COURT OF APPEALS
DECISION
DATED AND RELEASED

November 12, 1996

No. 96-1915-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DARWIN E. DUTTER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Reversed.*

MYSE, J. Darwin E. Dutter appeals a conviction for criminal trespass to a dwelling in violation of § 943.14, STATS. Dutter asserts that he may not be convicted of criminal trespass to a dwelling when he resided in the dwelling alleged to have been the subject of the trespass. Dutter contends that because he had an informal rental agreement with the owner of the dwelling at the time of the alleged trespass, he did not violate this statute. Because one may not be convicted of criminal trespass to a dwelling in which one lawfully resides, the judgment of conviction is reversed.

The facts giving rise to this appeal are essentially undisputed. Dutter and Laurie Mooney were involved in a romantic relationship and lived

together from March 1990 until September 1994. During this time, they also shared a joint checking account and held themselves out to the public as a married couple. After September 1994, Dutter and Mooney lived together sporadically. On the date in question, Dutter was living with Mooney at her home under an informal rental agreement involving the payment of rent to Mooney.

On March 1, 1995, Dutter left the residence in the couple's jointly owned van to go to work. He called Mooney later in the day and she advised him that if he was drunk he should not come home. At 2 a.m. on the following morning, Mooney was awakened by Dutter pounding on the door and demanding to be admitted to the residence. After some time, Dutter broke down the door and entered the dwelling. Dutter yelled at Mooney in the hallway for not letting him into the home.

Shortly thereafter, the police arrived and questioned Dutter about an accident involving the van. Dutter was ultimately charged with drunk driving and driving after revocation. These convictions are not subject to this appeal.

The police escorted Dutter to the local hospital for blood alcohol tests. The arresting officer advised Dutter that Mooney did not wish that he return to the residence. Dutter indicated that he was going to the residence because he needed a place to stay and that his billfold and checkbook were located in the residence. After Dutter returned to the household and threatened to enter, Mooney called the police. After seeing the damaged door, the officers arrested Dutter for criminal trespass to a dwelling based on his breaking down the door and entering the apartment.

The single issue raised in this appeal is whether an individual, who is a resident of the dwelling, can be convicted of criminal trespass to that dwelling. Because this is a matter of statutory interpretation it raises a question of law this court reviews without deference to the trial court's determination. ***State v. Keith***, 175 Wis.2d 75, 78, 498 N.W.2d 865, 866 (Ct. App. 1993). Section 943.14, STATS., reads as follows:

> **Criminal trespass to dwellings.** Whoever intentionally enters the dwelling of another without the consent of some person lawfully upon the premises, under circumstances tending to create or provoke a breach of the peace, is guilty of a Class A misdemeanor.

The element of the statute raised in this appeal concerns the meaning of the phrase of "the dwelling of another." ***Id.*** That phrase, however, is not defined by the statute. The primary source of statutory construction is the language of the statute itself. ***State v. McKenzie***, 139 Wis.2d 171, 176, 407 N.W.2d 274, 276 (Ct. App. 1987). Further, it is reasonable to presume that the legislature chose its terms carefully and precisely to express its meaning. ***Ball v. District No.4, Area Bd.***, 117 Wis.2d 529, 539, 345 N.W.2d 389, 394 (1984). Although we construe criminal statutes narrowly, we construe them in light of their manifest object. ***State v. Olson***, 106 Wis.2d 572, 584-85, 317 N.W.2d 448, 455 (1982).

In ***State v. Carls***, 186 Wis.2d 533, 521 N.W.2d 181 (Ct. App. 1994), we determined that a jointly owned home, but one no longer used as a residence by an estranged husband, could permit a prosecution for criminal trespass to a dwelling against the non-resident husband because the dwelling was not his residence at the time of entry. The mere fact that he was a co-owner non-resident was insufficient to preclude a conviction for criminal trespass to a dwelling. ***Id.*** at 535-36, 521 N.W.2d at 181.

In this case, however, it is undisputed that Dutter was a resident of the dwelling in question. While they were co-residents of the dwelling, he paid rent, kept his personal possessions in the dwelling and slept in the dwelling. These facts are sufficient to establish that Dutter used the dwelling as his residence at the time of the alleged offense. Indeed, Mooney acknowledged in her testimony that the house was Dutter's dwelling at the time of the alleged offense. In response to the question "There is no doubt in your mind at least though that Mr. Dutter was living at the place on March 2 [the date of the offense]," Mooney responded "Right."

Because the dwelling in question was Dutter's residence, an essential element of the offense is lacking. Section 943.14, STATS., requires the entry be to the dwelling of another. This statutory element is absent when the dwelling in question is one used as a residence by the person gaining entry.

The mere existence of others who also reside in the dwelling does not change a co-occupant's right to gain access.

This court recognizes that in some situations the fear of violence may require that a co-resident be removed from the household by law enforcement, that an injunction may be obtained or that other lawful restrictions on the entry of the premises by another resident may be valid and enforceable. Just as one spouse may be removed from the household to protect another from domestic violence, so too may co-occupants of a dwelling be removed. This, however, does not mean that Dutter's forceful entry of his residence while intoxicated is a criminal trespass.

This court, therefore, concludes that because Dutter established he was a resident in the dwelling, he cannot be convicted of the offense with which he was charged. This court does not address whether his conduct would subject him to other criminal charges, such as disorderly conduct.

The State urges us to review this conviction under a sufficiency of the evidence standard. This court does not agree that this case presents a sufficiency of the evidence issue. The question presented here is a legal one, to wit: whether a dwelling used as a residence is "the dwelling of another" as that phrase is used in § 943.14, STATS. This is a matter of statutory construction. The facts giving rise to the criminal offense charged are largely undisputed and will support the jury verdict only if the dwelling entered meets the statutory requirement of being the dwelling of another.

By the Court.—Judgment reversed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.