COURT OF APPEALS DECISION DATED AND FILED

October 26, 2016

Diane M. Fremgen
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP2381-CR

Cir. Ct. No. 2012CF447

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL WHITE,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Walworth County: DAVID M. REDDY, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 PER CURIAM. A jury found Daniel White guilty of battery to a law enforcement officer; resisting an officer, causing a soft-tissue injury; and disorderly conduct. We affirm the judgments of conviction and the order denying White's postconviction motion for a new trial.

¶2 "Girl A" and "Girl B," ages fourteen or fifteen, were at the home of Phyllis Murray, Girl A's grandmother. Murray lives next door to White. The girls saw a cat on the sidewalk. Thinking it was a stray, they took it inside and fed it a can of tuna. A witness who knew the cat belonged to White told him the girls had taken it. White came to Murray's house shouting for his cat. He confronted Girl A on the porch, got close to her face, flailed his arms, and screamed in an angry and aggressive tone in language laced with profanity. Girl B hid inside. Both testified they thought White would strike Girl A. When White left, the girls went to a neighbor's house and called Girl A's mother and grandmother. The neighbor testified that the girls were crying, distraught, and scared. Girl A's mother called the police.

¶3 Walworth County deputy sheriffs Matthew Weber and John Czerwinski responded to the Murray residence. Weber testified that Girl A was "worked up and sad" and "began crying and sobbing" as she described the incident. He described Girl B as "upset" and "frightened." Czerwinski described both girls as "upset."

¶4 The deputies went to White's home to arrest him for disorderly conduct. They identified themselves through a stockade-type fence enclosing White's property. They ordered him to produce identification, to exit, and to "put up" his two pit bulls. White refused to exit or secure the dogs. The officers informed White he was under arrest for disorderly conduct and forced opened the locked gate. White and two "growling," "barking," "very aggressive" dogs emerged from the enclosure. White twice "sucker-punched" Czerwinski, as Czerwinski described it, and hit him in the head with a board. The dogs bit all three men. White had to be physically subdued to be handcuffed and arrested.

¶5 White filed a motion to suppress, contending the officers' entrance onto his property to arrest him was illegal, as it was without his consent, a warrant, or exigent circumstances. After an evidentiary hearing, the circuit court concluded that the arrest was legal under WIS. STAT. § 968.07 (2013-14),[1] as the officers had a reasonable basis to believe White was committing or had committed a crime. *See* § 968.07(1)(d).

¶6 After a five-day trial, the jury found White guilty. He filed a postconviction motion for a new trial.[2] He alleged that the trial court erred by: (1) prohibiting evidence that the police did not obtain a search or arrest warrant before opening the gate, and (2) excluding as hearsay not subject to any exception the testimony of White's wife, Stephanie, regarding statements White made as the officers were opening the gate. He also argued that he was entitled to a new trial in the interest of justice because the real controversy was not tried, as the jury was not instructed in regard to the officers' authority to open the gate or the privilege to use force in defense of one's property.

¶7 The trial court found that (1) the motion to suppress was properly denied because, when the officers opened White's gate, they had probable cause to arrest him for disorderly conduct in connection with the citizen complaint; (2) the subsequent offenses—battery and resisting—occurred after the officers arrived with probable cause to arrest and outside the fence; (3) the jury was properly instructed; (4) the excited-utterance exception to the hearsay rule did not apply to

[1] All references to the Wisconsin Statutes are to the 2013-14 version.

[2] In the alternative, he sought an order vacating the DNA surcharges the court had ordered. That part of his motion was successful and is not at issue on appeal.

Stephanie's testimony, and White did not argue at trial that her statement was not hearsay; and (5) White did not argue the defense-of-property privilege at trial or request such a jury instruction. The court denied the motion for a new trial and concluded that the interest of justice did not require a new trial. This appeal followed.

Deputies' Lawful Authority to Enter Property

¶8 White first asks us to grant him a new trial in the interest of justice. He contends the trial court's incomplete instructions to the jury about the officers' lawful authority to open the gate to arrest him prevented the real controversy from being fully tried. White concedes he did not object to the instruction or request a modification. "The failure to object to a proposed jury instruction constitutes waiver of any error." ***State v. Glenn***, 199 Wis. 2d 575, 589, 545 N.W.2d 230, 236 (1996). WISCONSIN STAT. § 752.35 allows this court to review otherwise waived error in the interest of justice. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 17-19, 456 N.W.2d 797 (1990).

