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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,

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 REPLY BRIEF

DOAR, DRILL & SKOW, S.C.
Aaron A. Nelson (#1027028)
Katie J. Christiansen (#1099686)
P.O. Box 388
New Richmond, WI 54017-0388
(715) 246-2211

Attorneys for Defendant-Appellant

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ARGUMENT

I. THE ENTRY INTO DURHAM'S HOME VIOLATED DURHAM'S FOURTH AMENDMENT RIGHTS.

A. The community caretaker exception does not apply.

Despite the State's claim that the community caretaker exception applies to the officers' warrantless entry, *Pinkard* does not support their argument. *State v. Pinkard*, 2010 WI 81, ¶ 29, 327 Wis. 2d 346, 785 N.W.2d 592. The Court in *Pinkard* relied upon the officers' corroboration of the informant's tip (the door standing open) to justify the entry under the community caretaker exception. *Id.* at ¶ 3. Once inside, the police observed "exactly what the . . . caller described": several unresponsive people lying next to a pile of drugs. *Id.* ¶ 38-39. Unlike this case, the officers in *Pinkard* corroborated at least one detail from the informant's tip before entering the home.

Moreover, the caller in *Pinkard* had personal knowledge that the people inside were engaged in dangerous drug activity, because the caller had just been inside the home. *Id.* at ¶ 2. The State attempts to argue that the complainant here – Joan Conroy – had the same personal knowledge as the informant in *Pinkard*, stating that while she may not have seen a dangerous crime occurring, she heard one. This assumes evidence that is not in the record. Conroy did not claim to see what happened inside Durham's home like the tipster in *Pinkard*. Conroy heard something then both she and the dispatcher leaped to the conclusion. But the facts are she heard yelling and loud banging coming from inside Durham's home. She did not hear anyone yelling for help, screaming in pain, crying, exclaiming they were hurt or in trouble, or any other indications of a dangerous crime or that anyone was hurt. What she heard and reported was yelling and the wall shaking. (R.35:Ex.1); (R.45:6-7; App. 106-7). What Conroy heard did not rise to "an 'objectively reasonable basis' to believe [that] there [wa]s 'a member of the public who is in need of assistance.' " *Ultsch,* 331 Wis.2d 242, ¶ 15, 793 N.W.2d 505 (quoting *Kramer,* 315 Wis.2d 414, ¶¶ 30, 32, 759 N.W.2d 598). To say Conroy heard a violent crime occurring is a mischaracterization of the evidence.

The State next attempts to discount *State v. Maddix*, 2013 WI App 64, ¶

12, 348 Wis. 2d 179, 831 N.W.2d 778, which involved a reported "domestic disturbance," and held that officers were not acting as community caretakers when they continued their search without a warrant. *Id.* at ¶ 38. *Maddix* further held that the police cannot assume the worst case scenario to justify their entry. *Id.* at ¶ 30 (explaining that speculation that a member of the public might be injured is not enough to justify a warrantless entry into a home).

In its effort to distinguish *Maddix* from this case, the State points out that in *Maddix*, the door to the home was locked and the police forced entry through the locked door. However, if the police really were exercising a community caretaking function in this case, whether the police forced entry through a locked door or opened an unlocked door would be irrelevant. *State v. Ferguson*, 2001 WI App 102, ¶¶ 5, 18, 244 Wis. 2d 17, 22, 629 N.W.2d 788, 790 (finding police were properly exercising their community caretaker function when they jimmied a locked bedroom door to enter).

