STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
CASE NO. 2015AP001978 CR

STATE OF WISCONSIN,

Plaintiffs-Respondents,

vs.

MICHAEL A. DURHAM,

Defendants-Appellant,

**APPEAL FROM AN ORDER OF THE CIRCUIT COURT
FOR PIERCE COUNTY, CASE NO. 14 CM 62
THE HONORABLE JOSEPH D. BOLES, PRESIDING**

DEFENDANT-APPELLANT'S BRIEF

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STATEMENT OF ISSUES

1. Whether the trial court properly denied the Defendant's motion to suppress evidence obtained from an entry of his residence.

2. Whether the trial court properly instructed the jury as to the elements of Count II of the complaint, Resisting an Officer.

3. Whether the evidence at trial was sufficient to sustain the jury's verdict of Guilty as to Count II, Resisting an Officer.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary as the Defendant anticipates that the briefs of the parties will fully meet and discuss the issues on appeal. Publication would be appropriate as the published opinion would establish a new rule of law or modify, clarify or criticize an existing rule. Wis. Stat. §§ 809.22 and 809.23(1)(a)1.

STATEMENT OF THE CASE

On March 17, 2014, Michael A. Durham ("Durham") was charged with two misdemeanor crimes: Disorderly Conduct in violation of Wis. Stat. § 947.01(1), and Resisting an Officer in violation of Wis. Stat. § 946.41(1). (R.2).

Durham moved to suppress all evidence on grounds that the entry to his home was unconstitutional. (R.8-10, 12). On June 9, 2014, an evidentiary hearing was held during which three witnesses testified: Joan Conroy ("Conroy"), and Prescott Police Officers Mark R. Schultz ("Schultz") and J. Neely ("Neely"). (R.45:2; App. 102).

On November 26, 2014, the trial Court denied Durham's motion. (R.17:4; App. 191). On February 13, 2015, Durham moved the Court to reconsider its order in light of *State v. Matalonis*, 2015 WI App 13, 359 Wis. 2d 675, 859 N.W.2d 628 *review granted*, 2015 WI 47, 862 N.W.2d 898. (R.25). On April 29, 2015, the trial Court denied Durham's motion to reconsider. (R.29; App. 192).

On May 7 and 8, 2015, a jury trial was held. (R.46A&B). At the jury instruction conference, defense counsel objected to the jury instruction for Resisting an Officer. (R.46B:423; App. 457). The judge overruled Durham's objection and provided the jury with the State's proffered instruction on. (R.46B:425-26; App. 459-60).

Durham filed a timely notice of intent to seek post-conviction relief and a timely notice of appeal. (R.39, 43). Durham brings this appeal challenging (1) the denial of his motion to suppress evidence, (2) the improper instruction to the jury, and (3) the sufficiency of the evidence.

STATEMENT OF FACTS

The Entry into Durham's Home

On January 26, 2014, Conroy called 911 to report she heard "banging and loud yelling" coming from her neighbor's home. (R.35:Ex.1); (R.45:6-7; App. 106-7). Conroy further reported that the banging shook the walls. (*Id.*)

Pierce County Dispatch then instructed the Prescott Police to go to 303 Oak Street to investigate "a possible domestic." (R.35:Ex.1); (R.45:9; App. 109). Dispatch advised the officers that the complainant had heard "banging on the walls and yelling." (*Id.*) There was no report to officers that anyone had been injured, that anyone at the home was in need of medical attention, that anyone needed an ambulance, or that anyone had been hurt in any way whatsoever. (R.45:74-75; App. 174-5.) In response to the call, Schultz and Neely went to 303 Oak Street – Durham's home – to investigate. (R.45:9; App. 109).

Upon arrival at the home, the police did not corroborate any details from the report. The police heard no yelling, no screaming, no crying, no complaints of pain, no cries for help, saw no lights on, and no complaints of injury. (R.45:27, 77; App. 127, 177). Neely testified that he was unable to see or hear anything that corroborated the call to dispatch about a domestic disturbance. (R.45:76; App. 176.)

Neely then knocked on the front door and rang the doorbell several times. (R.45:77; App. 177). He announced, "police," but received no answer. (R.45:64-5; App. 164-65). Meanwhile, Schultz noticed that the overhead garage door was opened, and then entered Durham's attached garage. (R.45:10; App. 110).

After walking into Durham's garage, Schultz knocked on the closed interior door, which led inside Durham's home. (R.45:10, 44; App. 110, 144). While inside the garage, Schultz received no answer to his knocking. (R.45:11; App. 111). Schultz did not announce "police." (R.45:10; App. 110). Despite Schultz not hearing any cries for help nor any complaints of pain, Schultz turned the door handle, opened the door, and entered Durham's home. (R.45:11, 35; App. 111, 135). At no point did Schultz attempt to obtain a search warrant. (R.45:13; App. 113). Upon entering Durham's home, Schultz did not call out to ask if everyone was okay, or if anyone needed help. (R.45:37; App. 137). From the time Schultz arrived at the scene and parked his squad car until the time he opened the interior garage door and entered Durham's home without a warrant, less than two minutes had lapsed. (R.45:40; App. 140).

Schultz said he did not apply for a warrant because he "wasn't there

searching the home for evidence of a crime," but instead was there "checking the safety of the occupants[.]" (R.45:13; App. 113). Neely, however, testified that he was in fact at the home to investigate whether a crime had occurred. (R.45:76; App. 176). Neither officer included anywhere in their reports that they went to the home to check on the welfare of the occupants. (R.45:25; App. 125).

The first thing Schultz did once inside Durham's home was go to the front door and unlock it to let in Neely. (R.45:12; App. 112). Neither Schultz nor Neely called out to ask if everyone was okay, nor to ask if anyone needed help. (R.45:37, 81; App. 137, 181). No lights were on inside Durham's home and neither officer turned on any lights. (R.45:38, 79; App. 138, 179). Neely testified that he had no information as to whether anyone inside was hurt or injured at the time the officers entered. (R.45:67; App. 167). He heard nothing and saw nothing. (R.45:65; App. 165). Schultz did not observe anything from which he could conclude that there had been a physical fight or that anyone was in danger in the home. (R.45:47; App. 147). Like Neely, Schultz heard no complaints of pain, no yelling, and no banging. (*Id.*).

Upon entering Durham's home, each officer immediately drew his firearm. (R.45:13, 38, 66; App. 113, 138, 166). According to the officers, they announced, "Prescott police," and shined their weapon-mounted flashlights around the home. (R.45:42; App. 142). They observed nothing to indicate any disturbance. (R.45:47, 67; App. 147, 167). Schultz and Neely then went towards the stairs with their firearms drawn. (R.45:12, 82; App. 112, 182). At this point, Durham descended the stairs in the dark and found two men in the stairwell of his home, with weapons drawn. (R.45:12, 15; App. 112, 115).

Upon seeing Durham, Schultz said "show me your hands, police," several times. (R.45:43; App. 143). Durham responded, "what the fuck?" or "fuck you." (R.2:2); (R.45:43; App. 143). Schultz testified that at some point during this encounter in the stairwell, Durham "lunged" towards him. (R.45:16; App. 116). On cross-examination, Schultz testified that when he used the word "lunged," he actually meant that Durham hinged at the waist, and leaned forward towards Schultz. (R.45:54-5; App. 154-55). Schultz agreed that when Durham "lunged," his feet never actually came off the landing. (R.45:54; App. 154).

