STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2023AP02083-CR

KYLE R. APPEL,

Defendant-Appellant.

ON NOTICE OF APPEAL FROM A JUDGMENT OF CONVICTION ORDERED AND ENTERED IN DUNN COUNTY CIRCUIT COURT, THE HONORABLE JAMES M. PETERSON PRESIDING

DEFENDANT-APPELLANT'S BRIEF

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ISSUES PRESENTED

I. WAS THE EVIDENCE SUFFICIENT FOR A RATIONAL JURY TO FIND BEYOND A REASONABLE DOUBT THAT APPEL COMMITTED THE OFFENSE OF OBSTRUCTING?

The trial court answered this question in the affirmative.

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II. DID THE TRIAL COURT ERR IN SUSTAINING AN OBJECTION TO A QUESTION BY THE DEFENSE OF THE ARRESTING OFFICER AS TO HIS REASON FOR ARRESTING APPEL?

The trial court answered this question in the negative.

III, WAS THE ERROR IN (II) SUFFICIENT TO WARRANT A NEW TRIAL?

The trial court did not answer this question.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested as the defendant-appellant (Appel) believes the briefs of the parties will fully meet and discuss the issues on appeal. Publication is not appropriate as the issues in this case are fact-specific and not of general interest to the administration of justice. Further, the issues involve little more than the application of well-settled rules of law to a unique fact situation. The issues will be decided on the basis of controlling precedent and no reason appears for questioning or qualifying the precedent. Further, this is a one judge appeal which does not qualify for publication. Sec. 809.23(1), Wis. Stats..

STATEMENT OF THE CASE

The above matter was commenced on September 15, 2021 by the filing of a criminal complaint (2) charging Appel with one count of obstructing an officer contrary to Sec.. 946. 41(1) , Wis. Stats. The offense was alleged to have

occurred on September 10, 2021. Assistant State Public Defender (ASPD) Jonathan B. Lundeen was appointed to represent Appel (37). On October 26, 2021, Appel had his initial appearance (76) Pretrials and other hearings were held thereafter (74, 77, 78, 79, 80, 81, 82, 83, 87, 84, 75, 85). On January 4, 2023, , a jury trial (86) was held which resulted in a verdict of guilty. The court proceeded immediately to sentencing.

Judge James M. Peterson placed Appel on probation for one year with credit for 22 days if probation was revoked (66; App. 101-102). Appel subsequently filed a notice of intent to pursue post-conviction relief (67) and the undersigned attorney was appointed to represent Appel (104). Appel's probation was subsequently revoked (94) and he was sentenced to 110 days in the county jail (97). The revocation proceedings are not the subject of this appeal.

.On November 7, 2023, Appel filed a notice of appeal (105) directed at the original judgment of conviction .

STATEMENT OF FACTS

At the jury trial on January 4, 2023, Kayla Kessels testified that on September 10, 2021, around 9:00 p.m. she saw a man on the south side of her rural home (86: 56). The man was wearing lighter colored bottoms with nothing on top (86: 57, 61). The man said he was meeting someone (86: 60). After Kessels replied that the man was not meeting anyone and was not welcome, the man stated

he did not know where he was or how to get back to the road (86: 60). Kessels gave the man directions on how to leave (86: 60). Then Kessels went inside and called the non-emergency line (86: 61). Nothing was disturbed in the yard (86: 62).

Darcee Friedrich testified that on September 10, 2021 she was at her boyfriend's house near Northline Road and Hintzman Road (86: 64). Shortly before 9:20 p.m., she was sitting outside by a bonfire (86: 65). Friedrich heard some noises from branches and leaves (86: 66). In response to a question by her boyfriend, the male said he was going to get picked up there (86: 67). The person was behind a camper (86: 67). The man left when the boyfriend said they were calling the cops (86: 68).

Deputy Samuel Miller testified that he was dispatched to a report of someone on other people's property around 9:25 p.m. on September 10, 2021 (86: 72). Miller located a subject walking north of the Friedrich residence on 410th Street also known as Hintzman Road (86: 73). When Miller asked Appel to identify himself, Appel stated that his name was irrelevant and he continued to walk (86: 74). Miller got out of the squad (86: 75). After Appel asked if he was under arrest, Miller told Appel he was not and Appel continued walking (86: 75). Miller again asked Appel what he was doing on other people's property and they had gotten several calls on him. Appel repeated that his name was irrelevant and kept walking after being told to stop (86: 75).

