WISCONSIN COURT OF APPEALS

DISTRICT III

STATE OF WISCONSIN

Plaintiff-Respondent,

Case No. 2019AP81-CR

v.

COREY STAUNER

Defendant-Appellant.

Brief and Appendix of Plaintiff-Respondent

Appeal from the circuit court for Marathon County, Honorable Greg Huber, Judge of Marathon County, Order dated December 7, 2015.

Marathon County District Attorney's Office
William Grau, Marathon County Assistant District Attorney
State Bar of WI # 1117724

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I. Logical consistency between the verdicts on the Bail Jumping charge and the Resisting an Officer charge is not required to uphold the Bail Jumping conviction.

II. The State of Wisconsin produced sufficient evidence to support Mr. Stauner's conviction for Bail Jumping.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This is a one-judge appeal under Wis. Stat. § 752.31(2)(f) and (3), making publication inappropriate. Oral argument is not request.

STATEMENT OF THE CASE

Corey Stauner (Appellant) was tried before a jury for three crimes in Marathon County on December 7, 2015: One count of Resisting an Officer contrary to Wis. Stat. § 946.41(1) and two counts of Bail Jumping contrary to Wis. Stat. § 946.49(1)(a). The bases for the Bail Jumping were violations of bonds Mr. Stauner was subject to that required him to remain absolutely sober and to not commit any new crimes. The jury convicted Mr. Stauner of two counts of Bail Jumping and acquitted him of Resisting an Officer. Appellant made a motion to the circuit court requesting that the conviction on the Bail Jumping count dealing with committing a new crime be dismissed on the grounds that the verdict was

inconsistent with the not guilty verdict on the count of Resisting an Officer. That motion was denied by the Hon. Greg Huber on December 20, 2018.

STATEMENT OF FACTS

Mr. Stauner's Bond

At trial, the State introduced evidence that on January 8, 2015, Mr. Stauner was subject to a bond from Dunn County that required that he not commit any new crimes and that he not consume alcohol or illegal drugs. (R97:51).

The Traffic Stop

Officer Chittum testified that on January 8, 2015, the Wausau Police Department initiated a traffic stop on a vehicle for driving at night without headlights. *Id* at 56. Officer Chittum testified that he made the stop in a marked Wausau Police Department vehicle. *Id* at 83. He was also wearing a full Wausau Police Department uniform. *Id*. Officer Chittum subsequently explained the reason for the stop to the driver. *Id* at 56. He also obtained the driver's license and identified the driver as Corey Stauner. *Id.*

After making contact with Mr. Stauner, Officer Chittum testified that he noticed an odor of intoxicants coming from inside of the vehicle. *Id* at 57. Officer Chittum proceeded to ask Mr. Stauner how much he had to drink that evening. *Id.*

Mr. Stauner initially stated that he did not have anything to drink that evening, but later admitted that he had consumed a few drinks. *Id.*

After returning to his squad car, Officer Chittum testified that he learned from dispatch that Mr. Stauner had an open warrant. *Id* at 58. This warrant required Officer Chittum to arrest Mr. Stauner. *Id* at 60.

Informing Mr. Stauner of his Arrest Warrant

Officer Chittum testified that after returning from his marked vehicle, he asked Mr. Stauner if he would perform field sobriety tests. *Id* at 59. Mr. Stauner indicated that he would. *Id.* Following the field sobriety tests, Officer Chittum informed Mr. Stauner that Mr. Stauner had an open warrant out for his arrest relating to a disorderly conduct charge. *Id* at 60. Officer Chittum then placed Mr. Stauner under arrest. *Id.*

Officer Chittum's squad video, which was presented to the jury at trial, showed that Officers Chittum and Carr applied wrist restraints to Mr. Stauner. *State Ex. 2* at 22:39:00. The Officers moved then moved Mr. Stauner to the front of Officer Chittum's squad vehicle. *Id* at 22:39:14. The video showed that Mr. Stauner inquired into the basis of his arrest warrant. *Id* at 22:39:32. Officer Chittum explained to Mr. Stauner that the arrest warrant was either issued because Mr. Stauner missed court or failed to pay a citation. *Id* at 22:40:00. Officer

Chittum subsequently confirmed for Mr. Stauner that he had missed a court date pertaining to his disorderly conduct charge. *Id* at 22:41:06.

