STATE OF WISCONSIN

IN SUPREME COURT

No. 2014AP2701-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT JOSEPH STIETZ,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION AFFIRMING A JUDGMENT OF CONVICTION ENTERED IN LAFAYETTE COUNTY CIRCUIT COURT, THE HONORABLE JAMES R. BEER, PRESIDING

RESPONSE BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

The State rephrases the issues on appeal as follows:

1. Two law enforcement officers were investigating a possible hunting violation when they encountered Robert Joseph Stietz on his neighbor's land. Stietz was carrying a rifle, and he told the officers that it was loaded. He refused the officers' requests to disarm. A scuffle ensued, and Stietz drew a loaded handgun and pointed it at one of the officers. Stietz then refused their repeated requests to disarm. His actions resulted in an extended standoff which ultimately required one officer to radio assistance for other law enforcement officers. Did Stietz have a right to instruct the jury on the privilege of self defense?

   The trial court held, No.

2. Did the law enforcement officers violate Stietz's Second Amendment rights when they forcibly disarmed Stietz of his loaded rifle?

   The trial court held, No.

3. Did Stietz have the right to argue and instruct the jury that the law enforcement officers who encountered Stietz on his neighbor's property were trespassers?

   The trial court held, No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case merits both oral argument and publication.

SUPPLEMENTAL FACTS

The facts of this case are important because this Court is asked to determine whether the trial court properly denied Stietz's requested jury instructions on the evidence presented. Because Stietz's facts are incomplete, the State submits supplemental facts.

The State charged Stietz with first-degree reckless endangerment; negligent handling of a weapon; two counts of resisting a law enforcement officer while threatening to use a dangerous weapon; and two counts of intentionally pointing a firearm at a law enforcement officer. (6.) The charges arose from a confrontation between Stietz and two Wisconsin Department of Natural Resources conservation wardens, Joseph Frost and Nick Webster.

- **Trial testimony**

Wardens Frost and Webster were on duty Sunday, November 25, 2012, 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 up a field drive. (111:165; 112:91.) They thought it could be someone out deer hunting. (111:165; 112:92.)

Warden Webster used his computer to check the vehicle's license plate while Frost looked inside the vehicle. (111:167, 168.) The time was 4:58 p.m., and the official end of hunting season was 4:45 p.m. (111:168; 112:10.) 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." (111:165-66.)

It is undisputed that both wardens were wearing their issued uniforms: a "blaze orange" jacket; a DNR patch on the shoulder of each arm of the jacket; a DNR badge along either the middle zipper of the jacket or the left chest; and a "blaze orange" hat with a DNR patch. (111:169-71.)

The wardens did not carry "long guns which most deer hunters [do]." (112:48.) As Frost informed the jury, "if we are not carrying a long gun, that's usually a give away as to us not being hunters." (112:49.) "[*E*]*ven at a distance*," Frost explained, "when they see us not carrying a long gun, it's suspicious to most hunters." (*Id.*)

The wardens began walking over a hill along a fence line, then walked down the hill, and they came upon an open cattle gate. (111:174; 112:95.) They entered the gate and walked down a path until they heard some noises behind them (112:95-97), and observed a person, later identified as Stietz, walking in the field (111:176). Stietz was about 30-40 yards away, and on the other side of the fence line. (111:176; 112:100.)

Stietz was not wearing any blaze orange, and he was carrying a rifle. (111:176; 112:98-99.) The wardens witnessed Stietz stop and look both ways every few steps. (112:145.) Webster testified that Stietz's actions were consistent with somebody who was "still hunting." (112:145.) 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." (112:101-02.) He described that, "When I was then 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.)

When Stietz was about 20 yards away near the gate (113:127), Frost turned on his flashlight, shined it at Stietz's "right side"[1], and identified himself, "Conservation Warden" (111:177; 112:51, 80). When Frost said, "Conservation Warden," Stietz's "head snapped and looked right at us." (112:147.) Seconds later, Webster identified himself, "Conservation Warden." (112:137, 143, 147.)

Stietz claims in his brief that "he did not hear them *ever* identify themselves" (Stietz's Br. 6, 23) (emphasis

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[1] Stietz, with no citation to the record, provides that "[t]heir blaze orange caps with a logo were also not readable by Stietz in the dark who was looking towards them but *with a light being shined into his eyes*." (Stietz's Br. 23 (emphasis added).) Stietz repeats this again in his brief: claiming that the wardens "shined a flashlight in his eyes," suggesting that Stietz therefore could not see the wardens' uniforms. (Stietz's Br. 6-7.) Stietz *never* testified that the wardens shined a flashlight into his eyes. Stietz's *only* testimony with regard to a flashlight is remarkably different:

> Q: Okay. And you didn't see them sign a flashlight towards you?
> Stietz: "When I first saw them, I didn't see no flashlight."
> Q: Okay. When they were down in your property, didn't they shine a flashlight up your way?
> Stietz: "I saw no flashlight."

(113:122.) Stietz is not entitled to any better version of the facts than he himself testified to.

added), but it is undisputed that on *direct* examination Stietz testified that he heard "one" of the wardens introduce himself as "Warden." (113:93.) Then, again, on cross-examination, Stietz testified, "one kind of said, Green County. The other one looked at him and said something Warden." (113:122.)

The wardens walked back through the open gate that they had entered, where they encountered Stietz. (112:25; 112:100, 101.) When the parties were "within arms reach" of each other (111:179), Webster asked Stietz if he had seen any deer (112:25, 100). Stietz responded yes, that he had seen seven doe. (*Id.*) Stietz was not wearing blaze orange, but the wardens could see that Stietz had blaze orange in his left coat pocket. (112:103.) Indeed, Stietz testified that in his coat pocket, he carried a blaze orange vest that he wears hunting, along with his hunting license and back tag. (113:108-09.)

But Stietz told the wardens that he was not hunting; he was looking for trespassers. (112:137.) The wardens asked if they could see the rifle. (111:180; 112:102.) Stietz replied, "no." (*id.*) Webster asked Stietz if the rifle he was carrying was loaded, and Stietz replied that it was. (112:38, 103; 111:180.) Webster explained he was concerned "for officer safety." (112:129.) Stietz's "verbal answers and his nonverbal facial expressions and the way he was holding his gun, his gestures lead me to believe there was an officer safety issue." (112:129.) Frost also testified about his concern for safety:

> [H]e is dressed in camouflage, it's after hours, he said his firearm is loaded, which I guess gave me reason to believe he was potentially hunting after hours, hunting without blaze orange. And then when he responded he wouldn't allow us to see the

> firearm. I guess, at that point there is a concern for, I guess, our safety that I guess something could happen if he continues to have the firearm.

