**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**September 17, 2008**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2007AP2141** **Cir. Ct. No. 2007CV1312**

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

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**TOWN OF BROOKFIELD,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DANIEL J. FOULIARD,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Waukesha County: LINDA M. VAN DE WATER, Judge. *Judgment affirmed.*

¶1 NEUBAUER, J.[1] Daniel J. Fouliard appeals pro se from a civil forfeiture conviction of operating a motor vehicle while under the influence of an intoxicant contrary to WIS. STAT. § 346.63(1)(a). Fouliard was convicted following a jury trial. Fouliard argues on appeal that the trial court erred in (1) denying his request for a jury instruction on the defense of entrapment, (2) excluding character evidence regarding the arresting officer, and (3) allowing the jury to consider a lesser offense of operating under the influence of an intoxicant instead of the original charge of operating while intoxicated. We reject Fouliard's arguments and affirm the forfeiture judgment.

¶2 In the early morning hours of April 19, 2006, Officer Scott Hibler of the Town of Brookfield police department stopped Fouliard on I-94 for a speeding violation. The stop resulted in Hibler issuing Fouliard a citation for operating while intoxicated. While the procedural history is not easily discerned from the record, it is undisputed that a court trial on this matter was held in the city of Waukesha municipal court[2] at which Fouliard was found guilty of OWI. Subsequent to that conviction, Fouliard filed an appeal with a request for a new trial before a six-person jury. The jury trial was scheduled for August 14, 2007.

¶3 On August 13, 2007, the court held a status hearing at which it ruled on several pretrial motions. A jury trial was held on August 14, 2007; however, a mistrial was declared due to an emergency involving one of the jurors. The jury

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] The parties submit without dispute that, due to recusals, Fouliard's case was moved from the Town of Brookfield to the city of Brookfield and finally to the city of Pewaukee municipal court. After Fouliard filed a judicial substitution request with the Pewaukee municipal court, his case was assigned to the city of Waukesha municipal court.

trial was rescheduled for September 5, 2007. Following that trial, the jury returned a unanimous verdict finding Fouliard guilty of operating a motor vehicle while under the influence of an intoxicant. Fouliard appeals.

¶4 Fouliard first argues that the trial court erred in denying his request for an entrapment instruction. Fouliard filed a brief in support of his motion for an entrapment instruction on September 4, 2007, one day prior to the commencement of his second trial date.[3] Fouliard's brief describes in detail numerous ways in which Hibler allegedly entrapped him by forcing him to change lanes to induce "drunk behavior" exaggerating or imagining smelling an odor of intoxicants despite weather reports indicating gusting winds that evening, and inducing him to fail field sobriety testing.

¶5 The Town of Brookfield argues that Fouliard waived his right to the entrapment instruction at his trial on September 5, 2007, and that in any event the entrapment defense is not applicable in this case. Because the record is unclear as to whether Fouliard waived his right to the entrapment instruction by failing to object during the jury instruction conference,[4] we address the issue on the merits.

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[3] The transcript of the status conference reflects Fouliard stating, "At this time the defense would like the motion in limine for an entrapment instruction and jury. Here's the brief." The prosecution informed the court that it had not seen the brief previously. The court allowed Fouliard to file the brief, stating, "You can file whatever you want. We'll rule on it, but at the last hour I'm not sure it's going to be coming in depending on what it is. I'll have to look at it and rule on it tomorrow morning." This should have all been submitted previously.

[4] Prior to the commencement of the rescheduled trial, the following exchange took place:

> The Court: Then there's also a motion and brief in support of jury instructions for entrapment in theory of defense and some other jury instructions. We can take those jury instructions up after the case at our conference. Are there any other motions pending by either party?

