COURT OF APPEALS
DECISION
DATED AND RELEASED

January 25, 1996

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

NOTICE

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

Nos. 95-1621-CR
95-1622-CR
95-1623-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES C. SARLUND,

Defendant-Appellant.

APPEAL from judgments of the circuit court for Dane County: JACK F. AULIK, Judge. *Affirmed.*

EICH, C.J.[1] James C. Sarlund appeals from judgments of conviction and sentence in three cases. He was convicted after a jury trial on counts of violating a harassment injunction (prohibiting him from having any contact with the complainant) and bailjumping. He pled no contest to a second

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

bailjumping charge. Sentence was withheld in all cases and Sarlund was placed on probation for varying terms, with a total of 120 days jail time as a condition.

Sarlund challenges only his conviction for violating the injunction and the trial court's refusal to disqualify the prosecutor from appearing at his sentencing. He argues that: (1) the evidence was insufficient to convict him of violating the injunction; (2) he was denied the right to testify in his defense when the trial court prohibited him from explaining why he wrote the letter that allegedly violated the terms of the injunction; and (3) the court erroneously exercised its discretion when it denied his motion to disqualify the prosecutor. We reject each argument and affirm the judgments.

The facts are not in serious dispute. Sarlund became attracted to a woman, Kimberly M., and began writing numerous "love letters" to her. Sarlund and Kimberly were not acquainted. They had had only limited contact with each other at a health club to which they both belonged and at the banking institution where Kimberly worked.

Kimberly obtained a harassment injunction prohibiting Sarlund from having "any written or verbal contact" with her, and he was charged with violating the injunction when he sent her a letter at her parents' address. At trial, Sarlund wished to testify that he wrote the letter because he thought he was going to die within a few years. The trial court rejected the testimony on hearsay and relevancy grounds. Then, after the jury found Sarlund guilty of violating the injunction, he asked the court to recuse the prosecutor, Kenneth Farmer, from appearing at his sentencing on grounds that Sarlund had told police that Farmer had been involved with controlled substances. The trial court denied the request, and the sentencing proceeded. Other facts will be discussed below.

I. Sufficiency of the Evidence

As indicated, the jury found Sarlund guilty of violating the injunction. The test for overturning a jury's verdict is well established:

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

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). Our consideration of the sufficiency of the evidence is also guided by the rule that "`[i]f more than one inference can be drawn from the evidence, the inference which supports the jury finding must be followed unless the testimony was incredible as a matter of law.'" ***State v. Wilson***, 149 Wis.2d 878, 894, 440 N.W.2d 534, 540 (1989).

Section 813.125(7), STATS., provides, "Whoever violates [a harassment] injunction" is guilty of a misdemeanor. Sarlund argues that he did not "violate" the injunction because the letter was addressed to Kimberly's parents and not to her, thus it cannot be said that he had any "contact" with her. He points out that he did not ask Kimberly's mother to contact her about the letter (as she did), or to read it to her over the telephone (as she also did); he maintains that no jury could determine from this evidence that Sarlund, rather than Kimberly's mother, contacted Kimberly and, consequently, the jury's guilty verdict punishes him for Kimberly's mother's acts. According to Sarlund, he was

> free to send as many letters as he wanted to [Kimberly's] parents. He was free to say anything he pleased in those letters. He was free to use any salutation of his choosing: "Dear Kimberly" or "Dear Kimberly's parents" or "To whom it may concern." He was free to write as many "Dear Kimberly" letters as he

> wanted, and to do as he pleased with them, as long as he did not contact [Kimberly].

We disagree. There is no question that the letter was directed to Kimberly. The envelope may have been addressed to her mother, but the letter's salutation was "Dear Kimberly" and its contents consisted of expressions of love directed toward Kimberly. We do not consider it "impossible," within the meaning of ***Poellinger***, for a reasonable jury to infer from those facts that Sarlund intended the letter to be for--and to reach--Kimberly (why else write it?) and knew that, after receiving the letter, Kimberly's mother would contact her about it. Certainly indirect contact--having an intermediary contact Kimberly on Sarlund's behalf, for example--would violate the injunction; we see little difference here. Because we believe that a letter written by Sarlund which is, by its salutation and content, intended for Kimberly and placed in an envelope addressed to Kimberly's roommate, her secretary or co-worker--or to her parents--could be seen by a reasonable juror as constituting indirect "contact" with Kimberly in violation of the injunction, we reject Sarlund's argument that, on this record, no reasonable jury could find or infer guilt.