(111:181-82.)

Frost asked Stietz again if he could see his firearm; Stietz refused. (111:180; 112:102-03.)

Frost then "stepped forward and reached [his] hand towards [Stietz's] firearm." (111:180.) Stietz took "the butt of the firearm, the lower portion of the firearm towards [Frost] and [Stietz] basically hit [Frost] in the navel with the firearm." (111:181.) Frost tried to gain control of the rifle, driving his body forward into Stietz. (*Id.*) They "basically got twisted around." (111:182.) During the scuffle, Webster yelled that Stietz's rifle was pointed at Webster. (*Id.*) Webster reached for the rifle and pushed it away. (112:41.) Webster testified that "when the rifle was aimed at me and when the handgun was aimed at me, I felt the consequence could have been my death." (112:130.)[2] Frost ultimately "ended up with the [rifle] in my hands, laying on my back." (111:182.)

Stietz reached for his handgun. (111:183.) Frost threw the rifle to the side and then reached for his handgun. (111:183; 112:42.) Frost 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.) Webster radioed the Lafayette sheriff's department from his

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[2] Contrary to Stietz's portrayal, this was anything but a "*polite* standoff." (Stietz's Br. 8 (emphasis added).) As Webster testified, "[w]hen somebody points a firearm at you, it's not a safe situation." (112:130.)

collar microphone. (111:189; 112:68, 109.) The time was 5:07 p.m. (111:189; 112:14, 15.) While Stietz claims that Stietz "made no effort to prevent" this (Stietz's Br. 9), as Frost testified at trial, "but he also wasn't complying with what we were asking him to do. And he had a gun pointed at Warden Webster." (112:67.)

Deputy Brett Broge of the Lafayette County sheriff's department arrived at 5:17 p.m. (113:15.) He described the scene: "[W]hen I arrived on scene [Stietz] had a weapon pointed at my partners, I believed that they were in danger and I was going to protect myself and the Wardens." (113:32.) At trial, when Stietz was asked why he *still* refused to put his gun down after Broge arrived, Stietz responded, "the Wardens would not put theirs down, and I wouldn't put mine down until they put theirs down, because they drew on me first." (113:141.)

At Frost's request, Broge started walking back to his squad, because Frost also wanted to move back towards the squad "instead of standing out in the open and trying to get us to a position to cover." (111:190.) As the wardens started walking in that direction, Stietz followed, with his handgun still pointed at Webster. (111:190; 112:113.)[3] Similarly, Webster's handgun was pointed at Stietz. (112:113.) When everyone reached Broge's squad car, the wardens stood behind it. (111:190.) Stietz continued to point his firearm at the wardens. (111:191.)

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[3] In his statement of facts, Stietz claims that he "did nothing to obstruct [the wardens'] movement to safe cover," but he fails to inform this Court that he: (1) disobeyed orders to drop his gun, and (2) kept his firearm pointed at Webster while the wardens followed Broge to the squad. (Stietz's Br. 9.)

Frost left to turn the emergency lights on in his squad car so that other responding officers could locate them. (111:191.) Frost then ran back to Broge's squad, and at around 5:20 p.m., Stietz had lowered, but had not put down, his handgun. (111:192; 113:29.) The officers made more requests to Stietz to put down his handgun. (111:92.) Stietz refused. (*Id*.)

Shortly before 5:30 p.m., other responders and officers arrived, including Deputies Gorham and Reichling. (111:192; 112:114, 155.) Reichling tried to convince Stietz to put down his gun.

> I told [Stietz] . . . that we had to end this before something bad happened. Basically telling him he was not in a winning situation, nothing good could come out of the situation. And I pleaded with him to just put his gun down, and you know, and walk out.

(112:161.) Then Gorham tried to persuade Steitz to lay down his gun. After an additional thirty minutes, around 6:00 p.m., Stietz laid his gun to the ground. (112:160, 162; 113:29.)[4]

[4] Stietz states that after "[o]ther deputies arrived and spoke with Stietz and assured him he would not be gang tackled," that Stietz "then placed his firearm on the ground." (Stietz's Br. 10.) If only things happened that quickly. After Reichling was unsuccessful, it still took Gorham almost a half hour before he convinced Stietz to finally drop his gun. (112:160, 162.)

- **The trial court denies Stietz's request for a jury instruction that he had a right to self-defense against law enforcement officers.**

Stietz sought a pattern jury instruction on the right to use self-defense against the officers. (107:50-56.) The court denied the request: "[W]e 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.) While Stietz argued that he provided testimony that he "didn't hear" the wardens identify themselves or see their badges, the court observed, "[u]nder the circumstances, if he didn't know they were wardens, he should have, and he didn't have a right to self-defense against a police officer." (107:56.)

- **The trial court allows Stietz to inform the jury he was patrolling for trespassers, but denies his request to argue that the wardens were trespassing.**

The State filed a motion in limine to prohibit any evidence of Stietz characterizing the wardens' conduct as trespassing. The court held a hearing, and Stietz admitted that the confrontation with the wardens occurred on a neighbor's land, not Stietz's land. (*See* 110:17, "the conversation happens, we're in agreement, outside the gates;" *see also* 110:15, "[t]hey 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.") But Stietz argued that because he first saw the wardens on his land, they were trespassers. (110:15.)

The court disagreed. "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." (110:18.) The court acknowledged that Stietz had a right to present a defense that he was patrolling for trespassers: "He can say that he was patrolling for trespassers, but he can't say that the wardens were trespassing." (110:19-20.)

When the issue was brought up again at the jury instruction conference, the court observed, "[a]t one point they were on [Stietz's land], but at the time that all the confrontation took place, they weren't trespassers. They were on Mr. Loeffelholz's property." (107:45.) "That is why you can't assert the trespass." (*Id.*)

- **The jury's verdict and the court's sentence.**

The jury convicted Stietz of two counts, both of which related to Warden Webster: resisting a law enforcement officer and intentionally pointing a firearm at a law enforcement officer. (61; 64; 78a.) With respect to Stietz's conviction for intentionally pointing a firearm at a law enforcement officer, the court imposed a four-year sentence consisting of one year of initial confinement followed by three years of extended supervision. The court withheld sentence on the resisting conviction and imposed a consecutive two-year probation term. (114:56.)

The Court of Appeals Decision.

1. No right to resist a lawful arrest.

The court of appeals unanimously affirmed Stietz's conviction. With respect to Stietz's claim that the trial court erroneously denied his request for a self-defense jury instruction, the court held, "an individual has no right to physically resist an arrest, even if the individual believes the arrest is unlawful." (R-App. 106.) "Because the record lacks sufficient evidence to support a self-defense instruction, the circuit court properly denied Stietz's request for the instruction." (*Id*.)

