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CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
SUPREME COURT
Case No. 2022AP001622 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs. Eau Claire County
Case No. 20CF130

DAVID A. SCHULTZ,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

James A. Walrath
State Bar No. 1012151
Law Offices of James A. Walrath, LLC
519 North 50th Street
Milwaukee, WI 53208
Attorney for Defendant-Appellant-Petitioner

ISSUE PRESENTED

When a motorist, such as David A. Schultz, is charged with OWI for operating a vehicle at night on a privately-owned parking lot, where signage on the lot restricts its use to customers of a day-time business, but the evidence does not establish who owns the lot or that owner's intent, must the jury be instructed to decide whether the prosecution proved *that it was the lot owner's intent to open* the lot for use by the public, as an element of the offense?

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CRITERIA FOR REVIEW

Every day, thousands of vehicles in Wisconsin are driven into parking lots simply to park, so that the driver may patronize a business adjacent to nor near the lot, and then may return to the vehicle and leave. Some lots are unmarked, and they do not have signage that even indicates that the lot can be used for parking. Yet members of the public choose to park there. Other lots indicate with signage that vehicles may freely use the area for parking without conditions (e.g., "free parking" or "public parking"). Then, other lots indicate with signage that vehicles may park, but only so long as they are actively patronizing or associated with a nearby business, after which they are not authorized to remain in the lot and will otherwise be towed away.

David Schultz's OWI case fell into the last category. There was signage at the lot location where he was arrested that stated: "RCU [Royal Credit Union] parking only" and "violators will be ticketed and towed at owner's expense." He was charged with operating his truck, by parking in the lot at night, while the signage, according to police testimony, related to the day-time credit union business.

Schultz appealed because his conviction was based on an incomplete statement of the law in the jury instructions that ignored the this Court's holding in *City of Kenosha v. Phillips*, 142 Wis.2d 549, 557, 419 N.W.2d 236, 239 (1988). The significance of that decision (where the defendant was charged with OWI in a private parking lot) was clearly stated: "[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."

In *Phillips* a motorist was found unconscious, intoxicated, behind the wheel of his parked vehicle located on the private parking lot of a company that posted, "No Trespassing" signs at the entrance to the parking lot to state that the parking lot was for the use of American Motors Corporation (AMC) employees only. The trial court dismissed the city's charge against the motorist for his intoxicated operation of his motor vehicle in a parking lot held open to the public for use of their motor vehicles. This Court concluded that the legislative intent of Wis. Stat.

§ 346.61 was to make the rules of the road, in respect to drunken driving, applicable off a highway *only* where there is evidence that it was the intent of the person owning the premises to allow the public, as a whole, to make use of the premises for their motor vehicles. This Court ruled that the term in the statute, "held out," meant to lead the world to believe by language and conduct, and that the holding out must be to the entire community at large, not a private, select group of persons. *Phillips*, 142 Wis. 2d 549 at 551.

How the parking lot is used is not the determinative issue; rather, the determinative issue is how the owner of the lot intended it to be used.

In Schultz's case, the jury should have been instructed to decide whether it was the lot owner's intent that the lot was open for public use, or for a more restricted private use. The complaint against Schultz alleged that his OWI offense occurred in a parking lot owned by the Bull Pen Bar; but trial testimony suggested, without any certainty or clarity, that the Royal Credit Union, or a nearby hospital owned the lot, not the bar. Hence, the jury should have been asked to decide if the lot owner (whoever that was) expressly or impliedly intended that the public could park in the lot.

But the jury instruction here was one-sided, and favored a finding that all parking lots, regardless of the owner's intended use, fall within the OWI statute. That's because the instruction focused solely on whether members of the public, *whether authorized or not*, used the parking area. The instruction provided that one element of the offense was: "the defendant operated a motor vehicle on a premises held out to the public for use of their motor vehicle." (P. App. 119). This led to Court of Appeals to rule in Schultz's appeal that this element of the OWI offense was proven 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" a potential owner's adjacent business (in this instance, RCU).

The noticeable defect in the jury instruction (which was based on WIS JI-CRIMINAL 2605) is that, at minimum, it did not state that the owner of the premises must be the person or entity that "held out [the lot] to the public for use of their motor vehicle." As written, the instruction allows a conviction if the jury finds that someone – anyone – held out the premises for the public's use, regardless of their authority to do so. Although the Court of Appeals referred to

motorists' "authorized" use, the jury was not instructed about whether an owner had conferred "use of the parking lot in an authorized manner."

The instruction thus presents solid reasons for granting review under Wis. Stat. (Rule) 809.62(1r)(c)3. The jury instruction question presented here is not factual in nature; instead, the issue here is a question of law about the content of a jury instruction that is likely to recur unless resolved by this Court. The likelihood is that numerous motorists are charged with OWI while driving or operating in privately owned parking lots, where signage restricts public use, and the instruction issue remains unresolved. Furthermore, this Court often grants review when a case presents an issue of whether a jury instruction was an incomplete statement of the law. *See, e.g.*, *State v. Johnson*, 2021 WI 61, ¶3, 397 Wis. 2d 633, 640, 961 N.W.2d 18, 21; *State v. Langlois*, 2018 WI 73, ¶¶52-53, 382 Wis. 2d 414, 448, 913 N.W.2d 812, 829; *State v. Lohmeier*, 205 Wis. 2d 183, 191, 556 N.W.2d 90 (1996).

