STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014AP2701-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT JOSEPH STIETZ,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN LAFAYETTE COUNTY CIRCUIT COURT, THE HONORABLE JAMES R. BEER PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General

SARA LYNN LARSON
Assistant Attorney General
State Bar #1087785

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-5366
(608) 266-9594 (Fax)
larsonsl@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page

Page

CONSTITUTION

STATUTES

OTHER AUTHORITY

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2014AP2701-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT JOSEPH STIETZ,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN LAFAYETTE COUNTY CIRCUIT COURT, THE HONORABLE JAMES R. BEER PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT OF THE ISSUES

The State rephrases the issues on appeal as follows:

1. Stietz was not entitled to a jury instruction on self defense because whether Stietz believed the DNR wardens' actions were unlawful is irrelevant under *State v. Hobson*, 218 Wis. 2d 350, 577 N.W.2d 825 (1998).

2. Stietz was not entitled to present evidence that the DNR wardens were trespassing, nor was he entitled to a jury instruction on trespassing, because the wardens were acting in their official capacity when they were enforcing the hunting laws.

3. Stietz was not denied his Sixth Amendment right to a public trial when the trial court conducted the jury instruction conference in a conference room because any such "closure" was trivial.

4. Stietz's Second Amendment rights were not violated when the DNR wardens – after identifying themselves and after Stietz pointed a loaded firearm at them – attempted to disarm Stietz.

5. DNR wardens are law enforcement officers, and therefore the jury properly found Stietz guilty of pointing a firearm towards a law enforcement officer, in violation of Wis. Stat. § 941.20(1m)(b).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication. This case may be resolved by applying well-established legal principles to the established record.

SUPPLEMENTAL STATEMENT OF THE FACTS

Because it is the State's position that the record reveals a different setting than the one offered in Stietz's brief-in-chief, the State submits this supplemental statement of facts.

After a three-day jury trial, a jury convicted Stietz of two counts: resisting or obstructing an officer in violation of Wis. Stat. § 946.41(1) and intentionally pointing a firearm at

a law enforcement officer in violation of Wis. Stat. § 941.20(1m)(b) (61; 64; 78a; A-Ap. 1-3). The evidence at trial established the following:

- **Trial testimony**

DNR conservation wardens Joseph J. Frost and Nick Webster were on duty Sunday, November 25, 2012; it was the last day of deer hunting season (111:163). Around 4:30 p.m., they were driving in Lamont township in Lafayette County (111:164). They observed a vehicle on a highway parked along a fence line (111:165). Frost thought it could be someone out deer hunting (*id.*). The wardens checked around the section of land to see if anyone was out deer hunting, but they saw no one (111:166).

Warden Webster used his computer to check the vehicle's license plate while Frost got out and looked inside the vehicle (111:167, 168). The time was 4:58 p.m. (111:168). Frost saw an empty gun case in the front seat that appeared to be unzipped and empty (*id.*). He also saw a camouflaged, portable tree seat and scent-killer spray, which were "items people would use when they are hunting" (*id.*). Frost testified, "It's just not typical for vehicles to be parked in the field, and typically during deer season that's where people would park if they're out hunting" (111:166).

Both Frost and Webster were wearing their issued uniforms:

- a "blaze orange" jacket, because they knew it was past hunting hours;[1]

[1] The Wisconsin Administrative Code provides that hunting hours for deer with firearms are 30 minutes before sunrise through 20 minutes after sunset. Wis. Admin. Code § NR 10.06(5). It is undisputed that on this day, November 25, 2012, at "4:45 the hunt ends" (112:10).

- A DNR patch on the shoulder of each arm of the jacket;

- a clip-on DNR badge along the middle zipper of the jacket;

- A "blaze orange" hat with a DNR patch.

(111:169-71)[2]

Frost testified that they decided they "would go in and see if [they] could locate the hunter" (111:173). Frost and Webster began walking along a fence line when they came to an open gate (111:174). They entered the gate and started walking on a trail, and then down a path (111:175). Soon after they heard some noises and observed a person, Stietz, walking in the field about 30-40 yards away (111:176).

Frost and Webster testified that Stietz was not wearing any blaze orange, and that he was carrying a long gun – a rifle – in his hands (111:176; 112:98, 99). At the time, Stietz was carrying the rifle in "the safest way," and in a safe direction (112:36, 37).

When Stietz was about 20 yards away, near a cattle gate (113:127), Frost turned on his flashlight, shined it at Stietz, and announced, "in a voice that would carry up" to Stietz, "Conservation Warden" (111:177; 112:80). Seconds later, Webster identified himself, "loud enough to be heard

[2] Webster testified that he was wearing a blaze orange jacket with a "noticeable" badge on the zipper, as well as a blaze orange cap with the Conservation Warden badge (112:88, 90). His gray shirt had a Wisconsin Warden badge on his left chest, a Wisconsin Department of Conservations Warden patch on his left arm, and the State Conservations Warden patch on his right shoulder (112:88). Webster testified that his blaze orange jacket had the same patches as his shirt (112:90).

pretty well" (112:147).[3] It is undisputed that when the parties met and encountered each other, that they were not on Stietz's land, but on his neighbor's land, owned by Fabian Loeffelholz (113:55-63).

