

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 19, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2007AP2944-CR

Cir. Ct. No. 2004CF97

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CRIN H. FORBES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 PER CURIAM. A jury convicted Crin H. Forbes of two counts of battery to a police officer, one count of resisting or obstructing an officer and one count of disorderly conduct, contrary to WIS. STAT. §§ 940.20(2), 946.41(1) and

947.01 (2005-06).¹ Forbes appeals from the judgment of conviction and from the orders denying his postconviction motion seeking either dismissal or a *Machner*² hearing. Forbes contends that defense counsel's and the prosecutor's failure to introduce a particular photograph at trial represents the former's ineffective assistance and the latter's prosecutorial misconduct. He also contends that the officers' entry into his home was illegal, making his subsequent arrest improper. Because the photograph was of minimal evidentiary value and, on these facts, *State v. Annina*, 2006 WI App 202, 296 Wis. 2d 599, 723 N.W.2d 708, validates the arrest, we affirm the conviction.

¶2 Few of the background facts are undisputed. Essentially, however, City of Mequon police officers Lindsey Graycarek and Mandy Rudolph went to Forbes' home about 8:30 p.m. one evening to investigate a report of a stolen computer.³ Forbes, his wife Tammy and their fifteen-year-old daughter were at home. Given a choice of surrendering the computer or having a criminal charge written up, Forbes told the officers to charge him and closed the door. Believing Tammy was amenable to discussing the matter, the officers entered. Forbes strode away, went down some steps, ignoring the officers' orders to stop. Graycarek radioed for backup assistance. Forbes entered a dimly lit basement room and picked up a nylon bag large enough to conceal a weapon. Unaware that the bag actually held a video camera, the officers struggled to handcuff him, and Forbes

¹ All references to the Wisconsin Statutes are to the 2005-06 version.

² See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

³ Forbes, a home-based computer consultant, had kept a client's computer, claiming the client had a large outstanding bill. The client filed a complaint alleging theft of the computer.

was pepper-sprayed, subdued and arrested. Rudolph and Graycarek sustained bumps, bruises and abrasions, all documented photographically.

¶3 Forbes', Tammy's and the officers' versions diverge significantly. According to Forbes' testimony, Graycarek rang his doorbell, loudly accused him of stealing a computer and told him he could return it or face criminal charges. Seeing "there was no way to discuss [it] in a civilized and businesslike manner," he said, "Okay, then charge me." His wife then closed the door and Forbes walked away. The next thing he knew, Tammy was screaming and Rudolph leaped onto his back and said, "I want to talk to you." They sparred over whether the officers needed a warrant to enter and whether he was entitled to a lawyer. Forbes went down a narrow stairway to the basement to get a video camera. He acknowledged hearing Rudolph telling him to stop so she could talk to him, but he did not stop because "[e]verything [he] had to talk was said." As Forbes neared the camera bag, Graycarek pepper-sprayed him in the face, Rudolph squeezed his testicles and he felt her finger in the area of his rectum. He denied trying to pin Rudolph up against the door frame or to pinch Graycarek's hand in the handcuffs.

¶4 According to Tammy's testimony, she told her husband not to open the door for the police officers because it was "not the business hour anymore," but he spoke to them briefly. When Forbes turned away from the door, Tammy closed and attempted to lock it, but Rudolph "ripped the door out of [her] hand," and the officers entered the house. Tammy said nothing to the officers and did not tell them to come in. Rudolph then shoved Tammy "strongly in the chest" and jumped on Forbes' back. Graycarek also shoved Tammy and began hitting and scratching Forbes. Forbes made for the basement to get the video camera with Rudolph dragging behind him, hitting him constantly. The officers did not tell him to stop although, "like a broken record," they kept saying they wanted to talk

to him. Graycarek punched and pepper-sprayed Forbes, and reached underneath his shorts in front. Rudolph reached inside his shorts in the back and it “looked pretty much” like she tried to get her fingers in his rectum. The officers laughed and made obscene remarks about Forbes’ genitals. Tammy called 9-1-1.

¶5 Officer Graycarek testified that Forbes answered the door and acknowledged that he had the computer but was not going to return it because the owners owed him money. She gave him his options, and Forbes said, “Then charge me,” and slammed the door in their faces. Almost immediately, Tammy reopened the door, said they needed to discuss the matter, and invited the officers inside.⁴ Rudolph followed Forbes down a stairwell, telling him to stop. Graycarek followed because they were out of her sight, a potentially unsafe circumstance. She put her arm out as she moved past Tammy, but did not push or shove her. Hearing Rudolph continue to tell Forbes to stop and to show his hands, Graycarek called for backup assistance. Graycarek saw Rudolph and Forbes in the far corner of the dimly lit basement office. When he still ignored the officers’ repeated commands to stop and moved toward a bag large enough to hold a weapon, they tried to handcuff him. Forbes struggled, and Graycarek used pepper spray on him. They got a cuff on one wrist, but lost control of his other arm when he pinned Rudolph against the door frame. Forbes grabbed a handcuff, painfully squeezing Graycarek’s fingers in the ratchet portion. Rudolph testified similarly. In addition, she denied jumping on Forbes’ back, digitally penetrating him or

⁴ City of Mequon Police Sergeant Charles Linzmeier, who responded to Graycarek’s call for backup, also testified that when he interviewed Tammy before making his report, she told him she invited the officers in to discuss the computer matter.

having physical contact with him any time while on the stairs. Both officers denied grabbing or squeezing his genitals, commenting indecently or laughing.

