COURT OF APPEALS DECISION DATED AND FILED

May 28, 2009

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. 2008AP2079-CR

Cir. Ct. No. 2007CM448

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHERI LYNN LUDWIG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Clark County: JON M. COUNSELL, Judge. *Reversed and cause remanded with directions.*

¶1 BRIDGE, J.[1] Cheri Ludwig appeals from a judgment of conviction for theft of moveable property in violation of WIS. STAT. § 943.20(1)(a) and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

(3)(a).[2] She contends the circuit court erred when it modified the standard jury instruction on mistake by substituting the word "may" for "must," and that she is therefore entitled to a new trial. We reverse Ludwig's conviction and remand for a new trial.

BACKGROUND

¶2 In 2006, Richard Hiserman and Ludwig agreed that in return for leveling a mobile home for Ludwig, Richard could store two vehicles on Ludwig's property. The vehicles Richard wished to store were a gray 1988 Cadillac for which he had paid $2,500, and a white 1988 Cadillac for which he had paid $500. How long Richard was allowed to store his vehicles on Ludwig's property is disputed by the parties. Richard claimed that Ludwig told him that the vehicles could be stored on her property for as long as he wanted. Ludwig claimed that she initially told Richard that he could store the vehicles on her property until the fall of 2006, but that she later agreed that he could store the vehicles on her property until the spring of 2007.

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[2] WISCONSIN STAT. § 943.20(1)(a) provides:

> (1) ACTS. Whoever does any of the following may be penalized as provided in sub. (3):
>
> (a) Intentionally takes and carries away, uses, transfers, conceals, or retains possession of moveable property of another without the other's consent and with intent to deprive the owner permanently of possession of such property.

WISCONSIN STAT. § 943.20(3)(a) provides:

> (3) PENALTIES. Whoever violates sub. (1):
>
> (a) If the value of the property does not exceed $2,500, is guilty of a Class A misdemeanor.

¶3 On June 11, 2007, Ludwig asked Roger Cochrane, who earned money by scraping vehicles, to remove the Cadillacs from her property. After Cochrane had removed the white Cadillac from the property, Richard's wife, Sheila Hiserman, noticed the vehicle was gone. Sheila notified Richard of the missing vehicle and Richard went to Ludwig's residence to investigate. When Richard arrived at the property, he observed that the white Cadillac was gone and that Cochrane was attempting to get inside the gray Cadillac. Richard spoke with Cochrane about the vehicles and Cochrane left without taking the gray Cadillac. The next day, Richard had the gray Cadillac removed from Ludwig's property.

¶4 On June 12, 2007, the Clark County Sheriff's Department received a report of a possible theft from the Hisermans. Following an investigation, Ludwig was charged with theft of movable property, that property being the white Cadillac, in violation of WIS. STAT. § 943.20(1)(a) and (3)(a). Ludwig plead not guilty and the matter proceeded to a jury trial.

¶5 The crime of theft of movable property has four elements. First, the defendant must intentionally take and carry away the moveable property of another.[3] Second, the owner of the property must not have consented to the taking and carrying away of the property. Third, the defendant must have known that the owner did not consent. Fourth, the defendant must have intended on depriving the owner permanently of the possession of the property. *See* WIS. STAT. § 943.20(1)(a).

[3] The defendant could also have used, transferred, concealed, or retained possession of the property. These actions, however, are not applicable to the facts of this case.

¶6 At trial, Ludwig's defense to the charged offense was that she believed the Hisermans had abandoned the Cadillacs and therefore had consented to their removal. Ludwig testified that in March 2007, she actively began attempting to have the Hisermans remove their vehicles from her property. She testified that she had repeatedly let the Hisermans know that she wanted the vehicles gone, and that she even had other individuals try contacting the Hisermans on her behalf. She testified that in April 2007, she told Sheila that the vehicles needed to be moved within two weeks and that Sheila informed her that she and Richard would move the vehicles the following week. However, the Hisermans failed to do so. Ludwig acknowledged that the first time she mentioned to the Hisermans that she was going to have the vehicles towed was on the day the white Cadillac was towed.

¶7 The Hisermans, in contrast, maintained that they were unaware that Ludwig wanted their vehicles removed from her property until the day Cochrane took their white Cadillac. Richard testified that prior to June 11, he had not had any discussions with Ludwig with regard to removing his vehicles from her property. Nor had he been notified that he needed to remove his vehicles. He testified that in April 2007, a friend of Ludwig's asked for the keys to the vehicles so they could be moved to a new location on the property, but stated the keys were returned to him the next day. Sheila also testified regarding the incident in April, but stated that although they were asked to move the vehicles, nothing was said to them about removing the vehicles from the property.

¶8 Before the matter was presented to the jury, Ludwig proposed that the jury be given the standard instruction on mistake, WIS JI—CRIMINAL 770 (2004), which provides as follows:

> In deciding whether the defendant acted with intent to steal the property of another, you **must** consider evidence that the Defendant believed that Richard Hiserman had abandoned his car on the Defendant's property and that Mr. Hiserman consented to the transfer of his car when he did not remove it after being notified to do so.
>
> If an honest error of fact results in a person's not having the intent or knowledge required for this crime, the person is not guilty of that crime.
>
> Before you may find the defendant guilty, the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant knew that the property belonged to another and knew that the owner did not consent to transfer of this property. (Emphasis added.)

