STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2023AP02083-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KYLE R. APPEL,

Defendant-Appellant.

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

PLAINTIFF-RESPONDENT'S BRIEF

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested as the plaintiff-respondent believes the briefs of the parties fully discuss the issues on appeal. Publication is not appropriate as this is a one judge appeal. Sec. 809.23(1).

STATEMENT OF FACTS

On September 10th 2021 at about nine o'clock p.m. Kayla Kessels was in the yard of her rural home taking dogs for a walk. She heard some noises that were not normal so she went back into the home to get a flashlight. Upon going back into the yard, one of the dogs alerted her in the direction of the south side of the yard. Kessels shone the flashlight in that direction and observed a man standing in the yard. The man was wearing lighter colored bottoms with nothing on top (86:57, 61). Kessels asked him what he was doing there and he said he was meeting someone. The man was at least a hundred yards from the road and around the side of the house. Kessels told the man that he was not meeting anyone and was not welcome. The man stated that 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 (86:61). The man left. Kessels called law enforcement.

Darcee Freidrich testified that on September 10, 2021 she was at her boyfriend's house near Northline Road and Hintzman Road (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). The description of the subject provided was a male with no shirt. Miller located a male subject not wearing a shirt walking north of the Friedrich residence on 410th Street also known as Hintzman Road (86:73). Miller asked the subject, 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 asked Appel what he was doing on other people's property and told him that they had gotten several calls on him. Appel repeated that his name was irrelevant and kept walking after being told to stop (86:75).

Miller again told Appel to stop but Appel kept walking (86:75). Miller told Appel he was being detained and that if he did not stop and talk to Miller, Appel would be placed in handcuffs (86:76). Appel began to walk faster and get into a stance that Miller thought he was going to start running. (86:87). Miller grabbed onto Appel's arm to secure him and he began pulling away from Miller and trying to get away, so he was secured in handcuffs. (86:76). Miller placed Appel under arrest for obstructing. (86: 76).

On cross examination of Miller by ASPD Lundeen the court sustained an objection to a question by Mr. Lundeen: "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. (86:83). The court later explained that it sustained the objection to playing the portion of the video where Miller discussed hitting Appel with obstructing when Appel would not give his name (86:89; App. 103). The court stated that the reason was that the officer's subjective reason for making the arrest is not relevant. The Court held that what's relevant is objectively the evidence whether he obstructed the officer. The court noted that the State was not proceeding on a theory that Appel was arrested because he refused to give his name. (86:89; App. 103).

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

The jury returned a verdict of guilty (63).

Argument

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

Whether the evidence is sufficient to support the conviction is a question of law that an appellate court reviews de novo. *State v. Smith*, 2012 WI 91, 342 Wis.2d 710, 817 N.W.2d 410 (2012). A court's review of a sufficiency of the evidence claim is very narrow. *State v. Rowan*, 2012 WI 60, 341 Wis.2d 281, 814 N.W.2d 854 (2012). The test for sufficiency of the evidence to convict is highly differential to the determination of the trier of fact. *Rowan*, 2012 WI at ¶¶ 5, 20,26, 341 Wis.2d at 287,

301, 306. The standard of review is whether the evidence, viewed in the light most favorable to the conviction, is so insufficient in probative value and force that as a matter of law no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. A reviewing court cannot substitute its judgment for that of the trier of fact unless that standard is met. *Smith*, 2012 WI at ¶ 24, 342 Wis.2d at 726. If there is any possibility that the trier of fact could have drawn the appropriate inferences from the trial evidence to support its verdict, an appellate court cannot overturn that verdict even if the Court believes that the trier of fact should not have found guilt based on the evidence. *State v. Hughes*, 2011 WI App 87 at ¶10,, 344 Wis.2d 445 at 451, 799 N.W.2d 504 (Ct. of App. 2011). The evidence was undisputed at trial. On two separate occasions, on September 10 2021, residents in rural Dunn County saw an unknown shirtless male on private property, in the dark. On one property he was at least 100 yards from the road and around the side of the house, and on the other he was near a camper. The man told the witnesses at each property that he was there to meet someone or to get picked up. The witnesses called the Sheriff's Office which dispatched Deputy Miller. Miller saw Appel who was shirtless walking on the road in the vicinity of the incidents. Miller asked the subject, Appel, to identify himself. Appel stated that his name was irrelevant and he continued to walk. Miller got out of the squad. After Appel asked if he was under arrest, Miller told Appel he was not and Appel continued walking. Miller asked Appel what he was doing on other people's property and told him that they had

