COURT OF APPEALS
DECISION
DATED AND FILED

May 5, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP382-CR **Cir. Ct. No. 2006CM477**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT LYLE LAWVER, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Columbia County: DANIEL GEORGE, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Robert Lawver appeals his convictions for disorderly conduct and for resisting an officer, both misdemeanors. The charges

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

stem from Lawver's stumbling down the roadway of a busy highway late at night under the influence of alcohol and, when confronted by police, proceeding to engage in loud, profane, and threatening behaviors. Lawver offers various reasons why each charge should be reversed. I address and reject each argument and, accordingly, affirm.

Background

¶2 Around midnight on June 25, 2006, two people made separate calls to the police, alerting police that a man was walking southbound in the roadway of Highway 13 in the City of Wisconsin Dells. Highway 13 in this location and at that time of year is a busy main road and was being used by various motorists that night. Three officers responded. The first officer to respond, Officer Miller, saw that Lawver was walking southbound on the right side of Highway 13, traveling with traffic, and that the area was dark because there were no streetlights. Officer Miller then saw Lawver stumble into the road "approximately four feet beyond the white fog line" and into "the middle of the southbound lane of traffic." In speaking with Lawver, Officer Miller immediately noticed a fairly strong odor of alcohol and that Lawver was swaying back and forth.

¶3 When told by Officer Miller that he was investigating a complaint, Lawver responded that he wanted to be left alone to continue walking home to Portage. Officer Miller estimated that Portage was at least fifteen miles away. Soon thereafter, two more officers arrived at the scene. The officers attempted to obtain a telephone number from Lawver of someone who might pick him up, but Lawver refused to cooperate. Lawver became more upset, and his behavior included yelling profanity, pacing, waving his arms, and clenching his fists.

¶4 At some point during this exchange, Lawver began to approach Officer Miller with "his hand in a fist with a finger pointed," saying, "You are the fucking criminal," and forcing the officer to back away. Another officer present, Officer Clausen, then stepped forward and attempted to calm Lawver down. Lawver stopped advancing, but did not calm down and continued yelling profanities. Lawver then turned away from the officers and began to walk. Officer Clausen told Lawver to stop or he would use a taser on him, but Lawver did not comply. Officer Clausen then deployed the taser, which struck Lawver, forcing him to the ground and allowing the officers to place him in handcuffs.[2]

¶5 The State charged Lawver with resisting an officer, contrary to WIS. STAT. § 946.41(1) (2003-04), a Class A misdemeanor, and with disorderly conduct, contrary to WIS. STAT. § 947.01 (2003-04), a Class B misdemeanor. After a first trial, and for reasons that are not important here, guilty verdicts on both counts were vacated, and Lawver was granted a new trial. On retrial, the jury again found Lawver guilty on both counts. Lawver appeals the resulting judgment. He also appeals the order denying his motions seeking postconviction relief. I discuss additional facts as needed below.

Discussion

¶6 Lawver raises various arguments directed at his two convictions. I address and reject each in turn.

[2] Officers Miller and Lowenhagen testified that Lawver was walking away when tased. Although Officer Clausen initially testified that Lawver was spinning away when he tased him, Officer Clausen eventually agreed there was a "good chance" that Lawver was walking away.

A. Otherwise Disorderly Conduct

¶7 Lawver argues that his "conduct of walking in the roadway at night" does not, as a matter of law, fit the definition of "disorderly conduct" under WIS. STAT. § 947.01. Lawver asserts that this is significant because the State singled out this conduct and presented it as one possible way for the jury to find Lawver guilty. Citing ***State v. Crowley***, 143 Wis. 2d 324, 329, 422 N.W.2d 847 (1988), Lawver contends that, if any of the State's theories of guilt are flawed, then he is entitled to reversal because it is not possible to know which theory the jury relied on in returning a verdict. Assuming, for argument's sake, that Lawver is correct about the application of ***Crowley*** here, I reject his argument that the State's alternative theory of guilt is legally insufficient.

¶8 WISCONSIN STAT. § 947.01 (2003-04) states:

> Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud *or otherwise disorderly conduct* under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.

(Emphasis added.) Lawver's argument concerns the emphasized portion of this provision, "otherwise disorderly conduct." "[C]onduct will fall under the 'otherwise disorderly' provision if under the circumstances the conduct is of the type that tends to disrupt good order. This test requires an objective analysis of both the conduct and the circumstances." ***State v. A.S.***, 2001 WI 48, ¶33, 243 Wis. 2d 173, 626 N.W.2d 712.

