indicated that they would talk more about it when they returned. (R:51-80). Huff then drove Brantley to City Hall. *Ibid.* Brantley went into City Hall and returned with papers seeming to indicate that he had voted. When they got back to Mother's Foods, Huff paid Brantley five dollars. (R:51-81). Barnes asked for money for bringing Brantley, however, Huff refused to pay him.

Argument

I. The trial court's instruction to the jury that police officers may pretend to be electors is contrary to law and created a mandatory presumption that violated Huff's due process right to a jury trial.

Huff was charged with conspiracy to commit election bribery. He attempted to defend the charges on the grounds that the undercover police officers were not electors under the statute and, therefore, it was impossible for Huff to have committed the crime of election bribery. The trial court, though, over Huff's objection, instructed the jury that police officers may pretend to be electors while investigating election fraud. This instruction is not the law in Wisconsin. "Impossibility" is a defense to a charge of conspiracy. Furthermore, the instruction created a mandatory presumption of fact that violated Huff's due process right to a jury trial on all material issues of fact.

There is a very specific reason that the state charged Huff with conspiracy to commit election bribery rather than with the crime of election bribery. It is because the undercover police officers were not electors. Sec. 12.11, Stats. prohibits monetary inducements only when the promise is made to an "elector". Thus, it was impossible for Huff to commit the crime of election bribery involving the undercover officers.

For nearly one-hundred and thirty years, though, "impossibility" has been a defense to the crime of conspiracy. In, *State v. Crowley*, 41 Wis. 271 (1876), the Wisconsin Supreme Court concluded that the crime of conspiracy was not committed where the

alleged co-conspirators agreed to distribute counterfeit money, but where the box that they thought contained money was actually filled with sawdust. In *Crowley,* distribution of counterfeit money was literally impossible because the conspirators had no counterfeit money. The Supreme Court held that no crime was committed. *Crowley* is still the law of this State.

Huff attempted to raise the defense of impossibility. He wanted to argue to the jury that the undercover police officers were not electors and, therefore, it was impossible for him to commit the crime of election bribery.

Unfortunately, the trial court gutted Huff's defense when the court instructed the jury, "Police officers may pretend to be an elector while involved in the investigation of prohibited practices in the election process." (R:49-74) The instruction was given both preliminarily and at the conclusion of the evidence. The district attorney emphasized the point in his closing argument. (R:53-54)

The problem, of course, is that this is not the law in Wisconsin; and, further, the court's instruction created a mandatory presumption of fact that denied Huff his due process right to a jury trial on all issues of fact. *See, e.g., Muller v. State,* 94 Wis. 2d 450, 476 (Wis. 1980). The mandatory presumption of fact was that the undercover officers were "electors" under the statute.

For this reason, Huff's conviction must be reversed.

II. The trial court erred in failing to have the court reporter record the statements from the audio recordings that were played to the jury.

As part of its investigation, the undercover police officers wore

a "body wire" that permitted the police to record the conversations that the officer had with Huff and others. The state sought to introduce portions of those audio recordings. The trial court permitted the state to do so; however, the court refused to have the court reporter record the statements made on those portions of the audio tape that were in fact played to the jury. As will be set forth in more detail below, the trial court's obligation to record all proceedings in a criminal case is mandatory. Thus, it was plain error for the trial court to fail to record the statements from the audio tapes. The error cannot be remedied by a remand to the trial court with instructions that the reporter record the statements from the records. This is because the record is ambiguous as to exactly what portions of the recordings were being played.[2]

The trial court told the parties:

> The other thing I want to tell you-- and that's for my stenographic purpose-- are we going to let the tape be the evidence so that -- because I don't intend to have her taking this down; you know, we're going to let the tape stand for itself. But then you get into the issue of assisting the people that are going to be, let's say if it goes to an appeal process, to assist them with respect to understanding and referencing the location of X and Y on the tape. . . (R:51-8)

The parties then had a discussion with the court about the proper use of a "transcript" of the audio recordings that was prepared by the district attorney. As Huff's attorney correctly pointed

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2 For example, the transcript of the testimony of Wardell Dodds looks like this:

Q. Thank you.

(audio is playing)

BY MR. CHISHOLM:

Q. Now when he just said that, whose voice was that that asked the question, "Did you come here to vote?"

A That's Mr. Huff. (R:51-40, 41)

out, he could create his own "transcript" and show it to the jury and it may not jive with the state's transcript. (R:51-10) Ultimately, Huff's lawyer told the court that Huff "wants it all in. So play it to the jury." (R:51-17).

