STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP1322-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TORY C. JOHNSON,

Defendant-Appellant.

APPEAL FROM A JUDGMENT AND ORDER OF THE
CIRCUIT COURT FOR MILWAUKEE COUNTY,
M. JOSEPH DONALD, JUDGE

BRIEF FOR PLAINTIFF-RESPONDENT

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STATE OF WISCONSIN

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ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because it would add nothing to the arguments in the briefs. The opinion should not be published because this appeal involves only the application of settled law to the facts of this case.

ARGUMENT

I. The evidence was sufficient to prove that Johnson was guilty of causing substantial bodily harm to a police officer while resisting the officer.

The defendant-appellant, Tory C. Johnson, was convicted of causing substantial bodily harm to a police officer while resisting the officer, in violation of Wis. Stat. § 946.41(1), (2r) (2013-14) (17; 27).

There is no question that Johnson caused substantial bodily harm to Officer DM. The undisputed evidence showed that Johnson punched and kicked Officer DM in the face (51:23, 25). As a result, the officer suffered lacerations around his right eye that required stitches and a broken bone below the eye that required surgery to repair (51:25-26).

The issues on this appeal concern whether Johnson was guilty of resisting Officer DM at the time the officer was injured.

To be guilty of resisting an officer, the defendant must forcibly oppose the officer personally while the officer is acting in an official capacity by performing duties he is employed to perform, and is acting with lawful authority by conducting his activities in accordance with the law. Wis. Stat. § 946.41(1), (2r); Wis. JI-Criminal 1765 (2012).

Johnson claims the evidence was insufficient to prove that he physically resisted a police officer while the officer was attempting to stop and question him, or to prove that the officer was acting with lawful authority when the officer attempted to stop and question him.

The deferential test for assessing the sufficiency of the evidence is not whether the reviewing court is convinced of the defendant's guilt, but whether the court can conclude that the trier of fact could reasonably be convinced beyond a reasonable doubt by the evidence it had a right to believe and accept as true. *State v. Perkins*, 2004 WI App 213, ¶ 14, 277 Wis. 2d 243, 689 N.W.2d 684; *State v. Poellinger*, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990).

Thus, the reviewing court must consider all the evidence, *State v. Kelley*, 107 Wis. 2d 540, 544, 319 N.W.2d 869 (1982), in searching the record for evidence that supports the finding, *State v. Schulpius*, 2006 WI App 263, ¶ 11, 298 Wis. 2d 155, 726 N.W.2d 706, viewing the evidence in the light most favorable to the finding. *Perkins*, 277 Wis. 2d 243, ¶ 14; *Poellinger*, 153 Wis. 2d at 504.

Facts can be established by reasonable inferences as well as direct evidence. *Perkins*, 277 Wis. 2d 243, ¶ 14; *Poellinger*, 153 Wis. 2d at 504. Inferences may be drawn by logical deduction from established facts viewed in light of common knowledge, common sense or experience. *Belich v. Szymaszek*, 224 Wis. 2d 419, 425, 592 N.W.2d 254 (Ct. App. 1999); *State v. Messelt*, 185 Wis. 2d 254, 264, 518 N.W.2d 232 (1994); *Poellinger*, 153 Wis. 2d at 508.

Since an inference is a finding of fact, the reviewing court must accept the inferences drawn by the fact finder, i.e., the inferences that support the finding, even if other inferences could also be drawn from the evidentiary facts. *State v. Routon*, 2007 WI App 178, ¶ 17, 304 Wis. 2d 480, 736 N.W.2d 530; *State v. Bodoh*, 226 Wis. 2d 718, 727-28, 595 N.W.2d 330 (1999); *Poellinger*, 153 Wis. 2d at 504; *State v. Friday*, 147 Wis. 2d 359, 370, 434 N.W.2d 85 (1989).

The credibility of the witnesses and the weight to be given their testimony are exclusively for the trier of fact to determine. *Perkins*, 277 Wis. 2d 243, ¶¶ 14-15; *Poellinger*, 153 Wis. 2d at 504, 506.

