STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
Case No. 2022AP001622 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs. Eau Claire County
Case No. 20CF130

DAVID A. SCHULTZ,

Defendant-Appellant.

Appeal from a final order denying defendant-appellant's post-conviction motion on September 19, 2021, the Honorable Emily M. Long, Eau Claire County Circuit Judge Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Was the evidence was insufficient to prove who was the owner of the parking lot?

The trial court did not directly rule on this issue. It did rule on postconviction motions that it was sufficient for the evidence to show that a number of vehicles used the parking lot, when coupled with "inaction" by "any owner" of the lot to stop such traffic. (A. App. 006).

II. Did the jury instructions adequately state that the "highway" element of the offense required the prosecution to prove beyond a reasonable doubt that the owner of the parking lot was the Bull Pen Bar?

The trial court ruled on postconviction motions that the standard jury instruction which directed the jury to determine whether the parking lot was held open to the public was sufficient, regardless of ownership. (A. App. 007).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Appellant Schultz does not request oral argument because, consistent with Wis. Stat. (Rule) § 809.22(2)(b), the written arguments can fully develop the theories and legal authorities on each side so that oral argument would be of marginal value.

Publication is permitted under Wis. Stat. (Rule) § 809.23.

STATEMENT OF THE CASE

David Schultz was charged by criminal complaint with a Class G Felony offense for operating a motor vehicle while under the influence of an intoxicant on January 17, 2020, after previously being convicted of that offense on four prior dates. The complaint (R. 3) alleged that he operated his vehicle on private property that belonged to a local bar: "the parking lot of the Bull Pen Bar, located at 1522 Bellinger Street in the City and County of Eau Claire, Wisconsin."

Schultz waived a preliminary hearing on the offense on June 17, 2020. The criminal information was filed June 29, 2020, and charged both offenses, to which Schultz entered not guilty pleas on July 28, 2020.

A jury trial on May 3 and 4, 2021 resulted in a verdict of guilty. Schultz was sentenced on July 8, 2021, to two years initial confinement followed by four years

extended supervision (R. 66). Schultz's postconviction motion was timely filed and was denied in an oral ruling (R. 138) on September 19, 2021, and by written, signed order (R. 128) that same date.

STATEMENT OF FACTS

At the outset of trial, the prosecution commented that a jury instruction regarding the substantive offense would be needed "with regard to the term 'highway.'" (R. 79, Transcript of trial proceedings, May 3, 2021: 8). The prosecution saw a need to clarify the jury instruction because, as it stated, "the term highway is not defined in the standard instruction at all." Id. at 9.

During jury selection defense counsel telegraphed that she would be raising an issue of whether the State would be able to prove ownership of the parking lot and would be able to show that the lot was intended for public use:

> the case involves a parking lot. And I'm just wondering whether anybody feels that -- and that's going to be one of the elements of the case, well, part of one of the elements. I'm wondering whether anybody feels as though if there's a parking lot that's open air that -- that's going to be open to the public for anybody to use?

(R. 79: 79).

The discussion of a proper jury instruction resumed following jury selection, and the parties suggested to the Court that language from WIS JI-Criminal 2605 be used, and the Court stated it intended to cover the parking lot

ownership and owner's intended use issues by stating that the proof must show the incident occurred on premises "held open to the public for use of their motor vehicles." (Id. at 95-97). Thereafter, the preliminary jury instructions included that language. (Id. at 104).

The prosecution's opening statement referred to the location as "the parking lot right behind the bar," meaning the Bull Pen Bar. (Id. at 107).

The defense, however, offered greater detail to the location, announcing that the proof would show that the location was "a Royal Credit Union parking lot."

> A parking lot that was not open to the public because it was a Royal Credit Union parking lot for customers only. And it was 7:15 at night, after the bank was closed. The sign on the lot was very clear, customer parking only, violators will be ticketed and towed. And that is one of the first elements, part of one of the first elements that the state is going to have to prove to you in the next few days beyond a reasonable doubt, that it was in a parking lot that was held open to the public."

(Id. at. 118). "David Schultz, who was homeless at the time, was parked at the Royal Credit Union parking lot. . . ." (Id. at 119).

> Now the police will say that this was a private parking lot, but you -- that this was a public parking lot owned by the Bull Pen. But you will see that this was a parking lot owned by Royal Credit Union and had signs."

(Id. at 121). "[Schultz was] not actually committing a crime because he was in a private parking lot . . . ." (Id. at 125).

