COURT OF APPEALS DECISION DATED AND FILED

April 14, 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. 2014AP2701-CR

Cir. Ct. No. 2012CF93

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT JOSEPH STIETZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Lafayette County: JAMES R. BEER, Judge. *Affirmed*.

Before Kloppenburg, P.J., Higginbotham, and Blanchard, JJ.

¶1 PER CURIAM. Robert Stietz appeals a judgment, entered upon a jury's verdict, convicting him of resisting a law enforcement officer and intentionally pointing a firearm at an officer. Stietz raises several challenges to his conviction. We reject his arguments and affirm the judgment.

BACKGROUND

¶2 The State charged Stietz with first-degree reckless endangerment; negligent handling of a weapon; two counts of resisting a law enforcement officer while threatening to use a dangerous weapon; and two counts of intentionally pointing a firearm at a law enforcement officer. The charges arose from a confrontation between Stietz and two Wisconsin Department of Natural Resources conservation wardens, Joseph Frost and Nick Webster. Stietz's pretrial motion to dismiss the charges based on his rights under the Second Amendment to the United States Constitution was denied after a hearing.

¶3 The matter proceeded to a jury trial. Wardens Frost and Webster testified that they were on duty on the last day of the deer hunting season in 2012. At approximately 4:30 p.m., the wardens were driving in Lamont Township in Lafayette County when they observed a vehicle parked along a highway fence line. Although the wardens were uncertain whether the vehicle was abandoned or whether it was a hunter's vehicle, Frost suspected it was a deer hunter's vehicle, noting that the location was "typically" where hunters parked during deer season.

¶4 The wardens continued driving on the road along the perimeter of the land where the vehicle was parked. When they saw no evidence that anybody was on the land at that time, the wardens returned to the parked vehicle. Deer hunting season ended at 4:45 p.m. that day, and at approximately 4:58 p.m., Webster ran the vehicle's license plate and discovered that Stietz was a registered owner. Frost looked into the vehicle for evidence of hunting, and noticed an empty long-gun case on the front seat. In addition to the gun case, Frost observed other "items people would use when they are hunting," including a camouflaged

portable tree seat and scent-killer spray. Because it was now after deer hunting hours had ended, the wardens headed onto the land to "try to find hunters."

¶5 Both wardens were wearing their issued uniforms: a "blaze orange" jacket; a DNR patch on the shoulder of each arm of the jacket; a DNR badge along either the middle zipper of the jacket or the left chest; and a "blaze orange" hat with a DNR patch. The wardens walked along a fence and when they came upon an open gate, they entered and walked down a path until they heard some noise and observed a person, later identified as Stietz, walking in the field about thirty to forty yards away. According to the wardens, Stietz was not wearing any blaze orange, he was carrying a rifle in his hands, and he would stop and look both ways every few steps.

¶6 The wardens observed Stietz as he walked back toward the gate. When Stietz was approximately twenty yards away, near the gate, Frost turned his flashlight on and each warden identified himself as "Conservation Warden" in a voice "loud enough to be heard pretty well." Webster then asked Stietz if he had seen any deer and Stietz responded that he had seen seven doe. Stietz informed the wardens that he was not hunting but, rather, looking for trespassers.

¶7 As Stietz walked toward the wardens, Frost noticed a handgun in Stietz's right front pocket and alerted Webster. Webster testified that Stietz "went from holding his gun off to the side and then turned his gun facing straight on as I was approaching him, which is unusual." Webster added that as Stietz's face became more visible, he saw in Stietz "a kind of agitation, aggression" and Webster "could tell something wasn't right." When the wardens and Stietz were "within arm's reach" of each other, Webster asked Stietz if the rifle was loaded

and Stietz replied affirmatively. After Stietz twice denied the wardens' requests to see the rifle, Frost became concerned for his and Webster's safety.

