COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1994-CR **Cir. Ct. No. 2014CM698**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY S. DECKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed*.

¶1 NEUBAUER, C.J.[1] Jeffrey S. Decker appeals from a judgment convicting him of obstructing an officer, contrary to WIS. STAT. § 946.41(1).

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Decker contends that the evidence was legally insufficient to support the charge of obstructing an officer, that he was denied the right to present a defense, and that the conviction should be overturned in the interests of justice. We reject each of these contentions and, thus, affirm.

¶2 According to the testimony at this court trial, Christopher Tarmann, a lieutenant with the University of Wisconsin-Oshkosh (UW-O) police department, was in uniform on May 16, 2014, and posted inside the alumni welcome and conference center as security for a grand opening event. Earlier that morning, Tarmann had reviewed an official letter and an e-mail from UW-O officials indicating that Decker was not permitted on the campus. Tarmann also reviewed an e-mail from Decker indicating his awareness that he was not supposed to be on campus that day.

¶3 According to Chief Joseph LeMire, also of the UW-O police department, he too was aware that Decker had been mailed the restriction order, and that Decker had asked a UW-O official in an e-mail if the university intended to enforce the prohibition against him.[2] Decker was told that the UW-O would enforce it. Decker responded by saying that hysteria and instability would occur. Decker's response confirmed for the UW-O that he was aware that he was restricted from campus. The University of Wisconsin, its legal department, chancellors on each campus or their designees had the authority to prohibit or restrict someone from entering its property, whether owned, operated, leased or controlled by the University of Wisconsin, LeMire testified.

[2] LeMire was called as a witness for the defense. Decker also called himself to testify.

¶4 While Tarmann was standing post, he saw Decker walking towards the entrance of the building. Tarmann exited the building and approached Decker, walked in front of him, and said something to the effect of "[h]ey, I would like to talk to you before you enter the building." Tarmann testified they made eye contact. Tarmann was going to ask Decker to leave the premises. Although Decker knew Tarmann—they had had prior interactions both on campus and at Tarmann's home—Decker sidestepped Tarmann and walked quickly into the building. Tarmann reported to LeMire that Decker was inside the building and pointed him out to LeMire. LeMire and Tarmann approached Decker, but Decker turned and walked quickly in the other direction. LeMire and Tarmann grabbed Decker's arm and asked him to leave the room so that they could talk to him. Decker, however, pulled away from their grip and started struggling with the officers. Decker fell to the floor and "sprawled out," preventing the officers from getting control of his arms. The officers pulled Decker to the doorway, and he locked his arms and legs onto a table. Several times the officers asked Decker to stop resisting. Ultimately, the officers placed Decker in handcuffs.

¶5 At the conclusion of the trial, the court found Decker guilty of obstructing an officer. Decker appeals.

¶6 On a challenge to the legal sufficiency of the evidence supporting a verdict, the verdict will be overturned only if the evidence, "viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). In reviewing such a challenge, "we must keep in mind that the credibility of the witnesses and the weight of the evidence is for the trier of fact, and we must adopt all reasonable inferences which support the jury's verdict." ***State v. Searcy***, 2006

WI App 8, ¶22, 288 Wis. 2d 804, 709 N.W.2d 497. Thus, where the record "supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law." ***Poellinger***, 153 Wis. 2d at 506-07. So long as there is any possibility that "the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." ***Id.*** at 507. In short, on a legal sufficiency challenge, the defendant "bears a heavy burden." ***Searcy***, 288 Wis. 2d 804, ¶22.

¶7 In order to sustain a conviction for obstructing an officer, the state is required to prove beyond a reasonable doubt the following elements: (1) that the defendant obstructed an officer, (2) that the officer was acting in an official capacity, (3) that the officer was acting with lawful authority, (4) and that the defendant knew that the officer was acting in an official capacity and with lawful authority and that the defendant knew that his conduct would obstruct the officer. *See* WIS. STAT. 946.41(1); WIS JI—CRIMINAL 1766.