The trier of fact must resolve any conflicts or inconsistencies in the evidence, whether in the testimony of the same witness or in the testimony of different witnesses, *Perkins*, 277 Wis. 2d 243, ¶ 15; *Kohlhoff v. State*, 85 Wis. 2d 148, 154, 270 N.W.2d 63 (1978), and in doing so the trier of fact is not required to either totally believe or totally disbelieve any witness. *Nabbefeld v. State*, 83 Wis. 2d 515, 529, 266 N.W.2d 292 (1978).

The trier of fact may disbelieve one assertion of a witness and still believe another assertion of the same witness. *Nabbefeld*, 83 Wis. 2d at 529. It may believe some of the testimony of one witness and some of the testimony of another witness. *Perkins*, 277 Wis. 2d 243, ¶ 15.

A reviewing court may not substitute its own determination of guilt or innocence for that of the trier of fact unless the evidence is so insufficient that no trier of fact could have reasonably found the defendant guilty. *State v. Dukes*, 2007 WI App 175, ¶ 13, 303 Wis. 2d 208, 736 N.W.2d 515; *State v. Webster*, 196 Wis. 2d 308, 320, 538 N.W.2d 810 (Ct. App. 1995); *Poellinger*, 153 Wis. 2d at 507.

A. The evidence was sufficient to prove that Johnson physically resisted an officer while the officer was attempting to stop and question him.

Johnson contends there was no evidence that he physically resisted a police officer while the officer was attempting to stop and question him. Brief for Defendant-

Appellant at 9-10. Johnson asserts that he was "stopped" while he was on the porch of a house, but that he was under arrest when he was taken off the porch in an escort hold, and that he did not offer any physical resistance until after he was no longer just stopped but arrested.

Johnson relies on a statement made by Officer DM that when 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" (51:14).

But this testimony is ambiguous. It could mean that the officer told Johnson he was under arrest, or it could mean that the officer merely threatened Johnson with arrest if he failed to comply with the officer's demands.

Because evidence must be viewed in the light most favorable to the finding of guilt, the ambiguity must be resolved in favor of a finding that Officer DM merely threatened Johnson with arrest, not that he actually arrested Johnson.

In any event, at another point Officer DM unequivocally testified that Johnson was not under arrest when he was taken off the porch.

When asked why he took Johnson off the porch in an escort hold, Officer DM stated that he wanted to take Johnson back to Johnson's car to "do a normal traffic stop" (51:64-65). Officer DM further testified, "I wanted him to come back to the car. He can talk about it there. It's not up to him where we discuss this" (52:30).

The police may transport a suspect back to the scene of a traffic violation in the course of a temporary investigative stop. *State v. Quartana*, 213 Wis. 2d 440, 448-49, 570 N.W.2d 618 (Ct.

App. 1997). *See State v. Griffith*, 2000 WI 72, ¶ 27, 236 Wis. 2d 48, 613 N.W.2d 72 (police conducting a traffic stop may order a suspect to remain in a car as a safety measure). The police may hold a suspect's arm to maintain control of him during the stop. *State v. Goyer*, 157 Wis. 2d 532, 536-38, 460 N.W.2d 424 (Ct. App. 1990). The suspect has no right to terminate an investigative stop which, while necessarily temporary, may continue as long as necessary to effectuate the purpose of the stop and complete the investigation. *Goyer*, 157 Wis. 2d at 537.

Resolving any conflict in Officer DM's testimony in favor of the finding of guilt, the evidence was sufficient to prove that at the time Johnson was being taken from the porch in an escort hold, he was still temporarily "stopped" to conduct an investigation regarding several traffic offenses. He was being taken back to his car for questioning about these offenses.

Abundant evidence showed that when the officer had taken Johnson as far as the sidewalk in an attempt to stop and question him, Johnson tried to break free from the officer's grasp, began to struggle with the officer, and punched and kicked him several times (51:14, 17-20, 23; 52:32-36; 53:65-66, 70-72).

The evidence was sufficient to prove that Johnson physically resisted an officer while the officer was attempting to stop and question him.

B. The evidence was sufficient to prove that the officer was acting with lawful authority when he attempted to stop and question Johnson.

The evidence showed that Officer DM and his partner observed a car being driven toward them that did not have a front license plate (51:8-9, 11; 53:61).