Apparently, though, during the actual presentation of the evidence Huff changed his mind. (R:51-69) Therefore, the worst course of procedure was ultimately followed. The district attorney played *parts* of the audio recording to the jury and the reporter did not record the statements made on those parts of the recording that were played. Thus, there is no clear record of what statements from the audio recording were played to the jury during the trial.[3]

SCR 71.01(2) requires that "[a]ll proceedings in the circuit court shall be reported." "'Reporting' means making a verbatim record." SCR 71.01(1). It is well-settled that a supreme court rule "has the force of a statute." *Mosing v. Hagen*, 33 Wis. 2d 636, 644, 148 N.W.2d 93, 98 (1967). Additionally, Sec. 885.42(4), Stats., provides: "At trial, videotape depositions and *other testimony presented by videotape* shall be reported."

It makes no difference that Huff's attorney did not specifically request that the court reporter record the statements from the audio recordings that were played to the jury. The rules are mandatory. See, *State v. Ruiz-Velez*, 2008 Wisc. App. LEXIS 834 (Wis. Ct. App. Oct. 28, 2008) published December 3, 2008, where the defense attorney did not request that the video taped testimony of a child witness be recorded by the reporter but, nonetheless, the court of appeals remanded the matter so that the videotaped testimony could

3 The district attorney did attempt to put on the record the approximate times of the segments of the audio recording that were played to the jury. It is impossible, though, to reconstruct on appeal those individual portions of the recording.

be recorded and transcribed by the reporter.[4]

Thus, there is no record of what evidence from the audio recordings was actually played to the jury. A remand would not correct the error because there is, likewise, no record of what segments of the audio recordings were actually played for the jury.

III. The evidence was insufficient as a matter of law to sustain the jury's verdict finding Huff guilty of conspiracy to commit election bribery.

Huff was charged with conspiracy to commit election bribery. A person is guilty of the crime of conspiracy if he agrees or combines with another to commit a crime and either of them takes a step in furtherance of the crime. Where the criminal objection of the conspiracy, though, is impossible, no crime has been committed. Here, the uncontroverted evidence was that the undercover officers who dealt with Huff were not "electors" as that term is defined in the statute. Therefore, regardless of what promises were made to the officers by Huff, the crime of election fraud could not be committed. Additionally, there was no evidence that Huff did anything, or said anything, that was intended by him to *induce* the undercover officers to go to the polls. There is no doubt that in each of the counts the officers had an *expectation* that he would be paid if he went to the polls. However, unless this expectation was created by Huff's behavior it is virtually irrelevant. Plainly, the officers' expectation that they would be paid if they went to vote was primarily created by the complaint that the police department received about Mother's Foods.

4 Here, a remand would not be helpful. Not all of the audio recordings were played to the jury. Thus, on remand, the parties would have to attempt to piece together what portions of the audio recordings were played to the jury and record just those portions. This would be an impossible task.

Huff did nothing, prior to taking the officers to the polls, that could fairly be characterized as an offer or a promise to pay the men if they voted. The fact that Huff paid the officers on the way back from the polls does not violate Sec. 12.11, Stats. It is relevant only insofar as it is circumstantial evidence of Huff's intent. Unless Huff did something to manifest his intent prior to taking the officers to the poll, though, the statute is not violated.

Because Huff did nothing, nor did he say anything, that amounted to a precedent offer to give a thing of value if the officers went to the polls, the evidence is insufficient as a matter of law to support the jury's verdict.

A. Standard of Appellate Review

The standard of appellate review of an issue of the sufficiency of the evidence in a criminal case is well-known. The Wisconsin Supreme Court has instructed:

> We hold that the standard for reviewing the sufficiency of the evidence to support a conviction is the same in either a direct or circumstantial evidence case. Under that standard, an appellate court may not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. We believe that this issue is before us today because of confusion concerning the oft-stated rule that circumstantial evidence must be strong enough to exclude every reasonable hypothesis of innocence. We therefore begin our analysis of the first issue presented in this case with a discussion of that rule in circumstantial evidence cases.
>
> In order to overcome the presumption of innocence accorded a defendant in a criminal trial, the state bears the burden of proving each essential element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). It is well established that a finding of guilt may rest upon evidence that is entirely circumstantial and that circumstantial evidence is oftentimes stronger and more satisfactory than direct evidence.

