STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No: 2015-AP-1322 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TORY C. JOHNSON

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
AND ORDER DENYING POSTCONVICTION
RELIEF, ENTERED IN THE
MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE M. JOSEPH DONALD, PRESIDING

BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1 Whether there is sufficient evidence to support the resisting an officer conviction on the elements of 'resisting' and 'lawful authority'?

Trial Court Answered: Yes

3 Whether the jury instructions were erroneous?

Trial Court Answered: No/Harmless error

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant does not request oral argument nor make specific request for publication.

STATEMENT OF THE CASE AND FACTS

Officer Dwain Monteihl and his partner Officer Roy Horn were assigned to a Tactical Enforcement Unit, on patrol in a high crime area. (51:6.7). Generally, they would handle search warrants, calls for subjects with guns and armed robberies. (51:8). In between calls, they would occasionally do traffic stops. (51:8). On August 26, 2013, On August 26, 2013, in the 2800 block of W. Auer, Milwaukee, Wisconsin, Officer Monteihl was driving his squad when he and Officer Horn, noticed a white Saturn as it passed on the other side of the street.(2;51:8). The front license plate was missing and they believed the driver and passenger were not wearing seatbelts. (2;51:8). Officer Monteihl decided not to immediately stop the vehicle but, rather, continue driving to the intersection of 29th and Auer and make a u-turn for the purpose of stopping the vehicle for the traffic violations. (2;51:8).

The Saturn had parked near 2815 W. Auer. (51:9,44). Officer Monteihl parked his squad car behind it. (51:10). The vehicle was noted to be improperly parked 18 inches from the curb and too close to the alley. (51:9,44). The driver, Tory Johnson, and passenger, his cousin, had already exited the

vehicle and walked to the front door of the house which was attached to a porch. (51:12). The porch was inside a gated, fenced front yard. (51:12,67).

Officer Monteihl ordered Mr. Johnson to come down from the porch regarding his parking and issues with the vehicle." (51:12). When he refused, the officer entered the yard and proceeded onto the porch. (51:12-13). Mr. Johnson still refused to come off the porch or provide identification at which point Officer Monteihl placed him in an escort hold and forcibly moved him to the street. (51.13). During the escort, a struggle ensued with Mr. Johnson trying to pull his arm away, pulling on the fence and yelling. (51:14,15). Officer Monteihl was trying to handcuff him and had told him to put his hands behind his back. (51:16). Officer Monteihl was trying to get him in custody. (51:16). When it seemed he might break free, Officer Monteihl directed him to the ground and landed on top of him. (51:17). They rolled on the ground and fought or wrestled. (51:17,18,22; 55:112-113).

Officer Monteihl noted this incident started over a seat belt violation and may be a license plate issue. (52:19). Officer Horn's struggle with the passenger also was over a seat belt violation. (52:19). Eventually, backup assistance arrived and Mr. Johnson was taken into custody. (51:23). Officer Monteihl sustained injuries to his right eye which required three stitches and surgery to repair a fracture. (51:26). Mr. Johnson sustained a bite to his left shoulder. (55:116,117,125,133).

Mr. Johnson was charged with resisting an officer causing substantial bodily harm to an officer § 946.42(2r), Wis. Stats., battery to a law enforcement officer, § 940.20(2), Wis. Stats., and attempt disarming a peace officer, § 941.21, Wis. Stats. (2;5)

A preliminary hearing was held on September 10, 2013, at which the court found probable cause a felony was committed based upon the testimony of injuries sustained by Officer Monteilh. (R.45:32). Any implausibility in the account of the injuries sustained was, the court noted, a credibility issue for a jury. (R.45:32). Thus, trial counsel's motion to dismiss was

denied.

Commencing on February 3, 2014, the case proceeded through a four-day jury trial. Officer Monteihl testified he wanted Mr. Johnson to go back to the vehicle so he could conduct "a normal traffic stop." (51:65). His intention was to put Mr. Johnson back in the vehicle. (51:65). When Mr. Johnson refused to give his name and come off the porch "[a]t that point, it becomes Obstructing. I had told him I'll basically just arrest him." (51:13).

Once the State rested, trial counsel moved to dismiss Count 1, the resisting offense on the ground that as a matter of law, a defendant is not required to produce identification. (54:72). He argued it was not a basis to arrest for obstructing nor a basis to "add additional reasonable suspicion." (54:72). He concluded:

> In short, at the time they were taken into custody by being physically escorted down the steps and brought down to the street, there was no basis for them to be seized at all. The officer did not have the right to take them into custody, to touch them, to bring them down to the station. No crime had been committed. No arrestable offense had been committed. And there was no reasonable suspicion of any crime articulated by these officers.
>
> So if that's the case, then any resisting that happened was based on an illegal arrest. They were being grabbed. And the only thing that was described by Officer Monteilh was that Tory Johnson pulled his arm, away while he's being pinned against the fence. So again, this was a resisting that arose from the unlawful exercise of the unlawful authority of the officers. Since there was no lawful autority to take them into custody, it knocks that element out. And it cannot be met as a matter of law.

(54:72-74). The State responded that the argument should have been made by motion and if trial counsel was challenging lawfulness of the arrest, it did not appear to be an appropriate motion at this juncture in the proceedings. (54:74). As for proof on the elements, they had all been established beyond a reasonable doubt. (54:74). Further, the State pointed out, Mr. Johnson was not arrested for not wearing a seatbelt. (54:75). He failed to provide identification and fought with the police when

they escorted him off the porch and this "turned the investigation into a whole other level..." (54:75).

The trial court viewed the motion as one to dismiss based upon whether "it was not a lawful stop, or at least lawful to question the defendant for identification. And pursuant to 968.24, temporary questioning without arrest, that does cover at least even civil forfeitures under State v. Krier at 164 Wis. 2d 673." (54:76; A-Ap. 103). Under the standard for sufficiency of the evidence, the court concluded the credible evidence and inferences supported a finding that the defendant was resisting an officer. (54:76-77; A-Ap. 103). This was so, the court continued, whether it was resisting with respect to identification or a civil forfeiture. (54:76-77; A-Ap. 103). Therefore, the trial court denied the motion to dismiss but informed trial counsel he could supplement the record with the case law or brief that he wished to cite. (54:77; A-Ap. 103). The trial then proceeded with defense witnesses and with Mr. Johnson as the final witness. (55:86).

