

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 17, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-0523-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES F. NEIL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Barron County:
JAMES C. EATON, Judge. *Affirmed.*

CANE, C.J. James Neil appeals a conviction for resisting arrest, contrary to § 946.41(1), STATS. Neil was charged with pointing a firearm at warden Terry Brown, and also with resisting arrest when Brown attempted to arrest Neil for pointing a firearm at him. The jury found Neil not guilty of pointing a firearm at Brown, but guilty of resisting arrest. The sole issue is whether the jury's not guilty finding on the predicate offense, pointing a firearm,

precludes a guilty finding on the resisting arrest charge. This court concludes that it does not and affirms the conviction.

The charges stem from an incident between James Neil and DNR warden Terry Brown. Brown visited Neil's residence to question him about some sand on the shore of Bear Lake where Neil's residence is located. The events that transpired at this point were disputed at trial.

Brown stated that he approached Neil's house and was invited into the house after knocking on the door and identifying himself. Brown testified that, upon entering the house, Neil pointed a gun at him and stated, "You just broke into my house, you are dead." Brown eventually convinced Neil to put the gun down on a chair, at which point Brown moved between Neil and the gun, and informed Neil that he was under arrest for pointing a firearm at him. There is no dispute that Neil resisted Brown's attempt to arrest him.

On the other hand, Neil testified that Brown entered his residence without permission and began handling the gun, which was on a chair. Neil expressed his displeasure with Brown handling the gun and called Brown a "brown-shirted son of a bitch." When Neil turned his back, he claims that Brown tackled him from behind and tried to arrest him.

It is undisputed that following their verbal exchanges a struggle ensued, with Brown eventually using pepper spray in an attempt to subdue Neil. When he was unable to restrain Neil, Brown called for backup, and Neil was arrested and taken to the Barron County Jail.

Neil does not dispute that he resisted Brown's attempt to arrest him, that Brown was doing an act in an official capacity and that he knew Brown was

acting in an official capacity. Instead he challenges only the element of resisting arrest where it is alleged that Brown was doing an act with lawful authority. Neil contends that because the jury found him not guilty of the event giving rise to the arrest, the arrest could not have been lawful, and therefore there was insufficient evidence to find him guilty of resisting arrest. Further, Neil argues that the apparent inconsistency between the verdicts results in an irrational and unacceptable result and should be overturned pursuant to § 752.35, STATS., due to a miscarriage of justice. This court is not persuaded.

Inconsistent Verdict

In *State v. Thomas*, 161 Wis.2d 616, 620-21, 468 N.W.2d 729, 730-31 (Ct. App. 1991), the jury acquitted the defendant of the armed robbery charge, but found him guilty of intimidating the alleged victim of the armed robbery. The defense argued unsuccessfully that if there was no crime of armed robbery, there could be no victim and the verdict was therefore inconsistent, requiring a reversal of the conviction. We wrote:

Thomas' acquittal on the armed robbery charge does not affect our conclusion that there was sufficient evidence to support a jury finding that Robinson was the victim of an armed robbery. Juries have always had the inherent and fundamental power to return a verdict of not guilty irrespective of the evidence. *United States v. Dougherty*, 473 F.2d 1113, 1130-1137 (D.C. Cir. 1972) (but court should not so instruct jury).

Id. at 630, 468 N.W.2d at 734-35. We also stated:

The fact that a not-guilty verdict is inconsistent with another verdict finding the defendant guilty does not require, or by itself permit, reversal of a judgment entered on the finding of guilt, *United States v. Powell*, 469 U.S. 57 (1984); *State v. Mills*, 62 Wis.2d 186, 191-193, 214

N.W.2d 456, 458-460 (1974), since there is no way of knowing whether the inconsistency was the result of leniency, mistake, or compromise, *Powell*, 469 U.S. at 65.

Id. at 631, 468 N.W.2d at 735.

It has been universally held that logical consistency in the verdict as between several counts in a criminal information is not required. *See State v. Mills*, 62 Wis.2d 186, 191, 214 N.W.2d 456, 458 (1974). "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment." *Dunn v. United States*, 284 U.S. 390, 393 (1932). The explanation for the inconsistency may be explained by leniency, compromise, or even mistake by the jury, but "verdicts cannot be upset by speculation or inquiry into such matters." *Id.* at 393-94.

Neil's argument that these verdicts are inconsistent and the conviction should therefore be overturned is unpersuasive, as inconsistent verdicts have long been a device juries have employed to administer what they determine to be just. The verdict will not be reversed based solely on an apparent inconsistency. Accordingly, Neil's argument that his conviction should be reversed due to an inconsistency in verdicts is rejected.

Sufficiency of Evidence

The next issue is whether the jury's determination that Neil did not point the firearm at warden Brown eliminates the lawful authority element that must be present for a resisting arrest conviction. "Lawful authority goes to whether the officer's actions are conducted in accordance with the law." *State v. Barrett*, 96 Wis.2d 174, 180, 291 N.W.2d 498, 501 (1980). An officer has lawful authority to make a lawful arrest when "[t]here are reasonable grounds to believe

that the person is committing or has committed a crime.” Section 968.07(1)(d), STATS. This standard is often referred to as probable cause. Thus, whether an officer is acting with lawful authority requires that an officer have “probable cause” for an arrest.

Here, the burden of establishing reasonable grounds to believe Neil was committing a crime is less than the necessary proof of “beyond a reasonable doubt” for a jury to convict. For example, even though a jury may find a person not guilty of a charged crime, that does not mean the arresting officer did not have probable cause to arrest. *See Michigan v. DeFillippo*, 433 U.S. 31, 36 (1979).

When reviewing the sufficiency of the evidence to support a conviction, this 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. *See State v. Johnson*, 184 Wis.2d 324, 346, 516 N.W.2d 463, 470 (Ct. App. 1994); *see also State v. Fettig*, 172 Wis.2d 428, 447, 493 N.W.2d 254, 262 (Ct. App. 1992). Thus, viewing the evidence in this light, and most favorably to the jury’s verdict, as this court must, the jury could reasonably find that warden Brown had probable cause to believe Neil had committed a crime and therefore was acting with lawful authority. For whatever reason, the jury found Neil not guilty of pointing a firearm, but guilty of resisting arrest. However, the reasoning behind this apparent inconsistency “cannot be upset by speculation or inquiry into such matters.” *Dunn*, 284 U.S. at 393-94. This court therefore rejects Neil’s arguments and affirms the conviction for resisting arrest.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.