During this exchange on the stairs, Schultz holstered his firearm, drew his Taser, and then shot Durham with his taser. (R.45:15-16; App. 115-16). After being shot, Durham exclaimed "fuck!" and then ran back upstairs to flee the intruders. (R.45:16, 70; App. 116, 170). Schultz and Neely then chased Durham up the stairs, tackled him to the ground, and shot him with the taser again. (R.45:70-71; App. 170-71). Durham was shot to such a degree that he lost control of his bowels and soiled himself. (R.45:57; App. 157). During this time

Durham's girlfriend was yelling at the officers, demanding they release Durham. (R.45:71; App. 171). Instead, Schultz and Neely placed Durham in handcuffs. (R.45:17; App. 117).

Trial Testimony

At trial, the evidence regarding the Police's entry into the home was essentially the same as at the evidentiary motion hearing discussed above. In addition, the State presented evidence to support their argument that Durham committed the crime of Resisting during his interactions with the police on the stairs and on the second floor. According to the police, when they encountered Durham on the stairs they yelled "freeze, police," and pointed their weapon-mounted lights at Durham. (R.46A:172; App. 207). Durham yelled out "what the fuck or fuck you, [or] something with a fuck in it." (R.46A:172-73; App. 207-08). Officer Schultz then said "police, show me your hands," to which Durham responded "fuck you." (R.46A:173; App. 208). This exchange occurred at least twice. (R.46A:175; App. 210). Schultz testified that while Durham was on the landing, 7 to 8 steps from the officers, Durham threw down his coat and "lunged" for the officer. (R.46A:176, 216; App. 211, 251). Schultz then shot Durham in the chest with his Taser. (R.46A:177; App. 212). After being shot, Durham yelled out "fuck," made a kind of flexing motion with his arms, and ran away from the shooter up the stairs. (*Id.*) Schultz figured that Durham was trying to get away from him, so he and Neely pursued Durham up the stairs and tackled him. (R.46A:178-79; App. 213-14). Schultz testified that after the two officers tackled Durham at the top of the stairs, Durham landed face-down with officers on top of him "pushing him into the ground." (R.46A:242, 246; App. 277, 281) Schultz testified that Durham was "flailing," "twisting," and "turning" while Schultz and Neely were on top of him pushing him into the ground. (R.46A:245, App. 280). According to Neely, Durham then "wrestled" with the officers while they were both on top of Durham. (R.46A:278; App. 313). Neely explained that by "wrestle," he meant try to get away. (R.46A:278; App. 313). After Schultz shot Durham with the taser the second time, there was "a little bit more wriggling" by Durham. (R.46A:247; App. 282). Neely also said Durham never hit him. (R.46A:279; App. 314).

Schultz also testified that that when a person is tased there is an electro neuromotor [SIC] phenomenon that causes the persons muscles to tense. (R.46A:238; App. 273). The effect of this phenomenon is that the person's brain loses the ability to send signals to their muscles and renders the person unable to control their movements. (R.46A:238-39; App. 273-74). Indeed, Schultz agreed that after being tased Durham had no control over whether his muscles tensed up while the Taser was active. (R.46A:246; App. 281). After the second Taser shot was over, Durham "wriggled" a bit and then put his hands behind his back.

(R.46A:247; App. 282).

Durham obviously did not call the police and he testified that he did not know the neighbor called the police. (R.46B:372; App. 407). Durham did not expect the police to be in his home that night, or even on their way to his home. (*Id.*) Durham did not hear anyone knocking on the door or ringing the doorbell, nor did he hear or see sirens indicating Police were present. (R.46B:374; App. 409). Durham explained that after his girlfriend slammed the shower door and then yelled at him, he got dressed, grabbed his jacket, keys, wallet, and phone, and headed downstairs to "get out of the house for a little bit" and clear his head. (*Id.*). Durham said it was extremely dark on the stairway; when he descended the stairs he could not see anything except two shadows and red lights. (R.46B:376-77; App. 411-412). Believing the red lights were coming from weapons, Durham exclaimed "what the fuck?" and was immediately shot with a Taser. (R.46B:378-379; App. 413-14). Durham never heard the persons in his home announce themselves as police officers. (R.46B:378; App. 413). Durham also denied that he ever lunged at the officers. (R.46B:379; App. 414). Durham said he did not realize the people in his home were police officers until after he had been tased the second time. (R.46B:385; App. 420). He also testified that he did not think that the officers were acting with lawful authority. (R.46B:382; App. 417).

The Jury Instructions

During the jury instruction conference, the State proposed that the following jury instruction be offered to the jury with respect to element one of Count II – Resisting an Officer:

> **Elements of the Crime That the State Must Prove:**
>
> 1. The defendant resisted an officer.
>
> To resist an officer means to oppose the officer by force or threat of force.
> . . .

(R.46B:423; App. 457).

Defense counsel objected on grounds that instructing the jury that resisting meant force ***or*** threat of force was a violation of Durham's right to jury unanimity. (*Id.*)

The judge instructed the jury per the State's request. (R.36) (R.46B:443; App. 465). The Judge ruled that because the pattern instruction does not dictate that the jury should be instructed as to either force or threat of force, it was

permissible to instruct the jury that "to resist an officer means to oppose the officer by force or threat of force." (R.46B:425-26; App. 459-60).

The State's theory was that when Durham swore at officers, failed to put up his hands when asked, "lunged" at Schultz, exclaimed "fuck" while making a flexing motion, and then ran from the officers upstairs, he was committing the crime of Resisting. (R.46B:457-58; App. 479-80). The State also argued that when Durham was tackled by the police on the second floor, during which time he "wrestled" with officers in an effort to get away from them, he was also committing the crime of Resisting. (*Id.*). During the State's closing the argument, the Government argued that Durham committed the crime of Resisting twice: both when allegedly threatened the use of force by sating "Fuck you" and then "lunging" at the police while on the stairs and then again when he allegedly used force by "wrestling" to get away on the second floor. (*Id.*)

The instruction given to the jury provided jurors with two alternative theories by which Durham could have committed the crime – force or threat of force. (R.36) (R.46B:443; App. 465). Because the State presented two distinct factual scenarios as proof of one crime that was allegedly committed in two different ways it resulted in a verdict that did not meet the constitutional requirements for unanimity.

ARGUMENT

I. THE ENTRY INTO DURHAM'S HOME WAS ILLEGAL AND VIOLATED DURHAM'S FOURTH AMENDMENT RIGHTS TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES.

A. Trial Court Ruling.

The circuit court ruled that the police entry into Durham's home qualified as an exception to the warrant requirement under the community caretaker and exigent circumstances exceptions. (R.17:2-3; App. 189-90).

In the trial court's application of the community caretaker exception, the Court found that there was a report of a possible domestic, which had the potential for violence, that some violence had occurred resulting in the wall shaking, that someone had been yelling, that people were inside the residence, and that said people were not responding to officers' knocks on the door. (R.17:3; App. 190). Based on those factual findings, the court then found that it was rational to believe someone was inside the home and in need of help. (R.17:3; App. 190). The Court further found that the public's interest in the intrusion outweighed Durham's right to privacy. (*Id.*)

The court's conclusion that some violence had occurred at the residence was not supported by the facts. The facts were that Conroy did not report observe any violence; she only reported yelling and the wall shaking. (R.35:Ex.1); (R.45:6-7; App. 106-7). Similarly, the Court assumed that people were at the residence, despite the Police having no evidence to corroborate that anyone was inside the home by the time they arrived.

