COURT OF APPEALS DECISION DATED AND FILED

September 1, 2010

A. John Voelker
Acting 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. 2010AP713-CR

Cir. Ct. No. 2008CM350

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JENNETTE L. ELLIFRITZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed.*

¶1 BROWN, C.J.[1] Jennette Ellifritz appeals from a judgment of conviction for obstructing a police officer contrary to WIS. STAT. § 946.41(1). On

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

appeal, Ellifritz argues that the evidence the jury used to convict her of obstruction was insufficient and that her conviction should be vacated. We disagree and affirm her conviction.

FACTS

¶2 On June 20, 2008, Jennette Ellifritz was at home with her two sons, who were seventeen and sixteen years old at the time. Ellifritz was also babysitting a friend's two-year old child.[2] At some point, a confrontation started between Ellifritz and her two sons. Eventually, the younger of the two sons punched the two year-old in the face, which caused Ellifritz's older son to call 911.

¶3 By the time the police arrived, Ellifritz had taken the two-year old approximately 100 yards away from the house and behind a wooded area. At trial, Ellifritz's attorney argued that Ellifritz had fled her house with the two-year-old in tow as a way of calming the situation and preventing further harm to the child. However, Ellifritz's older son testified that Ellifritz left the house around the time the police arrived.

¶4 When the police went to investigate the situation, they found the two sons out in front of the house, but not Ellifritz. It was not until one of the officers heard Ellifritz call out to her younger son that the police were able to locate her just beyond the wooded area. When an officer went to ask Ellifritz what happened to the two year-old, Ellifritz repeatedly turned her body away from the officer to

[2] Additionally, Ellifritz was babysitting the child's brother. However, that fact is not relevant for purposes of this appeal.

shield him from seeing the child's face. Ellifritz told the officer that he did not need to see the child. This whole incident lasted roughly forty seconds.

¶5 Later on, Ellifritz referred to one officer as a "child abuser" when he attempted to get closer to the two-year-old. Additionally, when an officer asked Ellifritz how the child received red marks on his face, Ellifritz told the officer that the marks were bug bites.[3] Despite all of these actions, the two on-site officers conceded that while Ellifritz made their investigation more difficult than it should have been, she did not ultimately prevent them from discovering what happened.

¶6 Ellifritz was subsequently convicted by a jury of obstructing an officer pursuant to WIS. STAT. § 946.41(1). She was then sentenced to one year of probation with a stayed sentence of six months in jail. Ellifritz filed a notice of intent to pursue postconviction relief and then filed a notice of appeal.

STANDARD OF REVIEW

¶7 When a defendant argues to an appellate court that the convicting evidence was insufficient, "it is not necessary that [the] court be convinced of the defendant's guilt but only that the court is satisfied the jury acting reasonably could be so convinced." ***State v. Koller***, 87 Wis. 2d 253, 266, 274 N.W.2d 651 (1979). This court will sustain a jury verdict if "any credible evidence" supports it. ***Morden v. Continental AG***, 2000 WI 51, ¶ 38, 235 Wis. 2d 325, 611 N.W.2d

[3] This statement alone would seem to amount to obstruction. *See* ***State v. Caldwell***, 154 Wis. 2d 683, 686, 454 N.W.2d 13 (Ct. App. 1990) ("knowingly giving false information with intent to mislead constitutes an obstruction as a matter of law."). However, the State decided not to pursue this argument at trial, and thus we will not comment further on it.

659. We thus take a very deferential posture towards jury verdicts, and we will "resolve sufficiency of the evidence questions by looking at the proof in the light most favorable to the verdict." ***State v. Caldwell***, 154 Wis. 2d 683, 691, 454 N.W.2d 13 (Ct. App. 1990).

¶8 However, what Ellifitiz is really arguing is that the jury was not asked to be unanimous as to each of her alleged acts that led to the obstruction charge. Thus, the issue here is not really whether the evidence was insufficient, but whether the jury instruction was deficient as a matter of law. Therefore, this is a constitutional issue which we review de novo. *See* ***Holland v. State***, 91 Wis. 2d 134, 138, 280 N.W.2d 288 (1979) (discussing the constitutional and due process requirements of a unanimous jury verdict).

DISCUSSION

¶9 Ellifritz frames the issue to be whether her actions constituted a single course of conduct, or whether her behavior towards the police should be viewed as multiple acts of obstruction. We interpret her claim to be that we should view her forty seconds of conduct like a movie with separate frames, with each frame containing its own alleged obstructive behavior. If we accept this premise, then Ellifritz argues that the verdict should be vacated because the jury was improperly instructed; instead of asking the jurors whether Ellifritz committed obstruction, the trial judge should have asked the jurors to consider each potential act of obstruction separately. The State predictably argues that Ellfritz's conduct towards the officers was one continuous act. We agree with the State.

