COURT OF APPEALS
DECISION
DATED AND RELEASED

January 22, 1997

No. 96-0352-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RONALD L. RAGAN,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Washington County: LAWRENCE F. WADDICK, Judge. *Affirmed*.

Before Snyder, P.J., Brown and Nettesheim, JJ.

NETTESHEIM, J. Ronald L. Ragan appeals from a judgment of conviction for filing a false declaration of candidacy pursuant to § 12.13(3)(a), STATS. Ragan also appeals from the trial court's denial of his motion for postconviction relief.

On appeal, Ragan challenges his conviction on three grounds. First, Ragan argues that his double jeopardy rights were violated when the trial court granted a retrial following a mistrial declaration. We conclude that the retrial did not violate Ragan's protection against double jeopardy.

Second, Ragan claims that his trial counsel was ineffective. Specifically, he argues that his counsel improperly failed to object to the retrial on double jeopardy grounds, failed to object to certain remarks made by the prosecution during closing arguments, failed to raise the defense of mistake, and failed to challenge the sufficiency of the complaint and bindover.

Since we will address the double jeopardy issue on the merits in the interests of justice, we need not address it in the context of ineffective assistance of counsel. As to the remaining claims, we hold that counsel was not ineffective for failing to object to the prosecutor's closing argument and for failing to raise the defense of mistake. We do hold that counsel was ineffective for failing to challenge the complaint and bindover, but we conclude that Ragan was not prejudiced.

Third, Ragan argues that the evidence was insufficient to support the jury's guilty verdict. We disagree. We affirm the judgment of conviction and the postconviction order.

FACTS

On January 3, 1994, Ragan filed with the town clerk for the Town of Erin a notarized declaration of candidacy form for the position of town

supervisor. The preprinted declaration of candidacy included the following language: "I have not been convicted of any infamous crime for which I have not been pardoned except the felony convictions on the attached list." Ragan signed and filed the form without listing any prior conviction. Nor did he otherwise notify that he had previously been convicted of a felony. Ragan won the election.

Ragan, however, had previously been convicted of felony theft in Milwaukee county in 1976 when he was twenty years old. As a result of Ragan's failure to give notice of this prior conviction, the State filed a criminal complaint charging Ragan with false swearing contrary to § 946.32(1)(a), STATS., and falsifying information with respect to a declaration of candidacy contrary to § 12.13(3)(a), STATS. The false swearing charge was dismissed at the preliminary hearing. The falsifying information charge proceeded to a jury trial.

Prior to trial, the State filed a motion in limine seeking to exclude at trial any reference to the fact that Ragan had won the election but had not been seated for the position of town supervisor. In support of its motion, the State argued that such evidence was inadmissible and that the jury might conclude that Ragan's loss of the position he had won in the election might be sufficient punishment. The trial court agreed and granted the State's motion.

Contrary to this ruling, a defense witness testified before the jury that Ragan had won the election. The State moved for a mistrial. The court granted the motion over Ragan's objection. Without further objection from Ragan, the matter proceeded to a retrial and the jury found Ragan guilty. Later,

the trial court rejected Ragan's motion for postconviction relief, including his claims of ineffective assistance of counsel. Ragan appeals. We will recite additional facts as we address the appellate issues.

DISCUSSION

Double Jeopardy

Ragan first argues that the trial court erred by failing to engage in the requisite "manifest necessity" analysis prior to granting the mistrial request by the State. As such, Ragan contends that the retrial violated his double jeopardy rights. Although Ragan objected to the mistrial request, he acknowledges that he did not object to the retrial on the basis of double jeopardy. Thus, Ragan concedes, pursuant to ***State v. Mink***, 146 Wis.2d 1, 10, 429 N.W.2d 99, 102 (Ct. App. 1988), that he has waived this issue. ("[When the state seeks a retrial], the defendant must move for dismissal on double jeopardy grounds to avoid waiver.")

