STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2017AP002141-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
vs.
BRIAN M. SMITS,
Defendant-Appellant.

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

On Appeal from Brown County Circuit Court,
the Honorable Donald R. Zuidmulder, presiding
Trial Court Case No. 15CM1575

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ISSUE FOR REVIEW

Whether the trial court properly allowed the State to amend the criminal complaint to add a second count of obstructing an officer in order to conform to the proof presented at the jury trial.

The Trial Court Answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin believes this is a one-judge case, in which the arguments can be adequately addressed in briefing and can be decided by straightforward application of law to the facts. Therefore, neither oral argument nor publication is requested.

STATEMENT OF THE CASE AND FACTS

Brian M. Smits was charged with obstructing an officer, contrary to Wis. Stat. §946.41 (1), along with operating a motor vehicle while intoxicated-2nd offense and operating with a prohibited alcohol concentration-2nd offense for an incident that had occurred on August 15, 2015. (R1). Smits had a jury trial on March 2 and March 3, 2016. (R74, 75, and 76). Smits was convicted of all four counts,

including both obstructing counts. (R76.280-81; R45). Smits' brief adequately sets forth the relevant facts of the case.

STANDARD OF REVIEW

A trial court has the discretion to allow an amendment of the charging document, and the reviewing court will not reverse such a decision absent an erroneous exercise of discretion. See *State v. Flakes*, 140 Wis.2d 411, 416-17, 410 N.W.2d 614, 616 (Ct. App. 1987) (citations omitted). There is a misuse of discretion if the defendant is prejudiced by the amendment. *State v. Neudorff*, 170 Wis.2d 608, 615, 489 N.W.2d 689 (Ct. App. 1992) (citation omitted). "If the record shows that discretion was exercised and a reasonable basis exists for trial court's ruling," the reviewing court will sustain it. *Flakes*, 140 Wis. 2d at 416.

ARGUMENT

I. THE TRIAL COURT PROPERLY ALLOWED THE AMENDMENT OF THE COMPLAINT TO BE AMENDED IN ORDER TO CONFORM WITH THE EVIDENCE PRESENTED AT TRIAL, AND SMITS WAS NOT PREJUDICED BY THE AMENDMENT AS HE WAS STILL ON NOTICE AS TO THE CHARGES AGAINST HIM, THE CRIME CHARGED WAS NOT CHANGED, AND IT AROSE FROM THE SAME FACTS AS THE ORIGINAL CHARGE.

"At the trial the court may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant." Wis. Stat. § 971.29(2). The purpose of the charging document is to inform the accused of the acts he or she allegedly committed so that he or she can understand the offense and prepare their defense. *State v. Wickstrom*, 118 Wis.2d 339, 348, 348 N.W. 2d 183, 188 (Ct. App. 1984). A prosecutor may bring charges in addition to those advanced at a preliminary hearing when the additional charges are related "in terms of the parties involved, geographical proximity, time, physical evidence, motive and intent." *State v. Burke*, 153 Wis.2d 445, 457, 451 N.W.2d 739, 744 (1990). "When an amendment to the charging

document does not change the crime charged, and when the alleged offense is the same and results from the same transaction, there is no prejudice to the defendant." *Wickstrom*, 118 Wis.2d at 348.

In *Wickstrom*, the defendant impersonated a public official in violation of Wis. Stat. § 946.69 by falsely assuming the role of a town clerk and a municipal judge. *Id.* at 343-344. The original complaint initially charged the defendant with one count of falsely assuming to act as a public official. *Id.* at 344. A week before trial the trial court allowed an amended complaint to charge two counts in violation of Wis. Stat. § 946.69, one for assuming to act as a town clerk, and another for assuming to act as a municipal judge. *Id.* The defendant, much like Smits here, argued that changing a single count in a complaint to two counts was prejudicial to him because it doubled the maximum penalty he faced if convicted. *Id.* at 348. This court explicitly rejected that argument, noting that the critical factor in determining whether an amended complaint has prejudiced the defendant is whether the defendant remained on notice as to the nature and cause of the accusations against him. *Id.* at 349. If the original

complaint supports additional counts of the same offense, there can be no prejudice. *Id*.

As Smits points out in his brief, the amendment of the complaint to add a second count of obstructing an officer was first suggested by the trial court, as the judge saw a unanimity issue possibly arising, as the testimony established that Smits had displayed obstructive behavior both inside the hospital and in the squad car. (R74.138-39). When the State subsequently sought to add an additional count of obstructing an officer and was allowed to do so by the trial court, the amended criminal complaint merely added a second obstructing charge to the charging paragraphs; it did *not* add any additional factual allegations. (*Compare* R1 and R28, both of which are attached to Smits' brief in the appendix). That's because Smits was already put on notice in the original complaint of the allegations that his obstructive behavior occurred both in the squad car and inside the hospital. As in *Wickstrom*, the original complaint supported the additional count of the same offense, and Smits was therefore on notice, and there can be no prejudice.

