COURT OF APPEALS DECISION DATED AND FILED

April 27, 2010

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. 2009AP1966-CR **Cir. Ct. No. 2008CF2448**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KATHERINE S. LONSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 BRENNAN, J. Katherine S. Lonski appeals a judgment entered after the trial court found her guilty of battery to a law enforcement officer, in

violation of WIS. STAT. § 940.20(2) (2007-08).[1] She appeals, asserting that the trial evidence was insufficient to support her conviction and that her jury trial waiver was not knowing, intelligent and voluntary. We affirm.

¶2 At a court trial on January 30, 2009, City of Cudahy Police Officer Michael Strzok testified that on May 12, 2008, he was on duty, wearing his official uniform, at St. Luke's South Shore Hospital. He was assigned to sit with Lonski while she was being medically cleared before she was transported to the Milwaukee Mental Health Center on a WIS. STAT. ch. 51 emergency detention. Lonski wanted to smoke a cigarette, so Officer Strzok took her outside to do so. Lonski began walking towards a person at a bus stop across the street to ask for a cigarette. Officer Strzok told her she could not go across the street and attempted to take her back into the hospital. Lonski started walking away from him, and he attempted to escort her back into the building by grabbing her right arm. Officer Strzok testified that it was his official duty at that time to ensure that Lonski did not leave the area for her protection. Officer Strzok testified that Lonski punched him on the right side of his face with her left arm. He then put his arms around her, picked her up and laid her down on the ground in an attempt to handcuff her. Lonski then bit Officer Strzok's right hand and wrist causing him pain. He was treated for the bite wound at the hospital.

¶3 Tracey Wist testified at trial that she was employed by St. Luke's South Shore Hospital. On May 12, 2008, she was on duty as the health unit coordinator in the emergency room and was seated at her desk when she saw

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Officer Strzok, wearing his uniform, enter the hospital with Lonski. When Officer Strzok and Lonski were about ten feet in front of Wist, Wist observed Lonski getting loud and trying to pull away from Officer Strzok. Wist saw Lonski twisting her body and Officer Strzok trying to hold on to Lonski. Officer Strzok grabbed Lonski's arm and they both ended up on the ground with Lonski on top. Wist then saw Lonski bite Officer Strzok's wrist. Officer Strzok yelled out, and Wist testified that she could tell Officer Strzok was hurt. Dr. Jeffrey Adler, an emergency room doctor, testified that he treated Officer Strzok's bite wound.

¶4 On May 14, 2008, Lonski was charged with battery to a law enforcement officer. On August 20, 2008, following a psychological evaluation, the parties stipulated that Lonski was competent to proceed. Lonski entered pleas of not guilty and not guilty by reason of mental disease or defect ("NGI"), on September 18, 2008. Lonski was examined under WIS. STAT. § 971.16, and after return of the doctor's report, the defense withdrew the NGI plea, on October 22, 2008.[2]

¶5 At the start of the January 30, 2009 court trial, Lonski waived her right to a jury trial, orally and in writing, on the record, while represented by trial counsel. At that time, Lonski's trial counsel advised the court that he believed Lonski's waiver of a jury trial was knowing, voluntary and intelligent. The waiver colloquy will be set forth in the discussion following. The State consented to the jury waiver, the court accepted it and a bench trial was held.

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[2] The Honorable M. Joseph Donald presided over the October 22, 2008 court appearance.

¶6 Lonski testified at trial that on May 12, 2008, she went to St. Luke's South Shore Hospital because she wanted to commit herself to the psychiatric ward. She testified that at that time she was really depressed and wanted medication. Lonski denied punching Officer Strzok, but admitted biting him: "And I know I bit him. I know that. I know that I probably, possibly bit him, yes. I never punched him. I never punched. But he was hurting me and it was a self-defense thing." Lonski admitted that Officer Strzok was in uniform and that Officer Strzok was at the hospital to watch out for her and was doing his job.

¶7 The trial court found that Officer Strzok's testimony was credible and that Lonski's testimony was not credible. Based on those findings, the court found Lonski guilty of battery to a law enforcement officer and sentenced Lonski to one year of probation. Lonski filed this direct appeal.[3]

DISCUSSION

I. Sufficiency of the Evidence

¶8 Lonski first argues that the evidence is insufficient to support her conviction because the State failed to disprove her self-defense claim. Lonski does not dispute the sufficiency of the evidence to support all of the elements of

[3] The trial court also found that the defendant was not suffering from a mental disease or defect that would excuse her conduct based on the trial defense counsel's concession that the defense had no evidence to offer in support of the NGI plea. Neither the parties nor the court commented on the October 22, 2008 withdrawal of the NGI plea before Judge Donald.

battery to a law enforcement officer.[4] Instead, she argues that when Officer Strzok attempted to restrain her, he unlawfully interfered with her person and she was thereby privileged to bite him. The trial court, in rejecting her self-defense claim, found that Lonski's version of events was not credible, and that Officer Strzok's version of events was credible, stating:

> And frankly, the court is forced to choose as to which version of the events it believes, and it's the officer's version and not [Lonski's]. And I don't believe that she was acting in self-defense as that is defined in the jury instructions and therefore I feel that the State has proven its case.

