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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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

1. The evidence was insufficient to prove just what the alleged private parking lot owner's intent was regarding public use of the lot.

The obvious strategy of the State's response brief (particularly at 12-13) was to ignore the significance of the Wisconsin Supreme Court's holding in *City of Kenosha v. Phillips*, 142 Wis.2d 549, 557, 419 N.W.2d 236, 239 (1988). The State attempts to misdirect that decision's importance by arguing that the Court was focused solely on the factual setting of whether the public, or private employees of American Motors Corporation, used the parking lot. That was not the Court's focus.

Instead, the Wisconsin Supreme Court made the significance of the case (where a defendant is charged with driving in a parking lot) abundantly clear: "[T]here must be proof that it was the intent of the owner to allow the premises to be used by the public. In the absence of any proof to show that intent, the charge against Phillips was properly dismissed."

Accordingly, how the parking lot is *used* is not the determinative issue to be decided at trial; rather, the determinative issue is a question of owner's intent: was it

the owner's intent that the lot be held open for public use, or for more restricted private use? In Schultz' case, the complaint alleged that Schultz's offenses occurred in a parking lot allegedly owned by the Bull Pen Bar. The evidence had to be sufficient to prove both that the lot was owned by the Bull Pen Bar (just as the proof in *Phillips* showed that AMC owned the lot in question) and, further, that the Bull Pen or its owner expressly or impliedly intended that the public park in the lot (which was disproved in *Phillips* because of the restrictive signage).

The State's reponse brief avoids altogether any discussion of the Supreme Court's declaration in *Phillips* that, "it is the intent of the owner of premises that is important." *Phillips,* 142 Wis.2d at 557. 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 Royal Credit Union). 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 the Bull Pen Bar or spaces further away.

All of this lack of evidence, to identify the ownership and the owner's intent for usage of the lot, undercut the prosecution's claim. Indeed, the only evidence in Schultz's

case about an owner's intent was presented by the defense. Officer 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 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, also showed an area further south of the area in the lot depicted by photo exhibit 54. (Id. at 162). The State never countered or overcame the defense evidence that use of the lot was for private RCU patrons, not the public at large.

The State's brief rests in its entirety (particularly at 12 and 14) on the supposition that the prosecution's burden went no further than to present evidence that the parking lot was "held out for public use." This ignores the declaration in *Phillips* that it was most important to show ***who*** held or owned the lot and ***how*** did they prescribe its use.

> "Held out to the public" is not defined in the statutes. We conclude, however, that the words must be interpreted in their ordinary sense as ascertained from any standard dictionary. The following definitions are typical:

> [*557] "Hold out, a. to present; offer." *Random House Dictionary of the English Language*, unabridged, 2d ed. (1987), p. 910.
>
> "c. To offer, proffer, present,
>
> "d. To represent." 5 *New English Dictionary* (1901), p. 334.
>
> ". . . offer, proffer . . . represent . . ." *Webster's Third New International Dictionary*, unabridged, p. 1079.
>
> "Hold out means to lead the world to believe by language and conduct." *Words and Phrases*, citing *U.S. v. Snow*, 4 Utah 313, 325, 9 P. 686 (1886).
>
> ***All of these definitions indicate that it is the intent of the owner of premises that is important -- Is it the intent of the person or corporation in control of the premises that they be available to the public for the use of their motor vehicles?*** If they are so "held out" to the public, [***10] the premises come within the ambit of the rules of the road in respect to drunk driving.

Phillips, 142 Wis.2d at 557. (Emphasis added.)

It was not sufficient, as the State argues, to show simply that the public made use of the lot; it was not sufficient, alternatively, that it could be inferred that the lessee of the Bull Pen bar, and not the owner of the lot, allowed the public to use it; and it was not sufficient if the evidence showed that members of the public or bar patrons simply treated the lot as if it was held open for their use.

II. The jury instructions did not adequately describe the "highway" element of the offense where the intent of the owner of the parking is disputed.

Schultz submits 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."

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 to require proof that the owner is identified, and that owner's intent is placed in evidence. 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 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 *State v. Perkins*, 2001 WI 46, 243 Wis. 2d 141, 626 N.W.2d 762, Perkins (just like Schultz here) had waived his right to object to the use of a jury instruction by failing to object at the jury instruction conference. The Court concluded 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 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 April 24, 2023.

Respectfully submitted,

Electronically signed by:

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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 1,817 words.

Dated April 24, 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 April 24, 2023.

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