¶8 Frost testified that he reached for the firearm and Stietz "started moving the … butt of the firearm … towards me and basically hit me in the navel with the firearm." Frost then dropped his flashlight and reached for the firearm to control it, putting his hands in similar positions to where Stietz had his hands." Frost drove his body forward toward Stietz as he tried to take the firearm from his hands and the two "got twisted around." During the scuffle, Webster yelled that the barrel of the rifle was pointed at him, so Frost grabbed the rifle harder and ultimately ended up with the rifle in his hands, lying on his back. When Stietz then reached for his handgun, Webster drew his handgun and Frost threw the rifle aside and drew his handgun. As Frost stood up, Stietz continued to point his handgun in Webster's direction and Frost could see that Stietz's finger was inside the trigger guard, the hammer was cocked, and Stietz's thumb was on the hammer.

¶9 Webster testified that "when the rifle was aimed at me and when the handgun was aimed at me, I felt the consequence could have been my death." During the stand-off, Webster radioed the sheriff's department from his collar microphone. For the next ten minutes, the wardens tried unsuccessfully to convince Stietz to lower his weapon. It was not until after a sheriff's deputy arrived that Stietz lowered his handgun. Other responders arrived shortly before 5:30 p.m. and Stietz eventually put his gun on the ground approximately thirty minutes after that.

¶10 Stietz testified that he was walking his fenced-in property during gun deer season looking for trespassers when he encountered two strangers clad in blaze orange on his property. Stietz further testified that when he refused to give

the strangers his rifle, they forcibly wrestled it away from him and, when one of the two strangers then drew a pistol on Stietz, he responded in kind. Stietz maintained that he feared for his life and acted in self-defense to protect himself. Based on his assertion of the right to self-defense, Stietz sought a self-defense jury instruction. That request was denied.

¶11 A jury found Stietz guilty of resisting a law enforcement officer with use of a dangerous weapon and intentionally pointing a firearm at a law enforcement officer—both counts as they related to Webster. Stietz was acquitted of the remaining charges. The court denied Stietz's postverdict motion for acquittal or a new trial. With respect to Stietz's conviction for intentionally pointing a firearm at a law enforcement officer, the court imposed a four-year sentence consisting of one year of initial confinement followed by three years of extended supervision. The court withheld sentence on the resisting conviction and imposed a consecutive two-year probation term. This appeal follows.

DISCUSSION

¶12 Stietz argues that the circuit court erred by denying his request for a self-defense jury instruction. "A circuit court has broad discretion in deciding whether to give a requested jury instruction." ***State v. Coleman***, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996). To support a requested jury instruction on a statutory defense to criminal liability, the defendant "has the initial burden of producing evidence to establish [that] statutory defense." ***State v. Stoehr***, 134 Wis. 2d 66, 87, 396 N.W.2d 177 (1986). The issue of whether the evidence establishes a sufficient basis for the instruction, however, presents a question of law that this court reviews independently. *See* ***State v. Giminski***, 2001 WI App 211, ¶11, 247 Wis. 2d 750, 634 N.W.2d 604.

¶13 Stietz contends that the evidence—specifically, his testimony—that he did not know Frost and Webster were wardens was "abundant" and sufficient to warrant a self-defense jury instruction. We are not persuaded, because Stietz's assertion is belied by his own testimony. Although Stietz testified that he did not know that Frost and Webster were wardens until Webster called for backup, he also testified that when the wardens initially approached him, one "looked at him and said a Warden, but it was kind of mumbled, not real loud." Stietz also testified that "one kind of said, Green County," while "[t]he other one looked at him and said something Warden." In light of Stietz's testimony, there was insufficient evidence to establish that Stietz was acting in self-defense when he pointed his firearm at the wardens and refused to hand over his weapon.

¶14 Moreover, to the extent that Stietz asserts that a self-defense instruction was necessary because he believed that the wardens' conduct was unlawful, our supreme court has held that an individual has no right to physically resist an arrest, even if the individual believes the arrest is unlawful. ***State v. Hobson***, 218 Wis. 2d 350, 380, 577 N.W.2d 825 (1998). Because the record lacks sufficient evidence to support a self-defense instruction, the circuit court properly denied Stietz's request for the instruction.