gotten several calls on him. Appel repeated that his name was irrelevant and kept walking after being told to stop.

Miller again told Appel to stop but Appel kept walking. Miller told Appel he was being detained and that if he did not stop and talk to Miller, Appel would be placed in handcuffs. Appel began to walk faster and got into a stance that Miller thought he was going to start running. Miller grabbed onto Appel's arm to secure him and he began pulling away from Miller and trying to get away, so he was secured in handcuffs. Appel's actions constituted obstructing. Appel's brief argues that his actions did not "hinder, delay, impede, frustrate or prevent" an officer from performing his duties. This is incorrect. The statute does not require a specific amount of time that the actions of the defendant hinders, delays, impedes, frustrates or prevents an officer from performing his duties. When Appel was walking away from deputy Miller who was telling him to stop, and pulling away when Miller had grabbed onto him, he was clearly obstructing Miller. The fact that Appel was unable to break the grasp of Miller and run does not mean that his conduct was not obstructing.

2. THE TRIAL COURT CORRECTLY RULED THAT QUESTIONING THE DEPUTY REGARDING HIS SUBJECTIVE MOTIVATION FOR ARRESTING APPEL WAS NOT RELEVANT

In *Gerald Devenpeck v. Alford*, 543 U.S. 146, 125 S.Ct. 588, 160 L.Ed.2d 537, 73 USLW 4038 (2004), the United States Supreme Court stated:

> "Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable

> cause. See *Whren v. United States,* 517 U.S. 806, 812-813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996)(reviewing cases); *Arkansas v. Sullivan, 532 U.S. 769, 121 S.Ct. 1876,, 149 L.Ed.2d 94 (2001)(per curium). That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause. As we have repeatedly explained, " 'the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.' "* Whren, supra, *at 813, 116 S.Ct. 1769."*
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> The Court continued: "Evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer. *Horton v. California*, 496 U.S. 128, 138, 110 L.Ed.2d 112 (1990)….. The rule that the offense establishing probable cause must be "closely related" to, and based on the same conduct as, the offense identified by the arresting officer at the time of arrest is inconsistent with this precedent. This would mean that the constitutionality of an arrest under a given set of known facts will "vary from place to place and from time to time," *Whren, supra,* at 815, 116 S.St. 1769, depending on whether the arresting officer states the reason for the detention and, if so, whether he correctly identifies a general class of offense for which probable cause exists. An arrest made by a knowledgeable, veteran officer would be valid, whereas an arrest made by a rookie in precisely the same circumstances would not. We see no reason to ascribe to the Fourth Amendment such arbitrarily variable protection." *Devenpeck v. Alford,* 543 U.S. 146 at 153, 125 S.Ct. at 593.

In our case, Miller believed that the defendant's failure to identify himself constituted obstructing. The fact that he was wrong was irrelevant, because the defendant's actions constituted obstructing. Appel's brief argues that ASPD Lundeen's questioning about Miller's state of mind was relevant to show bias and to show that charging Appel was a pretext. A pretext stop or arrest is legal under the Fourth Amendment if it is based on an objectively ascertainable basis for the required level of information. *State v. Iverson*, 2015 WI 101, ¶ 61 n. 21, 365 Wis.2d 302, 335 n.21, 871 N.W. 2d 661; *State v. Newer,* 2007 WI App 236, ¶ 4 n.2, 306 Wis.2d 193, 196 n.2, 742 N.W.2d 923; *United States v. Correa*, 908 F.3d 208, 214

