COURT OF APPEALS
DECISION
DATED AND RELEASED

December 12, 1996

NOTICE

No. 96-1099-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Appellant

v.

HAROLD R. ALTENBURG,

Defendant-Respondent.

APPEAL from an order of the circuit court for Wood County: EDWARD F. ZAPPEN, JR., Judge. *Affirmed*.

ROGGENSACK, J. The State appeals a postconviction order granting Harold R. Altenburg a new trial. The trial court set aside Altenburg's conviction for hunting deer out of season, because it believed an erroneous pre-trial ruling and jury instruction had kept the real controversy from being tried. Because this court[1] concludes the State was required to prove beyond a reasonable doubt that Altenburg was not acting in a privileged defense of

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

property when he shot the deer, and that the trial court properly exercised its discretion when it ordered a new trial, the order is affirmed.

BACKGROUND

On September 27, 1994, Altenburg was charged with hunting during the closed season, contrary to NR 10.01(3)(e) of the Wisconsin Administrative Code,[2] for shooting deer in the woods surrounding his vegetable farm in Grand Rapids. Altenburg pleaded not guilty, on the theory that the shootings were privileged in defense of his crops, which had been repeatedly damaged by deer. At an instruction conference on April 24, 1995, the trial court decided to preclude Altenburg from introducing evidence that his shootings of deer were privileged. Altenburg's counsel relied on this pre-trial ruling when preparing his defense; and therefore, he did not call witnesses other than the defendant at trial.

However, Altenburg did file his previously requested jury instruction on defense of property with the court on the morning of trial. At a second instruction conference held during the noon recess, the judge said he had changed his mind, and intended to allow some instruction on the defense. Altenburg then testified that he had shot two deer during August of 1994 and explained the history of difficulties he had had trying to prevent deer from damaging his crops. Based on this testimony, the trial judge determined that Altenburg had made a *prima facie* case for his defense that the shootings were privileged, and it fashioned a compromise jury instruction which read:

> A landowner has a qualified privilege to shoot wild game when the shooting is a reasonable necessity under the then existing circumstances. In order for the defendant to resort to force in protecting his property, the defendant must have exhausted all other reasonable remedies available by law to protect his property. Further, he must only use such force

[2] A violation of the natural resources administrative code is a criminal misdemeanor under §§ 939.12 and 939.60, STATS.

> and means that are reasonable and necessary under the circumstances. In determining whether the defendant's actions were reasonable, the standard is what a person of ordinary intelligence and prudence would have done in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's actions must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now.
>
> If you find the defendant's actions at the time of the acts to be reasonable, then you should find the defendant not guilty.

Altenburg objected to the court's modification of his proposed jury instruction because the instruction given failed to explain that the State had the burden of proving beyond a reasonable doubt that the defendant's actions were not privileged. The State objected to giving any jury instruction on privilege, contending that, as a lessee, Altenburg was not entitled to raise the defense.

Altenburg was convicted of two counts of hunting out of season. On postconviction motions, the trial court concluded that the real controversy had not been fully tried because (1) it had not properly instructed the jury on the burden of proof for the privilege defense, (2) it had not given the defendant the opportunity to present his case on the reasonableness of his actions, and (3) it had improperly excluded testimony on exhaustion of remedies. Accordingly, the court set aside Altenburg's conviction and granted his motion for a new trial. The State appeals.

DISCUSSION

Scope of Review.

A trial court's decision to set aside a conviction in the interest of justice is a discretionary determination. Section 805.15(1), STATS.[3]; ***State v. Harp***, 161 Wis.2d 773, 775, 469 N.W.2d 210, 211 (Ct. App. 1991) (***Harp II***). The trial court properly exercises its discretion when it makes a reasonable decision in accordance with accepted legal standards and the facts of record. ***State v. Hereford***, 195 Wis.2d 1054, 1065, 537 N.W.2d 62, 66 (Ct. App. 1995). However, the trial court erroneously exercises its discretion if its decision is based on a mistake of law. ***Hoeft v. Friedel***, 70 Wis.2d 1022, 1037, 235 N.W.2d 918, 925 (1975).

Instructional Error.

