COURT OF APPEALS
DECISION
DATED AND FILED

February 23, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2271-CR **Cir. Ct. No. 2003CF56**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY L. DEMMER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County: ROBERT P. VAN DE HEY, Judge. *Affirmed.*

Before Lundsten, P.J., Deininger and Higginbotham, JJ.

¶1 LUNDSTEN, P.J. Timothy Demmer was tried before a jury and convicted of felony escape. He makes three arguments directed at the jury instructions defining felony escape and the sufficiency of the evidence to support his conviction. First, Demmer argues the evidence was insufficient to support a

jury finding that he was "in custody" for purposes of the in-custody element of the escape statute. As we explain below, this challenge involves both a sufficiency-of-the-evidence argument and an argument regarding the meaning of the in-custody element. Second, Demmer argues the evidence was insufficient to support a jury finding that police had reasonable grounds to arrest him for a crime. This argument goes to the "for a crime" component of the element of felony escape requiring proof that the escape was from custody pursuant to an arrest "for a crime." Finally, Demmer argues that the jury instruction was deficient because it makes it impossible to determine whether the jury found, beyond a reasonable doubt, that police had reasonable grounds to arrest Demmer for a crime as opposed to a forfeiture. We reject all of Demmer's arguments and affirm the trial court.

Background

¶2 Officer Jeffrey Haas was on patrol in the City of Platteville when he spotted Demmer leaving a tavern. The officer thought Demmer was under the legal drinking age and approached him while he stood in a recessed doorway of another tavern. Officer Haas asked Demmer if he had identification and Demmer said no. Haas asked Demmer if he was twenty-one years old and Demmer said he was.[1] Officer Haas asked Demmer if he was "sure" and Demmer responded by maneuvering to one side of the officer in an attempt to flee. A prolonged struggle ensued between Officer Haas and Demmer.

[1] The transcript indicates that Officer Haas testified that he asked Demmer if he was "23" years old. Demmer, on the other hand, testified that Haas asked him if he was "21." Both parties assume that the "23" in the officer's testimony is a typographical error. We proceed under the same assumption.

¶3 During the struggle, Officer Haas grabbed Demmer's arm, but was unable to hold on because Demmer flailed his arms. Haas also grabbed Demmer's sweatshirt, but Demmer was able to "spin out of his sweatshirt." The struggle moved from the recessed doorway to the middle of the street, and later to a sidewalk, with the officer continuously attempting to subdue Demmer by holding on to his clothing and person. Demmer resisted continuously and, at one point, hit Officer Haas in the face with a "clenched" hand. At one point, Demmer was temporarily on the ground and Officer Haas ordered him to "stay down on the ground," but Demmer stood up and continued to resist. The struggle ended when Demmer tried, but failed, to strike Officer Haas and Haas then tried but failed to strike Demmer. When the officer made this attempt to strike Demmer, Demmer was free of the officer's grasp and ran away.

¶4 Officer Haas gave chase while calling for back-up. Haas lost sight of Demmer, but spotted him a short time later running through an alley. A civilian chased Demmer, caught him, and Demmer was then successfully subdued by Officer Haas and another responding officer.

¶5 Demmer was charged with obstructing an officer, battery to a law enforcement officer, felony escape, and disorderly conduct. Demmer's jury acquitted him of battery and disorderly conduct. He was found guilty of obstructing and felony escape. Demmer appeals only the judgment finding him guilty of felony escape.

Discussion

The In-Custody Element Of Escape

¶6 Demmer was tried on the charge of felony escape from custody pursuant to a legal arrest for a crime, under WIS. STAT. § 946.42(3)(a) (2003-04).[2] This crime has four elements:

1) The defendant was in custody.

2) The custody resulted from a legal arrest for a crime.

3) The defendant escaped from custody.

4) The escape from custody was intentional.

See WIS JI—CRIMINAL 1773.

¶7 Demmer argues that the trial evidence was insufficient to support a jury finding on the first element, the in-custody element. He contends the evidence showing that Officer Haas repeatedly grabbed and struggled with him in an unsuccessful attempt to subdue him is insufficient to prove custody. Demmer argues that he was in custody only later, after he ran away and was successfully subdued by the civilian and two officers.

