

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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.

No. 99-1090-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WESLEY J. LACROSSE, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Vilas County:
ROBERT A. KENNEDY, Judge. *Reversed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Wesley LaCrosse appeals a judgment convicting him of misconduct in public office for failure to perform a known duty, contrary to § 946.12(1), STATS. He argues that the State's reliance on his position as police captain fails to support the element that the duty was one of his employment. We

agree. Viewing the evidence in the light most favorable to the State, we conclude that the facts established at trial fail to show that LaCrosse's duties as a police captain required him to bid the contracts for the city hall renovation project. Therefore, we reverse the judgment of conviction.¹

¶2 The charge against LaCrosse of misconduct in public office arises out of a city hall renovation project. LaCrosse was a city police captain and had helped with a previous police department renovation project. The city council decided to renovate space in an old school to house city offices. LaCrosse agreed to take on the role as project manager for \$17 per hour. There is no indication in the city council's minutes that LaCrosse was formally appointed but, nevertheless, he was the paid project manager. Employment taxes were not deducted from his checks, and he received a Form 1099 disclosing his compensation. During the renovation project, LaCrosse also continued to serve separately as police captain and was paid his regular salary.

¶3 The city council did not direct LaCrosse to obtain bids for the project. The council members did not take an active role in directing the project.² One council member, Jeff Hyslop, testified that LaCrosse reported to the council "at least monthly" during the project. It is undisputed that no bids were taken for the work performed. After the project was substantially completed, the State

¹ He further argues that (1) the evidence was insufficient to satisfy other elements of the offense; (2) the trial court erroneously refused to admit relevant testimony; and (3) erroneously refused to grant a mistrial on the basis that the jury deliberated until 1:30 a.m. Because our determination is dispositive, we do not reach LaCrosse's other claims of error. See *Sweet v. Berge*, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

² In closing, the prosecutor characterized the city council members as "laid back. No question about that." He stated: "I think everybody will agree they made a mistake here. They should have really watched this project." He further stated: "I think the blame that these city council members should get would be extreme negligence."

charged LaCrosse as party to a crime, with misconduct in public office for failing to obtain bids, in violation of § 946.12(1), STATS.³

¶4 The bid requirement derives from § 62.15(1), STATS., which states, in part:

CONTRACTS; HOW LET. All public construction, the estimated cost of which exceeds \$10,000, shall be let by contract to the lowest responsible bidder; all other public construction shall be let as the council may direct.

It is undisputed that the cost of the construction exceeded \$10,000.

¶5 LaCrosse argues that the facts established at trial fail to satisfy the statutory element that the duty to bid was a duty of his employment as a police captain. We agree. In *State v. Avila*, 192 Wis.2d 870, 887, 532 N.W.2d 423, 429 (1995), the court stated: "The Due Process Clause of the Fourteenth Amendment places upon the prosecution in state criminal trials, the burden of proving all elements of the offense charged, and the burden of proving 'beyond a reasonable doubt' every fact necessary to establish those elements" (Quoted source omitted.) Once that finding is made, an appellate court may not reverse a criminal conviction unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value 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. *State v. Poellinger*, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). We do not assess weight or credibility of the witnesses, but ask only if the

³ Although LaCrosse was charged as party to a crime, the State prosecuted him as principal. At closing, the prosecutor stated: "I think its pretty simple ... I think he is guilty as a principal because he intentionally did it. ... He intentionally violated the law because he is the one that didn't get the bids."

evidence is patently incredible or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt. *State v. Alles*, 106 Wis.2d 368, 376-77, 316 N.W.2d 378, 382 (1982).⁴

¶6 Misconduct in public office under § 946.12(1), STATS., requires proof of the following elements: (1) the defendant must be a public officer or employee and (2) he must have intentionally failed or refused to perform (3) a known, nondiscretionary, ministerial *duty of his employment* at the time or in the manner prescribed by law.⁵

¶7 The record discloses that the prosecutor relied on LaCrosse's employment as a police captain to satisfy the element that that the defendant must be a public employee.⁶ The trial court instructed the jury that "The first element requires that at the time of the alleged offense the defendant was a public employee. A police captain is a public employee." The prosecutor argued to the jury that the first element required that at the time of the offense, the defendant

⁴ The question whether a duty exists presents an issue of law. See *State v. Schwarze*, 120 Wis.2d 453, 456, 355 N.W.2d 842, 843 (Ct. App. 1984). Here, the issue involved the factual determination whether the duty to bid was one of LaCrosse's employment.

