COURT OF APPEALS
DECISION
DATED AND FILED

June 14, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP2305-CR **Cir. Ct. No. 2014CM423**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT H. WENGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County: THOMAS T. FLUGAUR, Judge. *Affirmed*.

¶1 LUNDSTEN, P.J.[1] Scott Wenger appeals a circuit court judgment convicting him of resisting an officer. Wenger argues that the evidence was

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

insufficient to find guilt on this criminal charge. Wenger also seeks dismissal of the charge because he "did not forcibly resist a peaceful arrest." For the reasons that follow, I affirm.

Background

¶2 Wenger's conviction for resisting arose out of his arrest for disorderly conduct during an Art in the Park event in Stevens Point. Wenger was initially charged with disorderly conduct as well as resisting an officer. The circuit court dismissed the disorderly conduct charge. The resisting charge was tried to the court, and the court found Wenger guilty on that charge.

¶3 I discuss the trial evidence in more detail below. For now, it is enough to note that the pertinent alleged resisting conduct occurred after police arrested Wenger and while they were attempting to place him in their squad vehicle. This conduct included Wenger making his body "rigid" so that police had difficulty placing him in their vehicle.

Discussion

¶4 As noted, Wenger raises two issues. Wenger first argues that the evidence was insufficient to convict him of resisting an officer. Wenger also argues that the resisting charge should have been dismissed because he "did not forcibly resist a peaceful arrest." I address each in separate sections below.

A. Sufficiency of the Evidence

¶5 I begin with Wenger's argument that the evidence was insufficient. "[A]n appellate court may not reverse a conviction [based on insufficiency of the evidence] 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).

¶6 The statute under which Wenger was convicted states: "[W]hoever knowingly resists or obstructs an officer while such officer is doing any act in an official capacity and with lawful authority is guilty of a Class A misdemeanor." WIS. STAT. § 946.41(1) (2013-14). Our supreme court has described this resisting crime as consisting of the following elements:

> First that the defendant *(resisted) (obstructed)* an officer.
>
> Second, that the officer was doing an act in his official capacity and with lawful authority.
>
> Third, that the defendant *(resisted) (obstructed)* the officer, knowingly; that is, that the defendant knew or believed that he was *(resisting) (obstructing)* the officer while the officer was acting in his official capacity and with lawful authority.

State v. Lossman, 118 Wis. 2d 526, 535, 348 N.W.2d 159 (1984) (citation and internal quotation marks omitted). Wenger challenges the sufficiency of the evidence as to each element.

1. Resists or Obstructs Element

¶7 As a preliminary matter, I note that Wenger's case was charged and litigated in the circuit court based solely on a "resists" alternative. Similarly, on appeal, the parties address only the "resists" alternative. Thus, I limit my analysis to the "resists" alternative.

¶8 In arguing that the evidence was insufficient to find that he resisted, Wenger acknowledges that there was evidence that he became "rigid" and otherwise engaged in uncooperative conduct while the police were attempting to place him in their squad vehicle. Wenger argues, however, that this conduct does not rise to the level of resisting. For the following reasons, I disagree.

¶9 There is scant published case law in Wisconsin defining what it means to "resist" an officer. Wenger correctly identifies the seminal case, ***State v. Welch***, 37 Wis. 196 (1875). The supreme court in ***Welch*** stated that "[t]o resist … is to oppose by direct, active and *quasi* forcible means." ***Id.*** at 201. The court in ***Welch*** went on to explain:

> [I]t is not enough that the execution of the [officer's] process is opposed or obstructed or interrupted or hindered or prevented; the officer must be resisted…. And the resistance must be active and direct towards him. He may be balked, baffled, circumvented, frustrated, and yet not be resisted….
>
> We do not hold that there must be actual force or even a common assault upon the officer. It is not easy to see how, but resistance may be possible, within our construction of the statute, without actual violence or technical assault.

Id. at 201-02.

¶10 "***Welch*** establishes that 'resist' and 'obstruct' have different meanings." ***State v. Dearborn***, 2008 WI App 131, ¶26, 313 Wis. 2d 767, 758 N.W.2d 463, *aff'd*, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97. "'Resist' means 'to oppose by direct, active and *quasi* forcible means' and does not include passive or indirect methods of impeding a warden's or officer's performance of duty." ***Id.***

¶11 Here, I agree with the State that there was evidence to support a finding that Wenger resisted the police, namely, evidence that Wenger repeatedly made his body "rigid" and maintained his body in a rigid position in direct opposition to the officers' attempts to physically place him in their vehicle. One officer described Wenger's pertinent conduct as follows:

> A … Once we got to the squad car, we opened it up and he was rigid and would not get into the car willingly. So we had another officer go to the other side of the car.
>
> ….
>
> A ... So we opened the door and tried to put him in. He wouldn't go. The other officer went to the other side rear door, opened that up and kind [of] prepared to help bring him in. Pull his, the front of his body forward. So he laid on the back seat of the car. That's what we had to do. So, instead of what we normally do is instruct them to sit with their butt, and swing their feet to the car. We had to, because he was resisting, push him down and put him sort of on his stomach and side into the car and the other officer had to kind of pull him onto the seat to fit him into the car. His feet were sticking out....
>
> ... And as I helped him sit up, he sprung back out of the car and then began shouting again to the crowd. So the officers, we had to kind of push on the top of his head and shoulders to try to push him down at the height of the entrance of the car and then push him in there again. And then this time, so ... he kind of went in the same way as the first time but this time with a little more force, because he was resisting again.