Ordinarily, vehicles registered in Wisconsin, which are issued two permanent license plates, must display these plates on both the front and the rear of the vehicle. Wis. Stats. §§ 341.12(2), 341.15(1) (2013-14). So the absence of a front plate gave the officers reason to suspect that the rule requiring display of two license plates may have been violated.

The occupants of the vehicle were not wearing seatbelts (51:44; 53:61), which was another traffic violation. Wis. Stat. § 347.48(2m) (2013-14).

The police may temporarily stop a vehicle and its occupants to investigate a traffic violation when they have reason to suspect that a traffic law has been or is being broken. *State v. Houghton*, 2015 WI 79, ¶¶ 20-30, 364 Wis. 2d 234, 868 N.W.2d 143. *See State v. Arias*, 2008 WI 84, ¶ 35, 311 Wis. 2d 358, 752 N.W.2d 748; *State v. Colstad*, 2003 WI App 25, ¶ 11, 260 Wis. 2d 406, 659 N.W.2d 394; *State v. Gammons*, 2001 WI App 36, ¶ 6, 241 Wis. 2d 296, 625 N.W.2d 623. So Officer DM and his partner had legal reason to stop the approaching car. *Cf. Gammons*, 241 Wis. 2d 296, ¶¶ 7-9 (the police could properly stop a car when they could not see a temporary license sticker).

Instead of stopping in the middle or the opposite side of the street, the police wisely decided to make a U-turn at the next intersection and approach the car from the rear (51:8; 53:61). By the time the police car turned around, the offending vehicle had stopped near the curb in front of 2815 West Auer (51:8-9; 53:61-62).

There is no requirement that the police have to bring a moving car to a stop in order to make a traffic stop. The police may also make a traffic stop of a car that just happens to stop without being forced to pull over. *See State v. Swanson*, 164 Wis. 2d 437, 447, 475 N.W.2d 148 (1991), *modified on other*

grounds by State v. Sykes, 2005 WI 48, ¶ 27, 279 Wis. 2d 742, 695 N.W.2d 277.

When the police pulled up behind the car, they saw that it had a temporary license plate (51:50-51; 53:83). Because only one temporary plate is issued for display on the back of a vehicle, Wis. Admin. Code § Trans 132.04(1)(a) (2012), the question regarding a possible violation of the license plate rules was resolved.

However, the question regarding the seat belt violation remained. And the police were given reason to suspect new violations because of the way the car was stopped, more than eighteen inches from the curb and less than four feet from the entrance to an alley (53:62).

Wisconsin Statute § 346.53(4) (2013-14) provides that no person shall stop or leave any vehicle standing within four feet of the entrance to an alley except temporarily while the vehicle is attended by a licensed operator so that it may be moved if there is an emergency or obstruction of traffic.

A violation of this statute is not simply a stationary parking violation. It is a moving violation, Wis. Stat. § 343.01(2)(cg) (2013-14), for which demerit points may be assessed against the violator's driver's license. Wis. Admin. Code § Trans 101.02(4)(e) (2015). This section is violated, not just by stopping a car, but by failing to remain in a position to operate the car so that it can be moved if necessary.

Stopping a vehicle more than twelve inches from the curb is also a moving violation. Wis. Stats. §§ 343.01(2)(cg), 346.54(1)(d), (2) (2013-14).

Therefore, the police could lawfully conduct a traffic stop because they had reason to suspect that the operator of a

vehicle, i.e., Johnson (51:11), had committed at least three traffic violations. A lawful stop of a vehicle is a lawful stop of any occupant of the vehicle. *Griffith*, 236 Wis. 2d 48, ¶ 27; *State v. Harris*, 206 Wis. 2d 243, 260, 557 N.W.2d 245 (1996).

While the police were making a U-turn to get behind the offending vehicle, Johnson got out and walked up onto the front porch of the house at 2815 West Auer (51:11-12; 53:62). So the officers initiated the traffic stop by walking up to the fence in front of that address and asking Johnson to come down off the porch so they could discuss the traffic violations with him (51:10-12; 53:62, 81-82; 55:99-101).

When Johnson refused to leave the porch, the officers went up to the porch where they told Johnson that they all needed to go back to his vehicle (51:12-13; 53:62).