⁵ Section 946.12(1), STATS., "Misconduct in public office," reads:

Any public officer or public employe who does any of the following is guilty of a Class E felony:

- (1) Intentionally fails or refuses to perform a known mandatory, nondiscretionary, ministerial duty of the officer's or employe's office or employment within the time or in the manner required by law
- (2)

⁶ The State acknowledges that LaCrosse, as project manager and police captain, was not a public *officer*. See § 939.22(30), STATS. ("A 'public officer' is any person appointed or elected according to law to discharge a public duty for the state or one of its subordinate governmental units."). A police chief, not a police captain, is an officer under § 62.09(1), STATS. There is no dispute, however, that a police captain is a public *employee*.

was a public employee. He stated: “A police captain is a public employee. Okay. That is what the [jury] instruction says. That’s what the law says. So that shouldn’t be an issue. He was police captain. He was a public employee. Okay.”

¶8 The State does not claim and the record does not indicate that, as a police captain, LaCrosse had any duty concerning the city hall renovation project. He was paid separately for each function. Also, the State does not suggest that LaCrosse failed to perform a duty relating to his functions as a police captain. Viewing the evidence in the light most favorable to the State, we must conclude that no jury, acting reasonably, could find that it was the “duty of the officer’s or employe’s office or employment” as a police captain to bid the city hall renovation project.

¶9 On appeal, the State changes its focus and maintains that as the project manager, LaCrosse was a public employee within the meaning of § 946.12, STATS., and had a duty to bid the project. We are unpersuaded. This is not the theory the State advanced at trial, and the record lacks support for this contention.

¶10 The city’s board of public works is statutorily responsible to superintend public works. Section 62.14(6), STATS. The city’s bidding duties reside in its board of public works. *See* § 62.15, STATS. While the council, by two-thirds vote, may dispense with the board and designate itself, a committee or an officer to discharge the board’s functions, *see* § 62.14(1), STATS., it is undisputed that here, the city council did not take such a vote. Consequently,

there is no evidence that the city council voted to dispense with the board and designate the project manager to discharge the board's functions.⁷

¶11 The State's contention, that the jury could have found that LaCrosse was a public employee in his capacity as project manager, attempts to substitute a theory of prosecution different from the position upon which it elected to rely during trial.⁸ We will not review a claim not raised before the trial court. *State v. Dean*, 105 Wis.2d 390, 402, 314 N.W.2d 151, 157-58 (Ct. App. 1981).

¶12 Viewing the evidence most favorably to the State, we conclude that the facts established at trial fail to satisfy the element that LaCrosse's duties of employment as police captain required him to bid the contracts for the renovation project. There is no evidence that as a police captain, his employment duties included any responsibility concerning the renovation project. Although the State argues that as project manager LaCrosse was designated to discharge the city's obligation to obtain bids, this is a factual issue never presented to the jury and is not to be decided by this court on appeal. Because the State failed to prove that the duty to obtain bids was "a duty of the officer's or employe's office or

⁷ It is undisputed that the council did not direct LaCrosse to obtain bids during the time in question. Late in the project, the council directed LaCrosse to obtain bids, and he did so.

⁸ The State's argument asks us to make factual determinations. "[A] public employee: (1) is not a public officer; (2) performs any official function for the state, county, etc.; and (3) is paid from the public treasury." *State v. Sammons*, 141 Wis.2d 833, 835, 417 N.W.2d 190, 191 (Ct. App. 1987). An official function is a function that relates "to an office, position, or trust." *Id.* at 836, 417 N.W.2d at 191 (quoted source omitted).

Not all services performed in the discharge of a public, governmental purpose, by a private entity, is an exercise of official or governmental power. See *Wisconsin Dev. Auth. v. Dammann*, 228 Wis.147, 162, 277 N.W. 278, 282, *vacated on other grounds*, 228 Wis. 147, 280 N.W. 698 (1938) ("Of course, the state or any of its subdivisions may employ individuals or corporations to do work or render service for it, but the distinction between a public officer and a public employe or contractor is plain and well recognized." (Quoted source omitted.) Factual determinations are a function of the jury, not the appellate court.

employment” within § 946.12 STATS., the evidence is insufficient to support his conviction.

By the Court.—Judgment reversed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.