Because Altenburg claims his actions were privileged, he has the initial burden of production for the defense. ***State v. Staples***, 99 Wis.2d 364, 376-77, n.4, 299 N.W.2d 270, 276, n.4 (Ct. App. 1980). The State then carries the burden of persuasion in negating the defense beyond a reasonable doubt. ***Moes v. State***, 91 Wis.2d 756, 764-65, 284 N.W.2d 66, 70 (1979).[4]

Shooting a protected animal in Wisconsin may be privileged on the ground that the defendant was protecting his property. ***State v. Herwig***[5], 17 Wis.2d 442, 445, 117 N.W.2d 335, 337 (1962), *citing* ***State v. Rathbone***, 100 P.2d 86 (Mont. 1940); ***State v. Burk***, 195 P. 16 (Wash. 1921). Privilege is bottomed in

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[3] A trial court may order a new trial in a criminal case in the interest of justice under § 805.15(1), STATS. ***State v. Harp***, 150 Wis.2d 861, 879, 443 N.W.2d 38, 45 (Ct. App. 1989) (***Harp I***) (overruled on other grounds).

[4] *Cf.* ***State v. Saternus***, 127 Wis.2d 460, 381 N.W.2d 290 (1986), which refused to extend ***Moes*** to the non-statutory defense of entrapment, holding that it was appropriate to require the defendant to carry the burden of persuasion.

[5] While the cited passages from ***Herwig*** are *dicta*, they are useful because the decisions from other jurisdictions cited by ***Herwig*** are on point for the case at hand.

the common law right to own and protect property, which right has been codified. *See* §§ 939.45(2) and (6), STATS.; 93 A.L.R.2d at 1368 (discussing the origins of the privilege, which at common law extended to tenants cultivating the land). The privilege exists when the shooting is reasonably necessary under the then existing circumstances to protect the shooter's property. ***Herwig***, 91 Wis.2d at 445, 117 N.W.2d at 337; *see also* 35 AM. JUR. 2D *Fish and Game* § 37.

"A defendant is entitled to an instruction on his theory of defense if it is supported by the evidence and a timely request is made." ***State v. Herriges***, 155 Wis.2d 297, 300, 455 N.W.2d 635, 637 (Ct. App. 1990) (citation omitted). In order to protect the defendant's due process interests, the jury should be instructed that before it can find the defendant guilty, it must find beyond a reasonable doubt that the defendant was not privileged to shoot the deer. ***Staples***, 99 Wis.2d at 377, 299 N.W.2d at 276.

The trial court correctly recognized that a conditional privilege exists to kill game otherwise protected by statute, when the killing is reasonably necessary for the protection of property.[6] The trial court also correctly determined that Altenburg, as a crop owner, was eligible to assert the privilege even if he only leased the farmland for crop production. We conclude the court properly determined that it should have instructed the jury that the State had the burden of proving beyond a reasonable doubt that Altenburg was not acting in lawful defense of his crops when he shot the deer.

Authority to Grant a New Trial.

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[6] The State urges this court to limit the use of the privilege to those who have obtained deer permits, as an Oregon court has done. However, an Oregon statute specifically provides:

> [N]o person shall take, pursuant to this subsection, at a time or under circumstances when such taking is prohibited by the commission, any game mammal … unless the person first obtains a permit for such taking from the commission.

ORS 948.012(1). In the absence of a similar Wisconsin statute, the permit issue is but one aspect of the larger question of whether the shooting was "reasonably necessary."

A trial court has discretionary authority to order a new trial in the interest of justice. Section 805.15(1), STATS. The court's discretion includes "the authority to reverse where trial errors have prevented the real controversy from being fully tried." ***Harp II***, 161 Wis.2d at 779, 469 N.W.2d at 212. The court's authority does not depend on the type of error involved, or on whether a proper objection was recorded and preserved. Additionally, the order for a new trial does not require a showing that a different result would be probable at a second trial. ***Id.*** at passim.

The State argues that the trial court lacked authority to order a new trial on the basis of any flaw in the jury instructions because Altenburg consented to the court's instructions at trial. We need not resolve the question of whether Altenburg waived any instructional error, however, because under the ***Harp II*** analysis, it is irrelevant. If an instructional error occurred, the court could conclude that the real controversy had not been fully tried, even if Altenburg never objected to the instruction.

The State's contention that Altenburg's reliance on a pre-trial ruling was inadequate to preserve the error for review under ***State v. Sohn***[7] fails for the same reasons. The issue in a discretionary reversal case is simply whether an error has occurred which has kept the real controversy from being fully tried.

In light of the court's error in the jury instruction and its determination that its pre-trial ruling kept the defendant from fully developing the issues of reasonableness and exhaustion of remedies, ordering a new trial was a proper exercise of discretion.

CONCLUSION

Because the trial court properly determined that an instructional error had occurred, the court acted in accordance with the law and the facts of record when it set aside Altenburg's conviction for hunting out of season.

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[7] 193 Wis.2d 346, 535 N.W.2d 1 (Ct. App. 1995)

By the Court. – Order affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4., STATS.