COURT OF APPEALS
DECISION
DATED AND FILED

July 1, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1971-CR **Cir. Ct. No. 2008CF60**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROY B. ISMERT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: RANDY R. KOSCHNICK, Judge. *Affirmed.*

¶1 DYKMAN, P.J.[1] Roy B. Ismert appeals from a conviction following a jury trial for obstructing an officer under WIS. STAT. § 946.41.[2] Ismert

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] WISCONSIN STAT. § 946.41 provides:

(continued)

argues that the evidence presented at trial was insufficient to convict him of obstructing an officer because the evidence did not support a reasonable finding that he knew the officer had the legal authority to stop, question, and arrest him. The State responds that, under the totality of the circumstances, the jury reasonably could have found that Ismert was aware that the officer possessed lawful authority. We conclude that the evidence sufficiently supports the jury's finding that Ismert knew the officer possessed lawful authority. Accordingly, we affirm.

Background

¶2 The following facts are based on the trial court testimony. On May 27, 2007, Lake Mills Police Officer John Richardson observed a vehicle operated by an individual he believed to be Ismert pull into the parking lot of a Lake Mills restaurant. Richardson confirmed that there was a warrant for Ismert's arrest and parked his marked squad car near the vehicle.

¶3 Richardson asked Ismert if he was Roy B. Ismert. Ismert answered "No" and told Richardson he was Rick Lee Turk and provided a date of birth of 10-8-1953. Ismert's actual date of birth is 7-15-1955. Richardson asked Ismert for identification, and Ismert replied that he did not have any. Ismert also told

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> **(1)** Whoever knowingly resists or obstructs an officer while such officer is doing any act in an official capacity and with lawful authority, is guilty of a Class A misdemeanor.
>
> **(2)** ....
>
> (a) "Obstructs" includes without limitation knowingly giving false information to the officer or knowingly placing physical evidence with intent to mislead the officer in the performance of his or her duty ….

Richardson that he was visiting from California. After running this information through dispatch, as well as through California's records, Richardson only received "near hits," but no one under that name and date of birth. Richardson asked Ismert to restate his information, and Ismert repeated that he was Rick Lee Turk.

¶4 While Richardson ran this information a second time, he allowed Ismert to pick up his friend's paycheck inside the restaurant. Ismert threw away his wallet, which contained his identification, in the women's bathroom When he exited the restaurant, Ismert continued to claim he was Rick Lee Turk. Richardson told Ismert he did not believe him. Ismert eventually admitted his true identity and stated he was "tired of running."

¶5 A jury found Ismert guilty of obstructing an officer. Ismert appeals.

Standard of Review

¶6 Sufficiency of evidence is a question of law that we review de novo. *See* ***State v. Booker***, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676. We "may not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that … as a matter of law … no trier of fact, acting reasonable, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Therefore, our review of the sufficiency of the evidence to support a criminal conviction is limited. ***State v. Grobstick***, 200 Wis. 2d 242, 249, 546 N.W.2d 187 (Ct. App. 1996).

Discussion

¶7 Ismert claims that no reasonable juror could find that he obstructed Richardson because the facts did not establish that he knew Richardson had legal authority to stop, question, and arrest him, or that the outstanding arrest warrants against him were lawful. Ismert asserts that the court therefore should not have accepted the guilty verdict.[3] The State responds that under the totality of circumstances, the evidence was sufficient to permit the jury to find that Ismert knew Richardson possessed the lawful authority to stop, question, and arrest him. Additionally, the State claims that it does not have the burden of proving Ismert knew his arrest warrants were lawful. We conclude that based on the totality of circumstances, the evidence sufficiently supported the jury's finding that Ismert knew Richardson acted with lawful authority. Further, we find no support for Ismert's claim that the State must show that Ismert knew his arrest warrants were lawful.

¶8 When a defendant challenges the sufficiency of the evidence to support a conviction, "the test is whether this court can conclude that the trier of fact could reasonably be convinced that the defendant was guilty beyond a reasonable doubt." ***State v. Lossman***, 118 Wis. 2d 526, 540, 348 N.W.2d 159 (1984) (citation omitted). "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence … to find the requisite guilt, [we] may not overturn a verdict." ***Poellinger***, 153 Wis. 2d at 507.

[3] After the jury returned its verdict, Richardson moved to have it set aside. In such a case, if the trial court had agreed that the evidence was insufficient, it could have entered a judgment of acquittal. *See, e.g.*, ***State v. Pask***, 2010 WI App 53, ¶8 n.2, __ Wis. 2d __, 781 N.W.2d 751.

