

FILED
04-26-2021
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**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV**

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 REPLY BRIEF

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ARGUMENT

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

Summary of the State's argument

The State and the defense agree on most of the applicable law. The defense obviously disagrees with the conclusions reached by the State. The State makes three arguments why trial counsel's performance was deficient (State's brief at 15). First, it asserts because the defendant did not present the reviewing court with the actual jury instruction it would have wanted at trial, there can be no deficient performance. Second, the theory of defense was effectively argued by trial counsel without the requested instruction. Third the premise of the argument, that is that the injured officer used excessive force, is false. As to prejudice, the State seems to argue because the jury found defendant guilty, the defense is unable to demonstrate he was prejudiced by trial counsel's actions (State's brief at 20). Defendant obviously disagrees with these contentions.

A. There was a legal and factual basis to give the requested instruction.

The State argues that because the cited language in Comment 8 of WIS JI-CRIMINAL 1765 focuses on whether there was a legal basis to arrest a defendant, it is inapplicable to this case (State's brief at 15-16). This is a disingenuous argument. While the example given in the comment addresses the legality of an arrest, the entirety of the comment makes it clear the instruction can be tailored to any lawful action being performed by an officer and if raised by the evidence, instructing the jury on the applicable legal standard. *Id.*

The State argues the defense did not provide the court with proposed language for a modified jury instruction. However, in argument to the trial court, counsel for defendant expressed to the court the proposed language of the modified instruction would have included language to the effect that an officer restraining or detaining a defendant may use the amount of force necessary to complete that process (106:15-16). The language of the relevant comment is flexible enough to allow a modification of the resisting instruction to include language that an officer securing detaining or restraining a person may use the amount of force reasonably necessary to complete the process, or words to that effect.

Trial counsel admitted such a modification of the resisting instruction would have provided legal support for his argument that the injured officer was not acting lawfully at the time because he used excessive force in his act of securing defendant (106:8). Trial counsel admitted the argument was the “whole crux” of his case (106:11).

The State argues that regardless of whether the trial court gave the modified jury instruction, defense counsel was still able to argue its theory of defense (State’s brief at 17). The problem with the State’s argument is that the trial court, not trial counsel, instructs the jury on the applicable law. The jury was given the following instruction at the conclusion of the trial:

[T]he Court will now instruct you on principles of law that you are to follow in considering the evidence and reaching your verdict. It is your duty to follow all of these instructions. Regardless of any opinion you may have about what the law is or ought to be, you must base your verdict on the law I give you in these instructions (98:142).

In the absence of the modified jury instruction, the jury was not bound by trial counsel’s opinion that if the officer used excessive force, he was acting contrary to the law. Trial counsel had no authority to bind the jury with his version of the law. The modified jury instruction was crucial to provide legal authority for trial counsel to convince the jury that the officer’s apparent excessive use of force made his actions unlawful, thus meaning defendant was not guilty of the resisting offense.

Notwithstanding the State's argument, there was a factual basis for the court to give this modified instruction. The focus is not on whether the trial court, Judge Hue presiding, would have been willing to give in the modified instruction, but whether he was legally *required* to give the instruction based on the evidence presented at trial.

The threshold between reasonable and excessive force is not easy to define. Whether the officer used excessive force was a jury question. In the postconviction proceedings, trial counsel testified that in his opinion, the officer used excessive force. The State argues that the officer did not use excessive force. The State points out that during the postconviction proceedings, the trial court said it did not believe it could watch the video of the incident and determine whether the officer's actions were excessive (106:31).

The trial court's analysis on this point misses the mark. The legal question was not whether the officer's actions were *in fact* excessive, it was whether the requested modification of the jury instruction was supported by sufficient evidence. Was evidence presented that would have allowed the jury to conclude the officer used excessive force in securing or detaining defendant? Counsel for defendant made that clear to the trial court during argument:

I would, your Honor, and I don't agree with your remarks in terms of you looking at the video and deciding whether or not you personally feel that the officer used excessive force. The question here is whether or not, if the jury was appropriately charged with this language, whether there is a reasonable likelihood the result would be different. And I don't think that equates with the Court deciding that the officer's behavior is appropriate (106:20-21).

