COURT OF APPEALS
DECISION
DATED AND FILED

March 13, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1754-CR **01-CM-1390**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SUSAN M. VETOS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: RICHARD T. WERNER, Judge. *Reversed.*

¶1 DEININGER, J.[1] Susan Vetos appeals a judgment convicting her of obstructing an officer in violation of WIS. STAT. § 946.41(1). She contends that the State presented insufficient evidence to prove that she knowingly gave false

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

information to an officer, intending to mislead him in the performance of his duties. We agree, although not for the reason Vetos asserts. Accordingly, we reverse the appealed judgment.

BACKGROUND

¶2 The State charged Vetos with obstructing an officer, alleging in the complaint that "Vetos denied making" a certain 911 call. She moved to dismiss the complaint on the basis of our holding in ***State v. Espinoza***, 2002 WI App 51, 250 Wis. 2d 804, 641 N.W.2d 484, *review denied*, 2002 WI 48, 252 Wis. 2d 151, 644 N.W.2d 687 (Wis. Apr. 22, 2002) (No. 01-1473-CR), that the legislature did not intend to include within the prohibitions of WIS. STAT. § 946.41(1) "all false answers or false statements which a defendant utters intending to exculpate himself or herself against a charge of a crime and to prevent his or her prosecution." ***Id***. at ¶20. The trial court denied Vetos's motion after concluding that "on the current state of the law the complaint meets the sufficiency necessary to get by this motion" because the ***Espinoza*** opinion had not yet been published.[2]

¶3 The following facts were adduced at trial. The Rock County 911 dispatcher received an anonymous call at approximately 6:00 p.m. from a phone near the Dunkin Donuts shop on Milton Avenue in Janesville. The female caller told the dispatcher that while at the Wedges Tavern she had overheard Tom Woodward threaten to kill his girlfriend with a gun. After receiving this call, the

[2] We issued our opinion in ***Espinoza*** on January 23, 2002, recommending that it be published. Vetos filed her motion on January 29th. The court heard and denied the motion on January 30th. A jury found Vetos guilty of obstructing an officer on January 31st. ***Espinoza*** was ordered published on February 27, 2002.

dispatcher advised the sheriff's department and deputies were sent to Woodward's home to investigate.

¶4 The deputies attempted to contact Woodward by phone, but the phone was not answered so they drove up his driveway and ordered him by bullhorn to come out of his house. When Woodward came out, the deputies frisked him at gunpoint. With his consent, they searched his house for guns and found none. Woodward denied that he had been to Wedges Tavern that day, a fact which deputies apparently later confirmed. Woodward was not arrested or detained further.

¶5 Later that evening, a deputy assigned to the case played the tape of the 911 call for Woodward, who said that he recognized the voice on the tape as that of Susan Vetos. Woodward testified at trial that he had met Vetos on a couple of occasions, that she knew where he lived, and that he had spoken to her on the phone briefly on several occasions over the past two years. The deputy then went to Vetos's home.

¶6 The deputy testified that "[a]fter speaking with her briefly, I come to the conclusion that [Vetos] was the person on the tape." When he told her that "I believe she was the person that called in," she responded that "she was not the person" who had made the call. When questioned about her activities that day, Vetos told the deputy that she had been at home between 4:30 p.m. and 9:00 p.m., and that she had spoken on the phone with Amanda Skogen at some point after 3:00 p.m. The deputy asked Vetos what she had been doing at 6:00 p.m., and Vetos replied that "she didn't really know but she was probably watching TV." The deputy testified that when he asked Vetos what she had been watching, she replied that she did not know. Vetos's husband offered that Vetos had been

watching an HBO movie and Vetos agreed. The deputy asked Vetos the name of the movie and she replied that she did not know because she had been sleeping.

¶7 The deputy told Vetos that he had the 911 tape with him and that it was her voice on the tape. Vetos again denied it. He then played the tape for Vetos, and she again denied that it was her voice and further stated that she could not have made the call because she had been home all day. The deputy pointed out that he had not told her where the 911 call had been made from. The deputy testified that Vetos did not have "a lot to say" in response to this remark. His interview terminated shortly thereafter when Vetos and her husband became "agitated" and complained about the deputy's handling the day before of a domestic abuse complaint involving Woodward and Amanda Skogen.

