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STATE OF WISCONSIN
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CASE NO. 2020AP002149-CR

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

-vs- **Case No. 2017 CF 431**
(Jefferson County)

MICHAEL J. FOSTER,
DEFENDANT-APPELLANT.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND THE ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN JEFFERSON COUNTY CIRCUIT COURT, THE HONORABLE WILLIAM HUE AND THE HONORABLE ROBERT DEHRING PRESIDING.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

BY:

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I. WHETHER DEFENDANT SHOULD BE GRANTED A NEW TRIAL BECAUSE DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO REQUEST AN APPROPRIATE JURY INSTRUCTION CONSISTENT WITH HIS DEFENSE.

On 12/8/20, the trial court orally denied defendant's motion for a new trial (106:27-30, App. at 102-05). On 12/9/20, an order denying defendant's motion for a new trial based on ineffective assistance of counsel was entered (90, App. at 101).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are not requested.

STATEMENT OF THE CASE

On 10/23/17, defendant Michael Foster was charged in Jefferson County Circuit Court Case 2017 CF 431 with the commission of the offenses of (1) resisting an officer, causing substantial bodily harm to an officer as a repeater; (2) criminal damage to property as a repeater; and (3) disorderly conduct while armed, as a domestic incident and as a repeater, the offenses allegedly occurring on 10/19/17 (2). On 10/23/17, defendant appeared in court and waived the time limit for the scheduling of a preliminary hearing (92). On 2/15/18, an order for a competency evaluation was entered (12). On 3/20/18, a competency evaluation was filed (15). The writer, Dr. Craig Schoenecker found defendant was competent to proceed (15:4-5). On 5/3/18, a competency hearing was held (94). Defendant agreed he was competent to proceed and the court so found (94:2). On 6/5/18, a preliminary hearing was held (96). At the conclusion of the hearing, defendant was bound over for trial (96:21-22). An information was filed which alleged the same offenses as in the criminal complaint (23). Not guilty pleas were entered on defendant's behalf (96:23).

On 8/20/18, a jury trial was held (98). At the commencement of the hearing, the State moved to dismiss Count 3 (98:3). That motion was granted (98:3) A jury was selected (98). Evidence was presented (98). At the close of evidence, defense counsel moved to dismiss the charges (98:112). The court denied the motion as to Count 1, but dismissed Count 2 (98:114). At the conclusion of the trial, defendant was found guilty of the resisting offense, as alleged (39, 98:155).

On 1/10/19, a sentencing hearing was held (102). The court withheld sentence and placed defendant on three years probation (102:23). The court ordered six months of conditional jail time and imposed and stayed an additional six months of jail time (102:28). The court imposed and stayed a five-year prison sentence comprised of four years initial confinement followed by one year of extended supervision (102:22). Defendant filed a timely notice of intent to seek postconviction relief (64).

On 8/24/20, a motion for a new trial was filed (80). On 12/8/20, a postconviction motion hearing was held (106). At the conclusion of the hearing, the trial court denied the motion (106:27-30, App. at 102-05). On 12/9/20, an order denying defendant's postconviction motion for a new trial was entered (90, App. at 101). On 12/21/20, a notice of appeal was filed (91).

STATEMENT OF FACTS

The issue at the jury trial was whether defendant had committed the offense of resisting, causing substantial bodily harm to Officer Michael Roehl of the City of Watertown Police Department (98). The incident was captured on a recording at the City of Watertown Police Department (34). The video was played during defendant's jury trial (34, 98:70-71). Officer Roehl testified as well (98:59-96). Briefly summarizing the evidence, during his processing for a domestic incident, defendant was asked to give his wallet to Officer Michael Roehl (34, (98:73). Defendant attempted to keep the wallet away from the officer when he tried to grab it from him (34, 98:76). A scuffle ensued and Officer Roehl's ankle was seriously injured (34, 98:79-81).

During trial, defense counsel questioned Officer Roehl about whether he had used appropriate force in taking defendant into custody at the police department (98:85-93). During the jury instruction conference, defense counsel agreed with the instructions suggested by the State (98:123). The court read the following jury instruction:

> Resisting an officer as defined in Wisconsin Statutes is committed by one who knowingly resists an officer while the officer is doing any act in an official capacity and with lawful authority. Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present. One, the defendant resisted an officer. A police officer is an officer. To resist an officer means to oppose the officer by force or threat of force. The resistance must be directed to the officer personally. Two, the officer was doing an act in an official capacity. Officer—police officers act in an official capacity when they perform the duties they are employed to perform. The duties of a police officer include booking or processing a suspect after an arrest. Three, the officer was acting with lawful authority. 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 booking or processing the defendant after arrest. Four, the defendant knew that Officer Roehl was an officer acting in an official capacity and with lawful authority and that the defendant knew his conduct would resist the officer (98:143-44).

