COURT OF APPEALS
DECISION
DATED AND RELEASED

July 27, 1995

No. 95-0016-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRADLEY BROWNLEE,

Defendant-Appellant.

APPEAL from an order of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed*.

GARTZKE, P.J. Following a jury trial, Bradley Brownlee was convicted on two counts of disorderly conduct, § 947.01, STATS., and one count of resisting an officer, § 946.41(1), STATS. He appeals from an order denying his postconviction motions for a new trial. He contends that he was denied effective assistance of counsel and should, in any event, have a new trial in the interest of justice.[1] This court affirms the order.

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

Section 947.01, STATS., defines disorderly conduct, a misdemeanor, as engaging 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. Section 946.41(1), STATS., defines resisting an officer as knowingly resisting or obstructing an officer while such officer is doing any act in an official capacity and with lawful authority. Such conduct is a misdemeanor.

The three convictions relate to three episodes. On September 5, 1993, Brownlee returned to the apartment he and Veronica Wardell occupied. Shortly after his arrival, they argued. According to Wardell, Brownlee pushed her several times, she slapped him, he punched her and she kicked him. He fell, knocked down a vase, and threw it at a mirror, shattering the vase and mirror. Wardell told Davina Keller, who arrived at the apartment shortly after the incident, to call the police, and Brownlee joined in the request. Keller left the apartment. This episode resulted in a disorderly conduct charge.

A while later, Wardell left the apartment. At the time she left, Brownlee had been asleep on the couch for at least fifteen minutes. She met police officers at the bottom of the stairwell leading up to the apartment. She talked to them at the police station, which was across the street, and she told them what had happened. She also told them that Brownlee was "passed out on the couch." They asked her whether there were any weapons in the apartment. She responded that there were knives in the kitchen, and that Brownlee worked as a meat boner.

After talking to Wardell, the two officers went back across the street and entered the apartment.[2] At this point episode two began. Brownlee lay on the couch under a blanket, and when the officers could not elicit a response from him, they decided to handcuff him. One officer attempted to remove the blanket, but Brownlee clutched it and would not let go. The officers pulled him to the floor in order to handcuff him. Brownlee struggled with

[2] At the trial, one officer testified that while at the police station he asked Wardell for her consent to enter the apartment and she gave it. The other officer testified that he was unsure whether Wardell was asked if she consented, although he believed she was. He also testified that he did not ask her for consent. Wardell testified that the officers "didn't directly ask me the question if they could go in [the apartment]."

them. One officer testified that he told Brownlee he was under arrest while Brownlee was on the floor. The other officer warned Brownlee that if he stood up, the officer would strike him. Brownlee started to stand up and the officer struck him with a flashlight. Brownlee moved away from the officers and toward the apartment's kitchen area. The officer with the flashlight followed him. According to that officer, Brownlee made an evasive move which put him close to a kitchen drawer. The officer delivered several blows to him, one of which resulted in a head wound. Brownlee again struggled with the officers. With the assistance of people who came up from downstairs, the officers carried him down the stairs and outside, and handcuffed him face down on the sidewalk. Brownlee's conduct during the officers' efforts to make the arrest resulted in the resisting-an-officer charge.

The third episode began after Brownlee's arrest and while he was being transported to a hospital. In the ambulance Brownlee threatened to kill the accompanying police officer and directed obscenities at emergency medical technicians. At the hospital he addressed similar language to an officer and an attending doctor. The third episode resulted in the second disorderly conduct charge.

Appellate counsel moved the trial court for a new trial on grounds that Brownlee's trial counsel had been ineffective in that he failed to raise the issues whether the police had consent to enter the apartment, had probable cause to arrest, and used excessive force in the arrest; and because he failed to object to a jury instruction on the resisting-an-officer charge which did not adequately define "lawful authority." Appellate counsel argued that because of those failures, Brownlee was precluded from raising the issue whether the officers' conduct provoked his response, which therefore precluded him from contending that he could not be found guilty of disorderly conduct when responding to improper police conduct, and from properly raising and presenting the affirmative defenses of privilege, § 939.45, STATS., and self-defense, § 939.48, STATS. Finally, appellate counsel urged that the instructional error precluded the real issue from being tried. The trial court denied Brownlee's postconviction motions. This appeal followed.

To prove ineffective assistance of counsel, a defendant must establish both a deficient performance and resulting prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). On appeal, ineffective assistance of

counsel is a mixed question of fact and law. ***State v. Pitsch***, 124 Wis.2d 628, 633-34, 369 N.W.2d 711, 714 (1986).

The first disorderly conduct charge relates to events before the officers arrived. Brownlee's ineffective-assistance claim cannot possibly relate to that charge. The second disorderly conduct charge relates to Brownlee's post-arrest verbal abuse. The ineffective-assistance claim has no relation to the second disorderly conduct charge. In short, the alleged deficiencies in the representation did not prejudice Brownlee with regard to either disorderly conduct charge. The trial court properly dismissed Brownlee's motion for a new trial on those charges.