Mr. Stauner's Response to Learning of His Arrest Warrant

After learning this, Mr. Stauner began to verbally insult Officers Chittum and Carr. The squad video played at trial showed that Mr. Stauner called the arresting officers "scumbag motherfuckers." *Id* at 22:40:06. He then told the arresting officers that they were "fucking pieces of shit". *Id.* The video also showed Mr. Stauner calling Officer Chittum a "motherfucker." *Id* at 22:40:24. During this time Officer Chittum observed Mr. Stauner become rigid and tense. (R97: 62). Officer Chittum testified that based on his training and experience, this body language was a "precursor of people trying to escape." *Id.*

Mr. Stauner's First Attempt to Walk Away

Shortly afterwards, the squad video showed Mr. Stauner make two attempts to pull away from the officers. First, after Mr. Stauner learned that he would be held in custody overnight on a $900 cash bond, he turned away from Officer Carr and began walking towards the middle of the street. *State Ex. 2* at 22:41:10. Mr. Stauner's actions forced Officer Carr to reach out and redirect Mr. Stauner back to the vehicle. *Id* at 22:41:17.

Mr. Stauner's Second Attempt to Walk Away

Seconds after this first attempt to walk away, the squad video shows a fourth individual arrive on the sidewalk in front of Officer Chittum's vehicle. *Id* at 22:41:27. Officer Carr testified that once he became aware of this, he began to walk towards that individual "to make sure that the scene was secure and safe and that individual did not come any closer." (R97: *93*). As Officer Carr moved towards the fourth individual, the squad video showed Mr. Stauner moving away from Officer Chittum. *State Ex. 2* at 22:41:29. Officer Carr testified:

> "as I began to walk towards that individual, Officer Chittum called my name. As I turned, I observed the defendant and Officer Chittum near the roadway on the opposite side of his squad. And the defendant had the motion that I saw appeared that he was trying to *pull away* from Officer Chittum." (R97: 93) (emphasis added).

Similarly, referring to the same timeframe, Officer Chittum testified, "Mr. Stauner, for the second time, tried *pulling away* from officers." *Id* at 62 (emphasis added).

ARGUMENT

I. Logical consistency between the verdicts on the Bail Jumping charge and the resisting an officer charge is not required to uphold the Bail Jumping conviction.

Appellant's Brief

Appellant's brief purports to raise a single argument – that there is insufficient evidence to support the conviction for the defendant's conviction for the Bail Jumping count dealing with committing a new crime. *Appellant Brief* at 7. However, in support of this argument, appellant's brief cites the inconsistency between 1) the guilty verdict on the Bail Jumping count dealing with committing a new crime, and 2) the not guilty verdict on the Resisting an Officer count. *Id* at 10-11. By highlighting this inconsistency, the appellant implies that the jury's decision to find the defendant not guilty of Resisting an Officer is itself proof that the State offered insufficient evidence to convict the defendant of Bail Jumping.

Standard of Review

Yet, the question of whether Wisconsin law requires logical consistency between convictions and acquittals is a distinct issue. It is also an issue that the courts have spoken clearly on. Courts have universally held that logical consistency in the verdict between several counts is not required. *State v. Mills*, 62 Wis. 2d 186 (1974). The rule dispensing with the necessity for logical consistency as between convictions and acquittals in a multicount information originates in *Dunn v. United States* (1932), 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356. *Id.* In *Dunn*, Justice HOLMES held that:

'Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment.' *Id.*

This holding has since been relied upon in federal[1] and Wisconsin[2] decisions. There are several reasons behind the rule that logical consistency between the verdicts in criminal matters is not necessary. *Mills* at 192. First, if the contrary were the case - that the absence of logical consistency would be fatal to the verdict - the state would be entitled to have the jury instructed that a finding of not guilty as to one count would be fatal to their findings of guilt as to other counts. *Id.* Such an instruction would be inconsistent with present instructions and detrimental to the defendant's right to a fair trial. *Id.*

Also, courts have conceded that juries have historically exercised a sense of lenity in criminal matters:

> 'The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. Wisconsin Courts interpret the acquittal as no more than their assumption of a power which they had no right to

[1] See *United States v. Lambert* (7th Cir., 1972) 463 F.2d 552; *United States v. Russo* (7th Cir., 1964), 335 F.2d 299.

