COURT OF APPEALS
DECISION
DATED AND RELEASED

DECEMBER 27, 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(1), STATS.

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

No. 95-2128-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARY R. KNUTSON,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed.*

ANDERSON, P.J. The narrow issue presented in this appeal is whether a tavern parking lot with signs declaring that the lot was for "Bike Parking Only" was an area held out to the public for their motor vehicles. A jury concluded that it was and convicted Gary R. Knutson of drunk driving. In this appeal, Knutson calls upon this court to review the jury's verdict with respect to whether he was driving on premises held out to the public.

We will uphold the verdict "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger,*** 153 Wis.2d 493, 507, 451 N.W.2d 752, 758 (1990). In addition, we are obligated to accept and follow the inferences drawn by the jury unless the evidence on which those inferences are based is incredible as a matter of law. *See* ***id.***

Knutson was arrested for drunk driving in the parking lot of a tavern after the police received a citizen's complaint about an accident in the lot. The accident occurred in the tavern's upper parking lot when Knutson backed over a motorcycle. The tavern catered to motorcyclists and when there was a large crowd the tavern would post portable signs at either end of the tavern building advising "Bike Parking Only." The signs were not posted at the entrance of the parking lot, but they were visible from the state trunk highway that paralleled the premises.

On appeal, Knutson maintains the argument that comprised his primary defense at trial. He concedes that the applicability of the drunk driving laws is not restricted to persons operating on a public highway; § 346.61, STATS., provides:

> In addition to being applicable upon highways, ss. 346.62 to 346.64 are applicable upon all premises held out 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.

However, Knutson argues that this statute requires the State to produce evidence that it was the intent of the tavern owner to allow the parking lot to be used by the public and that the State failed to fulfill its burden.

Section 346.61, STATS., was construed in ***City of Kenosha v. Phillips,*** 142 Wis.2d 549, 419 N.W.2d 236 (1988). In ***Phillips***, the supreme court held that it was the burden of the prosecution to present "proof that it was the intent of the owner to allow the premises to be used by the public." ***Id.*** at 554, 419 N.W.2d at 238. In the absence of proof of the owner's intent, the drunk driving laws would not be applicable to incidents occurring off of a public highway. The supreme court explained that the burden of establishing that the premises were held out for public use could be satisfied in many ways:

> Holding out can be by action or inaction that would make the intent explicit or implicit. Either action or inaction might, in appropriate circumstances, constitute a holding out to the public, but the burden of proof is on the proponent of the applicability of the statute.

Id. at 558-59, 419 N.W.2d at 239-40.

We agree with Knutson that the testimony of the bartender on duty the day of the accident is not direct evidence of the intent of the owner because the bartender was an employee without any ownership, management or supervisory interest. However, we disagree with Knutson that the only real evidence of the owner's intent was the "Bike Parking Only" signs and that the only inference that could be drawn from this evidence was that the owner intended not to hold out the tavern's parking lot for public use.

In ***City of LaCrosse v. Richling,*** 178 Wis.2d 856, 860, 505 N.W.2d 448, 449 (Ct. App. 1993), we developed a commonsense test for the application of § 346.61, STATS., "the appropriate test is whether, on any given day, potentially any resident of the community with a driver's license and access to a motor vehicle could use the parking lot in an authorized manner."

Applying this test to the facts of this case, we conclude that there is sufficient circumstantial evidence of the tavern owner's intent to support the jury's verdict that the parking lot was held out for use of the public. *See* ***Phillips***, 142 Wis.2d at 558, 419 N.W.2d at 239. The "Bike Parking Only" signs were portable signs that were not permanently posted, they were not posted at the entrance of the parking lot and they did not warn violators of potential consequences for disobedience.[1] And, because the signs were portable and only used when there was a large number of motorcyclists at the tavern, the jury could reasonably infer that the parking lot was not maintained for the benefit and use of motorcyclists.[2] The imprecise makeup and random use of the signs

[1] In comparison, in ***City of Kenosha v. Phillips,*** 142 Wis.2d 549, 419 N.W.2d 236 (1988), the signs were permanently posted at the entrance of the parking lots, limited parking to employees of AMC and warned violators of potential consequences. From this evidence, without the testimony of the owner or manager of AMC, the supreme court concluded that the parking lot was not held out to the public. *See* ***id.*** at 559, 419 N.W.2d at 240.

[2] In comparison, the trial court found that there was "no question that the parking lot

permit the jury to reach the reasonable conclusion that the owner had no intention to restrict the use of the parking lot.

In addition, although the testimony of the bartender is not direct evidence of the owner's intent, it is circumstantial evidence of that intent. A jury could reasonably infer that the bartender was given instructions pertaining to the use of the parking lot. The bartender testified that access to the upper lot was not restricted to motorcycles when the signs were posted and that anyone could enter the lot for any purpose. She also testified that any person could park his or her motor vehicle in the lot and leave it there and no action would be taken to remove the motor vehicle.

We conclude that the circumstantial evidence and reasonable inferences support the jury's determination that the tavern premises were held out to the public for the use of their motor vehicles. Therefore, we affirm Knutson's conviction for his fourth drunk driving offense.

By the Court.—Judgment affirmed.

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

(..continued)
was owned and maintained by American Motors for the benefit of their employees." ***Phillips***, 142 Wis. 2d at 553, 419 N.W.2d at 237.