COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1306-CR **Cir. Ct. No. 2009CM753**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD A. WUSTERBARTH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Reversed and cause remanded for further proceedings.*

¶1 BRUNNER, J.[1] Richard Wusterbarth appeals his conviction for obstructing an officer. He asserts the criminal complaint was insufficient to

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

support his obstructing charge, the circuit court erred in permitting him to proceed pro se, there was insufficient evidence presented at trial, and a limiting and a substantive instruction given to the jury were inappropriate. We conclude the complaint was sufficient in this case. However, we also conclude the circuit court erred by permitting Wusterbarth to proceed pro se; therefore, we reverse and remand for a new trial.

BACKGROUND

¶2 The facts set forth in the criminal complaint are as follows. On October 2, 2008, Wusterbarth called police because he believed a neighbor was manufacturing methamphetamine in the neighbor's apartment. Kaukauna officers Michael Frank and Jason Severson responded. Upon arrival, Wusterbarth explained to the officers that his upstairs neighbor was manufacturing methamphetamine. Frank reported that Wusterbarth "spoke for about ten minutes, but did not make a lot of sense." Both officers indicated they thought Wusterbarth was suffering from mental health issues.

¶3 The complaint further alleged that Frank spoke with Wusterbarth's upstairs neighbor and determined there was no illegal drug activity occurring in her apartment. Wusterbarth's neighbor reported to Frank that Wusterbarth had a tendency to stare at her and it made her uncomfortable.

¶4 The complaint indicated that on October 14, 2008, officer Thomas Raether was assigned to follow up with Wusterbarth. Wusterbarth, after speaking with Raether through a window, reported that he believed his neighbor was manufacturing drugs, someone was spraying a chemical that was entering his apartment, and he needed to get his locks changed because someone had entered his apartment. Wusterbarth also reported he thought his upstairs neighbor had

sprayed something off her balcony causing the leaves on the tree outside his window to die. Raether told Wusterbarth he would leave his business card on his front door, but Wusterbarth directed him to leave it in the bushes outside his window.

¶5 Finally, the complaint stated that on October 16, 2008, the Kaukauna Police Department received letters written by Wusterbarth to various sheriffs' departments indicating that the Kaukauna Police Department refused to investigate his complaint about drug manufacturing and that officer Frank was assisting in the drug trafficking. In response, officer Raether contacted Wusterbarth and offered to assist him in finding help for his paranoid behavior. The complaint states Wusterbarth refused help and proceeded to tell Raether a story about how people get killed.

¶6 The complaint charged Wusterbarth with obstructing an officer. Wusterbarth, representing himself, brought a motion to dismiss the complaint for lack of probable cause. The circuit court denied his motion. Also, at the same hearing, Wusterbarth informed the court he wished to proceed without counsel. The circuit court engaged Wusterbarth in the following colloquy regarding his waiver of counsel:

> The Court: …. You want to represent yourself?
>
> The Defendant: Yes.
>
> The Court: And has anyone forced you or made any promises to get you to represent yourself?
>
> The Defendant: No.
>
> The Court: You're going to represent yourself throughout the rest of the case?
>
> The Defendant: Yes.

> The Court: Do you have any questions for me concerning that right?
>
> The Defendant: No.
>
> The Court: Do you understand that representing yourself in a criminal case may be difficult and that having an attorney may be of some benefit or advantage to you?
>
> The Defendant: Yes.
>
> The Court: Now, I've read through your documents, and I especially think having an attorney to assist you may be of some benefit, just my feeling. I think you're off on tangents, and I'll address those as we go through your motions, but your – it's not my decision to make. It's your decision. I know we've, you've been here watching a jury trial and you've been here watching other motion hearings, pretrial conferences. So you've spent some time in this courtroom watching, and you must be making that decision after watching all those things, and you're doing that for some strategic reason or after giving it some careful thought?
>
> The Defendant: No, just to familiarize myself with the process here.
>
> The Court: Okay, but you've given that some thought and you want to represent yourself?
>
> The Defendant: Yes.

¶7 At the State's request at the close of the hearing, the circuit court ordered a competency evaluation for Wusterbarth. The evaluator opined Wusterbarth was competent to proceed. The evaluator did not explicitly assess Wusterbarth's competency to represent himself but did suggest Wusterbarth would benefit from standby counsel.

