COURT OF APPEALS
DECISION
DATED AND FILED

July 19, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-3525-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BARRY A. KUNDERT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: EDWIN C. DAHLBERG and DANIEL T. DILLON, Judges. *Reversed and cause remanded.*

¶1 DEININGER, J.[1] Barry Kundert appeals a judgment convicting him of obstructing an officer, claiming he should be granted a new trial because he was

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

denied his constitutional right to a unanimous verdict. We agree and reverse both the judgment of conviction and the order denying Kundert's postconviction motion for a new trial.

BACKGROUND

¶2 According to the criminal complaint, a Rock County Sheriff's deputy found Kundert's vehicle, abandoned and overturned, on a rural Rock County highway in the early morning hours of February 21, 1999. Kundert reported the vehicle stolen to the Jefferson County Sheriff's Department. During a phone conversation with a Rock County deputy on February 23rd, Kundert allegedly again maintained that his car had been stolen from his place of employment, a Jefferson County tavern. On that same day, another Rock County deputy spoke with an acquaintance of Kundert's, Dawn Olin, who initially said she had given Kundert a ride home from the tavern on February 21st. She then changed her story, however, saying that Kundert had called her to pick him up that morning from a location near where his vehicle was found, and that he had asked her to lie for him if questioned by police. Kundert subsequently admitted that his vehicle had not been stolen and that he had been driving it at the time of the accident.

¶3 Kundert pled not guilty to the charge of obstructing an officer, and the matter was tried to a jury. Before trial, Kundert moved to require the State to elect its theory of Kundert's liability—direct commission of the offense for lying to the deputy himself, or the alternative party-to-a-crime theory based on his asking Dawn Olin to lie on his behalf. The court denied this request. During his opening statement, the prosecutor informed the jury that "[t]he evidence will clearly show that the defendant not only obstructed Jefferson County Deputies, he

obstructed Rock County Sheriff's Deputies, and he also, as a party to the crime, encouraged Ms. Olin to obstruct or lie to a Rock County Sheriff's Deputy…." Following the State's opening statement, Kundert again informed the court that there was a "unanimous verdict problem" with the State's case, arguing that "it can't be put to [the jury] that half could find that he asked Dawn Olin to lie for him, and half could find that he lied directly to [the deputy]." The court again denied Kundert's motion to have the State elect its theory of the crime charged.

¶4 The State presented two witnesses, the Rock County deputy with whom Kundert had spoken on February 23rd, and Dawn Olin. The deputy testified that Kundert told him that "his car had been taken from his bar and he had reported it to the Jefferson County Sheriff's Department." Olin testified that Kundert told her on February 21st that he had reported the car stolen and that she "was supposed to go along with it" by telling the police that she had driven him home from the tavern. She also acknowledged initially giving that story to a deputy but then she "broke down and told him the truth." When asked whether she would have initially lied to the deputy if Kundert had not asked her to do so, she replied, "Probably not because I'm not a good liar."

¶5 The only witness to testify for the defense was Kundert. He admitted to giving a false report to the Jefferson County Sheriff's Department that his car had been stolen. He denied, however, that he had lied to the Rock County deputy on February 23rd. Kundert also testified that he told Olin on February 21st to say she had driven him home that morning, but that he had not specified that she should say it was from the tavern. On cross-examination, he first conceded that he "implied" that Olin should lie to police, and later acknowledged that he told her to do so. Kundert denied, however, that he made any direct statement to the deputy on February 23rd that his car had been stolen.

¶6 During the instruction conference, the court and counsel discussed whether the State's party-to-the-crime theory was grounded on a conspiracy between Kundert and Olin to obstruct the police, or on Kundert's having aided and abetted Olin's obstruction by asking her to lie. The court concluded that it would give an instruction on conspiracy but not aiding and abetting. Kundert then renewed his request that the State elect its theory of culpability, and the court initially commented that jurors "would all have to agree on one. They would [have to] be unanimous on conspiracy under the law, they would have to be unanimous on the other one [direct commission by Kundert]." After further argument, however, the court concluded, citing ***Holland v. State***, 91 Wis. 2d 134, 280 N.W.2d 288 (1979), "[h]alf of them can be satisfied that there was a conspiracy, and half can be satisfied it was directly committed, and still have a valid verdict."