Stietz testified that he "looked at him and said a Warden, but it was kind of mumbled, not real loud" (113:93). He also testified, "I said – one kind of said, Green County. The other one looked at him and said something Warden" (113:122). But on direct examination, Stietz claimed that the first time he realized Frost and Webster were wardens was "when actually, I really don't know because I never seen no credentials or when he called for backup, that's when I knew" (112:114).

After Webster identified himself, he asked Stietz if he had seen any deer (112:25, 100). Stietz responded yes, that he had seen seven doe (*id.*). Stietz informed the wardens that he was not hunting, that he was looking for trespassers (112:137).

When Stietz was walking towards the wardens, Frost saw a handgun in Stietz's right front pocket (111:178). Frost alerted Webster of this (111:178; 112:100). Webster testified that Stietz "went from holding his gun off to the side and then turned his gun facing straight on as I was approaching him, which is unusual" (112:101). Webster explained: "people typically don't point a gun in your direction when you go to make contact with them" (112:102). He described that, "When I was walking up to him, I saw him turn his gun to straight forward and I could see in his face a kind of agitation, aggression. I could tell something wasn't right" (*id.*). Eventually the wardens and Stietz met "within arm's reach" of each other (111:179).

Webster asked Stietz if the rifle he was carrying was loaded, and Stietz replied that it was, but that he was just

---

[3] Webster testified that the first thing he said to Stietz was, "Conservation Warden" (112:137).

out looking for trespassers (111:180; 112:38). Webster and Frost asked him if they could see the rifle, but Stietz refused (111:180; 112:102-03). Frost then "stepped forward and reached [his] hand towards [Stietz's] firearm" (111:180). Frost again asked if he could see the rifle (*id.*). Frost testified that "when [Stietz] responded that he wouldn't allow us to see the firearm" that Frost was concerned for his and Webster's safety (111:181).

As Frost reached for the firearm, Stietz "started moving the firearm towards, I guess, it would be the butt of the firearm, the lower portion of the firearm towards me and [he] basically hit me in the navel with the firearm" (111:180-181). After that, Frost testified:

> I basically just let go of the flashlight and reached for it to control the firearm. I grip – basically put my hands in similar positions to where he had his hands on the firearm. Except for my left hand would have been further up towards – actually it would have been my right hand would have been further up towards the barrel. And, I guess, I drove my body forward towards him as I am trying to take the firearm from his hands.

(111:181)

Once Frost had his hands on the rifle, he drove his body into Stietz, and "we basically got twisted around and I ended up, I guess, spun around with the firearm in my hand" (111:182). During the scuffle, Webster yelled that the barrel of Stietz's rifle was pointed at Webster (*id.*). Frost grabbed the rifle harder (*id.*). Frost ultimately "ended up with the [rifle] in my hands, laying on my back" (*id.*). Stietz then reached for his handgun (111:183). Webster then drew *his* handgun, Frost threw the rifle to the side, and Frost drew his handgun (*id.*). At this time, Webster and Stietz were about six feet apart (112:107). Frost testified that he was able to see that Stietz's finger was inside the trigger guard, that the hammer was cocked, and that Stietz's thumb was on the hammer (112:44).

Frost stood up (111:184). Stietz continued to point his firearm in Webster's direction (111:187-88). Webster testified that "when the rifle was aimed at me and when the handgun was aimed at me, I felt the consequence [of Stietz pointing the gun at me] could have been my death" (112:130). Webster radioed the Lafayette sheriff's department from his collar microphone (111:189; 112:68, 109). The time was 5:07 p.m. (111:189; 112:14, 15).

Both wardens ordered Stietz to put down his gun, and Stietz refused (111:188). For the next ten minutes, the wardens tried to convince Stietz to lower his gun, unsuccessfully (*id.*).

Deputy Brett Broge of the Lafayette County sheriff's department arrived at 5:17 p.m. (111:189). Deputy Broge left his squad and walked over with his gun pointed towards Stietz (112:112). Broge ordered Stietz to drop his gun, but Stietz refused (*id.*). At Frosts' request, Deputy Broge went back to his squad (111:190). Frost wanted to move back towards the squad "instead of standing out in the open and trying to get us to a position to cover" (*id.*).

As Frost, Webster, and Stietz started moving, Stietz continued to follow Webster with his handgun pointed at him (111:190; 112:113). Similarly, Webster's handgun was pointed at Stietz (112:113).

By the time everyone reached Broge's squad car, it was fairly dark out (112:112). The wardens stood next to each other behind the squad car (111:190). Stietz still had his firearm pointed in the wardens' direction (111:190).

At this time, Foster left to turn the emergency lights on in *his* squad car so that other responding units could locate them (111:191). When Foster reached his squad, he turned on the lights and retrieved more firearms (*id.*). He then ran back to Broge's squad, whereby this time Stietz had lowered (as opposed to put down) his handgun (111:192).