¶8 The court accepted the evaluator's opinion and deemed Wusterbarth competent to proceed. The court once again questioned Wusterbarth about his decision to represent himself:

> The Court: … it's my understanding you want to represent yourself …?
>
> The Defendant: Yes.
>
> The Court: Okay. You don't want to have an attorney to represent you?
>
> The Defendant: I said that if somebody could help me with the details, filing the subpoenas, getting the addresses because I'm not an attorney so I know I don't have access to some of the resources that they do; but would I have to pay for the attorneys, but if not, then I can hire somebody else to do that? That's just as—
>
> The Court: Well, the first issue, […] are you going to represent yourself?
>
> The Defendant: Yes.
>
> The Court: Okay. And you're not going to have legal counsel representing you or that's what your desire is or –
>
> The Defendant: Right.

¶9 Next, the circuit court discussed with Wusterbarth the various ways he could obtain legal representation. The circuit court informed Wusterbarth that it may decide to appoint standby counsel for Wusterbarth; however, the court expressed concern that, given Wusterbarth's paranoia, Wusterbarth would believe standby counsel was working for the State or the circuit court. The circuit court asked Wusterbarth if he would like standby counsel, and Wusterbarth refused. The circuit court engaged Wusterbarth in one final waiver of counsel colloquy.

> The Court: …. So you're going to proceed in this case representing yourself?
>
> The Defendant: Yes.
>
> The Court: And you understand that that may be difficult? I know you have law school training. You understand that representing yourself in a criminal case may be difficult, that having an attorney or legal counsel may be of some advantage or benefit to you? Do you understand those two things?

> The Defendant: Yes.
>
> ….
>
> The Court: And has anyone made any threats to you or promised you anything to get you to waive your right to have a lawyer and to represent yourself in this case?
>
> The Defendant: No.

¶10 On the morning of trial, Wusterbarth informed the court that he was not prepared for trial, that he had psychological reasons for not being prepared, and that he needed more time. The court asked for the State's position.

> The State: To be honest with the Court, my concerns about Mr. Wusterbarth's ability to focus have been in existence for a number of months, and that's basically why we asked the Court to consider competency when we did last what, August or September. When was that, Mr. Wusterbarth?
>
> The Defendant: September. September 8.
>
> The State: And I certainly think that he could benefit from some help. I've thought that all along. I was actually kind of hoping that it would happen. So that's our position. Our position is that I do have some concerns that he could benefit from some help, either seeing a doctor or talking to a doctor. So that's our position.
>
> The Court: And I agree. From what I have observed, I think Mr. Wusterbarth would benefit from help.

¶11 Without further discussion, the circuit court proceeded to trial. At trial, officer Frank testified that he and officer Severson responded to Wusterbarth's complaint. Frank testified that Wusterbarth reported he could smell methamphetamine being manufactured by his upstairs neighbor. Both officers testified that they could not smell anything and found no other evidence to support Wusterbarth's allegations. Frank advised Wusterbarth that he knew the upstairs neighbor and guaranteed that she was not manufacturing methamphetamine. Frank also testified that he spoke to the upstairs neighbor and found no evidence

of a methamphetamine laboratory in the neighbor's apartment. Both officers testified that they had concerns with Wusterbarth's mental health.

¶12 Officer Raether testified that when he visited Wusterbarth for a follow-up, Wusterbarth continued to have concerns that his upstairs neighbor was manufacturing methamphetamine. Raether stated Wusterbarth also reported his upstairs neighbor was spraying a chemical off her balcony that was causing the leaves to change color. Raether testified that he saw no damage to the leaves other than leaves turning color in mid-October, smelled no odd odors, and saw no evidence of a methamphetamine laboratory.

¶13 Wusterbarth was ultimately found guilty and convicted of obstructing an officer, in violation of WIS. STAT. § 946.41(1).

DISCUSSION

¶14 Wusterbarth challenges (1) the sufficiency of the complaint, (2) his waiver of counsel and competence, (3) the sufficiency of the evidence, (4) the appropriateness of a limiting jury instruction, and (5) the appropriateness of a substantive jury instruction.[2] We conclude the complaint sufficiently alleged probable cause; however, because we also conclude the circuit court erred in permitting Wusterbarth to proceed pro se, we reverse.[3]

[2] Wusterbarth is represented by counsel on appeal.

[3] Because we have reversed on other grounds, we need not address the defendant's challenge to the appropriateness of the jury instructions. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (if a decision on one point disposes of the appeal, we need not address the other issues raised); *see also* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground …."). However, because we reversed, we are obliged to address his sufficiency of the evidence claim. *See* ***State v. Ivy***, 119 Wis. 2d 591, 609-10, 350 N.W.2d 622 (Ct. App. 1984).

