COURT OF APPEALS
DECISION
DATED AND RELEASED

December 14, 1995

NOTICE

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

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

Nos. 95-1764-CR
95-2305-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FRED J. O'DELL,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Reversed and cause remanded with directions.*

VERGERONT, J.[1] Fred J. O'Dell appeals from a judgment convicting him of bail jumping in violation of § 946.49(1)(a), STATS., and from an order denying postconviction relief.[2] The complaint alleged that on August 11,

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

[2] O'Dell filed an appeal from the judgment of conviction and an appeal from the order denying postconviction relief. We consolidated the appeals by order dated September 13, 1995.

1992, in case number 92-CM-372, O'Dell was released from custody on a $5,000 recognizance bond. The complaint further alleged that the bond contained a condition that he not be at or around 127 Kennedy Heights; that this condition was in effect on August 25, 1993; and that O'Dell intentionally failed to comply with the condition by being on the premises at 127 Kennedy Heights on August 25, 1993.[3] O'Dell asserts that: (1) the evidence received at trial was insufficient to show that on August 25, 1993, he was subject to a bond condition that he not be at 127 Kennedy Heights; and (2) the trial court erroneously received an exhibit at trial (Exhibit 4) that was not properly authenticated and identified. We conclude that the evidence received at trial, including the challenged exhibit, was insufficient to support the conviction. We therefore reverse the conviction and remand with directions to the trial court to enter a judgment of acquittal.

Before a defendant may be found guilty of the offense of bail jumping under § 946.49(1), STATS., the State must prove by evidence beyond a reasonable doubt the following three elements: (1) that the defendant was either arrested for, or charged with, a felony or misdemeanor; (2) that the defendant was released from custody on a bond, under conditions established by the trial court; and (3) that the defendant intentionally failed to comply with the terms of his or her bond. ***State v. Dawson***, 195 Wis.2d 161, 170, 536 N.W.2d 119, 122 (Ct. App. 1995).

The case was tried to the court. There was testimony that O'Dell entered the residence at 127 Kennedy Heights at approximately 9:30 p.m. on the evening of August 25, 1993. There were three pieces of evidence that related to the existence of a bond condition that O'Dell not be at or around 127 Kennedy Heights. First, Michael Evans testified for the prosecution. He testified on direct examination that he had heard a judge tell O'Dell that he was not supposed to be at his (Evans') residence, which was 127 Kennedy Heights. Although Evans answered "yes" to the question regarding whether that condition was in effect at approximately 9:30 p.m. on August 25, 1993, on cross-examination, redirect, and in answer to the court's question, Evans contradicted that answer and also said he did not know.

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[3] The complaint contained five counts, one of which was the bail jumping charge at issue on this appeal. O'Dell was found not guilty on the other four counts.

The State moved to have Exhibit 3, a certified copy of a document entitled "Court Minutes," admitted into evidence. Exhibit 3 contains the case number 92-CM-372, and the defendant is listed as Fred J. O'Dell. Exhibit 3 lists the charges as "Vio Child Abuse Ord\Injun" and is dated August 11, 1992. On the backside (or second page) of Exhibit 3, in a section entitled "Judgment and Certificate of Conviction," an eight-month period of incarceration is specified, commencing August 18, 1992. In the space below is written:

Conditl Bond until jail date
No contact with victim-Michael Evans.
Huber is for employment or schooling, only
No contact at: 127 Kennedy Heights.

Exhibit 3 was admitted over the objection of defense counsel, who argued that it was not relevant because it showed that the bond condition was in effect only until the jail date, August 18, 1992.