¶8 Although Demmer characterizes his argument as a sufficiency-of-the-evidence argument, we agree with the State that part of Demmer's attack is directed at the part of the jury instructions defining the in-custody element of escape. Demmer's jury was instructed on the in-custody element as follows:

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

"Custody means that a person's freedom of movement is restricted either by the use of physical force by a peace officer or by the assertion of authority by a peace officer to which the person has submitted." This definition comes from the pattern jury instruction for "Escape From the Custody of a Peace Officer After Legal Arrest for a Crime," WIS JI—CRIMINAL 1773. Demmer effectively argues that this instruction contains an incomplete or erroneous definition of custody. Relying on ***State v. Swanson***, 164 Wis. 2d 437, 446, 475 N.W.2d 148 (1991), Demmer argues that whether a defendant is in "custody" for purposes of the in-custody element of escape depends on whether a reasonable person in the defendant's position would have considered himself to be in custody.

¶9 If Demmer thought the jury instruction was incomplete or in error, he was obligated to object at a time when the error could be corrected. WIS. STAT. § 805.13(3). He did not object, and this failure constitutes waiver. ***Id.*** The general rule is that we lack authority to review unobjected-to instructional error. *See* ***State v. Schumacher***, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988); ***State v. Booth***, 147 Wis. 2d 208, 211, 432 N.W.2d 681 (Ct. App. 1988). Demmer presents no reason why we should not apply the ***Schumacher*** waiver rule here. Perhaps more to the point, Demmer provides no reason why we should not measure the evidence against the unobjected-to jury instructions.[3]

[3] While we do not address the merits of Demmer's attack on the definition of custody contained in his jury instructions, we observe that Demmer's argument mistakenly looks to arrest law when discussing the meaning of the in-custody element of escape. For example, Demmer relies on ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), *modified on other grounds by* ***State v. Sykes***, 2005 WI 48, ¶27, 279 Wis. 2d 742, 695 N.W.2d 277. ***Swanson*** discusses the meaning of arrest, but does not address the meaning of the in-custody element of escape. Demmer's misplaced reliance on ***Swanson*** is likely caused, in part, by some unclear language in that decision. In ***Swanson***, the supreme court explained that Swanson's arrest was illegal because it was based on marijuana found during an illegal search. ***Swanson***, 164 Wis. 2d at 454-55. The court summed up in its last paragraph:

(continued)

¶10 Once Demmer's legal argument attacking the jury instructions is stripped away, what remains is the question whether the evidence is sufficient to support a finding that Demmer's "freedom of movement [was] restricted either by the use of physical force by a peace officer or by the assertion of authority by a peace officer to which [Demmer] has submitted." *See* WIS JI—CRIMINAL 1773.

¶11 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." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). If the evidence supports contrary inferences, the trier of fact is free to choose among them, "within the bounds of reason," and we must accept and follow inferences that support the verdict unless they are based on evidence that is incredible as a matter of law. ***Id.*** at 506-07.

¶12 The trial evidence here does not support a finding that, prior to his escape, Demmer submitted to Officer Haas's show of authority. Thus, the pertinent question is whether the evidence is sufficient to support a finding that

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> It follows then, that the subsequent arrest of Swanson for possession of a controlled substance was invalid because the controlled substance was the fruit of an illegal search. As Swanson was not "in custody" at the time he eluded police, he cannot be considered as to have escaped from custody under sec. 946.42(3)(a), Stats.

Id. at 455. In isolation, the second sentence above could be read as a conclusion that Swanson was not "in custody" at all for purposes of the escape statute, leaving the impression that the supreme court had addressed the in-custody element of escape. However, the court's preceding discussion makes clear that Swanson was in custody, but his escape charge could not stand because he was not in custody *pursuant to a legal arrest*. ***Id.*** at 454-55.

