R. STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2022AP1622-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID A. SCHULTZ,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE EAU CLAIRE COUNTY CIRCUIT COURT, THE HONORABLE EMILY M. LONG, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

On a snowy evening in January of 2020, a drunken David Schultz left the Bull Pen Bar in Eau Claire and backed his Chevy Tahoe into a truck parked directly behind him. Unfortunately for Schultz, the owner of the truck was leaving the Bull Pen around the same time and saw the collision happen. Schultz tried to speed away but succeeded only in spinning his tires before the owner of the truck caught up and insisted that he stop. Schultz begged the truck's owner not to call the police, but call the police he did. After the police arrived and investigated the scene, they arrested Schultz for operating while intoxicated.

Schultz took his case to trial, where part of his theory was that the parking lot where he had operated the Tahoe was closed to the public, and therefore not a "highway" within the meaning of the State's OWI statutes. The jury, apparently not seeing things Schultz's way, found Schultz guilty of his fifth OWI offense.

Schultz now appeals that conviction, arguing that the State's evidence at trial was insufficient to establish ownership of the parking lot where he operated the Tahoe. He further argues that the jury was inadequately instructed on what constitutes a "highway." He is wrong on both counts. His entire position is based on the legally incorrect theory that the State needed to prove ownership of the parking lot. It did not. Rather, the State needed to present evidence that the parking lot was held out for public use, which it did. The jury's verdict is entitled to great deference and should remain intact. Moreover, the jury instruction correctly stated the relevant provisions of the OWI statute. Schultz's arguments to the contrary are unavailing. This Court should affirm.

ISSUES PRESENTED

1. Did the State present sufficient evidence that Schultz operated while intoxicated?

The circuit court concluded that there was sufficient evidence to sustain the jury's guilty verdict.

This Court should affirm.

2. Did the jury instructions adequately state the law with regard to the operating while intoxicated offense?

The circuit court concluded that the jury instructions were proper because they sufficiently conveyed the correct legal standard.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. This Court can resolve this case by applying settled legal principles to the facts, which are fully explained in the parties' briefs.

STATEMENT OF THE CASE

According to the criminal complaint, on the evening of January 17, 2020, around 7:15 p.m., Eau Claire Police Officer Matthew Sanda responded to a call of a vehicle collision at the Bull Pen Bar in Eau Claire. (R. 3:1.) Upon arriving at the scene, Officer Sanda saw a red Chevy Tahoe with fresh tire tracks in the snow behind it, indicating that it had recently been driven. (R. 3:1.) The Tahoe was running, and its lights were on. (R. 3:1.) The tire tracks suggested that the Tahoe's tires had spun out at some point. (R. 3:2.)

Two men approached Officer Sanda from near the patio of the bar: M.M., and the Defendant-Appellant, David A. Schultz. (R. 3:2.) Officer Sanda spoke with Schultz

first and quickly observed multiple indicia that Schultz was drunk. (R. 3:2.) Eau Claire Police Officer David Mikunda arrived on the scene and took over the interview of Schultz. (R. 3:2.) Officer Sanda went to speak with M.M. (R. 3:2.)

M.M. reported that he had been walking out of the Bull Pen when he saw the Tahoe backing up. (R. 3:2.) M.M. watched as the Tahoe backed into the front of his truck, then pulled forward, spinning its tires as if to make a quick escape. (R. 3:2.) He ran up to the Tahoe to stop it, and Schultz got out. (R. 3:2.) Schultz told M.M. that he had insurance and registration and implored M.M. not to call the police. (R. 3:2.)

Meanwhile, Officer Mikunda took Schultz to the police precinct to perform field sobriety tests due to the weather. (R. 3:2.) Schultz performed poorly on the tests, and a preliminary breath test indicated Schultz's blood alcohol content to be .211 g/100mL. (R. 3:2–3.) Officer Mikunda placed Schultz under arrest and took him to a nearby hospital for a blood draw. (R. 3:3.) That test showed Schultz's blood alcohol content to be .224 g/100mL. (R. 56:2.)

Based on the blood test results and Schultz's history of OWI's, the State charged him with one count of operating while intoxicated as a fifth offense contrary to Wis. Stat. § 346.63(1)(a) and one count of operating with a prohibited alcohol concentration as a fifth offense contrary to Wis. Stat. § 346.63(1)(b). (R. 13:1.) The case proceeded to trial, which took place on May 3rd and 4th of 2021. (R. 78; 79.)