¶15 Next, Stietz argues that the trial court erred by refusing to allow either evidence of, or a jury instruction on, trespassing. The State filed a motion in limine to prohibit any evidence characterizing the wardens' conduct as trespassing. In granting the motion, the court concluded: "Wardens do have certain rights to go when they are investigating and they saw a tree stand, they were properly investigating because they saw a car with hunting equipment, it was after the hours were closed. It isn't a trespass."

¶16 Stietz argues that the trial court's decision deprived him of his right to present a defense. He contends that, because the wardens entered his property without consent, "by definition they were not acting in an official capacity or within the lawful scope of their authority." We are not persuaded. The wardens were allowed to investigate pursuant to the open fields doctrine, which "is predicated on the theory that the protection of the Fourth Amendment is to 'persons, houses, papers, and effects.'" *See* ***Conrad v. State***, 63 Wis. 2d 616, 624, 218 N.W.2d 252 (1974) (quoted source omitted). Thus, "[u]nder that theory, the Fourth Amendment affords no protection to evidence either on or in the ground, unless the particular area in question is so intimately related to a protected area that it can come within the concept of curtilage." ***Id.*** at 624-25.

¶17 In ***Oliver v. United States***, 466 U.S. 170, 181 (1984), the United States Supreme Court concluded "that an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers." Further, "[a]n open field need be neither 'open' nor a 'field' as those terms are used in common speech.... [A] thickly wooded area ... may be an open field as that term is used in construing the Fourth Amendment." ***Id.*** at 180 n.11. The ***Oliver*** court held that law enforcement's information-gathering intrusion on an "open field" did not constitute a Fourth Amendment search, even though it would have qualified as a trespass at common law. ***Id.*** at 183.

¶18 Here, the wardens had reasonable suspicion that somebody may have been hunting illegally. As noted above, the wardens saw a car parked where hunters would normally park and Frost observed an empty hunting rifle case and other items ordinarily associated with hunting inside the vehicle. Because the vehicle's occupants had not returned by the time deer hunting season officially ended, the wardens were justified in entering the land to investigate what they had

reasonable suspicion to believe was illegal hunting. In light of the open fields doctrine, the circuit court properly excluded both evidence of trespass and the corresponding jury instruction on trespass.

¶19 Stietz also contends that he was denied his Sixth Amendment right to a public trial when the trial court conducted the jury instruction conference in a courthouse conference room. The Sixth Amendment to the United States Constitution guarantees that a criminal defendant shall enjoy the right to a public trial. The public trial is premised on "[t]he principle that justice cannot survive behind walls of silence[.]" ***State v. Ndina***, 2009 WI 21, ¶42, 315 Wis. 2d 653, 761 N.W.2d 612. The right to a public trial "has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution and that the knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on the possible abuse of judicial power." ***Id.***, ¶42 (quoted source omitted). The public trial right protects "all persons accused of crime—the innocently accused, that they may not become the victim of an unjust prosecution, as well as the guilty, that they may be awarded a fair trial[.]" ***Id.*** (quoted source omitted).

¶20 The determination as to whether the Sixth Amendment right to a public trial was violated presents the application of constitutional principles to historical facts. ***Id.***, ¶45. This court upholds the circuit court's findings of evidentiary or historical fact unless those findings are clearly erroneous. ***Id.*** However, we determine the application of constitutional principles to those evidentiary or historical facts independently of the circuit court, while benefiting from the circuit court's analysis. ***Id.***

¶21 This court applies a two-step analysis to determine whether a defendant's Sixth Amendment right to a public trial has been violated. ***Id.***, ¶46. First, we determine whether the closure at issue implicates the Sixth Amendment right to a public trial. ***Id.*** If the right is not implicated, we need not reach the second step. ***Id.*** If a closure implicates the Sixth Amendment right to a public trial, we must then determine whether the closure was justified under the circumstances of the case. ***Id.***

