STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2020AP0007-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KALLIE M. GAJEWSKI,

Defendant-Appellant.

ON APPEAL FROM A JUDGEMENT OF CONVICTION ENTERED IN THE MARATHON COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL K. MORAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Is Kallie M. Gajewski entitled to suppression of evidence gathered after her arrest on the porch of her trailer home because the arrest was unconstitutional?

The circuit court answered "no." It concluded that officers had probable cause that Gajewski committed an offense and were justified in arresting her on the porch of her trailer once she came outside and engaged them there.

This Court should answer "no," and affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

INTRODUCTION

Law enforcement officers who had been dispatched to a report that a person driving a blue Saturn might be intoxicated went to Gajewski's trailer home to investigate. Officers observed the car parked near Gajewski's trailer, and they went onto the trailer's front and back porches and knocked on the front and back doors. After the officer who knocked on the back door moved off of the porch and was standing on the ground near the porch, Gajewski came out of her trailer onto the back porch and engaged the officers, who asked her a few questions. The officers observed clear signs of intoxication. The officers asked Gajewski what she had been doing that evening. She gave them false information that she had been home all evening and had not been driving and started to go back into her home. However, one of the officers recognized Gajewski as having driven the blue Saturn minutes before. An officer stepped onto the porch and grabbed Gajewski before she entered her home and arrested her.

Gajewski claims that her arrest was unconstitutional because her porch was within the curtilage of her home, so the officers had to have probable cause and exigent circumstances to arrest her on the porch. She claims they had neither.

However, the officers had probable cause to arrest Gajewski for OWI and for obstructing an officer. And exigent circumstances were not necessary to justify the arrest because the officers did not arrest Gajewski in her home—they arrested her on her porch after she exited her home and engaged them. When Gajewski went onto her porch to engage the officers, she put herself in a semi-public place in which she could lawfully be arrested.

STATEMENT OF THE CASE AND FACTS

On August 28, 2016, at 12:28 a.m., police officers were dispatched to a report of a car parked on Corlad Road near the village of Athens, in the lane of travel with its lights off. (R. 53:4–5, 21.) The person who called the police described the car as a blue Saturn with a female driver. (R. 53:5–6.) The caller said she had made contact with the woman and believed the woman may have been under the influence of drugs or alcohol. (R. 53:5, 22.) Village of Athens police officer Marcus Goetsch responded to the call. (R. 53:4.) He observed a blue Saturn come to a stop at an intersection on Corlad Road. (R. 53:5.) He spoke to the driver, who he later identified as Gajewski. (R. 53:6, 8–9.) The officer asked the driver if she had seen a car stopped on Corlad Road, and she said she had. (R. 53:5.) Officer Goetsch did not suspect that the blue Saturn was the car about which he had been dispatched, because he thought the caller was currently observing that blue Saturn. (R. 53:6.)

Officer Goetsch continued down Corlad Road but did not find a blue Saturn on the road. (R. 53:6.) He then heard from dispatch that the blue Saturn was going north on Iron Bridge Road,[1] and then that the Saturn had turned onto Schweizer Road. (R. 53:6.) The officer turned onto Schweizer Road and saw an "Amish gentleman," who told him that he had observed a blue Saturn turning into a driveway on Schweizer Road. (R. 53:7.) The officer turned into the driveway but did not see the Saturn. (R. 53:7.) He continued down the road, but did not see the car, so he returned to the driveway and pulled in further. (R. 53:7.) He observed a blue Saturn parked in the backyard, near "a single-story trailer type house" with a detached garage. (R. 53:7.)

Officer Goetsch walked towards the car to check the license plate but returned to his squad car when two large dogs ran towards him. (R. 53:7–8.) He saw Gajewski come out the back door of her trailer to retrieve her dogs, and then go back inside. (R. 53:8.) A short time later, Marathon County Sheriff's Deputy Brandon Stroik arrived. (R. 53:9.) Deputy Stroik went to the trailer's back door while Officer Goetsch went to the front of the trailer. (R. 53:9, 23.) Deputy Stroik walked onto the back porch and knocked on the trailer's back door. (R. 53:23.) The porch was about ten feet by ten feet and was not enclosed. (R. 53:23.) Two or three steps led up to the porch, which led to a door to the trailer. (R. 53:10–11.) When no one answered the door, Deputy Stroik left the porch and walked over near the Saturn. (R. 53:24.) Gajewski then came out of her trailer, onto the porch. (R. 53:24.)

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[1] Google maps indicates that a little north of the intersection where Officer Goetsch encountered Gajewski, Corlad Road becomes Iron Bridge Road.

Deputy Stroik approached, but stayed on the ground, seven to eight feet from Gajewski. (R. 53:24–25.) Officer Goetsch walked to the back of the trailer. (R. 53:11.) He was about 20 feet from Gajewski while Deputy Stroik asked her questions about her evening. (R. 53:12, 25.) Deputy Stroik noticed a strong odor of intoxicants coming from Gajewski's person, and observed that her eyes were glassy and bloodshot, and that she sounded like intoxicated people he had spoken to. (R. 53:25.) Officer Goetsch observed that Gajewski had a hard time following Deputy Stroik's questions, and that her speech "seemed really slurred." (R. 53:11–13.) He thought "she might have been under the influence of something." (R. 53:13.)