In analyzing the case, defense counsel argued in closing:

> He could have attempted to just handcuff him. He could have said, Mr. Foster, I need to handcuff you again, I don't like where this is going. Could have gave some verbal communication. The verbal communication that was provided was, give me back your wallet.
>
> And finally, for the resisting, number four is the defendant know that the officer was acting in an official capacity and with lawful authority, and he knew that his conduct would resist the officer. We saw Mr. Foster. I think that anybody who's in a police station probably should know that they're being arrested, but he believed that he wasn't being arrested for a lawful reason. He said you have no right to arrest me, you have no right to touch me. That's the only evidence we have on Mr. Foster's thoughts on that. Say what you will, but I would say that

> Mr. Foster believed that he was being unlawfully arrested, and I certainly believe that based on what we see that his actions would not be resisting what Officer Roehl was doing, using excessive force. We saw it. We saw it twice. It's hard to comprehend. … He could have used any of the other protocols that were testified to that are in place to try to de-escalate without use of excessive force (98:138-39).

At the conclusion of the trial, defendant was found guilty of resisting arrest, causing substantial bodily harm (39, 98:155).

ARGUMENT

I. DEFENDANT SHOULD BE GRANTED A NEW TRIAL BECAUSE DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO REQUEST AN APPROPRIATE JURY INSTRUCTION CONSISTENT WITH HIS DEFENSE.

A. Relevant law.

The concept of ineffective assistance of counsel is discussed and defined in *State v. Cooks*, 2006 WI App 262, ¶¶32-34, 297 Wis.2d 633, 726 N.W.2d 322:

> Criminal defendants are constitutionally guaranteed the right to counsel under the Sixth and Fourteenth Amendments of the United States Constitution and article I, section 7 of the Wisconsin Constitution. The right to counsel includes the right to effective counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The standard for determining whether counsel's assistance is effective under the Wisconsin Constitution is the same as that under the Federal Constitution. (citation omitted). To succeed on a claim of ineffective assistance of counsel, a defendant must show both that counsel's representation was deficient and that the deficiency was prejudicial. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Id. A defendant must establish that counsel's conduct falls below an objective standard of reasonableness. (citation omitted). However, "every effort is made to avoid determinations of

> ineffectiveness based on hindsight ... and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." (citation omitted). To prove constitutional prejudice, "the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" (citation omitted). Appellate review of an ineffective assistance of counsel claim presents a mixed question of fact and law. (citation omitted). We will not disturb the trial court's finding of fact unless they are clearly erroneous. (citation omitted). The ultimate determination of whether the attorney's performance falls below the constitutional minimum is a question of law subject to our independent review.

In *State v. Coleman,* 206 Wis.2d 199, 212, 556 N.W.2d 701, 706 (1996), the court wrote:

> A circuit court has broad discretion in deciding whether to give a requested jury instruction. *See e.g. State v. Vick*, 104 Wis.2d 678, 690, 312 N.W.2d 489 (1981). However, a circuit court must exercise its discretion in order "to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence." *Id.* (quoting *State v. Dix*, 86 Wis.2d 474, 273 N.W.2d 250 (1979)). In addition, a criminal defendant is entitled to a jury instruction on a theory of defense if: (1) the defense relates to a legal theory of a defense, as opposed to an interpretation of evidence, *State v. Davidson*, 44 Wis.2d 177, 191-92, 170 N.W.2d 755 (1969); (2) the request is timely made, *Turner v. State*, 64 Wis.2d 45, 51-52, 218 N.W.2d 502 (1974); (3) the defense is not adequately covered by other instructions, *Johnson v. State*, 75 Wis.2d 344, 367-68, 249 N.W.2d 593 (1976); *Davidson*, 44 Wis.2d at 192, 170 N.W.2d 755; and (4) the defense is supported by sufficient evidence, *Johnson v. State*, 85 Wis.2d 22, 28-29, 270 N.W.2d 153 (1978); *Turner*, 64 Wis.2d at 51-52, 218 N.W.2d 502.

The failure to object to instructions at the jury instruction conference constitutes a waiver of any error. *See* Wis. Stat. §805.13(3); see also *State v. Austin*, 2013 WI App 96, ¶ 20, 349 Wis. 2d 744, 836 N.W.2d 833. A claimed error in the jury instructions that has been waived by trial counsel's failure to object may be reviewed under a claim of ineffective assistance of counsel. *See Austin*, 349 Wis. 2d 744, ¶20.