¶6 Forbes was charged with two counts of battery to a police officer, one count of resisting or obstructing an officer and one count of disorderly conduct. He unsuccessfully moved to dismiss on grounds that his arrest was illegal because the entry into his house was illegal. A jury found him guilty on all counts. The trial court denied his motion for postconviction relief.

¶7 Forbes then moved to supplement the trial court record with a photograph not introduced into evidence at trial. The photograph depicts a cut on the index finger of a woman's left hand; Graycarek had testified about injuries to the fingers of her right hand. This court denied the motion. Soon after, Forbes successfully moved to return the case to the trial court to seek a *Machner* hearing. His new postconviction motion claimed that trial counsel was ineffective for failing to introduce the photograph into evidence. The trial court denied the motion without a *Machner* hearing.

¶8 Forbes raises three issues on appeal: ineffective assistance of trial counsel, prosecutorial misconduct and illegality of the arrest based on illegal entry. The first two issues involve the photograph that was the subject of his second postconviction motion. Forbes alleges that his trial counsel was ineffective because he did not introduce the photograph to impeach the officers' testimony.⁵ Forbes' counsel filed an affidavit averring that had he introduced the photograph,

⁵ Forbes argues that introducing the photograph would have significantly undermined both officers' credibility: Graycarek's because she described right-hand injury and Rudolph's because she took the picture.

the result of the trial very well could have been different. Forbes requests either a new trial or a *Machner* hearing to evaluate the claimed ineffectiveness.

¶9 This court operates under the principles adopted by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). To establish an ineffective assistance of counsel claim, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *State v. Kimbrough*, 2001 WI App 138, ¶26, 246 Wis. 2d 648, 630 N.W.2d 752. Assuming for this discussion that counsel's failure to introduce the photograph constituted deficient performance, we need address only whether that deficiency prejudiced Forbes' defense. The test for prejudice is whether there is a reasonable probability that, but for the unprofessional error, the result of the proceeding would have been different. *State v. Johnson*, 153 Wis. 2d 121, 129, 449 N.W.2d 845 (1990). Assessing prejudice presents a question of law that we decide independently. See *Kimbrough*, 246 Wis. 2d 648, ¶27.

¶10 The State produced eighteen photographs depicting the officers' injuries. Twelve—six of Rudolph, six of Graycarek—were introduced into evidence. The photograph at issue, an undated photograph of an unidentified woman's left index finger bearing a cut, was not. Because Graycarek had testified that Forbes forcibly squeezed the fingers on her right hand in the handcuffs, he contends the "finger photograph" would have seriously undermined Graycarek's credibility on that issue and, by extension, overall. Forbes' trial counsel filed a supporting affidavit averring that introducing and cross-examining Graycarek on the photograph would have raised a reasonable doubt as to whether Forbes had battered her and "very well" could have led to a different trial result.

¶11 Trial counsel’s affidavit offering legal conclusions does not bind us. *See Wisconsin DOR v. River City Refuse Removal, Inc.*, 2006 WI App 34, ¶33 n.18, 289 Wis. 2d 628, 712 N.W.2d 351., *aff’d*, 2007 WI 27, 299 Wis. 2d 561, 729 N.W.2d 396. As we have said, whether counsel’s performance was prejudicial to the defense is a question of law. *Kimbrough*, 246 Wis. 2d 648, ¶27. We see no prejudice from counsel’s failure to introduce the photograph. Graycarek’s mention of the cut on her right finger was but half a line out of her over fifty pages of testimony. She may have misspoken. Moreover, Graycarek testified to “intense pain” as a result of Forbes squeezing her fingers in the handcuffs, not to physical damage. In fact, she testified that she believed the backup officer’s arrival actually spared her from injury to her fingers. And as the trial court observed, “[Y]ou can’t photograph pain.” In any event, a photograph of her left hand does not disprove injury to her right. Testimony and photographs portrayed Graycarek’s other injuries, and Rudolph’s were similarly established. Plentiful evidence supported the charges of battery to a police officer.

¶12 Substantial evidence likewise supported the resisting/obstructing and disorderly conduct counts. Forbes ignored the officers’ repeated commands to stop and to show his hands. He went to a far corner of a dimly lit basement room and approached a bag of a size that could have held a weapon. Forbes thrashed his arms about to thwart the officers’ efforts to control him with handcuffs, and pinned Rudolph in the doorway. Counsel’s failure to catch and try to capitalize on the left-right discrepancy does not undermine our confidence in the verdict.