2. No right to an instruction on trespassing.

The court of appeals also rejected Stietz's claim that the trial court's decision refusing to allow evidence of, or a jury instruction on, trespassing, deprived him of his right to present a defense. (R-App. 106-08.) It concluded that the wardens were entitled to enter his land under the open fields doctrine. (R-App. 107.)

3. No Second Amendment right to point a firearm at a law enforcement officer.

Finally, the court of appeals dismissed Stietz's second amendment claim:

> Based on the wardens' reasonable suspicion that Stietz may have been illegally hunting, WIS. STAT. § 23.58 (2013-14)[3] authorized the wardens to stop and question Stietz. Having stopped Stietz pursuant to § 23.58, and believing Stietz's rifle constituted a threat to their safety, the wardens had the right to temporarily take and secure

> the weapon pursuant to WIS. STAT. § 23.59. Because Stietz was pointing his weapon at the wardens, they were entitled to disarm him without violating the Second Amendment.

(R-App. 110.)

Stietz appeals.

ARGUMENT

I. On its face, without weighing the credibility of the parties' witnesses, Stietz's testimony did not warrant a self-defense instruction.

Stietz argues that the trial court erroneously exercised its discretion when it denied his request for a self-defense jury instruction. Because Stietz's testimony was incredible on its face that he reasonably believed there was an unlawful interference, the State disagrees.

A. Standard of Review and Legal Principles of Self-Defense.

"Self-defense is generally viewed as an affirmative defense." *State v. Austin*, 2013 WI App 96, ¶ 12, 349 Wis. 2d 744, 836 N.W.2d 833. "An 'affirmative defense' is . . . 'a defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim even if all allegations in the complaint are true.'" *State v. Watkins,* 2002 WI 101, ¶ 39, 255 Wis. 2d 265, 647 N.W.2d 244 (citation and emphasis omitted).

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.

Under the unambiguous language of this statute, a person cannot exercise the privilege of self-defense unless that person "reasonably believes" that he is preventing or terminating an unlawful interference with his person. Importantly, "the 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." *State v. Head*, 2002 WI 99, ¶ 115, 255 Wis. 2d 194, 648 N.W.2d 413.

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. To support a requested jury instruction on a statutory defense to criminal liability, the defendant "has the initial burden of producing evidence to establish [that] statutory defense." *State v. Stoehr*, 134 Wis. 2d 66, 87, 396 N.W.2d 177 (1986). Whether there are sufficient facts to allow the giving of an instruction is a question of law which this Court reviews de novo. *Id*.

Stietz argues that he needed to supply only "some" evidence to receive a self-defense instruction. (Stietz's

Br. 11.) But this Court has explained the "some" evidence standard:

> This court expounded on the "some"-evidence standard in *State v. Mendoza,* 80 Wis.2d 122, 258 N.W.2d 260 (1977), where we examined the showing required to warrant the submission of a manslaughter instruction to the jury. The court stated that in determining whether to submit an instruction regarding imperfect self-defense, the circuit court must determine whether a reasonable construction of the evidence will support the defendant's theory "viewed in the most favorable light it will 'reasonably admit of from the standpoint of the accused.'" The court concluded that if the evidence viewed most favorably to the defendant supported the defendant's theory, it was the role of the jury to determine whether to believe the defendant's theory. In other words, "if under any reasonable view of the evidence the jury could have a reasonable doubt as to the nonexistence of the mitigating circumstance, the burden has been met."

Head, 255 Wis. 2d 194, ¶ 113 (internal citations omitted). As will be applied below, in this case, Stietz failed to meet his burden because under any reasonable view of the evidence, a self-defense instruction was not warranted.

B. Stietz failed to meet his burden of producing evidence to establish that he was entitled to a self-defense instruction because his testimony, on its face, was insufficient to warrant the instruction.

In making a determination of whether Stietz presented sufficient evidence to support a self-defense instruction determination, the trial court could ask only

whether a reasonable construction of the evidence, viewed favorably to Stietz, supported his defense:

> [N]either the trial court nor this court may, under the law, look to the "totality" of the evidence . . . in determining whether the instruction was warranted. To do so would require the court to weigh[ ] the evidence accepting one version of facts, rejecting another and thus invade the province of the jury.

Mendoza, 80 Wis. 2d at 152. "If this question is answered affirmatively, then it is for the jury, not for the trial court or this court, to determine whether to believe defendant's version of the events." *Id.* at 153.

The trial court denied Stietz's requested instruction, WIS JI-Criminal 800.[5] (107:17.) On appeal, Stietz argues

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[5] This pattern instruction provides:

Self-Defense

Self-defense is an issue in this case. The law of self-defense allow the defendant to threaten or intentionally use force against another only if:

- The defendant believed that there was an actual or imminent unlawful interference with the defendant's person; and,
- The defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and
- The defendant's beliefs were reasonable.

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the

that there was "abundant" evidence–which was only *his* testimony–that supported this instruction. (Stietz's Br. 11-12.) Stietz's claim is that because (1) he "had ongoing problems with trespassers," and (2) he thought the wardens were strangers, "it was reasonable for him to infer these were illegally trespassing hunters." (Stietz's Br. 12-13.)

But Stietz's claim that he thought the wardens were "illegally trespassing hunters" (Stietz's Br. 13) is, as the court of appeals concluded, "belied by *his own* testimony" (R-App. 106 (emphasis added)). Stietz's testimony alone shows that he knew Frost and Webster were wardens. He testified on direct that when he first encountered the wardens, one "looked at him and said a Warden, but it was kind of mumbled, not real loud." (113:93.) He testified on cross, "I said – one kind of said, Green County. The other one looked at him and said something Warden." (113:122.)

Notably, Stietz's testimony shows that he did not approach or confront the wardens as if he thought they were "illegally trespassing hunters." Stietz's brief states:

> One of the two asked Stietz if he had seen any deer, to which he replied "seven." Stietz testified that the strangers demanded his rifle and he refused to give it to them. From Stietz's perspective at that point, the only information he had was that there were two strangers, dressed in hunter's blaze orange, walking on his property

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circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

Wis. JI-Criminal 800.

> uninvited asking if there were any deer around; it was reasonable for him to infer these were illegally trespassing hunters.

(Stietz's Br. 13.)

When Stietz saw the two "trespassing hunters," who weren't carrying hunting rifles, why did Stietz not confront them? Why did he not ask the "trespassing hunters" any questions about what they were doing on his land? Why did he not immediately inform the "trespassing hunters" that they were on his land, illegally trespassing? And if Stietz did not actually believe that the two "trespassing hunters" were wardens, why did he not ask them for identification? And why would illegal trespassers *approach* a person carrying a rifle, such as Stietz? Even Stietz testified that "usually if it's a trespasser they took [sic] off and get the heck out of there." (113:127.)

