COURT OF APPEALS
DECISION
DATED AND FILED

June 22, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2849-CR **Cir. Ct. No. 2009CM575**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEITH A. STICH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

¶1 BROWN, C.J.[1] Keith A. Stich appeals his conviction for obstructing an officer, contrary to WIS. STAT. § 946.41(1). Stich claims that the State failed to offer evidence sufficient to show that he actually obstructed officers

[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.

or that he knew the officers were acting in an official capacity. Alternatively, Stich argues that he was denied the effective assistance of counsel due to counsel's failure to object to the prosecutor's remarks made in closing argument. We find these arguments unpersuasive, and affirm.

FACTS

¶2 On March 29, 2009, a deputy with the Kenosha county sheriff's department was on duty when he observed Heidi Courtright driving a snowmobile down the middle of the road, an illegal act. As he watched, the snowmobile went into a ditch and rolled onto Courtright. The deputy went to Courtright's aid.[2] While speaking with Courtright, the deputy observed another snowmobile driver going down the middle of the road. The driver was wearing a tan jacket, dark pants, and a dark helmet. The deputy called out to the driver, but the driver sped away.

¶3 Another deputy soon found the other snowmobile driver, but was unable to stop him. The deputy proceeded to 24615 67th Street,[3] where he met a third deputy. They observed two men standing in front of a van parked at 24608 67th Street. One of the men, later identified as Vernon Lidbloom, was wearing a tan jacket and blue jeans. The other man was the defendant, Keith Stich. The

[2] Courtright was subsequently arrested for operating a snowmobile under the influence of intoxicants.

[3] This was the address of Heidi Courtright. The initial deputy obtained the address when he questioned her after her accident, and he then passed the information on to other deputies. The transcript of Courtright's testimony shows her giving her address in court as 24615 65th Street, but all other parties and documents indicate that she lived on 67th Street. Her address is not in dispute and does not affect the charges against Stich.

deputies instructed the men to come talk to them. The men ignored the deputies, and Lidbloom put his hands in his pockets. At Stich's suggestion, the men began walking past the deputies to a house. The deputies identified themselves as police officers, and ordered the men to stop. The deputies were in full police uniform. The men again ignored the deputies' orders, and Stich grabbed Lidbloom's arm, telling him to keep walking. One of the deputies became concerned for his safety and drew his firearm. He was finally able to detain Lidbloom after Lidbloom had walked ten to fifteen feet up the driveway.

¶4 Stich continued to ignore the deputies' orders and tried to persuade Lidbloom to walk to the house. Stich grabbed the back of Lidbloom's jacket and tried to pull him towards the house. Stich then left Lidbloom, went into the house, and began closing the blinds. He went in and out of the house several times while shouting obscenities at the deputies. The deputy who had his gun drawn was unable to handcuff Lidbloom because he believed it was unsafe to holster his weapon while Stich was behaving so erratically. After approximately two minutes of the deputy brandishing his gun, the other arresting deputy came over and they handcuffed Lidbloom. The deputies were forced to call for backup, and three additional deputies arrived ten to fifteen minutes later. One of the responding deputies was eventually able to pull Stich out of the house when Stich put his arm out of the front door. Two deputies were then able to handcuff Stich.

¶5 Stich was convicted of obstructing an officer and disorderly conduct. His postconviction motion was denied, and he appeals.

DISCUSSION

¶6 Stich's first argument is that the State failed to prove two of the elements of the crime of obstructing an officer. The crime has four elements:

first, that the defendant obstructed an officer;[4] second, that the officer was doing an act in an official capacity; third, that the officer was acting with lawful authority; and fourth, that the defendant knew that the officer was acting in an official capacity and with lawful authority and that the defendant knew his conduct would obstruct the officer. *See* ***State v. Young***, 2006 WI 98, ¶57, 294 Wis. 2d 1, 717 N.W.2d 729; WIS JI—CRIMINAL 1766. Stich argues that the State failed to provide sufficient evidence that he actually obstructed an officer and that he knew the officer was acting with lawful authority.