Then Miller asked Appel to stop again but Appel kept walking (86: 75). Miller then told Appel he was being detained and that if he did not stop and talk to Miller, Appel would be placed in handcuffs in the back of the car (86: 75-76). After Appel continued to walk, Miller grabbed Appel's arm (86: 76). When Appel began pulling away, Appel was secured in handcuffs (86: 76). Appel was in handcuffs about five minutes after the call came in (86: 78). It was under a minute from the time Miller made contact with Appel and Appel was in handcuffs (86: 79).

The squad video[1] was played from 00:10 until 2:23 (86 80). Miller asked Appel four times what his name was and Appel refused to answer (86: 81). Appel said he was going for a walk and did not realize he was on somebody else's property (86: 81). Appel was on a private road in the video (86: 81). It was after the fourth refusal to give him name that Miller told Appel he was detained (86: 82).

The court sustained an objection by the State to a question by ASPD Lundeen as to Miller's question to another officer as to what to do with Appel (86: 83). Then the following exchange occurred:

Q (By Mr. Lundeen) Okay. Do you recall saying obviously he's up to something; he won't tell me his name so I'm going hit him with obstructing?

MR. MAKI: Objection. Relevance.

[1]The squad video was not offered as evidence and used solely to refresh Miller's recollection. However, Lundeen's questioning of Miller established the relevant time line. The undersigned attorney viewed the video and confirmed Miller's answers to questions that would be shown by the video. Much of the video was useful only for the audio portion.

THE COURT: Okay. Sustained.

(86: 83).

Later, the court explained that it sustained the objection to playing the portion of the video where Mller discussed hitting Appel with obstructing when Appel would not give his name (86: 89; App. 103). The court stated that the officer's subjective reasons were not relevant (86: 89; App. 103). Miller did what Sec. 968.24 and *Terry* permitted (86: 90; App. 104).

When Appel saw another squad coming up 410th Street, Appel began to walk faster, Miller told Appel he was not free to leave and grabbed Appel's arm (86: 87). Appel was within three feet from Miller 986: 87). It was about twenty seconds from the time Miller told Appel to stop until Miller handcuffed Appel (86: 87). Miller detained Appel to ascertain what had gone on with the two properties (86: 88).

At the conclusion of the State's case, ASPD Lundsteen moved to dismiss the case but the motion was denied (86: 94-95).

The jury returned a verdict of guilty (63).

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT APPEL WAS GUILTY OF OBSTRUCTING AN OFFICER.

An appellate court may not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *State v. Poellinger* , 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The evidence as to the circumstances surrounding Appel's arrest were undisputed at trial. On two separate occasions during the evening of September 10, 2021,, residents in rural Dunn County saw an unknown shirtless male on private property that they were unable to identify who did not disturb anything on the respective properties. They called the Sheriff Department which dispatched Deputy Miller. Miller saw Appel walking on the road in the vicinity of the incidents. Miller asked Appel to identify himself but Appel declined to do so. Then Miller got out of his squad car and continued the conversation with Appel. After Appel's fourth refusal to give Miller his name Miller told Appel he was detained (86: 82). Appel continued to walk after Miller twice told Appel to stop and grabbed Appel's arm and placed him in handcuffs as Appel continued to walk.

The elements of obstructing that the State was required to prove were as follows:

"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.

Number one, the defendant obstructed an officer. A sheriff's deputy is an officer. To obstruct an officer means that the conducts of the defendant prevents or makes more difficult the performance of the officer's duties. The refusal to answer an officer's questions by itself is not obstructing an officer.

The officer -- and this is the second element. The officer was doing an act in an official capacity. Sheriff's deputies act in an official capacity when they perform duties that they are employed to perform. The duties of a sheriff's deputy include investigating suspicious-person complaints.

Number three, the officer was acting with lawful authority. Sheriff's deputies 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 suspicious-person complaint.