¶9 On a sufficiency of the evidence review, we may not substitute our judgment for the trial court's unless we determine that the evidence, viewed in the light most favorable to the State, is so lacking in probative value that no trier of fact could have reasonably found the defendant guilty beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). As long as the theory relied on by the trial court in its judgment of guilt is supported by sufficient evidence, we affirm, even if there are alternate theories of the crime also present in the record. ***Id.*** at 507-08.

¶10 The trial court's findings of fact will not be set aside unless clearly erroneous. WIS. STAT. § 805.17(2). When the trial court acts as the finder of fact, it "is the ultimate arbiter of the credibility of the witnesses." ***Gehr v. City of***

[4] WISCONSIN JI—CRIMINAL 1230 requires the State to prove beyond a reasonable doubt that: (1) Lonski caused bodily harm to Officer Strzok; (2) Officer Strzok was a law enforcement officer; (3) Officer Strzok was acting in an official capacity; (4) Lonski knew or had reason to know that Officer Strzok was a law enforcement officer acting in an official capacity; (5) Lonski caused bodily harm to Officer Strzok without his consent; and (6) Lonski acted intentionally. Lonski admits that she saw Officer Strzok's police uniform, that she knew he was a police officer assigned to protect her and that she purposefully bit Officer Strzok without his consent.

Sheboygan, 81 Wis. 2d 117, 122, 260 N.W.2d 30 (1977). "The reason for this rule is that the trier of fact had the opportunity to observe the witnesses and their demeanor." ***State v. Peppertree Resort Villas***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345.

¶11 Under WIS. STAT. § 939.48, a person is privileged to use self-defense to terminate what the person *reasonably* believes is an unlawful interference with his or her person. However, the amount of resistance used must be only that degree of force that is reasonable necessary to terminate the interference. ***Id.*** "Once the defendant successfully raises an affirmative defense, the [S]tate is required to disprove the defense beyond a reasonable doubt." ***State v. Head***, 2002 WI 99, ¶106, 255 Wis. 2d 194, 648 N.W.2d 413.

¶12 Here, the validity of Lonski's self-defense claim depends on whether a reasonable person would have believed that Officer Strzok acted unlawfully when he restrained Lonski. Although Lonski does not dispute that Officer Strzok was acting in his "official capacity" when she bit him, she nonetheless argues that Officer Strzok was "unlawfully" interfering with her person. She asserts that she was doing nothing wrong when Officer Strzok "slammed" her into the cement. Under her version of events, she was privileged to bite Officer Strzok to stop his unlawful actions. However, the trial court expressly rejected Lonski's version of events as not credible. This court will not reverse a trial court's credibility determination unless we can conclude, as a matter of law, that no finder of fact could believe the testimony. ***State v. Garcia***, 195 Wis. 2d 68, 75, 535 N.W.2d 124 (Ct. App. 1995).

¶13 Officer Strzok testified that it was his official duty to detain Lonski while she awaited transport to the Milwaukee Mental Health Center and to make

sure Lonski did not leave the area immediately adjacent to the hospital. When Lonski started to cross the street toward a stranger at a bus stop, Officer Strzok told her she could not and attempted to return her to the hospital by making contact with her arm. She punched him on the right side of his face with her left arm. He was trying to handcuff her when she bit his right wrist and hand. The trial court found Officer Strzok's version of events to be credible and those findings are not clearly erroneous under WIS. STAT. § 805.17(2).

¶14 Wist corroborated Officer Strzok's testimony. She testified that Officer Strzok and Lonski were ten feet in front of her when she observed Lonski being very loud and twisting her body to get away from Officer Strzok. Wist testified that Officer Strzok was trying to get a hold of Lonski's hands to keep her close to him when they ended up on the ground and Lonski bit Officer Strzok's wrist.

¶15 We affirm the trial court's findings and credibility determinations unless no trier of fact could reasonably find the defendant guilty beyond a reasonable doubt. ***Poellinger***, 153 Wis. 2d at 507. Here, the trial court's findings and conclusions were amply supported by the evidence. *See* ***id.*** at 507-08. Because no reasonable person in Lonski's position would have believed that Officer Strzok was *unlawfully* interfering with her when he attempted to move her back into the hospital while detaining her on a WIS. STAT. ch. 51 commitment, she was not privileged to use self-defense under WIS. STAT. § 939.48. For all of the foregoing reasons, we conclude that the State has met its burden of rebutting Lonski's claim of self-defense and we affirm the conviction.