(continued)

¶6 A trial court "has broad discretion in deciding whether to give a particular jury instruction." ***State v. Fonte***, 2005 WI 77, ¶9, 281 Wis. 2d 654, 698 N.W.2d 594. The trial court "must exercise its discretion to 'fully and fairly

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> Mr. Fouliard: How do you rule on entrapment?
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> The Court: We aren't going to take up jury instructions until after the case and depending on what facts come in.
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> Mr. Fouliard: All right.

At the close of evidence, the circuit court stated on the record: "[W]e're going to excuse the jury so we can go over the jury instructions and then when we reconvene, we will do closing arguments and, then, jury instructions, and, then, the jury will be able to deliberate." During the jury instruction conference, Fouliard failed to raise the issue of the entrapment instruction even though the record reflects that the parties and the circuit court discussed several instructions and made changes.

WISCONSIN STAT. § 805.13(3) governs the jury instruction and verdict conference. It provides:

> At the close of the evidence and before arguments to the jury, the court shall conduct a conference with counsel outside the presence of the jury. At the conference, or at such earlier time as the court reasonably directs, counsel may file written motions that the court instruct the jury on the law, and submit verdict questions, as set forth in the motions. The court shall inform counsel on the record of its proposed action on the motions and of the instructions and verdict it proposes to submit. Counsel may object to the proposed instructions or verdict on the grounds of incompleteness or other error, stating the grounds for objection with particularity on the record. Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict.

Here, the circuit court went over each instruction "one by one" and asked for input by counsel. Fouliard contends that he "never got a chance to object to an entrapment instruction not being submitted to the Jury because the Judge never asked about it." Because we find no indication that the trial court informed Fouliard of its decision to deny his motion for an entrapment instruction pursuant to § 805.13, we will address Fouliard's contention that the trial court erred in refusing it.

inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence.'" ***Id.*** (citation omitted).

¶7 Entrapment is the inducement of one to commit a crime not contemplated by him or her for the mere purpose of instituting criminal prosecution against him or her. ***State v. Hochman***, 2 Wis. 2d 410, 413, 86 N.W.2d 446 (1957). WISCONSIN JI—CRIMINAL 780, the entrapment instruction, is triggered only when the jury concludes that the elements of the crime charged have been proved beyond a reasonable doubt, that there is a completed crime, including the intent to commit the crime. *See* ***State v. Saternus***, 127 Wis. 2d 460, 468-69, 381 N.W.2d 290 (1986). The essence of the defense of entrapment is a situation where the "evil intent" and the "criminal design" of the offense originate in the mind of the government agent, and the defendant would not have committed an offense of that character except for the urging of the agent. ***State v. Hilleshiem***, 172 Wis. 2d 1, 8, 492 N.W.2d 381 (Ct. App. 1992).

¶8 Fouliard's offense was operating while intoxicated. The evidence is undisputed that he had consumed alcoholic beverages and operated a vehicle prior to encountering Hibler. In order for the entrapment instruction to apply to his OWI offense, Fouliard would have to have presented evidence that Hibler induced him to drink alcohol and then operate a motor vehicle. For apparent reasons, Fouliard did not do so. As such, the entrapment instruction was not applicable and the trial court did not err in refusing to give it. ***Id.*** at 9 (A trial court is justified in declining to give an instruction on the defense of entrapment if it is not reasonably required by the evidence.).

¶9 It is worth noting that the jury heard much of the evidence underlying Fouliard's request for an entrapment instruction. During the trial,

Fouliard testified as to his version of the events surrounding his arrest—*i.e.*, feeling induced to change lanes; perceiving Hibler as "aggressive and angry"; that he was facing I-94 during the field sobriety testing causing him to fail the horizontal nystagmus gaze test; that the wind was blowing so forcibly that it was unlikely Hibler could have smelled intoxicants. He was also permitted to demonstrate his performance on the walk-and-turn test while testifying as to what he believed to be defects in its administration. In the end, the issue was one of credibility and whose version of the events was more plausible. Given the jury's finding of guilt, it is clear that the jury found Hibler to be more credible.

