

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 6, 2005**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2005AP858-CR**

**Cir. Ct. No. 2003CM2181**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MARK H. GABRIEL,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed.*

¶1 CANE, C.J.<sup>1</sup> Mark Gabriel appeals a judgment of conviction for obstructing an officer, contrary to WIS. STAT. § 946.41. Gabriel contends that there was insufficient evidence to convict him, that evidence admitted at trial was

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

unduly prejudicial, and that the jury instructions were misleading. This court rejects Gabriel's arguments and affirms.

## FACTS

¶2 On August 28, 2003, Town of Grand Chute Police Officer Steven Sullivan was investigating some signs posted along a roadway near a Planned Parenthood building, contrary to a town ordinance requiring signs posted on a public right-of-way to be physically held onto by someone. Sullivan approached Gabriel, who was one of several abortion protesters stationed outside Planned Parenthood. In response to questioning, Gabriel told Sullivan that he did not put the signs there and that he was unaware of who did.

¶3 Sullivan then entered Planned Parenthood, where a witness told Sullivan that she saw Gabriel hang one of the signs from a tree. Sullivan returned to Gabriel and informed him that the signs were posted illegally. Sullivan contacted a town official to come out and measure to confirm that the signs were within the town's right-of-way.

¶4 Sullivan noticed that Gabriel was carrying a video camera and believed it might contain evidence showing who illegally posted the signs. Sullivan told Gabriel that he needed the videotape as evidence of the ordinance violation. Gabriel refused to hand over the videotape, stating that he would hand it over after the town official had completed his measurements. Sullivan stated that he could not take the chance that Gabriel might change the videotape if allowed to keep it. Sullivan then informed Gabriel that if he did not surrender the videotape, he would be arrested for obstructing an officer. When Gabriel did not hand over the tape, he was arrested.

¶5 At trial, Sullivan not only testified about the above facts, but also about a prior occasion where he requested a videotape from Gabriel. He testified that on that occasion he demanded Gabriel's videotape because he believed it contained evidence of an ordinance violation. Gabriel refused, stating that he did not believe Sullivan had the right to take the tape. Sullivan then called the district attorney's office and was told he could take the videotape. Gabriel then acquiesced and gave the videotape to Sullivan.

¶6 With Gabriel acting pro se, a jury found him guilty of obstructing an officer. Gabriel appeals.

#### DISCUSSION

¶7 Gabriel's first claim is that there was insufficient evidence for the jury to find him guilty of obstructing an officer. When faced with such a claim, this court will only reverse if the evidence, viewed most favorably to the State, is so insufficient that no factfinder, acting reasonably, could find guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). In this case, there was sufficient evidence to support the jury's finding.

¶8 To convict Gabriel of obstructing an officer, the State was required to prove four elements: (1) the defendant obstructed an officer; (2) the officer was acting in an official capacity; (3) the officer was acting with lawful authority; and (4) the defendant knew the officer was acting in an official capacity and with lawful authority and the defendant knew his conduct would obstruct the officer. *See* WIS. STAT. § 946.41(1); *see also* WIS JI-CRIMINAL 1766 (2003).

¶9 Gabriel challenges the jury's ability to find three of these four elements. He first claims that his conduct did not amount to obstructing.

Obstructing is conduct that prevents or makes the performance of an officer's duties more difficult. *See* WIS JI–CRIMINAL 1766. The jury could reasonably find that Gabriel's refusal to comply with Sullivan's demand for the videotape was hindering or delaying Sullivan's attempts to collect evidence.

¶10 While Gabriel does not challenge the second element—whether Sullivan was acting in an official capacity—he does challenge the jury's finding that Sullivan was acting with lawful authority. Gabriel argues that the only evidence presented on this element was Sullivan's testimony that he had called the district attorney's office on a prior occasion and was told that he could take a videotape if it contained evidence of a crime.

¶11 Gabriel misunderstands the legal and factual components of the lawful authority element. Whether an officer has lawful authority to demand a videotape that the officer believes contains evidence of a crime is, in the abstract, a question of law. This is reflected in the jury instructions, which anticipate that the court will direct the jury regarding what an officer may lawfully do in specific circumstances. *See* WIS JI–CRIMINAL 1766. Here, the court created the following instruction regarding lawful authority:

The third element is that the officer was acting with lawful authority. Now, municipal police officers act with lawful authority if their acts are conducted in accordance with the law. In this case, it's alleged that the officer was responding to a complaint concerning a violation of a sign ordinance and alleged that he was seeking to gather evidence that might be relevant to such a violation.

