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DISTRICT II

December 11, 2019

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

2018AP1588-CR State of Wisconsin v. John M. Mitchell (L.C. #2015CF203)

Before Reilly, P.J., Gundrum and Davis, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

John M. Mitchell appeals from a judgment of conviction for operating a vehicle while intoxicated (OWI), fifth offense, and an order denying postconviction relief. Mitchell argues that the circuit court misstated the law when instructing the jury on whether he drove on a “premises

held out to the public for use of their motor vehicles.” WIS. STAT. § 346.61 (2017-18).¹ Based upon our review of the briefs and record, which reflect that Mitchell did not object to the jury instruction utilized by the circuit court, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

On April 26, 2015, Mitchell crashed his motorcycle and lost consciousness at Sybil Lane and South Lakeshore Drive in the Town of Linn, Walworth County. After regaining consciousness, Mitchell fled on foot but was eventually apprehended by police a short time later. Mitchell had “trouble standing and walking, had thick and slurred speech,” and was emitting an odor of intoxicants. Mitchell denied driving the motorcycle initially, but eventually admitted that he “had some drinks, drove his bike, and made a mistake.” Mitchell was taken to the hospital for treatment of his injuries and a blood draw, which revealed a blood alcohol concentration of .248. Mitchell was charged with OWI, fifth offense, pursuant to WIS. STAT. § 346.63(1)(a).

“In addition to being applicable upon highways,” Wisconsin’s drunk driving laws “are applicable upon all premises held out to the public for use of their motor vehicles.” WIS. STAT. § 346.61. At the jury trial, Mitchell’s defense was that he was not operating his motorcycle on premises held open to the public. Sybil Lane extends from South Lakeshore Drive, with approximately twenty-five houses lining both sides of the street, and dead-ends at a lake. A sign on the street indicates “Sybil Lane, Private Drive, No Outlet.” A homeowner’s association owns

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Sybil Lane and, according to testimony, only homeowners and their guests are authorized to use Sybil Lane.

At the close of evidence, the parties discussed the definition of “roadway” and what it means for a premises to be “held open to the public.” The State’s proposed instruction was a combination of standard jury instruction WIS JI—CRIMINAL 2669, portions of WIS JI—CRIMINAL 2600 and WIS JI—CRIMINAL 2605, and a line from *State v. Tecza*, 2008 WI App 79, ¶22, 312 Wis. 2d 395, 751 N.W.2d 896. Following the jury instruction conference, the court concluded that the instruction to be given to the jury on “premises held open to the public” was agreed upon as follows:

“Premises held open to the public” means premises held open to the public for use of their motor vehicles, whether such premises are publicly or privately owned, and whether or not a fee is charged for the use thereof. If on any given day any licensed driver could enter the community unchallenged, the road ways of a private community are held open to the public for use of their motor vehicles.

Mitchell’s counsel agreed with the instruction.

The jury found Mitchell guilty, and the circuit court sentenced him to thirty months’ initial confinement followed by three years’ extended supervision. Mitchell thereafter filed a postconviction motion arguing that the jury instruction noted above was “plainly or fundamentally erroneous and affected the substantial rights” of Mitchell. The court denied Mitchell’s motion, concluding that the jury instruction at issue was not wrong. Mitchell appeals.

Mitchell admits that his trial counsel did not object to the instruction at issue and that a defendant who does not object to a jury instruction cannot later claim that the instruction was erroneous. *See State v. Paulson*, 106 Wis. 2d 96, 103-04, 315 N.W.2d 350 (1982). He argues,

however, that a jury instruction may be reviewed on appeal if “the error is so plain or fundamental as to affect the defendant’s substantial rights.”² *Id.* at 104-05.

We begin by stating the obvious: “Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict.” WIS. STAT. § 805.13(3). We lack the discretionary power to review the claimed error, even under the plain-error doctrine. *State v. Schumacher*, 144 Wis. 2d 388, 402-09, 424 N.W.2d 672 (1988). We are limited to exercising our discretionary power of reversal pursuant to WIS. STAT. § 752.35. *Schumacher*, 144 Wis. 2d at 408. “A discretionary power of reversal (as opposed to a discretionary power of review) is compatible with doing justice in the individual case, yet the limitation imposed by a discretionary power of reversal is also a limitation compatible with the fact that the court of appeals does not declare or develop the law.” *Id.* Further, “discretionary reversal power is exercised only in ‘exceptional cases.’” *State v. Avery*, 2013 WI 13, ¶38, 345 Wis. 2d 407, 826 N.W.2d 60 (citation omitted).

We refuse to exercise our discretionary reversal power under the circumstances in this case as we have no hesitancy in concluding that the real controversy was fully tried, and we are satisfied that there has been no miscarriage of justice. *See Vollmer v. Luety*, 156 Wis. 2d 1, 17, 456 N.W.2d 797 (1990). Wisconsin’s drunk driving laws “are applicable upon all premises held out to the public for use of their motor vehicles.” WIS. STAT. § 346.61. As shown by Mitchell’s use of Sybil Lane,³ it is evident that on any given day Sybil Lane is held out to the public and not

² Mitchell does not allege ineffective assistance of his trial counsel.

³ The record indicates that Mitchell did not live on Sybil Lane.

limited or restricted to the approximately twenty-five households who own Sybil Lane via their homeowner's association. The court, with the parties' agreement, utilized the now complained of language from *Tecza*. As *Tecza* is precedential, we have no power to overrule any of its language. See *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997).

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals