COURT OF APPEALS
DECISION
DATED AND FILED

December 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP909-CR **Cir. Ct. No. 2012CM498**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW K. VALIQUETTE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: JULIE GENOVESE, Judge. *Affirmed.*

¶1 SHERMAN, J.[1] Andrew Valiquette appeals a judgment of conviction for resisting an officer, contrary to WIS. STAT. § 946.41(1), and an order denying his motion for postconviction relief. I affirm.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

BACKGROUND

¶2 In March 2012, Valiquette was charged with one count of resisting an officer, in violation of WIS. STAT. § 946.41(1). On February 28, 2012, Charles Weiss, an officer with the Madison Police Department, conducted a traffic stop of a vehicle, of which Valiquette's father was a passenger, in the parking lot of Valiquette's business.

¶3 Weiss testified at trial that during the stop, he activated his emergency lights and that when the occupants of the vehicle began to exit the vehicle, the situation escalated. Weiss testified that he drew his firearm and requested backup.

¶4 Rene Gonzalez, also an officer with the Madison Police Department, testified that he arrived at the scene in response to an "urgent request" for backup by Weiss. Officer Gonzalez testified that as he approached the scene, he observed Weiss telling Valiquette to back away. Officer Gonzalez testified that he instructed Valiquette "to get back and keep his hands out of his pockets." Officer Gonzalez testified that although Valiquette removed his hands from his pockets, he "immediately" returned them to his pockets and failed to back up. Officer Gonzalez testified that he made several more requests for Valiquette to move back and remove his hands from his pockets and that when Valiquette failed to reply with those requests, he placed his hands on Valiquette's arm and advised Valiquette that he would need to pat him down for weapons. Officer Gonzalez testified that Valiquette pulled his arm away, and that he then brought Valiquette down to the ground where Valiquette continued to struggle. Officer Gonzalez further testified that he handcuffed Valiquette and that during the process, Valiquette resisted.

¶5 Valiquette testified that he was inside his business when he was alerted to a situation outside between his father and the police. Valiquette testified that he exited the building and observed Weiss aiming his gun at Valiquette's father. Valiquette testified that after he exited the building, Officer Gonzalez arrived on the scene and made one request for him to remove his hands from his pockets, which he did. Valiquette testified that Officer Gonzalez then grabbed his arm and advised him that he was under arrest. Valiquette testified that he questioned the arrest and was advised by Officer Gonzalez that he was under arrest for not listening. Valiquette testified that Officer Gonzalez then brought him to the ground, but that he did not resist while being placed under arrest.

¶6 Following the presentation of evidence, the jury was instructed, without objection by Valiquette's trial counsel, on the elements of the crime and the State's burden. The jury ultimately returned a guilty verdict.

¶7 Valiquette moved the circuit court for postconviction relief, which the court denied following a ***Machner***[2] hearing. Valiquette appeals.

DISCUSSION

¶8 Valiquette contends: (1) the evidence was insufficient to support his conviction; (2) an instruction provided to the jury misstated the law and misled the jury; (3) he received ineffective assistance of counsel at trial; and (4) the real controversy was not tried. I address each of these arguments in turn below.

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

A. Sufficiency of the Evidence

¶9 Valiquette argues the State failed to present sufficient evidence at trial to support his conviction.

¶10 When this court reviews a challenge to the sufficiency of the evidence, it employs a highly deferential standard of review. *See* ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659. This court will not overturn a verdict if there is any credible evidence, under any reasonable view, that leads to an inference supporting the verdict, and this court considers the evidence in the light most favorable to the verdict. ***Id.***, ¶¶38-39. It is the trier of fact, not the appellate court, who has the opportunity to hear and observe testimony. Thus, the trier of fact, in this case the jury, and not this court, is charged with resolving conflicts in testimony and weighing credibility. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990).