After the jury had retired, trial counsel's renewed motion to dismiss for lack of lawful authority was heard. (55:179). The State's response was that nothing had changed since his original motion. (55:180). The trial court denied the motion, stating the issues were for the jury and reiterating its conclusion that the motion was essentially directed at sufficiency of the evidence and stating "as a matter of law, that if an officer observes an individual for purposes of a traffic stop, they can request at least identification, and that's the testimony...that was proffered...." (55:180-81; A-Ap. 104).

At the start of the trial, a lengthy conference regarding preliminary jury instructions was held. (50:2). The parties discussed the State's proposal and elements for a modified instruction on attempted disarming an officer. (50:2-6). Trial counsel asserted if the court was going to proceed with substantive instructions at the preliminary stage, he was entitled to an instruction addressing excessive force and self-defense, pursuant to State. v. Reiwand, 147 Wis. 2d 192. (50:6-9). The State objected. (50:8). Based upon the objection, the trial court denied the request. (50:10-12). When this elicited an objection

from trial counsel on the use of any substantive instructions if his proposed instruction could not be read, , the trial court decided to give no preliminary substantive instructions at all, leaving the issues to be revisited during the final conference. (50:10,12-14).

On February 5, 2014, trial counsel filed Defendant's Proposed Supplemental Jury Instruction. (12:1). On February 6, 2014, he filed Defendant's Brief in Support of Dismissal of the Charge of Resisting an Officer, or, in the Alternative, Request for Supplemental Jury Instructions. (13:1). On the final day of trial, February 7, 2014, the proceedings commenced with a lengthy conference. (56:2-42). The parties discussed trial counsel's proposed final jury instructions based on Reinwand (56:2-5). Trial counsel initiated telephone conversations with the Attorney General's office as well as the District Attorney's office regarding application of a self-defense instruction on the resisting charge versus the battery charge. (56:2-3,17,18,19-20). Ultimately, the court concluded the self-defense instruction was to be applied to the resisting offense. (56:20,29,33).

The State submitted a "Legal Use" instruction, indicating it was based on the trial court's citations earlier in the trial, to State v. Krier, 165 Wis. 2d 673 and sec. 968.24, Stats., Temporary Questioning Without an Arrest. (56:6-7). Trial counsel objected to the last sentence of the Legal Use instruction, which stated, "If a person refuses to provide identification, they can be taken into custody and obtain the subject's identification." (56:7). Trial counsel argued against such an instruction as a "huge mistake" absent a case or statute establishing such proposition. (56:7-14; A-App. 105). He pointed out the officers had specifically testified they had asked for identification for purposes of a seat belt violation and which thus "expressly excludes arrest as a possible consequence." (56:8; A-App. 105). The State responded, the charge is not resisting an arrest, that an arrest was not required and that arrest was not an element of the crime. (56:9; A-App. 105). Trial counsel pointed out, "If there is no lawful authority to detain them, and they do not wish to be detained, there is no authority for the proposition that they can be taken into custody in order to obtain this identification." (56:10; A-App. 105). The trial court ruled:

> "All right. The issue of contention is whether or not the person who refuses to provide identification can be taken into custody to obtain a subject's identification. All. right. Yeah, the subject's identification.
>
> At this time then, what I would suggest to ensure that there is no overt violation of the law, we can rephrase that last sentence to indicate that the person who refuses, can be detained until the identification is ascertained...."

(56:11; A-App. 105). Responding to trial counsel's request for authority, the trial court cited section "968.24, Temporary Questioning without an Arrest," pointing out that the only other option would be to strike the last sentence altogether. (56:11-12; A-App. 105). Trial counsel asserted the problem in such an instruction is that it implies that if a person refuses to provide identification, the officers then can take the person into custody or will have a reasonable belief that the person has committed the crime of obstructing. (56:12; A-App. 105). He continued this was of particular concern since the testimony shows that the officers actually did believe they had probable cause for obstructing when Mr. Johnson and his cousin refused to provide identification, which is contrary to Wisconsin law. (56:12-13; A-App. 105). Further, he continued:

> "So it leads the jury directly into the conclusion that the evidence supports a reasonable belief that simply by refusing to give his identification, he was committing a crime, and if he was committing a crime, the officer can take him into custody and then lawful authority is out the window, Judge."

(56:13; A-App. 105). The State disagreed but suggested the trial court could change the language to read "they can be detained to obtain the subject's identification." (56:13-14; A-App. 105). The record does not reflect a ruling. Later, during the conference, the trial court stated, "All right. I've also provided the parties with at least a corrected version of the Legal Issue instruction that was provided by the State...." (56:37). The last sentence on the Legal Issue instruction still read: "if a person refuses to provide identification they can be detained to obtain the subject's identification." (15; 56:45)

Trial counsel requested supplemental instructions to guide

the jury on the law, as follows:

> 1. Police officers may stop, detain, and question a person when they reasonably believe that the person has committed a traffic violation, such as failure to wear seatbelts.
>
> 2. If a person is stopped, detained, or questioned by police for reasons that are related to non-criminal traffic violations, and not related to a criminal offense, the detained person is not required by law to provide their identification or cooperate with the investigation. Under these circumstances, the detained person is not obstructing or resisting an officer simply because they failed to provide identification or cooperate with officers.
>
> 3. Illegal parking is not a criminal offense. A person cannot legally be arrested, detained, or stopped by police for parking illegally. A parking ticket is issued to the vehicle, or the person who owns or parks the vehicle.
>
> 4. Failure to wear a seatbelt is not a criminal offense. A police officer may issue a citation for failure to wear a seatbelt, but is not authorized to arrest the person.
>
> 5. Pulling away from a police officer who is not acting within his lawful authority is not committing the offense of resisting or obstructing an officer.