A second officer similarly described Wenger's conduct:

> A He was physically resisting, pushing against the vehicle, not cooperating with—we were trying to move him, this person, in. Would not sit down. We had to push him into the vehicle.
>
> Q After he'd gotten out of the squad, did you have to then get him back into the squad?

> A Yes. He stood up, became rigid and started yelling at the crowd again. We had to push him back inside the vehicle.

¶12 In other words, although Wenger did not strike out at the officers, or pull away from them, he used his body to generate a force in direct and active opposition to their efforts to place him in their squad vehicle. Of particular significance is the officers' testimony explaining how, in response to Wenger becoming "rigid," they had to "push" against Wenger in order to get him into their vehicle, both initially and again after he got out of the vehicle.

¶13 In arguing that the evidence was insufficient, Wenger appears to liken his conduct to more passive behaviors such as "going limp," behaviors that Wenger asserts do not meet the definition of resisting under ***Welch***. I disagree that Wenger's conduct was passive within the meaning of ***Welch***. Notably, the court in ***Welch*** acknowledged that there would be cases in which an individual resists without using "actual force" and without engaging in violent or assaultive conduct. *See* ***Welch***, 37 Wis. at 202 ("We do not hold that there must be actual force or even a common assault upon the officer…. [R]esistance may be possible … without actual violence or technical assault.").

¶14 In a separate "resists"-related argument, Wenger argues that he had no choice but to maintain a rigid position because the officers were handling him "like a piece of wood." Wenger bases this argument on a bystander's testimony that the police "kind [of] picked him up, hoist[ed him] like a piece [of] wood." Wenger apparently interprets this testimony as establishing that Wenger became rigid in response to the police picking him up. In context, however, the more reasonable inference from this testimony is that the police picked up Wenger in

response to Wenger making himself rigid. Thus, Wenger's argument on this topic lacks merit.[2]

2. The Remaining Elements

¶15 I turn to Wenger's challenge to the sufficiency of the evidence on the remaining elements. To repeat, those elements are:

> that the officer was doing an act in his official capacity and with lawful authority [and]
>
> … that the defendant *(resisted)* ... the officer, knowingly; that is, that the defendant knew or believed that he was *(resisting)* ... the officer while the officer was acting in his official capacity and with lawful authority.

See ***Lossman***, 118 Wis. 2d at 535 (citation and internal quotation marks omitted).

¶16 There is no dispute that the police were acting in their official capacity, and that Wenger knew they were acting in their official capacity. Wenger argues, however, that the evidence was insufficient to support a finding that the police were acting with lawful authority, and also insufficient to support a

[2] The bystander testified as follows:

> Q All right. Did you see the officers put Mr. Wenger in the car, in the squad car?
>
> A Yes, I did.
>
> Q Did you—how did you describe that?
>
> A I would describe it because of him being uncooperative, not wanting to get in the car. They kind [of] picked him up, hoist[ed him] like a piece [of] wood and—
>
> Q Tossed him in?
>
> A Not tossed him, but slid him in.

finding that Wenger knew or believed they were acting with lawful authority. For the reasons that follow, I reject these arguments.

a. Acting with Lawful Authority

¶17 Acting with "lawful authority" means that the police conduct was in accordance with constitutional and statutory law. ***State v. Ferguson***, 2009 WI 50, ¶16, 317 Wis. 2d 586, 767 N.W.2d 187. Wenger's insufficiency arguments as to "lawful authority" are difficult to grasp. More factual or legal development of these arguments might have helped. As it stands, I understand Wenger to be making two lawful authority arguments, and I conclude that neither is persuasive.

¶18 First, Wenger argues that the officers were not acting with lawful authority because they lacked probable cause to arrest him for disorderly conduct. In support of this argument, Wenger asserts that the circuit court dismissed the disorderly conduct charge for lack of probable cause. Wenger is incorrect. The court repeatedly made clear that it dismissed the disorderly conduct charge not for lack of probable cause but based on the court's conclusion that the State could not meet the significantly higher trial burden of beyond a reasonable doubt on that charge.

¶19 Wenger does not develop an argument explaining why probable cause might have been lacking. Regardless, as I now explain, there was ample evidence to support a conclusion that the police had probable cause to arrest Wenger for disorderly conduct. That evidence included the following.