¶11 A defendant is guilty of resisting an officer if: (1) the defendant resisted an officer; (2) the officer was acting in his or her official capacity; (3) the officer was acting with lawful authority; and (4) the defendant knew the officer was acting in his or her official capacity and with lawful authority. *See* WIS. STAT. § 946.41(1).

¶12 Valiquette argues the State did not prove beyond a reasonable doubt that he knew Officer Gonzalez was acting with lawful authority. I disagree.

¶13 In ***State v. Lossman***, 118 Wis. 2d 526, 544-45, 348 N.W.2d 159 (1984), the supreme court held that "evidence that [an] officer was in full uniform, driving a marked patrol car, which still had its headlights on and red flashing lights, and that the officer told the defendant a traffic stop was in progress" was

sufficient for a reasonable jury to determine that the defendant believed the officer was acting under lawful authority. In the present case, testimony at trial established that both Officers Weiss and Gonzalez were in uniform, a marked patrol car was present with its emergency lights flashing, and Valiquette observed an exchange between Officer Weiss and the passengers of a vehicle that was pulled over in the parking lot of his business. Under these facts, a jury could reasonably have determined beyond a reasonable doubt that Valiquette believed that Officer Gonzalez was acting with legal authority.

¶14 Valiquette also argues that the State failed to prove beyond a reasonable doubt that he resisted Officer Gonzalez. However, there is credible evidence to support a finding that Valiquette resisted. Officer Gonzalez testified that he asked Valiquette more than once to back up and remove his hands from his pockets, but that Valiquette failed to do so. Officer Gonzalez testified that when he placed his hand on Valiquette's arm and advised Valiquette that he would need to pat him down for weapons, Valiquette pulled his arm away. Officer Gonzalez also testified that when he attempted to place handcuffs on Valiquette, Valiquette resisted his attempts to do so.

¶15 Because there is credible evidence to support the jury's finding that Valiquette knew Officer Gonzalez was acting with lawful authority and that Valiquette resisted Officer Gonzalez, I reject Valiquette's challenge to the sufficiency of the evidence.

B. Jury Instruction

¶16 Valiquette contends the jury was provided an instruction on "lawful authority," which misstated the law and mislead the jury.

¶17 An error in a jury instruction is forfeited when counsel does not raise an objection to the instruction at trial. ***Best Price Plumbing, Inc. v. Erie Ins. Exch.***, 2012 WI 44, ¶37, 340 Wis. 2d 307, 814 N.W.2d 419. Valiquette's trial counsel did not object at trial to the instruction on lawful authority and thus any error to the instruction has been forfeited.

C. Effective Assistance of Counsel

¶18 Valiquette contends that he received ineffective assistance of counsel at trial because counsel did not challenge whether Officer Gonzalez was acting with lawful authority when Officer Gonzalez searched him.

¶19 To prevail on a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must identify specific acts or omissions of his or her attorney that fall "outside the wide range of professionally competent assistance." ***Id.*** at 690. To show prejudice, the defendant must demonstrate that the result of the proceeding is unreliable. ***Id.*** at 687. If the defendant fails to show either prong, the defendant's ineffective assistance of counsel claim fails. ***Id.*** at 697. This court begins with the presumption that counsel has rendered adequate assistance. ***Id.*** at 689.

¶20 Whether counsel was ineffective presents a mixed question of fact and law. ***State v. Kimbrough***, 2001 WI App 138, ¶27, 246 Wis. 2d 648, 630 N.W.2d 752. This court "will not reverse the [circuit] court's factual findings unless they are clearly erroneous," but will review independently the issues of deficiency and prejudice. ***Id.***

¶21 At the evidentiary hearing, counsel testified that Valiquette maintained that he did not resist and therefore her focus at trial was on the issue of his resistance, and not the lawfulness of the arrest. Counsel further testified as to why she did not pursue a "lawful authority" defense:

> I was careful [arguing about lawful authority] because this is a difficult case in which the initial officer who arrived at the scene I believe overstepped his boundaries but he's not the officer that dealt with my client. The officers that dealt with my client had very limited information, they responded to a call quickly, arrived on the scene, didn't know much and approached my client, and I was focused on … did [Valiquette] resist them in what they were investigating at that point, and I wanted to be very careful to keep the jury's focus on that, while also showing that the entire scene was a bit ludicrous and blown out of proportion as to what really happened that night.