(56:25-26;13:4-5). The request was denied as likely to confuse the jury. (56:26-27).

In the afternoon of February 10, 2014, the jury reached a verdict. (57:2). During deliberations the court had received and responded to five questions, as follows:

> Question 1. Can we see exhibits, again specifically photos of arm of Tory Johnson and pictures of the front of the house?
>
> Answer: Exhibits 2, 8, 36, 37, 38, 39, 40, 41, 42, 47, 48, and 94 were sent back.
>
> Question 2. Define "official capacity" as relates to officers taking action that they did. What law was he enforcing at point of taking Tory Johnson into escort

hold?

Answer: Refer to instruction 1765, elements of the crime. Number two, police officers act in an official capacity when thy perform duties they are employed to perform. That's just right off the substantive instruction.

Question 3. We have been asked to refer to 939.50 ad 939.32 documents. These are not in the binder. There is 939.48. Is there a typo on that 939.50 document?

Answer: 939.32 refers to attempt. See instruction 580. 939.48 refers to self defense. See instruction 800. 939.50 refers to classification and penalties of crimes.

Question 4. Were they trying to arrest when put in escort hold? Was that acting in official capacity and accordance of the law given that situation of not identifying themselves when asked?

Answer: You must rely on your collective memory of the testimony.

Question 5. Is it okay to detain someone for non-compliance in not identifying themselves?

Answer: Refer to legal issue instruction and then the additional words were if officers have no reasonable belief that the person has committed a traffic violation or other criminal offense then a person cannot be detained for refusing to identify themselves. A parking violation is not a traffic violation or criminal offense.

(59:2-4; 16). The handwritten questions also show stricken questions regarding taking "someone into custody for not... presenting an ID? Were they read their rights when put in escort hold? Is that necessary?" (16:1); "Is it correct that officers are required to take some into custody for not [presenting] id." (16:2).

Jury verdicts were issued, on February 10, 2014, acquitting him on all but the resisting/self-defense charge. (17;18;19;57). His postconviction motion, alleging insufficient evidence, erroneous jury instructions and trial court error, was denied. (31;36;A-Ap. 102). He now appeals.

ARGUMENT

I THE RESISTING CONVICTION MUST BE REVERSED BECAUSE, AS A MATTER OF LAW, THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE.

In reviewing the sufficiency of the evidence, the conviction will not be reversed "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." State v. Poellinger, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

Whether the circumstances of an investigative stop or detention satisfy constitutional standards is a question of law that is reviewed *de novo*. State v. Young, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997).

The application of a statute to an undisputed set of facts presents a question of law that this court reviews without deference. State v. Polk, 117 Wis. 2d 42, 45, 342 N.W.2d 761 (Ct. App. 1983).

A. There is no evidence of physical resistance to the stop or questioning

The State tried Mr. Johnson for resisting the officer's "attempt to stop and question" him. (15). The evidence presented was that Mr. Johnson was stopped on a porch, he was asked his name and he refused. (51:13). No evidence whatsoever was presented of any physical resistance by Mr. Johnson to the officer's stopping him nor the officer's questioning.

Resisting an officer has four elements:

> First, that the defendant resisted an officer.
>
> Second that the officer was doing an act n an official

> capacity.
>
> Third, that the officer was doing an act with lawful authority.
>
> Fourth, that the defendant knew that [the officer] was an officer acting in an official capacity and with lawful authority and that the defendant knew his conduct would resist the officer.

Wis. Stats. § 946.41(1); Wis JI-Criminal 1765. To resist an officer means to "oppose the officer by force or threat of force." (15:Wis JI-Criminal 1765). 'Resisting' is "interpreted to require physical interference." (15:Wis JI-Criminal 1765, Comment). Thus, the first element requires evidence of physical resistance.

The only evidence of physical resistance was during the escort hold, after Officer Monteihl stated he would arrest Mr. Johnson for obstructing for refusal to comply with his demands. (51:13). However, as noted, he was tried for resisting the officer's attempt to stop and question him. (15: Wis JI Criminal Resisting an Officer). He was not on trial for resisting an escort hold or resisting an arrest. (54:75). Since no evidence at all was presented of any resistance to the stop or the questioning, the State failed to meet its burden of proof on the first element of the crime. A conviction cannot stand "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970).

B. The investigatory traffic stop was not in accordance with sec. 968.24, Wis. Stats.

The stop was not made in a 'public place.' The Wisconsin legislature has determined that a charge of resisting an officer will not lie in the event the officer acts without lawful authority. Specifically, the offense of Resisting an Officer requires proof of four elements, of which the third element requires that "The officer was acting with lawful authority." Wis. Stats. s. 946.41(1). "'[L]awful authority' as that term is used in Wis. Stat s 946.41(1) requires that police conduct be in compliance with both the federal and state Constitutions in

addition to any applicable statutes." State v. Ferguson, 2009 WI 50, ¶¶ 15-16, 317 Wis. 2d 586, 767 N.W.2d 187. Thus, the element of 'lawful authority' is satisfied if the officer's actions are in accordance with law.

Officer Monteihl stopped Mr. Johnson on the porch of a residence to conduct an investigative traffic stop. (51:12). The residence was the home of Mr. Johnson's sister. (51:12). The officers had observed Mr. Johnson's vehicle driving in the 2800 block of W. Auer and believed there were two traffic violations, a missing license plate and seat belt violation.(2;51:8). However, they made a deliberate choice not to stop the vehicle. (51:12).

Wis. Stats. s. 968.24 authorizes "temporary questioning without arrest ... in a public place, when the officer reasonably suspects that the person is committing is about to commit or has committed a crime, and may demand the name and address of the person...." (emphasis added.). Also see, Terry v. Ohio, 392 U.S. 1, 22 (1968)(The law authorizes police officers to briefly detain and question individuals in a vehicle or on the street, even without probable cause to arrest.).

The statute's requirement that investigative stops are to be conducted in a public place has been affirmed as a requirement. In State v. Stout, 2002 WI App. 41, ¶ 14, 258 Wis. 2d 768, 641 N.W.2d 474, the court stated Wisconsin law, sec. 968.24, Stats., as well as Terry, "authorize [investigative] stops in public places, not in homes or hotel rooms.'" (citation omitted.).