The State also moved to have a computer print-out from the court computer system, COMASCO, admitted into evidence. This exhibit, marked Exhibit 4, consists of thirteen computer pages, six and one-half pages of hard copy. There is no title to this document. The first section is entitled "Case," and includes this information:

CASE NO. 92CM000372 OLD CASE NO: CASE TYPE: MISDEMEANR PLAINTIFF: STATE FILING DATE: 01/31/92 CHARGE AGENCY: DANE CO SHERIFF CHARGE PAPER TYP: COMPLAINT INITIAL CT DATE: 01/31/92 AGENCY CASE NO.: 247512 JUDGE: DECHAMBEAU, ROBERT A. ASSIGNED ADA: DAWSON, LINDA
SUMMARY DATA STATUS: ACTIVE WCIS TRANS CODE: Y
NAME: ODELL, FRED J SCHD DATE: 08/25/93 SCH PROCED: POST-JUDG MOTN ORIG CASE NO: CASE FINDING: 08/11/92 ACTION: GUILTY REASON: GTY AFTER COURT TRIAL GUILTY FINDING: Y SENT DECISION: 08/11/92 APPEAL NOTICE:

Directly following this "Case" section is a section titled "Scheduled Event," containing this information:

SCHD DATE: 08/25/93 SCHD PROCED: POST-JUDG MOTN TIME: 1430 ROOM: 222 BRANCH: 01 JUDGE: DECHAMBEAU, ROBERT A.

Following sections titled "Defendant," "Charge/Disp," and "Sentence," there is a section titled "Bail Activity":

SEQ NO.: 01 CHARGE COUNT: 01 DATE: 08/14/92 BAIL TYPE: RECOGNIZNE AMOUNT: 5000.00 BAIL TYPE: AMOUNT: BAIL SATISFIED: Y STAY DATE: COMMITMENT: BAIL CONDITIONS: NO ACTS/THREATS OF VIOL TO MICHAEL EVANS. NO DISCU BAIL CONDITIONS: SSION OF THIS CASE W/M EVANS. SEE MINUTES 7/8/92. BAIL AMENDED: Y
OLD BAIL INFO: 050692/PR/500.00

There follow numerous entries titled "Event" and "Minute," with the first date of the first event being January 31, 1992, for an arraignment, and the date of the last event being June 24, 1993, containing this information:

DATE: 06/24/93 PROCEEDING: SETOVER SCHD DATE: 06/24/93 SCHD PROCED: POST-JUDG MOTN WCIS ACTIVITY CD: OTHER IN-COURT ACTIVITY JUDGE: DECHAMBEAU, ROBERT A BRANCH: 01 EVENT ACTION: COMPLETED.

Computer pages 8 and 9 contain this entry:

DATE: 08/14/92 PROCEEDING: MOTION HEARING SCHD DATE: 08/14/92 SCHD PROCED: MOTION HEARING WCIS ACTIVITY CD: OTHER IN-

COURT ACTIVITY JUDGE: DECHAMBEAU, ROBERT A BRANCH: 01 EVENT ACTION: COMPLETED

SEQ NO: 01 MINUTE: CT GRANTED DEF'S MOTN RECONSIDERATION-STAY PEND. APPEAL; BAIL AMENDED TO $5000 RECOG. W/CONDS:1)NO CONTACT W/MICHAEL EVANS; 2)NOT TO BE @ 127 KENNEDY HTS ADDRESS OR SURROUNDING AREA; 3)PURSUE APPEAL W/IN 90 DAYS.

In offering Exhibit 4, the print-out from COMASCO, the prosecutor stated that the bail conditions as stated in Exhibit 3 were amended on August 14, 1992, to a $5,000 recognizance bond, with the other conditions being similar, but not identical, to the bail conditions, and these conditions were to remain in effect through the appeal. She stated that she did not have a certified copy because the file was currently with the supreme court on appeal. She asked that Exhibit 4 be admitted and she would later supplement the record with a certified copy of the minutes from August 14, 1992. The prosecutor never did file a certified copy of the minutes.

The court asked the prosecutor a number of questions about Exhibit 4. In response, the prosecutor explained how the clerk's office entered data into the computer. The prosecutor acknowledged that the print date was not on the print-out and stated that it was printed on "Tuesday of this week." It was the prosecutor's position that Exhibit 4 showed that the conditions imposed on August 14, 1992, were in effect on August 25, 1993, because there were no subsequent entries modifying it and the conditions were set after an appeal was filed.