The court expressed concern about the use of the word "must" in Ludwig's proposed instruction. The court stated in pertinent part:

> I think any time you tell the jury they must do anything, you are invading their—to me, you are invading their province, which is to decide whatever they want to believe and however they want to believe it. The only time you tell them must is when you say if you don't believe that these elements are proven, you must find them not guilty. That's telling them to find a conclusion based on their factual findings. It is not telling them that they have to consider a particular piece of evidence in a particular way, which I think the instruction is just plain wrong.

The court went on to instruct the jury using the standard instruction; however, over an objection by Ludwig's counsel, the court substituted the word "may" for the word "must." The jury ultimately found Ludwig guilty of theft, and a judgment of conviction was entered by the court. Ludwig appeals.

DISCUSSION

¶9 Ludwig contends that the circuit court erred in instructing the jury when it substituted the word "may" for the word "must" in her proposed

instruction on mistake. When it comes to instructing the jury, circuit courts are afforded broad discretion. ***State v. Fonte***, 2005 WI 77, ¶9, 281 Wis. 2d 654, 698 N.W.2d 594. Although use of the standard jury instructions is generally recommended, the court's instructions to the jury need not conform exactly to the standard instructions. ***State v. Foster***, 191 Wis. 2d 14, 26-27, 528 N.W.2d 22 (Ct. App. 1995). It is entirely appropriate for a court to modify the standard instructions when it must do so in order to state the law fully and fairly. ***Id***. at 27.

¶10 We are guided in this case by our opinion in ***State v. Foster***. In ***Foster***, the circuit court modified the standard jury instruction on voluntary intoxication by substituting the word "may" for the word "must." We agreed with the State that use of the word "must" in the instruction erroneously advised the jury "that it '*must* consider the evidence *that* [the defendant] was intoxicated.'" ***Id***. at 27-28. We explained that as it was written, the instruction advised juries "not merely to consider evidence, but rather, to consider evidence in a way that favors the intoxication defense." ***Id***. at 28. However, we also agreed with the defendant that substitution of the word "may" for "must" was also an incorrect statement of the law because it advised the jury "that it 'may consider the evidence that [the defendant] was intoxicated.'" ***Id***. We explained that a jury could interpret this to mean it need not consider the evidence at all. ***Id***. We then concluded that the correct statement of law was that the jury "'must consider the evidence regarding *whether* the defendant was intoxicated at the time of the alleged offense.'" ***Id***.

¶11 The relevant portion of the mistake instruction at issue in the present case is substantially similar to the instruction in ***Foster***. As was the case in ***Foster***, by instructing the jury that it "must consider evidence that the Defendant believed that Richard Hiserman had abandoned his car on the Defendant's

property," the standard instruction proposed by Ludwig would advise the jury that it must consider evidence in a way that favors the mistake defense. However, substitution of the word "may" for "must" is also incorrect because the instruction could be interpreted as suggesting that the evidence of mistake need not be considered at all. We conclude that like the instruction in ***Foster***, a correct statement of the law to the jury would have been that the jury *must consider the evidence regarding* ***whether*** *the defendant believed that Richard Hiserman had abandoned his car on the Defendant's property*.[4] *See* ***id***.

¶12 Although we have concluded that the instruction given to the jury on mistake was not a correct statement of the law, Ludwig is not necessarily entitled to a new trial. Our determination of whether a defendant's conviction should be reversed and a new trial ordered is not based on a reading of the challenged instruction in isolation. ***Id***. Rather, we must determine whether the jury instructions as a whole communicated an incorrect statement of law or misled the jury. ***Id***. If they did not, the defendant is not entitled to a new trial. *See* ***id***.

¶13 In ***Foster***, we found that even though the challenged instruction was not a correct statement of the law, the defendant was not entitled to a new trial. ***Id***. at 29. We explained that the negative effect of the improperly worded instruction on the jury was diminished by other instructions given by the court, which

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[4] The State argues that whether the instruction was a correct statement of law is irrelevant to the question of whether Ludwig received a fair trial because the State still had to meet its burden of proving that Ludwig knew the Hisermans did not consent to the removal of the vehicle—the third element of the crime. This argument ignores the fact that in order to meet its burden of proof, the State needed to prove all elements of the crime, not just one. For the same reasons, we also reject the State's argument that any error on the court's part in substituting "may" for "must" was harmless because regardless of the mistake instruction, the State bore the burden of proving "the issue of non-consent."

required the jury to consider all the evidence and used the term "may" in such a way that it "emerged … not as a term giving permission to the jury to consider evidence, but rather, as a term explaining the jury's authority to reach certain determinations based on its evaluation of the evidence." ***Id***.

¶14 The same cannot be said in the present case. With respect to Ludwig's intent, the court provided the jury with a modified version of Ludwig's proposed jury instruction on mistake, which, as explained above, could have been interpreted by the jury as suggesting that it could ignore evidence regarding Ludwig's belief that Hiserman had abandoned his vehicle on Ludwig's property, and therefore consented to the transfer, when deciding whether Ludwig acted with the requisite intent. Unlike ***Foster***, however, the jury was not further instructed that all evidence was to be considered. Nor was the word "may" used in other instructions in such a way that it would convey to the jury that the term was used to explain the jury's authority to reach a certain determination, rather than a term giving the jury permission to ignore evidence. Thus, unlike the jury in ***Foster***, the jury in the present case was not given further instructions that counterbalanced the incorrect statement of law given in the instruction on mistake. We therefore conclude that, as a whole, the instructions communicated an incorrect statement of law. Accordingly, we reverse Ludwig's conviction and remand the matter for a new trial.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)(4).