More unbelievable is Stietz's testimony that he did not see the wardens' uniforms. Stietz testified that he did not see the DNR patches on the wardens' shoulders because he was "studying their faces." (113:126.) But it is unbelievable that he could "[study] their faces" but not see the DNR emblem on their hats, chest, and shoulders. (111:169-71.) So by the end of Stietz's testimony, *he* alone discredited any claim of self defense so "that no reasonable jury could conclude that the [S]tate had not disproved it." *Head*, 255 Wis. 2d 194, ¶ 115.

Additionally, there was no "unlawful interference," as Wis. Stat. § 939.48(1) requires. The law enforcement officers were lawfully entitled to disarm Stietz of his loaded rifle. Wis. Stat. § 23.59. It is undisputed that Stietz testified that they identified themselves as law enforcement officers. (113:93, 122). Based on the information known to the

wardens, when Stietz refused to hand over his loaded firearm, the officers were lawfully entitled to disarm him. The general test of police action, our nation's highest court has held, is whether the officer "acted reasonably in such circumstances." *Terry v. Ohio*, 392 U.S. 1, 27 (1968).[6] By this test, under these circumstances, the conduct of the law enforcement here, was, as a matter of law, entirely reasonable. When Stietz refused to hand over his rifle, and when he reached for his loaded handgun, the officers, at close range, could have easily pulled the trigger. But from

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[6] "Wisconsin has codified the *Terry* standard for protective searches in Wis. Stat. § 968.25, and, as with the *Terry* stop standard, we follow those cases interpreting *Terry." State v. Williams*, 2001 WI 21, ¶ 49, 241 Wis. 2d 631, 623 N.W.2d 106.

> When a law enforcement officer has stopped a person for temporary questioning pursuant to s. 968.24 and reasonably suspects that he or she or another is in danger of physical injury, the law enforcement 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 law enforcement officer finds such a weapon or instrument, or any other property possession of which the law enforcement officer reasonably believes may constitute the commission of a crime, or which may constitute a threat to his or her safety, the law enforcement officer may take it and keep it until the completion of the questioning, at which time the law enforcement officer shall either return it, if lawfully possessed, or arrest the person so questioned.

Wis. Stat. § 968.25.

start to finish the officers engaged in a self-controlled course of conduct without using their firearms to shoot Stietz.

Finally, the State encourages this Court to watch Exhibit 12 (58), which is a video taken from Deputy Broge's squad. That video shows Broge's arrival at the scene of the ongoing confrontation outside of the cattle gates. (58.) More importantly, the video shows the wardens–lit up by the squad lights–decorated in blaze orange and in their full uniforms. (58.) And it shows Stietz continuing to point his loaded firearm at Webster. (58.)

The evidence that existed in the record, viewed favorably to Stietz, did not warrant a self-defense instruction. Stietz needed to do more than just claim an *actual* belief, he needed to provide a "reasonab[le]" belief that the wardens were unlawfully interfering with his person. Wis. Stat. § 939.48(1).

C. Even after additional law enforcement officers arrived, Stietz continued to resist, and he continued to point a loaded firearm at the wardens.

Under Stietz's own admission, he continued to resist Frost and Webster and he continued to point a loaded firearm at them after the wardens radioed for help and after Deputy Broge arrived. (113:115-17.) Stietz claims in his brief that he "testified that he first suspected they were officers of some sort only *after* the confrontation, when Webster radioed for backup." (Stietz's Br. 23.) *Even assuming* that Stietz did not recognize the wardens when they first encountered each other, he *continued* to resist them, and he did not voluntarily put down his gun once he ascertained their identity. (113:115-17.) It is bizarre to suggest that

there is some mistake of fact question left for the jury. He simply can no longer claim self-defense under *his* testimony.

The trial court did not erroneously exercise its discretion. Stietz's testimony did not support a self-defense instruction.

D. The court granted Stietz's fundamental, constitutional right to present a defense.

The State agrees with Stietz that he has a constitutional right to present a defense. (Stietz's Br. 15.) However, he was not entitled to his defense of *choice*–self-defense–because, as argued above, he failed to present sufficient evidence to warrant it.

Stietz's defense with regards to counts 3 and 6 (his two convictions) was the following: that the State did not prove the elements because the State failed to prove (1) the wardens were acting with lawful authority, and (2) Stietz knew that they were officers acting in their official capacity with lawful authority. (107:131, 137-39.) Stietz argued that by "grabbing someone's rifle," the wardens were not acting in their "official capacity or duties that their employment required them to perform." (107:90.) He continued, "[f]orcibly taking a rifle from a man who is walking his fence line looking for trespassers and not hunting was not something done in the official capacity of these wardens." (107:94; *see also* 107:95.)

Stietz criticizes the court of appeals for "ignoring" *State v. Mendoza*, 80 Wis. 2d 122, 258 N.W.2d 260 (1977). Stietz argues that *Mendoza* prohibits what the court of appeals did in this case: it "improperly usurped the jury's ability to make [the] determination" of whether Stietz was acting in self-defense. (Stietz's Br. 17-18.)

Mendoza concerned the conflicting "version of events" between the *parties;* specifically, the "[d]efendant's version of the struggle," and the "state's factual theories of the case," which were "substantially different from the defendant's story." 80 Wis. 2d at 133-34. This Court determined that neither a trial court nor a reviewing court may weigh the evidence, but instead may only ask whether a reasonable construction of the evidence, viewed favorably to the defendant, supports the alleged defense. *Mendoza,* 80 Wis. 2d at 152.

But in *this* case, the court of appeals did not weigh the credibility of the parties to determine that Stietz was not entitled to the self-defense instruction. Rather, it determined that Stietz's testimony *alone* did not warrant a self-defense instruction: "Stietz's assertion [that he did not know Frost and Webster were wardens] is belied by his own testimony." (R-App. 106.)

The "reasonable construction of the evidence," *viewed favorably* to Stietz, simply did not support a self-defense instruction. Essentially, the court of appeals determined that Stietz's testimony was, as a matter of law, insufficient to warrant a self-defense instruction. (*See* R-App. 106.)[7] Its decision is not that the *court* did not believe Stietz; rather, that nobody–no jury–would believe Stietz.

[7] This is a reasonable conclusion since Stietz *continued* to point his firearm and resist the wardens even after Broge arrived.

