

FILED
07-05-2023
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2023AP000697-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TROY ALLEN SHAW,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and Order
Denying Postconviction Relief, Entered in the
Sheboygan County Circuit Court, the Honorable
Angela W. Sutkiewicz, presiding

BRIEF OF
DEFENDANT-APPELLANT

FRANCES REYNOLDS COLBERT
State Bar No. 1050435

WISCONSIN DEFENSE INITIATIVE
411 W. Main Street, Suite 204
Madison, WI 53703
(608) 620-4949
frances@widefense.org

Attorney for Defendant-Appellant

TABLE OF CONTENTS

ISSUE PRESENTED.....	4
POSITION ON ORAL ARGUMENT AND PUBLICATION.....	5
STATEMENT OF THE CASE	5
STATEMENT OF FACTS	6
ARGUMENT	11
I. The trespass statute.	11
II. The prosecution committed plain error when it argued that the jury could find Mr. Shaw guilty because JN’s father did not consent to Mr. Shaw being in his house. . .	14
A. Improper arguments, plain error and standard of review.	14
B. The prosecutor’s argument affected the fairness of the trial.	15
CONCLUSION.....	18
CERTIFICATION AS TO FORM/LENGTH.....	19
CERTIFICATION AS TO APPENDIX	19

TABLE OF AUTHORITIES

Cases

<i>Holland v. State</i> , 91 Wis. 2d 134, 280 N.W.2d 288 (1979)	16
<i>Kirk v. Credit Acceptance Corp.</i> 2013 WI App 32, 346 Wis. 2d 635, 829 N.W.2d 522	9
<i>State v. Jorgensen</i> , 2008 WI 60, 310 Wis. 2d 138, 754 N.W.2d 77	14
<i>State v. Luedtke</i> , 2015 WI 42, 362 Wis. 2d 1, 863 N.W.2d 592.	15
<i>State v. Mayo</i> , 2007 WI 78, 301 Wis. 2d 642, 734 N.W.2d 115	14, 16
<i>Vitek v. Jones</i> , 445 U.S. 480, 491–92 (1980).....	10

Statutes

Wis. Stat. (Rule) § 809.23(1)(a)1.	5
Wis. Stat. (Rule) § 809.41(3).....	5
Wis. Stat. § 901.03	14
Wis. Stat. § 943.14(2).....	4, 5, 11

Other Authorities

<i>In the Matter of the Condition of T.A.S.</i> , Sheboygan County Case No. 20ME33	10
WIS JI-CRIMINAL 1437	13, 14, 15

ISSUE PRESENTED

The Wisconsin trespass statute, Wis. Stat. § 943.14(2), creates criminal liability for anyone who:

... intentionally enters or remains in the dwelling of another without the consent of some person lawfully upon the premises or, if no person is lawfully upon the premises, without the consent of the owner of the property...

Mr. Shaw entered the N's residence with permission of one of the occupants, JN. At issue at trial was whether JN revoked her permission at some point. It was undisputed that JN's father, who owned the property but who was not on the premises, never consented to Mr. Shaw being in his home. During closing arguments, the prosecutor argued that the jury could find guilt because Mr. Shaw was on the premises after he was informed JN's father did not consent to his being there. Was it improper prosecutorial argument – and plain error – for the prosecutor to argue that Mr. Shaw was guilty of criminal trespass because he was in the dwelling of another without the consent of the owner who was not on premises?

The circuit court determined that “certainly, the prosecutor misspoke” but it did not reach the level of plain error.

POSITION ON ORAL ARGUMENT AND PUBLICATION

There are few cases interpreting the criminal trespass statute, and none since it was last amended to include the language “or, if no person is lawfully upon the premises, without the consent of the owner of the property.” Wis. Stat. § 943.14(2). Pursuant to Wis. Stat. § 809.41(3) and § 809.23(1)(a)1., this Court should exercise its discretion to convert this appeal to a 3-judge panel so that it may publish its opinion. A binding court of appeals decision will clarify for the bench and bar when this language applies.

Mr. Shaw does not seek oral argument; the facts are straightforward, the question presented is purely legal and the briefs should be able to address the question presented in full.