When trial testimony began, Eau Claire Police Officer Sanda testified that 1520 Bellinger Street was the location of the Bull Pen Bar, with a parking lot to its west, which was used by Bull Pen Bar customers (Id. at 130). Sanda was not allowed to opine, however, that the parking was held open to the public, because the Court sustained a defense objection. (Id. at 130-131). However, the Court allowed Sanda's testimony that, based on his police patrols of the area, he would see traffic coming and going at the lot, and the lot appeared to be open to the public. (Id. at 132).

As to ownership of the lot, Sanda testified that he had not spoken to someone either at the Bull Pen or the Royal Credit Union, and that he was unsure who actually owned the lot. (Id. at 151). Upon being shown a photo exhibit 53, depicting the credit union parking lot and "behind the Bull Pen Bar," he recognized a sign for the credit union, and in photo exhibit 54 he recognized a sign which stated: "RCU parking only" and "violators will be ticketed and towed at owner's expense," which if "properly posted" indicated the lot is "a private parking lot." (Id. 151-154). Sanda also testified that a photo exhibit 52, which showed the lot directly west of the Bull Pen Bar patio, showed an area further south of the area in the lot depicted by photo exhibit 54. (Id. at 162).

Officer Mikunda testified that he was aware that ownership of the parking lot had changed to the Mayo Hospital, but he was unaware of who owned the lot in January 2020. (Id. at 205-206).

When trial resumed the next day, the prosecution sought to arrange for testimony from the owner of the Bull Pen Bar (Craig Pingel) to testify that he had leased from the credit union two rows of the lot for his bar patrons to use. (R. 78, Transcript of trial proceedings, May 4, 2021: 5-6). But the prosecution was unable to secure his attendance. As an alternative to that testimony, the prosecution requested that the Court decide that fact issue of whether the premises were held open to the public. (Id. at 7). Later in the proceedings, the Court denied that request, stating that the issue was one of fact for the jury to decide. (Id. at 67).

When testimony resumed, the owner of the vehicle which defendant Schultz had backed into, testified that the lot in his experience had been used by Bull Pen customers and had been shared with the Royal Credit Union. (Id. at 14). Officer Mikunda testified further that in his routine night patrolling (but not specific to January 2020) he saw that the lot was "commonly used" for people at the Bull Pen Bar and not for the credit union, which had closed.

The Court instructed the jury that both charges required that the prosecution prove that defendant Schultz

was driving a motor vehicle on "a premises held out to the public for use of their motor vehicles." (Id. at 90, 91, 92). Following the jury's rendering of guilty verdicts, the defense moved for dismissal for lack of sufficient evidence: "[W]e would move for a judgment notwithstanding the verdict based on the lack of evidence by any actual person who owned the lot there that it was a public parking lot." (Id. at 139).

ARGUMENT

1. The evidence was insufficient to prove who was the owner of the private parking lot.

The complaint's allegation that the parking lot was owned by the Bell Pen Bar's ownership was not mere surplusage. Because of the location where the police found evidence of Schultz's vehicle, the prosecution had to meet certain proof requirements at trial. OWI offenses in Wisconsin are Chapter 346 offenses and are limited to driving or operating incidents that occur on "highways." Wis. Stat. § 346.02(1) so provides. That term, "highway," is then defined in Wis. Stat. § 340.01(22) to include generally all "public" roadways. Yet the definition of "highway" expressly excludes "private roads or driveways." Instead, those terms, according to Wis. Stat. § 340.01(46), in pertinent part, constitute "every way or place in private ownership and used for vehicular travel only by the owner and those having express or implied permission from the owner. . . ."

Accordingly, the allegations in the complaint set the table, so to speak, as to what proof would be required at trial, given the averments that Schultz's offenses occurred at 1522 Bellinger Street in a parking lot alleged to belong to the Bull Pen Bar. The evidence had to be sufficient to prove that the lot was owned by the Bull Pen Bar. Further, under Wis. Stat. § 340.01(46), even if the Bull Pen's, or specifically Craig Pingel's, ownership had been proven (which it had not), the prosecution had to prove that the owner of the bar expressly or impliedly intended to give permission for the public to park on the lot. Neither of those essential facts were proven.

Wisconsin statutes and case law determined how the prosecution needed, but neglected, to present its trial evidence. First, because the offense was alleged to having been committed "in relation to property," that is, a privately-owned parking lot owned by the Bull Pen Bar, the complaint had to follow the procedural requirement in Wis. Stat. § 971.32 that it allege who was the owner of the lot. That statute provides:

> **Ownership, how alleged.** In an indictment, information or complaint for a crime committed in relation to property, it shall be sufficient to state the name of any one of several co-owners, or of any officer or manager of any corporation, limited liability company or association owning the same.