¶8 The State also presented the testimony of Gerald Skogen, Amanda's father, who knew Vetos as a social acquaintance and had previously been her supervisor at General Motors. He said he recognized the 911 caller's voice on the tape as Vetos's. An investigator testified that the Dunkin Donuts from which the call was placed was about an eight to nine minute drive from Vetos's home. In addition, jurors heard the 911 tape played in court several times, and Vetos was called to the stand for the sole purpose of reading an excerpt from a transcript of the tape.

¶9 At the close of the State's case, Vetos moved to dismiss on the basis that the evidence proved only that she had made an "exculpatory denial" which did not interfere with or impede the deputy's investigation of the 911 call. The court agreed with Vetos that she had made an "exculpatory denial" but denied the motion because "what keeps the case alive" is that she also told the deputy that she

had been at home between 4:30 p.m. and 9:00 p.m., which the jury could find had impeded the deputy's investigation.[3]

¶10 Vetos called three witnesses, but did not testify herself. Her husband and a friend who had been at the Vetos home on the afternoon in question both testified that they had seen Vetos there between 4:30 p.m. and 6:30 p.m. Vetos's ex-husband testified that he had a lengthy telephone conversation with Vetos concerning their daughter's graduation party during this same time frame. Both her current and former husbands testified that the voice of the caller on the 911 tape was not that of Vetos.

¶11 The court gave the following instruction, to which Vetos did not object, regarding the elements of obstructing an officer:

> Obstructing an officer … is committed by one who knowingly gives false information to an officer with intent to mislead the officer in the performance of his or her duty while the officer is doing any act in an official capacity and with lawful authority.
>
> Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.
>
> First, that the defendant knowingly gave false information to an officer.
>
> Second, that the officer was acting in an official capacity.

[3] Vetos does not claim error on appeal in the trial court's denial of her pretrial and mid-trial motions to dismiss, nor could she necessarily do so. *See* ***State v. Robbins***, 43 Wis. 2d 478, 480, 168 N.W.2d 544 (1969) ("This issue is not properly before this court because the defense put in evidence and thereby waived its motion to dismiss."); *Cf.* ***State v. Webb***, 160 Wis. 2d 622, 635-36, 467 N.W.2d 108 (1991) ("A defendant who claims error occurred at the preliminary hearing may only obtain relief prior to trial.").

> Third, that the officer was doing an act with lawful authority.
>
> Fourth, that the defendant intended to mislead the officer in the performance of his or her duty.
>
> The first element requires that the defendant knowingly gave false information to an officer. A [deputy sheriff] is an officer.
>
> ….
>
> The fourth element requires that the defendant intended to mislead the officer. This requires that the defendant knew that [the deputy] was an officer acting in an official capacity and with lawful authority and that the defendant had the purpose to mislead the officer in the performance of his or her duties. It is not required that the officer was misled.

See WIS JI—CRIMINAL 1766A (footnotes omitted).

¶12 The jury returned a guilty verdict and the court subsequently entered a judgment of conviction imposing a fine of $1,000 plus costs.

ANALYSIS

¶13 Vetos's sole contention is that the State did not present sufficient evidence for the jury to find her guilty of obstructing an officer. Before analyzing the sufficiency of the State's evidence and Vetos's challenge to it, we pause to emphasize that the obstructing charge against Vetos was *not* based on any false information given to the dispatcher by the 911 caller. WISCONSIN STAT. § 146.70(10) criminalizes the making of a false 911 call.[4] The State did not

[4] WISCONSIN STAT. § 146.70(10)(a) provides as follows:

(continued)

charge Vetos under that statute. The investigating deputy and prosecutor were apparently not aware of it.[5]

¶14 The elements of obstructing an officer are: (1) the defendant knowingly gave false information to an officer; (2) the officer was acting in an official capacity; (3) the officer was acting with lawful authority; and (4) the defendant intended to mislead the officer in the performance of his or her duty. *See* WIS. STAT. § 946.41(1); ***Espinoza***, 2002 WI App 51 at ¶10; WIS JI—CRIMINAL 1766A. The State asserted at trial that the obstruction charge was based

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> Any person who intentionally dials the telephone number "911" to report an emergency, knowing that the fact situation which he or she reports does not exist, shall be fined not less than $50 nor more than $300 or imprisoned not more than 90 days or both for the first offense and shall be fined not more than $10,000 or imprisoned for not more than 7 years and 6 months or both for any other offense committed within 4 years after the first offense.