In the trial court's application of the exigent circumstances exception, the Court found that it was reasonable for the officers to enter the residence after receiving a report from dispatch of a "possible domestic," receiving a report of loud yelling and the wall shaking, knowing that at least two people were inside, and after arriving at the home and receiving no response to knocks on the door. (R.17:2-3; App. 189-90). Again, the Court's order assumed that at least two people were inside the home despite there being no evidence as to this fact when the police arrived. The Court found that because of the foregoing facts, it was reasonable to believe that someone inside the residence was in danger. (R.17: 3; App. 190).

B. Standard of Review.

"When reviewing the denial of a motion to suppress evidence, [the appellate court] uphold[s] the circuit court's findings of fact unless clearly erroneous." *State v. Maddix*, 2013 WI App 64, ¶ 12, 348 Wis. 2d 179, 831 N.W.2d 778 (citations omitted). "[T]he application of constitutional principles to facts is a question of law that we review de novo." *Id.* (citations omitted). Accordingly, the court should "independently review" whether an officer's actions fall within an exception to the warrant requirement. *See id.* (citations omitted).

C. Applicable Legal Standards.

"The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures." *Maddix*, 2013 WI App 64 at ¶ 13. (quotations and citations omitted). Warrantless searches are per se unreasonable under the Fourth Amendment, subject to "a few well-delineated exceptions." *Id.* (quotations and citations omitted). A person's garage is subject to the same Fourth Amendment protection as a person's home. *See Oliver v. United States*, 466 U.S. 170, 180 (1984) (explaining that curtilage is "the land immediately surrounding and associated with the home," and is entitled to the same Fourth Amendment protections that "attach to the home.") (citation omitted); *see also State v. Davis*, 2011 WI App 74, ¶ 12, 333 Wis. 2d 490, 798 N.W.2d 902 ("[I]t is difficult to imagine a scenario where the typical attached garage could be considered not curtilage.").

"[T]he warrantless entry of a residence is more suspect and subject to stricter scrutiny than entry and search of a motor vehicle. *Maddix*, 2013 WI App 64 at ¶ 15 (citing *State v. Ultsch*, 2011 WI App 17, ¶ 18, 331 Wis. 2d 242, 793 N.W.2d 505). "The State has the burden of establishing that a warrantless entry into a home occurred pursuant to a recognized exception to the warrant requirement . . . One such exception involves an officer functioning as a 'community caretaker.'" *Maddix*, 2013 WI App 64 at ¶ 13 (citations omitted). "When acting as a community caretaker, an officer may conduct a search or seizure without probable cause or reasonable suspicion, as long as the search or seizure satisfies the reasonableness requirement of the Fourth Amendment." *Id.* at ¶ 14 (citing *State v. Kelsey C.R.*, 2001 WI 54, ¶ 34, 243 Wis. 2d 422, 626 N.W.2d 777).

Wisconsin courts apply a three-part test to determine whether an officer's conduct properly falls within the scope of the community caretaker exception. *Id.* at ¶ 16 (citing *State v. Pinkard*, 2010 WI 81, ¶ 29, 327 Wis. 2d 346, 785 N.W.2d 592). Specifically, the court must assess: (1) whether a search or seizure within the

meaning of the Fourth Amendment has occurred; (2) if so, whether the police were exercising a bona fide community caretaker function; and (3) if so, whether the public interest outweighs the intrusion upon the privacy of the individual such that the community caretaker function was reasonably exercised within the context of a home. *Id.*

In order to qualify for the exigent circumstances exception to the warrant requirement, the State must show that there was a threat to the safety of a suspect or others. *State v. Richter*, 2000 WI 58, ¶ 29, 235 Wis.2d 524, 612 N.W.2d 29. In addition, the State must show that it was reasonable under the circumstances for the police to believe that someone's safety was at risk. *State v. Mielke*, 2002 WI App 251, ¶ 8, 257 Wis.2d 876, 653 N.W.2d 316. When analyzing the "reasonableness" of the officer's belief, the "totality of the circumstances" are considered. *State v. Garrett*, 2001 WI App 240, ¶ 16, 248 Wis.2d 61, 635 N.W.2d 615.

D. The community caretaker exception does not apply to the officers' warrantless entry into Durham's home.

1. A Fourth Amendment Search Occurred When The Police entered Durham's garage and home without a warrant.

A Fourth Amendment search occurred when the police entered Durham's garage and home.

2. The police were not exercising a bona fide community caretaker function when they entered Durham's home and garage

Police exercise a bona fide community caretaker function only when there is "an 'objectively reasonable basis to believe [that] there is 'a member of the public who is in need of assistance.'" *Ultsch*, 2011 WI App 17 at ¶ 18 (quotation omitted).

Upon arrival at Durham's residence, the police knew that (1) a neighbor reported loud banging and yelling next door, and observed the wall shaking; and (2) dispatch characterized the call as a "possible domestic disturbance." The neighbor did not hear any crying, she heard no complaints of pain, and at no point did she hear anyone say "ow!" or "stop it!" or "quit it!" or "that hurts." (R.35:Ex.1); (R.45:7-8; App. 107-08). The neighbor simply heard bangs and yelling, and observed the wall shaking. (*Id.*) Based on this evidence, the trial court ruled that the community caretaker exception applied because it was possible someone inside needed help. (R.17:3; App. 190).

However, in *State v. Matalonis*, the Court held that loud banging coming from within a residence, even when it is accompanied by a trail of blood leading into a residence, and a visibly injured victim nearby but outside the residence, does not constitute an objectively reasonable basis to believe that there is a member of the public who is in need of assistance. *Matalonis*, 2015 WI App 13 at ¶ 37.

The *Matalonis* Court explained that:

> the absence of contrary evidence alone does not provide an objectively reasonable basis [to enter]. Although it is possible, on the lower end of the possibility spectrum, that another person was injured inside [the defendant's] residence, applying the objective standard in this case, we conclude that the evidence known to the officers did not provide an 'objectively reasonable basis' to believe that a member of the public was in need of assistance. A mere possibility that another person may be injured without any other evidence that concretely points to the possibility that a member of the public required assistance does not meet the more demanding objective reasonable basis standard.

Id. at ¶ 25 (citing *Ultsch,* 331 Wis.2d 242, ¶ 15).

In *Matalonis*, police were dispatched to a residence after receiving a call for medical assistance. *Matalonis*, 2015 WI App 13 at ¶ 3. When they arrived at the scene, they encountered a highly intoxicated, battered man, whose body was covered in blood. *Id.* The man reported that he had been beaten up, and he was transported to a hospital. *Id.* at ¶¶ 3-4. Officers were able to follow a trail of blood from the scene to a nearby residence. *Id.* at ¶ 4. Upon reaching said residence, officers heard two "loud bangs coming from inside." *Id.* Officers knocked on the door, and were greeted by Matalonis, "who was out of breath, but did not appear to be injured." *Id.* Matalonis told the police that he had gotten into a fight with his brother (who did indeed turn out to be the injured person officers first encountered) and that he lived alone. *Id.* The police then entered and proceeded to conduct a protective sweep of the house. *Id.* The State argued that the warrantless entry and search was justified by the community caretaker exception to the warrant requirement, but the Court of Appeals disagreed. *Id.* at ¶¶ 9, 37. The Court explained that the officers had no evidence before them pointing to any discrete possibility that a member of the public was inside Matalonis' residence and in need of assistance. *Id.* at ¶ 24.