A detention of a citizen under these circumstances is lawful if the officer has reasonable suspicion that a person is committing, has committed, or is about to commit an offense. A stop may continue for a reasonable time required to conduct an investigation. Such investigation may proceed with lawful authority to include the seizing of evidence if the officer has reasonable cause to believe that

the evidence will be of assistance in showing whether and who might have committed an offense. Thus, with such reasonable cause, the officer may, with lawful authority, request the handing over of such evidence.

¶12 Thus, the factual question for the jury was not whether an officer may demand a videotape under these circumstances, but instead whether these circumstances actually existed in this case. The jury could reasonably conclude that Sullivan believed the videotape contained evidence of an ordinance violation because a witness saw Gabriel place the signs, and the videotape and camera were in Gabriel's possession.

¶13 Gabriel further contends that there was insufficient evidence that he knowingly obstructed Sullivan. The transcript of the videotape reveals, however, that Sullivan explained why he had the right to take the tape and that Gabriel would be arrested for obstructing if he did not comply. Further, Gabriel had been told, on the prior occasion, that Sullivan could lawfully take a videotape. From this, the jury could reasonably find that Gabriel knew he was obstructing.

¶14 Gabriel next claims that certain evidence should have been excluded at trial. Evidentiary decisions are discretionary determinations for the trial court. *State v. Baldwin*, 101 Wis. 2d 441, 456, 304 N.W.2d 742 (1980). Gabriel cites WIS. STAT. § 904.03, which permits the exclusion of relevant evidence if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. He argues that Sullivan's testimony regarding the prior incident where Gabriel gave a videotape to Sullivan was unduly prejudicial. He contends that Gabriel's compliance with Sullivan's previous request misled the jury into believing Gabriel was obstructing in this case. Gabriel does not elaborate exactly how this evidence misled the jury into finding that was obstructing. This court doubts, however, that an example of Gabriel not obstructing Sullivan

compelled the jury to find that he was obstructing in this case. Moreover, the fact that Gabriel was told on that previous occasion that Sullivan could seize a videotape was relevant to whether he knowingly obstructed in this case.

¶15 Gabriel also argues that the videotape, and transcript thereof, that recorded his interaction with Sullivan leading up to his arrest in this case was irrelevant. This court sees no merit in Gabriel's argument. The videotape was relevant because it captured Gabriel's refusal to comply with Sullivan's demand, along with Sullivan's explanation of why he had a right to take the tape and his warning that Gabriel would be arrested if he refused.

¶16 Finally, Gabriel challenges the jury instructions quoted above, regarding lawful authority. This court independently reviews a jury instruction to determine whether it accurately states the law. *State v. Fonte*, 2005 WI 77, ¶9, 281 Wis. 2d 654, 698 N.W.2d 594. Reversal is only appropriate where an erroneous instruction is prejudicial. *Id.*, ¶14. A jury instruction is prejudicial if it probably, not merely possibly, misled the jury. *Id.* Gabriel contends that the instruction misled the jury into believing Sullivan had lawful authority to demand the videotape.

¶17 Gabriel's argument fails because it does not establish why the instruction was an inaccurate statement of the law. He does not develop any legal arguments suggesting the officer did not have lawful authority to demand the videotape. *See* WIS. STAT. RULE § 809.19(1)(e). Gabriel does not assert that the officer's demand was contrary to his Fourth Amendment right against unreasonable seizures, nor does he assert his Fifth Amendment right against self-incrimination. Insofar as Gabriel failed to develop any argument that the jury instruction was erroneous, this court assumes it to be a correct statement of the

law. Without showing that the instruction misstated the law, Gabriel is unable to show how it was prejudicial.

¶18 Moreover, Gabriel's argument again seems to be based upon the mistaken premise, as mentioned above, that the jury is the sole determiner of whether police conduct is lawful. He does not comprehend the distinction between the legal determination of what an officer may lawfully do, which is a question for the court, and the factual question of what actually happened, which is a question for the jury. The jury instruction specified what facts the jury must find to conclude that Sullivan was acting with lawful authority. The instruction did not interfere with the jury's ability to deliberate on those facts.

*By the Court.*—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

