

FILED
06-04-2024
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2023AP697-CR

STATE OF WISCONSIN,

Plaintiff -Respondent,

v.

TROY ALLEN SHAW,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 294-2907 (Fax)
obriendj@doj.state.wi.us

The Plaintiff-Respondent State of Wisconsin opposes the petition for review filed by Defendant-Appellant-Petitioner Troy Allen Shaw for the following reasons.

1. The petition does not satisfy the criteria for review set out at Wis. Stat. § (Rule) 809.62(1r). Shaw merely disagrees with the court of appeals' application of the plain error and harmless error rules to the unique facts of this case. There is no reason for this Court to second-guess the court of appeals' thorough application of the plain error and harmless error rules in its error-correcting capacity here.

2. Review will not contribute to the development of the law. Shaw has not shown any need for this Court to change, modify, or expand the plain error rule which, as this Court has held, is to be employed "sparingly" because it comes into play only when the defendant fails to object to the error at trial. *State v. Jorgensen*, 2008 WI 60, ¶ 21, 310 Wis. 2d 138, 754 N.W.2d 77.

3. The court of appeals properly applied this Court's established precedent regarding the plain error rule to these unique and rather bizarre facts. It correctly held that the prosecutor's remarks about the father's lack of consent for Shaw to remain in his house were erroneous: what mattered was whether his 17-year-old daughter (Joan) who was on the premises with a friend had revoked *her* initial consent for Shaw to enter. But the court of appeals also correctly held that Shaw failed to prove the error was so plain or fundamental that it requires a new trial even though he did not object to it:

[T]he State presented substantial evidence that Joan and her friend told Shaw to leave the house after Joan had allowed him to enter. Though she acknowledged she was not certain, Joan testified that she believed she told Shaw that he had to leave the house after the police arrived. She also testified she was sure her friend told Shaw the same thing several times. In its closing argument, the State highlighted both Joan's

and her friend's statements to Shaw in arguing that he had remained in the house without consent.

State v. Shaw, No. 2023AP697-CR, 2024 WL 259709, ¶ 22 (Wis. Ct. App. Jan. 24, 2024) (unpublished) (footnote omitted). The court also explained why the jury instructions further diminished the impact of the prosecutor's erroneous remarks:

[T]he State's references to [the father's] lack of consent were limited in scope. They were also immediately preceded by references to the evidence that Joan and her friend told Shaw he needed to leave the house. And the jury was correctly instructed to focus on their consent, rather than [the father's]: to find Shaw guilty, the jury was told, the State had to prove that he "remained in the dwelling without the consent of someone lawfully upon the premises." The trial court also instructed the jury that its verdict had to be based "on the law I give you in these instructions," that "[r]emarks of the attorneys are not evidence," and that the parties' closing arguments "are not evidence." This court presumes that the jury heeded these instructions.

Id. ¶ 24.

4. The court of appeals also correctly held that the State proved the prosecutor's erroneous references to the father's lack of consent, even if plain error, were harmless beyond a reasonable doubt. *Id.* ¶¶ 26–27. *See Jorgensen*, 310 Wis. 2d 138, ¶ 23. Shaw simply disagrees. That is not a valid reason to grant review.

5. The unpublished one-judge opinion of the court of appeals has no precedential value.

6. This Court also should deny review because there is no place for the gratuitous footnote in the petition accusing this Court of wrongfully delaying Shaw's jury trial in a Chapter 51 commitment proceeding during the height of the Covid pandemic; and accusing the State of improperly prosecuting Shaw for his crimes, including the trespassing conviction under review here, because it "had already

extracted its pound of flesh.” (Pet. at 9, n.2.) The footnote has nothing whatsoever to do with the plain error and harmless error issues Shaw presents for review. There is no reason to grant review.

Dated this 4th day of June 2024.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Daniel J. O'Brien
DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 294-2907 (Fax)
obriendj@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm), and 809.62(4) for a response produced with a proportional serif font. The length of this response is 690 words.

Dated this 4th day of June 2024.

Electronically signed by:

Daniel J. O'Brien
DANIEL J. O'BRIEN
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 Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 4th day of June 2024.

Electronically signed by:

Daniel J. O'Brien
DANIEL J. O'BRIEN
Assistant Attorney General