(The provision was first enacted in 1977 and originally provided for only a monetary fine. *See* Laws of 1977, ch. 392, § 3. In 1987, however, the legislature added a maximum 90-day jail sentence for a first offense and up to five years imprisonment for a second offense. *See* 1987 Wis Act 27, § 1836gr.)

[5] The deputy was asked on cross-examination whether there was "such a crime as making a false 911 call." He replied, "I don't believe so." The prosecutor, during argument on the defense motion to dismiss at the close of the State's case, told the court "that there may not be a specific crime of making a false report to 911 call. That may be a loophole in the law in terms of that …." Defense counsel, too, seemed unaware of WIS. STAT. § 146.70(1), informing the court during argument "I don't know this for sure, but it's probably why there is no law against making a false 911 call because I couldn't find one, either."

on Vetos's denial of having made the 911 call, and to a lesser extent, on her related claim that she had been at home between 4:30 p.m. and 6:30 p.m.[6]

¶15 Vetos argues that the evidence the State presented at trial was insufficient to prove elements 1 and 4. Specifically, Vetos asserts that evidence that a voice on a tape sounds like her voice is insufficient to prove that she obstructed an officer. Our task is to determine whether the evidence the State presented at trial is so lacking in probative value and force that no rational trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We do not weigh the evidence as a jury would, but review it only to ensure that the inferences the jury reached in assessing the evidence were reasonable. ***Id***. at 504. In short, if any possibility exists that the trier of fact could "have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt," we may not overturn the verdict. ***Id***. at 507.

¶16 The evidence to support the charge consisted of the deputy's account of his interview with Vetos and her denial that she made the call; testimony from Woodward and Gerald Skogen that it was Vetos's voice on the tape; the 911 tape itself, which was played for the jury; and Vetos's compelled voice sample given in front of the jury. Vetos argues that evidence "that a voice on a tape sounds like the defendant's voice is insufficient to prove that a defendant obstructed justice."

[6] The prosecutor told jurors in his opening statement that Vetos was "charged with obstructing based upon her lying about the fact that, number one, she made this phone call on the tape and, number two, for lying about the fact that she had been home all day when in fact the evidence will show that this call was made at a Dunkin Donuts on Milton Avenue … [a]nd in fact it was the defendant who made the phone call." In his closing, the prosecutor asserted that "the key issue in this case is whether or not the defendant made the phone call in question."

She points out that no one saw her using the phone at Dunkin Donuts at the time of the 911 call, and that she provided alibi witnesses placing her at home at that time. In Vetos's view, therefore, the only evidence linking her to the call was the sound of her voice.

¶17 Vetos also cites studies demonstrating that voice identifications are "even more prone to error" than eyewitness identifications. Vetos asserts that we should not allow a guilty verdict to rest solely on what she characterizes as "the similarity of her voice and the voice on the tape," because to do so would be to sustain a verdict based on mere speculation instead of the requisite standard of beyond a reasonable doubt. We reject Vetos's assertion because it rests on a faulty premise—that she was found guilty on the basis of the jury's determination that her voice was "similar" to the voice on the tape. The State presented two witnesses who testified, not that the voices were similar, but that the voice on the tape *was* Vetos's.

¶18 To be sure, the weight and credibility of this testimony, like that of a witness who identifies a defendant as the perpetrator of a crime from visual observation, is subject to challenge, and Vetos did so. Although she did not attempt to introduce the scientific research she cites on appeal to undermine the reliability of voice identifications, she did seek through cross-examination to undermine the reliability of the State's witnesses by showing that they lacked recent contact with her and had rarely if ever spoken to her over the telephone. Moreover, she presented witnesses of her own who said that the voice on the tape was *not* hers.

¶19 The weight and credibility of testimony are solely matters for jurors, and not a reviewing court, to weigh. ***State v. Webster***, 196 Wis. 2d 308, 320, 538

N.W.2d 810 (Ct. App. 1995). We will not declare evidence incredible as a matter of law unless it is "'in conflict with the uniform course of nature or with fully established or conceded facts.'" ***Rohl v. State***, 65 Wis. 2d 683, 695, 223 N.W.2d 567 (1974) (citation omitted). Vetos has provided no precedent, binding or otherwise, for the proposition that a voice identification should be deemed incredible as a matter of law, and we are unwilling to declare it so here. Having reviewed the record, we are satisfied that the evidence presented at trial that Veto was the 911 caller was not so lacking in probative value and force that no rational trier of fact, acting reasonably, could have found beyond a reasonable doubt that it was her. ***Poellinger***, 153 Wis. 2d at 501.