B. Trial counsel's performance was deficient.

Defendant was charged with resisting arrest, causing injury. During trial, counsel argued that Officer Roehl's excessive force caused his injuries, not the defendant. Unfortunately, counsel did not request a modification of the resisting jury instruction to support his defense. As set forth in the comment to Comment 8 of WIS JI-CRIMINAL 1765:

> The Committee suggests specifying the lawful function being performed and, if raised by the evidence, instructing the jury on the applicable legal standard. For example. … if the evidence raises a question about the legality of the arrest, something like the following may be helpful: In this case, it is alleged that the officer was making a lawful arrest. An arrest is lawful when the officer has reasonable grounds to believe the person committed a crime. **An officer making an arrest may use on the amount of force reasonably necessary to take the person into custody. (**emphasis added**).**

During the *Machner* hearing, trial counsel was asked about whether he considered seeking a modification of the standard jury instruction:

> Q: And the incident was captured on video; is that correct?
>
> A: That's right.
>
> Q: And did that video lay things out pretty well as to what had led up to the incident?
>
> A: Absolutely.
>
> Q: At trial, you are argued that the officer had overreacted to the situation; is that accurate?
>
> A: Yeah, absolutely. …
>
> Q: So what was your defense at trial?
>
> A: My defense at trial was that Officer Roehl used excessive force as a means to try to, um, secure, I suppose, Mr. Foster.

Q: And why did you think it was excessive?

A: Um, in my opinion in watching the video and reviewing the evidence, there didn't appear to be any indication that Mr. Foster was aggressive or not complying with Officer Roehl to that point, and he was essentially, um, just holding his wallet—from my memory, holding his wallet essentially straight up in the air when Officer Roehl decided, in my opinion, to use excessive force by slamming Mr. Foster to the ground.

Q: The offense that Mr. Foster was on trial for had a number of elements, correct?

A: That is correct.

Q: Which elements did you focus on related to the Defense then?

A: Uh, whether or not, um, Mr. Foster was being—one, I'd say whether he was resisting, and two, whether or not he was being, uh, legally detained.

Q: Okay. Prior to trial, did you review the applicable Jury Instruction for the offense?

A: I did review the Jury Instruction, yes.

Q: Did you request any kind of modification of the Jury Instruction during the Instruction Conference?

A: I did not, and I suppose maybe I should clarify my previous statement. When I say I reviewed the Jury Instruction from my notes and memory, I just reviewed the elements of the crime as indicated in that instruction, um, and I think that's about as much as I can say at this point.

Q: Okay. Do you remember whether there was any modification to the instructions during the Instruction Conference?

A: I do not believe there was.

Q: I am going to read a comment out of the instruction for the relevant offenses, and this Wisconsin Jury Instruction Criminal 1765. … Comment 8 of the instruction reads "The committee suggests specifying the lawful function being performed, and if raised by the evidence, instructing the jury on the applicable jury standard. For example, if the evidence raises a question

about the legality of the arrest, something like the following may be helpful: In this case it is alleges that the officer was making a lawful arrest. An arrest is lawful when the officer has reasonable grounds to believe the person committed a crime. An officer making an arrest may use the amount of force reasonably necessary to take the person into custody. Do you remember ever looking at that particular comment of the instruction?"

A: I do not.

Q: In hindsight, do you think anything within that comment would have been helpful to you as far as a Jury Instruction?

A: I think it would have absolutely been helpful, um, as that was essentially the whole crux of my argument.

Q: And how do you think it would have been helpful?

A: Well, if I could have informed the jury or the Court or simply could have informed the jury as to, uh, taking into account the amount of force that was reasonably necessary, um, I would like to think the jury would have considered that.

Q: Okay. And that may have impacted on one or more of the elements?

A: Absolutely, specifically I think maybe the third element as to whether or not, uh—the third element, I believe.

Q: Dealing with whether or not the officer was acting lawfully?

A: Correct.

Q: In other words, if he was using excess force, he may not be acting lawfully?

A: That is correct.

Q: Was there a strategic reason why you did not consider requesting that specific language.

A: Absolutely not, and like I said before, I think if I would have paid attention to that passage, to that note, I would have absolutely asked the Court to modify the instruction.

> Q: Objectively, did you think there was an issue as to whether or not the officer used excessive force?
>
> A: I did, and I believe I questioned the officer on the techniques that he was trained and techniques that he was to use in those circumstances (105:7-12).