Because the issue is waived, Ragan urges this court to review his double jeopardy claim "in the interests of justice." *See* ***State v. Moesly***, 102 Wis.2d 636, 652, 307 N.W.2d 200, 209-10 (1981) (An appellate court may consider an alleged constitutional error "in the interests of justice," even if the error was insufficiently preserved for appeal.); § 752.35, STATS. The State responds that we should not address the issue in the interests of justice because Ragan has not shown a substantial probability of a different result on retrial and therefore justice has not miscarried. *See* ***Vollmer v. Luety***, 156 Wis.2d 1, 16, 456 N.W.2d 797, 805 (1990).

The State's argument may be well taken. However, this case is unusual because this issue is also raised in Ragan's ineffective assistance of counsel argument. There he contends that his trial counsel was ineffective for failing to raise a double jeopardy claim. But that failing would constitute defective performance by counsel only if a manifest necessity for the mistrial did not exist in the first place. Thus, we would have to address the manifest necessity question in any event. We choose to address it under Ragan's interests of justice argument.

In reviewing a double jeopardy claim based on mistrial, the question is whether, under all of the facts and circumstances, it was reasonable to grant a mistrial under the "manifest necessity" rule. *See* ***Mink,*** 146 Wis.2d at 10, 429 N.W.2d at 103 (citing ***State v. Copening***, 100 Wis.2d 700, 710, 303 N.W.2d 821, 826-27 (1981)). Considerable deference is normally given to the trial court's determination of "manifest necessity" because that court is in the best position to make a first-hand assessment of the prejudice consideration. *See* ***Mink***, 146 Wis.2d at 10, 429 N.W.2d at 103.[1]

Here, the State brought a pretrial motion in limine to exclude evidence that Ragan had won the election for town supervisor but had been denied the position. The State's request was based on two concerns. First, the

[1] We acknowledge that the standard of review stated in ***State v. Copening***, 100 Wis.2d 700, 303 N.W.2d 821 (1981), appears contrary to that expressed in ***State v. Mink***, 146 Wis.2d 1, 429 N.W.2d 99 (Ct. App. 1988). ***Mink*** states that "manifest necessity is a mixed question of fact and law and when the facts are not in dispute, only a question of law remains." ***Id***. at 10-11, 429 N.W.2d at 103. ***Copening***, however, is a statement by our supreme court, whereas ***Mink*** is a statement by the court of appeals. In such a setting, we properly follow the supreme court's declaration.

evidence was irrelevant to the charge of filing a false declaration of candidacy. Second, the State sounded a jury nullification concern, arguing that "if the Jury hears that [Ragan] was elected and/or that he was not seated, they may feel that he's already been punished enough; and that might influence their findings of fact in this case." The trial court granted the State's motion in limine.[2]

Although the correctness of the trial court's motion in limine ruling is not before us, we observe that the ruling was obviously correct from an evidentiary standpoint. Whether Ragan won the election and whether he was seated were clearly irrelevant to the charge of falsifying information on the declaration of candidacy.

When a defense witness later testified before the jury that Ragan had been elected to the office, the State moved for a mistrial. Ragan opposed the motion, suggesting instead that the trial court give the jury a curative instruction. The court rejected this suggestion and declared a mistrial. Although the court did not use the phrase "manifest necessity," the court harkened back to the State's argument at the motion in limine that Ragan's winning the election but not being seated might constitute punishment enough in the mind of the jury.[3] In addition, the court expressed a concern that the

[2] The trial court's ruling in favor of the State's motion in limine, however, was not a ringing endorsement of the State's argument. Although granting the motion, the court stated, "I, frankly, have my doubts that there would be prejudice in mentioning … that he was elected but he wasn't seated."