We turn next to the resisting-an-officer count. The record shows that the trial court instructed the jury that before it could find Brownlee guilty of the resisting-an-officer offense, it must find that he resisted an officer, the officer was doing an act in an official capacity and with lawful authority, and the defendant knew that the officer was acting in an official capacity and with lawful authority and knew that his conduct would resist the officer.

The court further instructed the jury:

> Police officers act in an official capacity if they perform duties that they are employed to perform. A police officer who performs acts for personal reasons that are not within the responsibilities of a police officer does not act in an official capacity. The responsibilities of a police officer include investigating domestic disputes.
>
> ...Police officers act with lawful authority if their acts are conducted in accordance with the law. In this case it is alleged that the officer was investigating a domestic dispute.

Neither the prosecutor nor Brownlee's trial counsel objected to the instructions. For that reason, the court of appeals lacks the power to review unobjected-to error in the instructions, except (as material here) with regard to ineffective

assistance of counsel and when deciding whether to reverse under § 752.35, STATS. ***State v. Schumacher***, 144 Wis.2d 388, 408 n.14, 409, 424 N.W.2d 672, 680 (1988).

Following the postconviction motions hearing, the court held that although "lawful authority" was not specifically defined in the instructions, that did not mislead the jury, since the evidence showed that the acts of resisting which the jury needed to consider were Brownlee's acts before the officers used force on him. The court held that the need to be more specific was not raised by the evidence, and the lack of specificity did not prejudice Brownlee.

Moreover, following a ***Machner*** hearing at which defense trial counsel testified, the court said that trial counsel's strategy was to show that the officers did not come into the apartment with "lawful authority," and he waited until the trial to confront the police, as a trial tactic. The tactic failed because the jury believed the testimony of the police to the effect that they had permission to enter the apartment. Consequently, failing to define the term "lawful authority" did not prejudice Brownlee.

The court ruled that trial counsel's performance was not deficient because he made a calculated decision that further definition of the term "lawful authority" was unnecessary, and because the time relevant to the issue of resistance was when Brownlee tried to "escape," not a later point when the officer hit him, and the amount of force used after his attempt to "escape" is not relevant to the resisting charge.

"Lawful authority" is an element of the resisting-an-officer charge. Further definition of "lawful authority" depends upon the officers' acts, if an issue was raised in that regard. *See* WIS JI CRIM—1765 cmt. 8.

If Wardell did not consent and the entry was not lawful for another reason, then the officers had no right to enter the apartment without a warrant and arrest Brownlee. Because the State does not contend that exigent or other circumstances justified their warrantless entry, whether the entry was consensual was critical. Whether Wardell consented to entry is a disputed issue of fact. The jury should have received instruction on the issue of consent to enter the apartment.

Probable cause is the *sine qua non* of a lawful warrantless arrest. ***State v. Drogsvold***, 104 Wis.2d 247, 254, 311 N.W.2d 243, 246 (Ct. App. 1981). Probable cause was not an issue. Because Wardell had told the officers at the police station what had happened, they had probable cause to arrest Brownlee even before they entered the apartment. An instruction on probable cause was unnecessary.

Excessive force when effecting an arrest deprives the arrest of lawful authority. *See* ***State v. Mendoza***, 80 Wis.2d 122, 154, 258 N.W.2d 260, 274 (1977) (officer may be guilty of assault and battery if unnecessary and excessive force is used in effecting arrest). One officer testified that they decided to handcuff Brownlee while he lay on the couch. When they pulled him off the couch and onto the floor he was kicking and they could not get his hands behind his back to handcuff him. The same officer testified that he told Brownlee he was under arrest while Brownlee was on the floor and before he stood up. The arrest was effected at that point. No basis exists for the contention that excessive force occurred before that point. Excessive force arguably occurred *after* Brownlee was arrested, but that circumstance could not effect the lawfulness of the arrest.

We return to the absence of an instruction on consent to enter. The defendant who claims ineffective assistance of counsel must show both a deficient performance and prejudice resulting from that performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether or not Brownlee's trial counsel provided a deficient performance by failing to request an instruction on consensual entry, the issue was present during the trial, evidence was received on the issue and both sides argued the issue to the jury. At the ***Machner*** hearing trial counsel testified that the prosecution argued that the officers entered with consent and he "certainly" argued to the contrary. The trial court found that the jury believed the testimony of the police officer that he and his partner had permission. The unobjected-to error did not prejudice Brownlee.

Finally, we decline to exercise our discretionary power of reversal under § 752.35, STATS., because it does not appear from the record that the real controversy has not been tried, or that a second trial will probably produce a different result. ***Vollmer v. Luety***, 156 Wis.2d 1, 19, 456 N.W.2d 797, 805 (1990).

By the Court.--Order affirmed.

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