

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 29, 2008

David R. Schanker
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP2095-CR

Cir. Ct. No. 2006CF233

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KELLY R. FERGUSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County:
GREGORY B. HUBER, Judge. *Reversed and cause remanded with directions.*

¶1 BRUNNER, J.¹ Kelly Ferguson argues her judgment of conviction for obstructing an officer should be reversed and remanded because the circuit

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

court improperly instructed the jury regarding the “lawful authority” element of the crime. We agree and therefore reverse and remand for a new trial.

BACKGROUND

¶2 On December 29, 2005, police received a report that a female was attempting to break into a residence. Officers Bill Taylor and Nathan Cihlar arrived at the location. The officers met with the lower tenant who told officers that the upstairs neighbor, Kelly Ferguson, had pounded on his door and yelled that he needed to get his stuff out by 6 a.m. because she was evicting him. The lower tenant told officers that Ferguson was not the landlord, and had no right to evict him. The officers went upstairs to investigate.

¶3 Cihlar knocked on the door and Ferguson answered. Cihlar asked Ferguson if she had been downstairs. Ferguson denied that she had been downstairs and proceeded to yell at the officers. She told the officers she was going to call her landlord and walked away from the door. As she walked into the house, her nephew, who was living with her, tried to calm her. Ferguson pushed her nephew and told him to pack his belongings and move out.

¶4 Taylor asked Ferguson not to call her landlord, but she ignored his suggestion. According to Taylor, police decided to take Ferguson into custody “[a]fter the situation with the telephone and her attempting to make a call, based on our encounter with her and her conduct and how she treated [her nephew]....” The officers then entered Ferguson’s home without a warrant in order to arrest her for disorderly conduct. Ferguson was uncooperative, forcing officers to carry her out of her home as she yelled and flailed her legs.

¶5 Ferguson was subsequently charged with disorderly conduct, obstructing an officer and two counts of battery by a prisoner.² At trial, Ferguson requested the court instruct the jury to use the following instruction for the third element of obstructing an officer; whether the officer was acting with lawful authority:

Police officers act with lawful authority if their acts are conducted in accordance with the law. In this case, it is alleged that while the police were investigating a complaint made against the defendant Kelly Ferguson by her downstairs neighbors and she got so loud and abusive toward the officers that they found it necessary to arrest her at her home.

The police lack authority to make an arrest of a person in the person's home without a warrant unless exigent circumstances exist that require the arrest to take place immediately.

In this case, the police did not have an arrest warrant.

Exigent circumstances which justify a warrantless arrest inside the person's home, fall into four categories:

- A. The police were in hot pursuit of the defendant at the time of her arrest inside her home.
- B. The police had reason to believe evidence would be destroyed unless they made an arrest immediately[.]
- C. The defendant was likely to flee.
- D. The defendant was an immediate threat to the safety of others.

If none of these circumstances [existed], the arrest was made without lawful authority[.]

The trial court rejected the proposed instruction and instead instructed the jury:

² The two counts of battery by a prisoner relate to events that occurred while Ferguson was confined in the Marathon County Jail.

Police officers act with lawful authority if their acts are conducted in accordance with the law. In this case, it is alleged that the officers were responding to and investigating a citizen complaint. During the course of doing so, the officers arrested the defendant.

An arrest is lawful when the officer has reasonable grounds to believe that the person is committing, has committed, or is about to commit a crime. An officer making an arrest may only use the amount of force reasonably necessary to take the person into custody.

Ferguson was convicted of disorderly conduct and obstructing an officer, but acquitted on the two counts of battery by a prisoner.

ARGUMENT

¶6 At issue here is whether the trial court properly instructed the jury regarding the lawful authority element of obstructing an officer pursuant to WIS. STAT. § 946.41. “A trial court ‘has broad discretion in deciding whether to give a particular jury instruction’” and must use its discretion to “‘fully and fairly inform the jury of the rules of law applicable to the case....’” *State v. Hemphill*, 2006 WI App 185, ¶8, 296 Wis. 2d 198, 722 N.W.2d 393 (citations omitted). We reverse if the instructions communicated an incorrect statement of law or misled the jury. *Id.* Whether the instruction is an accurate statement of the law applicable to the facts of the case is a question of law we review without deference. *Id.*

¶7 WISCONSIN STAT. § 946.41(1) states, “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.” “[B]y its very terms, WIS. STAT. § 946.41(1) requires an officer to have ‘lawful authority’ before a citizen can be charged with resisting an officer.” *State v. Annina*, 2006 WI App 202, ¶18, 296 Wis. 2d 599, 723 N.W.2d 708.

¶8 “Lawful authority goes to whether the officer’s actions are conducted in accordance with the law.” *State v. Barrett*, 96 Wis. 2d 174, 181, 291 N.W.2d 498 (1980). A warrantless entry into one’s home by police is presumptively prohibited by both the United States and Wisconsin Constitutions. *State v. Hughes*, 2000 WI 24, ¶17, 233 Wis. 2d 280, 607 N.W.2d 621. However, there are exceptions to the warrant requirement, including when “the government can show both probable cause and exigent circumstances that overcome the individual’s right to be free from government interference.” *Id.*

¶9 Here, the trial court told the jury an “arrest is lawful when the officer has reasonable grounds to believe that the person is committing, has committed, or is about to commit a crime.” The court stated it was relying on *Annina*, and did not instruct the jury regarding the requirements for a warrantless entry.

¶10 In *Annina*, police entered Annina’s home pursuant to a search warrant, later determined to be invalid, to investigate claims of underage drinking. *Annina*, 296 Wis. 2d 599, ¶17. Annina yelled at officers while they executed the search warrant, and the officers arrested her for disorderly conduct for her behavior in yelling at them. *Id.*, ¶¶4-6. Annina was also charged with obstructing an officer for kicking police and forcing them to carry her out of her home when they attempted to arrest her. *Id.*, ¶6. We stated that despite the invalid search warrant for underage drinking, her disorderly conduct was a new crime which gave the officers lawful authority to arrest her. *Id.*, ¶¶17-19. In other words, Annina’s behavior in yelling at officers, disorderly conduct, was a new crime from the underage drinking that police unlawfully entered to investigate. She was charged with obstruction for her behavior in resisting arrest for disorderly conduct, not in resisting arrest for facilitating underage drinking, the crime for which the invalid warrant was issued.

¶11 In our case, police entered Ferguson’s house without a warrant to arrest her for disorderly conduct for yelling at officers, attempting to call her landlord and pushing her nephew. Unlike *Annina*, they did not enter her home for one reason and then, once already inside the home, decide to arrest her for new conduct. Because a warrantless entry is presumptively unlawful, it is not possible in this case to say that Ferguson was obstructing the officers *while* they acted with lawful authority unless the officers’ warrantless entry could be justified by exigent circumstances. See *Hughes*, 233 Wis.2d 280, ¶17; see also WIS. STAT. § 946.41(1). Thus, we reverse and remand for a new trial.

By the Court.—Judgment reversed and cause remanded with directions.

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