E. Stietz had no right to physically resist the law enforcement officers.

Stietz next argues that the court of appeals erroneously relied upon this Court's decision in *State v. Hobson*, 218 Wis. 2d 350, 577 N.W. 2d 825 (1998) when it rejected his argument that a self-defense instruction was necessary because he believed that the wardens' conduct was unlawful. (Stietz's Br. 20.) The State agrees with Stietz that the issue is not whether he had a right to resist an arrest, but whether he had a right to act in self defense. [8] But to the extent that Stietz asserts that a self-defense instruction was proper because he believed that the wardens' conduct was unlawful, *Hobson* provides guidance that such a belief is of no consequence and the officers' conduct was clearly legal.

In *Hobson,* this Court considered whether public policy would be best served by abrogating the common law privilege to forcibly resist an unlawful arrest. 218 Wis. 2d at 358. This 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

[8] Stietz argues that the abrogation of the right to self-defense doesn't affect this case since the officers did not attempt an arrest.

> peace officer performing his duties, regardless of whether the arrest is illegal in the circumstances of the occasion."

Id. at 380. Therefore, under *Hobson*, whether or not Stietz believed the wardens' actions[9] were unlawful is irrelevant.

Stietz's claim that he did not know that Frost and Webster were wardens performing their duties is refuted by the trial evidence. Stietz himself testified that the wardens identified themselves. (113:93, 122.) Stietz was also close enough to wrestle with Frost over his rifle. The wardens were in full uniform, with badges, and they identified themselves. Stietz knew they were acting in their official capacity, and yet he resisted. And he continued to resist and point a loaded firearm at the wardens even after additional law enforcement arrived. 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. Stietz was not entitled to a self-defense instruction.

II. Stietz did not have a Second Amendment right under the United States or Wisconsin Constitution to refuse the law enforcement officers' requests to disarm his loaded firearm.

Stietz argues that his Second Amendment rights were violated when his rifle was forcibly disarmed by the law enforcement officers. He claims that they had no legal justification for disarming him, and that because Stietz "cannot be prosecuted" for the exercise of his Second

[9] While it is undisputed by the parties that the wardens were not arresting Stietz, this makes Stietz's assault on them that much more egregious, especially in light of the restrained actions of the wardens.

Amendment rights, the criminal charges must be vacated. (Stietz's Br. 27-28.)

A. This Court should not address Stietz's undeveloped constitutional claim.

Stietz's Second Amendment argument is undeveloped. Stietz cites cases that generally confirm that there is a constitutional right to bear arms. (Stietz Br. 28-29.) But he does not cite anything to support his claims that (1) disarming him under these circumstances violates his Second Amendment rights, or (2) that *if* the wardens' actions violated his Second Amendment rights, that it "precludes his prosecution." (Stietz's Br. 28.) This Court will neither develop an appellant's argument for him, *see State v. Gulrud*, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987), nor address issues on appeal that are inadequately briefed. *See State v. Flynn*, 190 Wis. 2d 31, 58, 527 N.W.2d 343 (Ct. App. 1994). Those principles apply with particular force when the claim is constitutional:

> Constitutional claims are very complicated from an analytic perspective, both to brief and to decide. A one or two paragraph statement that raises the specter of such claims is insufficient to constitute a valid appeal of these constitutional issues to this court. For us to address undeveloped constitutional claims, we would have to analyze them, develop them, and then decide them. We cannot serve as both advocate and court.

Cemetery Servs. v. Dep't of Regulation & Licensing, 221 Wis. 2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998). Because this is an underdeveloped claim, the State requests that this Court neither consider nor develop it for Stietz.

B. Stietz did not have a Second Amendment right to refuse law enforcement officers' request to disarm.

If this Court chooses to consider Stietz's second amendment claim on the merits, his claim fails. 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, 595 (2008), the Supreme Court noted that the exercise of this right is not unlimited.[10] And in this case, the court of appeals correctly determined that the wardens "were entitled to disarm [Stietz] without violating the Second Amendment." (R-App. 110.)

Wisconsin Stat. § 23.58 (2013-14) 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 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) . . . . 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.

The wardens were authorized to investigate whether Stietz was violating the laws related to hunting. And, under

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[10] The Wisconsin Constitution also gives citizens the right to "keep and bear arms for security, defense, hunting, recreation or any other lawful purpose." Wis. Const. Art. 1 § 25.

Wis. Stat. § 23.59, the wardens also had the authority to secure Stietz's loaded rifle:

> 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 . . . . *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. . . .

Wis. Stat. § 23.59 (2013-14) (emphasis added). Additionally, in *State v. Iverson*, 2015 WI 101, ¶ 41, 365 Wis. 2d 302, 871 N.W.2d 661, this Court recognized that the authority of state troopers is also provided in Wis. Stat. § 23.58, which authorizes "an enforcing officer" to "stop a person in a public place 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)." Wisconsin Stat. § 23.50(1) describes the procedure in forfeiture actions. *Iverson* then went on to recognize that officers may conduct a *Terry* stop for a forfeiture violation. 365 Wis. 2d 302, ¶ 42. Therefore, wardens may also arrest individuals for civil forfeitures as well as criminal violations.

But Stietz argues that the wardens "had no reasonable suspicion, much less probable cause, to think that any crime

had been committed" when they encountered Stietz. (Stietz's Br. 24.) He makes this argument by noting that the wardens "heard no shots and saw no hunting." (*Id*.) Stietz's argument would essentially require wardens to have personal knowledge of hunting violations prior to conducting an investigation. The inevitable result would be the unnecessary depletion of Wisconsin's wildlife, which the DNR is bound to protect and preserve. And, as Frost testified:

> Q: Warden Frost, do shots have to be fired in order to indicate[ ] somebody is hunting?
> A: No
> Q: Does somebody need to have a deer carcass to indicate that they have been hunting?
> A: No.
> Q: What about a drag rope?
> A: No.
> Q: What about a thermos?
> A: No.
> Q: Do they need to have blood on their shoes to indicate that they had been hunting?
> A: No.

(112:73.) Additionally, certain illegal hunting methods must be viewed on the scene; such as shining deer (Wis. Stat. § 29.245), hunting deer outside of authorized hours (Sec. NR 10.06(3), Wis. Admin. Code), and the use of illegal nets or traps (Wis. Stat. § 29.331).

Numerous factors—Stietz's possession of a hunting firearm after hours, walking as though he was "still hunting," not wearing blaze orange, wearing camouflage, his refusal to turn over his weapon to the wardens, the wardens' observation of an empty rifle case and hunting paraphernalia—gave the wardens reason to believe that

Stietz was violating Wisconsin's hunting laws. Stietz's conduct was not constitutionally protected under the Second Amendment. He has failed to show any Second Amendment right that allowed him to refuse the law enforcement officers' repeated requests to disarm.