In this case, as in *Matalonis*, in no version of any report before the officers was there any reference to any person being injured inside Durham's home. *See id.* at ¶ 24. Nor was there evidence that anyone inside needed help. The officers own actions prove that they were not at the home to serve as community caretakers. They did not use their sirens while en route to the home, but instead purposefully turned them off so that they could surprise whoever was there. (R.45:24; App. 124). When the officers entered the home, they did not ask if anyone needed help. (R.45:37; App. 137). They did not turn on the lights to try to see if anyone was hurt or needed help. (R.45:38, 79; App. 138, 179). Instead, after unlocking the front door so that Neely could enter, Schultz and Neely drew their weapons. (R.45:12, 82; App. 112, 182). They used their weapon-mounted lights and began to walk upstairs. (*Id.*) Even after making contact with Durham and later with his girlfriend, they never asked either of them if they were okay, if they needed help, or if they needed medical attention. (R.45; App. 101-187). Nor did the officers include anywhere in their various reports that they went to the home to check on the welfare of the occupants. (R.45:25; App. 125). The evidence shows that the police were at Durham's home to investigate a crime, not to do a welfare check. Indeed, this was officer Neely's understanding of the purpose of the officers' trip to Durham's residence. (R.45:76; App. 176).

Even if the officers' intent truly had been to conduct a welfare check, their warrantless entry was not justified based on the evidence. In *Matalonis*, the officers had even more information that implied someone was hurt and in the defendant's home than the officers did here. In that case, the officers had actually observed someone battered and bloody, and a trail of blood leading to the defendant's door. *Id.* at ¶ 4. Nonetheless, the Court concluded that the officers were not acting as community caretakers when they entered the defendant's home without a warrant. *Id.* at ¶ 30. The Court should do the same in this case.

The trial court also found that *Pinkard* was analogous to this case. The facts of *Pinkard* are as follows: an anonymous caller phoned the police and advised that he had just left Pinkard's home. *Id.* at ¶ 2. The caller reported that inside the home two people were seemingly unconscious and lying next to a pile of drugs, cash, and paraphernalia. *Id.* The caller reported that the door to the home was standing open. *Id.* Officers responded and arrived at Pinkard's home to find the door standing open, just as the caller described. *Id.* at ¶ 3. Once inside, they observed through another open door "exactly what the . . . caller described": several unresponsive people lying next to a pile of drugs. *Id.* ¶ 38-39.

Pinkard is distinguishable from this case. The caller here did not claim to see what happened inside Durham's home like the tipster did in *Pinkard*. The caller in this case told the police that she heard loud banging and yelling coming from inside Durham's home. In *Pinkard*, the caller had been inside the home and

had observed both suspicious and potentially dangerous activity, but Conroy made none of these observations. Second, in this case there was no report that someone was injured or in need of help. No facts in this case point to any sort of hidden injury or danger, like the open door and unresponsive occupants lying next to drugs in *Pinkard*. Moreover, when police arrived on the scene in *Pinkard*, they were able to corroborate at least one detail before entering the home: the door to the home standing open just as the caller described. *Id.* at ¶ 2. In addition, the officers in *Pinkard* observed the two people lying next to drugs almost immediately upon entering the home, and from just inside the main door. *Id.* at ¶ 5. The officers did not proceed to walk around the home and ascend the stairs with weapons drawn. *Id.* at ¶ 55 (explaining that the fact that none of the five officers at Pinkard's home ever "employed any force or drew their weapons" supported the finding that the officers were engaged in a community caretaking function). In *Pinkard*, the police entered the home only after corroborating some of the tipster's information (the open door) and then immediately upon entry corroborated that there were two unresponsive people and a pile of drugs.

In this case, the police observed nothing whatsoever that corroborated the caller's report. They heard no yelling or banging. They observed no movements or noises whatsoever, and the entry doors at Durham's residence were closed shut. Nonetheless, they entered Durham's garage, then his home, and ascended his stairs in the dark with weapons drawn. The facts here are distinguishable from *Pinkard*, and do not support the State's position that the officers were acting as community caretakers when they entered Durham's home.

While the Court in *Pinkard* ultimately found the officers were acting in a community caretaking capacity, the Court noted that it was indeed "a close case." *Id.* at ¶ 33.

For ease of reference and illustrative purposes, additional case law[1] regarding the community caretaker exception has been summarized into the following chart:

[1] *State v. Gracia*, 2013 WI 15, 345 Wis. 2d 488, 826 N.W.2d 87; *State v. Maddix*, 2013 WI App 64, 348 Wis. 2d 179, 831 N.W.2d 778; *State v. Pinkard*, 2010 WI 81, 327 Wis. 2d 346, 785 N.W.2d 592; *State v. Ultsch*, 2011 WI App 17, 331 Wis. 2d 242, 793 N.W.2d 505; *State v. Matalonis*, No. 2014AP108-CR, 2014 WL 7271620 (Wis. Ct. App. Dec. 23, 2014).

	Gracia	Maddix	Pinkard	Ultsch	Matalonis		Durham
Report someone was hurt inside the home	NO	NO	YES	NO	NO		NO
Corroboration of the reported information	YES	YES	YES	YES	YES		NO
Evidence at the scene that someone was hurt	NO	NO	NO	NO	YES		NO
Reporting party had personal knowledge that someone was hurt	NO	NO	YES	NO	NO		NO
Report of loud banging and yelling inside the home	NO	NO	NO	NO	YES		YES
Officers hear screaming and crying from inside the home	YES	YES	NO	NO	NO		NO
Officers primary concern is investigating safety	YES	NO	YES	NO	YES		NO
Report of "domestic disturbance"	NO	YES	NO	NO	NO		YES
Does community caretaker exception apply?	YES	NO	YES	NO	NO		NO

The only factors that the Courts considered in the foregoing cases that were present in this case were (1) the loud banging and yelling reportedly coming from within Durham's home before the officers arrived, and (2) the that it was a possible domestic. Wisconsin appellate courts have never held a warrantless entry was legally justified based on these facts. In fact, the two cases that are the most similar to this case – *Maddix*, which involved a reported "domestic disturbance," and *Matalonis*, which involved loud banging coming from inside the accused's home – both found that the officers were not acting as community caretakers when they entered a home without a warrant. *Maddix*, 2013 WI App 64; *Matalonis*, 2015 WI App 13.

The police had no evidence that any person inside Durham's home needed help. Fear and suspicion are not objectively reasonable beliefs unless they are based on evidence or reasonable inferences from the evidence. The police cannot simply assume the worst case scenario to justify their entry. *See State v. Maddix*, 2013 WI App 64, ¶ 30 (explaining that speculation that a member of the public

might be injured is not enough to justify a warrantless entry into a home). Because there was no evidence of injury, there existed no objectively reasonable basis to believe anyone needed help. As such, the entry was not justified by the community caretaker exception to the warrant requirement.