STATEMENT OF THE CASE

The State’s theory of trespass, at least in part, was that Mr. Shaw was guilty because he stayed on the N premises after he was told “the owner” did not consent to him being there. But under Wisconsin’s trespass statute, JN’s consent was the only consent that mattered. Whether JN’s father – the owner – gave or revoked consent was not relevant so long as his daughter was on the premises and he was not. In arguing that the jury could find Mr. Shaw guilty if they found that Mr. Shaw remained on the property after he was told that JN’s father did not consent, the prosecutor not only obfuscated the real issue –

whether JN ever revoked her consent – but he also gave the jury a clear path to conviction that was contrary to law. The improper argument thereby constitutes plain error and the trespass conviction must be reversed.

STATEMENT OF FACTS

~The events of March 30, 2020~

On March 30, 2020, the City of Sheboygan Police department responded to a call from a Mr. F. regarding a disturbance in an apartment complex. (88:130). When officers arrived on the scene, they encountered Mr. Shaw, who appeared agitated and upset. (88:131; 55:0:37-1:27¹). At this point, officers did not suspect Mr. Shaw of a crime and decided the best thing to do was to let Mr. Shaw be on his way. (88:166, 208). At no time did police tell Mr. Shaw that he could not leave or that he was under arrest, and they made no attempt to follow him when he left the scene. (55:1:00-1:30).

While in the apartment complex talking to Mr. F. and other neighbors about the alleged disturbance, dispatch received another call for help – this time it was from Mr. Shaw. (88:149). Mr. Shaw had left the apartment complex, crossed the street and placed a

¹ Record numbers 54 and 55 are audio-visual exhibits from the trial that were played for the jury. Citations to these record cites include the relevant timestamp following the record cite.

911-call from inside a neighboring house. (88:149-152). Although Mr. Shaw did not previously know the owners of the house, he had asked permission to go inside the home and JN, who was at home with her boyfriend, gave him permission to do so. (55:12:19-12:23).

In crossing the street Mr. Shaw had left the Sheboygan city limits. (88:156, 169). Nevertheless, the City of Sheboygan police officers were close by and went to the N's house in response to Mr. Shaw's call for assistance. (88:210). When they got there, JN came outside to talk with law enforcement but Mr. Shaw did not. (55:11:28-12:28). JN reported to the officers that Mr. Shaw did not want to come out and speak to them because he was afraid the police officers would shoot him. (55:12:36-57). The officers asked JN if they could go inside the house, but she did not give the officers permission to do so. (55:12:52-55; 17:08). The officers then asked JN to go back inside and tell Mr. Shaw that they would not hurt him and that they would like him to come out and speak to them. (55:12:55-57). When JN went back inside the house, officers noted that JN did not appear to be scared or upset. (55:13:32-34). After JN and her boyfriend came out again, the officers told them to remain outside. (55:15:40).

Because the incident at the N's house was occurring outside of the City of Sheboygan, and "there was no report of active weapons or lives being threatened," the City of Sheboygan police officers were instructed by their supervisors to "remain on perimeter" until Sheboygan County sheriff deputies

arrived. (88:157). While waiting for the Sheboygan County Sheriffs to arrive, City of Sheboygan Police Officer Chris Sondalle began talking with Mr. Shaw through an open window. (88:155; 55:16:45).

Mr. Shaw told the officer that he wished to talk with sheriffs, not the City of Sheboygan police and would not grant Officer Sondalle's request to come outside the house. (55:15:27-16:45, 18:00). Mr. Shaw told police that he had permission to be in the house and they did not. (55:19:54-20:00, 23:38, 24:19, 27:20). He also stated that he was not armed and showed Officer Sondalle that he was not carrying any weapons. (55:18:45, 19:37-19:33).

Meanwhile, another City of Sheboygan police officer, Trisha Saeger, spoke with JN's father on the phone. (88:159-60). JN's father, who was not on the premises, stated – in no uncertain terms – that he wanted Mr. Shaw out of the house. (88:160). JN's father left work to come home and deal with the situation as soon as he was apprised of it. (88:197).