Defense counsel objected to Exhibit 4. The State subsequently stipulated that the objections were sufficient to constitute an objection based on hearsay, and an objection based on authenticity and identification. The court admitted Exhibit 4, concluding:

> First of all, after questioning Ms. Dawson, as an officer of the court, I find that I am able to read and interpret what these entries mean.
>
> Secondly, as it relates to whether or not Ms. Evans had filed a notice of appeal by then, the thing that I find to be controlling, the fact that the minute entry indicates that bail was modified upon the defendant's motion. Thus, the defendant would have initiated the bail modification process. The Court granted that motion. And imposed the following conditions, which I've already read into the record.
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> So as far as whether or not it's hard to tell how accurate this is, this is obviously not as accurate as someone procuring for the Court a transcript. However, I feel I am able to read it with accuracy and, accordingly, on those grounds, I am going to receive Exhibit 4.

The court found O'Dell guilty of intentionally violating the condition of his release from custody that he not be on the premises of 127 Kennedy Heights. The court found this condition was lawfully imposed and it inferred an intentional violation of the condition from the fact of the condition. The court noted that O'Dell did not present any testimony to rebut this inference. The court sentenced O'Dell to three years in prison.

At the hearing on O'Dell's postconviction motion, counsel argued that Exhibit 4[4] was improperly admitted, and that, with or without Exhibit 4, the evidence was insufficient to sustain the conviction. The trial court concluded that Exhibit 4 was what it was purported to be--a computer run on Case No. 92-CM-372, ***State of Wisconsin v. Fred J. O'Dell***--and that as an official publication, it was self-authenticating under § 909.02, STATS. The court also concluded that it was able to accurately read Exhibit 4; that the prosecutor's remarks were not

[4] The postconviction motion also challenged the admission of Exhibit 3, but that issue is not raised on appeal.

testimony; and that Exhibit 4 shows what bail conditions were imposed on O'Dell at the time in question.

We address the issue of the sufficiency of the evidence first. Even if Exhibit 4 were improperly admitted, we would be required to determine whether the evidence presented at trial was sufficient to sustain the conviction before remanding for a new trial.[5] *See* ***State v. Ivy***, 119 Wis.2d 591, 607-610, 350 N.W.2d 622, 631-32 (1984). In ***Burks v. United States***, 437 U.S. 1 (1978), the United States Supreme Court held that when a defendant's conviction is reversed by an appellate court on the ground that the evidence was insufficient to sustain the jury's verdict, as opposed to some trial court error, the Double Jeopardy Clause bars a retrial on the same charge. A reviewing court's reversal for insufficiency of the evidence is in effect a determination that the government's case against the defendant was so lacking that the trial court should have entered a judgment of acquittal, rather than submitting the case to a jury. ***Id.*** at 16-17. *See also* ***Lockhart v. Nelson***, 488 U.S. 33, 38-42 (1988) (when deciding whether a retrial is permissible under the Double Jeopardy Clause when evidence was erroneously admitted against the defendant, a reviewing court must consider all of the evidence admitted by the trial court, including the evidence erroneously admitted, in assessing the sufficiency of the evidence).

In reviewing evidence to determine whether it is sufficient to support a conviction, we apply this standard:

> The burden of proof is upon the state to prove every essential element of the crime charged beyond reasonable doubt. The test is not whether this court or any

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[5] The State appears to suggest that even if Exhibit 4 were erroneously admitted, the error does not entitle O'Dell to a new trial because the error does not affect a "substantial constitutional right." However, the State does not explain what evidence admitted at trial, besides Exhibit 4, is proof that on August 25, 1993, O'Dell was subject to a condition of a bond not to be at or near the premises of 127 Kennedy Heights. Our review of the record discloses none. Therefore, if Exhibit 4 were erroneously admitted, there is a reasonable possibility that the error contributed to the conviction and O'Dell would be entitled to a new trial. *See* ***State v. Dyess***, 124 Wis.2d 525, 543-44, 370 N.W.2d 222, 231-32 (1985) (defendant is entitled to a new trial if there is a reasonable possibility that error, whether of constitutional proportions or not, contributed to the conviction).

> member is convinced of the guilt of the defendant beyond a reasonable doubt but whether this court can conclude that a trier of facts could, acting reasonably, be convinced to the required degree of certitude by the evidence which it had a right to believe and accept as true. On review we view the evidence in the light most favorable to sustaining the conviction. Reasonable inferences drawn from the evidence can be used to support a conviction; if more than one reasonable inference can be drawn from the evidence, the inference which supports the conviction is the one that the reviewing court must adopt.