While the State correctly states that the *Maddix* Court found that it was the search after entry that was problematic, the initial entry in *Maddix* is distinguishable from the entry in this case. In *Maddix*, the report that led to the officers' dispatch was that someone was screaming. 2013 WI App 64 at ¶ 3. Upon arriving at the residence, the police heard a woman yelling, which they later described as "some female screams as if somebody had been in trouble." *Id.* Again, like in *Pinkard*, the police corroborated the initial complaint before entering the home. After the initial corroboration, they again heard screams "coming from upstairs so [they] forced entry based on the safety of the person screaming." *Id.* Upon entering, the officers encountered a woman who advised officers that she was not harmed, and that she and her boyfriend, Maddix, had just been arguing. Nonetheless, the officers searched the home. The Court explained that once the officers were assured there was no ongoing emergency their role as community caretakers was no longer justified. *Id.* at ¶ 27. Here, the officers did not hear anyone screaming upon arrival as the officers had in *Maddix*, nor did they observe any corroboration of the informant's tip whatsoever. *Maddix* supports a finding that the officers were not justified when they entered Durham's home.

The State next argues that *State v. Ultsch*, 2011 WI App 17, ¶ 18, 331 Wis. 2d 242, 793 N.W.2d 505, is of no assistance in this matter because the community caretaker doctrine was held not to apply. The State offers no explanation whatsoever as to why *Ultsch* is not of assistance in this

community caretaker analysis, which is especially curious given that Courts in Wisconsin have continuously cited to *Ultsch* as an authority on community caretaker analyses. *See e.g. State v. Matalonis*, 2015 WI App 13, ¶ 15, 359 Wis. 2d 675, 859 N.W.2d 628 *review granted*, 2015 WI 47, ¶ 15, 862 N.W.2d 898. The *Ultsch* Court held that even when officers investigating a traffic accident knew the driver involved had crashed into a brick wall, fled the scene, and had information upon arrival at the driver's place of residence that her car was damaged and she was inside the home, they did not have enough evidence that the driver was in need of assistance. *Ultsch*, 2011 WI App 17 at ¶ 21. The Court emphasized that while officers may have had reason to attempt to find the driver, without more evidence, like there being blood at the scene or the vehicle being damaged in a way that indicated a human body had made impact with the interior of the car and been harmed, there was not enough evidence to enter the home. *Id.* at ¶¶ 19-20. The officers in this case might have had enough evidence to enter the home if they had arrived at the Durham home and found some evidence that someone had been hurt or was being hurt. But there was no corroboration of the caller's report of yelling or loud banging and, therefore, no reason to believe someone inside was in need of assistance. In both *Ultsch* and *Maddix,* when officers were chasing a suspicion that assumed the worst case scenario but had no basis in fact or reality, it was held that they were not legally justified to enter without a warrant because there was not an objectively reasonable basis to believe someone was in need of assistance. In this case, the officers had only received a report of yelling and wall banging. While we agree that an officer's suspicions shouldn't be entirely disregarded merely because they are trying to render aid, it is not the officer's suspicions that govern. It is whether there's an objectively reasonable basis to believe someone is in need of assistance. On these facts, it simply cannot be said that this is so. There was no evidence that anyone had been hurt or was in need of assistance. As such, the officers were not exercising a justifiable community caretaking function when they entered the home without a warrant.

The State refrains from addressing *Matalonis'* holding in any detail, arguing it is not significant because it is unpublished. *State v. Matalonis* is an unpublished Court of Appeals case, released after July 1, 2009. As such, it has persuasive value, Wis. Stat. § 809.23 (3)(b), and its holding should be considered.

B. The exigent circumstances exception does not apply.

Despite the State's repeated claims, there was simply no emergency in this case. The dispatcher's interpretation of what Conroy heard or even the officers' fears do not make it an emergency. At most, it was a report of a verbal argument in which a wall shook (which was because of the shower door banging shut). The State attempts to argue the exigent circumstances exception applies based on the factors asserted in a 1970 D.C. Circuit Court of Appeals case, *Dorman v. United States*, 435 F.2d 385, 389 (D.C.Cir.1970). This argument was not raised at the trial court, nor did the Circuit Court rely on *Dorman* in its analysis. Moreover, as the State points out, the factors outlined in *Dorman* have not been universally approved of or adopted. *Dorman* is not binding to this Court's analysis of the issues herein. The Court should analyze this issue under Wisconsin law, as outlined in Durham's brief.