At trial, the State called four witnesses: Officer Sanda, Officer Mikunda, M.M., and Michelle Gee, the controlled substance analyst who tested Schultz's blood sample for alcohol. (R. 78:2; 79:2, 244–47.) Officer Sanda, Officer Mikunda, and M.M. testified consistent with the criminal complaint. (R. 78:13–23, 45–55; 79:128–50, 162–63, 166–94.) In addition, Officer Sanda testified about the parking lot where the accident took place, noting that he had seen

vehicles parked in the lot and traffic coming and going. (R. 79:131–32.) Based on these observations, Officer Sanda testified, the lot appeared to be open to the public. (R. 79:132.) Officer Mikunda also testified about the parking lot, its location in relation to the Bull Pen and the Royal Credit Union, and parking enforcement in the lot. (R. 79:207–09.) M.M. testified that there was parking available in the lot shared with Royal Credit Union directly behind the Bull Pen. (R. 78:14.)

Schultz called no witnesses and elected not to testify. (R. 78:74.) At the jury instruction conference following the close of evidence, the parties agreed that the jury would be instructed on OWI offenses occurring on "premises held out to the public." (R. 78:77.) Accordingly, the court instructed the jury that "Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a premises held out to the public for use of their motor vehicles while under the influence of an intoxicant."[1] (R. 78:90.)

Following deliberations, the jury found Schultz guilty of both counts as charged. (R. 78:133.) On July 8, 2021, the circuit court sentenced Schultz to two years of initial confinement and four years of extended supervision. (R. 77:31.)[2]

On May 4, 2022, Schultz filed a motion for postconviction relief. (R. 98.) In the motion, Schultz argued that the State needed to—and failed to—prove the ownership of the parking lot where the accident occurred, as well as whether the owner's intent was that the lot be open to the public. (R. 98:6.) Schultz further argued that the jury

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[1] This language matches the pattern jury instruction for "premises other than highways." *See* Wis. JI–Criminal 2605 (2011).

[2] The circuit court "merged" the charges, effectively resulting in dismissal of the PAC charge, pursuant to Wis. Stat. § 346.63(1)(c). (R. 78:140.)

instructions were insufficient because of a lack of definition of the term "public highway" in them. (R. 98:7.) After a response by the State, the circuit court denied Schultz's motion, concluding both "that there was sufficient evidence to sustain the jury verdict, and also that the jury instruction was proper and that it sufficiently conveyed the appropriate legal standard." (R. 138:3.)

Schultz now appeals.

STANDARDS OF REVIEW

When "determining whether the evidence was sufficient to support a conviction," this Court "may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Hayes*, 2004 WI 80, ¶ 56, 273 Wis. 2d 1, 681 N.W.2d 203 (quoting *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)).

"A [trial] court has broad discretion when instructing a jury." *Nommensen v. American Cont'l Ins. Co.*, 2001 WI 112, ¶ 50, 246 Wis. 2d 132, 629 N.W.2d 301. "If the overall meaning communicated by the instructions was a correct statement of the law, no grounds for reversal exist." *State v. Hubbard*, 2008 WI 92, ¶ 27, 313 Wis. 2d 1, 752 N.W.2d 839 (citation omitted).

ARGUMENT

I. The State presented sufficient evidence of Schultz's guilt of operating while intoxicated.

A. An appellate court's review of a jury verdict is highly deferential.

For a criminal conviction to satisfy due process, the State must prove each essential element of a charged crime

beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 324 (1979); *Poellinger*, 153 Wis. 2d at 501. On review of a "sufficiency" challenge, the "appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *Poellinger*, 153 Wis. 2d at 507. Furthermore, "[i]f any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt . . . ." *Id.*

"Although the trier of fact must be convinced that the evidence . . . . is sufficiently strong to exclude every reasonable hypothesis of the defendant's innocence," this "is *not* the test on appeal." *Poellinger*, 153 Wis. 2d at 503. (emphasis added). "[A]n appellate court need not concern itself in any way with evidence which might support other theories of the crime. An appellate court need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence to sustain the verdict rendered." *Id.* at 507–08.

B. The jury reasonably determined that Schultz had operated his vehicle in an area held out to the public for the use of motor vehicles.

Schultz contends that the State failed to present evidence relating to the ownership of the parking lot where he drove drunk. (Schultz's Br. 10–15.) This was fatal to the State's case, Schultz argues, because Wisconsin's OWI statute applies only on "highways" as defined in Wis. Stat. § 340.01(22). (Schultz's Br. 10.) Schultz fundamentally misunderstands Wisconsin's OWI statutes.