Before JN's father arrived, Officer Sondalle relayed to Mr. Shaw that "the owner" wanted Mr. Shaw out of the house. (55:23:18-20). Mr. Shaw responded, incredulously, "Where is she?," evidently assuming the officer was referring to JN. (55:23:20-22). Mr. Shaw told police that "she" never told him to get out. (55:24:26-27). The officer never clarified that by "owner" he was referring to JN's father, who was not on the premises.

After the police informed Mr. Shaw that “the owner” didn’t consent to him being on the premises, Mr. Shaw stopped communicating with law enforcement and started closing the windows and doors of the house. (55:25:00-28:11). As Mr. Shaw was attempting to close the back door, the City of Sheboygan police grabbed him, pulled him outside and tased him. (88:162-163; 55:28:25-33).

~The trial~

About a month later, Mr. Shaw was charged with disorderly conduct, criminal trespass and obstructing an officer as a result of this incident and went to trial on all charges.² At trial, both Officer

² Three weeks before criminal charges issued in this case, the City of Sheboygan Police filed a Statement of Emergency Detention by Law Enforcement Officer pursuant to Chapter 51. *In the Matter of the Condition of T.A.S.*, Sheboygan County Case No. 20ME33 (this court may take judicial notice of circuit court records, see *Kirk v. Credit Acceptance Corp.* 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522). The Statement of Emergency Detention cited the events of March 30, 2020 as part of the basis for their request to emergently detain Mr. Shaw. *Id.* Though Mr. Shaw demanded a jury trial in the ME case, he was never afforded the statutory and constitutional due process protections guaranteed to individuals subject to Chapter 51 proceedings as a result of the supreme court orders suspending jury trials during the pandemic. See Supreme Court Order, dated April 16, 2020, in *In the Matter of the Condition of T.A.S.*, Sheboygan County Case No. 20ME33 (applying the general prohibition on jury trials during the pandemic to Mr. Shaw’s ME case). Despite the huge liberty interest at stake, the government was effectively relieved of its burden to prove the necessity of the

Sondalle and Officer Saeger testified about the events that day and their body camera video was played for the jury. (88:125-178; 200-230). Mr. F testified about the initial disturbance and why he called the police and JN testified about her role in the events at her house. (88:102-125). JN's father testified that he never consented to Mr. Shaw being in his house that day. (88:197).

With respect to the trespass charge, JN testified that she told Mr. Shaw to leave her house – but when pressed, she admitted that she was not 100 % sure she had and actually could not remember. (88:192-193). During closing arguments, the prosecutor argued that regardless, once it was relayed to Mr. Shaw that the father did not give permission for Mr. Shaw to be in the house, Mr. Shaw was guilty of trespass. (88:270).

commitment and was able to detain and deprive Mr. Shaw of his liberty and bodily integrity for over 4 months without a commitment order. *Cf. Vitek v. Jones*, 445 U.S. 480, 491–92 (1980) (civil commitments are “a massive curtailment of liberty” requiring significant due process protections). Though Mr. Shaw doesn't have a separate legal basis to challenge the disorderly conduct conviction, he maintains that the prosecution for all these misdemeanor charges is fundamentally unjust as the ME case demonstrates that government clearly believed the events on March 30, 2020 were caused by severe mental illness. By the time of trial in this case, the government had already extracted its pound of flesh – and achieved any sentencing goals of protection of the public and rehabilitation of the defendant – through the significant period of detention and involuntary medication. *See id.* (“the loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement”).

The prosecutor emphasized the body camera footage that showed Mr. Shaw remaining inside the house for over six minutes after he was told the “owner” didn’t consent to his being there: “so he’s got 6-and-a-half minutes to know that he does not have consent to be in the house, so that is true beyond a reasonable doubt.” (88:270).

Postconviction, Mr. Shaw argued the trespass conviction should be reversed because the prosecutor’s argument was improper, contrary to law, and plain error.³ The motion was denied and this appeal follows.