Demmer's freedom of movement was restricted by the officer's use of physical force. Demmer does not argue that the evidence was insufficient to show that Officer Haas used force to restrict Demmer's movement. Indeed, Demmer's own appellate brief recounts evidence showing that the officer restricted Demmer's movement and that Demmer broke free of the officer and ran. This evidence is sufficient to support a finding that Demmer was in custody for purposes of the in-custody element of escape before he broke free and ran.

Whether The Evidence Was Sufficient To Prove Police Had Reasonable Grounds To Arrest Demmer For A Crime

¶13 It is a felony to escape from custody pursuant to an arrest "for a crime." WIS. STAT. § 946.42(3)(a). If, instead, a person escapes from custody pursuant to an arrest for a forfeiture offense, the escape is a misdemeanor. WIS. STAT. § 946.42(2)(a). Demmer argues that, even if he escaped from custody, he was not in custody pursuant to an arrest for a crime because Officer Haas lacked reasonable grounds to arrest Demmer for a *crime* prior to his escape. At best, argues Demmer, prior to his escape Officer Haas had reasonable grounds to believe only that Demmer violated underage drinking ordinances. If this is true, then the evidence was insufficient to support his conviction for *felony* escape.

¶14 Demmer's jury was instructed on the two crimes the prosecution alleged supported his arrest, namely, obstructing an officer and battery. Thus, we must resolve whether the evidence, viewed in a light most favorable to the verdict,

is sufficient to support a finding that the officer had reasonable grounds to arrest Demmer for obstruction or battery.[4] *See* ***Poellinger***, 153 Wis. 2d at 501.

¶15 Demmer argues that Officer Haas lacked reasonable grounds to arrest him for obstructing prior to his escape because he obstructed and escaped simultaneously. Demmer acknowledges he "struggled for a bit" with the officer before breaking free, but asserts the officer first had reasonable grounds to arrest him for obstructing after he broke free and ran. Demmer argues that it was his act of escaping that constituted obstruction and, therefore, the officer could not have had reasonable grounds to believe Demmer had engaged in obstructing before he escaped. We disagree.

¶16 The jury was instructed, without objection, that obstruction means "conduct of the defendant [that] prevents or makes more difficult the performance of the officer's duties." *See* WIS JI—CRIMINAL 1766. We are not faced with evidence showing that Demmer broke free in some sort of single movement, and we need not concern ourselves with whether such simultaneity would make a difference. Here, Demmer struggled with the officer before he broke free. Obviously, Demmer's physical resistance before he broke free is conduct that "prevents or makes more difficult the performance of the officer's duties."

¶17 We turn to Demmer's battery argument. Demmer admits he struck the officer's face prior to his escape, but he asserts his actions were "clearly

[4] Demmer does not make a jury unanimity argument. We do not mean to suggest that there is a viable jury unanimity argument to be made, only that we do not address the topic because neither party raises the issue. We also note that Demmer does not argue that the evidence was insufficient to support a finding that he was "arrested." Accordingly, we do not address that question.

defensive, and done in an effort to prevent the officer from seizing him." Demmer argues that he did not commit a battery because it was "obvious" he did not intend to hurt the officer, but was instead acting in self-defense. This sort of argument, however, is properly directed to a fact finder, not an appellate court. The argument fails to address whether the evidence, viewed in a light most favorable to the escape verdict, supports a finding that the officer had reasonable grounds to believe Demmer had committed a battery. Under this standard, the evidence was plainly sufficient. Officer Haas testified that Demmer "turned towards me as I had a hold of his T-shirt and he hit me" with a clenched fist.

¶18 Demmer also seems to argue that the jury could not have believed there were reasonable grounds to believe he committed a battery against Officer Haas because the same conduct was the basis for the battery charge against Demmer and the jury acquitted him of that charge. Demmer asserts it would have been obvious to the jury that he did not intend to hurt the officer. He argues that "[t]he State failed to prove battery beyond a reasonable doubt *because* there was not even probable cause to arrest for battery" (emphasis added). Demmer's argument suffers from at least one fatal flaw: there is no logical inconsistency between an acquittal on Demmer's battery charge and a finding that Officer Haas had reasonable grounds to believe that Demmer had committed a battery.