Later in the proceeding, counsel for defendant argued:

I think a jury, looking at a situation like this, would have the ability to determine an officer's conduct was excessive, just by notions of fair play and reasonableness looking at the video (106:26).

When one views the video of the incident, Trial Exhibit 1 (34), a reasonable juror could conclude the officer's actions were unreasonable. Defendant's actions on the video appear to be fairly harmless and not confrontational (34). The officer's response appears to be abrupt and physically aggressive (34). From the video evidence, defendant is able to demonstrate there was a factual basis for giving the modified instruction.

Curiously, the State defends the trial court's decision not to watch the video of the incident and piles blame on postconviction counsel for having failed to demand that the trial court watch the video ahead of the postconviction motion hearing (State's brief at 18-19). In prefacing this argument, based on other interactions with the trial court, postconviction counsel wants to make it clear he has nothing but respect for the trial court and is not attacking the general competence of the trial court. However, on this issue, the trial court erred. Arguably, the trial court had a duty to familiarize itself with the relevant portions of the record in preparation for the postconviction hearing. Postconviction counsel is not under an affirmative duty to demand that a trial court review the entire record or that the trial court review some, but not all of the record in preparation for a postconviction hearing.

It is important to note the postconviction motion filed in this matter was not a "barebones" form motion; the request for postconviction relief was clearly and concisely pleaded both in relevant facts and in relevant law (80).

It is clear the trial court did not review the video of the incident, a fairly objective item of evidence most important to the analysis (106:19-22). Appellate counsel asked the court to review the video near the end of the postconviction motion hearing (106:22). The trial court seemed to agree to do so, but cautioned that the hearing would not be completed that day (106:22-23). The State did not object to proceeding in that fashion (106:23). However, thereafter, the court ruled:

At this evidentiary hearing today, what isn't presented to me is the video. Although it is a part of the record, nobody asked me to look at it before this hearing. Moreover, I think Attorney Shock's point is a good one. There's no evidence here today, other than the opinion of trial counsel and the opinion of appellate counsel, that the force was unreasonable. Given the lack of record, I don't think the Court can find prejudice here because I

can't find that, you know, a jury would reasonable have found on that issue with the instruction (106:29).

As previously argued, the trial court's ruling on the postconviction motion was clearly erroneous. A court properly exercises its discretion if it relies on the relevant facts in the record and applies the proper legal standard to reach a reasonable decision. *LeMere v. LeMere*, 2003 WI 67, ¶ 13, 262 Wis.2d 426, 663 N.W.2d 789. Here, the trial court ruled on the motion without reviewing the video of the incident, evidence crucial to the analysis.

B. Trial counsel's performance was prejudicial.

Defendant asserts the error was prejudicial for the same reasons previously argued. There is a reasonable likelihood the outcome of trial would have been different but for trial counsel's error in failing to seek the modified instruction. Defendant does not have to prove the result would in fact have been different. 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 and the heart of the defense theory. Had the jury been properly instructed by the trial court that the officer had to use reasonable force in order for him to have acted lawfully, there is a reasonable likelihood the jury would have found defendant not guilty. Defendant is able to demonstrate that trial counsel's performance was prejudicial.

The State's argument that there was no prejudice is not availing. The State essentially argues that because the officer testified his actions were reasonable and the jury convicted defendant, that there is no prejudice (State's brief at 20). In its argument, the State ignores the real problem in this case, that is that the jury was not made aware if it found the officer's actions were excessive in his securing of defendant, defendant would not be guilty of the offense.

CONCLUSION

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

Dated: 4/22/2021

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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 1738 words.

Dated: 4/22/21

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: 4/22/2021

Philip J. Brehm