ARGUMENT

I. The trespass statute.

Under the plain words of the Wis. Stat. § 943.14(2), there are two alternative situations that can create criminal trespass: (1) when a person enters or remains in the dwelling of another without the consent of some person lawfully upon the premises; OR (2) *if no person is lawfully on the premises*, without the consent of the owner of the property. In this case, the second alternative clause never kicks in because JN was lawfully on the premises the entire time Mr. Shaw was in the dwelling. As such, the only issue for the jury should have been whether JN revoked her consent to allow Mr. Shaw on the premise and whether Mr. Shaw

³ Mr. Shaw also claimed that there was insufficient evidence to support the obstructing conviction. The circuit court agreed and vacated the obstructing conviction. (117).

knew that she had revoked her consent, if she had. *See* WIS JI-CRIMINAL 1437.⁴ Under the circumstances of this case, whether or not JN's father consented was legally irrelevant to whether Mr. Shaw committed criminal trespass.

The statute makes sense exactly because of the situation at hand. If multiple people in different locations have equal authority give or revoke consent, a question as to who has ultimate authority to give permission arises. The statute resolves this question by giving the authority to grant or deny permission to the person who is lawfully on the premises. This way, even if an off-the-premises owner of the house doesn't consent to a certain guest being on the premises, the

⁴ The elements of criminal trespass to a dwelling are:

1. The defendant intentionally entered or remained in the dwelling of another.
2. The defendant entered or remained in the dwelling without the consent of someone lawfully on the premises.
3. The defendant entered or remained in the dwelling under circumstances tending to provoke a disturbance.
4. The defendant knew that the entry into or remaining in the dwelling was without consent and under circumstances tending to create or provoke a breach of the peace and knew that it was the dwelling of another.

WIS JI-CRIMINAL 1437

guest will not be guilty of trespass so long as they have permission from a person lawfully on the premises.

It's not hard to imagine other situations in which an off-the-premises owner may not consent to an invited guest being in their house. Take, for example, a teenager who invites friends over when the parents are out of town or a spouse involved in an extramarital affair who brings home a lover. In these cases, the invited guest is not guilty of criminal trespass despite the fact that a lawful owner legitimately objects to their presence on the premises. The statutory provision granting the authority to consent to the person who is on the premises is critical in cases like these where there are multiple people capable of consenting, and importantly, when the multiple people capable of consenting disagree about whether consent should be given.

If this were a case of off-the-premises consent, the pattern jury instructions contemplate a different instruction. *See* WIS JI-CRIMINAL 1437, Comment 2 (noting 2015 Wis. Act 176 added the language “or, if no person is lawfully upon the premises, without the consent of the owner of the property that includes the dwelling”). But this was not the situation of this case and this instruction was not requested or given. In this case, JN was on the premises the entire time Mr. Shaw was in the house. Therefore, the only question relevant to whether Mr. Shaw committed the crime of trespass was whether JN had ever revoked her consent and, if she did, whether Mr. Shaw knew it. *See* WIS JI-CRIMINAL 1437 (elements (2) and (4)). The fact that

JN's father never consented was irrelevant to whether Mr. Shaw was guilty of trespass.

II. The prosecution committed plain error when it argued that the jury could find Mr. Shaw guilty because JN's father did not consent to Mr. Shaw being in his house.

Because the law doesn't grant JN's father, who was not on the premises, the authority to consent or revoke consent as long as JN was lawfully on the premises, it was improper – and plain error – for the prosecutor to argue to the jury that they could find Mr. Shaw guilty because JN's father did not give Mr. Shaw permission to be there. This error infected the correct analysis of the issue in dispute on the question of criminal trespass and Mr. Shaw was therefore denied his due process right to a fair trial.

A. Improper arguments, plain error and standard of review.

Plain error occurs when errors are “so fundamental that a new trial ... must be granted even though the action was not objected to at the time.” *State v. Jorgensen*, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77; *see also* Wis. Stat. § 901.03. There is no bright-line rule that dictates whether an error is plain, necessitating reversal. *State v. Mayo*, 2007 WI 78, ¶29, 301 Wis. 2d 642, 734 N.W.2d 115. “Rather, the existence of plain error will turn on the facts of the particular case.” *Id.* Especially important “is the quantum of evidence properly admitted....” *Id.* When a defendant alleges that a prosecutor's statements and

arguments are improper, the test applied is whether the statements “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Id.*, ¶43 (quotation omitted). Finally, the State has the burden to prove the error harmless beyond a reasonable doubt. *Id.*

Whether a due process violation has occurred is a question of law and is reviewed *de novo*. See *State v. Luedtke*, 2015 WI 42, ¶37, 362 Wis. 2d 1, 863 N.W.2d 592. With respect to the trespass statute, questions of statutory interpretation are also reviewed *de novo*. *Id.*, ¶38.