III. The trial court did not erroneously exercise its discretion when it denied Stietz's request for an instruction on trespassing.

According to Stietz, the trial court's decision to refuse an instruction on trespass deprived him of his right to present a defense. (Stietz's Br. 15.) But Stietz lacks standing to assert that the wardens were trespassing on his neighbor's property, which is where the confrontation that gave rise to the criminal charges occurred.

A. Stietz has no standing to allege trespassing.

Wisconsin's trespassing statute, 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." With no citation to the record, Stietz claims on appeal that "the wardens were trespassing when they encountered Stietz." (Stietz's Br. 21.) But at the trial court, Stietz acknowledged that the encounter did *not* happen on his land, but land that his neighbor (and uncle) owned, Fabian Loeffelholz. (113:123-128, (Stietz's trial testimony, recognizing that the encounter happened after the wardens walked through the gate); 110:17, (Stietz's lawyer informing the trial court "the conversation happens, we're in agreement, outside the gates"); 110:15, ("[t]hey 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"); 110:16, ("[t]hat's where the actual conversation and confrontation occurs. . . . On the easement.").)[11]

At a sidebar during trial, the court informed Stietz's attorney that Loeffelhoz "owns the title to the property." (113:74.) The court continued, "it's the property owner who can prevent people from going on the property, not the easement holder." (113:75.) Stietz's attorney argued, "Well, I don't have [a] case on this, but I think both people with a record interest in the property have the right to exclude others." (113:75.) The court asked, "Do you have some law?" (*Id*.) Stietz's attorney replied, "No." (*Id*.) Further, Stietz offered no evidence at trial that the easement granted Stietz "the right to exclude others." (*See* 57:Exhibit 12.) Rather, what Stietz offered into evidence was the 1997 warranty deed "between Paul R. Wilson and Eunice E. Wilson," which granted Stietz only a right for "ingress and egress." (*Id*.)[12]

Therefore, at the jury instruction conference, the court again noted that "[a]t one point they were on [Stietz's land], but at the time that all the confrontation took place, they weren't trespassers." (107:45.) "That is why you can't assert the trespass." (*Id*.) Stietz did not disagree with the trial court that the confrontation occurred on his neighbor's land. (*Id*.) Stietz has no standing.

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[11] *See also* Exhibit 12 (58), which is Deputy Broge's squad video showing the confrontation outside of the gates.

[12] This Court has stated, "A conveyance of a right-of-way two rods wide is a conveyance of a right-of-way over a strip of land two rods wide, not a conveyance of the strip of land itself. Title to the land does not pass but only the right to pass over it." *Hunter v. McDonald*, 78 Wis. 2d 338, 344, 254 N.W.2d 282 (1977) (citation omitted).

State v. Gaulke, 177 Wis. 2d 789, 503 N.W.2d 330 (Ct. App. 1993) supports the conclusion that Stietz lacks standing. In *Gaulke*, the court of appeals held that the defendant had no standing to argue that DNR agents had trespassed when they cited him on *his father's land* for hunting past hours. *Id.* at 795. The court of appeals held that because Gaulke did not possess "good title to the land," he had no standing to assert that the wardens trespassed. *Id.* at 794. This Court has also held that even one who owns an easement in land cannot complain of trespass for an injury to or disturbance of the enjoyment of that easement. *Chloupek v. Perotka*, 89 Wis. 551, 553, 62 N.W. 537 (1895).

Title to the land where the confrontation occurred was held by Stietz's uncle. Stietz has no standing to invoke trespass as a defense to his conduct.

B. Game wardens have statutory authority to enter private property.

Because Stietz did not have standing to pursue a trespassing defense or jury instruction, the inquiry should end there, and this Court need not consider Stietz's other claims regarding trespassing. Should this Court disagree with the State's standing argument, the State offers the following arguments.

Wisconsin Stat. § 29.924(1) provides that "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." Additionally, Wis. Stat. § 23.61 authorizes DNR wardens to conduct a search of a person or place *without* reasonable suspicion if it is done with the authority and within the scope of a right of lawful inspection, or if it done during the authorized temporary

questioning under Wis. Stat. § 23.59. And, Wis. Stat. § 23.59 provides that when an officer has stopped a person for questioning pursuant to Wis. Stat § 23.58, that the officer take a persons' weapon until questioning is complete.

But Stietz argues that the court of appeals erred when it held that Wis. Stat. § 23.58 allowed the wardens to enter "his" land because that statute provides that an officer can stop a person only "in a public *place*" if the officer reasonably believes the person is committing or about to commit a violation. According to Stietz, because the officers testified that they knew they were not on "state *land*" or "public *land*" (112: 23, 24), Wis. Stat. § 23.58 does not apply (Stietz's Br. 37). In a similar vein, Stietz argues that the wardens were not acting in their legal authority because Wis. Stat. § 29.924(5)[13] provides when wardens can enter "private *land*," and "none of those circumstances are present." (Stietz's Br. 34.) Therefore, the wardens "should be treated as trespassers who acted outside their authority." (Stietz's Br. 35.)

But there is a difference between "public *place*" and the legal nature of ownership. By its terms, Wis. Stat. § 23.58 does *not* limit a warden's stop on "private property" or "public property." It uses the word "public place." And a "public place" is not dependent on ownership. In other words, privately owned property can also be a public place. Wisconsin Stat. § 968.25, which governs general *Terry* stops,

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[13] Wisconsin Stat. § 29.924(5) provides that "[t]he department may, after making reasonable efforts to notify the owner or occupant, enter private lands to retrieve or diagnose dead or diseased wild animals and take actions reasonably necessary to prevent the spread of contagious disease in the wild animals."

also uses the term, "public place." And in *State v. Stout*, 2002 WI App 41, ¶ 15, 250 Wis. 2d 768, 641 N.W.2d 474, the court of appeals noted, "under Wisconsin law, *Terry* applies to confrontations between the police and citizens in *public places* only. For private residences and hotels, in the absence of a warrant, the police must have probable cause and exigent circumstances or consent to justify an entry." *Stout*, 250 Wis. 2d 768, ¶ 15 (emphasis added). Similarly, in Wis. Stat. § 23.58, the Wisconsin legislature explicitly authorized wardens to "stop a person in a public place," and that is where the wardens stopped Stietz.[14]

C. Game wardens are not trespassers because they have a right to enter private land without owners' permission when they are acting reasonably and within the scope of their lawful authority.

As a general manner, law enforcement officers performing their duties are not trespassers, since they are privileged to enter if they are acting reasonably and within the scope of lawful authority.[15] In *Giacona v. United States*, 257 F.2d 450, 456 (5th Cir. 1958), the Fifth Circuit Court of

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[14] And even if the wardens didn't have statutory authority to be on the private property, Stietz still committed the crimes.