(7th Cir. 2018). In *Whren v. United States,* 517 U.W. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) the Court addressed whether temporarily detaining "a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws." Id. at 808, 116 S.Ct. 1769. The defense moved to suppress the evidence on the theory that the officers' "ground for approaching the vehicle—to give the driver a warning concerning the traffic violation—was pretextual." Id. at 809, j116 S.Ct. 1769. In an opinion by Justice Scalia, a unanimous Court held that the brief detention of a motorist who police have probable cause to believe has violated a traffic law is not an unreasonable search or seizure within the meaning of the Fourth Amendment, even if the officer would not have initiated the stop without some additional law enforcement objective. Id at 808, 818-19, 116 S.Ct. 1769.In other words, pretextual traffic stops—stops designed to investigate violations not related to the observed violation—are not per se unreasonable under the Fourth Amendment. *State v. Houghton,* 2015 WI 79, ¶¶ 23-25, 364 Wis.2d 234, 248-49, 868 N.W.2d 143. The same is true in the prosecution of crimes. There was nothing improper with the government going after Al Capone and OJ Simpson for property crimes when they believed they were guilty of murder. The issue is whether the government has probable cause for the crime for which the defendant is arrested. Appels' argument that the officer's subjective motivation for arrest was relevant to show that this was a pretext arrest, is incorrect. The fact that the officer believed

that he could arrest Appel because he failed to identify himself does not mean or even tend to prove that the officer was biased against Appel. Furthermore, at the time that the objection to Miller's subjective motivation for the arrest was sustained ASPD Lundeen did not argue that it was relevant to show bias on the part of Miller. The sidebar was accurately put on the record by the Trial Court. (86: 91). The entire discussion centered on whether the officer's subjective motivation for arrest was relevant. The trial court sustained the objection. There was no mention of proving bias on the part of Miller. That issue has been waived. Where error is claimed as a result of exclusion of evidence, an offer of proof must be made in the trial court as a condition precedent to the review of any alleged error. An offer of proof need not be stated with complete precision or in unnecessary detail, but it should state an evidentiary hypothesis underpinned by a sufficient statement of facts to warrant the conclusion or inference that the trier of fact is urged to adopt. *State v. Haynes,* 118 Wis.2d 21 at 28, 345 N.W.2d 892 at 896 (Ct. of App. 1983). Appel's brief also does not raise ineffective assistance of trial counsel. Therefore that issue has been waived. Where a counsel's conduct at trial is questioned it is the duty of the appellate counsel to require a Machner hearing and require trial counsel to testify. *State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. of App. 1979).

3. EVEN IF IT WAS ERROR TO NOT ALLOW ASPD LUNDEEN TO QUESTION MILLER ABOUT HIS REASONS FOR ARRESTING APPEL, IT WAS HARMLESS.

The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction. If it did, reversal and a new trial must result. The burden of proving no prejudice is on the beneficiary of the error, here the State. The state's burden, then is to establish that there is no reasonable possibility that the error contributed to the conviction. *State v. Alexander,* 214 Wis.2d 628, 571 N.W.2d 662 (1977). In our case, even if the jury was allowed to hear that Miller arrested Appel because he believed it was obstructing for Appel to fail to identify himself, that would not have changed the verdict. The Jury convicted Appel because of his actions in walking away, getting into a stance to run, and pulling away from Miller. That evidence was undisputed at trial. Any supposed bias on the part of Miller based on his confusion was minimal at best, and therefore was harmless error, if any.

CONCLUSION

Therefore, the judgment in this case should be affirmed.

Dated this 24th day of January 2024

Electronically signed by Andrew J. Maki

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CERTIFICATION AS TO FORM AND LENGTH

I hereby 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 the brief is 2,573 words.

Dated this 24th day of January 2024

Electronically signed by Andrew J. Maki

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