COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2289

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

IN THE INTEREST OF JOSHUA C.S.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JOSHUA C.S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Oneida County: ROBERT E. KINNEY, Judge. *Affirmed.*

HOOVER, J. Joshua C.S. appeals his delinquency adjudication. The trial court found at a fact-finding hearing that Joshua committed burglary, contrary to § 943.10(1)(a), STATS., and theft, contrary to § 943.20(1)(a), STATS. Joshua contends that the evidence was insufficient to sustain the State's burden of proof as to each count's consent element because the owners of the building and

the stolen property did not testify at the hearing. The trial court did not err by relying on circumstantial evidence in finding non-consent. Moreover, the evidence was sufficient to permit a trier of fact to find lack of consent both to enter the burglarized premises and to take movable property from within. The delinquency adjudication is therefore affirmed.

Joshua was charged in a delinquency petition with intentionally entering Jeff Simon and Debbie Moore's residence without consent with intent to steal and with taking marijuana from the premises without permission. At the fact-finding hearing, the court received a statement Joshua gave to an investigating sheriff's deputy and heard testimony from a co-participant. Joshua's statement indicated that he, Michael H. and two others met and discussed a plan to "break into" the victims' trailer home later that night. Joshua was told he would be paged around midnight and that he was to bring a screwdriver with him. Once paged, he met Michael and the others outside the victims' residence. Michael pried the door open with Joshua's screwdriver. The three then entered the trailer home while the fourth "stayed outside and act[ed] as a look-out." After about a half hour, the burglars left, taking with them marijuana they had found in the residence.

Michael testified, inter alia, that the burglars entered the victims' trailer home with the intent to find marijuana. He indicated that they planned to pry the trailer door open with Joshua's screwdriver after the victims left for work. He stated that he did not "necessarily" have permission to be in the residence on the night in question, although Jeff's son, Jesse, had on previous occasions told him ("us") that he, Jesse, did not care if they "want[ed] to go get [his father's

marijuana]."[1] Michael further testified that he did not have permission to be in the trailer at the time in question and neither he nor those he was with, as far as he was aware, had permission to take the marijuana that night. He later testified that at the time he entered the trailer home, he knew the marijuana belonged to Jeff and that he did not have Jeff's permission to take it.

Joshua contends that, the circumstantial evidence notwithstanding, he could not be convicted without direct testimony of nonconsent from the property owners or persons in lawful possession. Specifically, he asserts "[t]he general rule is that the testimony of the owner of the property alleged to have been stolen is necessary to prove the fact of non-consent," citing ***State v. Moon***, 41 Wis. 684 (1877), and ***State v. Morey***, 2 Wis. *494 (1853). This legal anachronism from the nineteenth century was a subspecies of the "best evidence rule," itself a discarded juridical relic.[2] Although Joshua apparently objects to the juvenile court's reliance upon circumstantial evidence due to the lack of direct testimony

[1] In this regard, Michael acknowledged, with respect to permission to take the marijuana, that they had not talked to Jesse about the incident in question and Jesse "hadn't told me straight out go get it." He also testified that Jesse "told us the easiest way to get in his house. I mean, it doesn't make it right, but he told us these things." Michael also testified that on the day of the burglary Jesse was in secure detention.

[2] ***State v. Moon***, 41 Wis. 684, 686 (1877), stated:

> [I]f the owner of the property alleged to have been stolen is known, and his attendance as a witness can be procured, his testimony that the property was taken from him without his consent is indispensable to a conviction. This is upon the principle that his testimony is the primary and best evidence … and hence, that secondary evidence of the fact cannot be resorted to, until the prosecution shows its inability … to procure the attendance of the owner.