Second, because different proof of ownership was not adduced at a preliminary hearing (because it had been waived), the prosecution's proof could not vary at trial

from the complaint's ownership allegation. The prosecution had to prove that the lot was owned by the Bull Pen Bar because Wis. Stat. § 971.33 imposed that ownership proof requirement:

> **971.33 Possession of property, what sufficient.** In the prosecution of a crime committed upon or in relation to or in any way affecting real property . . . , *it is sufficient if it is proved that at the time the crime was committed either the actual or constructive possession* or the general or special property in any part of such property *was in the person alleged to be the owner thereof*.

(Emphasis added.)

Third, *City of Kenosha v. Phillips*, 142 Wis.2d 549, 557, 419 N.W.2d 236, 239 (1988), indicates that proof as to ownership and the owner's intent becomes a major issue when a vehicle is operated in a non-publicly-owned location. The burden of proof with respect to the intent of the private-property-owner's intent is on the prosecution, the proponent of the § 340.01(46)'s applicability.

To meet the pleading and proof requirements under Wis. Stats. §§ 971.32 and 971.33, and where, as *City of Kenosha v. Phillips* states, "it is the intent of the owner of premises that is important," the prosecution needed to show who or what entity owned the lot location at issue and whether that owner intended that location to be generally accessible to the public, or that more limited access was intended.[1] The proof was a mess and confusing

[1] It bears repeating that the prosecution's complaint alleged that the lot location was owned by the Bull Pen Bar.

on these points because no witness could testify as to who owned the lot, and no owner testified.. While the prosecution called police officers and the other vehicle's owner who testified that they observed many vehicles regularly using the lot, the prosecution's witnesses also conceded that they were uncertain as to who owned the lot (possibly the Bull Pen Bar's owner, or RCU). As to whether RCU's signage restrictions limited who could use the lot, the police witnesses were uncertain whether that signage covered the lot location behind Bull Pen Bar or spaces further away.

All of this lack of evidence, to identify ownership and the owner's intent for usage of the lot, undercut the prosecution's case, and the prosecution's case. The prosecution relied upon *City of Kenosha v. Phillips* and *City of LaCrosse v. Richling*, 178 Wis.2d 856, 505 N.W.2d 448 (Ct. App. 1993) to argue that the proof was sufficient because it mirrored the proof in those cases. But that is not correct. Those cases instead support Schultz.

The proof in the former case was that American Motors Corporation (AMC) owned the lot in question. Further, the proof of signage at the lot showed that AMC had restricted access (barring the general public's use) to its employees. The proof in Schultz's case was that RCU signage at the lot similarly restricted access to its customers. And the prosecution's offer of proof actually

showed that Craig Pingel was not the owner, but only a lessee with RCU.

Likewise, the proof about parking lot access in the *Richling* case came from Norbert Schmidt, the parking lot's owner, as well as Schmidty's Bar & Restaurant. In contrast, no such ownership evidence was presented in this case.

In its "motion to amend witness list" (R.31) the prosecution essentially admitted the defect in its proof, where it stated that the Bull Pen owner had ownership rights through a lease arrangement:

> Mr. Pingel, as the owner of the Bull Pen Bar, will testify that on January 17, 2020, he leased two rows of the parking lot immediately behind his bar for his patrons to use for parking while visiting his business. He will testify about the agreement he had with Royal Credit Union that after 6:00 PM, his customers were able to use the entire parking lot without fear of being towed. This parking lot was a premises held open to the public for his patrons to use because there is no parking on either Bellinger Street (directly in front or East of the business) or on Madison Street (directly to the North of the business.

But the prosecution adduced no such testimony. Further in the "STATE'S REQUESTED MODIFICATION TO JURY INSTRUCTIONS," (R. 32), the prosecution represented facts to the Court, which it conceded would be necessary to its case, which were not proven:

> 2. The parking lot at the Bull Pen Bar is open to the public. * * *

> 4. In City of Kenosha v. Phillips, 142 Wis.2d 549 (1988), the supreme court considered whether a parking lot was "held out to the public" for purposes of Wis. Stats. §346.61. The court held that *there must be "proof that it was the intent of the owner* to allow the premises to be used by the public." Phillips, 142 Wis.2d at 554. The burden to present this proof is on the prosecution. Id. at 558. However, this burden can be satisfied by any of the conventional forms of proof – direct, demonstrative, testimonial, circumstantial or judicial notice. Id. The proof can consist of action or inaction. Id.
>
> 5. In City of LaCrosse v. Richling, 178 Wis.2d 856 (Ct. App. 1993) the court developed a common sense test for the application of Wis. Stats. §346.61. The appropriate test is whether, on any given day, potentially any resident of the community with a driver's license and access to a motor vehicle could use the premises in an authorized manner. See Id. *In other words, the owner of the premises must have intended the area to be open to the public*. Phillips, 142 Wis.2d at 554.

