COURT OF APPEALS
DECISION
DATED AND FILED

April 6, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP487-CR **Cir. Ct. No. 2014CF242**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NANCI L. GAVIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed.*

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Nanci Gavin appeals the circuit court's judgment convicting her, after a jury trial, of one count of operating a vehicle to flee an officer and three counts of obstructing an officer. Gavin argues that: (1) the evidence was insufficient to support a guilty verdict on the operating-a-vehicle-to-

flee charge; (2) errors in the jury instructions deprived Gavin of a fair trial; (3) the exclusion of evidence relating to Gavin suffering from post-traumatic stress disorder (PTSD) violated Gavin's right to present a defense; and (4) the combined effect of instructional and evidentiary errors prevented the real controversy from being fully tried. We reject Gavin's arguments, and affirm.

Background

¶2 Gavin's four offenses arose from a December 2013 traffic stop conducted by City of Reedsburg police officer William Botten. Botten stopped Gavin for defective registration lamps.

¶3 According to Officer Botten, during the stop, the events unfolded as follows. Botten explained to Gavin the reason for the stop, to which Gavin's response was to repeatedly ask if Botten was detaining her. Gavin refused to provide identification or proof of insurance. Botten knew Gavin's name based on prior contact with her and, after Gavin continued to be uncooperative, Botten informed Gavin that he would be issuing her a "warning." Botten told Gavin something to the effect of "hang tight," "sit tight," or "stay in the vehicle," and told her that he would be right back. Gavin responded that she "was not going to allow [Botten] to issue her any forms and was not going to stay there." Gavin then drove away at a slow rate of speed.

¶4 Officer Botten returned to his squad car, activated the siren, and followed Gavin, who continued driving at a slow rate of speed. After a minute or two, Gavin pulled into a gas station parking lot.

¶5 Additional officers arrived on the scene, and Officer Botten approached Gavin's vehicle. Gavin told Botten that police had no right to detain

her. Botten instructed Gavin to exit her vehicle because she was being arrested, and Gavin refused to comply. Gavin drove a short distance to a connected grocery store parking lot, where officers blocked her in with multiple police vehicles. The police again instructed Gavin to exit her vehicle, and Gavin again refused to comply. The police chief arrived on the scene and, because he knew who Gavin was and how she could be located, he allowed her to leave while informing her that she would be receiving a summons.

¶6 Based on her conduct in driving away from the initial traffic stop, Gavin was charged with one count of operating a vehicle to flee an officer, a specific variant of fleeing an officer. Gavin was additionally charged with three counts of obstructing an officer based on her subsequent conduct.

¶7 Gavin's defense was based on her trial testimony that she believed that the initial traffic stop was over when she drove away from Officer Botten. Gavin told the jury that this was her belief, and she gave a version of the events that contradicted Officer Botten's version. According to Gavin, she immediately provided Botten with identification and proof of insurance. She denied telling Botten that she would not allow him to give her any paperwork, and she also denied that Botten gave her any indication, at the time she drove away, that she was not free to leave. Gavin claimed that she understood Botten's reference to giving her a "warning" as an indication that she was free to go because, when Botten had stopped Gavin seven weeks earlier in October 2013 for a defective headlamp, that stop ended with Botten informing Gavin that she was receiving a warning, meaning an oral warning.

¶8 More specifically as to the operating-a-vehicle-to-flee charge, Gavin argued that her mistaken belief that the December 2013 stop was over negated the

element requiring knowing flight. Gavin also argued that her driving behaviors were inconsistent with knowing flight. As to the obstructing charges, Gavin similarly argued that her mistaken belief that the stop was over negated the element requiring knowledge that police acted with lawful authority at the time of her alleged obstructing conduct.

¶9 The jury found Gavin guilty on all charges. We discuss additional facts as needed below.

Discussion

A. Sufficiency of the Evidence

¶10 Gavin argues that the evidence was insufficient to support her conviction for the operating-a-vehicle-to-flee charge. We reject the argument for the reasons that follow.

¶11 We reverse for insufficiency only if the evidence, viewed most favorably to the verdict, is so insufficient in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). "It is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." ***Id.*** at 506. Likewise, the trier of fact decides the credibility of witnesses. ***Id.*** at 504.