More requests were made put his handgun down, but Stietz refused (*id.*).

Shortly before 5:30 p.m., other responders and officers arrived, including Deputy Michael Gorham and Chief Deputy Francis Reichling (111:192; 112:114, 155). Reichling tried to convince Stietz to put down his gun, but Stietz refused (112:153-54). Then Gorham talked to Stietz for about thirty minutes, and, after initially not complying, Stietz eventually put his gun down to the ground (112:160, 162).

- **Jury Instruction Conference**

Stietz was present with his attorney at the jury instruction conference, which the court held in a conference room downstairs from the courtroom (107:3). Off the record and prior to the conference, Stietz's counsel expressed his concern to the trial court about whether it was a violation of Stietz's right to a public trial (107:63-64). Broaching these concerns again after the jury instruction conference, the court responded:

> We had the door open until the point in time when it got so noisy out there, that the court reporter asked the door to be closed, and then Mr. Stietz closed it, but I did not close this to anyone. It is just that it would have been unruly with about 40 to 60 people sitting in the courtroom at the time, and how are we going to listen to it?
>
> Now my problem would be – is I would have been having deputies escort people out, arresting them for contempt, etc., for not remaining silent, and I don't want to create a brouhaha upstairs in the courtroom or a commotion in the courtroom, but I believe we have done this in the open. We have always done it this way. I think every court I know of takes the – and Stietz has to be present, the state does, the clerk, et cetera, but we did have the additional fact that we did open the door, so if a reporter had been here, they could have come in.

(107:64).

The arguments over jury instructions were all on record (108:12). All jury instructions were provided to the jury in open court (*id.*).

- **Request for a Self-Defense Jury Instruction**

Stietz requested a jury instruction on self defense (107:48-50; A-Ap. 22-27). Denying the instruction, the court stated, "we have law enforcements officers, and if I make this decision and allow this in, that means every time a police officer comes up to a car on his traffic stop at nighttime or anywhere else, someone would be able to pull a gun on him, and that is not the state of the law" (107:55, 57).

- **Verdict**

The jury acquitted Stietz of four counts and convicted Stietz of resisting or obstructing an officer in violation of Wis. Stat. § 946.41(1) and intentionally pointing a firearm at a law enforcement officer in violation of Wis. Stat. § 941.20(1m)(b). The court imposed a bifurcated sentence which included one year of initial confinement (78a, 92, A-Ap. 1-3).

- **Motion for Acquittal or New Trial**

Stietz moved for an acquittal or new trial (70). The court held a hearing and denied his motion (108:15).

Stietz appeals.

STANDARD OF REVIEW

The State will address the applicable standards of review within each argument.

ARGUMENT

I. STIETZ WAS NOT ENTITLED TO A JURY INSTRUCTION ON SELF DEFENSE BECAUSE WHETHER STIETZ BELIEVED THE DNR WARDENS' ACTIONS WERE UNLAWFUL IS IRRELEVANT UNDER *STATE V. HOBSON*.

Stietz argues that the evidence was sufficient to require the trial court to instruct the jury on self defense (Stietz Brief at 10, 11). A trial court's "willingness to entertain a defendant's theory of defense and submit requested instructions to the jury is grounded on the evidence presented to the trier of fact." *State v. Head*, 2002 WI 99, ¶ 44, 255 Wis. 2d 194, 648 N.W.2d 413. Whether there are sufficient facts to allow the giving of an instruction is a question of law which this Court reviews de novo. *Id*. If this Court determines that a trial court has committed an error in failing to give a jury instruction, it must "assess whether the substantial rights of [Stietz] have been affected." *Id*., citing Wis. Stat. § 805.18(2). "An error does not affect the substantial rights of a defendant if it is clear beyond a reasonable doubt that a rational jury would have found [Stietz] guilty absent the error." *Id*., citing *State v. Harvey,* 2002 WI 93, ¶ 49, 254 Wis. 2d 442, 647 N.W.2d 189.

Wisconsin Statute § 939.48(1), self-defense and defense of others, provides:

> A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person by such other person. The actor may intentionally use only such force or threat thereof as the actor reasonably believes is necessary to prevent or terminate the interference. The actor may not intentionally use force which is intended or likely to cause death or great bodily harm unless the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself.

"[T]he standard for giving a jury instruction on self-defense may, in some circumstances, be *higher* than the standard for admitting self-defense evidence at trial, because a defendant's claim of self-defense may be so thoroughly discredited by the end of the trial that no reasonable jury could conclude that the state had not disproved it." *Head*, 255 Wis. 2d 194, ¶ 115.

Stietz argues that the evidence – his testimony – that he did not know that Frost and Weber were wardens was "abundant" and sufficient to warrant a jury instruction on self defense (*see* Stietz's Brief at 11-14). The State disagrees, because under *State v. Hobson*, 218 Wis. 2d 350, 577 N.W.2d 825 (1998), a belief that one is being unlawfully arrested is of no consequence.