¶8 Here, the evidence was legally sufficient to support the trial court's verdict. First, there was sufficient evidence upon which the court could conclude that the conduct of Tarmann and LeMire in seeking to confront Decker about his presence on the campus, and ultimately removing Decker from the campus, in accordance with the prohibition UW-O had issued against him, was all conduct having "some relation to [the officers'] employment" as officers with the UW-O police department and, thus, they were acting in an official capacity. *See* ***State v. Lossman***, 118 Wis. 2d 526, 537, 348 N.W.2d 159 (1984).

¶9 Second, there was evidence in the record from which the court could conclude the officers were acting with lawful authority, that is, their actions were in accordance with the law. ***State v. Ferguson***, 2009 WI 50, ¶¶14-16, 317 Wis. 2d 586, 767 N.W.2d 187. Tarmann testified that he reviewed an official letter from the UW-O and an e-mail indicating that Decker was not permitted on campus. Tarmann also testified that he reviewed an e-mail from Decker acknowledging receipt of the restriction. LeMire was aware of both the restriction and Decker's e-mail. Decker, who testified at trial, did not deny that he had received the order by e-mail or that he had responded to it.[3] LeMire testified that the University of Wisconsin, its legal department, chancellors on each campus or their designees had the authority to prohibit or restrict someone from entering its property, whether owned, operated, leased or controlled by the University of Wisconsin.[4] Thus, when the officers saw Decker on campus, they had "reasonable grounds to believe" that Decker had violated the order issued by the UW-O barring him from entering campus grounds. *See* WIS. STAT. § 36.11(2)(a).

¶10 Third, while the officers were acting in an official capacity and with lawful authority, there was evidence to support the court's finding that Decker obstructed them. Decker did so by, among other things, pulling away from the

[3] To the extent Decker suggests the order never existed, both Decker and LeMire testified that Decker received the written order prohibiting him from campus when he was in jail.

[4] While neither party provides us with the order or the specific source of the authority for such an order, whether statutory or administrative, there are several authorities upon which the order could have been based. *See* WIS. ADMIN. CODE § UWS 18.11(7)(e) (Aug. 2009) (granting the chief administrative officer the authority to issue a written order barring any person from entering university lands in accordance with that officer's responsibility for the health, safety, and welfare of the university); WIS. STAT. § 813.125(4)(a) (authorizing a judge to issue an injunction, which has the effect of requiring the respondent to avoid the petitioner and the petitioner's premises); ***Board of Regents-UW System v. Decker***, 2014 WI 68, ¶52, 355 Wis. 2d 800, 850 N.W.2d 112.

officers' grip, struggling with them, and locking his arms and legs onto a table. *See* ***Ferguson***, 317 Wis. 2d 586, ¶32; ***State v. Grobstick***, 200 Wis. 2d 242, 249, 251, 546 N.W.2d 187 (Ct. App. 1996).

¶11 Fourth and finally, the State established Decker's criminal intent as to each of these elements. *See* WIS. STAT. § 939.23(2); ***Lossman***, 118 Wis. 2d at 536. There was evidence to show that Decker knew that the officers were acting in an official capacity as evidenced by their prior interactions, the officers being in uniform, Decker's knowledge of the order prohibiting him from campus, and his attempts to evade the officers. *See* ***Grobstick***, 200 Wis. 2d at 251. Decker knew that the officers were acting with lawful authority because Decker had received the e-mail informing him that he was prohibited from the campus. *See* ***Lossman***, 118 Wis. 2d at 542-43 (explaining that the defendant's subjective belief as to an officer's lawful authority is ascertained based on the totality of the circumstances); ***Grobstick***, 200 Wis. 2d at 251. There was evidence to show that Decker knew that his conduct in pulling away from the officers' grip, struggling with them, and locking his arms and legs onto a table would obstruct the officers, that is, make it more difficult for them to perform their duties. *See* ***State v. Young***, 2006 WI 98, ¶57, 294 Wis. 2d 1, 717 N.W.2d 729; ***Grobstick***, 200 Wis. 2d at 249, 251. To the extent that Decker disputed the testimony of Tarmann, the credibility of the witnesses and the weight of the evidence are issues for the trier of fact to determine. ***Poellinger***, 153 Wis. 2d at 504 (citation omitted). Accordingly, the evidence was legally sufficient to support the trial court's verdict finding Decker guilty of obstructing an officer.