¶7 We review the evidence in the light most favorable to the jury's verdict. ***State v. Bannister***, 2007 WI 86, ¶22, 302 Wis. 2d 158, 734 N.W.2d 892. "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, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt…." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

¶8 We hold that a reasonable jury could have found that Stich's actions obstructed an officer. To obstruct an officer means to prevent or make more difficult an officer's duties. ***Young***, 294 Wis. 2d 1, ¶57. When the arresting deputies first instructed Stich and Lidbloom to come speak with them, the men were standing near the minivan. Lidbloom did not begin walking away from the deputies until Stich told him to come inside the house.

[4] One of the requirements of WIS. STAT. § 946.41(1) is that the defendant resist or obstruct an officer. An officer is defined in § 946.41(2)(b) as "a peace officer or other public officer or public employee having the authority by virtue of the officer's or employee's office or employment to take another into custody."

¶9 Stich correctly notes that "not every barrier placed in the path of an officer gives rise to a violation of sec. 946.41(1)." ***State v. Hamilton***, 120 Wis. 2d 532, 535, 356 N.W.2d 169 (1984). ***Hamilton***, however, involved a defendant who refused to provide an officer with information that the officer could have easily and immediately obtained from another source. ***Id.*** at 542. The court in ***Hamilton*** found that the defendant's conduct "did not affect the investigation." ***Id.*** Stich's actions are more akin to the actions of the defendant in ***State v. Grobstick***, 200 Wis. 2d 242, 546 N.W.2d 187 (Ct. App. 1996). In ***Grobstick*** the defendant eluded officers for ten to fifteen minutes before they were able to apprehend him. ***Id.*** at 246. This court in ***Grobstick*** held that the defendant's eluding officers for ten to fifteen minutes was enough for a jury to find that he had made the deputies' duties more difficult. ***Id.*** at 249-50. Similarly, we hold that Stich's actions, which delayed the deputies' ability to question Lidbloom, were enough for a jury to find that Stich made the officers' duties more difficult.

¶10 Stich's behavior also escalated the situation from a brief ***Terry***[5] stop into an arrest at gunpoint. Stich argues that the arresting deputy drew his weapon solely because Lidbloom had his hands in his pockets and not based on any of Stich's actions. He then infers that if Lidbloom had not placed his hands in his pockets, the arresting deputy would not have drawn his weapon. The arresting deputy testified, however, that he continued to ask Stich and Lidbloom to come over to him, without drawing his weapon, even after Lidbloom had placed his hands in his pockets. From this, a jury could reasonably have concluded that the deputy would not have drawn his gun if Lidbloom had been cooperative and

[5] ***Terry v. Ohio***, 392 U.S. 1 (1968).

followed his instructions rather than Stich's advisements, even if Lidbloom did have his hands in his pockets. Indeed, the deputy testified that Stich's erratic behavior is what caused him to keep his weapon out even after Lidbloom had knelt in the driveway. A reasonable jury could certainly have found that Stich's behavior had contributed to the deputy's decision to draw his gun, and thus made the deputy's duties more difficult.

¶11 Stich also argues that the State failed to present evidence sufficient to show that Stich knew that the officers were acting with lawful authority. The requirement that a defendant "know" specific facts requires only that the defendant believes those facts. WIS. STAT. § 939.23(2). Stich contends that his statements to Lidbloom that the arresting deputies had no warrant and so could not come onto his property prove that he thought the deputies had no lawful authority, and there was no evidence to the contrary presented by the state. This ignores the testimony that both deputies were in full uniform, from which a jury could infer that Stich believed the deputies were acting with lawful authority. The jury could properly look at surrounding circumstances such as these to determine Stich's belief. *See* ***State v. Lossman***, 118 Wis. 2d 526, 542-43, 348 N.W.2d 159 (1984) (explaining that the defendant's subjective belief as to an officer's lawful authority is ascertained based on the totality of the circumstances). We find that based on

the totality of the circumstances, a reasonable jury could have found that this element of the crime was satisfied.[6]

¶12 Stich's second argument is that he was denied the effective assistance of counsel due to counsel's failure to object to the prosecutor's remarks made in closing argument. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). In assessing whether trial counsel's performance was adequate, Wisconsin applies the two-part test outlined in ***Strickland***. To establish that he was denied effective representation, Stich must show both that counsel's performance was deficient and that the deficiency prejudiced him by adversely affecting the judgment. ***Id.*** at 687.