The porch on which Mr. Johnson was stopped was at a private residence at 2815 W. Auer, the home of his sister. (51:12). It was inside a gated, fenced front yard. (51:12,67). Thus, entry over the fence line at this private residence, without permission, obviously amounts to a trespass. The porch of this private residence was not a public place. See, e.g., State v. Popp, 2014 WI App. 100, ¶¶ 7, 20, 357 Wis. 2d 696, 855 N.W.2d 471 (holding that police officers had trespassed when they went up some back steps onto a porch without permission.

In addressing this point, in a decision denying Mr. Johnson's postconviction motion, the trial court found "the porch

was a public place for the purposes of section 968.24, Stats." (36:4; A-Ap. 102). It stated that although the law treats the porch as part of the curtilage of the home, it also holds that "a license to approach the home is implied by societal norms, and a police officer not armed with a warrant is not precluded from coming to the door and knocking." (36:3; A-Ap. 102), citing Florida v. Jardines, 133 S. Ct. 1409, 1415 (2013). Since there is an implied license for "solicitors, hawkers and peddlers of all kinds," the trial court reasoned such license "should apply equally to a police officer like Monteilh." (36:3-4; A-Ap. 102). Officer Monteihl, however, had a different purpose. He was making a 'traffic stop,' on the porch, not typical or expected activity of a visitor. However, the trial court did not consider the officer's purpose.

Police purpose in entering a private location was a significant factor in Jardines. There, the court noted the officer's purpose being to search with a drug-sniffing dog would not be implicitly licensed and, further, that the same might hold true with respect to any police information or evidence gathering. See, Jardines, 133 S. Ct. at 1415-17. Under Jardine, therefore, Officer Monteihl's purpose being to conduct a traffic stop on the enclosed porch is not an activity that can be said to be implicitly licensed. Thus, by initiating the stop on the porch of a private residence, rather than in a public place, Officer Monteihl was not acting in accordance with law. It follows that when he demanded Mr. Johnson's identification, he was not making such demand while acting in accordance with law. It further follows that when he placed him in an escort hold upon Mr. Johnson's refusal to comply with his demands, he was not performing such act with lawful authority. Thus, the crime of resisting an officer did not occur in any event. See, State v. Annina, 2006 WI App. 202, ¶ 18, 296 Wis. 2d 599, 723 N.W.2d 708; Ferguson, 2009 WI 50, ¶ 14.

C. There was no probable cause

An officer has 'probable cause' when there are "'reasonable grounds to believe that the person is committing or has committed a crime.'" State v. Popke, 2009 WI 37, ¶ 14, 317 Wis. 2d 118, 765 N.W.2d 569.(citation omitted). There is

reasonable suspicion to justify a stop if "'the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing or is about to commit a crime. '" State v. Post, 2007 WI 60, ¶ 13, 301 Wis. 2d 1, 733 N.W.2d 634.

It is the State's burden to prove that the stop meets the constitutional reasonableness requirement. Post, 2007 WI 60, ¶ 12. A traffic stop can be based on probable cause or reasonable suspicion. State v. Gaulrapp, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996)(citing Whren v. U.S., 517 U.S. 806, 809-10 (1996); Berkemer v. McCarty, 468 U.S. 420, 439 (19840).

Both an arrest and an investigative stop or traffic stop constitute seizures under the Fourth Amendment. See, e.g. Laasch v. State, 84 Wis. 2d 587, 595, 267 N.W.2d 278 (1978), Post, 2007 WI 60, ¶ 10; Popke, 2009 WI 37, ¶ 11. The Fourth Amendment of the United States Constitution and Article I, sec. 11 of the Wisconsin Constitution guarantees citizens the right to be free from unreasonable searches and seizures. Under the Fourth Amendment, a warrantless search or seizure is *per se* unreasonable unless it falls under a well-delineated, established exception to the warrant or probable cause requirement. State v. Williams, 255 Wis. 2d 1, ¶ 18, 646 N.W.2d 834; U.S. v. Watson, 423 U.S. 411 (1976). A stop pursuant to sec. 968.24/Terry is a recognized exception. Stout, 2002 WI App. 41, ¶ 10.

Section 968.24, Stats., as noted above, authorizes a stop in a 'public place.' It is established that sec. 968.24/Terry "applies to confrontations between the police and citizens in public places only." Stout, 2002 WI App. 41, ¶ 15. Police confrontations in non-public places requires "[i]n the absence of a warrant, the police must have probable cause and exigent circumstances or consent to justify an entry [into the private place]. Id. (citation omitted). Thus, since Officer Monteihl did not make the stop in a public place, he needed both probable cause to arrest and exigent circumstances in order to justify the seizure of Mr. Johnson. The record does not show either.

As noted, Mr. Johnson was stopped on the porch when the police stood at the fence line and demanded he come off the

porch and then asked for identification. (51:12). Officer Monteihl acknowledged that at the time he asked Mr. Johnson for identification, he had information about a possible parking violation for which he did not need identification and he had information about a front plate which was not necessary since there was a temporary tag. (51:53).

The seat belt violation he had observed was not mentioned in his report. (51:45,57). He testified, however, he could arrest someone for a seat belt violation if they did not comply with him. (51:54). Further, Mr. Johnson, he believed, was obligated to give his identification as a matter of law and because of that he believed his refusal was obstructing his investigation of a traffic issue. (51:64). Thus, he testified, when Mr. Johnson refused to give his name and come off the porch "[a]t that point, it becomes Obstructing. I had told him I'll basically just arrest him." (51:13).

He used an escort hold to remove him from the porch "[b]ecause he wasn't complying with what I was asking him to do." (51:64). "While escorting him, he began pulling onto the fence, and that's were[sic] ensued a struggle." (51:14). When he got Mr. Johnson to the sidewalk, Mr. Johnson was holding onto the fence while he was trying to handcuff him. (51:16). He had told Mr. Johnson to put his hands behind his back. (51:16). He took Mr. Johnson into custody not solely for a seat belt violation but also for identification.(52:20).

