**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**July 18, 2006**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2005AP2996-CR** **Cir. Ct. No. 2004CM802**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CHRISTOPHER D. BROWN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed*.

¶1 CURLEY, J.[1] Christopher D. Brown appeals the judgment convicting him of two counts of resisting an officer, contrary to WIS. STAT.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04).

§ 946.41 (2003-04).[2] He argues that the prosecutor's closing arguments violated his right to due process because the prosecutor: incorrectly told the jury it did not matter if the officers were uniformed or not; vouched for some of the witnesses; and provided improper personal opinions on the evidence. Additionally, he contends that the trial court erred by refusing to give the jury a curative instruction concerning the prosecutor's error regarding whether the officers were uniformed or not. This court determines that: (1) although the prosecutor's comment to the jury concerning whether the officers were uniformed was error, as the charging portion of the complaint specifically named the two uniformed officers as those being resisted, the error was harmless; and (2) although the prosecutor improperly introduced her personal opinion when she said she believed the police, this error, too, was harmless. Consequently, Brown's due process rights were not violated. Further, the trial court properly exercised its discretion in refusing to give a curative instruction. Therefore, this court affirms the judgment of conviction.

## I. BACKGROUND.

¶2 On February 4, 2004, a University of Wisconsin-Milwaukee (UWM) student complained to the UWM police that, while she was at the UWM Union, she saw a black man wearing a hooded sweatshirt, later identified as Christopher Brown, get in a verbal argument with another person. She stated that she saw Brown leave and then return and again confront the person he had been arguing with, saying something to the effect of: "Do something now, you have your friend

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

with you, you all tried to jump me, I got my friend with me now." The student then saw Brown put his hands in his pocket as though he had a weapon.

¶3 In response, several uniformed police officers began looking for the man meeting the description given by the student and soon encountered Brown. When one of the officers put her hand on Brown's arm and asked to speak to him, Brown said something to the effect of, "[g]et your hands off me, I haven't done anything wrong." Brown then began yelling and was uncooperative with the officers. Meanwhile, the student identified Brown as the man who had been in the earlier argument and who possibly had a weapon. Brown was then arrested for disorderly conduct. Brown continued to refuse to follow the officers' commands and tried to get away from them, requiring the officers to ask for backup. After several plain clothed officers arrived, Brown continued to impede the efforts of the police to handcuff him, and after the officers pleaded with him to cooperate and he refused, the police pepper sprayed him. Brown continued to resist and struck one of the officers in the chest. The struggle continued and eventually Brown was handcuffed. No weapon was found on Brown. Many of the officers sustained minor injuries.

¶4 Brown was charged with disorderly conduct and two counts of resisting the uniformed officers. A jury trial was held. During closing arguments, the prosecutor expressed her opinion concerning Brown's explanation of what he thought was occurring at the time of the incident:

> The defendant keeps saying that he took a common law class and he knows the law, but he obviously doesn't know that he needs to comply with the police when they ask you to put your hands behind your back. And I think that he also knows that he does not have a right to use force against officers.

> Now, more officers came to the scene because he was not being compliant. And I know he keeps saying that un-uniformed officers – he didn't know they were really officers. And I find that hard to believe. I don't think that's reasonable from the testimony here, because there were two uniformed officers, eventually three uniformed officers and two un-uniformed officers. What every, single officer testified to: there were three uniformed and two un-uniformed. There was [sic] police there. Stop resisting. Please be cooperative. Please cooperate with our officers.
>
> The defendant admits he grew up in the hood and he thought he was being beat up. But I ask you to think whether it's reasonable if you were getting beat up, whether people would ask you to stop resisting and be cooperative? No. And I also ask you to believe, is it reasonable that the defendant was acting in self[-]defense? If he were acting in self[-]defense, [he] would punch or kick….

Defense counsel objected, and the trial court sustained the objection.

¶5 Later, the prosecutor also told the jury her opinion concerning the credibility of the police:

> Now, there's just a few more remarks I want to make, and the first one has to do with the fact that defense counsel makes it seem like the police used unreasonable force against Mr. Brown. And I don't think that there's been any evidence of that. He wasn't substantially hurt. He, in fact, sustained less injuries than many of the officers did, and I don't believe the police used unreasonable force. I believe the police when they said they were trying to de-escalate the situation and keep everyone – themselves, the students around, and Mr. Brown – I think that's clear—

Again, defense counsel objected, and before the trial court could rule, the prosecutor said, "I'm sorry." The prosecutor also stated in her rebuttal that, despite the fact that the two charges were for resisting the uniformed officers, "Nowhere in the definition of [r]esisting an [o]fficer does it say that it must be a uniformed officer. So whether Mr. Brown resisted an un-uniformed officer, a uniformed officer, it doesn't matter. He resisted an officer." No objection was

made, but shortly thereafter, Brown's attorney asked for a curative instruction due to the prosecutor's assertion.