In *Hobson,*[4] the Wisconsin Supreme Court considered whether public policy would be best served by abrogating the common law privilege to forcibly resist an unlawful arrest, in the absence of unreasonable force. 218 Wis. 2d at 358. The court concluded that it would, and it quoted with approval the reasoning in *Miller v. State,* 462 P.2d 421 (Alaska 1969):

> "It is not too much to ask that one believing himself unlawfully arrested should submit to the officer and thereafter seek his legal remedies in court. Such a rule helps to relieve the threat of physical harm to officers who in good faith but mistakenly perform an arrest, as well as to minimize harm to innocent bystanders. . . . We hold that a private citizen may not use force to resist peaceful arrest by one he knows or has good reason to believe is an authorized peace officer performing his duties, regardless of whether the arrest is illegal in the circumstances of the occasion."

[4] Stietz's brief does not try to distinguish, nor does it even acknowledge *Hobson,* even though he discussed its holding and attempted to distinguish it in his postconviction motion (*See* 70:9-11).

Hobson, 218 Wis. 2d at 380. Therefore, under *Hobson*, whether or not Stietz believed the wardens' actions[5] were unlawful is irrelevant. The holding of *Hobson* is clear: the Wisconsin Supreme Court abrogated the common law right to resist an unlawful arrest.

Stietz's claim that he did not know that Frost and Weber were wardens performing their duties – which will be discussed further in Issues II and V – lacks merit under his *own* testimony. Stietz testified that he "looked at him and said a Warden, but it was kind of mumbled, not real loud" (113:93). He also testified that when he first encountered Frost and Weber, "I said – one kind of said, Green County. The other one looked at him and said something Warden" (113:122). Stietz was also close enough to wrestle with Frost over his gun. Stietz knew they were acting in an official capacity, and yet he resisted. Even if *Hobson* were *not* the law, by the end of the trial, any claim of self defense was so discredited "that no reasonable jury could conclude that the [S]tate had not disproved it." *Head*, 255 Wis. 2d 194, ¶ 115. The wardens were in uniform, with badges, and they identified themselves.

Stietz had no legal right to obstruct or resist the wardens. *Hobson* controls: he was not entitled to a self-defense instruction.

[5] While the wardens were not arresting Stietz, this makes his assault on them that much more egregious.

II. STIETZ WAS NOT ENTITLED TO PRESENT EVIDENCE THAT THE DNR WARDENS WERE TRESPASSING, NOR WAS HE ENTITLED TO A JURY INSTRUCTION ON TRESSPASSING BECAUSE THE WARDENS WERE ACTING IN THEIR OFFICIAL CAPACITY WHEN THEY WERE ENFORCING THE HUNTING LAWS.

Stietz next argues that the trial court erred when it refused to allow evidence of, and a jury instruction on, trespassing.

As indicated in Stietz's first issue, a trial court's "willingness to entertain a defendant's theory of defense and submit requested instructions to the jury is grounded on the evidence presented to the trier of fact." *Head*, 255 Wis. 2d 194, ¶ 44. Whether there are sufficient facts to allow the giving of an instruction is a question of law which this Court reviews de novo. *Id*.

Prior to trial, the State filed a motion in limine to forbid any evidence from characterizing the wardens conduct as trespassing (48). The trial court held a hearing and granted the State's motion (110:18-19).[6] At the close of the hearing, the trial court concluded:

> Wardens do have certain rights to go when they are investigating and they saw a tree stand, they were properly investigating because they saw a car with hunting equipment, it was after the hours were closed. It isn't a trespass.

---

[6] At the motion in limine hearing, Stietz's counsel acknowledged that when the parties encountered each other, the wardens had "come out through the gates, now they're on the easement, but they're outside the parcel, and that's where the talking and then the physical confrontation happens" (110:15). At trial, testimony indicated that the owner of the land, where the parties encountered each other, was Stietz's neighbor, Fabian Loeffelholz (113:55-63). Loeffelholz testified that he did not object to Stietz's entry to walk on his land along the fence line "as long as [Stietz] was checking his fence" (113:58).

. . . .

> If they had been out there hunting on the property, then it was a trespass. And not doing their job.

(110:18). The trial court prohibited Stietz from arguing that the wardens were trespassing (52). It also refused a jury instruction on trespassing (110:18-19). According to Stietz, this decision deprived him of his right to present a defense: that the wardens were not acting in their official capacity and outside the scope of their authority (Stietz Brief at 15).

Stietz claims that the wardens' trespass was "very likely" in violation of the Wisconsin criminal code (Stietz Brief at 16).[7] He argues that the wardens entered his property without consent, and because they were trespassing, "by definition they were not acting in an official capacity or within the lawful scope of their authority" (Stietz Brief at 17). The State disagrees.

