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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.

REPLY BRIEF OF
DEFENDANT-APPELLANT

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ARGUMENT: The prosecutor’s argument was improper, contrary to law and plain error; it was not harmless.

The prosecutor’s argument was egregious because it gave the jury a path to conviction that was contrary to law and obfuscated the key question in dispute: whether JN revoked her consent. As a result of the prosecutor’s argument, in light of the nature of the evidence presented, Mr. Shaw’s trial was fundamentally unfair.

The State, as beneficiary of the error, must prove “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *State v. Mayo*, 2007 WI 78, ¶47, 301 Wis. 2d 642, 734 N.W.2d 115. The State did not come close to meeting this high burden.

The prosecutor’s argument regarding the father’s consent was not an “ambiguous remark.” (Resp. Br. at 13, quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 646-47 (1974)). Far from merely commenting on the evidence, the prosecutor made explicit reference to the video evidence it presented and argued that from that evidence the jury could conclude – beyond a reasonable doubt – that Mr. Shaw did not have consent. (88:270). In doing so, the prosecutor effectively misinformed the jury of the law.

The State’s evidence on JN’s father’s non-consent was extensive. In addition to the video evidence, the State presented testimony regarding JN’s father’s non-consent from JN’s father himself, JN

and Officer Saeger. (88:59-60, 187, 197). Arguably, trial counsel could have objected to this evidence as irrelevant, however, it's unlikely the objection would have been sustained. While irrelevant to the question of whether Mr. Shaw had consent, the father's distress and agitation about Mr. Shaw being in his house is certainly relevant to actions the officers took as well as whether Mr. Shaw's presence in the house "tend[ed] to provoke a disturbance." *See* WIS JI-CRIMINAL 1437 (third element). The issue is not that the evidence came in, it's that the prosecutor instructed the jury that it could conclude from this evidence that Mr. Shaw did not have permission to be in the house.

The State argues that it "did not exclusively rely on the owner's withdrawal of consent" and "[a]bsent any remarks about the owner revoking Shaw's consent to be inside of his residence, a rational jury would have been able to find Shaw guilty of criminal trespass." (Resp. Br. at 8, 11). But this is not a sufficiency of the evidence question, where deference is given to the jury's determination and evidence is viewed in the light most favorable to the state. *State v. Coughlin*, 2022 WI 43, ¶24, 402 Wis. 2d 107, 975 N.W.2d 179. That there is some evidence that could support the verdict is not the question here.

Importantly, the evidence that JN revoked her consent was equivocal. (*See* Opening Br. at 16-17). As noted in the opening brief, JN testified that she was not 100% sure if she had told Mr. Shaw to get out. (88:192-193). The video evidence does not reflect that JN told officers that she had told Mr. Shaw to get out

or that she wanted Mr. Shaw to get out. (55: 12:19-23, 23:20-33, 24:24). JN testified in retrospect that she was freaked out by the situation but there is no evidence that she told officers this at the time. (88:189). And we are not “certain” that JN’s boyfriend told Mr. Shaw to get out of the house – if he even had the authority to do so – or that Mr. Shaw heard him, if he did. (Resp. Br. at 6). The State offered only hearsay evidence on this point. *See Gehin v. Wisconsin Grp. Ins. Bd.*, 2005 WI 16, ¶58, 278 Wis. 2d 111, 692 N.W.2d 572 (hearsay evidence is inherently unreliable). The equivocal nature of the evidence that JN did revoke her consent, in combination with the substantial video evidence supporting Mr. Shaw’s contention that JN did not revoke her consent demonstrates that reasonable jurors could go either way on this key question.

The prosecutor’s instruction that the jury could convict based on JN’s father’s non-consent infected the trial on criminal trespass because it informed jurors that they need not reach the question of JN’s consent. While the court properly instructed the jury on the law, there is a reasonable probability that the jury’s verdict was based on the prosecutor’s unobjected-to affirmative misstatement of the law. Because it is reasonably probable that the jury would have acquitted absent this error, Mr. Shaw’s conviction is fundamentally unfair and the conviction should be reversed.

CONCLUSION

For the reasons stated in her and in the Opening 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 18th day of October, 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 this brief is 782 words.