¶20 Our inquiry into the sufficiency of the evidence to convict Vetos of obstructing an officer is not at an end, however. Although the parties do not cite or discuss our opinion in ***Espinoza***, 2002 WI App 51, they did so in the trial court in the context of Vetos's motions to dismiss the complaint before trial and at the close of the State's case. We conclude that our holding in ***Espinoza*** is also germane to the question of whether the State adduced sufficient evidence at trial to convict Vetos of obstructing an officer. We conclude it did not.

¶21 We held in ***Espinoza*** that a defendant's denial of guilt when confronted by a police officer about an alleged crime cannot be the basis for a charge of obstructing an officer. ***Espinoza***, 2002 WI App 51 at ¶20. The police accused the defendant in ***Espinoza*** of attempting to steal a tire from a car. ***Id***. at ¶6. The defendant denied involvement in the attempted theft, threatened to sue the officers who had confronted him, and told them that they had "the wrong guy." ***Id***. at ¶7. Based on other evidence police had gathered, the State charged Espinoza with attempted theft and with obstructing an officer based on his denial of guilt. ***Id***.

¶22 We affirmed the trial court's dismissal of the obstructing charge, relying in part on ***Peters v. State***, 70 Wis. 2d 22, 29, 233 N.W.2d 420 (1975).[7] We also found persuasive and adopted the rationale of ***People v. Brooks***, 367 N.E.2d 236, 238 (Ill. App. Ct. 1977), that "the legislature did not intend such a broad result as to include within the statute all false answers or false statements which a defendant utters intending to exculpate himself or herself against a charge of a crime and to prevent his or her prosecution." ***Espinoza***, 2002 WI App 51 at ¶20. We explained that a false exculpatory denial should not be the basis for an obstructing charge when a person is "a clear target of the police investigation" and a truthful answer would implicate the suspect in the crime under investigation. ***Id***.

¶23 We did not discuss in ***Espinoza*** what statements beyond "I didn't do it" come within the ambit of an exculpatory denial. We believe it is significant, however, that in ***Brooks***, whose rationale we adopted, the defendant not only denied involvement in a shooting but told police that he had not been at the scene of the crime that day and gave an exculpatory account of his activities. ***Espinoza***, 2002 WI App 51 at ¶16. We quoted the Illinois court's conclusion that "'any truthful admission as to the gun or the presence of the one who used it at the scene would have implicated defendants.'" ***Id***. at ¶19 (quoting ***Brooks***, 367 N.E.2d at 238). Here, the trial court correctly concluded at the close of the State's case that Vetos's denial that she was the 911 caller was "an exculpatory denial." The court

[7] "[O]ur supreme court held in ***Peters*** that before a charge is made under § 946.41, the district attorney should have sound reasons for believing that statements made by a suspected defendant to the police were knowingly and intentionally made for the purpose of deceiving and misleading the police, and not simply out of a good faith desire to defend against an accusation of crime." ***State v. Espinoza***, 2002 WI App 51, ¶12, 250 Wis. 2d 804, 641 N.W.2d 484, *review denied*, 2002 WI 48, 252 Wis. 2d 151, 644 N.W.2d 687 (Wis. Apr. 22, 2002) (No. 01-1473-CR) (citing ***Peters v. State***, 70 Wis. 2d 22, 29, 233 N.W.2d 420 (1975)).

denied the motion, however, because Vetos's claim to have been at home at the time of the call "keeps us in the case." We conclude, however, that under ***Espinoza*** and ***Brooks***, both Vetos's statement that she was not the 911 caller and her claim to have been at home at the time of the call are part and parcel of her exculpatory denial, provided, of course, that other criteria for an exculpatory denial are present. We conclude that they are.