Johnson had no basis to complain that the officers came up on the porch where he was standing. It was not his porch. He lived somewhere else (55:86). He was not even an invited guest at that moment (55:138).[1]

A defendant who complains that there was an unlawful search or seizure has a burden to establish that he had a reasonable expectation of privacy in the place where the search or seizure occurred. *State v. Earl*, 2009 WI App 99, ¶ 9, 320 Wis. 2d 639, 770 N.W.2d 755; *State v. Bruski*, 2007 WI 25, ¶ 22 & n.2, 299 Wis. 2d 177, 727 N.W.2d 503; *State v. Rewolinski*, 159 Wis. 2d 1, 14-16, 464 N.W.2d 401 (1990). The defendant must prove both that he had an actual subjective expectation of privacy, and that this expectation was objectively reasonable. *Earl*, 320 Wis. 2d 639, ¶ 9; *Bruski*, 299 Wis. 2d 177, ¶¶ 22-23; *Rewolinski*, 159 Wis. 2d at 14-16.

[1] Johnson testified at the trial that he exited the porch at the request of the police, and that they never went on the porch (55:102-06).

Johnson presented no evidence that he subjectively expected privacy on a porch fronting somebody else's house.

Any such expectation would have been unreasonable because a porch fronting the main entrance to a house offers implied permission to enter, which necessarily negates any expectation of privacy. *State v. Edgeberg*, 188 Wis. 2d 339, 346-47, 524 N.W.2d 911 (Ct. App. 1994). Therefore, police officers with legitimate business may enter such a porch like any member of the public who is impliedly invited there. *Edgeberg*, 188 Wis. 2d at 347. *See Florida v. Jardines*, 133 S. Ct. 1409, 1415-16 (2013).

State v. Popp, 2014 WI App 100, 357 Wis. 2d 696, 855 N.W.2d 471, on which Johnson relies, is inapposite because that case involved officers going onto a back porch, nowhere near the main entrance and well inside the yard, where members of the public were not impliedly invited to go. *See Popp*, 357 Wis. 2d 696, ¶ 20.

The police were permitted to continue their investigative stop while they were properly present with the defendant on the porch.

An investigative stop must be conducted in a public place. *State v. Munroe*, 2001 WI App 104, ¶ 13 n.4, 244 Wis. 2d 1, 630 N.W.2d 223; Wis. Stat. § 968.24 (2013-14).

The threshold to a house is such a public place. *United States v. Santana*, 427 U.S. 38, 42 (1976). *See State v. Larson*, 2003 WI App 150, ¶ 13, 266 Wis. 2d 236, 668 N.W.2d 338. And although the police may not intrude on a porch outside a house for the purpose of conducting a search of the inside of the house, *Jardines*, 133 S. Ct. at 1416, they can go up to the threshold to take into custody a person who is standing there

when they have legal justification for the detention. *Santana*, 427 U.S. at 42.[2]

On the porch the police asked Johnson to identify himself (51:13).

The police had authority to request identification both under Wis. Stat. § 968.24, which governs temporary investigative stops generally, and under Wis. Stat. § 343.18(1) (2013-14), which governs traffic stops in particular. *See Griffith*, 236 Wis. 2d 48, ¶¶ 35, 46 & n.12. A request for identification is reasonably related to the purpose of a traffic stop, and no further justification is required. *Gammons*, 241 Wis. 2d 296, ¶ 13. *See Griffith*, 236 Wis. 2d 48, ¶ 45.

Johnson was required to show his driver's license to the police on demand. Wis. Stat. § 343.18(1). *See State v. Black*, 2000 WI App 175, ¶¶ 14-15, 238 Wis. 2d 203, 617 N.W.2d 210. When Johnson refused to comply with this requirement, he gave the police an additional ground to detain him for violating yet another traffic regulation. *State v. Williams*, 2002 WI App 306, ¶ 22, 258 Wis. 2d 395, 655 N.W.2d 462. *Cf. Hiibel v. District Court*, 542 U.S. 177, 187-88 (2004) (police may require a suspect to disclose his identity during an investigative stop and arrest him for refusing).

Admittedly, this discussion does not track Officer DM's testimony explaining his reasons for his actions.