Regardless, each factor articulated in *Dorman* supports a finding that no exigency existed to justify the warrantless entry of Durham's home:

(1) There was no reported violence in the call that the police responded to;

(2) There was no evidence of anyone being armed;

(3) The officers had no reason to know whether Conroy's report was trustworthy or not; for all they knew she was a vindictive neighbor;

(4) There was no reason to believe that if they did not enter anyone could have escaped, especially when police were at each of the two exits from the home;

(5) The police had no consent when they entered, snuck up the stairs in the dark, surprised Durham, then shot him with a Taser when he ran away from the armed intruders pointing guns at him. (Short of shooting a gun at the homeowner, not many entries could be more forceful.)

(6) The police entered Durham's home in the early evening on a Sunday.

Next, the State attempts to argue *State v. Richter* supports the trial court's decision in this case. 2000 WI 58, ¶ 30, 235 Wis. 2d 524, 541, 612 N.W.2d 29, 37. However, as explained in Appellant's brief, the proper test outlined in Richter "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." *Richter,* 2000 WI 58, ¶ 30.

The State argues that the characterization of the neighbor's report of a verbal argument which the dispatcher called a "possible domestic" puts it into the category of "threat to the suspect or others." However, the neighbor never mentioned hearing a threat or any type of physical abuse. The only words the neighbor reported hearing was that of a man saying "leave me alone." The State makes the unsupported and unreasonable claim that the police were obligated to assume the worst. As discussed in the previous section, the Court in *Maddix* specifically held the exact opposite: The police cannot assume the worst case scenario to justify their entry. *Maddix* at ¶ 30. Nor is the State correct when they argue the police were mandated to make an arrest. First, at the time of the entry, the police did not even have probable cause to believe any crime had occurred, let alone one of domestic abuse. While dispatch called it a "possible domestic," even ignoring the obvious point that "possible" does not equal "probable cause," for any crime to be "domestic" there must first be a ***crime*** **–** and when the police entered the home without a warrant, they did not have probable cause that any crime – domestic or not – had occurred. The State cites Wis. Stat. § 968.075, but fails to mention that Wis. Stat. § 968.075 applies only to "domestic abuse." There were never any charges nor was there or is there any evidence of "domestic abuse." Herein, the State once again mischaracterizes the evidence and misleads the Court.

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

The State does not address Durham's argument that the jury instruction violated Durham's right to a unanimous verdict.

First, the State asserts that Durham offers no reason why the Court should deviate from the approach of treating offenses involving "force or threat of force" as being read in the disjunctive, per cases such as *State v. Baldwin*, 101 Wis.2d 441, 447–54, 304 N.W.2d 742 (1981); *State v. Travis*, 2013 WI 38, ¶ 107, 347 Wis. 2d 142, 186, 832 N.W.2d 491, 513. Respondent ignores the fact that an entire section of Appellant's brief was dedicated to distinguishing those very offenses and cases. (Brief of Appellant, p. 22-24.)

Similarly, the State chose not to respond to Durham's alternative argument that in the event the Court finds the Resisting statute 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. Instead, the State misdirects the court to consider their argument about sufficiency of the evidence, which will be addressed below. The State makes no response whatsoever to Durham's arguments about the history and wide practice of Wisconsin Courts when it comes to Resisting an Officer charges, nor the alternate mental states required for the crime of Resisting by force as opposed to Resisting by threats, which make the two conceptually and morally distinct.