¶10 We next turn to Fouliard's contention that the trial court erred in excluding evidence which he believed pertained to Hibler's character[5] and thus was admissible under a variety of evidentiary statutes.[6] Prior to the initial trial on August 14, 2007, the court held a status hearing at which it granted the Town's motion to preclude the introduction of testimony relating to investigations of Hibler. Fouliard filed a response motion to introduce evidence "to attack the credibility of … Hibler." Based on its finding that Fouliard failed to produce adequate documentation at the motion hearing, the trial court granted the Town's motion to preclude it. When Fouliard later sought to introduce further documentation prior to the rescheduled trial, the trial court refused to reconsider its ruling, stating, "The motion to admit the police officer's conduct and all of the

[5] Fouliard's statement of the issues cites to additional pieces of evidence that were excluded, however, we agree with the Town that Fouliard waived the review of the exclusion of that evidence by failing to develop any argument pertaining to it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (We may decline to review issues that are inadequately briefed).

[6] Fouliard cites to WIS. STAT. §§ 906.08, 904.03, 904.04, 904.06, 904.05, 904.04(2).

materials you submitted with it. That was previously ruled on. It wasn't submitted at the time, and I ruled it can't come in, so we aren't going to hear that motion again."

¶11 Without addressing the propriety of the trial court's refusal to consider his motion due to insufficient supporting documentation, Fouliard cites to the two primary pieces of evidence he sought to admit and numerous evidentiary statutes in bullet point form before making the conclusory statement that the evidence was admissible at trial. While we acknowledge that Fouliard is pro se on appeal,[7] we nevertheless "cannot serve as both advocate and judge." ***State v.***

[7] Fouliard requests that we hold him to less stringent standards as a result of his pro se status. We note that we have in fact afforded him leniency on technical briefing requirements. While Fouliard's arguments as to the other issues on appeal were sufficiently developed, his briefing of this evidentiary issue fails to meet basic requirements. Our supreme court advised us on the treatment of pro se litigants in ***Waushara County v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992).

> *Pro se* appellants must satisfy all procedural requirements, unless those requirements are waived by the court. They are bound by the same rules that apply to attorneys on appeal. The right to self-representation is "[not] a license not to comply with relevant rules of procedural and substantive law." ***Farretta v. California***, 422 U.S. 806, 834 n.46 (1975). While some leniency may be allowed, neither a trial court nor a reviewing court has a duty to walk *pro se* litigants through the procedural requirements or to point them to the proper substantive law. As one commentary states:
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> Depending on what the court knows about a particular litigant's circumstances, almost any of the briefing requirements may be waived, except the basic requirements that the brief state the issues, provide the facts necessary to understand them, and present an argument on the issues.
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> ....

(continued)

***Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992). Therefore, because this issue is inadequately briefed, we decline to address it. *See* ***id***. (this court will not address issues on appeal that are inadequately briefed).

¶12 Finally, we reject Fouliard's contention that the trial court provided the jury with "a 'lesser offense instruction' of Operating Under the Influence of an Intoxicant—instead of the original charge of Operating While Intoxicated." Fouliard focuses on the addition of the words "under the influence" in the jury instruction, as opposed to simply "operating while intoxicated." However, the jury instruction for operating under the influence of an intoxicant addresses Fouliard's concerns and renders his argument futile. WISCONSIN JI—CRIMINAL 2663B expressly informs the jury:

> Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

¶13 Fouliard was cited for violating WIS. STAT. § 346.63, the jury was provided the instruction for § 346.63, and the jury found him guilty of violating § 346.63. We conclude that the trial court did not err in instructing the jury or excluding evidence. We affirm the judgment.

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> Although the court may make special concessions in certain pro se appeals, it cannot be said that pro se appellants have any advantage over appellants who are represented by counsel….
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> D. Walther, P. Grove, M. Heffernan, *Appellate Practice and Procedure in Wisconsin*, Ch. 11, sec. 11.9 (1986).

*By the Court.*—Judgment affirmed.

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