¶7 During his closing, the prosecutor told the jury Kundert had

> committed the crime of obstructing in two separate ways. First, he provided false information to [the deputy] in regards to his vehicle being stolen. Second, he advised Ms. Olin to lie to the deputies if she were asked about the accident or the vehicles being stolen, basically support his false story.
>
> And I think the testimony that was presented to you this morning clearly establishes that the defendant is guilty on both theories of liability.
>
> Now you will be instructed by the Judge that you don't even all have to agree on the theory of liability. Six of you can believe that he directly committed the crime; six of you can believe that he conspired with Ms. Olin to commit the crime.

In the defense closing, counsel noted that Kundert's admittedly false statements to Jefferson County Sheriff's deputies were not actionable in the Rock County prosecution. Counsel further argued that the Rock County deputy misperceived what Kundert had said by reading into Kundert's questions and statements that he was still claiming the car had been stolen. He also argued that the State had not established that Olin had in fact obstructed an officer in Rock County, or the elements of a conspiracy between her and Kundert to do so. The prosecutor closed his rebuttal with a request to jurors that they "find [Kundert] accountable under one or both of the theories of liability which I set forth for you and find him guilty."

¶8 The court informed the jury that the State had charged "[t]hat on or between February 21st and February 23rd, 1999, in Rock County, that the defendant, Barry Kundert, as a party to the crime, did unlawfully and knowingly obstruct an officer …." It then instructed jurors that "[b]efore you may find the defendant guilty, you must be satisfied beyond a reasonable doubt that the crime of obstructing an officer was committed and that [Kundert] directly committed it or that [Kundert] was a member of a conspiracy to commit that crime." In describing the elements of the crime of obstructing an officer, the court's instructions included the following:

> First, that [Kundert] or Dawn Olin knowingly gave false information to an officer.
>
> ….
>
> And fourth, that [Kundert] or Dawn Olin intended to mislead the officer in the performance of his or her duty.
>
> ….
>
> If you are satisfied beyond a reasonable doubt from the evidence in this case that [Kundert] committed all of the elements of obstructing an officer as that crime has been defined, or that he agreed or joined with Dawn Olin in a

> conspiracy to commit that crime, you should find [Kundert] guilty.

Regarding the need for jury unanimity, the court told jurors only that "before the jury may return a verdict which legally can be received, such verdict must be reached unanimously. In a criminal case, all 12 jurors must agree in order to arrive at a verdict."

¶9 During deliberations, the jury sent the following note to the court:

> "We are confused.
>
> Obstruction of Justice is made up of 2 parts:
>
> 1) obstruction
> 2) conspiracy
>
> Do we need a unanimous decision on either one or both? Or is obstruction—obstruction + conspiracy and we only find on the obstruction."

Over Kundert's objection, the court responded to the jury's question as follows:

> In response to that, as the instructions purport to tell you, we have a single offense for which the defendant may be found liable in one of two ways, either by direct commission, if you were to believe the testimony of the deputy, or by conspiracy, if you believe the testimony of Dawn … Olin. All you have to agree is that the defendant, if you find beyond a reasonable doubt that he did commit acts or engaged in a conspiracy, is guilty on either of one of those theories. Six of you you (sic) were to agree that he did it directly and six were to agree that he did it as a party to the crime as a basis for conspiracy that would be all that would be required. Unanimity is not required.
>
> If you are not satisfied beyond a reasonable doubt that he committed the offense in one of those two ways then you must find him not guilty. Unanimity is not required.

¶10 Less than ten minutes later, the jury returned with its verdict of guilty on the single charge of obstructing an officer. Kundert moved postconviction for a new trial on the grounds that Kundert was denied his right to a unanimous verdict, which was denied. Kundert appeals both the judgment of conviction and the order denying postconviction relief.

ANALYSIS

¶11 "The Wisconsin Constitution's guarantee of the right to trial by jury includes the right to a unanimous verdict with respect to the ultimate issue of guilt or innocence." ***State v. Johnson***, 2001 WI 52, ¶11, No. 99-2968-CR (citing WIS. CONST., art. I, §§ 5 and 7; ***State v. Derango***, 2000 WI 89, ¶13, 236 Wis. 2d 721, 613 N.W.2d 833). "Jury unanimity, however, is required 'only with respect to the ultimate issue of the defendant's guilt or innocence of the crime charged, and … not … with respect to the alternative means or ways in which the crime can be committed.'" ***Derango***, 2000 WI 89 at ¶14 (citing ***Holland***, 91 Wis. 2d at 143). Ordinarily, we review a trial court's instructions to the jury under the erroneous exercise of discretion standard, *see* ***State v. Glenn***, 199 Wis. 2d 575, 581-82, 545 N.W.2d 230 (1996). However, where the issue presented is whether a defendant's constitutional rights were violated, we decide the question de novo. *See* ***State v. Sauceda***, 168 Wis. 2d 486, 492, 485 N.W.2d 1 (1992).