[3] We observe that the trial court's failure to use the phrase "manifest necessity" does not mean that such a condition did not exist or that a retrial violated the defendant's double jeopardy rights. *See* ***State v. Mendoza***, 101 Wis.2d 654, 659, 305 N.W.2d 166, 169 (Ct. App. 1981) (quoting ***Arizona v. Washington***, 434 U.S. 497, 517 (1978)).

cautionary instruction "would be a reasonable inference for the Jury to conclude that … there had been an election successfully run by this candidate and that he had not continued in office; and we're back to Square One." Thus, the court was legitimately concerned that a cautionary instruction would reinforce, rather than diminish, the effect of the improper testimony.

This issue touches on the dynamics of the courtroom and the fairness of the trial as sensed and evaluated by the trial court when the event occurred. As such, the trial court was in the best position to assess the effect of the improper testimony on the jury. Since the court's motion in limine ruling was correct from an evidentiary standpoint, and given the deference which we properly accord the trial court's manifest necessity ruling, we conclude that the court did not misuse its discretion in declaring the mistrial.[4]

Ineffective Assistance of Counsel

To succeed on a claim of ineffective assistance of counsel, Ragan must show that his attorney's performance was deficient and that the deficient performance prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The test for measuring an attorney's performance is the reasonableness of counsel's challenged conduct on the particular facts of the case, viewed as of the time of counsel's conduct. ***Id.*** at 690; ***State v. Pitsch***, 124

(..continued)

[4] We do so mindful of the supreme court's caution in ***Copening***, 100 Wis.2d at 710, 303 N.W.2d at 827, that a trial court's discretionary mistrial ruling must scrupulously protect the defendant's right to have the matter resolved by the initial jury chosen to hear the matter.

Wis.2d 628, 636, 369 N.W.2d 711, 716 (1985). There is a strong presumption that the attorney has rendered effective assistance and made all significant decisions while exercising reasonable professional judgment. ***Strickland***, 466 U.S. at 689.

Our supreme court has stated that it disapproves of postconviction counsel second-guessing trial counsel's considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel. ***State v. Felton***, 110 Wis.2d 485, 502, 329 N.W.2d 161, 169 (1983). Trial counsel is free, after considered judgment, to select a particular tactic among available alternatives. *See* ***id***. at 501-02, 329 N.W.2d at 169. This court will not find ineffective assistance of counsel even though in hindsight it is apparent that a more appropriate decision could have been made. ***Id***. at 502, 329 N.W.2d at 169.

If we agree with the trial court's conclusion that Ragan's trial counsel did not provide ineffective assistance, we need not decide whether counsel's performance was prejudicial. *See* ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990) (reviewing court may dispose of ineffective assistance claim on either ground). If Ragan succeeds in proving that counsel's performance was deficient, he must also show that there is a reasonable probability that, but for trial counsel's unprofessional errors, the result of the proceeding would have been different. ***Strickland***, 466 U.S. at 694; ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996).

Ineffective assistance of counsel claims present mixed questions of law and fact. ***Pitsch***, 124 Wis.2d at 633-34, 369 N.W.2d at 714. The trial court's

findings of fact will not be disturbed unless clearly erroneous. ***Id***. at 634, 369 N.W.2d at 714-15. However, the determinations of whether counsel's performance was deficient and prejudicial are questions of law, which we review de novo. ***Id***. at 634, 369 N.W.2d at 715.

With these standards in mind, we now turn to Ragan's specific ineffective assistance of counsel claims.

A. Double Jeopardy

Ragan first contends that trial counsel was ineffective for failing to raise the double jeopardy issue prior to the retrial, thus waiving his right to appeal on that issue. However, we have already addressed that question on the merits and upheld the trial court's determination that a mistrial was manifestly necessary. Thus, Ragan's double jeopardy rights were not violated by the retrial. *See* ***Mink***, 146 Wis.2d at 11-12, 429 N.W.2d at 103. Therefore, trial counsel was not ineffective for failing to raise the issue. Nor was Ragan prejudiced by the retrial since any double jeopardy challenge would have failed.[5]

[5] We also observe that Ragan's trial counsel testified at the ***Machner*** hearing that, based on his research, he concluded (as have we) that a double jeopardy challenge would not have prevailed.