¶6 The jury acquitted Brown of disorderly conduct, but found him guilty of the two resisting an officer charges. He was sentenced to three years' probation on each count, to be served concurrently, with the condition that he serve two months in the House of Correction on each count, consecutively. The sentences were stayed pending appeal.

## II. ANALYSIS.

### *A. Some of the prosecutor's remarks violated the Wisconsin Supreme Court Rules, as well as the ABA's Standards for Criminal Prosecutors.*

¶7 Supreme Court Rule 20:3.4, entitled "Fairness to Opposing Party and Counsel," prohibits a lawyer from telling a jury their personal opinion. "A lawyer shall not: … (e) in trial … assert personal knowledge of facts in issue … or state a personal opinion as to the justness of a cause, the credibility of a witness, … or the guilt or innocence of an accused…." SCR 20:3.4 (2005).

¶8 The American Bar Association Standards for Criminal Justice—Prosecution Function and Defense Function, Standard 3-5.8 (3d ed. 1993), provides:

> Standard 3-5.8 Argument to the Jury
>
> (a) In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.
>
> (b) The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant….

¶9 The record reflects that the prosecutor's first set of remarks, objected to by Brown, used the phrase, "And I find that hard to believe"; however, she then followed this by saying, "I don't think that's reasonable from the testimony here." This latter comment is permissible. Later, she stated, "And I also ask you to believe, is it reasonable that the defendant was acting in self[-]defense?" While stating "I believe" may be a technical violation, the remainder of the sentence was acceptable argument.

¶10 The second set of remarks is more problematic. There, the prosecutor stated her opinion that the police did not use unreasonable force when she said, "I don't believe the police used unreasonable force." She went on to give another personal opinion when she stated, "I believe the police when they said they were trying to de-escalate the situation…." These are not technical violations.

¶11 So, too, the prosecutor erred in advising the jury that it did not matter if the officers were uniformed or not. While WIS. STAT. § 946.41 does not require an officer to be in uniform in order to be the victim of a resisting charge, here, the State specifically named two uniformed officers as those being resisted by Brown.

¶12 Even assuming the State's comments in this case crossed the constitutional line, however, this court will not necessarily reverse the conviction. *See* ***State v. Spring***, 48 Wis. 2d 333, 339-40, 179 N.W.2d 841 (1970). This court will uphold a conviction as long as the State can demonstrate the error "was harmless beyond a reasonable doubt." ***Id.***; *see also* ***State v. Hale***, 2005 WI 7, ¶60, 277 Wis. 2d 593, 691 N.W.2d 637 (reaffirming "beyond a reasonable doubt" standard). This court must consider several factors, including the character of the

remarks in light of their context, any curative instruction and its probable effect, the strength of the evidence against the defendant, and all other facts that bear on the effect the remarks had on the jury. ***Spring***, 48 Wis. 2d at 340.

¶13 This was a simple case. The State needed to prove only that the person who was resisted was a police officer who was resisted personally, that the officer was doing an act in an official capacity and that the officer was acting with lawful authority, and that the defendant knew that the officer was an officer and that his conduct would resist the officer. *See* WIS JI—CRIMINAL 1765. The jury heard the evidence and knew the elements of the crime. The prosecutor was clearly inexperienced and actually apologized for one of her errors. Here, the jury was not faced with a complicated set of facts or charges. Under these circumstances, it is doubtful that the jury was looking to the prosecutor for guidance or direction in ascertaining the guilt or innocence of Brown.

¶14 Brown's claim of self-defense, based on his belief that he thought he was being beaten up because the backup officers were plain clothed and he was merely defending himself, was implausible.

¶15 This court also notes that the State had a strong case, as five officers were engaged in the scuffle and it was observed by citizen witnesses who supported the officers' accounts of the events. In light of these factors, the State has met its burden of proving the errors were harmless beyond a reasonable doubt.

*B. The trial court properly exercised its discretion when it refused to give a curative instruction.*

¶16 The decision whether to give a curative instruction is left to the trial court's discretion. *See* ***State v. Lombard***, 2003 WI App 163, ¶18, 266 Wis. 2d 887, 669 N.W.2d 157 (trial court acted within its sound discretion in giving the

curative instruction). When asked by defense counsel to give a curative instruction following the prosecutor's rebuttal argument to the jury that it did not matter whether the officers were uniformed or not, the trial court declined to do so, stating that the jury was well aware of the fact that the State charged Brown with resisting the two uniformed officers because the names of the uniformed officers were listed in the charging portions of the complaint, their names were included in the jury instructions, the officers testified to the events, and the jury had a copy of the jury instructions available to them during their deliberations. This court agrees with the trial court that although the prosecutor erred in claiming that it did not matter which officers Brown resisted, nevertheless, the jury knew that the two uniformed officers who were resisted were named in the complaint and the jury instructions included that information and the instructions were both read to the jury and they had been supplied with a copy of the instructions. Consequently, this court is satisfied that the trial court properly exercised its discretion, and we affirm the judgment.

*By the Court.*—Judgment affirmed.

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