I. Sufficiency of the Complaint

¶15 A criminal complaint must set forth facts or reasonable inferences that are sufficient to allow a reasonable person to conclude that a crime was committed and the defendant probably committed it. ***State v. Adams***, 152 Wis. 2d 68, 73, 447 N.W.2d 90 (Ct. App. 1989). A complaint is sufficient if it answers the following questions: "(1) Who is charged?; (2) What is the person charged with?; (3) When and where did the alleged offense take place?; (4) Why is this particular person being charged?; and (5) Who says so?" ***Id.*** at 73-74 (quoting ***State v. White***, 97 Wis. 2d 193, 203, 295 N.W.2d 346 (1980)). A complaint is evaluated in a common sense rather than hyper technical manner. ***Id.*** at 73. The sufficiency of a criminal complaint is a matter of law which this court reviews de novo. ***Id.*** at 73-74.

¶16 In this case, the parties agree the criminal complaint adequately addresses the first, second, third, and fifth questions. The only question remaining is whether the complaint sufficiently establishes the reason Wusterbarth was charged with obstructing. Specifically, the question is whether the complaint sets forth facts or reasonable inferences that show Wusterbarth knowingly obstructed an officer.

¶17 The complaint states the information Wusterbarth gave to police was false and Wusterbarth was advised that there was no drug activity occurring in the upstairs apartment. Wusterbarth subsequently reported this same information to another officer and other sheriffs' departments. We conclude the facts in the criminal complaint support a reasonable inference that Wusterbarth knowingly obstructed officers.

II. Self-Representation

¶18 When a circuit court is confronted with a criminal defendant who wishes to proceed pro se, "the circuit court must ensure that the defendant (1) has knowingly, intelligently, and voluntarily waived the right to counsel, and (2) is competent to proceed pro se." ***State v. Imani***, 2010 WI 66, ¶21, 326 Wis. 2d 179, 786 N.W.2d 40. If the circuit court finds that both requirements are met, the circuit court must allow the defendant to proceed pro se. ***Id.*** However, if the court finds that one or both of the requirements are unsatisfied, the circuit court must prevent the defendant from representing himself or herself. ***Id.*** This inquiry will ensure the defendant is not deprived of his or her right to counsel. ***Id.***

¶19 Whether an individual has knowingly, intelligently, and voluntarily waived his or her right to counsel is a constitutional question that is reviewed independent of the circuit court. ***Id.***, ¶19. To prove that an individual made a knowing, intelligent, and voluntary waiver of the right to counsel, the circuit court must engage in a colloquy with the defendant. ***Id.***, ¶23. This colloquy must address the defendant's: (1) deliberate choice to proceed without counsel; (2) awareness of the difficulties and disadvantages of self-representation; (3) awareness of the seriousness of the charge or charges; and (4) awareness of the general range of possible penalties. ***Id.*** A reviewing court may determine there was a valid waiver of counsel *only* if the circuit court engaged in these four lines of inquiry. ***Id.*** If the circuit court failed to engage a defendant in these four lines of inquiry, "a reviewing court may not find, based on the record, that there was a valid waiver of counsel." ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997).

¶20 In this case, the waiver of counsel colloquies with Wusterbarth were insufficient because they failed to include two of the four ***Klessig*** lines of inquiry. While the circuit court did discuss with Wusterbarth his deliberate choice to proceed without counsel and his awareness of the difficulties and disadvantages of self-representation, at no point did the circuit court discuss with Wusterbarth the seriousness of the offense or the possible range of penalties. As a result, the colloquies were inadequate.[4]

¶21 "In addition to knowingly, intelligently, and voluntarily waiving the right to counsel, a defendant who seeks to represent himself or herself must be competent to proceed pro se." ***Imani***, 326 Wis. 2d 179, ¶36. Whether a defendant is competent to proceed pro se is "uniquely a question for the trial court to determine." ***Id.***, ¶37 (quoting ***State v. Pickens***, 96 Wis. 2d 549, 568, 292 N.W.2d 601 (1980), *overruled on other grounds by* ***Klessig***, 211 Wis. 2d at 206, 212 (expressly "affirm[ing] the holding in ***Pickens*** as still controlling on the issue of competency")). "It is the trial judge who is in the best position to observe the defendant, his conduct and his demeanor and to evaluate his ability to present at least a meaningful defense." ***Id.***

¶22 However, a defendant's competency to proceed pro se is a higher standard than a defendant's competency to stand trial. ***Id.***, ¶36. As a result, a circuit court's independent determination that a defendant is competent to proceed pro se must appear in the record. ***Id.***, ¶37. We will uphold the circuit court's determination of a defendant's competency to proceed pro se unless "totally

[4] The manner of the court's colloquy leaves us uncertain as to whether the court was eliciting the defendant's beliefs and knowledge upon which the court could make its required finding of waiver of counsel or simply asking the defendant to confirm what the court had already concluded.

unsupported by the facts apparent in the record." ***Id.*** (quoting ***Pickens***, 96 Wis. 2d at 569-70).