Fourth element, the defendant knew that Deputy Miller was an officer acting in an official capacity and with lawful authority and that the defendant knew his conduct would obstruct the officer."

(86: 104-105). Taken from Wis. JI-*Criminal* 1766.

The first element was the one at issue in this case. The origins of the obstructing statute was discussed in footnote 2 of Wis. JI-*Criminal* 1766 which stated:

> 2. This part of the definition of "obstruct" was adapted from the one found in the 1966 version of Wis JI-Criminal 1765 which referred to "hinder, delay, impede, frustrate or prevent" an officer from performing his duties. No change of meaning is intended.

> "Obstructing" was added to the statute in the 1955 version of the Criminal Code. Earlier definitions of this offense had prohibited only "resisting." See discussion in State v. Welch, 37 Wis. 196 (1875). The addition of "obstructing" was intended to cover the type of conduct (e.g., "impeding," "hindering," "frustrating") that Welch said was not covered by "resisting" standing alone.
>
> The instruction's definition of "obstruct" was referred to with apparent approval [but without citing the instruction] in State v. Grobstick, 200 Wis.2d 242, 249, 546 N.W.2d 187 (Ct. App. 1996), where the court found that the defendant's jumping out a window and then returning to hide in a closet "made more difficult" the execution of a bench warrant.

There are numerous cases, mostly unpublished, interpreting what "obstructing" in Sec. 946,41 (1) means. The leading case from our Supreme Court is *State v. Hamilton,* 120 Wis.2d 532, 356 N.W.2d 169 (Wis. 1984). The precise issue in *Hamilton* is whether Hamilton's refusal to identify himself violated the statute. *Hamilton*, 356 N.W.2d at 171. The Wisconsin Supreme Court held that it did not. *Hamilton,* 356 N.W.2d at 174. It accepted a definition taken from a dictionary that "obstructing" meant to "'to hinder, delay, impede, frustrate or prevent'..." *Hamilton,* 356 N.W.2d at 172. But in finding that a refusal to give a name was not "obstructing " the Wisconsin Supreme Court also found that more than a minor hindrance in having to undertake identification procedures for a recalcitrant subject was necessary to constitute "obstructing." The Supreme Court stated, " "We grant that the defendant's conduct in refusing to furnish identifying information was not a model for good civic-minded behavior. Indeed, the officer was probably justifiably irritated and disturbed by the defendant's

refusal to respond to a simple request for identification." . *Hamilton*, 356 N.W.2d at 171.

However, in spite of the additional efforts Hamilton caused the police to identify him by arresting him and undergoing additional procedures, the Supreme Court found the requirements of the statute were not met. The court noted the absence of evidence that Hamilton's conduct affected the investigation in any way. *Hamilton,* 356 N.W.2d at 174. In this case, Officer Miller testified that it was twenty seconds from the time he told Appel to stop until Appel was in hand cuffs (86: 87). Appel was within arm's reach (three feet) of Miller (86: 87). Appel started to pull away but then was in handcuffs almost immediately (86: 87). Miller thought Appel might start running but Appel just walked a bit faster (86: 87). While Appel was not cooperative, he never was in danger of escaping Miler's grasp and took no substantial efforts to flee.

The facts of this case contrast greatly with *State v. Grobstick*, 546 N.W.2d 187, 200 Wis.2d 242 (Wis. App. 1996). Grobstick jumped out of a window upon hearing police were in the house and later re-entered and hid in a closet. *Grobstick*, 200 Wis2d at 246. Gobstick had evaded officers for ten to fifteen minutes. *Grobstick*, 200 Wis2d at 246, The evidence was sufficient for a conviction of obstructing even though Grobstick did not have direct contact with the officers. *Grobstick*, 200 Wis2d at 250. Appel had verbal contact with Miller. But once Miller grabbed Appel's arm, Appel did nothing more than continue the walking in which Appel had been engaging for a few seconds before the handcuffs

were applied. There are no other published cases of conduct as minimal as in this matter in which a conviction was affirmed.

Appel believes that as a matter of law that the evidence he obstructed Miller was insufficient. No rational jury could have concluded the investigation was hindered by more than a *de minimus* period of time and with no substantial additional effort..