[2] See *Hebel v. State* (1973), 60 Wis.2d 325, 210 N.W.2d 695; *Teske v. State* (1950) 256 Wis. 440, 41 N.W.2d 642; *State v. DeHart* (1943), 242 Wis. 562, 8 N.W.2d 360; *Gundlach v. State* (1924), 184 Wis. 65, 198 N.W. 742; *State v. Lloyd* (1913), 152 Wis. 24, 139 N.W. 514; *Burns v. State* (1911), 145 Wis. 373, 128 N.W. 987.

> exercise, but to which they were disposed through lenity.' *Steckler v. United States* (2nd Cir., 1925), 7 F.2d 59, 60.

Additionally, Wisconsin Courts have reasoned that juries have granted numerous defendants clemency for crimes which they have committed and which the evidence is sufficient to sustain. *Mills* at 192. Thus, Wisconsin Courts are of the opinion that the inconsistencies found in jury verdicts result solely from the fact that they believe the defendant is overcharged and thus exercised lenity as to the charge. *Id.*

Legal Argument

Here, the State concedes that the jury's decision to find Mr. Stauner not guilty of Resisting an Officer but guilty of Bail Jumping by committing a new crime is not logically consistent. However, as the above case law makes clear, this is not a basis on which the Bail Jumping conviction may be vacated. Nor, contrary to the Appellant's assertion, is the inconsistency evidence that the State produced insufficient evidence to support the conviction of Bail Jumping. Rather, the logical inconstancy between the two verdicts should be viewed as the jury's attempt to exercise lenity towards Mr. Stauner.

II. The State of Wisconsin produced sufficient evidence to support Mr. Stauner's conviction for Bail Jumping.

Standard of Review

When Wisconsin courts review a challenge to the sufficiency of the evidence, it employs a highly deferential standard of review. *See Morden v. Continental AG,* 235 Wis.2d 325. The standard of review on a claim that there was insufficient evidence to convict is whether "viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonable, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493 (1990).

A jury verdict will be overturned only if, viewing the evidence most favorably to the State and the conviction, it is inherently or patently incredible, or so lacking in probative value, that no jury could have found guilt beyond a reasonable doubt. *State v. Lossman*, 118 Wis. 2d 526, 543 (1984). Reasonable inferences drawn from the evidence can support a finding of fact, and if more than one inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted. *Id* at 541, quoting *Bautista v. State,* 53 Wis.2d 218, 223 (1971*)*. In weighing the evidence, a jury may consider matters of common knowledge and experience in the affairs of life. *State v. Lossman*, 118 Wis. 2d at 544.

Applicable Legal Standard

The crime of Resisting an Officer, contrary to Wis. Stat. § 946.41(1), has the following elements that must be proven at trial prior to conviction:

1. The defendant resisted an officer.
2. The officer was doing an act in an official capacity.
3. The officer was acting with lawful authority.
4. The defendant knew that the officer was acting in an official capacity and with lawful authority, and the defendant knew that his conduct would resist the officer.

Argument Overview

Appellant argues that based on the evidence the State produced at trial, no trier of fact, acting reasonably, could have found elements one and four proven beyond a reasonable doubt. *Appellant Brief* at 10. However, Appellant fails to present the evidence presented at trial in the light most favorable to the state and conviction. Additionally, it simply omits crucial evidence supporting the conviction. A reasonable jury, viewing all of the evidence presented at trial most favorably to the State, could have found beyond a reasonable doubt that Mr. Stauner knowingly resisted an officer acting in his official and lawful capacity. This section will first examine the evidence at trial supporting the first element of Resisting an Officer before analyzing the fourth element.