¶9 We may order a new trial under WIS. STAT. § 752.35 if we conclude that the real controversy has not been fully tried. We exercise this power of reversal "'only in exceptional cases.'" ***State v. Armstrong***, 2005 WI 119, ¶114, 283 Wis. 2d 639, 700 N.W.2d 98 (citation omitted). We need not determine that a different outcome is likely. ***State v. Watkins***, 2002 WI 101, ¶97, 255 Wis. 2d 265, 647 N.W.2d 244. This is not the exceptional case.

¶10 One of the elements of resisting an officer is that the officer "was acting with lawful authority" when the defendant resisted. WIS JI—CRIMINAL 1765. The trial court instructed the jury as to that element as follows:

> Three, the officer was acting with lawful authority. Deputies act with lawful authority if their acts are conducted in accordance with the law. In this case it is alleged that the deputy was making a lawful arrest. An arrest is lawful when the officer has reasonable grounds to believe that the person has committed a crime. The deputy making an arrest may use only the amount of force reasonably necessary to take the person into custody. Whether force used during an arrest is reasonable depends on the individual circumstances of the case including the severity of the crime at issue, whether the person poses an immediate threat to the safety of the deputies or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Id.

¶11 White argues that, as given, the instruction was unclear as to whether the "arrest" referred to was the arrest for disorderly conduct regarding the confrontation with the girls or the one for the "skirmish" with the officers. He contends a reasonable probability exists that the jury believed it was the former and, if so, the instruction was incomplete as it did not advise the jury about the "lawful authority"—a warrant, consent, or exigent circumstances—required for the deputies to legally enter his property. As used in WIS. STAT. § 946.41(1), the resisting statute, "lawful authority … requires that police conduct be in compliance with both the federal and state Constitutions, in addition to any applicable statutes." ***State v. Ferguson***, 2009 WI 50, ¶16, 317 Wis. 2d 586, 767 N.W.2d 187.

¶12 We fail to see how the jury could have been confused. White was charged with resisting an officer, causing soft-tissue injury, a violation of WIS. STAT. § 946.41(2r), not simple resisting, a violation of § 946.41(1). Czerwinski did not suffer a soft-tissue injury until White came outside the fence and struck him. That gave rise in short order to the battery and resisting-an-officer charges. "'[P]olice may legally arrest a defendant for a new, distinct crime, even if the new

crime is in response to police misconduct and causally connected thereto.'" ***State v. Annina***, 2006 WI App 202, ¶11, 296 Wis. 2d 599, 723 N.W.2d 708 (citation omitted). The resisting charge—a "new and distinct crime" supported by probable cause—sprang from the deputies' exercise of lawful authority to take him into custody for battery to a law enforcement officer. *See* ***id.***, ¶¶11, 18.

¶13 Further, although the jury was not instructed about exigent circumstances, it was instructed on lawful authority. *See* WIS JI—CRIMINAL 1765 ("An arrest is lawful when the officer has reasonable grounds to believe that the person has committed a crime.). The jury necessarily found that there were reasonable grounds to believe White had committed a crime because it convicted him of disorderly conduct. To do so, it had to find under the instruction given that the officers acted pursuant to their lawful authority. *See* ***Ferguson***, 317 Wis. 2d 586, ¶¶41-42.

¶14 We agree with the trial court that the instruction taken as a whole properly stated the law and did not mislead the jury. A new trial is not required to accomplish the ends of justice on the resisting charge.

Evidentiary Rulings re: Warrant

¶15 The trial court granted the State's motion in limine requesting that White be prohibited from commenting on or asking any witness whether a search or arrest warrant was obtained to enter White's property or to arrest him. The court ruled that those were questions of law that already had been decided, and any relevance was substantially outweighed by the risk of unfair prejudice, confusion of the issues or misleading the jury. *See* WIS. STAT. § 904.03.