[15] Restatement (Second) of Torts, § 329 (1965), defines a "trespasser" as "a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." Comment (a) of this section provides that "[o]ne may be privileged to enter land in the possession of another without the possessor's consent for the purpose of advancing or protecting his own private interest or those of the public." Restatement (Second) of Torts, § 158, comment e (1965), provides that conduct which would otherwise constitute a trespass is not a trespass if the conduct is privileged.

Appeals stated, "When the performance of his duty requires an officer of the law to enter upon private property, his conduct, otherwise a trespass, is justifiable." *See also* 52 Am. Jur. *Trespass*, § 41 ("[C]onduct otherwise a trespass is often justifiable by reason of authority invested in the person who does the act, as, for example, an officer of the law acting in performance of his duty.") Prosser on Torts contains the following comment:

> The courts have encountered considerable difficulty in dealing with public officers, firemen and the like who come upon the land in the exercise of a legal privilege and the performance of a public duty. Such individuals do not fit very well into any of the more or less arbitrary categories which the law has established. They are not trespassers, since they are privileged to enter. The privilege is independent of any permission or license of the possessor, and there is no right to exclude them[.]

W. Prosser, Torts 608 (1941).

Therefore, wardens, as law enforcement officers, are entitled to this privilege.[16] This is supported by two Attorney General Opinions. In one opinion, an official asked the Attorney General "Has the game warden a right to go on said lands without permission of the owner for the sake of seeing that the law is being enforced?" 15 O.A.G. 522 (1926) (R-App. 113).[17] The Attorney General responded, yes. *Id*. at 524. In

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[16] Wisconsin Stat. § 939.45(3) provides that the defense of privilege can be claimed "[w]hen the actor's conduct is in good faith and is an apparently authorized and reasonable fulfillment of any duties of a public office[.]"

[17] "An Attorney General's opinion is entitled to considerable weight when the legislature amends a statute but makes no change in that part of the statute interpreted by the Attorney

the answer, the Attorney General discussed Wisconsin's statutory authority that allows wardens to enter any place without a warrant where they have reason to believe that wild animals are taken. *Id.* at 523. Then, recognizing that there was no caselaw on point, the Attorney General ultimately concluded:

> [I]t is the duty of the state to regulate and conserve game for the people and since the power which it has for this purpose, being the police power, is as broad and plenary as the taxing power, I am constrained to answer your question in the affirmative. It is well known that under the taxing power searches may be made for property without search warrants.

15 O.A.G. at 524.

In a second opinion, the Attorney General opined that, by virtue of the State's title to uncaptured fish and wildlife, agents of the State may enter private land to rescue fish stranded by the receding flood waters of a river. 13 O.A.G 158 (1924) (R-App. 117). The Attorney General also opined that the land owner's notification to keep off his land be disregarded in such circumstances. *Id.* at 159.

It is important to keep in mind that Wisconsin's wildlife is not owned by any individual, but is held in trust for the benefit of the public at large. *State v. Herwig*, 17 Wis. 2d 442, 446, 117 N.W.2d 335 (1962); *see also Krenz v. Nichols*, 197 Wis 394, 222 N.W. 300, 303 (1928) ("As trustee

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General." *Town of Vernon v. Waukesha Cty.*, 99 Wis. 2d 472, 479, 299 N.W.2d 593 (Ct. App. 1980). Since the Legislature has not overruled this opinion, although it has amended the statutes discussed, the Legislature apparently believes that this is a correct statement.

for the people, the state may conserve wild life and regulate or prohibit its taking in any reasonable way it may deem necessary for the public welfare, so long as it does not violate any organic law of the land."). "[V]aluable wild animal life would soon be exterminated if the state should fail to conserve it and aid in its reproduction." *Krenz*, 222 N.W. at 303. The State has been entrusted to regulate and manage these resources through the Department of Natural Resources. Hunting is a "privilege," a highly regulated sport, and it requires participants to be properly licensed and abide by regulations designed to sustain the public resources. *Id*. Hunting is a privilege subject to the conditions, restrictions and limitation imposed by the state in both statutes and regulations. DNR wardens, as representatives of the people of Wisconsin, are charged with enforcing the laws and regulations enacted by the people. Wis. Stat. § 23.10.

Out of practical necessity, wardens must have the power to enter private lands to enforce game regulations. There would be no way to regulate the State's resources if someone could shut off their land without any kind of checking. The entries by the wardens are for the purpose of regulating and managing a state-owned resource. Investigating hunting violations, without prior knowledge of a violation or without reasonable suspicion that one has already occurred, is a lawful and necessary activity. Any attempt to diminish the State's authority and ability to investigate and inspect licenses and game would have a huge impact on the ability of DNR to manage and protect this state's public wildlife resources. If the ability of DNR wardens to investigate violations on private lands were restricted in the manner Stietz proposes, it would be exceedingly difficult to determine if a hunter on private land had a proper license or was abiding by other important safety regulations, like no night hunting.

On private land, hunters are hunting the same public wildlife resources. It would be all but impossible for a DNR warden to determine whether or not someone was in fact lawfully hunting without, as Stietz would propose, actually contacting the owner (Stietz's Br. 29, 34) while a person was engaged in the illegal activity. It would seem incongruous for state government to employ a group of employees who are trained specifically to enforce conservation laws, but create a situation in which they could enforce laws only if they first gained permission to enter the premises of those who were being regulated. It would also be difficult to determine ownership of some lands, and it would be impractical to locate landowners in many instances to seek permission to enter. There may be several landowners who own land in a particular section. In other cases, landowners could live several miles away.

While Stietz claims that the wardens did not articulate any "reasonable suspicion, much less probable cause, to [believe] that any crime had been committed" (Stietz's Br. 24), (1) the evidence suggests otherwise, and, (2) wardens do not need reasonable suspicion to believe that a crime has been committed before they enter private land.

In this case, Warden Frost testified that when he saw Stietz's car, he thought it could be someone out deer hunting. (111:165.) Frost knew it was past hunting hours, which is a violation of Wis. Admin. Code § NR 10.06(5.). (111:169.) 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 hunting paraphernalia: a camouflaged, portable tree seat and scent-killer spray. (*Id.*) The circumstances dictated an investigation to determine whether an individual was out night hunting. The wardens' entry onto the property was justifiable.