3. Durham's privacy rights to be secure in his home vastly outweigh any alleged public interest.

Another factor to consider in the community caretaker analysis is whether the public's interest in the well-being and safety of citizens outweighs the degree and nature of the intrusion of Durham's constitutional interests. In balancing these interests, courts look to four factors:

> (1) the degree of the public interest and the exigency of the situation; (2) the attendant circumstances surrounding the [search], including time, location, the degree of overt authority and force displayed; (3) whether an automobile is involved; and (4) the availability feasibility and effectiveness of alternatives to the type of intrusion actually accomplished.

Pinkard, 2010 WI 81, ¶ 42 (quotation omitted).

Again, the *Matalonis* case is instructive. In finding that the supposed exigency presented by a battered man and a trail of blood did not outweigh the defendant's right to privacy in his own home, the *Matalonis* Court explained that even where "an initial observation had been sufficient to lead the officers to believe that the situation was exigent, the exigent nature of the situation diminished significantly once the officers were informed by Matalonis that he had been involved in a fight with his brother and that his brother had left." *Matalonis*, 2015 WI App 13 at ¶ 32.

In the instant case, there was no exigency presented to officers at all. The neighbor's report was characterized as a possible domestic disturbance, not abuse or violence, but a possible disturbance. (R.35:Ex.1); (R.45:9; App. 109). Even if the report of domestic disturbance presented an exigency initially, upon arrival the officers did not corroborate that report. The police heard no screaming, saw no one moving around in the home, and did not corroborate any elements of the complainant's report, or even if anyone was in the home. Any suspicion by the police that someone inside Durham's home was hurt was based on mere speculation. Speculation that a member of the public might be injured is not enough to justify a warrantless entry under the community caretaker exception. *Maddix*, 2013 WI App 64, ¶ 30 ("It is not enough that the officers subjectively thought that perhaps someone else was in the [home]; what matters is whether

they possessed any facts that would lead to a reasonable conclusion that someone else was present to justify a search to render assistance or protection.").

With regard to the second factor, the location and degree of overt authority and force involved in this case was extreme. Whenever an officer conducts a warrantless search of a citizen's residence without their consent, the location and degree of overt authority is deemed considerable. *Matalonis*, 2015 WI App 13 at ¶ 33. Moreover, the officers here did not attempt to obtain a warrant, but instead entered Durham's home at night, without the warning of sirens. Nor did they turn on the lights or yell out to ask if anyone was in need of help. Rather, they immediately drew their firearms and began climbing Durham's stairs. Upon encountering Durham, whom they had no rational basis to believe was not a resident of the home, they tased him to such a degree that he defecated himself. (R.45:57; App. 157). They then refused to allow him to change his clothes, and forced him to sit in his own waste until he agreed to comply with their demands. (R.45:58; App. 158). The degree of authority and force in this case was extreme, if not outrageous, and Durham's privacy interests vastly outweigh any alleged public interest.

Additionally, it was not an automobile that was searched in this case, but a person's home. The home receives heightened Fourth Amendment protection. *See Payton v. New York*, 445 U.S. 573, 585 (1980) ("[A] man's house is his castle[.]"). "[T]there is a constitutional difference between houses and cars," and "a warrantless search of a car deemed reasonable may be unreasonable in the context of a search of a home." *Pinkard*, 2010 WI 81, ¶ 16.

The final factor requires an analysis of alternatives to the warrantless entry. The State conceded that applying for a warrant was an available option, but argued that it was not a feasible one because there was no time given the exigency of the situation. (R.11). However, no facts exist to support that there was any sort of exigency. Rather than entering the home without a warrant the police could have waited a minute or two after knocking[2], they could have turned on their sirens to get the attention of any occupants, or they could have called the residence. But they didn't. Instead they immediately entered the home without a warrant. Their entry was not excepted from the warrant requirement under the community caretaker exception.

E. The exigent circumstances exception does not apply to justify the officers' warrantless entry into Durham's home.

[2] Less than two minutes had lapsed from the time the officers arrived at the scene and parked their squad cars until the time they entered Durham's home. (R.45:40; App. 140).

The trial court also found that the exigent circumstances exception to the warrant requirement applied. (R.17:2-3; App. 189-190). The trial court reasoned that a report of a possible domestic based on loud banging, yelling, and the wall shaking constituted a dangerous circumstance that justified a warrantless entry into a the home. (*Id.*)

The trial court cited *State v. Richter* for the proposition that the test to determine when exigency justifies a warrantless search is whether a reasonable police officer would reasonably believe that there existed a "threat to the safety of a suspect or others." (R.17:2; App. 189). However, this was not the test outlined in *Richter*. The proper "test is whether a police officer under the circumstances known to the officer at the time of entry reasonably believes that delay in procuring a warrant would gravely endanger life or risk destruction of evidence or greatly enhance the likelihood of the suspect's escape." *Richter*, 2000 WI 58, ¶ 30, 235 Wis. 2d 524, 541, 612 N.W.2d 29, 37. Thus, the test is not whether there existed a threat to someone's safety, but rather whether delay in procuring a warrant would gravely endanger life.

The police had no reasonable basis to conclude that anyone's life was in grave danger at the Durham home. The only report received from dispatch was that there was yelling, loud banging, and the wall was shaking. No reports were made that anyone at the residence had been hurt, or that anyone was in need of medical attention. The police heard no yelling, banging, or screaming, no cries for help, and no complaints of injury before they entered the home. Contrary to the trial court's findings, the officers did not know that at least two people were in the home. (R.17:3; App. 190). In fact, the officers had no idea upon arrival if anyone at all was in the home. As the State put it, "when the officers arrived, everything was quiet," the officers "did not know the physical condition of the occupants," "did not know if they needed medical attention," and "did not know if the occupants were harmed" "or simply chose not to answer the door." (R.11:5). Based on these facts, it was not reasonable to believe that anyone's life was in grave danger.

Moreover, the facts of *Richter* are distinguishable from this case. In *Richter*, an officer responded to a report of a home burglary in progress, and while in route he was flagged down by the burglary victim. *Richter*, 2000 WI 58 at ¶ 1. The victim informed the officer that she had seen the intruder flee her home and enter the defendant's trailer. *Id.* at ¶ 1. The officer was able to corroborate the victim's report in that the defendant's home had signs of forced entry. *Id.* When the officer approached the home into which the defendant fled, he observed two sleeping occupants through a broken window. *Id.* The officer then entered the trailer and observed marijuana in plain view. *Id.* The *Richter* Court found that in these circumstances, the officer's entry was justified as a hot pursuit of the

burglary suspect, as well as the officer's need to protect the innocent occupants of the trailer. *Id.* at ¶ 2. Unlike in *Richter*, here there was no hot pursuit of a fleeing suspect from the scene of a crime, nor was there any reason to suspect that anyone at all was in Durham's home when the police arrived, let alone someone hurt and in need of assistance.

In rendering its November Order, the trial court also relied on *State v. Mielke*, 2002 WI App 251, 257 Wis. 2d 876, 653 N.W.2d 316. However, the State conceded that the facts in this case are distinguishable from *Mielke*. (R.11:2). In *Mielke*, the Court held that exigent circumstances existed where officers received a report that a woman had been hit in the stomach and was spitting blood, and police arrived on the scene to find the alleged victim "crying, shaking, and cowering on the front porch." *Mielke*, 2002 WI App 251, ¶ 8. In this case there was no report that someone had been hurt. When the police arrived on the scene they did not observe any indications whatsoever that someone's safety was or had been threatened.