¶10 WISCONSIN STAT. § 946.41(1) makes it a class A misdemeanor to "knowingly resist[] or obstruct[] an officer while such an officer is doing any act in an official capacity and with lawful authority." While Wisconsin courts have

never fully defined "obstruct," § 946.41(2)(a) states that obstruction "includes without limitation knowingly giving false information to the officer or knowingly placing physical evidence with intent to mislead the officer in the performance of his or her duty[.]" "Officer" is defined as "a peace officer or other public officer or public employee having the authority by virtue of the officer's or employee's office or employment to take another into custody." § 946.41(2)(b).

¶11 Thus, the elements of WIS. STAT. § 946.41(1) are: (1) the defendant obstructed an officer; (2) the officer was acting in an official capacity; (3) the officer was acting with lawful authority; and (4) the defendant "knew or believed that he ... was obstructing the officer while the officer was acting in [an] official capacity and with lawful authority." ***State v. Grobstick***, 200 Wis. 2d 242, 248, 546 N.W.2d 187 (Ct. App. 1996) (quoting ***Caldwell***, 154 Wis. 2d at 689-90). Elements two and three are not contested. Thus, this court will only examine whether the jury was properly instructed as to these two elements.

¶12 The Wisconsin Constitution guarantees the right to a jury trial. *See* WIS. CONST. art. I, §§ 5, 7. This includes the right to a unanimous verdict. ***State v. Lomagro***, 113 Wis. 2d 582, 588-89, 335 N.W.2d 583 (1983). Ellifritz argues that the jury did not reach a unanimous verdict because it is unclear which act of Ellifritz's the jurors thought was obstruction. That is, some jurors may have thought that Ellifritz obstructed the officers when she took the two-year-old child to the wooded area, while other jurors may have thought she committed obstruction only when she tried to hide the child's face from the officers. However, the State rebuts that it did not need to prove which specific act of Ellifritz's amounted to obstruction—the jury was free to consider all of her conduct that afternoon as one continuous act of obstruction.

¶13 The Wisconsin Supreme Court has previously rejected an argument similar to the one Ellifritz now makes. In ***State v. Giwosky***, 109 Wis. 2d 446, 451, 326 N.W.2d 232 (1982), the court held that when a defendant's behavior amounts to one continuous criminal act, the jury only needs to agree on the defendant's guilt or innocence; they do not need to agree on which specific act constitutes the crime. That case involved a defendant who both threw a log at and punched the victim during an altercation. ***Id.*** at 448-49. Because the two acts were part of "a short continuous incident that cannot be factually separated.... The jury could properly consider it as one continuous event." ***Id.*** at 456-57. The court further noted that "[t]he jury should not be obliged to decide between two statutorily prohibited ways of committing the crime if the two ways are practically indistinguishable." ***Id.*** at 455 (quoting ***Manson v. State***, 101 Wis. 2d 413, 430, 304 N.W.2d 729 (1981)). The rule of ***Giwosky*** is that when a defendant is charged with violating a statute in multiple ways, the jury only needs to be unanimous "with respect to the ultimate issue of the defendant's guilt or innocence of the crime charged," and not "with respect to the alternative means or ways in which the crime can be committed." ***Giwosky***, 109 Wis. 2d at 453-54 (quoting ***Holland***, 91 Wis. 2d at 143).

¶14 Ellifritz cites a different supreme court case in arguing that because the State alleged that she committed multiple acts of obstruction, the jury should have been instructed that it had to find Ellifritz guilty of each specific act, rather than just finding her guilty based on her entire conduct. The case she cites is ***State v. Crowley***, 143 Wis. 2d 324, 422 N.W.2d 847 (1988). There, our supreme court held that "when alternative methods of proof resting upon different evidentiary facts are presented to the jury, it is necessary, in order to sustain a conviction, for an appellate court to conclude that the evidence was sufficient to convict beyond a

reasonable doubt upon both of the *alternative modes of proof*." ***Id.*** at 329 (emphasis added).

¶15 But Ellifritz misinterprets the ***Crowley*** decision. Crowley was convicted of aggravated battery by a jury. ***Id.*** at 327. At that time, the statute[4] that Crowley was convicted under created two possible avenues for the jury to reach a guilty verdict—either the State could prove that Crowley's conduct towards the victim created "a high probability of great bodily harm," or the State could establish a rebuttable presumption that Crowley's conduct created "a high probability of bodily harm" merely by demonstrating that the victim was disabled. ***Id.*** at 327 (quoting former WIS. STAT. § 940.19(3)). Because the victim in ***Crowley*** was legally blind, the prosecutor attempted to prove that Crowley's conduct created a high probability of great bodily harm, *and* that the victim was disabled. ***Crowley***, 143 Wis. 2d at 328. But because it was unclear which of the two "modes of proof" the jury relied on in convicting Crowley, the court held the conviction violated due process. ***Id.*** at 331-32.[5]

¶16 Ellifritz's conduct and conviction more closely mirrors ***Giwosky***. Similar to the defendant in ***Giwosky***, Ellifritz's conduct took place within a relatively short temporal window. Additionally, Ellifritz's decision to remove herself and the two-year-old 100 yards away from the house, and her actions in turning her body away from the officer to shield the child's face were all part of

[4] Crowley was convicted under WIS. STAT. § 940.19(3), which was repealed by 2001 Wis. Act 109.

