

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

December 28, 1995

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(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2230-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CARL SCOTT HITCHCOCK,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Jefferson County:
JOHN ULLSVIK, Judge. *Reversed and cause remanded.*

GARTZKE, P.J.¹ Carl Hitchcock appeals from a judgment of conviction for resisting arrest and disorderly conduct, §§ 946.41 and 947.01, STATS. The jury acquitted him on the charge of endangering safety by negligent handling of a weapon, § 941.20(1)(a), STATS. Hitchcock contends that he was denied his Sixth Amendment right to counsel and that the trial court improperly permitted the State to introduce evidence of his conversations with persons not involved in the incidents alleged in the complaint.

¹ This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

Our task is lightened. The State concedes that Hitchcock was denied his constitutional right to counsel. For that reason, we set aside the convictions and remand for a new trial on the resisting arrest and disorderly conduct charges.

However, the State contends that the challenged evidence would have been properly admitted had a cautionary instruction, WIS J I--CRIMINAL 275, been given to the jury regarding that evidence. We infer that the State intends to introduce the same evidence at the second trial. To economize judicial effort, and perhaps avoid a second appeal, we review the evidentiary issue.

According to the amended complaint, all charges arose out of an incident on March 24, 1993. The Watertown fire chief and city engineer had been checking the water level at a dam Hitchcock's mother owns, Hitchcock jumped out of his truck with a rifle and asked who they were and what they were doing there and told them to "get the fuck off his property." He aimed the rifle he was carrying in the chief's face, and later raised the rifle to the face of the engineer and told him to get off his private property and never return. We infer those incidents gave rise to the disorderly conduct and weapon charges. Later that day the police scuffled with Hitchcock when arresting him, and that resulted in the resisting charge. At no time during the scuffle did Hitchcock have his rifle with him.

At trial Robert Hansis, a DNR employee, testified that on March 24, 1993, in a telephone conversation with Hitchcock, Hansis expressed his concern about the height of the water at the dam. When Hansis asked Hitchcock to forward information to his mother, Hitchcock became abusive and said he would "put a fucking bullet" through Hansis's head. Thomas Reiss operates the Rock River Power & Light Corporation in Watertown. On March 24, 1993, Hitchcock telephoned him and said, "Reiss, you scumbag, you have been blowing your mouth off to the DNR again. I have business to take care of in Watertown and I am coming down there and, when I'm finished, I'm going to come and find you and put a bullet in your head."

The court ruled that the telephone conversations were relevant to Hitchcock's intent. The court therefore concluded that the conversations were

admissible on the weapons charge. Because the jury acquitted Hitchcock on that charge, whether the evidence was relevant to the weapon charge is a moot issue.

Other crimes or acts evidence is admissible if not offered to prove the character of a person in order to show that the person acted in conformity with his character. Section 904.04(2), STATS. But the evidence must be relevant to an issue in the case. *State v. Johnson*, 184 Wis.2d 324, 338, 516 N.W.2d 463, 467 (Ct. App. 1994). The conversations with Hansis and Reiss do not tend to make the existence of any fact of consequence to the determination of the disorderly conduct or resisting charge more probable or less probable and are therefore irrelevant under § 904.01, STATS. The testimony by Reiss and Hansis will be inadmissible at the second trial.

By the Court. – Judgment reversed and remanded for a new trial.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.