¶9 The pertinent facts include the following. Lawver was walking at night down an unlit highway, traveling with traffic, so that he would not have been in a position to see motorists approaching from behind him. An officer witnessed

Lawver stumble into the highway "approximately four feet beyond the white fog line," which put him in "the middle of the southbound lane of traffic." This was a "well traveled" stretch of "main road," motorists were traveling on the highway that night, and Lawver would have been in the path of such a vehicle if one had been passing at that moment. Lawver displayed obvious indications of intoxication, such as smelling of alcohol and swaying back and forth.

¶10 In addition, there was testimony that two people called the police about Lawver being on the highway, and the officers were dispatched based on these reports of Lawver "walking in the roadway" and "walking in the middle of the roadway." At trial, Lawver did not object to this testimony as hearsay and, thus, even if hearsay, the jury was entitled to rely on this additional evidence of Lawver walking down the middle of the road.[3] *See* ***State v. Jenkins***, 168 Wis. 2d 175, 203, 483 N.W.2d 262 (Ct. App. 1992) (unobjected-to hearsay is admissible as substantive evidence).

¶11 These events, Lawver contends, do not constitute "otherwise disorderly conduct" as a matter of law. He does not, however, point to any direct support for his contention. Rather, he relies on a general proposition in ***State v. Zwicker***, 41 Wis. 2d 497, 164 N.W.2d 512 (1969), that only acts that tend to be "substantial intrusions" are punishable as disorderly conduct. *See* ***id.*** at 508. Lawver then asserts, without support, that his conduct was not a "substantial intrusion," but rather was merely "unsafe." This argument is not persuasive. The

[3] I note that the record contains a motion in limine from Lawver that sought a general ruling that hearsay was inadmissible. But the motion did not specify the callers' statements and Lawver, appropriately, does not argue on appeal that this vague motion preserved a hearsay objection to this specific testimony.

fact that Lawver's behavior was unsafe and, in particular, unsafe to members of the traveling public shows that he did substantially intrude on public order by dangerously interfering with the road's use.

¶12 Lawver also contends that, even if his conduct could be considered disorderly conduct, there was *insufficient evidence* to convict him of disorderly conduct here. This argument essentially repeats the arguments that I have just discussed. Thus, I simply observe that the evidence was sufficient under the applicable standard. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) ("[I]n reviewing the sufficiency of the evidence 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.").

B. First Amendment Violation

¶13 Lawver's next argument is again based on the general proposition he extracts from ***Crowley***—that, if any prosecution theory is flawed, reversal is warranted. This argument focuses on a different theory of disorderly conduct presented by the State, which relates to events during the interaction between Lawver and the police officers.

¶14 In its closing argument, the State argued that Lawver engaged in disorderly conduct when he was loud and profane during his interaction with the police officers. For example, Lawver highlights that the State elicited testimony about Lawver calling an officer a "fucking criminal," and that the State referred to this in its closing argument. Lawver asserts that this was a verbal protest against the officers' actions and was constitutionally protected speech.

¶15 The problem with this argument is that there is no reasonable view of the State's case that would support the idea that Lawver was punished because he was expressing a particular idea or thought. Rather, the State's case can only be reasonably understood as asking the jury to punish Lawver's *conduct* of delivering the statements in a loud and threatening manner. To the extent the State talked about Lawver's calling the officer a "fucking criminal" and shouting "the F word," it was in this context. In other words, it was plainly the disturbance that was at issue here, and Lawver does not present a persuasive argument to the contrary.

¶16 Lawver also presents an argument directed at the jury instructions that is premised on the same First Amendment theory. This argument adds nothing to the one I have just rejected.

C. Resisting An Officer Jury Instruction

¶17 Lawver's next argument concerns his conviction for resisting an officer under WIS. STAT. § 946.41(1). He argues that the real controversy was not fully tried because the jury instruction did not properly present an element of the offense concerning the police officers' "lawful authority." In particular, Lawver asserts that a police officer who acts with excessive force is not acting with "lawful authority," and he says the jury should have been told this. I reject this argument because Lawver fails to show that the real controversy was not fully tried.

¶18 Lawver acknowledges that he did not timely object to the jury instructions and, accordingly, has forfeited this argument. Still, he argues reversal is warranted based on the discretionary power to reverse in the interest of justice when "it appears from the record that the real controversy has not been fully

tried." *See* WIS. STAT. § 752.35. The power of discretionary reversal is exercised "only in exceptional cases." ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990).