¶9 The elements of WIS. STAT. § 946.41 are that: the defendant obstructed an officer, the officer was acting in an official capacity, the officer was acting with lawful authority, and the defendant "knew or believed that he … was obstructing the officer while the officer was acting in [an] official capacity and with lawful authority." ***State v. Caldwell,*** 154 Wis. 2d 683, 689-90, 454 N.W.2d 13 (Ct. App. 1990). "Acting in an official capacity" and "acting with lawful authority" are distinct elements. ***Lossman,*** 118 Wis. 2d at 537. "Acting in an official capacity" means an officer is acting in accordance with his or her employment as a law enforcement officer, while "acting with lawful authority" goes to whether the officer's actions are in accordance with the law. ***Id.*** Here, the only issue in dispute is whether Ismert knew Richardson possessed lawful authority.

¶10 In determining whether the evidence establishes that the defendant knew an officer possessed lawful authority, we determine whether a jury, acting reasonably and weighing the totality of circumstances, including what the officer and defendant said or did, could be convinced that the defendant knew the officer was acting with lawful authority. ***Id.*** at 544. Further, a jury may utilize personal experience and common knowledge to find that a reasonable person would believe an officer was acting with lawful authority. ***Id.*** A defendant may not have believed an officer acted with lawful authority, "but the question is whether a jury, acting reasonably, could be so convinced that the defendant knew the officer was acting with lawful authority." ***Id.***

¶11 Thus, in ***Lossman***, the supreme court held that, based on the totality of circumstances, the jury reasonably found that the defendant knew the officer acted with lawful authority. ***Id.*** A jury had found Lossman guilty of obstructing an officer and the court entered a judgment of conviction. ***Id.*** at 531. Lossman

appealed, asserting that he did not know the officer had lawful authority. ***Id.*** The record established that at the time of the contact, the police officer was in full uniform and driving a marked patrol car, which still had its lights flashing. ***Id***. at 530, 544. Additionally, the officer testified he pulled his patrol car over on Lossman's property as part of a traffic stop of a third party, and that he relayed this information to Lossman, who proceeded to attack him. ***Id.*** at 529-31.

¶12 Lossman claimed the officer provided no reason for his presence on his land, and he therefore did not know the officer possessed lawful authority. ***Id.*** at 530-31. The ***Lossman*** court stated that the conflict in the testimony was not fatal in establishing the sufficiency of the evidence regarding the defendant's knowledge of the police officer's lawful authority. The court stated discrepancies in the testimony were properly resolved by the jury and that common knowledge and experience could be taken into account when weighing such evidence. ***Id.*** at 544. The court concluded that given the officer's official dress, Lossman's admission he had seen the police insignia and gun worn by the officer, and the officer's testimony that he had told Lossman he was carrying out a traffic stop, the evidence was sufficient for the jury to conclude that Lossman knew the officer acted with lawful authority. ***Id.*** at 544-45.

¶13 Similarly, in ***Grobstick***, we found that the defendant's evasive behaviors constituted sufficient evidence to support the jury's finding that Grobstick was aware the officer had lawful authority to arrest him. ***Grobstick***, 200 Wis. 2d at 251. There, police went to Grobstick's home to arrest him pursuant to a warrant. ***Id.*** at 246. The officer informed Grobstick's girlfriend, who answered the door, that he had a warrant for Grobstick's arrest. ***Id.*** Grobstick then jumped out a window, returned, and hid in a closet. ***Id.*** We held that Grobstick's actions

supported a jury finding that Grobstick knew the officer had lawful authority to arrest him. ***Id.*** at 251.

¶14 We conclude that ***Lossman*** and ***Grobstick*** are persuasive on the facts before us. Like the officer in ***Lossman***, Officer Richardson testified that at the time of his contact with Ismert, he was operating a marked squad car. His official vehicle supports the finding that a reasonable person would believe the officer possessed the lawful authority to stop and question him or her. Ismert contends that since the jury was not told whether Richardson informed him of the existence of the arrest warrants at the initiation of their contact, the jury's finding was unreasonable. Ismert argues that his false statements, coupled with the fact that he did not run away from the officer while he was in the restaurant, shows Ismert did not know Richardson had the lawful authority to arrest him. However, while this is one inference the jury may have drawn, it was not required to draw that inference. Ismert's evasive conduct, like the conduct in ***Grobstick***, could reasonably be interpreted as a method for preventing his lawful arrest.

¶15 Ismert also asserts that even if the evidence established that he knew there was a warrant for his arrest, there was no evidence that he knew the warrant was lawful, and therefore the State did not establish that he knew that Richardson had the legal authority to arrest him. Ismert implies that because defects may invalidate warrants, rendering them unlawful, the State has the burden to show that Ismert knew no such defects existed here. *See, e.g.,* ***Lo-Ji Sales, Inc. v. New York***, 442 U.S. 319 (1979); ***Franks v. Delaware,*** 438 U.S. 154 (1978). However, Ismert provides no authority, nor do we find any, supporting the position that the State has this burden. We conclude that the jury reasonably found that Ismert's evasive behavior stemmed from his knowledge of the officer's lawful authority to arrest him, supporting Ismert's conviction. Accordingly, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.