

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 24, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2009AP2464

Cir. Ct. No. 2009FO354

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

COUNTY OF JEFFERSON,

PLAINTIFF-RESPONDENT,

v.

JODI L. GROMOWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County:
ARNOLD SCHUMANN, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Jodi Gromowski appeals a judgment of conviction under WIS. STAT. § 125.07(1)(a) for selling an alcoholic drink to an underage person. I affirm.

Background

¶2 In January 2009, a nineteen-year-old woman, working as an agent for the Jefferson County sheriff's department, entered a tavern alone, sat down at the bar, and, after being approached by a bartender, ordered an alcoholic drink. The bartender, Jodi Gromowski, did not ask for identification or otherwise ask the agent her age. After the transaction was complete, Gromowski was issued a citation for violating WIS. STAT. § 125.07(1)(a)1., which states that “[n]o person may ... sell ... any alcohol beverages to any underage person not accompanied by his or her parent, guardian or spouse who has attained the legal drinking age.”

¶3 Gromowski pled not guilty and, at a bench trial, advanced an entrapment defense and a statutory defense under WIS. STAT. § 125.07(6). The circuit court found that Gromowski violated § 125.07(1)(a) and did not qualify for a defense, and it issued a judgment fining her a total of \$249, including costs. Gromowski appeals, contending that her two defenses were valid.

Discussion

¶4 Gromowski argues, first, that the defense of entrapment applies to her civil forfeiture offense and, second, that the circuit court erred when finding no entrapment. I need not reach the first issue because I conclude that, even if the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

entrapment defense applies to the civil forfeiture here, the circuit court did not err in finding no entrapment.

¶5 Gromowski concedes that, to succeed on entrapment, she must show that she was induced, which requires more than a mere opportunity to commit an offense.² See, e.g., *State v. Hilleshiem*, 172 Wis. 2d 1, 9, 492 N.W.2d 381 (Ct. App. 1992) (stating that “an opportunity to commit the crime does not by itself constitute entrapment”).

¶6 The facts that Gromowski points to, however, fail to show more than an opportunity to commit the offense. For example, Gromowski finds it significant that the underage agent was in the tavern illegally, but the fact remains that the agent’s presence merely created an opportunity for Gromowski. Gromowski also points to the police control over their selection of an agent and, therefore, over their agent’s appearance. However, this apparent assertion that the agent’s older appearance induced Gromowski to sell alcohol to her is not supported by the court’s finding about the agent’s appearance.³ In sum, I agree with the circuit court that there was no entrapment.

¶7 Gromowski next argues that the circuit court failed to properly apply the statutory defense under WIS. STAT. § 125.07(6). Specifically, Gromowski

² Elsewhere, Gromowski also suggests that a lower showing of inducement should apply to her violation because bartenders are “very susceptible to innocent inducement to commit the offense ... based on unlawful acts by the underage purchaser.” I do not find this argument persuasive.

³ During the agent’s testimony at trial, a photograph of the agent taken the night of Gromowski’s citation was offered and received into evidence. The court found that the agent did not look older than her age of nineteen years, and Gromowski fails to show that this finding was clearly erroneous.

argues that the court failed to adequately address certain circumstances that she contends are relevant to her defense, such as the appearance of the underage agent as described by Gromowski and her fellow bartenders and the notion that the agent's mere presence in the tavern misled Gromowski into thinking the agent was of legal age. I disagree.

¶8 As relevant here, WIS. STAT. § 125.07(6) states:

(6) DEFENSES. In determining whether or not a licensee or permittee has violated sub[[]]. (1)(a) ..., all relevant circumstances surrounding the presence of the underage person or the procuring, selling, dispensing or giving away of alcohol beverages *may* be considered, including any circumstance under pars. (a) to (d).

(Emphasis added.)⁴ Plainly, this provision's use of the word "may" grants the circuit court discretion whether to consider relevant surrounding circumstances when applying § 125.07(1)(a). Further, the statute grants the court discretion to

⁴ Paragraphs (a) to (d) refer to the following:

(a) That the purchaser falsely represented that he or she had attained the legal drinking age.

(b) That the appearance of the purchaser was such that an ordinary and prudent person would believe that the purchaser had attained the legal drinking age.

(c) That the sale was made in good faith and in reliance on the representation and appearance of the purchaser in the belief that the purchaser had attained the legal drinking age.

(d) That the underage person supported the representation under par. (a) with documentation that he or she had attained the legal drinking age.

WIS. STAT. § 125.07(6). The statute also provides that satisfaction of *all* of these elements is an absolute defense, but Gromowski does not argue on appeal that she qualifies for this absolute defense. See *City of Oshkosh v. Abitz*, 187 Wis. 2d 202, 206, 522 N.W.2d 258 (Ct. App. 1994) (recognizing "two lines of defense" in § 125.07(6)).

consider these relevant circumstances and “still find guilt.” *City of Oshkosh v. Abitz*, 187 Wis. 2d 202, 206, 522 N.W.2d 258 (Ct. App. 1994).

¶9 In reaching its conclusion, the circuit court considered the circumstance that nothing prevented Gromowski from asking the agent her age and that the agent did not falsely represent her age to Gromowski. In addition, the court found that the agent did not look older than nineteen. I agree with the circuit court that these are the relevant surrounding circumstances and that they do not demonstrate that Gromowski is entitled to the statutory defense. I therefore affirm.

By the Court.—Judgment affirmed.

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