Gajewski denied driving the blue Saturn or being in the area to which police had been dispatched. (R. 53:25.) When Officer Goetsch pointed out that he had seen her driving her car, Gajewski "quickly ended the conversation" and said she was going back inside. (R. 53:11–12.) She then moved quickly towards the door. (R. 53:12, 25.) Deputy Stroik told Gajewski to stop but she continued towards the door. (R. 53:13, 25.) Deputy Stroik moved onto the porch and grabbed Gajewski's sweatshirt as she was in the door jamb area and about to go into her trailer. (R. 53:13, 26.) Gajewski's dogs had come to the doorway, and she told the dogs to "get him." (R. 53:13, 26.) The officers got the dogs back inside, closed the door, and handcuffed Gajewski. (R. 53:13–14, 26.)

Deputy Stroik put Gajewski into his squad car. (R. 53:14, 26–27.) Officer Goetsch verified Gajewski was the person he saw driving the blue Saturn. (R. 53:14, 27.) Deputy Stroik got Gajewski out of the squad car, removed the handcuffs, and asked if she would perform field sobriety tests. (R. 53:14, 27.) She refused, and physically resisted. (R. 53:27.) Deputy Stroik reapplied the handcuffs and put Gajewski back into the squad car. (R. 53:27.) He drove away but stopped a short time later to complete the citation for OWI and read the

informing the accused form to Gajewski. (R. 53:27–28.) She agreed to his request for a blood sample. (R. 53:28.) A test revealed an alcohol concentration of .268. (R. 59:12.)

The State charged Gajewski with OWI as a fourth offense with a prior offense within five years. (R. 37; 38.) Gajewski moved to suppress evidence gathered after her arrest. (R. 15.) After briefing and a hearing (R. 19; 22; 23; 53) the circuit court denied Gajewski's motion. (R. 55:2–8). Gajewski moved for reconsideration (R. 26), and the court denied the motion in an oral ruling. (R. 56). The court concluded that the officers were justified in knocking on the trailer's door to investigate a possible OWI. (R. 56:7.) It found that the officers did not enter Gajewski's home. (R. 56:8.) The determined that while the porch is in the curtilage of a home for some purposes, when Gajewski came out onto her porch, she subjected herself to law enforcement. (R. 56:7–8.) The court concluded that when Gajewski gave the officers false information, there was probable cause to arrest her for obstructing an officer, and that the officers validly arrested her on her porch. (R. 56:10, 12.)

Gajewski pleaded no contest to OWI as a fourth offense, with one prior offense within five years—a felony. (R. 59:11.) The court withheld sentence and placed her on probation for three years, with nine months in jail. (R. 59:14.) Gajewski now appeals. (R. 47.)

STANDARD OF REVIEW

"[W]hether police conduct violated the constitutional guarantee against unreasonable searches and seizures," is a question of constitutional fact. *State v. Dumstrey*, 2016 WI 3, ¶ 12, 366 Wis. 2d 64, 873 N.W.2d 502 (lead opinion) (quoting *State v. Griffith*, 2000 WI 72, ¶ 23, 236 Wis. 2d 48, 613 N.W.2d 72. The circuit court's factual findings are evaluated under the clearly erroneous standard, but the circuit court's

application of the historical facts to constitutional principles is reviewed de novo. *Id.*

ARGUMENT

The circuit court properly denied Gajewski's motion to suppress evidence gathered after police went onto her porch to make contact with her, and then arrested her after she came out of her home to engage them.

The circuit court denied Gajewski's motion to suppress evidence and her motion to reconsider because it concluded that police were justified in arresting her while she was on her trailer home's porch, at the threshold of the trailer's door. The court noted that the officers did not go into Gajewski's home, and that Gajewski was not in her home when she was arrested. The court concluded that the officers were justified in stepping onto her porch and that they had probable cause to arrest her for obstructing an officer.

On appeal, Gajewski asserts that her arrest on her porch was unconstitutional. She claims that her porch was in her home's curtilage, so the officers could not step onto her porch, much less arrest her on it, without both probable cause that she committed a jailable offense and exigent circumstances.

However, the officers—like anyone else—were justified in going onto Gajewski's front and back porch to knock on the doors to her home to attempt to talk to her. And when Gajewski came out of her trailer onto her porch to speak to the officers, thereby exposing herself to the officers' view, speech, hearing, and touch, she entered a semi-public place where she could be arrested. The officers' observations of Gajewski gave them probable cause that she operated a motor vehicle while under the influence of an intoxicant. And when Gajewski gave the officers false information about not having

driven, there was probable cause that she committed a crime by obstructing an officer. When she ignored an officer's demand that she stops, but instead attempted to go into her home, the officers were justified in arresting her on her porch.