II. Sufficiency of the Jury Waiver

¶16 Lonski's second argument on appeal is that her jury trial waiver was not knowing, intelligent and voluntary. This presents a legal question which we review *de novo*. *See* ***State v. Anderson***, 2002 WI 7, ¶12, 249 Wis. 2d 586, 638 N.W.2d 301. Although Lonski signed a written jury trial waiver, a written waiver alone is not sufficient. *See* ***id.***, ¶23. Where, as here, the trial court conducted a colloquy with the defendant personally, the Wisconsin Supreme Court has set forth a two-step analysis of the sufficiency of the waiver. *See* ***State v. Grant***, 230 Wis. 2d 90, 99, 601 N.W.2d 8 (Ct. App. 1999). First, the defendant must show that the colloquy preceding the waiver was inadequate and that he or she did not understand an element of the colloquy. ***Id.*** A valid colloquy ensures that the defendant:

> (1) made a deliberate choice, absent threats or promises, to proceed without a jury trial; (2) was aware of the nature of a jury trial, such that it consists of a panel of 12 people that must agree on all elements of the crime charged; (3) was aware of the nature of a court trial, such that the judge will make a decision on whether or not he or she is guilty of the crime charged; and (4) had enough time to discuss this decision with his or her attorney.

Anderson, 249 Wis. 2d 586, ¶24. If the defendant establishes the first step, then the burden shifts to the State to show by clear and convincing evidence that the defendant's jury trial waiver was knowing, intelligent and voluntary. *See* ***State v. Hampton***, 2004 WI 107, ¶46, 274 Wis. 2d 379, 683 N.W.2d 14.

¶17 We note at the outset that Lonski: (1) has not specifically alleged that she failed to understand an element of the colloquy as required by ***Grant***; and (2) has not brought a postconviction motion claiming that her jury trial waiver was invalid. We will nonetheless address the adequacy of the waiver.

¶18 The waiver colloquy between Lonski and the trial court was as follows:

> THE COURT: We're here for a court trial. Miss Lonski, it's my understanding that you want a trial in front of a judge on this matter rather than a trial in front of a jury; is that right?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Okay. And you understand that if you wanted a trial in front of a jury, we would have 12 people from the community to listen to the evidence, and all 12 would have to be convinced of your guilt before you would be found guilty; do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Okay. And did anyone promise you anything if you gave up your right to a jury and decide [sic] to try it in front of a judge?
>
> THE DEFENDANT: No.
>
> THE COURT: Did anybody threaten you to get you to do that?
>
> THE DEFENDANT: No.
>
> THE COURT: Have you used any drugs or alcohol in the last 24 hours?
>
> THE DEFENDANT: No.
>
> THE COURT: Are you on any prescription medication?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And did you take your medicine when you were supposed to?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And that medicine helps you understand things, right?
>
> THE DEFENDANT: No, it helps me calm my nerves. I'm not so panicky.

> THE COURT: Calms your nerves and you're not so panicky?
>
> THE DEFENDANT: Well, I'm still – I'm nervous. I'm terrified.
>
> THE COURT: But you know what is going on here today?
>
> THE DEFENDANT: Yeah. I have never been charged in my whole life. This is a nightmare.
>
> THE COURT: Just calm down. I just have to have this conversation with you to make sure that you are giving up your right to a jury trial and you know what you are doing, okay?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And you feel you know what you are doing, right?
>
> THE DEFENDANT: I hope so.
>
> THE COURT: Mr. Schwarz [defense counsel], are you satisfied that she is knowingly, and voluntarily, and intelligently, with full understanding of her rights giving up her right to a jury trial?
>
> MR. SCHWARZ: Yes.

¶19 As the colloquy shows, the four ***Anderson*** factors were addressed. Lonski told the court that no one promised her anything or threatened her to get her to give up her right to a jury trial. The court advised her of the nature of a jury trial: that it consisted of twelve people, that they would hear all the evidence and that a guilty finding had to be unanimous. And although the court did not expressly use the word "elements," it indirectly did so by referring to the fact that the jury would have to unanimously decide from all of the evidence whether she was guilty. The colloquy shows that the court explained the difference between a jury decision and a judicial decision by stating the court's understanding that Lonski wanted "a trial in front of a judge on this matter rather than a trial in front

of a jury; is that right?" Lonski confirmed the trial court's understanding by responding, "Yes."

¶20 Finally, the colloquy shows that, although she was not directly asked, Lonski indirectly made it clear that she had had enough time to discuss her decision to waive a jury trial with her trial counsel. First, her trial counsel confirmed that Lonski was knowingly, voluntarily and intelligently waiving her right to a jury trial, and Lonski did not dispute that assertion. Second, Lonski informed the court on three separate occasions that she knew "what [was] going on" and that she "knew what [she was] doing" during the waiver colloquy. Additionally, the case history shows that Lonski did not decide to waive her right to a jury trial at the last minute. In fact, the case was never set for a jury trial. The case had twice been adjourned for doctor's reports and had been set for a guilty plea from the June 9, 2008 scheduling conference until November 11, 2008, when the case was rescheduled for a court trial on January 30, 2009—the date of the actual jury waiver.

¶21 And even if the colloquy by itself did not meet the ***Anderson*** requirements, the record establishes that the State met its burden of overcoming any inadequacy in the colloquy, establishing by clear and convincing evidence that Lonski's waiver was in fact made knowingly, intelligently and voluntarily, as shown above. *See* ***id.***, 249 Wis. 2d 586, ¶26. Accordingly, we affirm the judgment of the trial court.

By the Court.—Judgment affirmed.

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