State v. Hamilton, 120 Wis.2d 532, 540-41, 356 N.W.2d 169, 173-74 (1984).

O'Dell argues that neither Michael Evans' testimony nor Exhibit 3 is evidence that he was released on a bond on the condition that he not go on or near 127 Kennedy Heights and that this bond condition was in effect on the evening of August 25, 1993. The State does not dispute this. Evans acknowledged in his testimony he did not know when the condition was in effect. Exhibit 3 states that the condition is in effect until August 18, 1992, when the jail sentence begins. The narrow issue, then, is whether Exhibit 4 is evidence from which a reasonable fact finder could be convinced to the requisite degree of certainty that the pertinent bond condition was imposed and was in effect on the evening of August 25, 1993.

We agree with the State that Exhibit 4 gives rise to a reasonable inference that on August 14, 1992, the court granted O'Dell's motion for a stay of the sentence in Case No. 92-CM-372 pending appeal, amending bail to a $5,000 recognizance bond, with a condition that O'Dell not be at 127 Kennedy Heights or the surrounding area. However, we do not agree that Exhibit 4 gives rise to a reasonable inference that this condition was still in effect on the evening of August 25, 1993.

It might be reasonable to infer that the absence of any later reference to this bond in Exhibit 4, and in particular to a modification of the

pertinent condition of the bond, is evidence that the bond condition remained in effect to the date of the last entry on Exhibit 4. Our hesitancy here is that the reasonableness of that inference depends on how Exhibit 4 was prepared, and there was no testimony on that. The prosecutor's statements explaining how and by whom Exhibit 4 was created are not evidence because they are not sworn testimony, as the trial court recognized. *See* § 906.03(1), STATS.; WIS J I—CIVIL 110 (arguments, conclusions and opinions of counsel are not evidence); ***Kenwood Equip., Inc. v. Aetna Ins. Co.***, 48 Wis.2d 472, 481, 180 N.W.2d 750, 756 (1970) (remarks of counsel are not evidence).

However, the greater problem with Exhibit 4 is that the last entry for "Event" is dated June 24, 1993. It appears that the event scheduled for that date--a post-judgment motion--was then scheduled for August 25, 1993, at 2:30. Exhibit 4 does not indicate what happened at that time, and there is no event with a later date scheduled or described in Exhibit 4. The incident giving rise to the charge of bail jumping occurred on August 25, 1993, at approximately 9:30 p.m. We conclude that Exhibit 4 does not give rise to a reasonable inference that the bond condition was in effect at that time.

The prosecutor told the trial court that Exhibit 4 was printed on Tuesday of the week of trial. Even if it were otherwise reasonable to infer that nothing changed from the date of last entry to the date of printing, the prosecutor's statement on the date of printing is not evidence. Similarly, other statements made by the prosecutor about the status in Case No. 92-CM-372 might, if they were evidence, together with Exhibit 4, create a reasonable inference that the bond condition was in effect on the evening of August 25, 1993. But those statements are not evidence. There was no witness giving sworn testimony on any of these matters, nor is there any date of printing, certification, or other writing on Exhibit 4 itself that would create a basis for a reasonable inference to that effect.

The trial court indicated at the postconviction hearing it could rely on the prosecutor's statement, as an officer of the court, to explain Exhibit 4. Certainly attorneys can comment and argue on how to interpret pieces of evidence. But where critical information is not contained in an exhibit, an attorney's unsworn statement cannot supply that, in the absence of a stipulation by the opposing party. The issue here is not whether the prosecutor's

statements are reliable, but whether they are evidence. They are not, unless preceded by an oath or affirmation as required by § 906.03(1), STATS.

We conclude that no reasonable trier of fact could conclude, based on Exhibit 4, that the bond condition that O'Dell not be at or near 127 Kennedy Heights was in effect on the evening of August 25, 1993. Because that is an essential element of the crime of bail jumping, we must reverse the conviction. Upon remand, we direct the trial court to vacate the conviction and to enter a judgment of acquittal.

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

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