The *Phillips* Court held that consideration must be given to the owner's intent, not solely to the lot's actual use. A fair instruction would have instructed the jury to consider not only how the public made use of the lot, but also whether there was evidence of an owner's intent and authorization to limit use of the lot to a select group of persons (in this case, customers of the Royal Credit Union), or to open it to the public at large.

The absence of an instruction on that 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. Yet counsel did not object to the instruction here. But 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, 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 considering this Court's decision in *Phillips* and the facts adduced at trial. The result was that the real controversy (*i.e.*, the lot owner's intent) was not an issue.

STATEMENT OF FACTS

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 (OWI) on January 17, 2020, after previously being convicted of four prior OWI's. The complaint 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."

At the outset of trial, the prosecution declared that a jury instruction regarding the substantive offense would be needed "with regard to the term 'highway.'" (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 whether proof regarding restricted use of the parking lot would be relevant to the question of whether 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?

(Id. at 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 location issue 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 two rows of the lot from the credit union for his bar patrons to use. (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" at night for people at the Bull Pen Bar and not for the credit union, which then was closed.

The Court's jury instruction 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 guilty verdict, 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

The jury instruction did not adequately state that the jury should consider, where signage on the lot restricted the use of the premises, whether it was the lot owner's intent to hold the parking lot premises out to the public for use of their vehicles.

The Court of Appeals' decision in Schultz's case heads in two different directions. It begins by emphasizing the focus of this Court's decision in *Phillip*s, particularly in the factual setting where the lot owner had placed restrictive signage at the lot. The decision emphasized that "the court rejected any test focusing on physical accessibility." The question to be decided, it held, was not whether "the location would physically accommodate vehicular traffic. . . . Instead, the court stated that the test focuses on the intent of the owner." (P. App. 111). That statement relied on this Court's declaration in *Phillips* that, "it is the intent of the owner of premises that is important." *Phillips,* 142 Wis.2d at 557.

Oddly, just two paragraphs later, the Court of Appeals' decision goes in another direction, by relying on *City of LaCrosse v. Richling*, 178 Wis.2d 856, 505 N.W2d 448 (Ct. App. 1993), that it read to mean that the jury's decision depends upon the public's accessibility to the parking lot – just the opposite of what the *Phillips* Court had stated. The test, which the appeals court adopted here, was instead: "[W]hether, 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."(P. App. 112). The emphasis shifted therefore to focus on a parking lot's accessibility and motorists' use of the lot, away from the owner's intent. It allowed the Court of Appeals to hold: "The testimony provided by the officers and the witness was sufficient for the jury to reasonably find that the parking lot directly behind the Bull Pen Bar was available to the bar's patrons and RCU customers and, therefore, was held out for public use." (P. App. 114-115).

It should be noted that the proof in the *Phillips* 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 but allowed access to its members, not the Bull Pen Bar's customers. Likewise, the proof about parking lot access in the *Richling* case came from Norbert Schmidt, who owned both the parking lot and Schmidty's Bar & Restaurant. In contrast, no such ownership evidence was presented in this case.

The Court of Appeals faulted Schultz's argument for being "entirely too narrow" (P. App. 115). Curiously, the Court then approved of Schultz's conviction because: "Here, any motorist could be a customer of RCU and park in that lot on any given day." (P. 116) One flaw in that point is that the issue before the jury was whether patrons of the Bull Pen Bar, such as Schultz, not the Royal Credit Union, were intended by RCU to be authorized users of the lot. There was no evidence on that point, and most importantly, there was no jury instruction that guided them to determining whether that was the owner's intent.

This Court should note the flaws in the Court of Appeals' approach: it arbitrarily extended what authority might have been given for RCU customers to use the lot (according to the signage) to the Bull Pen Bar patrons' use of the lot after RCU was closed (and for which there was no signage or indication that their night-time use was authorized). Most importantly, the jury was allowed to speculate that (1) one of three possible lot owners (the bar, the credit union, or the hospital) authorized the public at large to use the lot; and (2) the public (that is, patrons of any one of the three businesses) appeared to have used the lot, so therefore the public was authorized to use it. .

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, or the Mayo Hospital). 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. The prosecution never bothered to prove who owned the lot.

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 members, not the public at large, especially at night.

The Court of Appeals in Schultz's case ignored the declaration in *Phillips* that it was ***most*** important to show ***who*** held or owned the lot and ***how*** they prescribed its use. This resulted from an incomplete jury instruction regarding this element of the offense. The instruction modelled after WIS JI-Criminal 2605 gave an incomplete statement of the law. The result was that the real controversy (*i.e.*, the lot owner's intent) was never tried.

CONCLUSION

For the foregoing reasons, David A. Schultz, by undersigned counsel, respectfully requests that this Court grant review.

Dated this 14th day of March, 2024.

Respectfully submitted,

Electronically signed by:
James A. Walrath
State Bar No. 1012151
Law Offices of James A. Walrath, LLC
519 North 50th Street
Milwaukee, WI 53208
Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this petition meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the petition is 4,018 words.

Dated this 14th day of March 2024.

Electronically signed by:
James A. Walrath
State Bar No. 1012151
Law Offices of James A. Walrath, LLC
519 North 50th Street
Milwaukee, WI 53208
Attorney for Defendant-Appellant

CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I hereby certify that:

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

This electronic petition 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 petition filed with the court and served on all opposing parties.

Dated this 14th day of March 2023.

Respectfully submitted,

Electronically signed by:
James A. Walrath
State Bar No. 1012151
Law Offices of James A. Walrath, LLC
519 North 50th Street
Milwaukee, WI 53208
Attorney for Defendant-Appellant