¶22 Valiquette argues that trial counsel's testimony indicates that she chose not to pursue a defense on the issue of lawful authority based on the "flawed legal premise" that an officer who has limited information is "justified [with] greater intrusiveness." Valiquette misconstrues trial counsel's testimony.

¶23 Trial counsel's testimony does not, as Valiquette suggests, indicate that she chose not to pursue a lawful authority defense based upon a misinterpretation of the applicable law. Instead, counsel's testimony indicates that she made a strategic decision to focus on the issue of whether Valiquette resisted.

¶24 Appellate courts are "'highly deferential' to counsel's strategic decisions and make 'every effort … to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'' ***State v. Domke***, 2011 WI 95, ¶36, 337 Wis. 2d 268, 805 N.W.2d 364. An officer has lawful authority to

search an individual if the officer has "a reasonable suspicion that the person is dangerous and may have immediate access to a weapon." ***State v. Johnson***, 2007 WI 32, ¶23, 299 Wis. 2d 675, 729 N.W.2d 182. In deciding whether he or she has reasonable suspicion to conduct a search, an officer is permitted to draw from the facts in light of his or her experience, and the question is resolved in light of the totality of the circumstances. ***State v. Alexander***, 2008 WI App 9, ¶8, 307 Wis. 2d 323, 744 N.W.2d 909.

¶25 Under these circumstances, I cannot say that counsel's decision to focus on whether Valiquette resisted, rather than direct attention toward the issue of whether Officer Gonzalez acted with lawful authority when he attempted to frisk Valiquette, was "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. Because I conclude that counsel's performance was not deficient, I need not and do not address the issue of whether counsel's performance was prejudicial. *See* ***id.*** at 697.

D. Real Controversy

¶26 Valiquette argues that he is entitled to a new trial because the real controversy was not fully tried.

¶27 This court has authority under WIS. STAT. 752.35 to grant, in the interest of justice, a discretionary reversal of a judgment of conviction if the real controversy was not tried. ***State v. Hubanks***, 173 Wis. 2d 1, 28-29, 496 N.W.2d 96 (Ct. App. 1992). To establish that the real controversy was not fully tried, a party must show "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoted source omitted).

Appellate courts exercise this power of reversal only in exceptional cases. ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶28 Valiquette argues that the real controversy was not tried because the jury did not "have a meaningful opportunity to rule on the reasonableness of police conduct … [and Valiquette's] response to [Officer Gonzalez]."

¶29 The State argues that Valiquette misidentifies the real controversy in this case, which the State asserts was not the reasonableness of Officer Gonzalez's and Valiquette's conduct on the night in question, but instead whether Officer Gonzalez was acting in his official capacity and with lawful authority, whether Valiquette knew Officer Gonzalez was acting in his official capacity and with lawful authority, and whether Valiquette resisted. Valiquette responds that the reasonableness of his conduct and the conduct of Officer Gonzalez was central to the issues of whether Officer Gonzalez acted with lawful authority and whether Valiquette had a defense for any resistance.

¶30 Valiquette does not argue that the jury was precluded from considering any important information bearing on those issues specifically, or his guilt or innocence as a general matter. Rather, he maintains that the jury was not given sufficient opportunity to weigh the reasonableness of his and Officer Gonzalez's actions. However, the jury heard both Valiquette's and Officer Gonzalez's testimony regarding what transpired on the night in question. Valiquette does not point to any particular ruling by the court that precluded the jury from considering his point of view. Thus, I am simply not persuaded that this case is one of the exceptional situations where this court should grant a new trial in the interest of justice. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990).

By the Court.—Judgment and order affirmed.

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