As a final point, the Fourth Amendment is not applicable to open field searches. Citing *Hester v. United States*, 265 U.S. 57, 59 (1924), the *Giacona* court noted that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields." In *Oliver v. United States*, 466 U.S. 170, 181 (1984), the United States Supreme Court again addressed open fields when it concluded "that an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers." The *Oliver* court held that law enforcement's information-gathering intrusion on an "open field" did not constitute a Fourth Amendment search, even though it would have qualified as a trespass at common law. *Id.* at 183. Further, in *United States v. Dunn,* 480 U.S. 294, 304 (1987), the Supreme Court left little room for the courts to consider the nature of the area observed or the reasonableness of defendant's efforts to shield the area from observation: "It follows that no constitutional violation occurred here when the officers crossed over respondent's ranch-style perimeter fence, and over several similarly constructed interior fences, prior to stopping at the locked front gate of the barn."

In an attempt to sidestep this precedent, Stietz argues that he is *not* arguing a Fourth Amendment violation, and therefore the Court of Appeals erred when it addressed open fields. (Stietz's Br. 39.) But Stietz consistently argues that the officers had no "probable cause," or "no reasonable suspicion." (Stietz Br. 24, 27, 37.) These are Fourth Amendment principles.

A relevant case on this issue is *Betchart v. Department of Fish and Game*, 158 Cal. App. 3d 1104 (Cal. Ct. App. 1984). In *Betchart*, the part owner of a parcel of agricultural

range land which was used for deer hunting brought an action for declaratory relief against the California Department of Fish and Game. The landowner wanted the court to determine the right of game wardens to enter and patrol the property without warrants or probable cause. The land was used by his family and guests to hunt deer during deer season. Game wardens, knowing that game was present and that deer hunting occurred on the property, routinely patrolled the property to enforce the provisions of the state game code. The wardens had no knowledge of any violations committed by the plaintiff, his family, or his guests.

On one occasion, a warden climbed over a locked gate to enter other parts of the property. The wardens did not have permission to enter and were requested to leave. The wardens refused to leave until completion of their routine patrol. The trial court entered a declaratory relief judgment favorable to the wardens. *Betchart*, 158 Cal. App. 3d at 1106. The court of appeals affirmed and declared that, because the State has the duty to preserve and protect wildlife, game wardens enter without warrants and patrol private open lands where game is present and hunting occurs in order to enforce state fish and game laws. *Id*. at 1106.

The court, as a threshold inquiry, determined that the plaintiff, under a Fourth Amendment analysis, had no constitutionally protected reasonable expectation of privacy, because it was undisputed that his land consisted of open fields. *Betchart*, 158 Cal. App. 3d at 1107. The court noted that the plaintiff was protected only against unreasonable governmental intrusion. *Id*. at 1108. The mere fact that Betchart had expressed his demand for privacy did not mean that his expectation was reasonable, for the test of reasonableness depends upon the totality of the facts and circumstances involved. *Id*. Since hunters are required to be

licensed, a fundamental premise arises that there is an implied consent to effective supervision and inspection as directed by statute. This, coupled with the fact that hunting takes place in "open fields," dictated that Betchart's expectation of privacy while hunting was unreasonable. *Id*. at 1110. The court found that the wardens' entry onto Betchart's land, even for purposes of routine patrol, was reasonable because California's pervasive scheme of regulating hunting would be a futile pursuit without frequent and unannounced patrols. *Id*. at 1109. The court held that wardens, as a matter of practical necessity, must have the power to reasonably enter open private lands to enforce game regulations. *Id*.[18]

In this case, the wardens were allowed to investigate. The wardens observed an empty hunting rifle case and other hunting paraphernalia inside the parked vehicle. The vehicle's occupants had not returned by the time deer hunting season officially ended, and so the wardens were justified in entering the land to investigate illegal hunting. The court of appeals correctly concluded that "[i]n light of the open fields doctrine, the circuit court properly excluded both evidence of trespass and the corresponding jury instruction on trespass. (R-App. 108.)

[18] *See also State v. Frey*, 440 N.W.2d 721, 727, 728 (S.D. 1989), where the South Dakota Supreme Court affirmed the trial court's decision that the defendant was not entitled to jury instructions on (1) self-defense or (2) trespass by game wardens.

IV. Even if the trial court incorrectly refused one or both jury instructions, such error was harmless.

Finally, if this Court concludes that the trial court erred by refusing to instruct the jury on either self-defense or trespass, it must determine whether such error was harmless. This Court has recognized:

> If we determine that a circuit court has committed an error in failing to give a jury instruction, we must assess whether the substantial rights of the defendant have been affected. 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 the defendant guilty absent the error.

Head, 255 Wis. 2d 194, ¶ 44.

In this case, no reasonable possibility existed that an error of failing to give either proposed jury instruction contributed to Stietz's convictions. Under one of Stietz's version of events, he claims that he "testified that he first suspected they were officers of some sort only *after* the confrontation, when Webster radioed for backup." (Stietz's Br. 23.)[19] Yet under Stietz's own admission, he continued to resist Frost and Webster and he continued to point a loaded firearm at them *after* the wardens radioed for help and *after* Deputy Broge arrived. He continued to resist and refused to put down his firearm after Deputy Reichling arrived. He continued to resist and put down his firearm after Deputy Gorham arrived.

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[19] *See also* Stietz Court of Appeals' Reply Brief at 4: "Stietz testified that he first *knew* they were officers of some sort only after the confrontation, when Webster radioed for backup" (emphasis added).

Under Wis. Stat. § 946.41(1), "whoever *knowingly* resists or obstructs an officer while such officer is doing any act in an official capacity and with lawful authority is guilty of a Class A misdemeanor" (emphasis added). The same applies with Wis. Stat. § 941.20(1m)(b): "whoever intentionally points a firearm at or towards a law enforcement officer. . . who is acting in an official capacity and who the person *knows or has reason to know* is a law enforcement officer . . . is guilty of a Class H felony" (emphasis added). Under Stietz's admissions at trial and in his appellate briefs, he ultimately knew they were law enforcement officers. But he *continued* to resist the officers, and he continued to point his loaded gun in their direction.[20]

It is clear beyond a reasonable doubt that a rational jury would have found Stietz guilty absent the alleged errors. Therefore, any error committed by the trial court in refusing to give either instruction is harmless.

[20] *See State v. Frey*, 440 N.W. 2d 721, (S.D. 1989), in which the South Dakota Supreme Court affirmed the trial court's decision that the defendant was not entitled to jury instructions on self-defense or trespass by game wardens.

CONCLUSION

The State respectfully requests that this Court affirm the judgment of conviction.

Dated this 23rd day of December, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 10,849 words.

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SARA LYNN SHAEFFER
Assistant Attorney General

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I hereby certify that:

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_____
SARA LYNN SHAEFFER
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. Robert Joseph Stietz
Case No. 2014AP2701-CR

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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SARA LYNN SHAEFFER
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