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[2] Because a front porch is a public place, the police did not need probable cause to arrest and exigent circumstances as would have been required if the detention was in a private residence. Nevertheless, the state notes that a person can be arrested for a traffic violation. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 311 n.12, 603 N.W.2d 541 (1999). Here, the police had probable cause because they personally observed two arrestable traffic violations, and Johnson's demeanor provided exigent circumstances because of the danger that he might try to flee.

But the test for assessing an investigative stop is objective, focusing on the reasonableness of the detention from the common sense perspective of ordinary trained and experienced law enforcement officers. *State v. Bons*, 2007 WI App 124, ¶ 13, 301 Wis. 2d 227, 731 N.W.2d 367; *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996).

So a police officer's subjective motivation for making a traffic stop is not important. *State v. Newer*, 2007 WI App 236, ¶ 4 n.2 , 306 Wis. 2d 193, 742 N.W.2d 923. The fact that the officer does not have the state of mind necessary to justify his actions does not matter as long as the circumstances viewed objectively justify them. *Sykes*, 279 Wis. 2d 742, ¶ 29.

If the officer has facts that could justify reasonable suspicion, it does not matter that he is not subjectively motivated by a desire to investigate this suspicion. *Newer*, 306 Wis. 2d 193, ¶ 4 n.2; *State v. Baudhuin*, 141 Wis. 2d 642, 650-51, 416 N.W.2d 60 (1987).

Having reason to suspect that Johnson violated at least four separate traffic laws, the police were permitted to take him by the arm back to his car where the three original traffic violations were committed. *Griffith*, 236 Wis. 2d 48, ¶ 27; *Quartana*, 213 Wis. 2d at 448-49; *Goyer*, 157 Wis. 2d at 536-38.

Therefore, the evidence was sufficient to prove that the police were acting with lawful authority, in accord with the law, when Johnson resisted their efforts to stop and question him about his traffic violations. The police were acting in compliance with both state and federal constitutions and with

all applicable statutes. *See generally State v. Ferguson*, 2009 WI 50, ¶¶ 15-16, 317 Wis. 2d 586, 767 N.W.2d 187.[3]

II. The circuit court did not commit any reversible error in instructing the jury.

A. The instruction that a person who refuses to provide identification can be detained to obtain the identification correctly stated the law.

The circuit court instructed the jury that the police had legal authority to request identification when they stopped Johnson for a traffic violation (56:63).

This was a correct statement of the law. Wis. Stats. §§ 343.18(1), 968.24. *See Gammons*, 241 Wis. 2d 296, ¶ 13; *Griffith*, 236 Wis. 2d 48, ¶¶ 35, 45-46 & n.12.

The court then told the jury that "[i]f a person refuses to provide an identification, they can be detained to obtain the subject's identification" (56:63).

This was also a correct statement of the law.

A person who is detained for a traffic violation is required to show his or her driver's license to the police on demand. Wis. Stat. § 343.18(1). *See Black*, 238 Wis. 2d 203, ¶¶ 14-15.

A person who refuses to comply with this requirement can be further detained for violating an additional traffic

[3] The state does not believe that *Ferguson* correctly states the law in this respect, but this court is bound to apply that precedent in this case. *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

regulation. *Williams*, 258 Wis. 2d 395, ¶ 22. *Cf. Hiibel*, 542 U.S. at 187-88. Furthermore, "when an officer is justified in stopping [a person] and requesting identification, the officer may remove his or her wallet to obtain the identification." *Black*, 238 Wis. 2d 203, ¶¶ 15-16.

B. Johnson forfeited any right to complain that the jury was not instructed that an investigative stop must be made in a public place.

Johnson argues in this court that the jury should have been instructed that an investigative stop must be made in a public place. Brief for Defendant-Appellant at 22-23.

However, Johnson fails to point to anything in the record showing that he asked the circuit court to instruct the jury that an investigative stop must be made in a public place.

Failure to request a jury instruction forfeits any right to complain on appeal that the instruction was not given. *State v. Wanta*, 224 Wis. 2d 679, 700, 592 N.W.2d 645 (Ct. App. 1999); *Bergeron v. State*, 85 Wis. 2d 595, 604, 271 N.W.2d 386 (1978).