Despite Stietz's claims, the wardens were acting in their lawful authority when they entered Stietz's property. While Stietz claims that the wardens "did not articulate any reasonable suspicion to believe that any crime or other violation was being committed" (Stietz Brief at 18), that is not the case. Warden Frost testified that when he saw Stietz's car, he thought it could be someone out deer hunting (111:166). Frost knew it was past hunting hours, which is a violation of Wisconsin Administrative Code § NR 10.06(5). (111:166-69; *see* n.1). He also testified that he saw an empty gun case in the front seat that appeared to be unzipped and empty (111:168). He saw a camouflaged, portable tree seat

---

[7] Wis. Stat § 943.13(1m)(a) prohibits any person from entering any enclosed, cultivated or undeveloped land of another without the express or implied consent of the owner or occupant. In his brief under this issue, Stietz also discusses a claim of excessive force, but he does not develop the argument. Rather, he indicates he will explore it in Issue IV (Stietz brief at 17). The State similarly will respond to this argument in Issue IV.

and scent-killer spray: "items people would use when they are hunting" (*id.*). The DNR officers, in full uniform and in their official capacity and within the scope of their authority, decided to walk through the open gate to investigate. Wisconsin Statute § 29.924(1) provides that the DNR "and its wardens shall, upon receiving notice or information of the violation of any laws cited in s. 29.921(1), as soon as possible make a thorough investigation and institute proceedings if the evidence warrants it." That is what the wardens did in this case – investigated a possible violation.

But Stietz cites *State v. Gaulke*, 177 Wis. 2d 789, 792, 503, N.W.2d 330 (Ct. App. 1993), to support his claim that an officer "engaged in a trespass" loses his legal authority (Stietz Brief at 18). In that case, this Court held that the defendant, Gaulke, could not argue that DNR agents had trespassed when they cited him for hunting past hours. This Court held that Gaulke lacked standing to challenge his citation on the ground that the wardens had not trespassed because the property was owned not by Gaulke, but by Gaulke's father. And because Gaulke did not possess "good title to the land," he had no standing to assert that the warden trespassed. *Id.* at 794. *Gaulke's* decision, however, was limited to that determination – the issue was decided on land ownership, it did not discuss the issue that Stietz presents on trespassing: whether the wardens were acting in their official capacity and within the scope of their authority (Stietz Brief at 15).

Stietz also argues that the wardens lacked probable cause to arrest Stietz at the time the agents were on his land. But Wis. Stat. § 23.61 authorizes DNR wardens to conduct a search of a place *without* probable cause if done under the authority and within the scope of a lawful inspection. Regardless, as described above, the facts of this case show that the wardens had probable cause to believe that a violation of this state's hunting laws occurred or was occurring. Frost testified: when he saw Stietz's car, he thought someone could be out deer hunting past hunting hours; he saw an empty gun case in the parked vehicle; he

saw a camouflaged tree seat and scent-killer spray. Probable cause existed to conduct a search of the property for an after-hours hunting violation.

Finally, the wardens in this case were allowed to investigate pursuant to the open fields doctrine. In *State v. Oliver*, 466 U.S. 170 (1984), the United States Supreme Court held that officers' information-gathering intrusion on an "open field" did not constitute a Fourth Amendment search, even though it was a trespass at common law. *Id.* at 183. "Quite simply, an open field, unlike the curtilage of a home, *see United States v. Dunn,* 480 U.S. 294, 300, 107 S. Ct. 1134, 94 L.Ed.2d 326 (1987), is not one of those protected areas enumerated in the Fourth Amendment. *Oliver, supra,* at 176-177, 104 S. Ct. 1735." *United States v. Jones*, 132 S. Ct. 945, 953 (2012). As pronounced in *Oliver*:

> [O]pen fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields.... [T]he asserted expectation of privacy in open fields is not an expectation that "society recognizes as reasonable.

466 U.S. at 179. The Supreme Court declared that "[a]n open field need be neither 'open' nor a 'field' as those terms are used in common speech. . . . [A] thickly wooded area . . . may be an open field as that term is used in construing the Fourth Amendment." *Id.* at 180, n.11.

For all of the above reasons, Stietz was not entitled to introduce evidence that the DNR officers were trespassing, nor was he entitled to a jury instruction on trespassing.

III. STIETZ WAS NOT DENIED HIS SIXTH AMENDMENT RIGHT TO A PUBLIC TRIAL WHEN THE TRIAL COURT CONDUCTED THE JURY INSTRUCTION CONFERENCE IN A CONFERENCE ROOM BECAUSE ANY SUCH "CLOSURE" WAS TRIVIAL.

Stietz argues that he was denied his right to a public trial when the trial court held the jury instructions "behind closed doors" in a downstairs conference room (Stietz Brief at 23).

The Sixth Amendment to the United States Constitution guarantees that a criminal defendant shall enjoy the right to a public trial. It provides in full as follows:

> In all criminal prosecutions, the accused shall enjoy the right to *a* speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VI (emphasis added). The Sixth Amendment's right to a public trial is applicable to the states through the due process clause of the Fourteenth Amendment. *Gideon v. Wainwright,* 372 U.S. 335 (1963).