(Emphasis added.)

The trial court, in its postconviction motion ruling, cited trial facts that suggesed the parking lot location was open either to Bull Pen Bar patrons or to RCU (i.e., Royal Credit Union) customers. The court's ruling was based on a shaky foundation: that either the bar or the credit union may have owned the lot location in question. However, one thing is certain: no witness testified that one or the other entity was owner of the location where Schultz had parked.

> *II. The jury instructions did not adequately state that the "highway" element of the offense required the prosecution to prove beyond a reasonable doubt that the owner of the parking lot was the Bull Pen Bar.*

Schultz submits that the Wisconsin Jury Instruction Committee's recommended instruction, WIS JI-CRIMINAL 2605, did not consider cases where, more specifically, the prosecution alleged the specific parking lot's ownership. In those cases, it should be the prosecution's burden to prove, consistent with Wis. Stat. § 340.01(46), that the premises did not constitute a "place in private ownership and used for vehicular travel only by the owner and those having express or implied permission from the owner." In other words, conversely stated, where private ownership is alleged, as it must be Wis. Stat. § 971.32, the prosecution had the burden to show that the owner gave express or implied permission for general public use of the lot, rather than limited or restricted permission to park to a limited number of associated parkers.

First, the instructions committee to WIS JI-Criminal 2600 and 2605 gave no consideration to situations, such as this, where the charging document specifically identifies the lot's owner. Indeed, it appears that the Wisconsin jury instructions committee has not looked at these standard instructions since February 2011, and it has not considered the issue.

Second, because the governing statute so clearly excepts certain privately owned premises for OWI coverage, depending on the owner's intent**,** a specific instruction

becomes necessary where the owner is identified, and that owner's intent is placed in dispute. Here, that dispute arose because of the conflicts in the evidence among the prosecution's own witnesses as to just who the lot owner was. Three entities were cited as possible owners– the Bull Pen Bar, the Royal Credit Union, and the Mayo Hospital. No witness could claim that it appeared from the lot usage alone that just one of the three, and not the others, was the owner and that such owner allowed general public parking.

The absence of an instruction to this subject led to the real controversy not being tried. Defense counsel made it clear from the outset, however, that this was a main issue of controversy. In such circumstances, Wisconsin courts allow this issue to be raised, litigated, and decided despite the lack of a defense objection or submission of a proper instruction. See, e.g., *State v. Hicks*, 202 Wis. 2d 150, 159-60, 549 N.W.2d 435 (1996); *State v. Harp*, 161 Wis. 2d 773, 469 N.W.2d 210 (1991). More recently, the Court in *State v. Perkins*, 2001 WI 46, 243 Wis. 2d 141, 626 N.W.2d 762 decided such an instruction error required reversal. Perkins waived his right to object to the use of a jury instruction by failing to object at the jury instruction conference, but he claimed that discretionary reversal was warranted under Wis. Stat. § 751.06. The Supreme Court agreed, concluding that the jury instruction there failed to define what would constitute a "threat[] to cause bodily harm," and that as a

result, Perkins was entitled to a new trial because the real controversy was not fully tried.

The Court concluded that the real controversy was not fully tried because the jury instruction gave an incomplete statement of the law. Here, the instruction modelled after WIS JI-Criminal 2605 gave an incomplete statement of the law in light of the exception stated in Wis. Stat. § 340.01(46), which in pertinent part states, that the premises do not constitute a "place in private ownership and used for vehicular travel only by the owner and those having express or implied permission from the owner." The jury was never advised of this exception to the definition of "highway;" and the owner's intent was never brought forth for the jury to determine.

The legislature has imposed a more stringent test for determining whether a defendant violates the drunk driving statute, when that driving occurs on non-public land. Under Wis. Stat. § 340.01(46) the legislature has excluded impaired driving incidents that occur on certain private lands by stating, in pertinent part, that those types of locations cover "every way or place in private ownership and used for vehicular travel only by the owner and those having express or implied permission from the owner. . . ."

The case was decided based on a fatally incomplete statement of the relevant law.

CONCLUSION

For the foregoing reasons, David Schultz, by counsel, respectfully requests that his conviction be vacated with directions that the case be dismissed due to insufficient evidence to convict, or alternatively, that his conviction be reversed and a new trial granted because of defects in the jury instructions.

Dated this 11th day of January 2023.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of the brief is 4,137 words.

Dated this 11th day of January 2023.

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CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 11th day of January 2023.

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