This court is prohibited from directly reviewing instructional errors when the right to review has not been preserved by the defendant. *State v. Becker*, 2009 WI App 59, ¶¶ 16-17, 318 Wis. 2d 97, 767 N.W.2d 585; *State v. Marcum*, 166 Wis. 2d 908, 916, 480 N.W.2d 545 (Ct. App. 1992); *State v. Schumacher*, 144 Wis. 2d 388, 416, 424 N.W.2d 672 (1988). Such errors may be reviewed, if at all, under the court's power of discretionary reversal when justice has miscarried or the real controversy has not been fully tried. *State v. Green*, 208 Wis. 2d 290, 304-05, 560 N.W.2d 295 (Ct. App. 1997); *Schumacher*, 144 Wis. 2d at 408.

Johnson does not acknowledge his forfeiture, or argue that the omission of an instruction should be considered by this court under the principles that apply when a claim of instructional error has been forfeited. Therefore, this court need not consider this claim. *See State v. West*, 179 Wis. 2d 182, 195-96, 507 N.W.2d 343 (Ct. App. 1993), *aff'd*, 185 Wis. 2d 68, 517 N.W.2d 482 (1994); *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992); *State v. Shaffer*, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980).

In any event, the omission of an instruction that an investigative stop must be made in a public place did not prevent the real controversy from being fully tried because there was no real controversy that the porch where Johnson was stopped was a public place, *Santana*, 427 U.S. at 42, so there would be no reason to reverse in the interest of justice.

C. Johnson forfeited any right to complain that the jury was not instructed on the definition of the term "lawful arrest."

Johnson argues in this court that the jury should have been instructed on the definition of the term "lawful arrest," which was included in the instruction on self-defense. Brief for Defendant-Appellant at 26-27.

However, Johnson fails to point to anything in the record showing that he asked the circuit court to instruct the jury on the definition of the term "lawful arrest."

Therefore, Johnson forfeited any right to complain on appeal that the instruction was not given. *Wanta*, 224 Wis. 2d at 700; *Bergeron*, 85 Wis. 2d at 604. So this omission may be reviewed, if at all, under the court's power of discretionary reversal when justice has miscarried or the real controversy has

not been fully tried. *Green*, 208 Wis. 2d at 304-05; *Schumacher*, 144 Wis. 2d at 408.

Johnson does not acknowledge this forfeiture either, or argue that the omission of this instruction should be considered by this court under the principles that apply when a claim of instructional error has been forfeited. Therefore, this court need not consider this claim. *See West*, 179 Wis. 2d at 195-96; *Pettit*, 171 Wis. 2d at 646-47; *Shaffer*, 96 Wis. 2d at 545-46.

In any event, the omission of an instruction defining what constitutes a lawful arrest did not prevent the real controversy from being fully tried because there was never any real controversy whether Johnson acted in self-defense. The instruction on self-defense, which included the term "lawful arrest," should never have been given in the first place, as repeatedly argued by the prosecutor in the circuit court (56:20, 28, 38-39).

A criminal defendant is entitled to a jury instruction on his theory of defense only if he produces sufficient evidence, viewed in the light most favorable to him, to support his theory. *State v. Giminski*, 2001 WI App 211, ¶¶ 10-11, 247 Wis. 2d 750, 634 N.W.2d 604.

A person is privileged to use force in self-defense for the purpose of preventing or terminating what the person reasonably believes is an unlawful interference with his person by the person against whom he uses the force. *Giminski*, 247 Wis. 2d 750, ¶ 12; Wis. Stat. § 939.48(1) (2013-14). Therefore, the defendant must produce sufficient evidence to show that he actually believed, subjectively, that he was acting to prevent or terminate an unlawful interference, and to show that, objectively, his belief was reasonable. *Giminski*, 247 Wis. 2d 750, ¶ 13.

Johnson produced no evidence to show that any subjective belief he might have had that Officer DM was unlawfully interfering with his person would have been objectively reasonable.