¶16 Whether to admit or exclude evidence lies within the sound discretion of the trial court. ***State v. Sveum***, 220 Wis. 2d 396, 405, 584 N.W.2d 137 (Ct. App. 1998). This court will uphold a discretionary determination if the trial court examined the relevant facts and applied a proper legal standard. ***Id.***

¶17 White argues that evidence about the lack of a warrant was relevant to whether the officers acted with lawful authority, such that the ruling precluding it impaired his constitutional right to present a defense regarding the "lawful authority" element of the resisting charge. *See* ***State v. St. George***, 2002 WI 50, ¶49, 252 Wis. 2d 499, 643 N.W.2d 777. Whether his right to present a defense was abridged is a question of constitutional fact for our de novo review. *See* ***State v. Stutesman***, 221 Wis. 2d 178, 182, 585 N.W.2d 181 (Ct. App. 1998).

¶18 We reject his argument. ***Annina*** teaches that, regardless of the validity of the grounds for the entry, the deputies did not lose their authority to arrest White for new, distinct crimes. *See* ***Annina***, 296 Wis. 2d 599, ¶19.

¶19 In ***Annina***, a police officer responded to a citizen complaint about cars parked in front of the Annina residence. ***Id***, ¶2. On seeing the officer, four juveniles standing in the garage ran into the house. ***Id.*** When the officer advised Annina of the parking complaint through the partially open front door, Annina seemed "defensive" and "suspicious." ***Id.*** After another officer arrested a minor who had admitted drinking alcohol at the Annina residence, the two officers went back to the residence to confront Annina with this information. ***Id.***, ¶3. She began screaming, slammed the door, and refused to allow the officers to enter. ***Id.***

¶20 The officers returned with a search warrant. ***Id.***, ¶4. An officer shouted to Annina that they had a warrant to search the house. ***Id.*** Annina opened the front door, then tried to shut it on the entering officers. ***Id.*** One officer

eventually was able to force the door open enough to enter and handcuff one of Annina's wrists. ***Id.*** Annina screamed and attempted to pull her cuffed arm away, becoming "uncontrollable" as the officers began their search. ***Id.***, ¶5. Advised that they were going to take her to the station for processing, Annina went to her knees, kicked at the officers when they tried to pick her up, and had to be carried from the residence. ***Id.***, ¶6. She was charged with disorderly conduct and resisting an officer. ***Id.***

¶21 The search warrant later was determined to be invalid. ***Id.***, ¶7. The circuit court refused to dismiss the resisting and disorderly conduct charges, however, as they were not of the type where the evidence would have to be suppressed because of the invalidity of the warrant. ***Id.*** Rather, they were "the outgrowth of the confrontation" between Annina and the officers at the door. ***Id.***

¶22 On appeal, Annina argued that because the search warrant later was invalidated, the officers were not acting with lawful authority in entering her home. ***Id.***, ¶10. The State argued that Annina's arrest for resisting stemmed from her disorderly conduct and therefore was brought about with lawful authority. ***Id.***, ¶11. Observing that WIS. STAT. § 946.41(1) requires an officer to have "lawful authority" before a citizen can be charged with resisting an officer, this court concluded that Annina's disorderly conduct was a "new and distinct crime giving the officers the lawful authority to arrest" her, notwithstanding the invalid warrant. ***Id.***, ¶¶18-19.

¶23 Just as in ***Annina***, the battery and resisting that occurred outside of White's gate were the outgrowth of the initial confrontation and were new, distinct crimes giving the deputies lawful authority to arrest him. If there is probable cause for an arrest of a new violation, an initially illegal home entry does not

invalidate that arrest and subsequent prosecution. *See* ***Ferguson***, 317 Wis. 2d 586, ¶22.

White's Statements when Deputies Opened Gate

¶24 Stephanie White testified about her husband's reactions and statements ("I have rights as a citizen"; "what are you doing, you can't do that, trying to come into the property") in response to the officers' demands and efforts to open the gate. The State objected that Stephanie's testimony was hearsay not subject to the excited-utterance exception. Defense counsel argued only that the statements were admissible as excited utterances. The trial court sustained the State's objections.

¶25 Postconviction, White argued that excluding this testimony was error because it was not hearsay and, even if it was, the excited-utterance and then-existing-state-of-mind exceptions allowed its admission. The court ruled that White forfeited the not-hearsay and state-of-mind contentions by not raising them at trial. It then reaffirmed its ruling that the excited-utterance exception did not apply, agreeing with the State that White's "stress" and level of "irritat[ion] at the law enforcement's presence" were not of a degree to guarantee the trustworthiness necessary for the exception to apply.