¶23 In this case, the circuit court failed to independently consider Wusterbarth's competence to proceed pro se. The circuit court did adopt the findings of a competency evaluation, deeming Wusterbarth competent to stand trial; however, the circuit court never independently determined on the record whether Wusterbarth met the higher standard of being competent to represent himself.

¶24 The usual remedy for a circuit court's failure to independently determine a defendant's competency to proceed pro se is an evidentiary hearing where the circuit court decides if the defendant was competent to proceed pro se. ***Klessig***, 211 Wis. 2d at 213. If the circuit court finds the defendant was not competent to proceed pro se, then the defendant must be granted a new trial. ***Id.*** However, an evidentiary hearing may not be necessary in every case where the circuit court did not make a determination as to the defendant's competency to proceed pro se. ***Id.*** at 214 n.9. In some cases, the record will be clear, thus making an evidentiary hearing unnecessary. ***Id.***

¶25 We conclude that an evidentiary hearing regarding Wusterbarth's competence to proceed pro se is unnecessary. The record clearly indicates Wusterbarth was not competent to proceed pro se. We note that from the onset of this prosecution, the record reflects that both the State and the circuit court repeatedly expressed concern that Wusterbarth's paranoia would interfere with his ability to represent himself. Although Dr. Brooke Lundbohm's report on Wusterbarth's competency to proceed did not evaluate his competency to represent himself, it did suggest he would benefit from standby counsel. Finally,

on the morning of trial, after the State told the circuit court it felt Wusterbarth would benefit from seeing a mental health professional and the circuit court agreed, the circuit court nevertheless proceeded to trial without any further examination into Wusterbarth's competency to proceed pro se.

¶26 A circuit court "has a continuing responsibility to watch over the defendant and insure that his incompetence is not allowed to substitute for the obligation of the state to prove its case." ***Pickens***, 96 Wis. 2d at 569. Because the record demonstrates the circuit court's concern with Wusterbarth's mental health and ability to proceed pro se, the circuit court had an obligation to ensure Wusterbarth was adequately represented. Accordingly, we reverse.

III. Sufficiency of the Evidence

¶27 Because we reverse, we must also address Wusterbarth's claim that the evidence presented at trial was insufficient. *See* ***Burks v. United States***, 437 U.S. 1, 16, 18 (1978); ***State v. Ivy***, 119 Wis. 2d 591, 609-10, 350 N.W.2d 622 (1984). If we conclude there was insufficient evidence to support Wusterbarth's conviction, we are precluded by the Double Jeopardy Clause from ordering a new trial even though an error in the circuit court proceedings might otherwise warrant a new trial. *See* ***Ivy***, 119 Wis. 2d at 609-10.

¶28 Wusterbarth asserts the evidence is insufficient support the obstruction conviction because it failed to show he knowingly obstructed an officer. Wusterbarth argues that the evidence only showed he believed the information conveyed to police was true; therefore, he did not *knowingly* obstruct an officer.

¶29 When determining whether the evidence was sufficient to support a conviction "an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Our review of a sufficiency of the evidence claim is very narrow, and great deference is given to the determination of the trier of fact. ***State v. Hayes***, 2004 WI 80, ¶57, 273 Wis. 2d 1, 681 N.W.2d 203. "We must examine the record to find facts that support upholding the jury's decision to convict." ***Id.***

¶30 In this case, the evidence presented was sufficient to support a jury verdict, beyond a reasonable doubt, that Wusterbarth knowingly obstructed an officer. The State presented evidence that Wusterbarth made an allegation that his neighbor was manufacturing methamphetamine because of an apparent odor seeping into his apartment. The officers testified that they did not smell anything, Wusterbarth had no other evidence to support his allegation, and after meeting with the neighbor, the allegation itself was unsubstantiated. Further, after being advised that the upstairs neighbor was not manufacturing methamphetamine, Wusterbarth reported the same concern to a follow up officer.

¶31 We cannot conclude that the evidence in support of Wusterbarth's conviction is so lacking in probative value and force that it can be said, as a matter of law, that no reasonable trier of fact could have drawn the inference that Wusterbarth knowingly obstructed an officer. Although the officers' testimony indicated concern with Wusterbarth's mental health and Wusterbarth argued during trial that he truly believed his neighbor was manufacturing methamphetamine, the jury simply chose not to believe that Wusterbarth's mental

health had any bearing on the reports made to police. "The trier of fact is free to choose among conflicting inferences of the evidence and may, within the bounds of reason, reject that inference which is consistent with the innocence of the accused." ***Poellinger***, 153 Wis. 2d at 506.

¶32 Accordingly, we conclude the evidence was sufficient to support the conviction, and as a result, we reverse and remand for a new trial.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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