¶12 Gavin's insufficiency argument is limited to the operating-a-vehicle-to-flee charge, which, to repeat, was based on Gavin driving away from Officer Botten during (or, as she argues, after) the initial traffic stop. The circuit court instructed the jury that Gavin was guilty of that charge if Gavin:

> [1] operated … a motor vehicle on a highway after receiving a visual or audible signal from a traffic officer or marked police vehicle.… [and] [2] ... knowingly fled the traffic officer by increasing the speed of [her] vehicle in fleeing.

¶13 Gavin focuses on the requirement that she "knowingly fled," and limits her argument to that requirement. Gavin argues that, given her driving behaviors, no reasonable jury could have found that she knowingly fled Officer Botten. Gavin looks to the officer's testimony about her actions, and points to the following:

- When driving away from the traffic stop, Gavin proceeded at a slow rate of speed, 18 to 23 miles per hour, well below the speed limit of 35 miles per hour;[1]
- As Gavin continued on her way, Gavin never increased her speed, never turned off on any roads, and never passed any other vehicles; and
- Gavin stopped her vehicle after driving a short distance.

¶14 We pause here to make clear that we do *not* understand Gavin to be arguing that her act of driving away from the stop was insufficient to support a finding that Gavin "increas[ed her] speed" for purposes of the particular fleeing crime for which she was convicted. Rather, Gavin argues that the described driving behaviors left no room for a reasonable inference that Gavin knowingly fled.

¶15 Even if we assumed that Gavin's driving behaviors, standing alone, failed to support a reasonable inference that Gavin knowingly fled the officer,

[1] The reason for Gavin's slow rate of speed is unclear but appears at least partially explained by road conditions at the time. Gavin testified that, due to a winter storm, there were weather advisories telling motorists not to be on the roads unless necessary.

Gavin's argument ignores additional evidence. Officer Botten testified that, before Gavin drove away, he told her something to the effect of "sit tight" and "I [will] be right back" and that Gavin responded that she "was not going to allow [Botten] to issue her any forms and was not going to stay there." More broadly, Botten testified that Gavin was uncooperative during the entire stop. Botten's testimony regarding the stop was easily sufficient to show that Gavin knowingly fled.

¶16 While we need say no more regarding Gavin's insufficiency argument, we choose to note that there was also other compelling evidence suggesting knowing flight in this case. That evidence included testimony regarding Gavin's behavior during the previous traffic stop involving Officer Botten and Gavin's own testimony that she believed she should not be detained by police for an equipment violation.

¶17 In sum, when we view the evidence in a light most favorable to the verdict, we conclude that the evidence was easily sufficient to support the jury's finding that Gavin knowingly fled from Officer Botten when she drove away from the December 2013 traffic stop.

B. Jury Instructions

¶18 Gavin argues that the circuit court erroneously instructed the jury in two ways: (1) by refusing to provide instructions telling the jury that Gavin had to *intend* to flee Botten in order to be guilty of the operating-a-vehicle-to-flee charge; and (2) by refusing to provide a mistake instruction. We conclude that any instructional error on these topics was harmless.

1. Intent to Flee

¶19 We need not explain the underlying details of Gavin's instructional error argument as to intent. That argument is complex and involves an attack on the pattern jury instruction based on the underlying statutory language.[2] Rather, because we resolve this challenge based on harmless error, it is sufficient to understand that Gavin argues that the failure to include certain instructional language relieved the State of its burden to prove that Gavin *intended* to flee.

¶20 We conclude that we need not resolve the merits of Gavin's intent argument. Rather, we agree with the State that, even if the circuit court erred by not including Gavin's requested intent-related instructions, such error was harmless.

¶21 "[An] error is harmless if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***State v. Hunt***, 2014 WI 102, ¶26, 360 Wis. 2d 576, 851 N.W.2d 434 (quoted source omitted).