B. Closing Arguments

Ragan next contends that trial counsel was ineffective for failing to object to certain remarks made by the prosecutor during closing arguments. Specifically, Ragan argues that the prosecutor misrepresented Ragan's obligations under the law as it pertained to Ragan's theory of defense.

Ragan's defense was that he did not know that the prior theft conviction was for a felony. In response to this defense, the prosecutor stated during his rebuttal closing argument that Ragan was obligated to investigate the nature of his prior conviction before filing the Declaration of Candidacy. Ragan argues that this was improper because the question for the jury was his knowledge at the time of the filing, not whether he had investigated his prior conviction.

At the ***Machner*** hearing, trial counsel testified that "initially [he] was about to jump out of [his] seat when the DA started talking in that matter …." However, he chose not to object because he knew that the trial court would shortly instruct the jury, inter alia, that the State had to prove that Ragan knew that the information in the declaration was false. Based on this testimony, the trial court determined that trial counsel had made a strategic decision not to object.

We agree with the trial court's ruling for a number of reasons. First, the trial court did, in fact, instruct the jury as trial counsel anticipated. The court told the jury that it was to measure Ragan's knowledge as of the time of the filing. We have repeatedly said that we assume the jury follows the

instructions of the trial court. ***Nowatske v. Osterloh***, 198 Wis.2d 419, 448, 543 N.W.2d 265, 276 (1996). Second, the trial court told the jury that the arguments of counsel were not evidence. Third, Ragan's own final argument was in keeping with the instruction given by the trial court.

With the benefit of hindsight, we perhaps might say that it would have been better had counsel objected. But, as we have noted, we will not find counsel ineffective based on strategic decisions which in hindsight may not have been the most appropriate. *See* ***Felton***, 110 Wis.2d at 502, 329 N.W.2d at 169.

C. Mistake Defense

Next, Ragan argues that trial counsel was ineffective for failing to raise the defense of mistake under § 939.43(1), STATS.[6] However, Ragan did not specifically raise this issue at the ***Machner*** hearing. In ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979), the court concluded that:

> [W]here a counsel's conduct at trial is questioned, it is the duty and responsibility of subsequent counsel to go beyond mere notification and to require counsel's presence at the hearing in which his conduct is challenged. We hold that it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel. We cannot otherwise determine whether trial counsel's actions were the result of incompetence or deliberate trial strategies.

[6] Section 939.43(1), STATS., provides: "An honest error, whether of fact or of law other than criminal law, is a defense if it negatives the existence of a state of mind essential to the crime."

Although trial counsel was questioned regarding possible defenses, Ragan's appellate counsel never directly inquired as to why a mistake defense was not raised. Because trial counsel did not have the opportunity to offer an explanation as to this issue, we deem it waived. *See* ***id.*** at 804, 285 N.W.2d at 908-09.[7]

D. Failure to Challenge Complaint and Bindover

As his final challenge to trial counsel's effectiveness, Ragan argues that counsel should have challenged the sufficiency either of the criminal complaint or the evidence at the preliminary hearing. Specifically, Ragan contends that neither the complaint nor the preliminary hearing evidence established that his prior felony theft conviction was an "infamous crime" within the meaning of art. XIII, § 3 of the Wisconsin Constitution.

In order to put this issue in its proper perspective, we first address the applicable constitutional and statutory provisions.

We begin with the Wisconsin Constitution. Article XIII, § 3 recites eligibility requirements for public office. Among other provisions, it bars any person who has been convicted of an infamous crime from holding public office.[8]

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[7] Although trial counsel did not formally raise this defense via a jury instruction, we do note that Ragan's theory of defense—that he did not know that his prior conviction was for a felony—prominently put this question before the jury.