Smits also relies on *State v. Duda*, 60 Wis. 2d 431, 201 N.W.2d 763 (1973), to support his argument that the State's amendment to the complaint, adding an additional charge, prejudiced him. Yet *Duda* is easily distinguished from the *Wickstrom* case and Smits' case because in *Duda* the amended complaint charged an entirely different crime from the one initially charged and because the amendment in *Duda* was made after the jury had reached its verdict. *Id.* at 435, 443. In *Duda*, the defendant presented a potential witness with a check and suggested that the witness cash the check in an effort to manufacture evidence that the witness was an employee. *Id.* at 434-435. However, the State saw the check as a bribe and therefore charged the defendant with bribery of a witness rather than solicitation of perjury. *Id.* at 435. After the verdict the State invoked Wis. Stat. § 971.29(2) to amend the charge to solicitation of perjury so that the charge (which rested on a new theory) would conform with the proof that the check was manufactured evidence and not a bribe. *Id.* at 439. The court of appeals rejected this use of Wis. Stat. § 971.29(2), noting that a defendant "cannot be convicted of an entirely different offense from

that charged," nor can a jury's verdict cure a failure to allege an offense. *Id.* at 441-442. In Smits' case, he was neither charged with an entirely different offense, nor was the offense added to the complaint after a verdict.

Smits' reliance on *State v. Neudorff* is similarly misplaced. Smits offers *Neudorff* for the proposition that even where an additional charge is related to facts considered at a preliminary hearing, a court may still find that a defendant has been prejudiced where his constitutional right to notice was violated. 170 Wis.2d at 621. That certainly may be the case, but the issue in *Neudorff* was that the defendant in that case was charged with "a new charge *with new elements* and thus did not give the defendant sufficient notice to prepare a defense" even though the defendant was apprised of the facts that made up that charge in a preliminary hearing. *Id.* at 611-612 (emphasis added). Specifically, the State in *Neudorff* amended the charge of possession of cocaine with intent to deliver to a charge of conspiracy to deliver, which suddenly made the testimony of a co-conspirator rather critical to proving the charge. *Id.* at 611, 618. The

court noted that the defendant may have had notice that someone was going to testify to the very facts that made up the new charge, but did not have notice of the charge itself and therefore did not have the adequate constitutionally required notice that would enable him to prepare a defense. *Id.* at 619-620.

Smits' case is easily distinguished from *Neudorff* because Smits was aware of both the underlying facts that made up the charge *and* that the underlying facts were going to be relevant to the State's case. Smits' case instead involved splitting up one obstruction charge into two, whereby the facts used by the State to prove the second obstructing count were already being used to prove the first obstructing count. The "split-off" obstructing charge was in every way related to the initial sole obstructing charge in terms of the parties involved, geographical proximity, time, physical evidence . . . and intent." *Burke*, 153 Wis.2d 445, 457. The only difference was Smits's obstructive behavior had occurred both in the squad car and inside the hospital, and the State and the trial court wanted to make

sure the jury was unanimous about where the obstructive behavior had occurred.

Further, Smits was on notice about how the State would apply the facts to the elements of the split off charge in the same way it would apply them to the elements of the initial charge. Smits cannot reasonably claim a lack of notice to prepare a defense given that he already knew the facts and how the State would use those facts to prove the crimes charged. In fact, Smits had already prepared and put on his defense against those charges. Smits' ability to defend against the prosecution was not adversely affected, Smits was not prejudiced, and the trial court therefore properly exercised its discretion in allowing an amendment to the charging document. See *Wickstrom*, 118 Wis.2d at 349.

CONCLUSION

Brian Smits was not prejudiced by the addition of the second obstructing charge. Therefore the trial court properly exercised its discretion in permitting the State to amend the criminal complaint to conform with the evidence presented at trial and add the second

obstructing charge. For that reason the State respectfully requests that this court uphold the circuit court's Judgement of Conviction.

Respectfully submitted this _____ day of May, 2018.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: Times New Roman proportional serif font, minimum printing resolution of 200 dots per inch, 14 point body text, 12 point for footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1710 words, including footnotes.

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Rule 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copes of this brief filed with the court and served on all opposing parties.

Dated this _____ day of May, 2018.

Signed:

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