[2] The underlying statute, WIS. STAT. § 346.04(3), provides:

> **(3)** No operator of a vehicle, after having received a visual or audible signal from a traffic officer, or marked police vehicle, shall knowingly flee or attempt to elude any traffic officer by willful or wanton disregard of such signal so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians, nor shall the operator increase the speed of the operator's vehicle or extinguish the lights of the vehicle in an attempt to elude or flee.

All references to the Wisconsin Statutes are to the 2015-16 version, unless otherwise noted.

¶22 Here, we conclude that it is clear beyond a reasonable doubt that instructions requiring a finding of intent to flee would not have changed the jury's verdict. Specifically, we agree with the State that, under the facts of this case, it makes no sense to think that the jury, having been instructed that it needed to find that Gavin *knowingly* fled Officer Botten and having made that finding, would not have also found that Gavin *intended* to flee Botten. As our sufficiency discussion above shows, the central issue for the jury was whether Gavin in fact believed that the December 2013 stop was over when she drove away. That issue, in turn, depended on whether the jury believed Gavin's testimony as to her belief and the events of the stop or instead believed Botten's conflicting testimony as to the events of the stop. In finding that Gavin knowingly fled Botten, the jurors plainly rejected Gavin's testimony and instead accepted Botten's testimony. Having thus found that Gavin knew the stop was not over and knowingly fled Botten by driving away from him, the jury could not have rationally found that Gavin did not intend to flee Botten.

2. Mistake Instruction

¶23 Gavin argues that the court erred by refusing to provide a mistake instruction. More specifically, Gavin argues that the court should have granted her request for an instruction telling the jury that, if Gavin honestly but mistakenly believed the initial stop was over when she drove away, Gavin's belief was a mistake of fact that negated the knowing flight element of the operating-a-vehicle-to-flee charge. Gavin makes a similar argument as to the obstructing charges, arguing that the court should have instructed the jury that her mistaken belief would negate the element of those charges requiring Gavin to know that the officers were acting with lawful authority at the time of her alleged obstructing conduct.

¶24 The State concedes that there was sufficient evidence to support a mistake instruction, at least as to the operating-a-vehicle-to-flee charge. The State argues, however, that any error in the court's refusal to provide a mistake instruction was harmless.

¶25 For reasons already explained, we again agree with the State's harmless error argument. To repeat, the central issue before the jury was whether to accept or reject Gavin's claim that she believed the initial traffic stop was over when she drove away from Botten. Indeed, Gavin's counsel argued no fewer than five times that the jury should not find guilt because Gavin believed the stop was over. We fail to understand what additional argument was available to Gavin if the mistake instruction had been given. As it was, Gavin was free to argue, and did argue, that she mistakenly believed the stop was over and, thus, did not knowingly flee. There is no reason to suppose that the jury would not have understood that a mistake by Gavin in this regard negated the "knowledge" elements of her offenses.

C. Exclusion of PTSD Evidence

¶26 Gavin argues that the circuit court violated her right to present a defense by excluding evidence that Gavin suffered from PTSD and related evidence showing that Gavin's alleged condition may have affected her state of mind. For shorthand, we refer to this evidence as the "PTSD evidence."

¶27 "Usually, whether to admit or exclude evidence is within the circuit court's discretion." ***State v. Jensen***, 2007 WI App 256, ¶9, 306 Wis. 2d 572, 743 N.W.2d 468. We review de novo, however, whether the exclusion of evidence denied the constitutional right to present a defense. ***Id.*** Here, for the reasons

explained below, Gavin fails to persuade us that a constitutional violation occurred.

¶28 Gavin made no formal offer of proof, but submitted a summary of the PTSD evidence and stated that it would include testimony by Gavin and a licensed clinical social worker. Gavin now explains that this evidence would have demonstrated that her interaction with police may have triggered her PTSD, causing her to panic, to be unable to think clearly and rationally, and to have a desire to run away. To quote Gavin's briefing:

> The defense wanted to present evidence on how Gavin's PTSD affected her thought processes, and the symptoms it causes—specifically, that when a person with PTSD believes a threat to their safety or integrity exists, it causes them to panic, which impairs their ability to think clearly and rationally, and results in a deep-seated need to protect themselves, and is accompanied by a strong physiological response to run away.
>
> Further, the evidence would have demonstrated why Gavin felt threatened by police officers due to a previous incident of domestic violence where officers refused to arrest her ex-husband. Proposed testimony from Gavin's licensed clinical social worker would have explained that Gavin perceived officers as part of the abuse that triggered her PTSD, a common situation for people with PTSD, whose "response, when exposed to internal or external cues that symbolize a traumatic event, involves feelings of intense fear, hopelessness, and intense psychological distress."