> (internal citations omitted). Regardless of whether the evidence presented at trial to prove guilt is direct or circumstantial, it must be sufficiently strong and convincing to exclude every reasonable hypothesis consistent with the defendant's innocence in order to meet the demanding standard of proof beyond a reasonable doubt. *Schwantes v. State*, 127 Wis. 160, 176, 106 N.W. 237 (1906).

State v. Poellinger, 153 Wis. 2d 493, 501-502 (Wis. 1990)

B. There is no issue of fact as to the impossibility defense.

Here, each undercover police officer admitted that he was not a legal voter and, therefore, they were not "electors" under Sec. 12.11, Stats. Thus, it was impossible for Huff to commit the crime of election bribery involving these officers. As such, the crime of conspiracy was not committed.

> The crime that is the subject of the conspiracy need not be committed in order for a violation of WIS. STAT. § 939.31 to occur; rather, the focus is on the intent of the individual defendant. *State v. Sample*, 215 Wis. 2d 487, 501-02, 505, 573 N.W.2d 187 (1998).

State v. Routon, 2007 WI App 178, P19 (Wis. Ct. App. 2007)

> The agreement to commit a crime that is necessary for a conspiracy may be demonstrated by circumstantial evidence and need not be express; a tacit understanding of a shared goal is sufficient. (internal citation omitted) The intent to commit the crime may be inferred from the person's conduct. (internal citation omitted) Although the supreme court in *State v. Nutley*, 24 Wis. 2d 527, 556, 129 N.W.2d 155 (1964), referred to "a stake in the venture" in describing the intent element, the supreme court has since made clear that a stake in the venture is not a necessary element of the crime of conspiracy. *Hecht*, 116 Wis. 2d at 627. Evidence of a stake in the venture "may be persuasive of the degree of the party's involvement" in the crime, but the lack of such evidence "does not absolve one of party to a crime liability [for conspiracy]." *Id*.

Routon, 2007 WI App 178, P23 (Wis. Ct. App. 2007). However, where it is impossible for the defendant to commit the crime that is the object of the conspiracy, the crime of conspiracy is not committed. *See, Crowley,* 41 Wis. 271

It is first necessary to understand what is prohibited by Sec. 12.11, Stats. (election bribery). In its relevant part, the statute provides that:

> Any person who does any of the following violates this chapter:
>
> (a) Offers, gives, lends or promises to give or lend, or endeavors to procure, anything of value, or any office or employment or any privilege or immunity to, or for, any *elector*, or to or for any other person, in order to induce any *elector* to:
>
> 1. Go to or refrain from going to the polls.

There was no issue of fact concerning the voting status of the undercover officers. Each admitted that he was not a legal voter in the Sixth Aldermanic District. Thus, none of the officers was an "elector" as that term is used in Sec. 12.11, Stats. As such, it was impossible for Huff to commit the crime of election bribery regardless of what he said to the officers. Because is was impossible for Huff to commit the crime of election bribery it was, therefore, impossible for him to be guilty of the crime of conspiracy to commit election bribery. As such, the evidence was insufficient as a matter of law to support the convictions.

C. There was evidence that the undercover police officer *expected* payment if he went to vote; however, there is no evidence that would permit the inference that Huff made any promise that induced any of the officers to vote.

Again, what is prohibited by Sec. 12.11, Stats., is offering to

give, or actually giving, a thing of value to a person to "induce" that person to go to the polls. Therefore, this section is not violated if nothing of value is given to, or promised to, the person with the intent to induce the person to go to the polls. This is true even if something of value is given to the person *after* the person has already gone to the polls.

Here, it is uncontroverted that Huff never gave the undercover police officers any money prior to the officers going to the polls. The officers were paid only after they had been to the polls.

The question, then, becomes whether Huff promised to give the officers anything of value with the intent to induce the officers to go to the polls. Plainly, Huff did not make any such a promise to any of the officers- even though that rumor may have been circulating through the community.

1. Wardell Dodds

With respect to the count involving Wardell Dodds, Dodds testified at trial that he went to Mother's Foods because the police department had received a tip that people were being paid to vote at that location. (R:51-27) This testimony was plainly not offered for the truth of the matter asserted. It was offered only to explain why the police went to Mother's Foods. More importantly, though, there was no evidence as to *who* was leading voters to believe that they would be paid if they went to Mother's Foods to vote. Thus, when Dodds went to Mother's Foods, he may have had an expectation, based on this anonymous tip, that he would be paid if he went to the polls; however, unless it was Huff who excited that expectation in Dodds- or unless there was evidence that a co-conspirator of Huff's made the promise- it is totally beside the point. The question is whether *Huff* did anything, or said anything, that created a

reasonable expectation in Dodds that if he went vote he would be paid. The question is *not* whether Dodds somehow had an expectation that he would be paid to vote and, then, Huff paid Dodds after voting.