To the contrary, as more fully discussed above, Officer DM was unequivocally acting with lawful authority when he attempted to stop Johnson for committing several traffic violations, *Houghton*, 364 Wis. 2d 234, ¶¶ 20-30; *Arias*, 311 Wis. 2d 358, ¶ 35; *Colstad*, 260 Wis. 2d 406, ¶ 11; *Gammons*, 241 Wis. 2d 296, ¶ 6; *Swanson*, 164 Wis. 2d at 447, when he ordered Johnson to come off the porch where he was standing and to return to the street where the violations occurred, *Griffith*, 236 Wis. 2d 48, ¶ 27; *Quartana*, 213 Wis. 2d at 448-49, and when he took Johnson by the arm to escort him back to the street when Johnson refused to go on his own. *Santana*, 427 U.S. at 42; *Goyer*, 157 Wis. 2d at 536-38.

Because there was absolutely no objective reason to believe that Officer DM was interfering with Johnson's person unlawfully, Johnson had no privilege to use force to resist the officer's attempt to take him into custody.

Moreover, even if Officer DM had been acting unlawfully in attempting to detain Johnson, Johnson still had no privilege to forcibly resist him in the absence of the use of excessive force by the officer. *State v. Hobson*, 218 Wis. 2d 350, 379-80, 577 N.W.2d 825 (1998). *See State v. Reinwand*, 147 Wis. 2d 192, 201, 433 N.W.2d 27 (Ct. App. 1988).

Even then, Johnson would have been privileged to use only such force as he reasonably believed was necessary to terminate the interference. *Giminski*, 247 Wis. 2d 750, ¶ 12; Wis. Stat. § 939.48(1). And any privilege to use any force would have ended when the officer stopped using excessive force. *Reinwand*, 147 Wis. 2d at 201-02.

Here, the undisputed evidence showed that the only force initially used by the officer was taking Johnson by the arm in an escort hold (51:15; 52:22; 53:63-66), hardly excessive by any standards.

The testimony of Johnson and several police officers differed somewhat on what happened after that.

Viewing the evidence in the light most favorable to him, Johnson claimed that Officer DM roughly tossed him against the fence by the sidewalk while patting him down (55:106-07). Johnson claimed that the officer grabbed him around the neck to try to pull him back from the fence while he was holding on to it (55:110). Johnson claimed that the officer was holding him in a bear hug while he was on top of the officer after both fell to the ground (55:111-15). Johnson claimed that the officer bit him in the left shoulder (55:116).

Johnson admitted that he then punched the officer in the face three times in an attempt to get off of him (55:118-19).

If things had stopped there, a self-defense instruction might have been arguably appropriate. But they did not stop there.

Johnson testified that after he hit the officer, he was able to separate himself from the officer (55:126).

The undisputed evidence is that when Johnson got up he kicked the officer in the face (51:23).

Other officers arrived and subdued Johnson, who continued to struggle, physically fight, thrash around, and resist every effort to bring him under control (51:23-24; 52:40, 82, 94-95, 101; 53:12-14, 45, 74-75; 55:127).

So there is no question that when Johnson kicked Officer DM in the face, the officer was no longer using any force against him. Any privilege to use force against the officer had terminated.

Moreover, the force used by Johnson against Officer DM plainly exceeded the level of force that might have been justified by Johnson's version of the facts. There was no privilege to use that amount of force.

Finally, there is no evidence that any of the officers who arrived after Johnson kicked Officer DM used any excessive force against Johnson. Therefore, Johnson had no privilege to use force against them to resist their attempts to arrest him.

Under these facts, Johnson was not entitled to an instruction on self-defense.

Even if the text of the instruction of self-defense might have contained an error because it failed to define "lawful arrest,"[4] any such error would not have prevented the real controversy from being fully tried because self-defense was not a real part of the controversy. Any error would have implicated something that was totally extraneous to the controversy in this case.

Therefore, there is no reason to reverse in the interest of justice. The state was not relieved of its burden of proof because it had no burden to prove that there was a lawful arrest to rebut a viable claim of self-defense.

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[4] The language regarding a lawful arrest is not part of the pattern instruction, Wis. JI-Criminal 800, but was taken verbatim from this court's opinion in *Reinwand*, 147 Wis. 2d at 200-01.

CONCLUSION

It is therefore respectfully submitted that the judgment and order of the circuit court should be affirmed.

Dated: January 8, 2016.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,172 words.

Dated this 8th day of January, 2016.

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

I hereby certify that:

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

I further certify that:

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

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

Dated this 8th day of January, 2016.

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Thomas J. Balistreri
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