[8] Wisconsin citizens recently voted to amend art. XIII, § 3. The amendment removes the "infamous crime" language from the constitution. The question approved by the voters stated:

Eligibility of convicted persons for office. Shall section 3 of article XIII of the

Next, we address the statutes. Section 12.13(3)(a), STATS., makes it illegal for any person to, inter alia, "[f]alsify any information in respect to … a … declaration of candidacy …." This is the crime which the State charged against Ragan. Unlike the constitutional provision, this statute does not set out eligibility requirements for public office. Rather, it is a criminal statute which makes it a crime to falsify certain information on a declaration of candidacy.

Next, we look to § 8.21, STATS., which sets out the components of a declaration of candidacy. These include a statement that the candidate "has not been convicted of any infamous crime for which he or she has not been pardoned *and* a list of all felony convictions for which he or she has not been pardoned." (Emphasis added.) In addition, a declaration of candidacy must be "sworn to before any officer authorized to administer oaths." ***Id***.

Insofar as a prior criminal record is concerned, these constitutional and statutory provisions teach the following: the constitution speaks only of an unpardoned "infamous crime," whereas § 8.21, STATS., speaks of both unpardoned "infamous crime[s]" and unpardoned felony convictions. A candidate can violate the statute *by failing to report either category of offense*. Thus, the criminal provisions of the statute take in more than the eligibility requirements of the constitution.

(..continued)

> constitution be amended to prohibit a person from holding public office or from appearing on a ballot for state or local office if the person has been convicted of a misdemeanor involving a violation of public trust or a felony and the person has not been pardoned for the conviction?

We now turn to the facts and procedure of this case. Ragan was charged under § 12.13(3)(a), STATS., with falsifying information on a declaration of candidacy. In support of this charge, the factual allegations of the complaint recited Ragan's prior felony theft conviction. However, the charging portion of the complaint did not specifically advise which alternative form of the crime the State was alleging: a failure to reveal a conviction for an infamous crime or a failure to reveal any prior felony conviction.

The factual allegations of the complaint, however, attached and incorporated a copy of Ragan's declaration of candidacy. This declaration recited in relevant part: "I have not been convicted of any infamous crime for which I have not been pardoned *except the felony convictions on the attached list.*" (Emphasis added.) This language was not in keeping with § 8.21, STATS., because it catalogued prior felony convictions under the ambit of infamous crimes. Therefore, unlike the statute which required Ragan to reveal unpardoned infamous crimes *and* all unpardoned felony convictions, the preprinted form only obligated Ragan to state his prior unpardoned infamous crime felonies. Whether or not consciously drafted to achieve this result, the declaration form necessarily restricted the State's charging in this case to only the infamous crime portion of § 8.21.

That brings us to the nub of Ragan's ineffective assistance of counsel claim. Ragan contends that his felony theft conviction did not, as a matter of law, qualify as an infamous crime and that his trial counsel was ineffective for failing to raise this issue at either the complaint or preliminary

hearing stage of the proceedings.[9] In response to this claim, Ragan's trial counsel testified that because § 8.21, STATS., envisions two alternative methods for violating § 12.13(3)(a), STATS., and since the complaint alleged a prior felony conviction, a challenge to the complaint or the evidence at the preliminary hearing would not have been successful. As our above discussion reveals, we agree with trial counsel's analysis of the statute.

However, trial counsel's analysis did not go far enough because he failed to discern that the declaration of candidacy, *by its very terms*, limited the convictions which Ragan was obligated to disclose to unpardoned infamous crimes "except the felony convictions on the attached list." Therefore, if felony theft was not an infamous crime, counsel missed the opportunity to obtain a dismissal of the charge at either the complaint or preliminary hearing stage of the proceedings.