It can be seen that at the time Officer Monteihl grabbed Mr. Johnson in an escort hold, it was his belief that based upon the refusal to comply, he could arrest him for obstructing, (51:13), he could arrest him for the seat belt violation, (51:54), and he took him into custody for the seat belt violation as well as for identification. (52:20). An officer's words as well as his actions are considered in determining whether a person is under arrest. State v. Swanson, 164 Wis. 2d 437, 447, 475 N.W.2d 148 (1991). An arrest is a seizure and is unreasonable unless it is supported by probable cause. Ferguson, 2009 WI 50, ¶ 17; also see, Michigan v. Summers, 452 U.S. 692, 700 (1981); Young, 2006 WI 68, ¶ 18("police-citizen contact becomes a seizure within the meaning of the Fourth Amendment 'when an officer

by means of physical force or show of authority has in some way restrained the liberty of a citizen.'")(citations omitted). Clearly, regardless of what point Mr. Johnson was formally arrested, there can be no question he was seized. By the facts and the officer's own testimony, he was taken into custody. He was taken into custody for a seat belt violation and for identification. (52:20). Thus, such seizure required probable cause. Yet prior to such seizure, there was no probable cause of a "crime." Under the facts of this case, neither the seat belt nor, for that matter, obstructing, could supply probable cause.

The seat belt violation, in this case, was not a crime. It was punishable by a $10 fine. See, Wis. Stats. § 347.50. A crime is defined as conduct "punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime. See, Wis. Stats. § 939.12. Furthermore, Wis. Stats. § 347.48(2m)(gm) explicitly provides that although it requires use of seat belts, "[a] law enforcement officer may not take a person into physical custody solely for a violation...."(emphasis added.).

The language of a statute "is given it common, ordinary, and accepted meaning, except that technical or specifically-defined words or phrases are given their technical or special definitional meaning." State ex rel. Kalal v. Circuit Court for Dane Cty, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Further, the language must be interpreted "in relation to the language of surrounding or closely-related statutes, and reasonably, to avoid absurd or unreasonable results." Id. at ¶ 46.

There is no evidence of any jailable offense accompanying the alleged seat belt violation so as to transform it into an jailable or arrestable offense. Citizens can refuse to provide identification. In Terry, 392 U.S. 1, 19 n. 16, (1968), Justice Byron White, in a concurring opinion, wrote:

> "There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. ...the person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obligated to answer, answers may not be compelled, and refusal to answer furnishes no

> basis for an arrest, although it may alert the officer to the need for continued observation."

Also see, Berkemer, 468 U.S. 420, 439 (1984)(officer may ask questions but "detainee is not obliged to respond."); also see, Kolender v. Lawson, 461 U.S. 352, 365 (1983)(Brennan, J., concurring)(Terry suspect "must be free to decline to answer questions put to him."); Illinois v. Wardlow, 528 U.S. 119, 125 (2000). Further, such refusal during an investigatory stop cannot result in prosecution for obstructing an officer. State v. Griffith, 2000 WI 72, ¶ 52, 236 Wis. 2d 48, 613 N.W.2d 72, citing Hennes v. Morrissey, 194 Wis. 2d 338, 353-54, 533 N.W.2d 802 (1995). Also see, Terry, 392 U.S. 1, 34. In addition, such "refusal to cooperate, without more, does not furnish the objective justification needed for a detention or seizure." Griffith, 2000 WI 72, ¶ 52, citing Florida v. Bostick, 501 U.S. 429, 437 (1991).

If the seat belt statute is read to allow Mr. Johnson to be taken into custody for identification, then his right to refuse to answer is thwarted as well as the seat belt statute's prohibition against taking someone into custody solely for a seat belt violation. Clearly, such interpretation of the statute is impermissible because it is an "absurd" and "unreasonable result." Kalal, 2004 WI 58, ¶ 46. In this regard, it is worth note that "'[w]hen the government's interest is only to arrest for a minor offense ... the government usually should be allowed to make such arrest[] only with a warrant issued upon probable cause by a neutral and detached magistrate.' The rationale for this holding is that the general presumption that police conduct accompanied by probable cause is reasonable is lessened when the underlying offense is minor." Ferguson, 2009 WI 50, ¶ 25, quoting Welsh v. Wisconsin, 466 U.S. 740, 750 (1984).

By grabbing Mr. Johnson on a private porch and taking him into custody, whether for the seat belt, obstructing or identification, the officer lacked probable cause of a crime and was not acting in accordance with the seat belt statute or s. 968.24, Stats. Such seizure without probable cause of a crime was obviously unreasonable. It violated Mr. Johnson's constitutional right to be free from unreasonable seizure and was

thus an unlawful act. See, Ferguson, 2009 WI 50, ¶ 15. Clearly, no crime of resisting could arise from the struggle which ensued when the officer grabbed Mr. Johnson because the officer was acting without lawful authority when he grabbed Mr. Johnson. Officers do not act with lawful authority when their conduct is not in compliance with the law. Ferguson, 2009 WI 50, ¶¶ 15-16.

A key point in this case is that there was not a lawful stop to begin with. The stop was made in a private place without any particularized evidence of any flight or disregard of a visual or audible signal to stop the vehicle or to remain in the vehicle. No evidence of any particularized suspicion of criminal activity was presented. The alleged seat belt violation was punishable by a $10 fine. See, Wis. Stats. § 347.50. Yet, without a warrant, Mr. Johnson was forcibly removed from a porch at a private residence, (51:12), slammed against the fence and patted down (55:106), placed in a choke hold when he hung on to the fence (55:110) and ended up on the ground on his back in the officer's bearhug-type grip. (55:111). From its inception, this stop was unjustified.