The facts here show no one was hurt or threatened. And, at least before the police illegally entered the home, pulled out their guns, wandered through the house in the dark, and then threatened and tased the homeowner, no one's safety had been at risk. Rather than rely on the facts, the police speculated that someone might be hurt. No matter their good intentions, police cannot enter a home without a warrant based only on their uncorroborated fear and speculation that someone is hurt. *See State v. Maddix*, 2013 WI App 64, ¶ 30 (explaining that speculation that a member of the public might be injured is not enough to justify a warrantless entry into a home). There was no exigency that justified the warrantless entries.

Because the officers illegally entered the home, all evidence gathered as a result of the unlawful entry must be suppressed. *See Wong Sun v. United States*, 371 U.S. 471, 484 (1963). The trial court therefore should have granted the Defense's motions to suppress all evidence pursuant to the illegal search.

II. IN THE ALTERNATIVE, DURHAM IS ENTITLED TO DISMISSAL BECAUSE HE WAS DEPRIVED OF HIS RIGHT TO A UNANIMOUS VERDICT.

In instructing the jury that element one of Resisting an Officer was established if the jury found Durham either used force or threatened force, his right to a unanimous jury verdict was violated.

A. Standard of Review.

In unanimity challenges, the threshold question is whether the statute at issue creates one offense with multiple modes of commission, or multiple offenses. *State v. Derango*, 2000 WI 89, ¶ 14, 236 Wis.2d 721, 613 N.W.2d 833. The issue is a question of law to be reviewed de novo. *State v. Dearborn*, 2008 WI App 131, ¶ 17, 313 Wis. 2d 767, 778, 758 N.W.2d 463, 468 *aff'd*, 2010 WI 84, ¶ 17, 327 Wis. 2d 252, 786 N.W.2d 97.

If the Court finds that the statute is one single offense with alternate modes of commission, the due process fundamental fairness test is employed, a constitutional standard which also presents a question of law to be reviewed de novo. *Id.* at ¶ 19 (citing *State v. Piddington*, 2001 WI 24, ¶ 13, 241 Wis.2d 754, 623 N.W.2d 528).

B. Applicable Legal Standards.

Mr. Durham's state and federal constitutional rights to a jury include the right to a unanimous verdict of guilty or not guilty as to each clearly identified charge. Wis. Const., art. I, §§ 5 and 7; *Holland v. State*, 91 Wis.2d 134, 138, 280 N.W.2d 288 (1979); *Vogel v. State,* 138 Wis. 315, 332–33, 119 N.W. 190 (1909); *Boldt v. State*, 72 Wis. 7, 14–16, 38 N.W. 177 (1888). "The principle justification for the unanimity requirement is that it ensures that each juror is convinced beyond a reasonable doubt that the prosecution has proved each essential element of the offense." *State v. Lomagro*, 113 Wis. 2d. 582, 591, 335 N.W.2d 583 (1983).

The first step in a unanimity challenge is to determine whether the statute creates one offense with alternative modes of commission or multiple offenses. *Derango*, 2000 WI 89 at ¶ 14. In analyzing the question, courts look to four factors: 1) the statutory language, 2) the legislative and contextual history of the statute, 3) the nature of the conduct prohibited by the statute, and 4) whether multiple punishment is appropriate for the conduct. *Id.* at ¶ 15 (citation omitted). Legislative intent is the crux of the analysis. *Id.*

If the statute at issue creates multiple offenses, the jury must be unanimous as to each crime. *State v. Hammer*, 216 Wis.2d 214, 219, 576 N.W.2d 285 (Ct. App. 1997). If, on the other hand, the statute creates a single crime with alternate modes of commission, the due process fundamental fairness test articulated in *Schad v. Arizona*, 501 U.S. 624, 637–45 (1991) is employed. *Derango*, 2000 WI 89 at ¶¶ 22-23. The *Schad* Court emphasized the impracticability of deriving any one-single test for this kind of a due process analysis. *Schad*, 501 U.S. at 637-38. The Court did mention, though, that in analyzing the fundamental fairness of a

jury instruction with respect to a unanimity challenge, it is appropriate to:

> [L]ook both to history and wide practice as guides to fundamental values, as well as to narrower analytical methods of testing the moral and practical equivalence of the different mental states that may satisfy the mens rea element of a single offense. The enquiry is undertaken with a threshold presumption of legislative competence to determine the appropriate relationship between means and ends in defining the elements of a crime.

Id.

C. Wis. Stat. § 946.41 Creates Multiple Offenses.

1. The statutory language.

The statute for which Durham was convicted provides, in relevant part, "whoever knowingly resists or obstructs an officer while such officer is doing any act in an official capacity is guilty of a Class A misdemeanor." Wis. Stat. § 946.41(1).

Durham was charged with Resisting an Officer, not Obstructing. While the statute defines "Obstructing," it does not define "Resisting." Because the statutory language itself does not define "Resisting," we must turn to element two.

2. The legislative history and context of the statute.

State v. Welch is the only Wisconsin case law that expressly discusses the meaning of the word "Resisting." 37 Wis. 196 (1875). *Welch* analyzed the predecessor statute to Section 946.41, and found that threats to an officer in most cases could not constitute Resisting at all. "Resist" means "to oppose by direct, active and quasi forcible means;" it does not include conduct that is passive or indirect modes of impeding an officer. 37 Wis. at 201.

Welch makes a clear distinction between threats to an officer and force applied to an officer, finding that the former will often fall outside the requisite definition of Resisting:

> [M]ere threats to the officer, unaccompanied by force, would not warrant the conviction of the defendants. Mere words cannot constitute resistance. Undoubtedly threats, with present ability and apparent intention to execute them, might well be resistance, as they might well amount to an assault; but not such vague, intemperate language as these defendants seem to have used without apparent purpose.

Welch, 37 Wis. at 202.

The Wisconsin Supreme Court reiterated this definition of resistance as excluding mere threats, saying, "[r]esistance is opposing force . . . not retreating from force. *Brown v. State*, 127 Wis. 193, 106 N.W. 536, 539 (1906) (citing *Welch* at 201).

Thus, the history of the statute and the context establishes that threatening force and force are not only to be distinguished, but that mere threats to an officer generally will not legally constitute Resisting.

Admittedly, some Wisconsin Courts have held that where an element of a crime is the "use or threat of force," that element is to be read in the disjunctive, constituting just one element that can be committed in various ways. *See e.g. State v. Baldwin*, 101 Wis.2d 441, 447–54, 304 N.W.2d 742 (1981); *see also State v. Travis*, 2013 WI 38, ¶ 107, 347 Wis. 2d 142, 186, 832 N.W.2d 491, 513.

However, those cases do not apply here. Those cases involve statutes where "force or threat of force" are the actual words in the statutes themselves as enacted by the legislature. *See Baldwin*, 101 Wis.2d at 447–54 (addressing Wis. Stat. § 940.225(2), which defines sexual assault as sexual contact by "use or threat of force or violence."); *State v. Travis*, 2013 WI 38, ¶ 109, 347 Wis. 2d 142, 187, 832 N.W.2d 491, 513 (addressing the statutory phrase, "by use or threat of force or violence" articulated in Wis. Stat. § 948.02(1)(d)).