¶12 We first note what is *not* at issue in this case. The issue of whether the legislature may constitutionally combine separate acts in a certain way so as to define a single offense is not before us. *See* ***Johnson***, 2001 WI 52, No. 99-2968-CR; *see also* ***Schad v. Arizona***, 501 U.S. 624, 631 (1991) ("The issue in this case … is one of the permissible limits in defining criminal conduct ….). Similarly, the question of whether the language of a given criminal statute creates "a single

crime with multiple modes of commission, rather than multiple, separate offenses" is also not before us. ***Derango***, 2000 WI 89 at ¶20; *see also* ***State v. Cheers***, 102 Wis. 2d 367, 399, 306 N.W.2d 676 (1981). Rather, the question we must answer is whether, on the present facts, the court committed constitutional error when it instructed jurors that they could return a guilty verdict if six of them concluded Kundert told Olin on February 21st to lie to police, while the remaining six jurors concluded that Kundert lied to a deputy on February 23rd. We conclude that the court erred.

¶13 We agree with the State that a proper beginning point for our analysis is the supreme court's decision in ***Holland***, 91 Wis. 2d at 143. Holland and another man had entered an apartment, sexually assaulted two women and murdered one of them. ***Id***. at 136-37. The State charged Holland with murder as a party to the crime. ***Id***. at 137. The trial court instructed the jury that Holland could be found guilty of the murder if he directly committed it, aided and abetted it, or conspired with another to commit it, but the court did not tell the jury that it had to be unanimous "as to the manner in which the defendant was a party to the crime." ***Id***. at 137-38. The supreme court concluded that no violation of Holland's right to a unanimous verdict had occurred:

> Unanimity is required only with respect to the ultimate issue of the defendant's guilt or innocence of the crime charged, and unanimity is not required with respect to the alternative means or ways in which the crime can be committed. The cases across the country—New York, Michigan, Washington—recognize and note that it is sufficient that all jurors unanimously agree on their ultimate conclusion that the defendant was guilty of the crime charged, though they may not agree on the manner in which the defendant participated in the crime if under any of the alternative ways the defendant would be guilty of the crime charged. To permit any other conclusion would be to permit the guilty defendant to escape accountability under the law because jurors could not unanimously choose

> beyond a reasonable doubt which of several alternate ways the defendant actually participated, even though all agree that he was, in fact, a participant.
>
> Here Holland was charged with first-degree murder, and the jury was instructed on the various parties to the crime theories. We recognize that the party to a crime statute does not create three separate and distinct offenses….
>
> Here we have a single offense for which the defendant could be found liable in three alternative ways—direct commission, aiding and abetting, and conspiracy—when the jury unanimously concluded the defendant was guilty of second-degree murder. The jury unanimously found participation, and it was not necessary that it be agreed as to the theory of participation. To require unanimity as to the manner of participation would be to frustrate the justice system, promote endless jury deliberations, encourage hung juries, and precipitate retrials in an effort to find agreement on a nonessential issue.

Id. at 143-44 (citations omitted).

¶14 Although the supreme court's discussion in ***Holland*** may be a proper beginning point, our analysis may not end there, however. As the court noted in ***Holland***, the defendant and his co-actor had committed "a single offense" (that is, one murder). ***Id***. at 144. The same is not true regarding the actions of Kundert and Olin in this case. WISCONSIN STAT. § 946.41 provides:

> (1) Whoever 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.
>
> (2) In this section:
>
> (a) "Obstructs" includes without limitation *knowingly giving false information to the officer* or knowingly placing physical evidence with intent to mislead the

> officer in the performance of his or her duty including the service of any summons or civil process.

(Emphasis added.) As the emphasized language indicates, the crime of obstructing an officer is complete when a person knowingly gives false information to a law enforcement officer.