II. The Evidentiary Ruling

We review a trial court's admission or rejection of evidence for erroneous exercise of discretion. "In reviewing evidentiary issues, `[t]he question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court [appropriately] exercised its discretion ....'" ***State v. Alsteen***, 108 Wis.2d 723, 727, 324 N.W.2d 426, 428 (1982) (citation omitted). And while Sarlund frames his argument in terms of a constitutional violation, the crux of his argument is that the trial court erroneously exercised its discretion in disallowing the proffered evidence because, first, it was not hearsay and, second, it was not irrelevant, as the trial court ruled. If a discretionary decision rests upon an error of law, the decision is, of course, beyond the limits of the court's discretion. ***State v. Wyss***, 124 Wis.2d 681, 734, 370 N.W.2d 745, 770 (1985).

In ruling the evidence irrelevant, the trial court stated:

> [the evidence] would not be relevant because the issue in this case is whether or not ... an injunction was issued,

> whether or not it prohibited the acts that were subsequently committed by the defendant, and whether the defendant subsequently committed those acts. That's the issue. I don't think ... there is any provision in the law that allows mitigation of the conduct of a person .... [who] violat[es] ... a harassment injunction.

We agree with Sarlund that a defendant has a right to "participate directly" in his or her trial. ***Alicea v. Gagnon***, 675 F.2d 913, 923 (7th Cir. 1982). But, as the supreme court has recognized, while the constitution gives a defendant in a criminal case the right to present favorable testimony on his or her behalf, a defendant has no right, constitutional or otherwise, to present irrelevant evidence. ***State v. Pittman***, 174 Wis.2d 255, 275, 496 N.W.2d 74, 83, *cert. denied*, 114 S. Ct. 137 (1993); ***State v. Robinson***, 146 Wis.2d 315, 332, 431 N.W.2d 165, 171 (1988). And, as indicated, we believe the trial court properly exercised its discretion in rejecting the evidence on relevancy grounds.

"We will not reverse a discretionary determination by the trial court if the record shows that discretion was exercised and we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987) (citation omitted). "[W]here the record shows that the [trial] court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law, we will affirm the decision even if it is not one with which we ourselves would agree." ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991) (citation omitted; footnote omitted).

"Relevancy ... is a function of whether the evidence tends `to make the existence of [a material fact] more probable or less probable than it would be without the evidence.'" ***Interest of Michael R.B.***, 175 Wis.2d 713, 724, 499 N.W.2d 641, 646 (1993); *see* section 904.01, STATS. Here, the trial court concluded that evidence that Sarlund thought he had only a limited time to live was not relevant to the issues being tried; it did not tend to make the existence of any fact material to his violation of the injunction more or less probable than without the evidence. As the trial court stated, the elements of the offense are (a) that an injunction was issued and Sarlund was aware of it, and (b) that he had contact with Kimberly in violation of the injunction. Section 813.125(7), STATS., punishes one for having or making the prohibited contact: it does not

excuse those persons who make the prohibited contact while believing, for whatever reason, that it is important for them to do so, any more than it punishes only those who make the prohibited contact for what they feel are unimportant or insignificant reasons.

We think it is neither contrary to law nor beyond the scope of reasonableness inherent in our evaluation of discretionary trial court rulings for the court in this case to conclude that the proffered evidence was irrelevant under the above standards, and to disallow it on that basis. A trial court's discretionary rulings are not tested by some subjective standard, or even by our own sense of what might be a "right" or "wrong" decision in the case; rather, they will stand unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion. ***State v. Jeske***, No. 95-0388-CR, slip op. at 7 (Wis. Ct. App. Oct. 26, 1995, ordered published Nov. 26, 1995). We think this is such a case, and we are unpersuaded by Sarlund's argument that we should reverse because, had the evidence been admitted and the jury understood that "his motivation for writing ... was that he thought he had a short time to live," the jurors might have "excused [his] behavior" despite his violation of the law, and found him not guilty. It is an argument for jury nullification, and we have recognized that the principle is at odds with the Wisconsin legal tradition of requiring jury verdicts to be based "on law, not personal whim." ***State v. Olexa***, 136 Wis.2d 475, 485, 402 N.W.2d 733, 738 (Ct. App. 1987). *See also* ***State v. Bjerkaas***, 163 Wis.2d 949, 962-63, 472 N.W.2d 615, 619-20 (Ct. App. 1991) (trial court did not err in prohibiting counsel from arguing to the jury that it could decline to follow the law should it wish to do so).

We conclude that the trial court did not erroneously exercise its discretion in declining to admit the proffered evidence on relevancy grounds, and Sarlund has not established any error of law, much less one of constitutional proportions, in the trial court's decision.

III. Recusal of the Prosecutor

Like a proffer of, or an objection to, evidence, a request to disqualify an attorney is addressed to the trial court's discretion, and we are guided in this inquiry by the authorities we have discussed above.