¶19 WISCONSIN STAT. § 946.41(1) (2003-04) provides: "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." (Emphasis added.) There are four elements to this offense. *See* WIS JI—CRIMINAL 1765. Lawver's argument concerns the element requiring proof that the resistance took place while the officers were acting with lawful authority.

¶20 I will assume, for argument's sake, that Lawver is generally correct that, "[l]ogically, an officer who uses excessive force is not acting … with lawful authority." Lawver nonetheless fails to show that this is a case warranting discretionary reversal. Lawver's theory is that the officers used excessive force when tasering him and that, to the extent he resisted the officers' excessive force, his conduct is not punishable under WIS. STAT. § 946.41(1) because he was not resisting an act of "lawful authority."

¶21 The flaw in Lawver's argument is the fact that the tasering did not precede the acts constituting Lawver's resistance. That is, the State's case primarily focused on Lawver's acts *prior to* the alleged excessive force. It is true that the State elicited testimony and referred in closing argument to the fact that, after being tasered, Lawver "used force when he pulled away from Officer Clausen and resisted the handcuffing." But, this was a small portion of what the State argued, and the State did not focus on this. Rather, in its closing argument, the State summarized its argument on this point as follows:

> In looking at the elements the State has to prove, the defendant resisted the officer by force or threat of force. He resisted not just one, but all three officers who made repeated attempts to get him off the road. Defendant chose to use force to the point where Officer Clausen had to use the taser to safely secure the defendant.

Lawver does not argue that the officers lacked lawful authority due to excessive force while he engaged in these behaviors *prior to* the tasering.

¶22 In sum, my review of the record persuades me that the real controversy was tried because the prosecutor focused on Lawver's pre-tasering conduct.

D. Ineffective Assistance Of Counsel

¶23 Lawver argues that he received ineffective assistance of counsel at trial. He points to four errors by his trial counsel. As explained below, however, his arguments are all premised on the arguments that I have already discussed and rejected.

¶24 The applicable principles are as follows:

> Wisconsin applies the two-part test described in ***Strickland*** [***v. Washington***, 466 U.S. 668 (1984)], for evaluating claims of ineffective assistance of counsel. ***State v. Johnson***, 153 Wis. 2d 121, 126, 449 N.W.2d 845 (1990). To prevail on an ineffective-assistance-of-counsel claim, the defendant must prove that his or her counsel's performance was deficient and that the deficiency prejudiced his or her defense. ***Id.*** at 127. In this analysis, courts may decide ineffective assistance claims based on prejudice without considering whether the counsel's performance was deficient. ***Id.*** at 128 (quoting ***Strickland***, 466 U.S. at 697).

State v. Roberson, 2006 WI 80, ¶28, 292 Wis. 2d 280, 717 N.W.2d 111.

¶25 Lawver first argues that his trial counsel erred both by failing to seek a pretrial ruling on whether the statements Lawver yelled at the officers were protected by the First Amendment and by failing to seek a jury instruction addressing the same topic. Lawver bases this argument on a proposition that I have already rejected—that "his conviction for disorderly conduct was based largely on speech protected by the First Amendment." His argument here, premised on this rejected proposition, is similarly unavailing.

¶26 Lawver also argues that three other allegations of deficient performance should be "reviewed for their aggregate effect since they all relate to counsel's decision not to raise the issue of excessive force to [the] jury" in the context of the resisting an officer charge. As I have already discussed, Lawver fails to show that the issue of excessive force was important in this case. He adds nothing to that argument here. Rather, he simply repeats his argument that excessive force mattered to the "lawful authority" element and asserts that, accordingly, trial counsel was deficient by failing to offer evidence of Lawver's injuries resulting from the alleged excessive force, by failing to present an argument based on excessive force at trial, and by failing to seek a jury instruction on excessive force.

¶27 I have already explained that the State's primary focus was on Lawver's conduct prior to the alleged excessive force. I need not repeat that discussion here. Based on what I have already discussed, I conclude that, even if Lawver's counsel erred in the ways Lawver asserts, his argument fails under the prejudice prong. *See* ***id.***, ¶29 (to show prejudice, there must be a reasonable probability that, but for counsel's errors, the result of the trial would have been different).

Conclusion

¶28 For the reasons discussed, I affirm the circuit court.

By the Court.—Judgment and order affirmed.

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