The public trial is premised on "'[t]he principle that justice cannot survive behind walls of silence[.]'" *State v. Ndina*, 2009 WI 21, ¶ 42, 315 Wis. 2d 653, 761 N.W.2d 612 (quotation omitted). "If a defendant's right to a public trial is determined to have been violated, [Stietz] need not show prejudice; the doctrine of harmless error does not apply to structural errors." *Id*. ¶ 43.

In *State v. Vanness,* 2007 WI App 195, ¶ 6, 304 Wis. 2d 692, 738 N.W.2d 154, this Court concluded that the issue of whether the Sixth Amendment right to a public trial was

violated presents the application of constitutional principles to historical facts. And, as provided in *Ndina*, 315 Wis. 2d 653, ¶¶ 45-46, an appellate court applies a two-step analysis to determine wither a defendant's Sixth Amendment right to a public trial has been violated:

> An appellate court upholds the circuit court's findings of evidentiary or historical fact unless those findings are clearly erroneous. The appellate court determines the application of constitutional principles to those evidentiary or historical facts independently of the circuit court and court of appeals but benefiting from those courts' analyses.
>
> An appellate court applies a two-step analysis to determine the question of law whether a defendant's Sixth Amendment right to a public trial has been violated. The appellate court first determines whether the closure at issue implicates the Sixth Amendment right to a public trial. If the closure does not implicate the Sixth Amendment right to a public trial, the appellate court need not reach the second step of the analysis. If a closure implicates the Sixth Amendment right to a public trial, the appellate court then must determine whether the closure was justified under the circumstances of the case.

(Footnotes omitted). In *Ndina*, the Supreme Court noted that "[c]ases holding that a closure is trivial are typically characterized by the exclusion of an extremely small number of persons from the courtroom or, alternatively, by a more general exclusion in effect for an extremely short period of time." *Id*. ¶ 53. That is what happened in this case. In this case, the "closure" that occurred did not implicate the Sixth Amendment right to trial. Rather, any closure was trivial.

First, the jury instruction conference was not closed to the public: it was held in a conference room in the courthouse (107:64). The conference began with the door to the room open (*id*.). The door was only later closed at the request of the court reporter, who had trouble hearing the remarks of counsel and the court (*id*.). At no time did the court deny anyone entry into the conference room (*id*.). In

this case, the closure was so "trivial as not to implicate the right to a public trial." *See Ndina*, 315 Wis. 2d 653, ¶ 48.

Further, Stietz fails to provide authority supporting his argument that it is a violation of the right to a public trial to hold a "private"[8] jury instruction conference. The reasons for a public trial are to ensure that a defendant is tried fairly and so that "the public may see he is fairly dealt with and not unjustly condemned[.]" *Waller v. Georgia,* 467 U.S. 39, 46 (1984). A public trial also encourages witnesses to come forward and discourages perjury. *Id.* While Stietz cites *Waller* to support his claim of a Sixth Amendment violation, *Waller* is inapposite. In *Waller* the Supreme Court provided that a suppression hearing must be public because "a suppression hearing often resembles a bench trial: witnesses are sworn and testify, and of course counsel argue their positions. The outcome frequently depends on a resolution of factual matters." *Id.* at 47.

These concerns are not present in a jury instruction conference. There are no witnesses who testify, the appropriateness of the instructions do not turn on factual issues to be determined, and the issues are legal.

Stietz also argues the trial court's decision to have the jury instruction conference outside of the court room amounted to structural error (Stietz Brief at 25). The State disagrees. Structural errors "'seriously affect the fairness, integrity or public reputation of judicial proceedings and are so fundamental that they are considered per se prejudicial.'" *State v. Travis*, 2013 WI 38, ¶ 54, 347 Wis. 2d 142, 832 N.W.2d 491 (footnotes and citation omitted). A structural error is a "'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" *Id.* (footnotes and citation omitted). Structural errors "'infect the entire trial process and necessarily render a trial fundamentally unfair.'" *Id.*

[8] The State does not concede that the jury instruction conference was "private."

(footnote and citation omitted). "Constitutional errors that are so intrinsically harmful to substantial rights that they 'are not amenable to harmless error analysis' are classified as structural errors" *Id.* ¶ 55 (footnote and citation omitted). Structural errors have been found only in a "'very limited class of cases.'" *Id.* ¶ 56 (footnote and citation omitted).

Stietz does not cite any case that warrants automatic reversal in this case. Both Stietz and his attorney were present for the conference. The trial court conducted the jury instruction conference where spectators where welcome, and it only closed the door so the court reporter could hear. Any error in this case simply does not fit into the general description of a structural error – which is a defect infecting the entire trial process. *See Travis*, 347 Wis. 2d 142, ¶ 54.