A week or so prior to the time Assistant District Attorney Farmer filed the charges against Sarlund, Sarlund had--unbeknownst to Farmer--reported to police that Farmer and another person had some unspecified involvement with controlled substances. The trial court found that, at the time the charging decision was made, Farmer was unaware of any such allegations. The court also noted that Sarlund's allegations had been investigated by police and the district attorney, who determined they were groundless. The court then referred to a letter from the district attorney indicating that his office would not disqualify Farmer from the case and went on to conclude:

> I think there is only two bases for the recusal, and that is by a finding by the prosecutor himself or herself that they believe that they have a problem and the -- other factor is for the court to decide whether the court believes there is any prejudice or unfairness. And, lastly, the court should consider whether there is any appearance of impropriety by Mr. Farmer continuing to represent the [State]. I've considered all of those issues, and I find that there is no rational basis for Mr. Farmer ... to be recused by the court, and that I do not believe there to be shown from these facts any showing of appearance of impropriety in him continuing to represent the State in this matter, so the motion is denied.

Citing out-of-state cases suggesting that prosecutors should recuse themselves "whenever the circumstances suggest that the prosecutor would have a personal animosity toward the defendant," Sarlund argues that because Farmer, as a government agent, has a "duty to do justice in every case, without partiality," Farmer's continuing in the case despite Sarlund's allegations against him created an "appearance of impropriety" in the proceedings which should result in reversal and at least a resentencing, if not a new trial. Again, we disagree.

We note at the outset our doubt as to the wisdom of ruling that a person facing trial on criminal charges can make baseless allegations against the prosecutor and then, after trial, attempt to undo the entire proceedings because of the prosecutor's participation in the trial. That would seem to us to be an invitation for manipulation of the criminal justice system in the same manner as

is frequently done by the political fringe groups who, hoping to exhaust the supply of available judges to hear their tax-law violation cases, routinely join each assigned judge as a defendant in an ancillary lawsuit and then attempt to recuse the judge.

Nor has Sarlund offered any evidence of impropriety--or even the appearance of impropriety--from any event, transaction or activity during the case, other than the fact that he had made the accusations against Farmer. And if his argument is that we should reverse because Farmer's continuation in the case after learning of Sarlund's accusations created an "appearance of partiality," he has not referred us to any authority that a prosecutor's appearance of being "partial" to his or her own side of the case would or should taint the proceedings. Indeed, all attorneys are "partisans" in the courtroom in that they are there to zealously advocate their clients' opposing interests. Indeed, the United States Supreme Court has noted that prosecutors, as part of the criminal law enforcement process "need not be entirely `neutral and detached.' In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law." ***Marshall v. Jerrico, Inc.***, 446 U.S. 238, 250 (1980) (quoted source omitted; citation omitted).

Sarlund has not persuaded us of the existence of any legal authority that would require reversal of the trial court's discretionary decision to deny his recusal motion. Nor can we say, on this record, that the trial court, in exercising that discretion, reached a result no reasonable judge could reach when it concluded that there had been no showing that Sarlund's baseless allegations created any prejudice, unfairness or impropriety--or any appearance thereof--in Farmer's remaining on the case through the trial and sentencing.[2]

---

[2] Even if the decision could be considered erroneous, we agree with the State that Sarlund has shown no prejudice. It is not argued that Sarlund's charges against Farmer had any effect on his trial or his sentence. He argues that we must find prejudice as a matter of law because the court's failure to recuse Farmer resulted in a violation of his "right to be free from a prosecution that is tainted by the appearance of impropriety." It is true that "some fact situations are so clearly detrimental to the integrity of the legal profession and administration of justice that counsel should be disqualified as a matter of law." ***State v. Retzlaff***, 171 Wis.2d 99, 103, 490 N.W.2d 750, 752 (Ct. App. 1992). Sarlund simply has not persuaded us that this is that type of case. It is, rather, a case like ***Retzlaff***, where Farmer's continuation in the case despite Sarlund's unfounded allegations against him simply does not, by itself, rise to that level of "detriment[] to the integrity of the legal

By the Court.—Judgments affirmed.[3]

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

(..continued)
profession and [the] administration of justice" that would warrant reversal. ***Id***. As we have indicated, we are equally satisfied that the trial court did not erroneously exercise its discretion in denying the recusal motion.

[3] Long after the briefing schedule had expired, and while the opinion was being prepared for release, we received a lengthy *ex parte* submission from Sarlund containing what he describes as "additional information" for our "review." The document contains many factual assertions and includes what he purports to be copies of handwritten letters and other documents. None of the assertions, and none of the purported documents, are accompanied by any citation to the record. *See* ***State v. Pettit***, 171 Wis.2d 627, 646-47, 492 N.W.2d 633, 642 (Ct. App. 1992) (court of appeals does not consider documents filed in violation of the rules of appellate procedure). Even so, our perusal of the material leads us to conclude that it adds nothing to Sarlund's appeal.