"Neither Wisconsin law nor federal law recognize a 'best evidence rule' that establishes a hierarchy or grading of forms of evidence." 7 DANIEL D. BLINKA, WISCONSIN PRACTICE § 1001.1, at 603 (1991).

from the victims, our supreme court has held that "owner nonconsent, like other elements of criminal offenses, may be proven by circumstantial evidence." ***State v. Lund***, 99 Wis.2d 152, 160, 298 N.W.2d 533, 537 (1980), *rev'd on other grounds* by ***State v. Poellinger***, 153 Wis.2d 493, 451 N.W.2d 752 (1990).

Joshua *may* also be claiming that the evidence produced at the fact-finding hearing was insufficient to support a determination that the burglary and theft were committed without consent of the appropriate person. This court will not reverse a conviction based upon the State's failure to establish consent unless the evidence, viewed most favorably to the State and the delinquency adjudication, is so insufficient that there is no basis upon which a trier of fact could determine lack of consent beyond a reasonable doubt.[3] *See* ***In re Corey J.G.***, 215 Wis.2d 394, 406-07, 572 N.W.2d 845, 850 (1998).

[3] Joshua offers, without citation to authority, as the standard of review this statement: "There are no jury trials in juvenile fact finding [sic] hearings and therefore the trial court is the fact finder [sic]; however, the Court of Appeals can judge this evidence just as well as the Circuit Court." This court declines an apparent invitation to abandon the sound and well-settled standard of review here applicable.

The trial court inferred from the circumstantial evidence that the victims[4] did not give Joshua consent to be in their residence or to take the marijuana. The court considered in concert the manner and hour of entry and that the burglars intentionally waited until the victims were at work. It also construed Joshua's statement and Michael's testimony to be admissions that they did not have consent.[5] The trial court also rejected as intuitively nonsensical the proposition that the victims would "consent to a bunch of kids, delinquents, going into their house and stealing their pot[.]" Finally, the court took into consideration that one of the burglars served as a lookout, a circumstance patently in conflict with the fact of or belief in permission. The evidence, viewed most favorably to the State and the delinquency adjudication, without question provides a sufficient basis upon which a trier of fact could determine lack of consent beyond a reasonable doubt.

[4] Joshua *may* be suggesting in his brief that Jesse's carte blanche permission to Michael (and whomever *may* have been with him at the time it was given) to take marijuana from his father extends to Joshua. The record is barren of any indication that Joshua knew of Jesse's invitation. It is also wholly unclear whether Joshua challenges the sufficiency of the evidence of Joshua's knowledge or belief of consent. On the one hand, Joshua cites ***State v. Schantek***, 120 Wis.2d 79, 353 N.W.2d 832 (Ct. App. 1984), for the proposition that nonconsent in burglary requires, in part, that the State prove the burglar knew entry was without consent. Several paragraphs later he argues that "[i]t may be argued by the State that the juvenile and his friends should have know[n] they would not have had permission to enter the premises under the circumstances; however, the juvenile's state of mind in respect to whether he know [sic] that his entry of a premises was without consent of the owner in lawful possession was irrelevant. ***Hanson v. State***, 52 Wis.2d 396, 190 N.W.2d 129 (1971). The ***Hanson*** citation is taken out of context; knowledge that entry is without consent is an element of burglary. *See* ***Schantek***, 120 Wis.2d at 82, 353 N.W.2d at 834. Because Joshua does no more than cite two propositions of law, the argument, if intended, is undeveloped and therefore will not be addressed. *See* ***McEvoy v. GHC***, 213 Wis.2d 507, 530 n.8, 570 N.W.2d 397, 406 n.8 (1997).

[5] Although the trial court did not identify precise language in the statement, it could reasonably infer lack of consent from Joshua's description of the entry as a "break-in."

The trial court did not err by relying on circumstantial evidence to find that the victims did not consent to Joshua entering their residence or taking the marijuana and that Joshua knew he did not have such consent. The circumstantial evidence adduced at the fact-finding hearing was sufficient to demonstrate all applicable consent elements beyond a reasonable doubt. The trial court's adjudication of delinquency is therefore affirmed.

By the Court.—Order affirmed.

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