¶22 "Although the 'exclusion of any spectator runs the risk of violating the Sixth Amendment and, accordingly, of requiring a new trial,' some courts have recognized that 'even an unjustified closure may, in some circumstances, be so trivial as not to implicate the right to a public trial.'" ***Id.***, ¶48 (quoted source omitted). The ***Ndina*** court recognized that "[c]ases holding that a closure is trivial are typically characterized by the exclusion of an extremely small number of persons from the courtroom or, alternatively, by a more general exclusion in effect for an extremely short period of time."[1] ***Id.***, ¶53.

¶23 Under the facts of the instant case, we assume, without deciding, that the jury instruction conference constituted a closure. Even with that assumption, we conclude that that closure was so trivial that it did not implicate the right to a public trial. Stietz and his counsel were present for the conference; spectators were welcome; and the door was closed only to permit the court reporter to better hear the proceedings. Further, in the context of all of the other parts of a trial, the

[1] To the extent Stietz argues that ***State v. Ndina***, 2009 WI 21, 315 Wis. 2d 653, 761 N.W.2d 612 was wrongly decided, we reject this argument because we are obligated to follow the decisions of our supreme court. *See* ***State v. Clark***, 179 Wis. 2d 484, 493, 507 N.W.2d 172 (Ct. App. 1993).

closure of the jury instruction conference did not invoke the types of concerns underlying one's public trial right.

¶24 Stietz additionally contends that his Second Amendment right to bear arms was violated when he was forcibly disarmed by the wardens.[2] Stietz reasons that the wardens had no legal justification to disarm him and because he cannot be prosecuted for the lawful exercise of his Second Amendment rights, the criminal charges must be vacated. The United States Supreme Court, however, has recognized that the exercise of one's Second Amendment right to bear arms is not unlimited. *See* ***District of Columbia v. Heller***, 554 U.S. 570, 595 (2008).

¶25 Based on the wardens' reasonable suspicion that Stietz may have been illegally hunting, WIS. STAT. § 23.58 (2013-14)[3] authorized the wardens to stop and question Stietz. Having stopped Stietz pursuant to § 23.58, and believing Stietz's rifle constituted a threat to their safety, the wardens had the right to temporarily take and secure the weapon pursuant to WIS. STAT. § 23.59. Because Stietz was pointing his weapon at the wardens, they were entitled to disarm him without violating the Second Amendment.

¶26 Finally, Stietz argues that DNR wardens are not law enforcement officers pursuant to WIS. STAT. § 941.20(1m)(b). That statute makes it a crime to point a firearm towards a "law enforcement officer" or among others, a "commission warden who is acting in official capacity." In turn, WIS. STAT.

[2] The Second Amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

§ 939.22(5) defines "commission wardens" as "wardens employed by the Great Lakes Indian Fish and Wildlife Commission." Stietz contends that because Frost and Webster are not "commission wardens," they are not "law enforcement officers" under the statute, thus rendering his conviction invalid. Although DNR wardens are not "commission wardens" under the statute, we conclude that they meet the definition of law enforcement officers for purposes of the statute.

¶27 DNR wardens are certified law enforcement officers under both the Department of Justice standards and WIS. STAT. § 165.85, which controls the regulation of law enforcement officers in this State. Section 165.85(2)(c) defines a "[l]aw enforcement officer" as "any person employed by the state or any political subdivision of the state, for the purpose of detecting and preventing crime and enforcing laws or ordinances and who is authorized to make arrests for violations of the laws or ordinances that the person is employed to enforce." In turn, WIS. STAT. § 30.50(4s) provides that a "'law enforcement officer' has the meaning specified under s. 165.85(2)(c) and includes a person appointed as a conservation warden by the department under s. 23.10(1)." Because DNR wardens are law enforcement officers under WIS. STAT. § 941.20(1m)(b), Stietz's claim fails.

By the Court.—Judgment affirmed.

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