[5] The court subsequently upheld the conviction after finding that the evidence supported both modes of proof. ***Crowley***, 143 Wis. 2d at 335.

the same attempt to keep police from finding out what had happened to the child.[6] Ellifritz's behavior thus falls comfortably within the "continuous course of conduct" standard set forth in ***Giwosky***. *See* ***Giwosky***, 109 Wis. 2d at 451. Therefore, a jury could reasonably conclude that all of her conduct and all of her behavior was simply geared towards one end—obstructing the officers.

¶17 ***Crowley***, on the other hand, dealt with a jury that was presented with two separate elements of a crime without actually being instructed on each statutory element. Conversely, all of Ellifritz's conduct fell under the same elements of one statute. Thus, unlike ***Crowley***, the jury in this case was never presented with "alternative modes of proof" such that it needed separate instructions for each act of alleged obstruction. *See* ***Crowley***, 143 Wis. 2d at 329. Rather, the jury was free to consider all of Ellifritz's conduct in deciding whether to convict her of obstruction.

¶18 Ellifritz also argues that ***State v. Hamilton***, 120 Wis. 2d 532, 356 N.W.2d 169 (1984), controls this case. In ***Hamilton***, an officer was investigating reports of shots fired through a residential window. ***Id.*** at 534. After the officer identified the house where he believed the shots originated, he was able to identify the owner of a BB gun. ***Id.*** When the officer observed another person—Hamilton—in the house, the officer asked him to identify himself. ***Id.*** When Hamilton refused to give the officer his name, the officer arrested him for obstruction. ***Id.*** The Wisconsin Supreme Court reversed Hamilton's conviction

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[6] In addition to the two acts of obstruction previously mentioned, the prosecutor listed three more examples of potential obstruction: (1) Ellifritz yelling at her son when calling 911; (2) Ellifritz yelling at the officers; and (3) Ellifritz calling one officer a "child abuser." However, the prosecution never developed the arguments as to how these actions actually obstructed the officers. Thus, we will not discuss them in the opinion.

and held that merely refusing to provide your name to an officer does not amount to obstruction. ***Id.*** at 542.

¶19 Ellifritz contends that ***Hamilton*** created a rule that a defendant's conduct must hinder an officer's investigation in some way before the conduct amounts to obstruction. We reject that contention. ***Hamilton*** merely stands for the proposition that refusing to provide one's name to an officer is not obstruction per se. ***Hamilton*** did not judicially create an element not found in the statute—that the officer must have been "hindered" in his or her investigation. In fact, this court has held that an obstruction conviction will be upheld if the jury finds that the defendant made the officer's job "more difficult." ***Grobstick***, 200 Wis. 2d at 249-50. In this case, we have testimony from three officers that their investigation was made more difficult than it should have been because of Ellifritz's actions. Thus, to adopt Ellifritz's argument would be to extend ***Hamilton*** beyond the holding of that decision.

¶20 Having found that the jury was reasonable in concluding that Ellifritz obstructed the officers, we now turn to the last element of WIS. STAT. § 946.41(1): whether Ellifritz knew that she was obstructing the officers while the officers were acting in their official capacity and with lawful authority. *See* ***Grobstick***, 200 Wis. 2d at 248. A defendant's intent to obstruct an officer must be inferred from the totality of the circumstances. ***State v. Lossman***, 118 Wis. 2d 526, 542-43, 348 N.W.2d 159 (1984). Given that Ellifritz knew her son had just called 911, and given that the responding officers were wearing their uniforms, we can safely assume that Ellifritz was aware that the officers were acting in an official capacity and with lawful authority.

¶21 Furthermore, the only explanation for why Ellifritz took the two-year-old 100 yards away from her house after her son called 911 is that she did not want the police to find out what had happened to the child. Her attempt to momentarily shield the child's face from the officers confirms that she did not want the police to see the child's injuries. Examining Ellifritz's conduct under the totality of the circumstances leads us to conclude that there was sufficient evidence from which the jury could find that Ellifritz was aware that she was obstructing officers who were acting in an official capacity and with lawful authority.

CONCLUSION

¶22 Ellifritz's actions on June 20, 2008, amounted to "one continuous course of conduct," such that the jury was free to reach a verdict by relying on one or more of the facts adduced by the State in support of the charge. *See* ***Giwosky***, 109 Wis. 2d at 451. Thus, Ellifritz's right to a unanimous jury verdict was not violated. Because we find that the jury's verdict was reasonable, we affirm Ellifritz's conviction.

By the Court.—Judgment affirmed.

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