

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 11, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP2455

Cir. Ct. No. 2007JV2

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN THE INTEREST OF LAURA R., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

LAURA R.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Oconto County:
RICHARD DELFORGE, Judge. *Reversed.*

¶1 HOOVER, P.J.¹ Laura R. appeals an order adjudicating her delinquent for criminal trespass. Laura argues there was insufficient evidence to

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

prove beyond a reasonable doubt that she knew the entry into the dwelling was without consent. We agree and therefore reverse.

BACKGROUND

¶2 On January 17, 2007, Laura left her mother's residence after having an argument with her. Laura went to James Zeise's apartment and told him she had nowhere to stay. Zeise told Laura she could stay at his mother's house. At about 8:30 p.m. Zeise's friend, Paul Sellen, drove Zeise and Laura to Zeise's mother's house. Sellen parked the car approximately twenty-five feet away from the garage, and he and Laura waited in the car as Zeise went to open the door to the house. After Zeise entered the house, he opened the door and let Sellen and Laura inside.

¶3 The next day, Zeise's sister Kelly Roberts discovered that Zeise and Laura were at the house. Sellen had already left. Roberts knew that her mother told Zeise he was not allowed at the house and called their mother to ask what to do. Their mother advised Roberts to call the police.

¶4 Laura was subsequently charged with burglary as a party to the crime, criminal damage to property as a party to the crime, and criminal trespass as a party to the crime. The burglary charge was dismissed at the start of the trial.

¶5 At trial, Zeise testified that neither Sellen nor Laura knew he had broken into the house. When asked how he got into the house, Zeise testified that he crawled through a hole in the garage that he had created earlier in the day. He then stated that he got into the residence through an inner garage door from which he had earlier removed the door handle. He then unlocked a different door and let Sellen and Laura through the door he unlocked. He stated that he did not think

Laura or Sellen saw how he got into the garage because the car was parked at an angle twenty-five feet away from the garage and it was dark out. Additionally, a garbage can concealed the hole in the garage. Zeise also stated that he told Laura she had permission to enter the house.

¶6 Officer Troy Sherman testified that he responded to Roberts' 911 call. He stated that when he arrived at the house, he examined the inner garage door and observed the locking mechanism and a screwdriver in plain view on the floor. Part of the entry lock and the screwdriver were located just inside the residence and part of the entry lock was located on the other side of the door, just outside the residence.

¶7 The court held that the State had "not met its burden of proof beyond a reasonable doubt to show that [Laura] was involved with criminal damage to property either as to the one causing the damage or as a party to a crime." The court then examined the elements of the trespass charge. With regards to the fourth element, whether Laura knew the entry was without consent and under circumstances tending to create or provoke a breach of the peace, the court stated:

Mr. Zeise has testified that he gave her permission to be there. He never told her or anybody else that he didn't have permission to be there. Well, first of all, he doesn't have the ability to give that consent to be on the property, but at least he's telling [Laura] that don't worry about a thing, we have the right to be here even though [I] crawled through a hole in the garage, we walked through an entry door with no lock on it and the locks are laying on the floor right as you enter into the premises with a screwdriver.

The court then found Laura delinquent of trespass.

DISCUSSION

¶8 When we review a conviction for sufficiency of the evidence, we will not reverse a conviction “unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). “It is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” *Id.* at 506. When evidence could support contrary inferences, “the trier of fact is free to choose among conflicting inferences of the evidence and may, *within the bounds of reason*, reject that inference which is consistent with the innocence of the accused.” *Id.*

¶9 In this case, the State was required to prove beyond a reasonable doubt that Laura knew the entry was without consent and under circumstances tending to create or provoke a breach of the peace. *See* WIS. STAT. §§ 943.14. The court apparently believed Zeise’s testimony that he told Laura she had permission to be on the premises. However, the court still found that Laura knew she was not supposed to be there. The court came to this conclusion based on a police officer’s testimony that the doorknob, locking mechanism, and a screwdriver were on the floor of the garage and residence in “plain view.” However, the court had no evidence that Laura actually saw the lock or the screwdriver. We cannot conclude that the inference that she actually saw it, and then knew that she was not supposed to be in the house, is reasonable. A review of the photos submitted into evidence of the doorknob, locking mechanism, and screwdriver does show these items on the floor of the garage and residence.

However, a number of other items were also on the floor, including what appears to be a can, a box, and a blanket or towel. In other words, the floor was cluttered.

¶10 In order to believe Laura knew the entry was without consent, the trial court would have had to believe she disregarded what Zeise directly told her, walked through the unlocked outer door, through an inner garage door with a broken lock,² and noticed amid the other clutter the lock and screwdriver, then from that observation concluded she did not have consent to be in the house. This is not a reasonable inference. Even assuming Laura saw the state of the door, there were numerous reasons the doorknob could have been taken off. The trial court did not merely choose among conflicting inferences, instead; the court built one inference upon another. A verdict cannot rest upon a guess, even if it is a good guess. *See Volk v. State*, 184 Wis. 286, 288, 199 N.W. 151 (1924). Thus, the evidence is not sufficient to prove beyond a reasonable doubt that Laura knew she entered the home without consent.

By the Court.—Order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b).

² The exact location of the doors and how Laura entered the home is actually unclear from the record. However, for the sake of clarity we assume that she did in fact walk through the inner garage door with the broken lock.