¶13 Stich points out two threads of thought made by the prosecutor that he believes his counsel improperly failed to object to.[7] The first group of

[6] Our totality of the circumstances discussion does not mean that we accept Stich's apparent premise that a defendant may challenge an obstruction charge based on his or her subjective understanding (or misunderstanding) of whether the police had a legal right to do what they did. In our view, a subjective belief that an officer showed all the indicia of lawful authority (badge, uniform, squad car) is one thing. The officer having a legal basis to act may be quite another. Even if Stich subjectively believed the deputies needed a warrant to be on his property, he could still "know[]" that they were acting with "lawful authority" within the meaning of WIS. STAT. § 946.41(1). We need not decide the exact parameters of the term "lawful authority" at this time, however, because even accepting Stich's apparent premise, his argument is unavailing.

statements dealt with the credibility of the deputies' testimony. As Stich correctly points out, attorneys may not state a personal opinion as to the credibility of a witness. *See* SCR 20:3.4(e) (2009). Attorneys may, however, comment on the credibility of a witness provided that the commentary is based on the evidence rather than personal opinion. *See* ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998). In his closing, the prosecutor stated that the deputies described what they saw "truthfully and honestly," without guessing at anything else. Viewed in context, however, these statements came immediately after the prosecutor outlined the officers' testimony. The prosecutor then stated that the deputies' testimony made sense, and that it all ran together. When viewed in this context, the prosecutor was not stating a personal opinion of the witnesses' credibility, but was making appropriate comments on the credibility of their testimony based on the evidence presented.

¶14 The second complaint alleges that the prosecutor invited the jury to convict Stich based on factors other than what was in evidence. The prosecutor discussed Stich's efforts to rile up his dog and his repeated commands to his dog to attack the deputies. The prosecutor then stated that these actions showed that Stich was willing to "go all the way." Stich argues that there was nothing in the evidence to support this assertion, and that it invited the jury to convict him based

[7] Stich also argues that there was no testimony supporting the prosecutor's statement that neighbors were turning on their lights and coming out of their homes. There was, however, testimony by one of the officers that Stich was shouting obscenities at the officers as they handcuffed him, and that he was yelling "[l]oud enough for the neighbors to hear it because the neighbors were all out across the street." Even if the prosecutor did misspeak by saying that lights were coming on, the impact of that statement falls far short of "so infect[ing] the trial with unfairness as to make the resulting conviction a denial of due process." *See* ***State v. Mayo***, 2007 WI 78, ¶43, 301 Wis. 2d 642, 734 N.W.2d 115. We will not address this argument further.

a willingness to "go all the way," rather than based on his actions as shown by the evidence.

¶15 We conclude that the prosecutor's behavior was not objectionable, and therefore, trial counsel was not deficient. Counsel should be afforded "considerable latitude" in arguing inferences from the evidence during closing arguments. ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). The prosecutor's comments about Stich going "all the way," when viewed in context, referred to Stich's willingness to use his dog to obstruct the deputies. The prosecutor was referring to Stich's willingness to let his dog attack the deputies, which was a reasonable conclusion to draw from the evidence. Perhaps it was a bit of hyperbole, but we agree with the trial court that it was not objectionably so. The trial court explained that it allowed evidence of Stich riling up his dog to determine Stich's motives and "as part of the whole episode of this incident." The prosecutor used this evidence to show Stich's intent to obstruct the officers throughout the episode, and referring to this conduct as a willingness by Stich to "go all the way" was simply the prosecutor's informal expression of why this evidence was relevant.

By the Court.—Judgment and order affirmed.

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