When Dodds got to Mother's Foods he encountered Huff and told Huff that he (Dodds) was there to vote. Huff said, "Do you want to vote? . . . . I'll be back to take you downtown to vote." (R:51-21) This was the extent of the trial testimony concerning any precedent communication between Dodds and Huff.[5]

It matters not that Huff gave Dodds five dollars on the ride back from the polls. The payment does not violate Sec. 12.11, Stats. unless Huff made a precedent promise to Dodds with the intent to induce Dodds to go the polls.

Because no such promise was made here, the evidence is insufficient as a matter of law to support the jury's verdict on this count.

2. Willie Brantley

The count involving Willie Brantley is a closer call. Brantley went to Mother's Foods with Dwayne Barnes. When Brantley and Barnes encountered Huff at Mother's Foods, Barnes old Huff that Brantley was there to vote "if the change was right" (R:51-79) Brantley explained to the jury that "change" meant money. Huff put off answering the question at that point so, on the way to the polls, Brantley asked again whether the change would be right and, this time, Huff said that they would talk about it when they got back.

5 The State's "transcript" of the body wire sets forth in greater detail the conversation between Dodds and Huff; however, as set forth in the preceding section of this brief, it is impossible to determine exactly what portions of the audio recording were actually played to the jury. Therefore, in assessing the sufficiency of the evidence the court of appeals should not consider what is contained in the written transcript of the body wire.

(R:51-80).

This is a closer call because Brantley communicated to Huff his (Brantley's) expectation that he would be paid if he went to the polls and, while not expressly agreeing to the request, Huff did nothing to disabuse Brantley of the expectation of payment. Then, when they arrived back at the food store, Huff in fact Brantley five dollars.

Again, it is important to emphasize that the payment of five dollars *after* the voter has been to the polls does not violate Sec. 12.11, Stats. It is relevant only insofar as it is circumstantial evidence of whether there was a precedent promise or offer to pay the voter if the voter when to the polls. Again, it is clear that Brantley had an expectation of payment if he went to the polls. He communicated this expectation to Huff. Nonetheless, unless it was Huff who did something or said something to Brantley that caused this expectation, Huff has not violated Sec. 12.11, Stats. It is the conduct of the defendant that violates the statute and not the behavior of the voter.

It is important here to distinguish the provisions of Sec. 12.11, Stats. from contract law. Clearly, Brantley *offered* to go to the polls if Huff would pay him. Arguably, Huff "assented" to this offer by his silence, by his conduct in taking Brantley to the polls and in then paying Brantley the five dollars. "Silence" accompanied by behavior consistent with acceptance can be "assent" to the offer. *See, e.g., Hoffman v. Ralston Purina Co.,* 86 Wis. 2d 445, 454 (Wis. 1979)

No "meeting of the minds" is required for Sec. 12.11, Stats to be violated, though. Rather, it is the defendant's "offer" or "promise" that violates the statute- the conduct of the voter is irrelevant. Here, Huff made no offer nor promise to Brantley. Rather, it was Brantley

who made the offer to Huff. At most, Huff might be said to have "assented" to Brantley's offer.

Thus, the evidence was insufficient as a matter of law on this count.

3. Dwayne Barnes

The count involving Dwayne Barnes is not at all a close call. The conversation Barnes had with Huff prior to Huff taking the officers to the polls was to the effect that Barnes could not vote because he was a convicted felon. Plainly, there was no precedent offer or promise to Barnes that induced either Dodds or Brantley to go to the polls.

Conclusion

For these reasons Huff's conviction must be reversed. Because the evidence was insufficient as a matter of law to support the verdicts, the Court of Appeals must remand the matter with orders to enter a judgment of acquittal on all counts.

Dated at Milwaukee, Wisconsin this ____ day of _____, 2008.

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Certification

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 5552 words.

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Dated this _____ day of _____, 2008:

_____

Jeffrey W. Jensen

State of Wisconsin
Court of Appeals
District I
Appeal No. 2008AP002664 -CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Garrett Huff,

Defendant-Appellant.

Appendix Certification

A. Record on Appeal

B. Transcript of court's jury instructions

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last

initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2008

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