Moreover, even when an individual flees from an officer who is trying to conduct an investigative stop, reasonable suspicion arising from such flight, "even coupled with exigent circumstances, is not sufficient to justify a warrantless home entry; probable cause and exigent circumstances are required." Stout, 2002 WI App. 41, ¶ 14(citation omitted). The same applies to a hotel room because it is not a public place. Id. Thus, the, Court noted, "we explicitly refused to sanction the trial court's use of the Terry doctrine authorizing brief investigative stops to justify talking to [a defendant] in his motel room about drugs. Id.

In Brown v. Texas, 443 U.S. 47, 50-51, (1979), the court stated, the reasonableness of a seizure, short of:

> ...traditional arrest, depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.' Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public

> concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.
>
> A central concern in balancing these competing considerations in a variety of settings has been to assure than an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.

Id., (citations omitted). Brown was stopped for identification purposes in an alley, which was in an area plagued by high drug traffic. Id. at 49. The officer believed the situation looked suspicious. Id. Brown refused to identify himself and was arrested under a Texas statute and convicted. The United States Supreme Court found that prior to the arrest, the officer had no reasonable suspicion of criminal conduct in order to justify the detention. Id. at 52. Where there is no basis to suspect such conduct, "the balance between the public interest and [Brown's] right to personal security and privacy tilts in favor of freedom from police interference." Id. Although the Texas statute may further the prevention of crime and thus serve "a weighty social objective in large metropolitan centers," the Court reversed the conviction, concluding such purpose, even if served by stopping and demanding identification without a specific basis to believe criminal activity was afoot, "the guarantees of the Fourth Amendment do not allow it. When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits." Id.

Here, in denying trial counsel's motions to dismiss, the trial court directed its focus to Officer Monteihl's testimony of having observed seat belt and parking violations. Relying on language in State v. Krier, 165 Wis. 2d 673, 678, 478 N.W.2d 63 (Ct. App. 1991), that an investigative stop may include civil forfeiture offenses, the court concluded the stop was therefore permitted under sec. 968.24, Stats. (54:76,55:180,56:7-14; A-Ap. 103-105).

However, the stop, in Krier was made on the vehicle. There the issue was whether an officer can perform an investigative stop under § 968.24 when the person's activity could be either a civil forfeiture or a crime. Krier, 165 Wis. 2d at 678. The Court of Appeals held that it could.

Although Krier addresses a stop for a civil forfeiture, the trial court overlooked that it does not address the lawfulness of a stop for a civil forfeiture in a non-public place. Further, while in Krier the suspected offense could have constituted a crime or a civil forfeiture, here, neither the seat belt nor parking violation could constitute a crime. Conduct punishable only by a forfeiture is not a crime." Wis. Stats. § 939.12. An adult person's failure to wear a seat belt is punishable by a fine. Wis. Stats. § 347.50. Similarly, the parking violation could not constitute a crime because it, too, is punishable by a fine. See, Wis. Stats. § 346.56.

Second, in any event, since the stop took place on a private porch, the officer needed both probable cause and exigent circumstances. See, Stout, supra.. However, not only did the officer lack probable cause, no sufficient exigent circumstances could be shown given that the traffic offenses were non-criminal, non-jailable offenses. In other words, exigent circumstances is insufficient to justify the entry and seizure given these were civil forfeiture offenses.

When "the government's interest is only to arrest for a minor offense, ... the government usually should be allowed to make such arrest only with a warrant issued upon probable cause by a neutral and detached magistrate." Ferguson, 2009 WI 50, ¶ 25, quoting Welsh, 466 U.S. at 750. The Supreme Court continued, "The rationale for this holding is that the general presumption that police conduct accompanied by probable cause is reasonable is lessened when the underlying offense is minor." Id. Thus, "Welsh held that the gravity of the underlying offense is 'an important factor to be considered when determining whether any exigency exists, and that where the underlying offense is 'a noncriminal, civil forfeiture offense for which no imprisonment if possible,' exigent circumstances will rarely, if ever, be present." Ferguson, 2009 WI 50 ¶ 27, quoting Welsh,

466 U.S. at 753,754.

At the time the officer seized Mr. Johnson inside the fenced yard on the porch, there was neither probable cause nor sufficient, if any, exigent circumstances. Since the officer thus lacked lawful authority for the entry and seizure, Mr. Johnson was not struggling with the officer while he was performing an act with lawful authority. See, Annina, 2006 WI App. 202, ¶ 18; Ferguson, 2009 WI 50, ¶ 14.

II. THE JURY INSTRUCTIONS WERE ERRONEOUS AND JUSTICE HAS MISCARRIED.

Introduction

"'Where jury instructions do not accurately state the controlling law, we will examine the erroneous instructions under the standard for harmless error, which presents a question of law for our independent review.'" State v. Williams, 2015 WI 75, ¶ 34 ____ Wis. 2d ___, ___ N.W.2d ____. (quoting State v. Beamon, 2013 WI 47, ¶ 19, 347 Wis. 2d 559, 830 N.W.2d 681; State v. Harvey, 2002 WI 93, ¶ 18, 254 Wis. 2d 442, 647 N.W.2d 189. In such review, we ask, based on "the totality of the circumstances," whether it is ''clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Beamon, 2013 WI 47, ¶ 27, (citations omitted).

"In determining whether an error was harmless, we will not overturn the jury verdict 'unless the evidence, viewed most favorably to sustaining the conviction is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact acting reasonable, could have found guilt beyond a reasonable doubt.'" Williams, 2015 WI 75, ¶ 34, (quoting State v. Beamon, 2013 WI 47, ¶ 21; Poellinger, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

It is the State's burden, as the party benefitting from the error, to show the error was harmless. State v. LaCount, 2008 WI 59, ¶ 85, 310 Wis. 2d 85, 750 N.W.2d 780. In other words, an "error is harmless if the beneficiary of the error proves 'beyond a reasonable doubt that the error complained of did not

contribute to the verdict obtained." State v. Mayo, 2007 WI 78, ¶ 47, 301 Wis. 2d 642, 734 N.W.2d 115, quoting State v. Anderson, 2006 WI 77, ¶ 114, 291 Wis. 2d 673, 717 N.W.2d 74. Also see, Beamon, 2013 WI 47, ¶ 27.

