COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-3502-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SUSAN HOLZL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Taylor County: MICHAEL W. HOOVER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Susan Holzl appeals from a judgment entered after a jury convicted her of battery to a law enforcement officer. She claims that: (1) the prosecutor, in her questioning of the officer/victim and in her closing argument, improperly shifted the burden of proof; (2) the trial court improperly limited her presentation of an offer of proof to establish that the officer/victim had a pattern of alleging obstruction or battery in order to deflect any potential

accusations of excessive force by an arrestee; (3) the evidence was insufficient to support her conviction; and (4) the prosecutor improperly placed her opinion of Holzl's guilt before the jury. We affirm.

I. BACKGROUND

On January 27, 1996, Ken Holzl was stopped and arrested for driving under the influence by Taylor County Police Officer Harlan Schwartz. Immediately following the stop, Susan Holzl, Ken's wife and a passenger in the vehicle, interfered with Officer Schwartz's effort to conduct a field sobriety test on her husband. Officer Larry Woebbeking, who arrived as backup to Officer Schwartz, directed Susan to return to and remain in her vehicle, but she refused. Shortly after Ken was arrested and placed in a squad car, Susan opened the backdoor of the squad and attempted to enter the vehicle. Officer Woebbeking rushed to the squad and removed Susan from the back seat. After being released from his grasp, Susan, who had her back to him, turned around and hit Officer Woebbeking with a backhanded punch. Officer Woebbeking then arrested her.

After a one-day trial, the jury convicted Holzl of battery to a law enforcement officer. The trial court sentenced Holzl to thirty days in jail with Huber privileges, imposed and stayed, placed her on probation for eighteen months, and ordered her to complete two hundred hours of community service.

II. DISCUSSION

Holzl first argues that the prosecutor's questioning of Officer Woebbeking and her closing argument improperly shifted the burden of proof. Holzl claims that by using defense counsel's comments from his opening statement in her questioning of Officer Woebbeking, the prosecutor shifted the

burden of proof to the defendant thus requiring her "to prove various facts to avoid conviction." Specifically, she asserts that by referring to defense counsel's opening statement, and in particular to what he claimed the evidence would show, the prosecutor implied that the defendant bore the burden of proof in this case.[1] Holzl, however, failed to preserve her claim of error by not offering timely and specific objections to the trial court.

As a general rule, a timely objection is necessary to preserve a claim of error for appellate review. *See* ***State v. Buck***, 210 Wis.2d 115, 127, 565 N.W.2d 168, 173 (Ct. App. 1997). In addition, the objection must include specific grounds on which the objecting party relies to support his or her claim of error. *See* ***State v. Hartman***, 145 Wis.2d 1, 9, 426 N.W.2d 320, 323 (1988). As the supreme court recently reiterated: "An objection or motion is sufficient to preserve an issue for appeal if it apprises the court of the specific grounds upon which it is based. Specificity is required so that the circuit court judge and the opposing party are afforded 'an opportunity to remedy any defect.'" ***State v. Corey J.G.***, 215 Wis.2d 394, 404, 572 N.W.2d 845, 849 (1998) (citations omitted). Accordingly, this court has held: "Arguments which are not raised at the trial level are deemed waived." ***State v. Keith***, 216 Wis.2d 61, 80, 573 N.W.2d 888, 897 (Ct. App. 1997).

The record shows that although defense counsel did object to the prosecutor's questions now at issue, counsel did not assert the bases now claimed

[1] Examples of the prosecutor's questions/statements which Holzl claims shifted the burden of proof are: "Defense counsel said in opening [that Holzl] wanted to ask her husband [something]. Did she make any statement like that to you?"; and "Officer, also in opening defense counsel said something about possibly you were hurt during this action of the opening and the closing of the doors."

as the grounds for the objections. At trial, defense counsel objected to the prosecutor's use of his comments in her phrasing of questions to Officer Woebbeking on the grounds that the prosecutor's questions were "leading" or were "not a question." These are unrelated to the argument Holzl now raises on appeal; accordingly, we conclude that she has waived the issue.[2]