Element One: Mr. Stauner Resisted the Officers Chittum and Carr.

The resistance prohibited by Wis. Stat. § 946.41(1) has been defined to mean "to oppose by direct, active, and quasi forcible means." *See State v. Welch,* 37 Wis. 196, 201 (1875). The resistance must be active and directed towards the officer. *See Id.* at 202. However, there need not be actual force or even a common assault upon the officer, and resistance may be found without actual violence or technical assault. *See Id.* In fact, while mere words alone cannot constitute resistance, threats, accompanied with present ability and apparent intention to execute the threat, can constitute resistance. *See Id.*

Additionally, the Wisconsin Court of Appeals has also suggested that pulling away from an officer constitutes resistance under Wis. Stat. § 946.41(1). *See State v. Wenger,* 2018 WI App 45. In *Wegner,* the court noted, "Although Wenger did not strike out at the officers, or *pull away* from them, he used his body to generate a force in direct and active opposition to their efforts to place him in their squad vehicle." *Id* at ¶ 12 (emphasis added). Here, the court includes "[p]ulling away from" officers as an example of a defendant using direct and active opposition to resist an officer.

At trial, the State introduced evidence that Mr. Stauner used threatening language towards Officers Chittum and Carr. *State ex 2* at 22:41:10. Additionally, Officers Chittum and Carr testified that Mr. Stauner's body language was tense and rigid. (R97: 62). Officer Chittum testified that based on his training and

experience, this body language was indicative of someone who was about to flee. *Id*. While these words alone cannot constitute resistance, the threats were accompanied with Mr. Stauner's present ability and apparent intention to pull away from Officer Chittum. Thus, this alone could constitute resistance. Yet, more importantly, the State provided testimony and video evidence demonstrating that that on two occasion, Mr. Stauner *did* attempt to pull away from the officers. See *State ex. 2.*

Mr. Stauner's First Attempt to Pull Away From Officer Chittum

At trial, the State offered sufficient evidence to prove beyond a reasonable doubt that Mr. Stauner resisted officers when he pulled away from Officer Chittum the first time. Officer Chittum testified regarding the first incident that Mr. Stauner "started walking away from Officer Carr" (R9: 62). The jury also had the opportunity to view Officer Chittum's squad video of the first incident and assess for themselves whether Mr. Stauner had attempted to pull away from the officers. *State Ex. 2* at 22:41:10.

Appellants brief states that "Officer Carr simply had to redirect [Stauner] to keep him safe due to traffic, not because he was trying to… break free." *Appellant Brief* at 9. This argument requires two clarifications.

First, Officer Carr's testimony makes clear that this statement only applies to the first time Mr. Stauner attempted to pull away from Officer Chittum. (R97: 97). Officer Carr did not testify that he reached this conclusion the second time Mr. Stauner pulled away from Officer Chittum. *Id.*

Secondly, as has already been established, the State introduced evidence through Officer Chittum and his squad video from which the jury could have reasonably inferred that Mr. Stauner was attempting to pull away. Thus, after viewing all of the evidence pertaining to Mr. Stauner's first attempt to pull away, the jury would have weighed Officer Carr's testimony against both Officer Chittum's testimony – which indicated that Mr. Stauner had begun to pull away – and the squad video they had viewed. Thus, a reasonable jury could have concluded that such actions constituted resisting an officer.

Mr. Stauner's Second Attempt to Pull Away From Officer Chittum

Additionally, the State offered sufficient evidence to prove that Mr. Stauner resisted officers when he pulled away from the officers a second time. While testifying about this second occasion, both Officers Chittum and Carr testified that Mr. Stauner had attempted to pull away from the officers. (R97: 62, 93). Officer Carr testified, "The defendant had the motion that I saw appeared that he was trying to *pull away* from Officer Chittum." *Id* at 93 (emphasis added). Similarly,

Officer Chittum testified "Mr. Stauner, for the second time, tried *pulling away* from officers" *Id* at 62 (emphasis added).