¶12 Contrary to Decker's contention, he was not denied his right to present a defense. The trial court's directions to Decker during his testimony not to argue but to testify as to facts were proper. *See generally* ***State v. Eugenio***, 210

Wis. 2d 347, 358, 565 N.W.2d 798 (Ct. App. 1997), *aff'd*, 219 Wis. 2d 391, 579 N.W.2d 642 (1998). The trial court did not abuse its discretion in ruling that evidence regarding prior orders excluding Decker from campus was irrelevant. *See* ***State v. Pharr***, 115 Wis. 2d 334, 344-45, 340 N.W.2d 498 (1983). Nor did the trial court abuse its discretion in terminating Decker's closing argument. *See* ***State v. Lenarchick***, 74 Wis. 2d 425, 457, 247 N.W.2d 80 (1976).

¶13 Finally, Decker argues that the conviction should be reversed in the interests of justice. *See* WIS. STAT. § 752.35. Prior to the date of trial, Decker subpoenaed a newspaper photographer whom Decker claimed had photographs of him "being arrested." The editor of the newspaper wrote the court informing it that the paper was not in possession of any such photographs. At the outset of trial, the trial judge informed the parties that the editor of the newspaper had called to tell him that the paper had no photographs of Decker being arrested. The judge told the editor that he did not need to appear in court and that he should memorialize in writing that the paper had no such photographs, which he did. Decker responded that he was also asking for the photographer to appear as an eyewitness. The judge responded that he had asked if he was an eyewitness, and he said that he was not. Decker replied that the photographer was not being truthful, but the judge directed the State to call its first witness.

¶14 Although Decker recounts the above facts in his main brief, he does not develop a legal argument that this was error. Nevertheless, the State concedes that "the procedure" the trial judge used to quash Decker's subpoena of the newspaper photographer was error but argues that the error was harmless. In reply, Decker argues that he was prejudiced by the trial court's error in that there were conflicting versions of the initial encounter between him and LeMire, and, had the photographer been permitted to testify, he would have confirmed Decker's

version of the events, making it more likely that the court would have credited Decker's testimony.

¶15 We agree that it was error for the trial judge to speak with the editor ex parte, effectively quashing the subpoena based on what he learned in that communication about a potential witness's knowledge. While neither party developed a legal argument, we note that SCR 60.04(1)(g)1. prohibits a judge from initiating, permitting, engaging in or considering ex parte communications concerning a pending or impending action or proceeding except in certain limited circumstances "that do not deal with substantive matters or issues on the merits." The trial judge's discussion with the editor about the potential witness's lack of knowledge of the encounter between the UW-O police and Decker concerned a "substantive matter."[5] ***Id.***

¶16 Nevertheless, we agree with the State that the error does not require reversal because it was harmless beyond a reasonable doubt. *See* ***State v. Vanmanivong***, 2003 WI 41, ¶¶35, 41, 261 Wis. 2d 202, 661 N.W.2d 76. Assuming the photographer had witnessed the encounter between Decker and LeMire, the only elements the photographer's testimony could have shed light on were whether Decker obstructed the officers and whether they were acting in an official capacity. But, Decker had no defense to these elements. There were multiple instances of Decker obstructing the officers, including after his initial encounter with LeMire. For example, while the officers were pulling Decker to

[5] The trial judge's recounting of that conversation is unclear as to whether he spoke only to the editor of the newspaper or also the photographer, the latter whom Decker claimed was an eyewitness. In other words, the claim that the photographer was not an eyewitness may have been second-hand information, coming from the editor.

the doorway, he fell to the floor and locked his arms and legs onto a table. Decker did not dispute that this occurred, and this alone was sufficient to prove that he obstructed the officers. Further, there could be no dispute that these officers were acting in their official capacity, as they were in full uniform and Decker knew them from his prior interactions with them.

¶17 We affirm.

By the Court.—Judgment affirmed.

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