Jeopardy attached once the jury was sworn. Sec. 972.07(2), Wis. Stats. The Double Jeopardy Clause bars reprosecution of individuals whose conviction are set aside for insufficient evidence. *Montana v. Hall*, 481 U.S. 400, 402, 107 S.Ct. 1825, 95 L.Ed.2d 354 (1987). The trial court should have dismissed this case with prejudice. This court should do the same.

II. THE TRIAL COURT ERRED BY NOT PERMITTING ASPD LUNDSTEEN TO QUESTION MILLER ABOUT HIS REASONS FOR ARRESTING APPEL.

A trial court's decision to admit evidence is a discretionary one, and appellate courts will not reverse the trial court's decision unless the record shows that the ruling was manifestly wrong and an [erroneous exercise] of discretion. *State v. Moats*, 156 Wis. 2d 74, 96, 457 N.W.2d 299, 309 (1990). Also see *State v. Vicks,* 104 Wis.2d 678, 690, 312 N.W.2d 489, 495 (1981).

The questions of Miller by Lundeen and the court's reasoning were set forth in the Statement of Facts above and in the Appendix pages 103-105. After attempting to refresh Miller's memory with the squad video. Lundeen continued:

Q (By Mr. Lundeen) Okay. Do you recall saying obviously he's up to something; he won't tell me his name so I'm going hit him with obstructing?

MR. MAKI: Objection. Relevance.

THE COURT: Okay. Sustained.

(86: 83).

ASPD Lundeen's questioning was aimed at impeaching Miller for bias. Miller's alleged remarks tended to show that charging Appel was a pretext. Impeachment of a witness for bias is admissible as set forth in Sec. 906.16 Wis. Stats which provides: "**906.16 Bias of witness**. For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible." The bias of Deputy Miller that might lead him to make a pretextual arrest was relevant evidence as set forth in Sec. 904.01, Wis. Stats.

The trial court found that the evidence was not relevant (86: 89; App. 103). The trial court was mistaken. While the trial court correctly stated that Miller's subjective motivations were not directly relevant, the court did not consider the issue of bias that Lundeen's proposed question would raise.

The trial court had the discretion to exclude relevant evidence on the grounds of prejudice, confusion or waste of time. Sec. 904.03, Wis. Stats.

However the court had to find that the probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The trial court did not engage in the reasoning process it was required to when it excluded the evidence. It is also clear from the record that the evidence was not time consuming not did it confuse the issues. It simply would have shown Miller's bias against Appel which bore upon other aspects of his testimony such as whether Appel's continued walking for a brief time after being told not to obstructed Miller's investigation.

III.. THE ERROR IN NOT PERMITTING ASPD LUNDSTEEN TO QUESTION MILLER ABOUT HIS REASONS FOR ARRESTING APPEL WAS SUFFICIENT TO WARRANT A NEW TRIAL.

Whether the error was harmless must be determined by considering the following factors:

> the frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence, the nature of the defense, the nature of the State's case, and the overall strength of the State's case.

State v. Stuart, 2005 WI 47, ¶41, 279 Wis.2d 659, 695 N.W.2d 259.

This was a closely contested case. Even if this court considers the issue of the excluded evidence because it found the evidence was legally sufficient, the evidence was not overwhelming in nature. Almost any error might be enough to raise questions as to whether a different result might occur upon s retrial. The credibility and bias of Deputy Miller was a key issue in the case as he as the only direct witness to the alleged obstructing. If the court finds there was error in excluding the evidence ASPD Lundeen sought to introduce, it should order a new trial.

CONCLUSION

For the reasons stated above, Appel requests that this court reverse the judgment of conviction and either order an acquittal or new trial.

Dated this 15th day of January 2024

Electronically signed by Len Kachinsky

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CERTIFICATION AS TO BRIEF LENGTH

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif spaced font. This brief has 3879 words, including table of contents, certifications and cover page..

Dated this 15th day of January 2024

Electronically signed by Len Kachinsky

LEN KACHINSKY

CERTIFICATION OF ELECTRONIC FILING

I hereby certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court of appeals by using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 15th day of January 2024

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