Whether counsel was ineffective, however, depends on whether the law would arguably support such a challenge. We thus look to the limited Wisconsin law on this question. In ***Becker v. Green County***, 176 Wis. 120, 184 N.W. 715 (1922), the supreme court held that a crime punishable by imprisonment in a state prison, i.e., a felony, is an infamous crime within the meaning of art. XIII, § 3 of the Wisconsin Constitution. ***Id***. at 124, 184 N.W. at 717. In ***Law Enforcement Standards Bd. v. Village of Lyndon Station***, 98 Wis.2d 229, 238-46, 295 N.W.2d 818, 823-27 (Ct. App. 1980), the court of appeals upheld

[9] Counsel did challenge the complaint on the basis of the theory of defense asserted at trial: that Ragan did not know that he had been convicted of a felony. The trial court rejected this challenge.

the disqualification of a police chief on a variety of grounds, including this language of the supreme court in ***Becker***. ***Lyndon Station***, 98 Wis.2d at 238-46, 295 N.W.2d at 823-27.

On further review, the supreme court affirmed the court of appeals decision in ***Lyndon Station***. ***Law Enforcement Standards Bd. v. Village of Lyndon Station***, 101 Wis.2d 472, 497, 305 N.W.2d 89, 101 (1981). However, in so doing, the supreme court did not find it necessary to address the constitutional basis of the court of appeals decision. Nonetheless, the supreme court stated that it disavowed the court of appeals language that all felonies constitute infamous crimes within the parameters of art. XIII, § 3. ***Id***.[10]

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[10] The supreme court's opinion in ***Lyndon Station*** covers twenty pages. The constitutional discussion, however, is limited to the final six-line paragraph of the opinion. It reads:

> Although we do not reach the question of whether Jessen was subject to removal from his position as police chief under the provisions of Wis. Const. art. XIII, sec. 3, we disavow the appellate court's language and ruling that *all felonies* constitute "infamous crimes" within the parameters of this constitutional provision.

Law Enforcement Standards Bd. v. Village of Lyndon Station, 101 Wis.2d 472, 497, 305 N.W.2d 89, 101 (1981).

For a variety of reasons, we have seriously considered whether this language truly overruled ***Becker*** and might be dicta. First, the supreme court had already affirmed the court of appeals decision on other grounds and expressly stated that it was not deciding the constitutional issue. Second, the supreme court did not expressly say that it was overruling ***Becker*** or withdrawing the language of that case. Third, although the supreme court "disavowed" the court of appeals language, that language was based squarely on the supreme court's prior decision in ***Becker***. As noted, the supreme court never addressed the ***Becker*** decision. Fourth, the supreme court decision engaged in no analysis as to why the ***Becker*** holding was wrong.

Despite this terse and obscure treatment of the issue, we choose to read the supreme court's opinion as overruling ***Becker***.

Thus, at the time of Ragan's prosecution in this case, it was an open question as to which felonies constituted infamous crimes within the meaning of art. XIII, § 3 of the Wisconsin Constitution.[11] This question left open, we conclude that principles of effective representation required Ragan's trial counsel to pursue this avenue of possible dismissal. Therefore, we conclude that trial counsel was ineffective.[12]

That brings us to the question of prejudice. When counsel's performance has been deficient, the court must also find that there is a reasonable probability that but for trial counsel's unprofessional errors, the result of the proceeding would have been different. ***Strickland***, 466 U.S. at 694; ***Sanchez***, 201 Wis.2d at 236, 548 N.W.2d at 76. A reasonable probability is a

[11] The State cites to this court's language in ***State v. McMahon***, 186 Wis.2d 68, 84, 519 N.W.2d 621, 628 (Ct. App. 1994), arguing that trial counsel cannot be labeled ineffective for failing to pursue an unresolved area of the criminal law. However, the State fails to note our additional statement just a few lines later: "We think ineffective assistance of counsel cases should be limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue." ***Id***. at 85, 519 N.W.2d at 628.

Thus, in some situations, a failure to raise an unresolved issue can constitute ineffective assistance of counsel. Here, despite the unresolved nature of the question, the supreme court's language in ***Lyndon Station*** is a signal, perhaps even an invitation, to the criminal defense bar to litigate the question. In light of ***Lyndon Station***, the question in this case was whether the complaint even stated a crime known to the law. Under those circumstances, we conclude that counsel's duty was clear under ***McMahon*** to raise the issue.