(Record citations omitted.)

¶29 The circuit court reasoned that evidence that Gavin suffered from PTSD was not relevant unless Gavin entered a plea of not guilty by reason of mental disease or defect under WIS. STAT. § 971.15.

¶30 We need not decide whether the circuit court's reasoning was correct. Regardless, Gavin fails to persuade us that the court's exclusion of the PTSD evidence violated her right to present a defense. More specifically, as we now explain, we agree with the State that Gavin fails to demonstrate any clear connection between the PTSD evidence and either Gavin's trial testimony or defense theory.

¶31 To begin, we observe that Gavin's summary of what the PTSD evidence would have shown is *inconsistent* with Gavin's trial testimony and her mistake defense. The PTSD evidence, according to Gavin, would have shown, in part, that she panicked and felt a need to "run away" from the December 2013 stop. That is, she drove away because she feared the officer, not, as she testified at trial, because she believed the stop was over. To put a finer point on it, Gavin's actual testimony and defense theory depended on the jury believing that Gavin's perception of events during the stop was accurate, thus justifying Gavin's professed rational belief that the stop was over when she drove away. This is a very different narrative than Gavin panicking and, for that reason, driving away.

¶32 What remains of Gavin's argument is that the PTSD evidence was relevant to her defense because it showed that Gavin might not have heard or understood everything that Botten was saying or doing. Once again, however, we see a disconnect between Gavin's argument and her trial testimony. To illustrate, we quote a representative section of Gavin's argument on appeal:

> Gavin's ability to accurately perceive events was a key issue at trial. Officer Botten testified he told Gavin he was issuing her a warning, and that she should "sit tight," while Gavin said Botten never said anything like she should "sit tight" or "hang tight." One way to reconcile the conflicting testimony is one of them was not telling the truth.

> However, another way to reconcile the testimony—which the defense was precluded from doing—was arguing it was possible Officer Botten made additional statements *that Gavin didn't hear because her PTSD and feeling that she was in danger left her mind racing, her fight-or-flight response kicking in, interfering with her ability to hear or process what the officer was saying. This would have been highly relevant to Gavin's knowledge, as well as whether she was mistaken about whether the stop was over when she pulled away.*

(Emphasis added.)

¶33 This perception-of-events argument regarding the PTSD evidence might make sense if Gavin had testified that she was not sure, or could not remember, whether she heard or understood everything that Botten said or did. The circuit court's ruling did not preclude such testimony. But again, Gavin did not testify that way. Instead, Gavin testified to having a clear recollection of events causing her to believe that the stop was over. When expressly asked whether she remembered what she and Botten said during the stop, Gavin testified that, although she might not remember "word for word," she remembered "[p]retty closely." Gavin then went on to provide a detailed play-by-play of her recollection, including, as we have described, denying that she ever told Botten that she was not going to wait for him to give her any paperwork.

¶34 It is also significant that Gavin does *not* argue that the PTSD evidence would have shown that Gavin might think *incorrectly* that she had an accurate and detailed recollection of events when in fact she did not. Thus, Gavin does not reconcile her trial testimony with the PTSD evidence.

¶35 In sum, we are unable to square Gavin's arguments on appeal regarding the relevance of the PTSD evidence with either Gavin's testimony at

trial or her defense theory. Accordingly, Gavin fails to persuade us that exclusion of the PTSD evidence violated her right to present a defense.

D. Combined Effect of Alleged Errors

¶36 Finally, Gavin argues that the combined effect of instructional and evidentiary errors prevented the real controversy from being fully tried. Based on the discussion we have already provided, we conclude that the real controversy was fully tried.

Conclusion

¶37 For all of the reasons above, we affirm the judgment of conviction against Gavin.

By the Court.—Judgment affirmed.

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