Chapter 346 of the Wisconsin Statutes is entitled "Rules of the Road." Subchapter X, sections 346.61—346.657, governs "Reckless and Drunken Driving," and sets out Wisconsin's OWI scheme. Wisconsin Stat. § 346.61 describes where OWI is forbidden, saying that in addition to applying on highways, the OWI statutes are in effect "upon all premises held out to the public for use of their motor vehicles . . . , *whether such premises are publicly or privately owned* . . . ." Wis. Stat. § 346.61. In other words, Wisconsin's OWI law does not care who owns a particular property, it cares about the nature of that property and whether it is available for public use.

Schultz's entire argument is premised on a misinterpretation of the governing law. He cites one of the first sections of Chapter 346 and quotes only half of it. In full, Schultz's cited authority—Wis. Stat. § 346.02(1)—says that Chapter 346 applies "exclusively upon highways *except as otherwise expressly provided in this chapter*." As shown above, section 346.61 is not limited to highways.

Compounding this error, Schultz cites the inapposite Wis. Stat. §§ 971.32 and 971.33 and contends that those provisions required the State to establish ownership of the parking lot because his OWI offense occurred "in relation to property." (Schultz's Br. 11—12.) But these provisions are plainly inapplicable because an OWI is not an offense that occurs "in relation to property." The term is not used often in Wisconsin cases, but the first appearance seems to be a case involving theft of timber in 1898. *See Golonbieski v. State*, 101 Wis. 333, 336, 77 N.W. 189 (1898). There, when discussing the burden of proof related to the theft of timber, the Wisconsin Supreme Court held that it was sufficient to show that the timber belonged to someone other than the defendant. *Id.* The language in Wis. Stat. § 971.32 about offenses occurring "in relation to property" is therefore clearly about theft and related offenses. The context of the statute confirms this

interpretation. Wisconsin Stat. § 971.33 discusses crimes "committed by stealing, damaging or fraudulently receiving or concealing personal property." Wisconsin Stat. § 971.34 discusses the "intent to defraud." And Wis. Stat. § 971.36 involves pleadings and evidence in theft cases.

Thus, contrary to Schultz's assertion, the State did not need to show who owned the parking lot at trial. Rather, the State only needed to show that the parking lot was "held out to the public for use of their motor vehicles." Wis. Stat. § 346.61.

It did.

The State presented witness testimony about the nature of the parking lot where the collision occurred. This included testimony from Officer Sanda, who testified that he had seen vehicles parked in the lot and traffic coming and going while he served in the district where the Bull Pen is located, and that based on his observations, the lot appeared to be open to the public. (R. 79:131–32.) Officer Mikunda also testified about the parking lot and its proximity to the Bull Pen. (R. 79:207–09.) And M.M., the man whose truck Schultz hit, testified that there was parking available in the lot shared with Royal Credit Union directly behind the Bull Pen. (R. 78:14.) This testimony, in conjunction, was sufficient for the jury to conclude that the parking lot directly behind the Bull Pen was available to Bull Pen patrons and thus held out for public use.

Schultz cites *City of Kenosha v. Phillips*, 142 Wis. 2d 549, 419 N.W.2d 236 (1988), for the premise that a defendant cannot be convicted of an OWI in a privately owned parking lot. (Schultz's Br. 12–13.) In *Phillips*, the Wisconsin Supreme Court considered whether an OWI could occur in the employee parking lot of American Motors Corporation (AMC), which was restricted to use by AMC employees at all times. *Id.* at 552–53. The court concluded that the AMC parking lot

was not "held out to the public" because it was for the use of AMC's employees only—a "defined, limited portion of the citizenry" rather than the public at large. *Id.* at 557.[3]

However, in *City of La Crosse v. Richling*, 178 Wis. 2d 856, 505 N.W.2d 448 (Ct. App. 1993), this Court concluded that *Phillips* did not control in a situation where the defendant was charged with an OWI for conduct occurring in the privately owned parking lot of a bar. *Id.* at 859–60. This Court stated, "it is not necessary that a business establishment's customers form a representative cross section of a city or town's population for them to be considered the 'public' within sec. 346.61, Stats. Nor is it necessary that some minimum percentage of the city's population patronize the business." *Id.* at 860. This Court continued by stating that "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 parking lot in an authorized manner." *Id.*

This case is far more like *Richling* than *Phillips*. Even assuming that the portion of the parking lot where Schultz drove the Tahoe was privately owned and designated for the use of credit union customers, the parking lot would still be considered "held out to the public" because any motorist with a driver's license and a vehicle "could use the parking lot in an authorized manner" by parking in the lot and patronizing the credit union. *See id.*

Schultz also suggests that the mention of the parking lot's ownership in the criminal complaint and the State's attempt to call the owner of the Bull Pen to testify about the ownership and leasing of the lot somehow established the ownership of the lot as an element of the offense of OWI.