[12] Trial counsel explained at the ***Machner*** hearing that he and Ragan tactically decided to defend on the basis of Ragan's claim that he did not know the prior conviction was for a felony and that they did not want to confuse the jury with the uncertain question of whether felony theft was an infamous crime. We respect counsel's right to select a jury trial strategy from among various available options. However, this begs the question as to counsel's failure to argue that the factual allegations of the complaint or the evidence at the preliminary hearing did not support the charge.

probability sufficient to undermine our confidence in the outcome. ***State v. Littrup***, 164 Wis.2d 120, 136, 473 N.W.2d 164, 170 (Ct. App. 1991).

In order to determine if the result would have been different, we must answer whether felony theft is an infamous crime. As our analysis of the Wisconsin case law has demonstrated, this question is unanswered. We thus look to other sources for assistance.

Ragan principally relies on the dictionary definition of "infamous" for support. He notes that "infamous" is defined in terms of reputational disgrace brought about by something grossly criminal, shocking, brutal or evil.

The case law, however, has not adopted this more aggravated concept of "infamous." Instead, "infamous" has been measured from two standards which have sometimes overlapped: (1) the penalty associated with the crime, and (2) whether the crime is inconsistent with commonly accepted principles of honesty and decency.

We first look to the federal cases. The Fifth Amendment to the United States Constitution provides, in part, "No person shall be held to answer for a capital, *or otherwise infamous crime*, unless on a presentment or indictment of a Grand Jury …." Relying on this language, federal court defendants indicted by information rather than by grand jury have sometimes challenged indictments by arguing that the crime alleged is "infamous."

In one such case, the Ninth Circuit observed that the punishment attached to the crime is relevant to whether the crime is infamous. *See* ***United***

States v. Yellow Freight Sys., Inc., 637 F.2d 1248, 1254 n.7 (9th Cir. 1980). The court noted that "crimes punishable by confinement to a penitentiary are infamous" and that "[i]n the case of crimes by individuals, the possibility of imprisonment for more than one year, and therefore in a penitentiary, remains the most reliable index of infamy." ***Id***. Similarly, in ***United States v. Driscoll***, 612 F.2d 1155, 1156 (9th Cir. 1980), the same court stated that "[t]he length of penalty is now the most reliable index of whether a crime is infamous, as that term is used in the fifth amendment." Since the penalty for the offense in ***Driscoll*** was less than one year, the court concluded that the crime was not infamous. *See* ***id***.

In this case, Ragan's prior felony theft conviction carried penalties of a fine of not more than $5000 and a term of imprisonment of not more than five years in the state prisons. Section 943.20(3)(b), STATS., 1975. By this measure, Ragan's prior conviction was for an infamous crime. However, such a holding would run afoul of our supreme court's statement in ***Lyndon Station*** that not all felonies are infamous crimes. *See* ***Lyndon Station***, 101 Wis.2d at 497, 305 N.W.2d at 101.

Next, we look to certain case law from Illinois. We find these cases instructive because they address infamous crime in the context of eligibility to hold public office. Although Ragan's case is a criminal case, not an eligibility case, his conviction stems from the information which he claimed made him an eligible candidate for public office.

Rather than looking to the extent of the punishment, the Illinois cases are built on the common law principle that "[a]n infamous crime at common law was an act, the commission of which was inconsistent with the commonly accepted principles of honesty and decency, or one which involves moral turpitude." ***Keenan v. McGuane***, 150 N.E.2d 168, 175 (Ill. 1958) (quoted source omitted). *See also* ***Symonds v. Gualano***, 240 N.E.2d 467, 468 (Ill. App. Ct. 1968); ***City of Kankakee v. Morris***, 467 N.E.2d 589, 592-93 (Ill. App. Ct. 1984).[13] We adopt this test for purposes of measuring whether a crime is infamous under Wisconsin law. Under this test, we conclude that felony theft is inconsistent with the commonly accepted principles of honesty and decency.

