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 REPLY 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.

ARGUMENT

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

The parties agree that the evidence in this case was largely undisputed. In fact, the State's recitation of it in its argument that it sufficient to support the conviction is almost the same as Appel's (pages 7-8 of State's brief and page 10 of Appel's brief-in-chief)..

The State claimed that the language in *State v. Hamilton,* 120 Wis.2d 532, 356 N.W.2d 169, 172 (Wis. 1984) requiring the conduct by Appel "'to hinder, delay, impede, frustrate or prevent'" was met in this case because Appel did not instantaneously stop walking when Deputy Miller put Miler's hand on Appel's arm and told him to stop (page 7 of State's brief). But this did not frustrate Deputy Miller any more than Appel's refusal to identify himself which was insufficient for a conviction in *Hamilton.* What the Supreme Court stated about Hamilton's conduct is applicable here: "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.

The State appeared to take the position that a lawful request by a law enforcement officer to stop in a non-life threatening situation must be complied with in a manner approaching close order military drill. In this case, Deputy 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. Once Miller grabbed Appel to force Appel to stop, Appel did not appear to prevent Miller from placing Appel into handcuffs and detaining Appel. To require instantaneous compliance in circumstances such as these to avoid an obstructing charge would give law enforcement an excuse to arrest and charge citizens with obstructing in many more circumstances than the legislature contemplated when it enacted Sec. 946.41(1), Wis. Stats.

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..

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

The State appears to conflate the issue of whether the trial court erroneously exercised its discretion in not permitting Lundeen to fully cross examine Deputy Miller on his reasons for arresting Appel with the issue of whether an officer's subjective motivation render a stop as an impermissible seizure under the Fourth and Fourteenth Amendments to the United States Constitution (pages 8-9 of State's brief). The whole point of .*Gerald Devenpeck v. Alford*, 543 U.S. 146, 125 S.Ct. 588, 160 L.Ed.2d 537, 73 USLW 4038 (2004) cited by the State was the lawfulness of an arrest, not whether an officer's subjective reason for an arrest might be relevant for some other purpose. Similarly, the cases cited by the State regarding pretextual stops (pages 9-10 of State's brief) are also beside the point.

What Lundeen clearly wanted to do in his questioning was to establish that Miller was irritated by Appel unwillingness to identify himself or stop until Miller ordered Appel to stop and grabbed Appel's arm. The questioning was

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 because Miller was irritated at Appel. In other words, Miller was biased agaisnt Appel because of what had occurred.. 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 arrest was relevant evidence as set forth in Sec. 904.01, Wis. Stats. The issue was not waived by Lundeen failing to mention the word "bias" after the court almost instantly sustained the State's objection. The point of Lundsteen's questioning was clear to all the parties.

State v. Haynes, 118 Wis.2d 21, 28, 345 N.W.2d 892 (Wis. App. 1984) cited by the State on page 11 of its brief was regarding whether proving error from failure to provide a notice of alibi required a detailed offer of proof. Here, the court did not offer ASPD Lundeen the opportunity for a more detailed reason why he wanted to ask Miller about his conversation with another officer on what to

charge Appel with. The face of the transcript and context of the case made that obvious to any knowledgeable observer.

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

Appel reaffirms the argument made on pages 16-17 of his brief-in-chief.

CONCLUSION

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

Dated this 29th 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 1715 words, including table of contents, certifications and cover page..

Dated this 29th 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 29th day of January 2024

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LEN KACHINSKY