¶19 The jury was instructed that, in order to convict Demmer of felony escape, there needed to be a legal arrest and that "[a]n arrest for a crime is legal when the officer making the arrest has reasonable grounds to believe that the person has committed or is committing a crime." *See* WIS JI—CRIMINAL 1773. Thus, with respect to the battery, the jury could have found there were reasonable grounds to believe Demmer committed a battery, but not found, beyond a reasonable doubt, that a battery occurred. For example, the jurors might have

reasoned that, even though the officer had reasonable grounds to believe Demmer intended harm, the prosecutor did not prove beyond a reasonable doubt that Demmer actually intended to harm the officer.[5]

¶20 In sum, Demmer has failed to persuade us that the evidence is insufficient to support the jury's finding that Officer Haas had reasonable grounds to arrest Demmer for a crime.

Demmer's Challenge To The For-A-Crime Portion Of The Escape Jury Instruction

¶21 Demmer's last argument is directed at the "for a crime" component of the element of escape requiring proof that Demmer's custody resulted from a legal arrest for a crime. He challenges the jury instructions on this topic. Demmer argues that the jury instructions should have more clearly explained that if, at the time of Demmer's escape, there were not reasonable grounds to believe he committed a crime, but instead only reasonable grounds to believe he committed a forfeiture offense, then Demmer was not guilty of felony escape. According to Demmer, if the instruction had more thoroughly explained *misdemeanor* escape, the jury might not have found him guilty of *felony* escape.[6]

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[5] Demmer's jury was instructed that the sixth element of battery to a law enforcement officer required a finding that Demmer "intended to cause bodily harm to" Officer Haas. *See* WIS JI—CRIMINAL 1230.

[6] The State's brief explains that the trial court correctly ruled that Demmer was not entitled to a lesser-included offense instruction on misdemeanor escape under WIS. STAT. § 946.42(2)(a) because that crime is not a lesser-included offense of felony escape under § 946.42(3)(a). We do not address the topic because we find no place in Demmer's brief where he argues that he was entitled to an instruction on misdemeanor escape. For that matter, at least in this section of his brief, Demmer does not argue that the jury instructions, so far as they went, wrongly stated the law. We do not fault the State for its thorough discussion of lesser-included law and other topics—topics we do not address—because this part of Demmer's brief touches on (continued)

¶22 At bottom, Demmer merely argues that the jury instructions could have been clearer about a crime that was *not* charged, misdemeanor escape. But once again, Demmer's trial counsel did not object to the instructions given or request additional language.[7] The failure to object to or request a jury instruction constitutes waiver. *See* ***State v. Olexa***, 136 Wis. 2d 475, 483-84, 402 N.W.2d 733 (Ct. App. 1987). The general rule is that this court lacks the authority to review unobjected-to instructional error. *See* ***Schumacher***, 144 Wis. 2d at 409. We have no power to determine questions related to jury instructions and proposed verdicts to which Demmer did not object. *See* ***id.***

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

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several issues. For example, Demmer begins his argument by quoting from ***Apprendi v. New Jersey***, 530 U.S. 466 (2000), and asserting that the trial court improperly removed a factual issue from the jury, but nothing that follows supports this lead-in. Similarly, Demmer points to language in ***State v. Carrington***, 134 Wis. 2d 260, 397 N.W.2d 484 (1986), addressing a particular "lesser-included" issue, but Demmer does not explain why this law is pertinent. It is refreshing that toward the end of this part of his brief, Demmer candidly states that his "argument is not meant to be confusing, but it probably is." Obviously, we agree. Suffice it to say, we have carefully reviewed this section of Demmer's brief and, apart from the argument we address in the text above, we find no developed argument meriting a response.

[7] At the instruction conference, Demmer's counsel argued that Demmer was entitled to a misdemeanor escape instruction because the crime is a lesser-included offense of felony escape. The court denied that request, and Demmer does not challenge that ruling. Demmer's counsel made no other objections and requested no additional language relating to this part of the jury instructions.