

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

February 13, 1996

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.

NOTICE

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

No. 94-2855-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES ROBERT SCHROEDER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. James Robert Schroeder appeals, after a jury trial, from a judgment of conviction for two counts of second-degree sexual assault, contrary to § 940.225(2)(a), STATS., and one count of false imprisonment, contrary to § 940.30, STATS. The jury acquitted Schroeder on two other counts of second-degree sexual assault. Schroeder claims that the trial court erred in

instructing the jury, and that he should be granted a new trial on the sexual assault convictions pursuant to § 752.35, STATS.¹ Schroeder does not seek a new trial on the false imprisonment conviction. Because the trial court inadequately instructed the jury, we must exercise our power of discretionary reversal under § 752.35, STATS. to reverse Schroeder's sexual assault convictions and remand for a new trial.

I. BACKGROUND.

In the early morning of October 11, 1993, Schroeder gave the victim, Betty H., a ride home from a tavern. He parked his car near her home. What happened next was hotly disputed. Betty H. testified that Schroeder prevented her from leaving the car, forcibly removed her clothes, and then sexually assaulted her. Schroeder's version of events was that Betty H. initiated the sexual activity, fully consented to the sexual contact, but became angry because after the sexual activity had concluded, he refused to come up to her apartment.

Schroeder was charged with four counts of second-degree sexual assault and one count of false imprisonment. The case was tried to a jury. During deliberations, the jury sent several notes to the trial court. The first note stated: "At what point in sexual intercourse is consent given or considered irrevocable/revoked?" and "At what point in sexual contact is consent given or considered irrevocable/or revoked?" The trial court responded to the jury's questions with a special instruction, which provided:

¹ Section 752.35, STATS., provides:

Discretionary reversal. In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial.

The following supplemental instruction is to be read in connection with the instruction on the bottom of page 3 concerning the meaning of the term “did not consent,” and also read together with all of the instructions in the case:

As to Counts 1-4, the second element requires that Betty H[.] did not consent *at the time of the sexual intercourse or contact* referred to in the first element for that count. It is up to you to decide whether consent did or did not exist at that time.

While you may consider any evidence relating to consent which may have proceeded or followed the sexual intercourse or contact, before you may find the defendant guilty you must be satisfied beyond a reasonable doubt that, at the time of the sexual intercourse or contact, Betty H[.] did not consent.

(Emphasis in original.) The jury later sent the trial court another note, which said: “In reference to the issue of consent, we have a question. Does the phrase consent “at the time of the sexual intercourse or contact” mean, in the case of penis-vagina intercourse, at any time while the penis is in the vagina?” (Underline in original.) Prior to discussing this additional note with the parties, the trial court sent a brief note back to the jurors stating: “You must resolve this case based on the instructions you have received. Please continue your deliberations.” While the trial court and the parties were discussing what additional response should be sent to the jury, the jury indicated that they had reached a verdict. The trial court entered the judgment of conviction and Schroeder now appeals.

II. ANALYSIS.

Generally, the trial court possesses wide discretion in instructing the jury. *State v. Amos*, 153 Wis.2d 257, 278, 450 N.W.2d 503, 511 (Ct. App.

1989). Nevertheless, under the circumstances presented in this case, we conclude that the jury was not adequately instructed and therefore, in the interests of justice, we must reverse and remand this case for a new trial on the sexual assault convictions. See § 752.35, STATS.,² and *Vollmer v. Luety*, 156 Wis.2d 1, 11, 456 N.W.2d 797, 802 (1990).

In reviewing the supplemental instruction given by the trial court in this case, we conclude that the phrase “at the time of the alleged sexual intercourse or contact” was ambiguous and confusing to the jury. This conclusion is based in part on the uncertainty of the phrase itself, as well as the obvious difficulty the jury was experiencing with the phrase, as evidenced by the subsequent note sent to the trial court. The phrase is ambiguous because it is capable of more than one meaning. *TDS Realestate Inv. Corp. v. City of Madison*, 151 Wis.2d 530, 537, 445 N.W.2d 53, 56 (Ct. App. 1989). The phrase given could mean either at the instant prior to the contact or at any time during the contact. The jury's confusion was evidenced by their subsequent note sent to the trial court addressing this precise issue. The trial court should have instructed the jury that the consent or lack of consent must be *at the instant prior to the act*. “At the time of the act” was not specific enough to guide the jury under the circumstances in this case. Accordingly, in the interests of justice, we reverse Schroeder's sexual assault convictions, and remand for a new trial.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

² Because Schroeder does not challenge his conviction for false imprisonment, that conviction is affirmed.