¶15 Here, Olin allegedly gave false information, knowingly and at Kundert's request, to one Rock County deputy, while Kundert allegedly, at a separate time and place, knowingly gave false information to a different deputy. The State conceded during postconviction argument that it could have charged Kundert with two separate offenses, but argued that it could permissibly, in its discretion, "combine multiple acts which have the same common purpose" in one charge. Thus, we must consider whether the combination of multiple acts, presented to the jury in this case as a single offense, violated "the prohibition against duplicity," one of the purposes of which is "to guarantee jury unanimity." ***State v. Lomagro***, 113 Wis. 2d 582, 586-87, 335 N.W.2d 583 (1983). The supreme court explained in ***Lomagro*** that "[w]hen separate criminal offenses of the same type occur during one continuous criminal transaction, the prosecutor may join these acts in a single count if they can properly be viewed as one continuous occurrence without violating the protections afforded the defendant by the rule against duplicity." ***Id***. at 589. If a protection, such as the guarantee of jury unanimity, is threatened "and cannot be cured by instructions to the jury," the State must "either elect the act upon which it will rely or separate the acts into separate counts." ***Id***.

¶16 Thus, we seem to have come full circle, and our disposition turns on what it means to be guaranteed a unanimous jury verdict, there being no question that the trial court's instructions did not require the jury to be unanimous on the

specific act constituting Kundert's obstruction. The court, in response to the jurors' inquiry, specifically told them they could split on whether Kundert lied to police or told Olin to do so, as long as all twelve concluded he did one or the other. In addressing the jury unanimity concern in ***Lomagro***, the court sought guidance from what it deemed to be the "leading case on the requirement of jury unanimity" at the time, ***United States v. Gipson***, 553 F.2d 453 (5th Cir. 1977). ***Lomagro***, 113 Wis. 2d at 591. We, however, have the benefit of a recent pronouncement of the United States Supreme Court on the issue, ***Richardson v. United States***, 526 U.S. 813 (1999), as well as the even more recent discussion of jury unanimity by the Wisconsin Supreme Court in ***Johnson***, 2001 WI 52, No. 99-2968-CR. *See also* ***Schad***, 501 U.S. at 634-35 (discussing ***Gipson*** and concluding its test of "distinct conceptual groupings" of acts is of limited value).

¶17 The supreme court noted in ***Johnson*** that a two step analysis is required to determine exactly what a jury must be unanimous about. *See* ***Johnson***, 2001 WI 52 at ¶¶11-13. The first step is to examine the language of the statute in order to determine the elements of the crime and whether the legislature created a single offense with multiple or alternate modes of commission. *See* ***id***. at ¶12. As we have noted, the legislature has established that a person may be found guilty of a crime if he or she either directly commits it or conspires with another to commit it. *See* WIS. STAT. § 939.05; ***Holland***, 91 Wis. 2d 134. As we have also noted, however, evidence of two acts of obstruction of an officer were presented to the jury in this case, Olin's (at Kundert's suggestion) and Kundert's. For purposes of this part of the analysis, we accept the State's argument that the two acts were relatively close in time, and thus, they might be viewed as being a part of a continuing criminal transaction instigated by Kundert to prevent the police from discovering that he was driving his car when it rolled over in the early morning

hours of February 21st. In short, we conclude the "first step" of ***Johnson*** is either inapplicable on the present facts, or to the extent it applies, it would support a determination that there is no statutory bar to presenting Kundert's multiple acts to the jury as one criminal offense.

¶18 The court next explained in ***Johnson*** that "[f]ederal constitutional due process considerations" limit the State's ability "to dispense with the requirement of jury unanimity on the alternate means or modes of committing" a crime. ***Johnson***, 2001 WI 52 at ¶13 (citing ***Richardson***, 526 U.S. 813 (1999)). "So, the second step in the analysis is an evaluation of whether the lack of jury unanimity on the alternate means or modes of commission violates due process." ***Id***. As the supreme court did in ***Johnson***, we look to ***Richardson*** for guidance on this question. *See* ***id***. at ¶¶24-25.

¶19 The Supreme Court expressed several concerns in ***Richardson***, among them was that "permitting a jury to avoid discussion of the specific factual details of each violation, will cover-up wide disagreement among the jurors about just what the defendant did, or did not, do." ***Richardson***, 526 U.S. at 819. We conclude that concern is present here. By telling jurors that six could agree that Kundert asked Olin to lie on February 21st, and six could agree that he lied himself on February 23rd, the court invited "wide disagreement about just what [Kundert] did, or did not, do." Kundert presented different defenses to the alternative theories. Regarding his own statement to the deputy, he maintained that he spoke no direct lies, but that the deputy, expecting Kundert to claim his car had been stolen, perceived his questions and statements as communicating that lie. And, with respect to his alleged conspiracy with Olin to obstruct police, Kundert argued to the jury, variously, that she would have lied even without his request in order to protect her fiancé (who was with Kundert at the time of the rollover); that

there was no agreement between them that she lie; and that the significant acts relating to her lie did not take place in Rock County.