Holzl next argues that the trial court improperly limited her presentation of an offer of proof to establish that Officer Woebbeking "used obstruction or battery charges in cases where he had used excessive force to discredit the subject." Here, Holzl correctly asserts that the trial court erred in abruptly stopping defense counsel's questioning of Officer Woebbeking regarding the alleged prior conduct. The record establishes that no sooner than the trial court

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[2] Holzl also claims that the prosecutor's closing argument shifted the burden of proof. The State acknowledges that, in the trial court, defense counsel did argue that the prosecutor's argument was attempting to shift the burden of proof to the defense. Counsel did so, however, with reference to only one of the prosecutor's comments: "Have they given you any reasonable hypothesis on which to reconcile the defendant's innocence?" This comment is not one of those to which Holzl refers in her argument to this court. Thus, as the State correctly argues, Holzl has also waived this issue.

Moreover, the State correctly asserts that even if Holzl had challenged this comment on appeal, her argument would still fail because that comment did not shift the burden to the defense. As the State explains:

> [The prosecutor's comment] was obviously a reference to the standard jury instruction that was given in this case, which told the jury that "[I]f you can reconcile the evidence upon any reasonable hypothesis consistent with the defendant's innocence, you must do so and return a verdict of not guilty." The prosecutor's comment was not suggesting anything with respect to the burden of proof. It was addressing the defendant's failure, in her closing argument, to suggest any reasonable hypothesis consistent with innocence that the evidence adduced by the [S]tate in this case would support.

We agree. We note that, if anything, the prosecutor's comment, by referencing the need for the jury to negate any reasonable hypothesis of innocence, affirmed the State's obligation to prove the defendant's guilt beyond a reasonable doubt.

ordered counsel to examine the officer on the prior incident, it abruptly cut off questioning, ruling that defense counsel "[wasn't] prepared to do it quickly enough." Given that counsel had only asked a total of ten questions, and had only just started eliciting information about the prior arrestee's allegation of excessive force, this ruling was precipitous. Nevertheless, because Holzl's substantive legal argument lacks merit, we conclude that the trial court's error was harmless. *See* ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985).

As a general rule, "the trial court should permit [counsel to make] an offer of proof either in question and answer form or by a statement of counsel, in the record, of what he [or she] believes the testimony would show." ***State ex rel. Schlehlein v. Duris***, 54 Wis.2d 34, 39, 194 N.W.2d 613, 616 (1972). An offer of proof not only provides this court with a meaningful record to review but it also provides the trial court with a more adequate basis for its evidentiary ruling. *See* ***id.*** This general rule, however, has limited exceptions under which the trial court may refuse an offer of proof in the exercise of judicial discretion. *See* ***id.*** For example, a trial judge need not permit an offer of proof as to matters that are clearly immaterial, irrelevant or without proper foundation. *See* ***id.*** In the instant case, as the State explains, Holzl's offer of testimony concerning Officer Woebbeking's prior incident involving allegations of excessive force and battery to a police officer could only have been irrelevant and immaterial.

First, Holzl never alleged a "pattern of misconduct" by Officer Woebbeking. Rather, she only stated that she wanted to cross-examine Officer Woebbeking regarding one specific incident. One incident does not establish a pattern of behavior. Second, Holzl failed to show that cross-examination about that prior incident of alleged excessive force would have included a showing that it had resulted in charging the arrestee with obstruction or battery. Although

defense counsel alluded to this fact in his cross-examination of Officer Woebbeking, he never did in fact state that the prior incident on which he wanted to examine the officer also involved an arrest for obstruction or battery. Further, even if we were to assume that Holzl's counsel could have established that charges for obstruction or battery had been filed, Holzl's counsel never claimed that he would have been able to show that the charges issued in the prior incident were false. Finally, although Holzl contends that the questioning of Officer Woebbeking would have shown that he used charges of battery or obstruction against arrestees to discredit arrestees' claims of excessive force, in this case, Holzl never made a claim of excessive force; therefore, the prior incident was immaterial. Accordingly, we conclude that any testimony concerning the prior incident would have been wholly irrelevant and, therefore, the trial court error was harmless.