If the jury was not properly instructed on the meaning of the element, "'lawful authority,' given the facts presented to the jury, the circuit court erred. Ferguson, 2009 WI 50, ¶ 31. "'[J]ury instructions that have the effect of relieving the State of its burden of proving beyond a reasonable doubt every element of the offense charged are unconstitutional under the Fifth and Sixth Amendments.'" Id., quoting Harvey, 254 Wis. 2d at ¶ 23.

In deciding whether to give a particular jury instruction, the trial court has broad discretion and has properly exercised its discretion when it " fully and fairly informs the jury of the law that applies to the charges for which the defendant is tried." Ferguson, 2009 WI 50, ¶ 9. (citation omitted). Whether an instruction fully and fairly informs the jury of the applicable law is a question of law that is reviewed independently. Id. If the jury instruction does not accurately state the law, then the circuit court has erroneously exercised its discretion. Id. "We review whether it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the [instructional] error' as a question of law." Id., quoting Harvey, 2002 WI 93, ¶ 46.

Wis. Stats. s. 752.35 permits discretionary reversal where the record shows the real controversy was not tried or that a second trial will probably produce a different result.

A. The Legal Issue instruction misstated the law..

The jury was instructed that Mr. Johnson resisted the officer while he was performing an act with lawful authority, namely "attempting to stop and question" him. (15: Wis JI-Criminal 1765). In addition, the jury was instructed on the law for investigatory stops:

> "Police officers may stop, detain, and question a person when they reasonably believe that the person has committed a traffic violation,

> such as failure to wear seatbelt. The police officers have the legal authority to request identification. If a person refuses to provide identification they can be detained to obtain the subject's identification."

(15: Legal Issue instruction)(emphasis added). Trial counsel objected, pointing to the seat belt violation testimony and the fact the statute bars arrests for such violations. (56:8; A-App. 105). He argued, "If there is no lawful authority to detain them, and they do not wish to be detained, there is no authority for the proposition that they can be taken into custody in order to obtain this identification." (56:10). The State responded, the charge is not resisting an arrest, that an arrest was not required and that arrest was not an element of the crime. (56:9; A-App. 105). The trial court suggested the sentence be rephrased to read: "the person who refuses, can be detained until the identification is ascertained...."(56:11; A-App. 105). Responding to trial counsel's request for authority, the trial court cited section "968.24, Temporary Questioning without an Arrest," pointing out that the only other option would be to strike the last sentence altogether. (56:11-12; A-App. 105). However, the sentence was never stricken. (15; 56:45). Further, a supplemental instruction aiming to cure the problem was proposed by trial counsel, as follows:

> 2. If a person is stopped, detained, or questioned by police for reasons that are related to non-criminal traffic violations, and not related to a criminal offense, the detained person is not required by law to provide their identification or cooperate with the investigation. Under these circumstances, the detained person is not obstructing or resisting an officer simply because they failed to provide identification or cooperate with officers.

(56:25-26;13:4-5). The request was denied as likely to confuse the jury. (56:26-27).

As noted previously, the law on investigatory stops is set forth in Wis. Stats. § 968.24, as follows,

> Temporary questioning without arrest. After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of

> time when the officer reasonably suspect that such person is committed, is about to commit or has committed a crime, and 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.

(emphasis added). It can be seen very clearly that the Legal Issue instruction misstates the law. By omission, it permits a temporary stop anywhere, i.e., without regard for whether the location of the stop is public or private. By addition, it expands the provisions of the temporary stop to permit detention of an individual who refuses to provide identification. There is no such law. Thus, the trial court erred in instructing the jury. The trial court concluded that omission of the 'public place' requirement was harmless error. (36:4; A-Ap. 102). The case law, discussed earlier, makes clear that on both points, the Legal Issue instruction is a misstatement of the law. See, e.g., Stout, supra., Griffith, supra. Also see, Beamon 2013 WI 47, ¶ 23, 347 Wis. 2d 559. 830 N.W.2d 681("Allowing parties or courts to establish the requirements necessary to constitute a crime is contrary to the established principle in Wisconsin that there are no common law crimes and that all crimes are defined by statute. . . A crime is 'conduct which is prohibited by state law.' Wis. stats. 939.12").

The Due Process Clause of the Fourteenth Amendment and parallel provision in the Wisconsin Constitution protect a defendant from conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." State v. Zelenka, 130 Wis. 2d 34, 387 N.W.2d 55 (1986), quoting In re Winship, 397 U.S. at 364. Further, "'...[p]roper jury instruction is a crucial component of the fact-finding process. The jury must determine guilt or guiltlessness in light of the jury charge, and the validity of that determination is dependent upon the correctness and completeness of the instructions given.'" State v. Perkins, 2001 WI 46, ¶ 53, 243 Wis. 2d 141, 626 N.W.2d 762(citation omitted). In addition, the Sixth Amendment of the United States Constitution and Article I, Section 7 of the Wisconsin Constitution assure a criminal defendant he is not to be convicted unless a jury makes a finding beyond a reasonable doubt that he

violated each element of the offense. Perkins, supra.

Here, the State charged Mr. Johnson with resisting an officer and specified he resisted the officer's 'attempt to stop and question' him. (2;15:Resisting an Officer). The evidence presented, however, was that he refused to provide identification and resisted the officer's attempt to detain him when he was escorted from the porch. For example, the State presented the following testimony over objection:

> Q. And you said you used an escort hold to try to gain compliance of Tory Johnson?
> A. Yes, ma'am.
> Q. And you had to use that hold because he was refusing your **lawful orders to come off the porch and to give you his identification**, is that right?
> A. That's correct.
>
> MR. KINSTLER: Objection. I'm sorry. I think it calls for a legal conclusion.
>
> THE COURT: Just for the record I will indicate essentially there is an objection and the Court is going to overrule the objection.