As the trial court explained:

> We had the door open until the point in time when it got so noisy out there, that the court reporter asked the door to be closed, and then Mr. Stietz closed it, but I did not close this to anyone. It is just that it would have been unruly with about 40 to 60 people sitting in the courtroom at the time, and how are we going to listen to it?
>
> Now my problem would be – is I would have been having deputies escort people out, arresting them for contempt, etc., for not remaining silent, and I don't want to create a brouhaha upstairs in the courtroom or a commotion in the courtroom, but I believe we have done this in the open. We have always done it this way. I think every court I know of takes the – and [Stietz] has to be present, the state does, the clerk, et cetera, but we did have the additional fact that we did open up the door, so if a reporter had been here, they could have come in.

(107:64).

The arguments over jury instructions were all on record, and the jury instructions were provided to the jury in open court. Any error is harmless error.

Stietz cannot prove that the trial court violated his Sixth Amendment right to a public trial. Any such closure was trivial and does not implicate the Sixth Amendment.

IV. STIETZ'S SECOND AMENDMENT RIGHTS WERE NOT VIOLATED WHEN THE DNR WARDENS, AFTER IDENTIFYING THEMSELVES IN AN OPEN FIELD, ATTEMPTED TO DISARM HIM.

Stietz argues that his second amendment right to keep and bear arms were violated when he was forcibly disarmed by the wardens (Stietz Brief at 37). He claims that they had no legal justification for trying to disarm him, and that because he cannot be prosecuted for the lawful exercise of his Second Amendment rights, the criminal charges must be vacated (Stietz Brief at 39-43).

In determining that the Second Amendment guarantees an individual, rather than a collective, right to bear arms, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court noted that the exercise of this right is not unlimited:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. . . . For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. . . . Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

(Footnote omitted).

Contrary to what Stietz claims, the wardens had the right to stop and attempt to disarm Stietz. Wisconsin Statute § 23.58 provides the wardens' authority to stop Stietz:

> After having identified himself or herself as an enforcing officer, an enforcing officer may stop a person in a public place[9] for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a violation of those statutes enumerated in s. 23.50(1), any administrative rules promulgated thereunder, any rule of the Kickapoo reserve management board under s. 41.41(7)(k), or any local ordinances enacted by any local authority in accordance with s. 23.33(11)(am) or 30.77. Such a stop may be made only where the enforcing officer has proper authority to make an arrest for such a violation. The officer may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

(Footnote added).

Here, the wardens were authorized to investigate whether Stietz may have been violating the laws related to hunting. They had the right to stop him, and having stopped him, they also had the right, as provided in Wis. Stat. § 23.59: to temporarily take and secure his weapon:

---

[9] The State is unaware of any *Terry* stop being invalidated on the grounds an open field is not a public place. The "public place" requirement is designed to protect against coercive confinement or interrogation at police headquarters. *See e.g. Florida v. Royer,* 460 U.S. 491, 500-501 (1983) (The defendant's consent was tainted by custodial interrogation which went beyond bounds of justifiable *Terry-type* detention.). Here the DNR wardens were authorized to investigate whether Stietz may have been violating the laws related to hunting (*See also* the discussion of open fields in Issue II., *supra*).

> When an enforcing officer has stopped a person for temporary questioning pursuant to s. 23.58 and reasonably suspects that he or she or another is in danger of physical injury, the officer may search such person for weapons or any instrument or article or substance readily capable of causing physical injury and of a sort not ordinarily carried in public places by law abiding persons. If the officer finds such a weapon or instrument, or any other property possession of which he or she reasonably believes may constitute the commission of a violation of those statutes enumerated in s. 23.50(1) or which may constitute a threat to his or her safety, the officer may take it and keep it until the completion of the questioning, at which time he or she shall either return it, if lawfully possessed, or arrest the person so questioned for possession of the weapon, instrument, article or substance, if he or she has the authority to do so, or detain the person until a proper arrest can be made by appropriate authorities. Searches during temporary questioning as provided under this section shall only be conducted by those enforcing officers who have the authority to make arrests for crimes.

The above statutes do not impermissibly constrain Stietz's Second Amendment rights. The former allows DNR agents to stop a person in an open field when they suspect he or she might be violating game laws. The latter authorizes wardens to temporarily take and keep a weapon. Contrary to Stietz's claims, the wardens had the right to stop and attempt to disarm Stietz. And, in this case, the facts suggest that a stop and temporary disarming was necessary.

The officers were investigating a possible violation of after-hours hunting. When they approached Stietz, Webster testified that Stietz "went from holding his gun off to the side and then turned his gun facing straight on as I was approaching him, which is unusual" (112:101). Webster also testified, that "people typically don't point a gun in your direction when you go to make contact with them" (112:101-02). He described that, "When I was walking up to him, I saw him turn his gun to straight forward and I could see in his face a kind of agitation, aggression. I could tell

something wasn't right" (112:102). Stietz informed the officers that his gun was loaded (111:180; 112:38). When Webster and Frost asked him if they could see the gun, Stietz refused (111:180; 112:102-03). Frost testified that "when [Stietz] responded that he wouldn't allow us to see the firearm" that Frost was concerned for his and Webster's safety (111:181).

The wardens were justified in stopping Stietz and trying to disarm him. There was no Second Amendment violation, and his convictions should stand.