Ignoring the relevant tests outlined in *State v. Derango*, 2000 WI 89, ¶ 14, 236 Wis.2d 721, 613 N.W.2d 833 and *Schad v. Arizona*, 501 U.S. 624, 637–45 (1991), the State attempts to argue that the jury instruction given at Durham's trial was appropriate because Durham's multiple alleged acts formed a "course of conduct" that prove he was resisting, and therefore the instruction was somehow appropriate. The State offers no authority for the proposition that Resisting an Officer can be proven by a "course of conduct." Indeed, where the legislature has intended certain offenses to be treated as "course of conduct" offenses, the legislature has enacted statutes that specifically express said intention therein. *See e.g.* Wis. Stat. § 940.32 (defining course of conduct within the offense of Stalking); 947.013 (defining course of conduct in the context of Harassment offenses). Resisting an Officer is not an offense that permits the State to use a "course of conduct" as a factual basis.

Durham maintains that these are two separate offenses, and the jury should have been instructed accordingly. In the alternative, even if Resisting by force or threat of force is one offense with multiple modes of commission, the instruction violated Durham's right to fundamental fairness as articulated in *Schad*.

The State does not address Durham's argument with regard to unanimity. The State cannot prevail on this issue by merely ignoring Appellant's argument.

III. EVIDENCE AT TRIAL WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT DURHAM WAS GUILTY.

The State mischaracterizes Durham's final argument. Durham is bringing an appellate issue on grounds of insufficiency of the evidence. The State erroneously claims the question on this issue is whether the facts are "legally sufficient to support recovery." (Brief of Resp., p. 12.) The standard is whether "the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true." *State v. Poellinger*, 153 Wis.2d 493, 504, 451 N.W.2d 752 (1990).

The State argues that Durham acknowledged that he "wrestled to get away" from officers, and is therefore guilty of Resisting by use of force. First, Durham did not acknowledge that the evidence at trial was such that he was "wrestling to get away" from officers. Rather, Durham consistently states in his Brief that during the State's closing argument, the State argued that Durham committed the crime of Resisting by "wrestling" to get away on the second floor. (Brief of Appellant, p. 8.) It was the State's witnesses that characterized Durham's movements on the second floor as "wrestling."

To the extent Durham used the word "wrestling" on page 23 of its Brief, Durham does not concede that the facts were that he wrestled. Indeed, it was not disputed at trial that 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 Durham's conduct after being tased. Instead, Durham argues that because the State characterized Durham's conduct as such, presenting two distinct factual scenarios as proof of one crime that they claim was committed in two different ways: either force (the alleged wrestling) or threat of force (the alleged "Fuck you"), a jury instruction specifying that was necessary. Durham did not threaten to use force. Durham does not concede that the act of wrestling to get away is sufficient to establish force. To resist by use of force for purposes of Wis. Stat. § 946.41 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. "Resistance is opposing force . . . not retreating from force." *Brown v. State*, 127 Wis. 193, 106 N.W. 536, 539 (1906) (citing *Welch* at 201). Durham did not intentionally use opposing force, if anything, he was retreating from force. Durham's arguments simply draw a distinction between the conduct alleged to be force and the conduct alleged to be threats of force, according to the State's characterization of the evidence.

Evidence was insufficient to sustain a guilty verdict, and the jury's verdict must therefore be overturned.

CONCLUSION

For all the reasons articulated herein, the Court must reverse Durham's conviction and remand with instructions to dismiss with prejudice on grounds that the entry into his home violated the Fourth Amendment and that Durham's due

process rights to juror unanimity were violated, and/or the evidence was insufficient to support the verdict.

Dated this 20th day of January, 2016.

DOAR, DRILL & SKOW, S.C.

Signed: /s/ Aaron A. Nelson
Aaron A. Nelson (#1027028)
Katie J. Christiansen (#1099686)
P.O. Box 388
New Richmond, WI 54017-0388
(715) 246-2211

Attorneys for Defendant-Appellant

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 2992 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 20th day of January, 2016.

DOAR, DRILL & SKOW, S.C.

Signed: /s/ Aaron A. Nelson

Aaron A. Nelson (#1027028)
Katie J. Christiansen (#1099686)
P.O. Box 388
New Richmond, WI 54017-0388
(715) 246-2211

Attorneys for Defendant-Appellant