If we were ranking the severity of felonies in a vacuum, we perhaps might say that felony theft falls on the lower end of the scale. However, we deal here with the qualifications of a candidate to hold public office and the eligibility representations made by that candidate when seeking such office. Viewed in this context, the seriousness of such a conviction begins to take on greater significance.

The expectation of attaining or holding public office is a privilege, not a civil right. ***Morris***, 467 N.E.2d at 592. The law is more concerned with the public interest in good government and confidence in its public officers than a defendant's privilege in holding public office. ***Id***. A conviction for felony theft

[13] Ragan argues that these cases are inapposite because they involve conduct or offenses committed by the public officials after they were already in office. However, ***Symonds v. Gualano***, 240 N.E.2d 467, 470 (Ill. App. Ct. 1968), succinctly answers this argument: "The determinative question is not when the conviction takes place but whether the conviction is for an infamous crime."

destroys the public confidence in an elected official who carries that stigma. *See* ***id***. As such, Ragan was duty bound to reveal it on his declaration of candidacy.

Sufficiency of the Evidence

Finally, Ragan challenges the sufficiency of the evidence. Specifically, he contends that the State failed to prove the following elements of the offense under § 12.13(3)(a), STATS.: (1) that he actually "filed" a declaration of candidacy within the meaning of § 8.21, STATS.; (2) that the declaration of candidacy was false in a material respect; and (3) that he filed the declaration knowing that it was falsely made.

Before a reviewing court will reverse a jury verdict, there must be "such a complete failure of proof that the verdict must have been based on speculation." ***Nieuwendorp v. American Family Ins. Co.***, 191 Wis.2d 462, 472, 529 N.W.2d 594, 598 (1995). Therefore, we will sustain a jury verdict if there is any credible evidence to support the verdict, sufficient to remove the question from the realm of conjecture. ***Id***. Our consideration of the evidence must be done in the light most favorable to the verdict, and when more than one inference may be drawn from the evidence, we are bound to accept the inference drawn by the jury. ***Id.*** This is even more true where the verdict has the trial court's approval. ***Fehring v. Republic Ins. Co***., 118 Wis.2d 299, 305, 347 N.W.2d 595, 598 (1984), *overruled on other grounds by* ***DeChant v. Monarch Life Ins. Co.***, 200 Wis.2d 559, 547 N.W.2d 592 (1996).

Ragan's arguments that he did not "file" the declaration and that it was not false in a material respect rest on his contention that the declaration was

not "sworn to before any officer authorized to administer oaths" as required by § 8.21, STATS. In support, he contends that the evidence does not show that Debra Zerbst, the town clerk with whom Ragan filed the declaration, was authorized to administer oaths. We disagree. The evidence includes the declaration of candidacy form which was signed by Ragan and notarized by Zerbst. Section 887.01(1), STATS., provides that a notary, among others, is authorized to administer an oath. Absent any evidence to the contrary, we hold that this evidence demonstrates that Zerbst was authorized to administer an oath and her notary establishes that such occurred.

In addition, Zerbst testified that Ragan signed the declaration in her presence and filed it with her on January 3, 1994. On its face, the declaration fails to recite Ragan's prior conviction. And since we have already concluded that the felony theft conviction was for an infamous crime, we conclude that the declaration was false in a material respect pursuant to § 12.13(3)(a), STATS.

We hold that the filing and falsity elements were sufficiently proven.

As to the third element regarding Ragan's knowledge, the jury was presented with conflicting evidence and a credibility question. Ragan testified that although he was aware that he had been convicted of theft, he did not know that theft was a felony. The State presented documentation of Ragan's theft conviction which included the word "felonious." The State also raised doubts as to whether one could be on probation for three years, as Ragan was, without knowing the level of the conviction.

The verdict reflects that the jury chose to disbelieve Ragan's theory of defense. We respect that finding because the evidence supports it. We affirm the judgment of conviction and the order denying postconviction relief.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.