¶26 On appeal, White renews his postconviction arguments about the exclusion of some of Stephanie's testimony. We agree that White forfeited his right to review of the unpreserved claims. Absent forfeiture, however, we conclude the statements are either hearsay to which the excited-utterance exception does not apply or irrelevant and cumulative evidence and that any error in excluding the statements was harmless.

¶27 A statement may be an excited utterance if made about a startling event or condition while the declarant is under the stress of the excitement produced by the event or condition. WIS. STAT. § 908.03(2); ***State v. Martinez***, 150 Wis. 2d 62, 72, 440 N.W.2d 783 (1989). Ordinarily, we review a trial court's evidentiary rulings for an erroneous exercise of discretion, but whether a statement is admissible under a hearsay exception is a question of law that we review de novo. ***State v. Joyner***, 2002 WI App 250, ¶16, 258 Wis. 2d 249, 653 N.W.2d 290.

¶28 The spontaneity associated with the stress of an event gives excited utterances their trustworthiness and insures that a statement is not the result of the mind interposing itself between the statement and the event. *See* ***Martinez***, 150 Wis. 2d at 73. The time that passed before White made the statements was sufficient for him to reflect on the consequences of his rant at the girls, the act for which the deputies arrived at his house.

¶29 White also argues that precluding his statements was plain error because they were not hearsay, as they were not offered to prove the truth of the matters asserted. *See* WIS. STAT. § 908.01(3). They were offered to prove, he contends, only that he *believed* that, as he "ha[d] rights as a citizen," the deputies lacked the authority to open the gate or to enter his property. Similarly, he contends that, even if we conclude the statements are hearsay, they go to show his then existing state of mind. *See* WIS. STAT. § 908.03(3).

¶30 Accepting his state-of-mind contention for argument's sake, we nonetheless conclude the testimony was properly excluded. A hearsay statement that falls within an exception to the hearsay rule is not necessarily admissible. *See* ***State v. Jacobs***, 2012 WI App 104, ¶27, 344 Wis. 2d 142, 822 N.W.2d 885. It is

not admissible if it is not relevant or is needlessly cumulative. *See* WIS. STAT. §§ 904.02, 904.03.

¶31 White's state of mind that *he* thought the officers had no authority to enter his property is irrelevant; they *did* have the authority by virtue of probable cause in the disorderly cause incident. Evidence that he told the deputies to keep out because he had rights would have been cumulative to other evidence that he did not want the officers to come into his gate. The jury heard testimony about his noncompliance with orders to exit and to secure the dogs, White saying "you can't come in" when Czerwinski began to unfasten the gate, and the "KEEP OUT," "NO TRESPASSING," and "DOG ON PREMISES" signs posted on the fence. While the court might have allowed Stephanie's testimony in, excluding it was harmless error, if error at all, because admitting the statements would not have affected the jury's verdict. *See* ***State v. Weed***, 2003 WI 85, ¶29, 263 Wis. 2d 434, 666 N.W.2d 485.

Failure to Give Defense-of-Property Privilege Instruction

¶32 Finally, White contends this court should grant him a new trial on the battery charge in the interest of justice under WIS. STAT. § 752.35. He argues that the real controversy was not tried on the battery charge because the jury was not instructed about the privilege to use force in defense of one's property. *See* WIS. STAT. § 939.49. He asserts that had he been allowed to introduce evidence supporting his recurring refrain that the officers entered the premises unlawfully, he could have asserted an affirmative defense to the battery-to-an-officer charge.

¶33 White's claim fails. First, he did not proceed on a defense-of-property theory at trial, he presented no evidence in support of that theory, and he did not request that instruction. A defendant is not entitled to have the jury

consider a theory of self-defense when he or she puts forth no evidence to support it. ***State v. Nollie***, 2002 WI 4, ¶20, 249 Wis. 2d 538, 638 N.W.2d 280.

¶34 Further, that strategy would have been for naught. To justify criminal acts on the basis of defense of property, the person's concerns must be "imminent." *See* ***State v. Dundon***, 226 Wis. 2d 654, 668, 594 N.W.2d 780 (1999). White was not defending his property when he attacked Czerwinski, punched him, and hit him with the board. He and the deputies were outside of the fence.

¶35 This court will not exercise its discretionary authority to order a new trial on grounds of the real controversy not being fully tried and a miscarriage of justice so that a defendant can try out a different trial strategy.

By the Court.—Judgments and order affirmed.

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