¶24 The deputy testified that, after he concluded "it was possible [Woodward] had not done anything," his investigation shifted to ascertaining "who made the call." He acknowledged that he considered it a part of his duties "in this particular incident to investigate a possibly false 911 report." The deputy also testified that, upon first speaking to Vetos, he quickly came to the conclusion that "she was the person on the tape," and he told her that he believed "she was the person that called in." As we have noted, the deputy was apparently unaware that a person who makes a false 911 call can be charged with a crime (see footnote 5). Vetos may or may not have shared that misimpression, but we conclude that jurors could reasonably infer from the deputy's account of his interview with Vetos that she believed she was being accused of wrongdoing.[8]

¶25 Jurors were not instructed that they could not find Vetos guilty if they concluded that Vetos's responses, even though false, were uttered "simply out of a good faith desire to defend against an accusation of crime," as opposed to

[8] Although some type of accusatory confrontation appears to be a prerequisite for an exculpatory denial to arise, we emphasize that it is the suspect's state of mind, not that of the investigating officer, which determines whether a response may be characterized as an exculpatory denial. That is, when, as here, an officer says to a person, "I think you did this, now tell me if you did," it is irrelevant that the officer does not know that the conduct in question is criminal, if it is in fact criminal and the accused might reasonably have understood it to be so.

being made "knowingly and intentionally … for the purpose of deceiving and misleading the police." ***Espinoza***, 2002 WI App 51 at ¶12. We conclude that, on the present facts, an instruction to that effect should have been given.[9] Notwithstanding Vetos's failure to request such an instruction, or to object to the one given, we may reverse and remand for a new trial in the interest of justice if the absence of an instruction incorporating the ***Espinoza*** holding prevented "the real controversy" from being "fully tried." *See* WIS. STAT. § 752.35; ***Vollmer v. Luety***, 156 Wis. 2d 1, 456 N.W.2d 797 (1990). The State could retry Vetos for obstructing an officer, however, only if we also conclude that the State presented sufficient evidence at trial to permit a properly instructed jury to have found her guilty. *See* ***State v. Perkins***, 2001 WI 46, ¶¶47-48, 243 Wis. 2d 141, 626 N.W.2d 762. We conclude the State did not do so.

¶26 As we have discussed, the State presented sufficient evidence for reasonable jurors to find beyond a reasonable doubt that Vetos was the 911 caller. There is no basis in the record, however, for jurors to also reasonably conclude that Vetos's motive in falsely denying that she was the caller was motivated by anything other than a "good faith desire to defend against an accusation of crime." ***Espinoza***, 2002 WI App 51 at ¶12. The State presented no evidence of some other motive, one unrelated to Vetos's desire to exculpate herself and avoid prosecution. That is, the State offered no evidence from which jurors could reasonably infer that Vetos intended to deceive and mislead the deputy, for example, in order to

[9] The Criminal Jury Instruction Committee may wish to consider whether an optional paragraph should be developed for use with WIS JI—CRIMINAL 1766A when the evidence at trial presents a factual dispute regarding whether a defendant's statement was an exculpatory denial.

protect some one else from liability or to keep embarrassing personal matters from coming to light.[10]

CONCLUSION

¶27 Because the State failed to present sufficient evidence to permit a rational jury, acting reasonably, to find beyond a reasonable doubt that Vetos's allegedly false statements were other than an exculpatory denial, *see* ***Poellinger***, 153 Wis. 2d at 501, we reverse the appealed judgment of conviction.[11]

By the Court.—Judgment reversed.

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[10] The State presented no evidence tending to show that the deputy's investigation was impeded in any way unrelated to Vetos's personal involvement in making the 911 call. When asked, "How did your conversation with Miss Vetos impede your investigation of the allegations made on that tape?", the deputy replied, "She told me she wasn't the person on the tape." There is no indication that the deputy took any further action in the matter beyond giving Vetos "an order-in slip for obstructing." We noted in ***Espinoza***:

> It seems that the intent of the legislature in WIS. STAT. § 946.41 was to prevent the waste of time, energy and expense involved in having law enforcement officers running down false leads concerning criminal conduct. Doubtless the legislature intended to circumscribe conduct which would frustrate or thwart the police function. The State makes no claim that Espinoza's mere denial of wrongdoing thwarted the police function. And though truth and morality may have required Espinoza to answer in the affirmative when he was questioned regarding the tire incident, we cannot say that the law required him to do so.

Espinoza, 2002 WI App 51 at ¶22 (footnote omitted).

[11] We have located only one appellate decision that cites or discusses ***Espinoza***. Like this one, it is an unpublished, single-judge opinion which addresses the sufficiency of the evidence at trial to convict a person of obstructing an officer and involved a verdict delivered shortly after ***Espinoza*** was decided.

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