Not only did the legislature choose not to define "Resisting" in Section 946.41 as one act of either threatening force or using force, but there is no Wisconsin case law that supports the proposition that to Resist an Officer means to either use force or threaten force, as one disjunctive element of the crime. On the contrary, *State v. Welch* makes clear that threats to an officer only rarely will constitute Resisting – when said threats are accompanied with "present ability and apparent intention to execute them." *Welch*, 37 Wis. at 202. Resisting means opposition by force. *Id.* That the Wisconsin model jury instruction defines Resisting as threat or use of force is of no significance here. The Jury Instruction is enacted by a committee, and is not binding law on this court. *State v. Olson,* 175 Wis.2d 628, 642 n. 10, 498 N.W.2d 661, 667 n. 10 (1993). (explaining that while a jury instruction may be persuasive, it is not binding on the courts). The jury instructions do not overcome the clear definition articulated in *Welch*.

The history and context of the statute support a finding that Resisting an Officer by force and Resisting an Officer by threat of force constitute two separate offenses.

3. The nature of the proscribed conduct.

This element of the analysis is about "whether the statutory alternatives are similar or significantly different." *Manson v. State*, 101 Wis. 2d 413, 426, 304 N.W.2d 729 (1981).

Here, threatening force and using force are significantly different in the specific context of the crime of Resisting an Officer. Mere threats to an officer unaccompanied by force do not fall within the definition of Resisting an Officer. *Welch*, 37 Wis. at 202. While force and threats of force are often lumped together in the statutory elements of other crimes, *see e.g.* Chapters 940, 948 of Wisconsin Statutes, they are significantly different and distinguishable in the context of a Resisting charge. This is because Resisting charges arise from the unique situation involving a citizen's interaction with police officers.

> It is obvious that many or all of [the words a legislature uses to describe resisting or obstructing] would include passive, indirect and circuitous impediments to the service of process. Some may imply merely negative difficulties, as hindering or preventing an officer by not opening the door or removing an obstacle or identifying a person or thing; or indirect difficulties, as preventing or obstructing an officer by warning or concealing a person or removing or hiding a thing; or difficulties in parol, as intimidating an officer by threats, or interrupting him by outcries, or preventing him by false identification or information. All these passive, indirect, circuitous, collateral difficulties in the way of an officer's execution of his process, we take to be excluded from our statute by the use of the single word, *resist.*

Welch, 37 Wis. at 201 (emphasis in original).

As set forth above, the Supreme Court has recognized that when it comes to the crime of Resisting an Officer, mere threats are distinguishable from the use of force. Indeed, the importance of precise wording in the jury instructions when it comes to these cases is illustrated by the case at hand: The State's evidence at trial included testimony that Durham said "what the fuck" or "Fuck you" to the officers; that Durham flexed like a weightlifter; that Durham fled up the stairs; that Durham "lunged" at officers; ***and*** that Durham wrestled to get away once on the second floor. The first three actions could not constitute Resisting at all, as they were mere words or actions, unaccompanied by force. The jury therefore should have been restricted to deciding whether Durham's wrestling to get away on the second floor was enough evidence to support the Resisting charge. However, because the jurors were improperly instructed that threats of force or use of force could constitute Resisting an Officer, it is unclear whether jurors convicted Durham of Resisting based on either multiple acts or separate actions. Some may

have convicted him of Resisting on the basis of his mere words alone, which is not a crime according to *Welch*, thereby violating his right to juror unanimity.

Element three supports the conclusion that Resisting an Officer creates two distinct crimes: one for threats of force and one for actual force.

4. The appropriateness of multiple punishment for the conduct.

Acts warrant distinct punishment when they are distinct in time or are significantly different in nature. *State v. Sauceda,* 168 Wis.2d 486, 499–500, 485 N.W.2d 1 (1992) (quoting *State v. Eisch,* 96 Wis.2d 25, 31, 291 N.W.2d 800 (1980)).

For the reasons set forth above, physically resisting an officer by use of force and threatening an officer are significantly different in nature. Again, the charge at issue in this case is distinguishable from other cases where threats of force or use of force constitute one element of a crime. The legislature has recognized in enacting the sexual assault statutes of our State that it is equally reprehensible and unacceptable to force someone to have sex against their will, whether they do so by actual physical force or by threats of physical force. *See* Wis. Stat. §§ 940.225 (Sexual Assault); 948.02 (Sexual Assault of a Child). The legislature has made this same decision when it comes to Robbery. Whether someone steals another person's property by force or threatening force is irrelevant; when it comes to Robbery, threatening force and using force have been deemed similar enough by the legislature so as to constitute one crime. Wis. Stat. § 943.32.

However, as *Welch* recognized, almost all conduct could be considered Resisting when it comes to interactions between unwilling citizens being forced to interact with police officers. *Welch*, 37 Wis. at 201. Hence the reason for the distinction in this context. Mere words unaccompanied by force is not Resisting. *Welch*, 37 Wis. at 202. For obvious reasons, different degrees of punishment are appropriate for someone who merely threatens the use of force, as opposed to someone who actually applies force to a police officer.

As such, Durham's objection to the jury instruction was improperly denied. The jury should have been instructed that either threatening force was Resisting, or that using force was Resisting, but not both.[3] Or, in the alternative, the State should have charged Durham with two counts of Resisting, one for the alleged

[3] Had the Defendant's objection been sustained, and had the State elected to use the words "threat of force" in the jury instruction, defense counsel would have then been able to make a motion for directed verdict and/or a motion for judgment notwithstanding verdict on the basis of *State v. Welch*.

threat and a separate count for the alleged use of force. The jury instruction violated Durham's right to jury unanimity.

D. Alternatively, Mr. Durham's rights to due process and jury unanimity were violated by the jury instruction.

Even if the Court finds that 946.41(1) creates a single crime with alternate modes of commission, Durham's due process fundamental fairness rights were violated by this jury instruction. *See Derango*, 236 Wis.2d at ¶¶ 23–25; *Schad*, 501 U.S. at 637–45.

Preliminarily, the presumption in *Schad* that the legislature made a constitutionally valid choice in creating Wis. Stat. § 946.41(1) to describe one offense with multiple modes of commission is not applicable here. *See Schad*, 501 U.S. at 637–38, 111 S.Ct. 2491. This is because "Resisting" is not defined in the statute at all, but is instead defined by case law. *State v. Welch*, 37 Wis. 196 (1875). The presumption that defers to the legislature is therefore inapplicable.

With respect to history, it is rooted in Wisconsin common law dating all the way back to 1875 that fundamental fairness requires a distinction between threatening an officer and resisting an officer, and for good reason. *Welch*, 37 Wis. at 201-202. Citizens interacting with police officers are generally not doing so of their own volition. Rather, they are being compelled to do so by the police. This is different, again, from cases of Robbery or Sexual Assault, where the offender is alleged to have voluntarily approached another person with intent to harm them, whether they elect to achieve their goal by threats of force or force. In Resisting cases, on the other hand, almost any action by a citizen interacting with a police officer could be construed as Resisting, were it not for the *Welch* Court's defining requirement of force. Thus the need to draw a strict line of distinction between mere threats and actual force in the context of a Resisting charge. *Id.*

In addition, the alternate mental states required for the crime of Resisting by force as opposed to Resisting by threats, make the two conceptually and morally distinct. Resisting by use of force requires the defendant use physical force against a police officer, while the other could constitute mere words. Here, among other things, Durham is alleged to have Resisted the officers in his home when he said "What the fuck," and fled from the unknown intruders. The moral implications of this conduct are in stark contrast to Resisting by force. Imagine, for example, if Durham would have punched one of the officers, or thrown an object at them when he was standing on the stairs. Clearly this type of intentional use of force is quite different. The moral culpability of Durham in each sense is vastly distinct. The mental states required of each separate offense are

conceptually and morally distinct and therefore they are separate crimes not one crime with multiple modes of commission.