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[3] Wisconsin Stat. § 346.61 was amended after *Phillips* to include "all premises provided by employers to employees for the use of their motor vehicles." *See* 1995 Wis. Act 127, § 1.

(Schultz's Br. 14.) They did not. The elements of OWI are set by statute; the fact that the prosecution may have sought additional testimony about the lot being held open to the public by the owner or lessee of the lot or discussed certain facts in the criminal complaint did not make that testimony or those facts *necessary* to sustain a conviction.

Because the OWI statutes apply to parking lots held out for public use, and because Schultz's OWI took place in such a parking lot, the only question in this appeal is whether there was sufficient evidence of that fact. There was. This Court should affirm.

II. The circuit court properly instructed the jury on the elements of operating while intoxicated.

A. Circuit courts have broad discretion in instructing juries.

"A circuit court properly exercises its discretion when it fully and fairly informs the jury of the law that applies to the charges for which a defendant is tried." *State v. Ferguson*, 2009 WI 50, ¶ 9, 317 Wis. 2d 586, 767 N.W.2d 187. "The purpose of a jury instruction is to fully and fairly inform the jury of a rule or principle of law applicable to a particular case." *Hubbard*, 313 Wis. 2d 1, ¶ 26 (quoting *Nommensen*, 246 Wis. 2d 132, ¶ 36).

In determining whether a jury instruction accurately stated the law, this Court must "review the jury instructions as a whole to determine whether the overall meaning communicated by the instructions was a correct statement of the law." *State v. Langlois*, 2018 WI 73, ¶ 38, 382 Wis. 2d 414, 913 N.W.2d 812 (quoting *Dakter v. Cavallino*, 2015 WI 67, ¶ 32, 363 Wis. 2d 738, 866 N.W.2d 656); *see also State v. Neumann*, 2013 WI 58, ¶ 139, 348 Wis. 2d 455, 832 N.W.2d 560 (Appellate courts view "jury instructions in light of the proceedings as a whole and do not review a single instruction

in isolation."). "If the jury instructions did not accurately state the law, then the circuit court erroneously exercised its discretion." *State v. McKellips*, 2016 WI 51, ¶ 30, 369 Wis. 2d 437, 881 N.W.2d 258.

"Although they are not infallible, [this Court] generally consider[s] the pattern instructions 'persuasive' on the points of law they state." *In Interest of D.P.*, 170 Wis. 2d 313, 332 n.7, 488 N.W.2d 133 (Ct. App. 1992) (citation omitted).

B. Schultz forfeited any claim that the jury instruction should have been different by failing to raise the issue at trial.

The Wisconsin Supreme Court has reiterated that, in a criminal case, "[f]ailure to contemporaneously object to jury instructions results in forfeiting review of the jury instructions." *McKellips*, 369 Wis. 2d 437, ¶ 47; *State v. Trammell*, 2019 WI 59, ¶ 24, 387 Wis. 2d 156, 928 N.W.2d 564. This rule applies regardless of whether the complained-of error is an affirmative misstatement or an omission. *See State v. Cockrell*, 2007 WI App 217, ¶ 36, 306 Wis. 2d 52, 741 N.W.2d 267 (holding that the defendant forfeited his right to challenge the omission of a phrase from the jury instructions by failing to object).

"The purpose of the rule is to give the opposing party and the circuit court an opportunity to correct any error." *McKellips*, 369 Wis. 2d 437, ¶ 47. "This also helps preserve jury verdicts and conserve judicial resources." *Id.* Additionally, "requiring parties to raise issues at the trial court level encourages diligent preparation and litigation, and discourages parties from 'build[ing] in an error to ensure access to the appellate court.'" *State v. Saunders*, 2011 WI App 156, ¶ 30, 338 Wis. 2d 160, 807 N.W.2d 679 (citation omitted).