¶20 In short, this is not a case where the jury had simply to choose between a complainant's and a defendant's competing versions of a single episode, and depending on whom jurors believed, conclude either that both acts occurred or that neither did. Nor was this a case where, as in ***Holland***, two persons acted in concert at one time to commit one crime, and the only question for the jury was whether the defendant had, in fact, participated in some way. Here, some jurors may not have been convinced beyond a reasonable doubt that Kundert conspired with Dawn Olin to have her lie to police, and some could have been unconvinced that he himself lied to a deputy.

¶21 The second concern expressed by the Supreme Court in ***Richardson*** was "the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire." ***Richardson***, 526 U.S. at 819. That risk is very much present in this case. Kundert acknowledged before the jury that he had falsely reported his car stolen to the Jefferson County Sheriff's Department, and that he had four prior criminal convictions. The jury could easily have concluded that he had a propensity to lie, and even if he did not do both things the State alleged, enough jurors could have been satisfied that Kundert did one or the other, which, under the court's instructions, permitted them to find him guilty.

¶22 Finally, the Court relied in ***Richardson*** on its prior conclusion in ***Schad***, 501 U.S. 624, 632-33 (1991), that the U.S. Constitution "limits a State's power to define crimes in ways that would permit juries to convict while

disagreeing about means, at least where that definition risks serious unfairness and lacks support in history or tradition." ***Richardson***, 526 U.S. at 820. The Court also quoted from the concurrence in ***Schad***: "'We would not permit … an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday ….'" ***Id***. (citing ***Schad***, 501 U.S. at 651 (Scalia, J., concurring)). Justice Scalia, in concurring with the plurality in ***Schad***, rejected the notion that the "moral equivalence" of two separate acts is a sufficient basis to allow a jury to convict a person of a crime for having committed either of the acts. ***Schad***, 501 U.S. at 651. That, however, is essentially what the State argues in this case.

¶23 According to the State, Kundert intended to mislead police into believing his car was stolen before the rollover accident, and he sought to accomplish that goal, as far as the Rock County prosecution was concerned, by conspiring with Olin to have her lie to police, and by lying to police himself. These acts are no doubt "morally equivalent," but the State cites no "history or tradition" of permitting two separate acts of obstructing an officer to be combined in this fashion, and we are aware of none. Under the instructions given in this case, Kundert could have been convicted because some jurors believed he told Olin on Sunday to lie to an officer, while other jurors believed he personally lied to another officer on Tuesday. We conclude that the instructions given contravene the "constitutional due process considerations" discussed in ***Richardson, Schad*** and ***Johnson***, and that Kundert is thus entitled to a new trial.

¶24 In closing, we note that we are satisfied that the State presented sufficient evidence to support Kundert's conviction for obstructing an officer, and hence there is no constitutional obstacle in retrying him. *See* ***State v. Perkins***, 2001 WI 46, ¶47, 243 Wis. 2d 141, 626 N.W.2d 762. On the evidence presented at trial most favorable to sustaining the conviction, we conclude that jurors,

properly instructed, could be convinced, unanimously and beyond a reasonable doubt, that Kundert committed one of the acts the State accused him of, or even that he committed both acts. *See* ***id***. at ¶48. The problem, as we have noted, is that under the instructions given, we have no way of knowing if this was indeed the case. *See* ***id***. at ¶40 (noting that "[a] proper jury instruction is a crucial component of the fact-finding process," and that a verdict's validity depends on proper instructions).

CONCLUSION

¶25 For the reasons discussed above, we conclude that the trial court erred when it instructed the jury that it need not be unanimous in determining whether Kundert conspired with Olin to have her obstruct an officer, or whether he subsequently did so himself. Accordingly, we reverse the judgment of conviction and the order denying his request for a new trial. The State claims that the only alternatives to the trial court giving the instructions it did would be for it to charge the crimes separately, or for it to elect which theory of culpability it would present to the jury. We see a third alternative, however. The State may proceed with the same evidence it presented in the first trial on the single count of obstructing as charged in the present complaint. Jurors should be instructed, however, that before they can find Kundert guilty of the offense, they must unanimously agree that Kundert was a party to an offense committed by Olin under WIS. STAT. § 939.05, or they must be in unanimous agreement that he directly obstructed an officer by knowingly giving false information to a deputy on February 23rd.

By the Court.—Judgment and order reversed and cause remanded.

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