COURT OF APPEALS
DECISION
DATED AND FILED

April 24, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1843-CR **Cir. Ct. No. 00-CF-674**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH P. BUCHHOLZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: ROBERT HAWLEY, Judge. *Affirmed*.

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Joseph P. Buchholz has appealed from a judgment convicting him of possession of marijuana with intent to deliver in violation of

WIS. STAT. § 961.41(1m)(h)1 (1999-2000).[1] The sole issue presented on appeal is whether the trial court erred in denying his motion to suppress evidence seized in a search of his dormitory room. Because we conclude that the trial court properly denied the motion on the ground that Buchholz consented to the entry of his room, we affirm the judgment.

¶2 A warrantless search based upon consent which is freely and voluntarily given does not violate the Fourth Amendment. ***State v. Phillips***, 218 Wis. 2d 180, 196, 577 N.W.2d 794 (1998). Voluntariness of consent to search presents a question of constitutional fact which we review under a two-step analysis. ***Id.*** at 195. The trial court's findings of evidentiary or historical fact will not be disturbed unless they are contrary to the great weight or clear preponderance of the evidence. ***Id.*** However, this court independently applies constitutional principles to the facts as found by the trial court to determine whether the standard of voluntariness has been met. ***Id.***

¶3 Consent to a search need not be given verbally, and may be given by gesture and conduct. ***Id.*** at 197. The State has the burden of proving by clear and convincing evidence that a defendant's consent was given voluntarily. ***Id.***

¶4 At the suppression hearing, Officer Trent Morgan of the University of Wisconsin-Oshkosh police department testified that in the early morning hours of September 28, 2000, he arrested Michael Schneider for driving a motor vehicle while intoxicated. He testified that Schneider and some of the occupants of the vehicle were under the legal drinking age, and that Schneider admitted they had

[1] All references to the Wisconsin Statutes are to the 1999-2000 version.

been drinking in 630 South Scott Hall. Morgan testified that at about 7:30 a.m. he went to Room 630 Scott Hall to investigate the report that underage drinking had taken place in the room the night before. He testified that he knew Room 630 was Buchholz's room before going to it, and that he knew Buchholz was underage.

¶5 Morgan testified that his purpose in going to Buchholz's room was to talk to Buchholz about alcoholic beverages and underage drinking. He testified that when Buchholz came to the door of the dorm room, he asked Buchholz for permission to enter the room, telling Buchholz that he would like to come into the room to speak to him. Morgan testified that he did not believe Buchholz said anything in response, but that Buchholz opened up the door, turned around, turned the light on, and walked into the room. Morgan testified that he understood Buchholz's actions as intending to give him permission to follow, and he therefore entered the room.

¶6 The trial court found that by his conduct, Buchholz gave Morgan permission to enter his room. We agree. Buchholz's acts of opening the door, turning on the light, and turning to walk back into the room in response to Morgan's request for permission to enter constituted an invitation and consent for Morgan to follow him. *See* ***id.*** Because Morgan made no misrepresentation as to his purpose, and used no duress or coercion, express or implied, to obtain Buchhholz's consent, we conclude that the trial court properly determined that the State met its burden of proving by clear and convincing evidence that Buchholz's

consent was voluntary. *See* ***id.*** at 197-98. The trial court therefore properly denied Buchholz's motion to suppress evidence observed and seized after entry.[2]

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[2] In his reply brief, Buchholz argues that the State "did not meet its burden of proving that the person who answered the door to Mr. Buchholz's room had the authority to allow the officer to enter the room." Lack of authority to consent to entry into the room was not clearly raised in Buchholz's brief-in-chief, and therefore need not be addressed by this court. ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981). In any event, the issue lacks merit. Morgan specifically testified that he knew before going to 630 Scott Hall that this dorm room belonged to Buchholz, and that "when Mr. Buchholz came to the door," he asked him for permission to enter the room. It is thus clear that consent to enter the room was given by Buchholz, who had the authority to do so.