Furthermore, any objections to alleged errors in the proposed jury instructions must be made at the jury instructions conference. Wis. Stat. § 805.13(3) (made

applicable to criminal proceedings through Wis. Stat. § 972.11(1)). "Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict."[4] Wis. Stat. § 805.13(3). Indeed, "the court of appeals has no power to reach an unobjected-to jury instruction because the court of appeals lacks a discretionary power of review." *Trammell*, 387 Wis. 2d 156, ¶ 25.

At the jury instruction conference, the court read the jury instruction at issue here: "on page 2, we have operate, and that was what we wanted. And then the verbiage of, 'the premises held out to the public,' is what we wanted as well; correct?" (R. 78:77.) The prosecutor replied, "Correct." (R. 78:77.) Defense counsel replied, "Correct." (R. 78:77.)

The law is clear: Schultz's acceptance of the jury instruction at the conference means that he forfeited review of the jury instruction issue on appeal. Wis. Stat. § 805.13(3). This Court lacks the power to review it now. *Trammell*, 387 Wis. 2d 156, ¶ 25. That, alone, is enough to warrant affirmance.

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[4] Although the statute talks about "waiver" of the issue, the more accurate phrasing for the failure to object at the instruction conference is "forfeiture." *See State v. Ndina*, 2009 WI 21, ¶ 29, 315 Wis. 2d 653, 761 N.W.2d 612 (explaining the distinct legal concepts embodied by the terms "forfeiture" and "waiver"); *see also State v. McKellips*, 2016 WI 51, ¶ 47, 369 Wis. 2d 437, 881 N.W.2d 258 (referring to forfeiture, rather than waiver, of review). Regardless of the terminology, however, the effect of the statute is the same—a party who fails to object to a jury instruction (or lack thereof) at the conference is precluded from challenging it later.

C. The circuit court properly instructed the jury that Schultz could commit the offense of operating while intoxicated "on a premises held out to the public for use of their motor vehicles."

Forfeiture aside, Schultz's misunderstanding of Wisconsin's OWI law bleeds from his first issue presented into his second. He claims that the circuit court erroneously instructed the jury, but that claim is based on his incorrect statements about what the State had to prove in order to establish that Schultz was guilty of OWI. Here again, Schultz claims that the OWI statute applies only on "highways" as defined in Wis. Stat. § 340.01(22). (Schultz's Br. 10.) He further argues that "[u]nder Wis. Stat. § 340.01(46) the legislature has excluded impaired driving incidents that occur on certain private lands . . . ." (Schultz's Br. 18.) This is simply not true. As explained above, Wisconsin's OWI laws apply on premises held out for the public use of their motor vehicles *in addition to* highways. Wis. Stat. § 346.61. Wisconsin Stat. § 346.61 controls, not Section 340.01.

Given that legal setup, it is clear that the jury instruction given in Schultz's trial was proper. The instruction stated, in pertinent part, that the State had to prove that Schultz "operate[d] a motor vehicle on a premises held out to the public for use of their motor vehicles." (R. 37:2.) This language comes directly from Wis. Stat. § 346.61 and matches the language contained in the pattern jury instruction. *See* Wis. JI–Criminal 2605 (2011). The instruction was a correct statement of the law actually at issue in the case, and therefore, it was proper. *See Langlois*, 382 Wis. 2d 414, ¶ 38. Schultz's argument, based in Wis. Stat. §§ 340.01(22), 340.01(46), and 346.02(1), is unavailing.

Finally, Schultz argues that the real controversy was not fully tried because of the perceived error in the jury instruction. (Schultz's Br. 17–18.) The State understands this

argument to be an attempt to overcome the requirement that a defendant raise issues with the jury instructions at the instruction conference or they are forfeited. *See Trammell*, 387 Wis. 2d 156, ¶ 25. The State does not understand Schultz to be raising a separate argument for discretionary reversal under Wis. Stat. § 752.35—he does not cite Wis. Stat. § 752.35 in his brief (although he does cite Wis. Stat. § 751.06, the Wisconsin Supreme Court's discretionary reversal statute). Regardless, the real controversy *was* fully tried. The question was whether Schultz operated a motor vehicle while intoxicated on a premises held out for public use. The jury found that he did. This Court should affirm.

CONCLUSION

For the reasons discussed, this Court should affirm Schultz's conviction.

Dated this 30th day of March 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,715 words.

Dated this 30th day of March 2023.

Electronically signed by:

John A. Blimling
JOHN A. BLIMLING
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 30th day of March 2023.

Electronically signed by:

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