B. The prosecutor’s argument affected the fairness of the trial.

Under the circumstances of this case, the prosecutor’s improper argument was significant. The jury should have been forced to make a credibility determination and decide whether JN had actually revoked her consent. Instead, the prosecutor affirmatively misinformed the jury that all they needed to convict was to find that Mr. Shaw remained on the property after being informed that JN’s father didn’t consent. Because of the very real probability that the jury convicted Mr. Shaw of criminal trespass due to JN’s father’s off-the-premises lack of consent and never reached the question of JN’s credibility or what Mr. Shaw knew about any revocation of her consent – questions central to the second and fourth elements of the crime – the trial on this charge was fundamentally unfair and in violation of Mr. Shaw’s

due process rights. *See Holland v. State*, 91 Wis. 2d 134, 138, 280 N.W.2d 288 (1979) (due process requires that the state proves each essential element of the crime beyond a reasonable doubt).

Importantly, the evidence was equivocal as to whether JN revoked her consent. When JN was pressed on cross-examination about whether she was sure that she had revoked her consent, she conceded she could not remember. (88:193). Further, there was ample evidence to support Mr. Shaw's position that JN never revoked her consent, including JN's calm demeanor and statement to law enforcement that she had given permission to Mr. Shaw to be in her house. (55:12:19-12:23). At no time did the body camera footage show JN telling Mr. Shaw or law enforcement that she revoked her permission for him to be in the house. (88:227). The body camera footage showing Mr. Shaw's visible surprise when Officer Sondalle told him that the "owner" wanted him out of the house, and Mr. Shaw's contemporaneous insistence that JN never told him to get out further supports the inference that Mr. Shaw never knew that JN had never revoked her consent, if she had. (55:23:20-33, 24:24).

While it is possible that the jury disregarded the prosecutor's explicit citation to evidence that showed Mr. Shaw stayed on the premises after being informed that JN's father did not consent – as well as the explicit instruction that they could find guilt in light of this fact – this is unlikely. (88:270). It is certainly not provable beyond a reasonable doubt. *Mayo*, 301 Wis. 2d 642, ¶43. And though the circuit court

reasoned that the prosecutorial error “was just something that was mentioned in closing argument” and “was not part of the prosecutor’s case,” this is not supported by the record. (122:7-8; App. 11-12). Far from being an idle comment in closing, the fact that JN’s father did not consent was central to the State’s case. The State presented significant evidence regarding JN’s father’s non-consent through extensive video evidence as well as the testimony of multiple witnesses, including Officers Saeger and Sondalle, JN, and JN’s father himself. (88:159-60, 187, 197, 54:21:25-21:46; 55:23:18-27).

Based on this evidence, the prosecutor argued the jury could find, beyond a reasonable doubt, that Mr. Shaw was guilty of trespass. (88:270). In doing so, the prosecutor relieved the jury of its obligation to reach the central issue in dispute in this case – whether JN revoked her consent. Mr. Shaw’s trial was thereby unfair and the resulting conviction is unjust. Mr. Shaw is entitled to a new trial on the criminal trespass charge.

CONCLUSION

For the reasons stated in this brief, Mr. Shaw respectfully requests that this Court vacate the trespass conviction and remand to the circuit court for a new trial on criminal trespass.

Dated this 5th day of July, 2023.

Respectfully submitted,

Electronically signed by

Frances Reynolds Colbert

FRANCES REYNOLDS COLBERT

State Bar No. 1050435

WISCONSIN DEFENSE INITIATIVE

411 W. Main Street, Suite 204

Madison, WI 53703

(608) 620-4949

frances@widefense.org

Attorney for Defendant-Appellant

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 this brief is 3437 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 5th day of July, 2023.

Signed:

Electronically signed by

Frances Reynolds Colbert

FRANCES REYNOLDS COLBERT