Accordingly, fundamental fairness and due process considerations require unanimity as to whether Durham resisted by force or threat of force. Because the jury instructions deprived Durham of his right to unanimity, his conviction must be overturned.

III. EVIDENCE AT TRIAL WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT DURHAM WAS GUILTY OF RESISTING AN OFFICER.

A. Standard of Review.

Challenges to the sufficiency of the evidence are analyzed under the "reasonable doubt standard of review." *State v. Poellinger*, 153 Wis.2d 493, 504, 451 N.W.2d 752 (1990). This court must look at the evidence in a light most favorable to sustaining the finding of guilt and determine if "the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true." *Id.* (citing *Johnson v. State*, 55 Wis.2d 144, 148, 197 N.W.2d 760 (1972)). The focus of the inquiry is on the whether the jury's verdict was objectively reasonable, rather than the correctness of their verdict. *Poellinger*, 153 Wis.2d at 508.

B. Applicable Legal Standards.

A verdict based on insufficient evidence is defective because the defendant convicted is denied due process of law. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). If the evidence is insufficient, principles of double jeopardy preclude remanding the case for re-trial. *State v. Ivy*, 119 Wis.2d 591, 610, 350 N.W.2d 622 (1984). Thus, judgment of acquittal is the only remedy. *Id.* at 609-10 (citing *Burks v. United States*, 437 U.S. 1, 18 (1978)).

In cases where a "jury may have arrived at its verdict by one of two independent grounds and there is no certainty in respect to which ground is used, a court is obliged . . . to determine that the evidence is sufficient under each mode of proof." *State v. Crowley*, 143 Wis.2d 324, 334, 422 N.W.2d 847 (1988) (citing *United States v. Sales*, 725 F.2d 458, 459 (8th Cir.1984); *Zant v. Stephens*, 462 U.S. 862 (1983).

C. The evidence at trial was insufficient to prove Durham resisted the officers by use of force.

To use force is "to oppose by direct, active and quasi forcible means;" it does not include conduct that is passive or indirect modes of impeding an officer. *Welch*, 37 Wis. at 201.

The evidence at trial was not that Durham used force against the officers, but that Durham was trying to get away from the officers. Schultz testified that when he and Neely encountered Durham on the stairs, they yelled "freeze police," and in response Durham said "what the fuck or fuck you, [or] something with a fuck in it." (R.46A:172-73; App. 207-08). According to Schultz and Neely, Durham made a "lunging" movement towards them, and they tased him in response. (R.46A:176; App. 211). Durham then yelled out "fuck," made a kind of flexing motion with his arms, and ran up the stairs. (*Id.*) The testimony was that Durham was trying to get away. (R.46A:178; App. 213). The officers pursued Durham up the stairs, and both officers tackled him. (R.46A:179; App. 214). At this point, the two officers were on top of Durham. (*Id.*) Neely testified that after the two officers tackled Durham, Durham continued to "wrestle" with the officers to get away. (R.46A:278; App. 313).

None of these actions constitute opposition by direct, active, or forcible means. *See Welch*, 37 Wis. at 201. Rather, the uncontroverted evidence was that Durham was trying to get away from the officers. "Resistance is opposing force . . . not retreating from force." *Brown v. State*, 127 Wis. 193, 106 N.W. 536, 539 (1906) (citing *Welch* at 201). Indeed, Officer Schultz testified that Durham did not use force against him. (R.46A:238, 241; App. 273, 276).

Moreover, Durham did not have control over his muscles once he was tased. (R.46A:246; App. 281); (R.46B:397; App. 432). Accordingly, it cannot be said that Durham intentionally used force against the officers based on any of Durham's conduct after being tased.

D. The evidence was insufficient to show Durham resisted the officers by threat of force.

Similarly, evidence introduced at trial was insufficient to sustain a verdict that Durham threated to use force against the officers. Again, threatening in the context of a Resisting charge is more than mere words. *Welch*, 37 Wis. at 202. In order to prove Resisting on the basis of a defendant's threats of force, the State must prove that the threat was accompanied with "present ability and apparent intention to execute [the threat]." *Id.* "[V[ague, intemperate language . . .without apparent purpose" will not suffice. *Id.*

Durham never made an explicit threat to use force against the officers. When Durham said "what the fuck" or "fuck you" on the stairs, this did not constitute Resisting under *Welch*. Similarly, saying "fuck you" while bending at the waist in a forward motion is not a threat to use force. Nor can Durham's flexing motion on the stairs, which was made after being shot with the taser, be considered a threat. Durham did not have control over his muscles once he was shot with the taser. (R.46A:246; App. 281); (R.46B:397; App. 432). Thus, the flexing motion was not an intentional threat of force; it was an involuntary muscle reaction to the taser, and cannot be the basis for the conviction.

E. Evidence was insufficient to prove that Durham knew the people in his home were officers who were acting with lawful authority.

The only testimony introduced at trial as to Durham's knowledge was that he did not know the persons in his home that night were officers. He did not call the police, nor did he know that someone else had called. (R.46B:372; App. 407). He did not expect the police to be in his home that night. (*Id.*) He did not hear anyone knocking on the door or ringing the doorbell, nor did he hear or see police sirens. (R.46B:374; App. 409). Indeed, the officers testified they had turned off their sirens on the way to Durham's home for the purpose of surprising anyone in the home. (R.46A:164; App. 199). It was extremely dark on the stairway; when Durham descended the stairs he could not see that they were police officers. (R.46B:376-77; App. 411-12). He never heard the persons in his home announce themselves as police officers. (R.46B:378; App. 413). He did not think they were police because he did not know police officers could enter homes without consent. (R.46B:379, 382; App. 414, 417). Once he figured out they may be police, he did not believe that the officers were acting with lawful authority when they surprised him in his home for no apparent reason. (R.46B:382; App. 417). He did not realize the people in his home were police officers until after he had been tased the second time. (R.46B:385; App. 420). Again, even then he did not have a reason to believe they were acting with lawful authority. There is not sufficient evidence from which a reasonable jury could conclude that Durham knew that the Police were acting with lawful authority when they surprised him in his own home.

This evidence was not sufficient to sustain the jury's verdict.

CONCLUSION

Mr. Durham asks this court to reverse his conviction for Resisting an Officer and remand with instructions to dismiss with prejudice on grounds that the

entry into his home violated his Fourth Amendment Rights, that Durham's due process rights to juror unanimity were violated, and/or based on insufficiency of the verdict.

Dated this 1st day of December, 2015.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 10,822 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 1st day of December, 2015.

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
CASE NO. 2015AP001978 CR

STATE OF WISCONSIN,

Plaintiffs-Respondents,

vs.

MICHAEL A. DURHAM,

Defendant-Appellant,

APPEAL FROM AN ORDER OF THE CIRCUIT COURT FOR PIERCE COUNTY, CASE NO. 14 CM 62 THE HONORABLE JOSEPH D. BOLES, PRESIDING

DEFENDANT-APPELLANT'S APPENDIX

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CERTIFICATION AS TO APPENDIX

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit 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.

Dated this 1st day of December, 2015.

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