COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1955-CR **Cir. Ct. No. 2012CF142**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEBRA A. DELONG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Lincoln County: JAY R. TLUSTY, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Debra Delong appeals a judgment of conviction, entered upon a jury verdict, for failure to comply with an officer's attempt to take

her into custody, a Class I felony proscribed by WIS. STAT. § 946.415.[1] Her sole argument on appeal is that the conviction was not supported by sufficient evidence. We affirm.

BACKGROUND

¶2 Delong was arrested on August 14, 2012, and subsequently charged with a violation of WIS. STAT. § 946.415. At trial, the State offered the testimony of two Merrill police officers present on the night Delong was arrested, Dane Mathwich and Matthew Waid.[2]

¶3 Mathwich testified he and Waid arrived at Delong's residence at approximately 9:20 p.m. to execute a municipal court warrant for failure to pay a fine. They were in uniform and arrived in a marked squad car. Except for a few candles burning in the entry, the house appeared dark. Mathwich testified the officers knocked on the door and a large dog started barking. A female voice, identified as Delong's, yelled at the dog to be quiet, and then asked, "Who the hell is it?"

¶4 Mathwich and Waid identified themselves as law enforcement officers. Delong came to the door, which had a window covered by a drape on the inside. According to Mathwich, Delong pulled the drape away and said, "What

[1] Delong was also convicted of disorderly conduct. She does not challenge that conviction on appeal.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] Officer Gregory Hartwig arrived just as Delong was taken into custody. His testimony is not relevant to this appeal.

the fuck do you want?" The officers informed Delong they were there to execute an arrest warrant. Delong asked what that meant, and Mathwich replied that she would need to come with them. Mathwich testified Delong became "very agitated, very upset, and [she] started walking around the house yelling [and] swearing about the situation." Mathwich could hear Delong moving from room to room. At some point Delong returned to the door and said she did not feel like she wanted to come out. She then asked what would happen if she did not come out, and Mathwich responded that they would enter the residence and arrest her.

¶5 Mathwich testified Delong then started swearing, arguing, and yelling, and she resumed walking around inside the residence. Mathwich heard Delong say she was looking for keys or getting ready. After a few minutes, Waid told Delong to just come to the door and exit the residence. According to Mathwich, Delong yelled back that she "wasn't an animal and couldn't be ordered around like one."

¶6 Mathwich then heard Delong on the other side of the front door. Through the closed door, Delong told the officers, "[Y]ou know, there's guns on both sides of this door." Mathwich backed away from the residence, told Waid to find cover, and both officers drew their firearms. Waid ordered Delong to exit the residence. Mathwich testified that approximately five to seven minutes had elapsed at this point since the officers' arrival.

¶7 Delong remained inside, and Mathwich could hear movement inside the residence. Mathwich testified Delong appeared to move to another room. After another minute or so, Delong returned to the door and started to open it. The officers still had their weapons drawn, and Delong exited, turned around, and

locked the front door behind her. Mathwich saw Waid holster his firearm and draw his taser.

¶8 When Delong turned toward the officers, Mathwich ordered her to the ground. Delong appeared to be carrying only her keys. She looked at the officers but did not comply. Waid then ordered Delong to the ground. Delong jumped a couple of inches off the ground, squatted down, raised her arms in a "boxer's stance," and shouted, "Bring it on, mother fuckers!" Delong was tased and taken into custody.

¶9 Waid largely agreed with Mathwich's account of the incident. Waid testified when he arrived, he politely asked Delong to come to the door several times in a conversational tone. Waid did not hear Delong make a comment about being treated like an animal, but did recall Delong say something about not coming with them. When Delong made the comment about guns, Waid retreated behind the corner of the residence and ordered her out. Delong did not immediately comply. Waid loudly issued four or five more orders to exit the residence. After a couple minutes, Delong opened the door, exited, and was ultimately tased. Waid testified between eight and ten minutes elapsed between the officers' arrival and the time Delong exited the residence.

¶10 The officers generally agreed Delong never explicitly refused to come out of the house, and she appeared to remain on the main floor of the house throughout the encounter.

¶11 Delong testified in her defense. She stated she was asleep on the couch when the officers arrived. Delong's electricity had been cut off for non-payment. She tried to calm her dog and approached the door. Delong confirmed her identity when asked, and acknowledged she was told about the arrest warrant.

Delong testified the officers asked her to come with them and she replied she was going to look for her shoes. She acknowledged officers repeatedly asked her to come out of the house. Delong also acknowledged telling officers there were guns on both sides of the door, but said she was only trying to make sure her dog did not get hurt. Delong emphasized that she never refused to come out of the house, and did in fact eventually exit.

¶12 The jury found Delong guilty. She now appeals.

DISCUSSION

¶13 On appeal, Delong challenges the sufficiency of the evidence to support her conviction for violating WIS. STAT. § 946.415. That statute, entitled "Failure to comply with officer's attempt to take person into custody," provides in relevant part:

> (2) Whoever intentionally does all of the following is guilty of a Class I felony:
>
> (a) Refuses to comply with an officer's lawful attempt to take … her into custody.
>
> (b) Retreats or remains in a building or place and, through action or threat, attempts to prevent the officer from taking … her into custody.
>
> (c) While acting under paras. (a) and (b), remains or becomes armed with a dangerous weapon or threatens to use a dangerous weapon regardless of whether he or she has a dangerous weapon.