Defendant asserts trial counsel's failure to seek an instruction on the reasonableness of the force used by Officer Roehl was deficient performance[1]. Counsel wanted to convince the jury that Officer Roehl's excessive force was the real cause of his physical injuries, not defendant's conduct. In other words, but for the overly aggressive actions of Officer Roehl, he would not have been injured at all. Counsel had the ability to seek a jury instruction tailored to the defense. The guiding law sought to be conveyed to the jury was not some obscure theory. It was spelled out the in the comments to the applicable jury instruction for the resisting offense. Had counsel requested the additional language spelled out in Comment 8 of the jury instruction, arguably, the trial court would have had a duty to give it based on the four-part standard cited from *Coleman.* As to the first part, the language related to a legal theory of a defense, as opposed to an interpretation of evidence, that is whether the officer acted lawfully in taking defendant into custody. As to the second part, the request was not timely made, the basis for the allegation of ineffective assistance of counsel per the law cited from *Austin*. Third, the defense was not adequately covered by other instructions. There was no way for the jury to feel bound by the argument of defense counsel on the issue of excessive force without the requested instruction. None of the other jury instructions covered the concept of how excessive force may have impacted of the lawfulness of the officer's actions. Fourth and finally, the evidence supported the instruction. If one watched Exhibit 1, a 20-minute video played at trial, one would have had the ability to conclude the officer's actions unnecessarily created the skirmish leading to his injury (34, 98:70-71). Of course, counsel should have wanted the tailored jury instructed on the

[1] Of course, appellate counsel is not attacking the general competency of defense counsel. As recognized in *State v. Felton,* 110 Wis.2d 485, 499, 329 N.W.2d 161, 167-68 (1983), in applying the standard regarding ineffective assistance of counsel, judges should recognize that all lawyers will be ineffective some of the time; the task is too difficult and the human animal too fallible to expect otherwise.

issue of excessive force if that were an option. That would have provided a legal basis for the jury to consider whether the force used by Officer Roehl was excessive and whether defendant's actions were a real, substantial factor in the causation of the officer's injuries.

In looking at the trial counsel's testimony from the *Machner* hearing, it is clear that trial counsel did not have a strategic reason for having not requesting the modification of the stock jury instruction. In fact, counsel testified that had he been aware of the language from the jury instruction comment, he would have requested it.

C. Trial counsel's performance was prejudicial.

Defendant asserts the error was prejudicial. There is a reasonable likelihood the outcome of trial would have been different but for trial counsel's error. It cannot be stressed enough that the relevant facts of this case were captured on 20-minute video. The legitimacy of defendant's position becomes immediately apparent if one watches the video.

Whether the officer used excessive force in effectuating the arrest went directly to the lawfulness of his conduct and one of the elements of the offense of resisting. Had the jury been properly advised by the trial court that the officer had to use reasonable force in order for him to have acted lawfully, there is every reason to believe the outcome of the proceedings would have been different. Defendant is able to demonstrate that trial counsel's performance was prejudicial.

D. Postconviction proceedings.

Finally, defendant must comment on the postconviction process. There is an unusual back-story to the postconviction proceedings. Judge William Hue was the judge at trial (96). Judge William Gruber was assigned to hear the postconviction proceedings (81). Judge Gruber recused himself based on a conflict (83, 84). Judge Robert Dehring Jr. was then assigned (86). He presided over the postconviction proceedings (105). Unknown by appellate counsel for defendant, Judge Hue was not, and still is not retired. He could have, and probably should have presided over the postconviction proceedings. The trial court chastised appellate counsel for having not requested that the court

specifically review the video of the incident prior to the motion hearing (105:19). While counsel chose not to argue with the court, counsel referenced the video in defendant's postconviction motion (80:3). Arguably, the trial court should have reviewed the full record before the postconviction motion hearing to be in a position to rule on the motion. Counsel asked the court to review the video before making a decision on the postconviction motion (105:20). Ultimately, the court denied the motion without taking the opportunity to consider the contents of the video, the most important factual evidence for the court to consider in addressing the merits of the motion. Counsel asserts that in failing to review the video, the trial court was without the facts necessary to consider the postconviction motion. Arguably, under these circumstances, the trial court erroneously exercised its discretion in denying the postconviction motion.

CONCLUSION

For the reasons set forth above, defendant should be granted a new trial based on ineffective assistance of counsel.

Dated: 3/7/2021

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of this brief is 3494 words.

Dated: 3/7/2021

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Philip J. Brehm

APPENDIX CERTIFICATION

I certify that filed with this brief, as part of this brief, an appendix complying with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court entries; (3) the findings or opinions of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning related to those issues.

I further certify if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: 3/7/2021

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Philip J. Brehm

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Rule 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 and that 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.

Dated: 3/7/2021

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Philip J. Brehm

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