¶13 We also reject Forbes’ contention that the prosecutor breached her duty to highlight the discrepancy for the court and the defense. The State’s duty to disclose covers only evidence within the State’s exclusive possession. *See State v. Rohl*, 104 Wis. 2d 77, 89, 310 N.W.2d 631 (Ct. App. 1981). The State already

had made the photograph available to Forbes in discovery. Moreover, the State is not obliged to help the defense try its case. Accordingly, the Rules of Professional Conduct that Forbes claims the prosecutor breached do not apply here.⁶

¶14 The jury heard Graycarek's and Rudolph's testimony about Forbes' lack of cooperation and physical resistance and viewed the undisputed photographs documenting their injuries. The jury then heard Forbes testify that he simply had turned to walk away when Rudolph leaped onto his back and began "squeezing [his] private parts." It also heard him testify that he was pepper-sprayed, both officers squeezed his testicles and he felt Rudolph's finger near his rectum, yet he did nothing but stand there with his hands in front of his genitals. It was for the jury to decide whose version of the events was credible, whose was not and how to resolve the conflicts between them. *See State v. Poellinger*, 153 Wis. 2d 493, 503, 451 N.W.2d 752 (1990). The jury had the right to accept the officers' testimony and to reject Forbes' and Tammy's contrary testimony that suggested his innocence. *See id.* Since the officers' testimony is not inherently or patently incredible, we, too, must accept it. *See State v. Saunders*, 196 Wis. 2d 45, 54, 538 N.W.2d 546 (Ct. App. 1995).

¶15 The unused photograph of the left-hand finger could not have detracted from the photographic proof of both officers' other injuries. In the context of the full trial, we conclude that there is no reasonable probability on any of the four counts that, but for counsel having failed to introduce the finger

⁶ Forbes alleges violations of SCR 20:3.3, Candor Toward the Tribunal, and SCR 20:3.8, Special Responsibilities of a Prosecutor.

photograph, the result of the proceeding would have been different. *See Johnson*, 153 Wis. 2d at 129. Forbes thus has not established that a new trial is warranted.

¶16 We agree that a *Machner* hearing also is not warranted. Forbes' postconviction motion did not on its face allege facts sufficient to entitle him to a hearing. *See State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. The motion's insufficient facts and conclusory allegations made deciding whether to grant a hearing a matter for the trial court's discretion. *Id.* The trial court concluded that, given all the evidence, counsel's failure to introduce the one photograph would not have "even potentially changed the result ... [or] in any way prejudiced [Forbes]." We defer to the court's proper exercise of discretion. *See State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).

¶17 Finally, Forbes argues that under *Georgia v. Randolph*, 547 U.S. 103 (2006), the warrantless entry was illegal and the charges thus should be dismissed. The officers claim Tammy invited them in, but Forbes reminds us that he shut the door on them. In *Randolph*, the Supreme Court held that a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to that resident on the basis of consent given to the police by another resident. *Id.* at 120.

¶18 Accepting without deciding that the entry was illegal, *Randolph* nonetheless does not apply. That Fourth Amendment case involved charges stemming from evidence obtained during a warrantless search for that evidence, a search conducted with the express lack of consent of one of the residents. *Id.* at 107. But here the Fourth Amendment is not implicated. The police did seize the computer they initially came to investigate, but Forbes was arrested for battery to police officers, resisting/obstructing, and disorderly conduct, not for theft. Even if

the entry to Forbes' home was invalid, the charges against him arose in the context of the officers' lawful exercise of authority. *See Annina*, 296 Wis. 2d 599, ¶1.

¶19 In *Annina*, police went to a residence to investigate a complaint about parked cars. *Id.*, ¶2. Based on a report of possible underage drinking, the officers secured a search warrant and attempted to enter the house but were forcibly resisted by Annina, the homeowner. *Id.*, ¶¶4-6. Annina, like Forbes, was charged with resisting an officer, in violation of WIS. STAT. § 946.41(1), which proscribes knowingly resisting an officer who is “doing any act in an official capacity and with lawful authority.” *Annina*, 296 Wis. 2d 599, ¶6. After the search warrant was found to be invalid, Annina argued that she should be permitted to withdraw her plea and that her resisting charge should be dismissed because the officers were not acting “with lawful authority” in entering her home. *Id.*, ¶¶7, 10. This court observed that, upon unlawfully entering premises, a police officer witnessing what he or she believes to be a crime does not necessarily lose lawful authority to make an arrest. *Id.*, ¶¶12-13. Because the officers were met with “new and distinct crimes” during the execution of the warrant, they possessed the lawful authority to arrest despite the warrant’s invalidity. *Id.*, ¶19.

¶20 Although *Annina* involved entry into a home for a Fourth Amendment search, its facts otherwise closely parallel those here. Rudolph and Graycarek came to investigate a report of a stolen computer. Forbes closed the door on them. Whether or not Tammy invited the officers to come in, or if an invitation made their entry legal, Forbes' resistance and disorderly conduct were “new and distinct crimes.” *See id.* The officers were not obliged to turn a blind eye to criminal behavior arising subsequent to the entry into the residence.

By the Court.—Judgment and orders affirmed.

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