V. DNR WARDENS ARE LAW ENFORCEMENT OFFICERS, AND THEREFORE THE JURY PROPERLY FOUND STIETZ GUILTY OF POINTING A FIREMARM TOWARDS A LAW ENFORCMENT OFFICER, IN VIOLATION OF WIS. STAT. § 941.20(1m)(b).

Stietz claim that DNR wardens are not law enforcement officers pursuant to Wis. Stat. § 941.20(1m)(b), and, therefore, he cannot be guilty of violating that statute (Stietz Brief at 43).

Wisconsin Statute § 941.20(1m)(b), makes it a crime to point a firearm towards a "law enforcement officer" or, among others, a "commission warden who is acting in official capacity." Wisconsin Statute § 939.22(5) defines "commission wardens" as "wardens employed by the Great Lakes Indian Fish and Wildlife Commission." Stietz argues that because Frost and Webster are not "commission wardens," that they are not "law enforcement officers" under the statute, and so his conviction for violating Wis. Stat. § 941.20(1m)(b) is invalid. The State disagrees because, while DNR wardens are not "commission wardens" under the statute, they are "law enforcement officers."

Because statutory interpretation is a question of law, this Court applies a *de novo* standard of review. *State v. Kirch*, 222 Wis. 2d 598, 602, 587 N.W.2d 919 (Ct. App. 1998). "A cardinal rule of statutory interpretation is that statutes

must be construed so as to avoid absurd results." *Wisconsin Citizens Concerned for Cranes & Doves v. Wisconsin Dep't of Natural Res.*, 2004 WI 40, ¶ 35, 270 Wis. 2d 318, 677 N.W.2d 612. "Also, when interpreting a statute, statutes governing similar subjects should be considered together, such that where a statute governing one subject contains a given provision, the omission of that same provision from a statute governing a related subject is evidence that a different intention existed." *Id.* (citation omitted).

DNR wardens are certified law enforcement officers under the Department of Justice standards and under Wis. Stat. § 165.85, which controls the regulation of law enforcement officers in this State. Wisconsin Statute § 165.85(2)(c) provides that a "[l]aw enforcement officer" means "any person employed by the state or any political subdivision of the state, for the purpose of detecting and preventing crime and enforcing laws or ordinances and who is authorized to make arrests for violations of the laws or ordinances that the person is employed to enforce." Wisconsin Statute § 30.50(4s), provides that a "'law enforcement officer' has the meaning specified under s. 165.85(2)(c) *and includes* a person appointed as *a conservation warden* by the department under s. 23.10(1)" (emphasis added).

Further authority that DNR wardens are "law enforcement officers," is that DNR wardens derive their arrest authority from Chapter 23 and 29 of the Wisconsin Code. Wisconsin Statute § 23.33(1)(ig) provides that "'[l]aw enforcement officer' has the meaning specified under s. 165.85(2)(c) and includes a person appointed as a conservation warden by the department under s. 23.10(1)." *See also* Wis. Stat. § 23.11(4) (authority of DNR conservation warden to arrest without a warrant for violations of laws of the State and rules of the Department); and Wis. Stat. § 29.921(1) (providing that DNR wardens "may arrest, without a warrant" for certain offenses punishable by forfeiture).

The rules of criminal procedure also define "law enforcement officer":

> In chs. 967 to 979, unless the context of a specific section manifestly requires a different construction: . . . . . (5) "Law enforcement officer" means any person who by virtue of the person's office or public employment is vested by law with the duty to maintain public order or to make arrests for crimes while acting within the scope of the person's authority.

Wis. Stat. § 967.02. Therefore, Wis. Stat. § 967.02 also applies to DNR wardens. Additionally, "peace officer" and "law enforcement officer" are used interchangeably in the statutes, and a warden falls within the definition of "peace officer" as defined in Wis. Stat. § 939.22. That statute provides in relevant part that "peace officer" is "any person vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes" Wis. Stat. § 939.22(22).

The evidence adduced at trial also indicates that wardens are law enforcement officers. Frost testified that he had to be certified by the Department of Justice as a law enforcement officer (112:74). He testified that he had to complete 400 hours of basic law enforcement training, "which was required of any police officer, sheriff's deputy, troopers, Wardens" (112:74). He also testified that every year there is recertification training that is required by the Department of Justice, "as well as firearms qualification training on an annual basis" (112:74-75; *see also* 112:86-87).

Because DNR wardens are law enforcement officers under Wis. Stat. § 941.20(1m)(b), Stietz's claim – that he cannot be convicted for violating a statute that makes it a crime to point a firearm at a law enforcement officer – fails.

CONCLUSION

The State requests that this Court affirm the judgment of conviction and trial court order denying postconviction relief.

Dated this 15th day of June, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

SARA LYNN LARSON
Assistant Attorney General
State Bar #1087785

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-5366
(608) 266-9594 (Fax)
larsonsl@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7505 words.

_____
Sara Lynn Larson
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 15th day of June, 2015.

_____
Sara Lynn Larson
Assistant Attorney General