(52:-20-21)(emphasis added). Thereafter, by the Legal Issue instruction, the jury was directed to find that the officer had lawful authority to detain an individual upon refusal to provide identification. Fundamentally unfair? -

"[A]n erroneous instruction can be upheld if the court is convinced, beyond a reasonable doubt, that the jury would have convicted the defendant if a proper instruction -- an instruction that is consistent with both the relevant statute and the factual theory presented -- had been provided to the jury. Williams, 2015 WI 75, ¶ 63. Where an instruction omits an element or instructs on a different theory, "it will often be difficult to surmise what the jury would have done if confronted with a proper instruction, even if the jury convicted under the erroneous instruction. In other words, in the latter situation it will be more difficult to demonstrate that the error in the jury instruction was harmless." Id., ¶ 62.

Here, the jury was told they could convict Mr. Johnson if

he physically resisted the officer's attempt to stop and question him. At trial, however, no evidence was presented of any physical resistance to the stop or to the questioning. Instead, evidence of a refusal to provide identification was presented coupled with testimony that refusal was a crime of obstructing, along with further evidence that he physically resisted the escort hold when the officer attempted to detain him upon refusal to provide identification. The jury was then instructed it was lawful to detain a person upon refusal to provide identification.

Clearly, the theory at trial and in the Legal Issue instruction, (i.e. refusal, detention and physical resistance to the escort), was not the same as the theory expressed in the allegation in the Resisting an Officer instruction (i.e., 'stop and question'). (15). Moreover, as earlier discussed, there is insufficient evidence to support the 'stop and question' theory due to a complete absence of any physical resistance to the stop or the questioning.

In State v. Wulff, 207 Wis. 2d 143, 557 N.W.2d 813 (1997), the jury was given an instruction which omitted a different theory on which to find the defendant guilty but the evidence presented related to the omitted theory. The Supreme Court reversed the conviction on the ground that it could not conclude beyond a reasonable doubt that the jury, if properly instructed, would have convicted the defendant on the omitted theory even though sufficient evidence had been presented on the omitted theory. Id., at 154; Williams, 2015 WI 75, ¶¶ 42,60. Similarly, here, it cannot be concluded beyond a reasonable doubt that the jury would have convicted Mr. Johnson if the resisting instruction (Wis JI-Criminal 1765) had alleged the theory of refusal, detention, physical resistance to the escort. Suffice it to say, therefore, the State cannot meet its burden to show that the instructional error was harmless.

Harmless error analysis looks at the basis on which the jury rested its guilty verdict. Perkins, 2001 WI 46, ¶ 54(Wilcox, J., concurring op.). We cannot review a verdict which necessarily was not rendered because to "hypothesize a guilty verdict that was never rendered...would violate the jury-trial guarantee." Id. As the Court explained,

> If a court fails to instruct the jury regarding a key element of the crime at issue, the court effectively removes that element from the jury's consideration. As to that element, then, the jury is precluded from deciding the defendant's guilt or innocence. Accordingly, to uphold a conviction under such circumstances would be tantamount to directing a verdict in favor of the State on the omitted element : the court, not the jury, is deciding guilt. Pursuant to the Due Process and Jury Clauses, such a result is strictly forbidden.

Id., ¶ 53(citations omitted.). Since juries are instructed that they must decide the case based on the law, if the instruction is devoid of explanation on an element, then the jury was precluded from rendering a verdict on that element. Id., ¶¶ 53,55.

Absent 'lawful authority,' there is no crime of resisting. Ferguson, supra. The jury was effectively precluded from determining 'lawful authority' by the last sentence in the Legal Issue instruction. As a result, all of the jury's findings were effectively vitiated. This is not a harmless error. See, Ferguson, 2009 WI 50, ¶ 24.

B. The State was relieved of its burden of proof.

The self-defense instruction states, "'[o]ne who resists a lawful arrest not only commits a criminal offense by so doing, but also justifies the officer in employing such force as is necessary to overcome the resistance and accomplish the arrest...." (15: 800 Privilege: Self-Defense)(emphasis added). This instruction failed to define the term 'lawful arrest.' It was therefore incomplete and thus erroneous.

was incomplete by the failure to define "lawful arrest." It is evident from the jury's deliberation questions that they did not know whether Mr. Johnson was being arrested by the escort hold. (see, 16). In response to Question 4, explicitly raising this point, they were instructed to rely on their collective memory. (59:2-4). Regardless of when the arrest occurred, since the jury was not given instruction on the meaning of "lawful arrest," they could not determine whether an arrest was made in accordance with law. Thus, the State was relieved of its burden to prove a lawful arrest was made.

A similar error occurred in State v. Reinwand, 147 Wis. 2d 192, 197, 433 N.W.2d 27, and necessitated reversal. In Reinwand a struggle ensued when an officer attempted to arrest Reinwand for violation of a city fireworks ordinance. He was charged with battery. In addition, he and family members who joined in the struggle were charged with resisting arrest. Reinwand, 147 Wis. 2d at 194,197-98. Reinwand and the other defendants requested an instruction on their right to resist an unlawful arrest. It was denied. Instead, the jury was instructed that "[a]n officer making an arrest is doing an act ... with lawful authority" and if they found the officer "was making an arrest," then they should find he was acting with lawful authority. Id. at 202, n. 1. Reinwand was convicted on both charges. On appeal, the court reversed the resisting conviction, finding that the instruction was "based on an erroneous view of the law and ... deprived the Reinwands of an instruction on the theory of their defense and relieved the sate of its obligation to prove every element of the crime beyond a reasonable doubt." Id.

Since the jury was precluded from determining lawful authority on the question of self-defense, the instructional error was not harmless and the jury was misled. It follows that reversal is required, here.

CONCLUSION

For the foregoing reasons, the defendant-appellant respectfully requests the Court to set aside the guilty verdict and vacate the Judgment of Conviction which was entered against him.

Dated this 4th day of November, 2015

Respectfully submitted,
STEWART LAW OFFICES

_____

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APPENDIX

CERTIFICATION

I hereby certify that filed with this brief either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral and written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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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I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(d) for a brief produced with a proportional font. The length of this brief is 10,034 words.

Dated 11/4/2015 _____

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I hereby certify that the text of the electronic copy of this brief is identical in content and format to the printed form of the brief filed this date.

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