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DISTRICT II/IV

January 30, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2012AP2142-CR

State of Wisconsin v. Michael B. Daniels (L.C. # 2010CF294)

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

Michael Daniels appeals a judgment, entered upon a jury's verdicts, convicting him of burglary and attempted theft.¹ Daniels argues the circuit court erred by denying a jury instruction request. Based upon our review of the briefs and record, we conclude at conference

¹ Daniels also purports to appeal orders deciding his postconviction motions. On appeal, Daniels does not challenge his conviction for attempted theft of property from Northern Lights Tan Spa, nor does he develop any argument challenging either postconviction order. This appeal will therefore be limited to reviewing only his burglary conviction.

that this case is appropriate for summary disposition. We summarily affirm the judgment and the orders. *See* WIS. STAT. RULE 809.21 (2011-12).²

Relevant to this appeal, the State charged Daniels with burglary of a room within How Dea Mini Mart. Burglary, as defined in WIS. STAT. § 943.10(1m)(f), is committed by one who intentionally enters a room within a building “without the consent of the person in lawful possession and with intent to steal or commit a felony in such place.” At trial, Daniels did not dispute that he entered the Mini Mart during business hours, walked into the manager’s office when nobody was in the office, and stole money from a cash box in the office. He asserted, however, that he was guilty only of theft at the Mini Mart—a crime for which he was not charged. Daniels argued to the jury that the State failed to prove all elements of the charged crime of burglary. Specifically, he claimed the State failed to establish a lack of consent by the person in lawful possession of the room. To that end, Daniels asked the court to read WIS. STAT. § 943.10(3) to the jury.

WISCONSIN STAT. § 943.10(3) provides: “For the purpose of this section, entry into a place during the time when it is open to the general public is with consent.” Daniels claimed this statutory section should be included in the instructions because “it is a defense to burglary if the establishment is open to the general public.” Daniels now challenges the circuit court’s denial of this jury instruction request.

² All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

The circuit court has broad discretion in determining whether to give a particular jury instruction. *State v. Ferguson*, 2009 WI 50, ¶9, 317 Wis. 2d 586, 767 N.W.2d 187. Whether a jury instruction fully and correctly informs the jury of the applicable law, however, is a question of law that we review independently. *Id.* A defendant in a criminal case is entitled to have a jury instruction on any valid theory of defense if: (1) the theory relates to a legal defense and not an interpretation of evidence; (2) the request is timely made; (3) the theory is not adequately covered by other instructions; and (4) the theory is supported by sufficient evidence. *State v. Coleman*, 206 Wis. 2d 199, 212-13, 556 N.W.2d 701 (1996).

In denying Daniels' jury instruction request, the court concluded that under the facts of this case, it would be confusing and a misstatement of the law to add the additional language of WIS. STAT. § 943.10(3). The store manager testified that only she, the cashiers, and the owners had permission to enter the office, and that the office door was marked with two signs that read "employees only." It is undisputed that Daniels was not a store employee. The manager further testified that Daniels did not have permission to enter the office.

Because the requested language did not differentiate the manager's office, which the evidence shows was closed to the public, from the general premises of the store, the instruction could have misled the jury into believing that Daniels had consent to enter the office, as a matter of law, because the rest of the store was open to the public. Daniels' argument that the office was open to the public because the door was left open is not persuasive. The court properly denied the requested instruction.

Upon the foregoing,

IT IS ORDERED that the judgment and orders are summarily affirmed pursuant to WIS.
STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals