

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 3, 2009

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. 2008AP3081-CR

Cir. Ct. No. 2008CM157

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DARYL K. DOSTAL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Barron County:
TIMOTHY M. DOYLE, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Daryl Dostal appeals a judgment convicting him of hunting deer without a license. Dostal argues the circuit court submitted an

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

ambiguous verdict to the jury and erroneously admitted opinion testimony. We affirm.

BACKGROUND²

¶2 On January 5, 2008, Russell Fell, of the Wisconsin Department of Natural Resources, responded to Dostal's property to investigate a complaint Dostal was illegally hunting deer. Dostal's deer hunting privileges were revoked at the time. Fell observed Dostal unload alfalfa onto a bale of hay on the ground, walk into a wooded area with a bow, and climb into a tree stand. After watching Dostal sit in the stand with an arrow in his bow for about two hours, Fell approached Dostal and told him to come down. Dostal confirmed the alfalfa pile was deer bait, but denied he was hunting deer. Instead, he claimed he was hunting coyotes, an activity for which he claimed he did not need a license. Dostal stated he placed the bait to attract deer, which he believed would in turn attract coyotes.

¶3 Dostal was charged with the misdemeanor offense of hunting deer without a license as a repeater. In addition, Dostal was charged with three civil forfeitures: hunting over bait, hunting during a period of revocation, and hunting after legal hours. All four charges were submitted to a jury, which found Dostal guilty on all counts.

² WISCONSIN STAT. RULE 809.19(1) requires an appellant's brief to contain a statement of the case, "which must include ... the procedural status of the case leading up to the appeal; the disposition of the trial court; and a statement of facts relevant to the issues presented for review, with appropriate references to the record." Dostal's statement of the case does not contain a clearly delineated statement of facts, and includes arguments such as "Daryl answered all the questions truthfully" that have no place in a statement of facts. His statement of the case also provides scant information about the case's procedural status. Finally, his brief contains no citations to the record. These errors violate the rules of appellate procedure. More importantly, they needlessly complicate the resolution of this appeal.

DISCUSSION

¶4 Dostal raises two issues on appeal. First, he argues the real issue of hunting deer without a license was not fully tried because the jury was misled by what he refers to as a “jury verdict instruction.”³ Second, Dostal contends Fell’s testimony that he believed Dostal was hunting deer was an inadmissible opinion on the ultimate issue. Our standard for reviewing both issues is deferential. *Miller v. Kim*, 191 Wis. 2d 187, 194, 528 N.W.2d 72 (Ct. App. 1995) (circuit courts have broad discretion in instructing juries); *State v. Burton*, 2007 WI App 237, ¶13, 306 Wis. 2d 403, 743 N.W.2d 152 (Evidentiary determinations “will be reversed only if the trial court’s determination represents a prejudicial misuse of discretion.”).

1. Jury Verdict

¶5 Dostal argues the verdict submitted to the jury was vague and ambiguous. This verdict stated:

We, the Jury, find the defendant, Daryl K. Dostal,

Guilty Not Guilty

of hunting deer in this state or engaging in any of the activities regulated under this chapter without the appropriate approval being issued, contrary to sec. 29.024(1), 29.971(11), 29.974(2) of the Wisconsin Statutes.

Dostal contends this confused the jury because it would not understand whether it was being asked if Dostal was hunting deer, as the State charged, or whether it

³ Although Dostal refers to a “jury verdict instruction,” his argument indicates he is challenging the verdict, not the jury instructions.

was being asked if he was engaging in other regulated activities—such as hunting coyotes, which is what he said he was doing.

¶6 As a preliminary matter, it is not clear Dostal preserved this issue for appeal. To preserve an objection to the jury instructions or verdict, the objecting party must object at the instruction or verdict conference, “stat[ing] the grounds for objection with particularity *on the record*.” WIS. STAT. § 805.13(3)⁴ (emphasis added). Failure to do so “constitutes a waiver of any error in the proposed instructions or verdict.” *Id.*

¶7 Dostal’s brief contains no indication of whether or where the issue was preserved. The State informs us that “while Dostal’s attorney did object to the substantive instructions the day of trial, the actual objection and the court’s ruling are not contained within the transcript.” The only mention on the record of any objection is the following statement the court made to Dostal’s attorney prior to instructing the jury: “[Y]ou have made your objections to [the hunting without approvals] instruction at some length. Are there additional objections you wish to raise?” Dostal’s attorney replied there were not. Dostal’s failure to object on the record leaves us to guess about the substance of any objection. The circuit court referred to an objection to a jury instruction, but on appeal Dostal takes issue with the wording of the verdict.

¶8 Even had Dostal preserved the issue for appeal, he fails to show how the verdict misled the jury. He argues the verdict was confusing because it did not make clear the jury was being asked to determine whether he was hunting deer.

⁴ WISCONSIN STAT. § 805.13 applies to both civil and criminal proceedings. *State v. Cockrell*, 2007 WI App 217, ¶6 n.11, 306 Wis. 2d 52, 741 N.W.2d 267.

But as the State correctly points out, this was the focus of the trial. Indeed, during its closing argument the State told the jury, “So this case really comes down to you finding that the defendant was hunting; that he was hunting deer” Likewise, the verdict that pertained to Dostal’s hunting-after-hours charge specifically asked the jury to find whether Dostal was guilty “of hunting deer after legal hours” In any event, Dostal concedes this issue because he failed to file a reply brief refuting the State’s arguments. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

2. Warden Fell’s Testimony

¶9 We similarly reject Dostal’s argument that Warden Fell should not have been able to testify he believed Dostal was hunting deer. First, Dostal explicitly concedes in his brief that he failed to object to this testimony, thereby waiving the issue on appeal. *State v. Huebner*, 2000 WI 59, ¶11, 235 Wis. 2d 486, 611 N.W.2d 727 (citations omitted). Second, we discern no patent error in admitting the testimony. We agree with the State that “[h]aving the warden give his opinion as to whether or not Dostal was hunting deer is no different than allowing a police officer to give an opinion based on his or her training and experience and observations that a person is under the influence of an intoxicant.” Finally, we deem this issue conceded as well because Dostal failed to refute the State’s arguments. *See Charolais Breeding Ranches, Ltd.*, 90 Wis. 2d at 109.

By the Court.—Judgment affirmed.

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