¶20 On the day of Wenger's arrest, police were initially dispatched to the Art in the Park event in response to a complaint by Wenger about a passing motorist. As they were leaving the park to investigate Wenger's complaint,

Wenger said something to the police to the effect of "You will be back when I'm taking pictures of people in the park." Later that day, police were again dispatched to the park, this time in response to a complaint that Wenger was photographing and harassing other Art in the Park patrons, including taking photographs of children whose parents did not want them photographed. Police officers and bystanders both testified that, when the police made contact with Wenger upon their return to the park, he began shouting or yelling at the police, further drawing the attention of park patrons. In addition, one of the bystanders mentioned above, who happened to be talking with Wenger when the police arrived, testified that Wenger's conduct toward the police caused him to "back[] away," and that he thought Wenger was intentionally trying to instigate a scene involving police. Based on this and other evidence, I agree with the circuit court that the police had probable cause to arrest Wenger for disorderly conduct.

¶21 Wenger's second lawful authority argument pertains to the officers' subjective motivations for arresting him. Wenger argues that the police were not acting with lawful authority because his arrest was motivated by one of the officer's personal feelings toward Wenger instead of by Wenger's own unlawful conduct. Wenger relies on admissions by one of the officers that he was frustrated with Wenger and that he called Wenger a "creep."

¶22 Wenger's subjective motivation argument fails for two reasons. First, Wenger fails to point to authority for the proposition that an officer's subjective motivations are relevant for purposes of determining the lawful authority question. *Compare* ***State v. Kramer***, 2009 WI 14, ¶31, 315 Wis. 2d 414, 759 N.W.2d 598 ("[T]he subjective intent of the officer plays no role in the totality of the circumstances that a court considers in determining whether there is probable cause to arrest."). Second, even if an officer's subjective motivations

could be relevant in this context, the most reasonable view of the evidence is that the police arrested Wenger not because of personal feelings but because they reasonably believed that Wenger was causing an illegal disturbance. I note that, in addition to the evidence already described, there was evidence that the officer who made the arrest decision was not the officer who called Wenger a "creep."

b. Knowledge or Belief

¶23 Wenger argues that there was insufficient evidence to show that he knew or believed that the police were acting with lawful authority. I reject this argument for the following reasons.

¶24 Whether a defendant knew or believed the police were acting with lawful authority is determined based on the totality of the circumstances, including "what the defendant said or did, what the officer said or did, and any objective evidence which is available." ***Lossman***, 118 Wis. 2d at 543. "The accused may not have believed the [officer] was acting with lawful authority, but the question is whether [the fact finder], acting reasonably, could be so convinced that the defendant knew the officer was acting with lawful authority." ***Id.*** at 544.

¶25 Here, Wenger argues that his conduct made clear that he believed the police were acting without lawful authority. Wenger asserts that there was evidence that he was shouting that the police were violating his rights and that he had asked for witnesses to testify to unlawful conduct by the officers. But, as should be obvious, people sometimes make allegations they know to be false. Just because Wenger said his rights were being violated does not mean that Wenger actually thought that was true. More to the point, the evidence permitted competing reasonable inferences as to whether Wenger knew or believed that the police were acting with lawful authority. Other evidence that I have already

described—including the evidence that Wenger told police "You will be back when I'm taking pictures of people in the park"—supports the circuit court's finding that Wenger knew police were acting with lawful authority and that Wenger in fact set out to engage in illegal activity requiring a police response.

B. Wenger's "Did-Not-Forcibly-Resist-a-Peaceful-Arrest" Argument

¶26 Wenger devotes a separate section of his briefing to arguing that the resisting charge should be dismissed because he "did not forcibly resist a peaceful arrest." As support for this argument, Wenger repeats many of the same facts and assertions from his insufficiency-of-the-evidence argument.

¶27 I have difficulty understanding what Wenger's "did-not-forcibly-resist-a-peaceful-arrest" argument adds to his insufficiency-of-the-evidence argument. Best I can tell, the only new argument relates to whether Wenger had a common law privilege to resist the police. Wenger cites ***State v. Hobson***, 218 Wis. 2d 350, 577 N.W.2d 825 (1998), which abrogates a common law privilege "to forcibly resist an unlawful arrest in the absence of unreasonable force." *See* ***id.*** at 353. As I understand it, Wenger reads ***Hobson*** as supporting the proposition that suspects are permitted to resist arrest when police *do* use unreasonable force.

¶28 Regardless whether ***Hobson*** supports that proposition, Wenger's "did-not-forcibly-resist-a-peaceful-arrest" argument fails for a different reason. Wenger fails to discuss authority addressing the legal standard for unreasonable force or to otherwise give me any reason to think that there is a viable argument that the police here used unreasonable force.

Conclusion

¶29 For the reasons stated, I affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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