WIS. STAT. § 946.415(2). The statute "is directed at a single result—criminalizing suspects' armed, physical refusals to comply with police officers' efforts to take them into custody." ***State v. Koeppen***, 2000 WI App 121, ¶21, 237 Wis. 2d 418, 614 N.W.2d 530.

¶14 Delong concedes the jury had sufficient evidence to support its finding under the third element, that she threatened the use of a dangerous weapon. However, she asserts there was insufficient evidence under paragraph (2)(a) that she refused to comply with the officers' attempt to take her into custody, and under paragraph (2)(b) that she remained in the building.

¶15 When reviewing the sufficiency of the evidence to support a conviction, we do not substitute our judgment for that of the trier of fact unless the evidence, viewed most favorably to the State and to the conviction, is "so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If the historical facts support more than one inference, we must accept the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law. ***Id.*** at 506-07. If there is any possibility that the trier of fact could have drawn the appropriate inferences from the trial evidence to find the requisite guilt, "an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." ***Id.*** at 507.

¶16 Delong contends the facts established at trial, and inferences from those facts, cannot support her conviction for violating WIS. STAT. § 946.415. Due process requires the State to prove each essential element of the crime charged beyond a reasonable doubt. ***Poellinger***, 153 Wis. 2d at 501. "[W]hether the evidence viewed most favorably to the verdict satisfies the legal elements of the crime constitutes a question of law, which we review de novo." ***State v. Routon***, 2007 WI App 178, ¶17, 304 Wis. 2d 480, 736 N.W.2d 530.

¶17 We conclude there was sufficient evidence from which the jury could find that Delong refused to comply with the officers' attempt to take her into custody. It is undisputed that Delong never explicitly refused to go with the officers. However, both officers testified Delong made comments about not leaving the house. Mathwich testified Delong said she did not want to come out, then asked what would happen if she refused. Waid similarly heard Delong say something about not coming with them. The officers' testimony about Delong's statements, taken with their testimony about Delong's general demeanor and her repeated failure to appear when ordered, formed a sufficient basis for the jury's finding that Delong refused to comply. Delong's conduct upon exiting the residence—crouching down in a fighting stance and telling the officers to "bring it on"—further supports the jury's finding.

¶18 The evidence was also sufficient for the jury to find that Delong remained in the residence and, through action or threat, attempted to prevent the officers from taking her into custody. The undisputed evidence established that Delong remained in the residence for eight to ten minutes after the officers' arrival, during which time she implicitly refused on numerous occasions to exit. The jury could reasonably infer that Delong remained in the building and her behavior and statements constituted actions and threats intended to prevent the officers from taking her into custody.

¶19 Despite paying lip service to the standard of review, which requires that we view all facts and inferences in the light most favorable to the verdict, *see* ***Nowatske v. Osterloh***, 201 Wis. 2d 497, 509, 549 N.W.2d 256 (Ct. App. 1996), Delong's argument highlights her own testimony that she was asleep, presumably somewhat groggy, and needed time to find her shoes and keys in the dark while simultaneously calming her excited dog. Delong argues that under "the rather

unusual circumstances of this case, the time it took for Delong to emerge from her house *was* reasonable."

¶20 We view the reasonableness of Delong's response time as a matter for the jury. "The credibility of witnesses and the weight to be given to their testimony are within the province of the trier of facts." ***Hillyer v. Wingert***, 13 Wis. 2d 217, 225, 108 N.W.2d 374 (1961). To be sure, the jury was entitled to accept Delong's explanation for her delayed exit and find that Delong complied as quickly as reasonably practicable with the officers' requests to exit.

¶21 However, the jury was also entitled to reject Delong's testimony and conclude that she unnecessarily delayed her exit to avoid being taken into custody. *See* ***Austin v. State***, 52 Wis. 2d 716, 720, 190 N.W.2d 887 (1971) (jury, within its proper province, could accept testimony of witnesses and reject the defendant's testimony). The jury had before it evidence that Delong made statements about not leaving and questioned what would happen to her if she refused to leave. Delong was not too busy complying with the officers' requests to return to the door and vaguely allude to the presence of firearms in the home, a statement the jury could reasonably conclude was designed to prolong the encounter. Under the circumstances, we cannot conclude as a matter of law that Delong's eight-to-ten-minute delay in complying with the officers' evacuation order was reasonable.

¶22 Delong also observes that she did ultimately exit the home. We do not regard this fact as material. The statute does not require that the defendant remain in the home indefinitely, or wait until police breach the residence and take the defendant by force. Contrary to Delong's argument, the purpose of the statute is not nullified in this case merely because she ultimately exited the building after

a standoff. The statute was designed to deter such standoffs in the first place. *See* ***Koeppen***, 237 Wis. 2d 418, ¶¶20-21.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.