Holzl also argues that the evidence was insufficient to support her conviction. Specifically, Holzl argues that the evidence failed to support the jury's finding that she struck Officer Woebbeking and that she did so intentionally.

Our standard of review is clear:

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless 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. If any possibility exists 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.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990) (citation omitted). Further, the determination of the credibility of witnesses and the resolution of conflicting testimony are matters within the jury's province. *See* ***Wheeler v. State***, 87 Wis.2d 626, 634, 275 N.W.2d 651, 655 (1979).

Trial testimony supports the jury's verdict. Officer Woebbeking testified that after he pulled Holzl out of the police squad and released her from his grasp, Holzl took a step forward, swung her fist around and hit him in the mouth. After describing Holzl's actions, Officer Woebbeking, at the prosecutor's request, stepped down from the stand and demonstrated how Holzl hit him. Officer Woebbeking clarified:

> A. Once I released my grip on her, I closed the right rear door of the squad car. I then refocused my attention to her. I turned back toward Susan Holzl, at which time she took one step away from me with one foot.
>
> Q. [Prosecutor] Can I interrupt? I apologize. When you said she was right next to you, was she facing you at that time?
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> A. She was facing away from me at that time.
>
> Q. So you were looking in a sense into the back of her winter jacket?
>
> A. Yes. She took one step away from me to the rear of the vehicle, at which time she turned back, and I believe it was with her right hand, I cannot be positive of that, took one step away from me, turned, and swung with her upper body and her head in one motion like this, come back. That is when she struck my mouth.
>
> Q. And what was her hand like when she struck you?
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> A. With a closed fist.
>
> Q. And in terms of the fist, did it hit you in the knuckle portion or the back of the hand that you can remember?
>
> A. I don't remember what portion of her fist actually struck me.
>
> Q. And where did it strike you?
>
> A. Lower left area of my lip ….

Based on this testimony, we conclude that the evidence was sufficient to support the jury's finding that Holzl hit Officer Woebbeking. This testimony, coupled with Officer Woebbeking's demonstration, does not "conflict with nature or fully established or conceded facts." *See* ***State v. Clark***, 87 Wis.2d 804, 816, 275 N.W.2d 715, 721 (1979). Accordingly, we cannot conclude, as Holzl maintains, that Officer Woebbeking's testimony describes an event which is wholly impossible.

Holzl also argues that the State failed to establish intent. We cannot agree. Officer Woebbeking testified:

> I believe it was intentional because of the set of steps that she took to deliver the strike. Actually[, she] took one step, which would have brought her to the right distance. She knew that I was right behind her because I pulled her from the vehicle. [She] [c]losed the fist; it was a fist. It wasn't an open hand as if you would turn around to get somebody's attention. It was a fist, and around with the momentum, and her body turned as one, she could obviously see where I was. She had a fist, and she did intend to strike me.

From this testimony, the jury could reasonably infer that Holzl intended to hit Officer Woebbeking. Officer Woebbeking's testimony explicitly alleged her intent and that, in combination with his demonstration of the battery, provided the jury with ample evidence to find intent beyond a reasonable doubt.

Finally, Holzl claims that "prosecutor's arguments in her closing . . . improperly placed [the prosecutor's] opinion of [Holzl's] guilt in front of the jury." Once again, however, Holzl failed to object on that basis at trial, and therefore, she has waived the issue. *See* ***State v. Seeley***, 212 Wis.2d 75, 81, 567 N.W.2d 897, 900 (Ct. App. 1997); *see also* ***State v. Fawcett***, 145 Wis.2d 244, 256, 426 N.W.2d 91, 96 (Ct. App. 1988) (to preserve an alleged error for review, the

objection to the error in the trial court must be made on the same ground as that raised on appeal).

By the Court.—Judgment affirmed.

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