Once again, the jurors had the opportunity to verify the officers' testimony by viewing this incident through Officer Chittum's squad video. ***State Ex. 2*** at 22:41:29. Thus, based on the testimony and evidence presented at trial, it was reasonable for the jury to conclude that Mr. Stauner's actions during the second incident were aimed at resisting the officers.

After hearing testimony and watching the squad video, the jury applied the appropriate definition of resistance to make its determination that the Defendant resisted officers. The jury's assessment that the Defendant was using force by twice attempting to pull away from Officers Chittum and Carr is based on eye witness testimony and video evidence and is not inherently or patently incredible such that the conviction should be overturned. Indeed, the jury's decision to find that Mr. Stauner pulling away from Officer Chittum constituted resistance under the statute is consistent with *Wegner*.

Element Four: Mr. Stauner knew that Officers Chittum and Carr were acting in an official capacity and with lawful authority, and the defendant knew that his conduct would resist the officers.

In *Lossman*, the Wisconsin Supreme Court clarified that a person who commits the crime of Resisting an Officer must have the subjective knowledge or

belief that the officer was acting with lawful authority. *State v. Lossman*, 118 Wis. 2d at 547. There, our Supreme Court held that "evidence that [an] officer was in full uniform, driving a marked patrol car, which still had its headlights on and red flashing lights, and that the officer told the defendant a traffic stop was in progress" was sufficient for a reasonable jury to determine that the defendant believed the officer was acting under lawful authority. *Id* at 544-545.

At trial, the State introduced evidence showing that Mr. Stauner believed the officers were acting under lawful authority that exceeds the evidence produced in *Lossman*. The evidence presented at trial had numerous similarities with *Lossman*. Officer Chittum was driving a marked patrol car. (R97: 56, 83). Officer Chittum initiated the original traffic stop by activating his vehicle's flashing lights. *State ex. 2.* Officer Chittum also explained to Mr. Stauner why he had been pulled over. *Id.* All the while, Officers Chittum and Carr were dressed in full uniform. *(*R97: 83).

Addittionally, Officer Chittum testified that he asked Mr. Stauner to conduct field sobriety tests and Mr. Stauner complied. *Id.* Mr. Stauner also volunteered to provide a PBT test. *Id.* Mr. Stauner's compliance with Officer Chittum from the moment Officer Chittum initiated the stop through the PBT test demonstrates Mr. Stauner's subjective knowledge that Officers Chittum and Carr were police officers acting in an official capacity and with lawful authority.

Furthermore, the evidence produced at trial shows that Mr. Stauner maintained this subjective knowledge following his arrest. Immediately prior to placing Mr. Stauner in handcuffs, Officer Chittum explained to Mr. Stauner that a court had issued a warrant for him. *Id* at 60. During the search of Mr. Stauner and prior to his attempt to pull away from the officers, Officer Chittum explained to Mr. Stauner that the arrest warrant had been ordered after Mr. Stauner failed to appear in court. *State Ex. 2* at 22:41:06. Thus, at the moment Mr. Stauner attempted to pull away from the officers, he was both aware that the officers were acting in an official capacity and that his arrest warrant was lawful. A reasonable jury could infer from Officer Chittum's statements that Mr. Stauner knew or believed that Officer Chittum's arrest was lawful.

A reasonable jury could review that evidence in light of their common knowledge and conclude that Officers Chittum and Carr had lawful authority to arrest an individual for whom an arrest warrant had been issued. A reasonable jury could also find, beyond a reasonable doubt, that Mr. Stauner knew or believed that the officers were acting with lawful authority. Therefore, the evidence, when viewed most favorably to the conviction, is sufficient.

CONCLUSION

For these reasons, the State respectfully requests that this Court affirm the rulings of the Circuit Court and deny the Defendant-Appellant's requests for relief.

Dated at Wausau, Wisconsin this 3rd day of July, 2019

Respectfully Submitted,

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 19 pages and 3532 words.

Signed:

s/William Grau

Marathon County Assistant District Attorney

WISCONSIN COURT OF APPEALS

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CERTIFICATION OF ELECTRONIC FILING

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of section 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Respectfully Submitted,

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