A. The police officers who arrested Gajewski did not do so in her home.

Both the United States and the Wisconsin Constitutions protect against "unreasonable searches and seizures." U.S. Const. amend. IV; Wis. Const. art. 1, § 11. Because section 11 of the Wisconsin Constitution is "substantively identical" to the Fourth Amendment to the U.S. Constitution, this Court has "historically interpreted [it] in accord with the Supreme Court's interpretation of the Fourth Amendment." *Dumstrey*, 366 Wis. 2d 64, ¶ 14. "The touchstone of the Fourth Amendment is reasonableness." *State v. Tullberg*, 2014 WI 134, ¶ 29, 359 Wis. 2d 421, 857 N.W.2d 120 (quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)). "The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *Id.* (quoting *Jimeno*, 500 U.S. at 250).).

Police generally may not enter a person's home to search it or to arrest the person without a warrant. "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton v. New York*, 445 U.S. 573, 590 (1980). "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Id.* (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

Here, as the circuit court found as fact, Deputy Stroik and Officer Goetsch did not enter Gajewski's home. (R. 56:8.) They went onto her porches and knocked on her doors, and they arrested her on her porch after she came out of her home. (R. 56:7–8.) Gajewski does not dispute that the circuit court was correct in finding that the officers did not enter her home. She instead claims that the officers violated the Fourth Amendment by going onto her porch to arrest her. As the State will explain, the circuit court properly rejected Gajewski's claim.

B. The officers were justified in going onto Gajewski's porch because the porch is a semi-public place where the general public can go to knock on the door.

As the circuit court recognized, when the officers went onto Gajewski's front and back porches to knock on her door and attempt to make contact with her, they entered the curtilage of her home. But as the court also recognized, the officers were justified in doing so because Gajewski's porches are semi-public places where the general public can go to knock on the doors to her home.

"The area 'immediately surrounding and associated with the home'" is within the home's curtilage. *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (citation omitted). Curtilage is the area which extends the intimate activity associated with the sanctity of the home and the privacies of life. *State v. Davis*, 2011 WI App 74, ¶ 9, 333 Wis. 2d 490, 798 N.W.2d 902. A person's expectation of privacy in his or her dwelling extends to the curtilage of the dwelling. *Id.* A porch is "the classic exemplar of an area adjacent to the home and 'to which the activity of home life extends.'" *Jardines*, 569 U.S. at 6 (quoting *Oliver v. United State*s, 466 U. S. 170, 182 n.12 (1984)).

Gajewski argues that the officers could not properly go onto her porch because her porch is in the curtilage of her home. (Gajewski's Br. 19.)[2] She relies on *Jardines*, 569 U.S. 1. But even though a home's porch is generally in the home's curtilage, "As the *Jardines* court acknowledged, the porch of a home is a semi-public area." *Dumstrey*, 366 Wis. 2d 64, ¶ 88 (A.W. Bradley, J., dissenting) (citing *Jardines*, 569 U.S. at 8). "An implicit license allows the general public to approach the porch, which is curtilage, and either be received or asked to leave." *Id.* Therefore, "a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'" *Jardines*, 569 U.S. at 8 (quoting *Kentucky v. King*, 563 U.S. 452, 469 (2011).

In *State v. Edgeberg*, this Court concluded that police were justified in opening the door to a suspect's enclosed porch and going onto the porch so that they could knock on the door going from the porch to the home. *State v. Edgeberg*, 188 Wis. 2d 339, 344, 348, 524 N.W.2d 911 (Ct. App. 1994). As this court later recognized, "It is well settled that the Fourth Amendment is not implicated by an officer's entry on private land to knock on a citizen's door for legitimate police purposes." *State v. Wieczorek*, 2011 WL 5338994, No. 2011AP1184-CR, ¶ 14, (Wis. Ct. App. Nov. 8, 2011) (unpublished) (citing *Edgeberg*, 188 Wis. 2d at 348).[3]

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[2] Citations to Gajewski's brief are to the page number on the e-filed version, on the top right corner of each page.

[3] This opinion is not binding and is cited only for its persuasive value. Wis. Stat. § 809.23(3)(b). The opinion is appended to this brief at R-App 101-08.

As the circuit court correctly concluded, the officers were justified in going onto Gajewski's property, and onto her porch, to knock on her trailer's doors. (R. 56:8, 11.) The officers were engaged in legitimate police activity when they entered Gajewski's property, went onto her porches, and knocked. They were investigating a report of a potential drunk driver when they went to Gajewski's trailer home and observed a car they believed to be the one subject to the report. (R. 53:7, 24.) They knocked on the trailer's front and back doors because they wanted to speak to Gajewski. (R. 53:9, 23–24.)

Gajewski argues that she had a greater expectation of privacy on her back porch because it is a back porch and is hidden from public view. (Gajewski's Br. 13.) But Officer Goetsch testified that the door that Gajewski came out of to engage the officers "appeared to be the door that the homeowner would use as a front door." (R. 53:17.) He said that when he first arrived at Gajewski's home, the dogs came from the side of the house where Gajewski later encountered the police, that she came out that side of the residence to get her dogs, and that it was the entrance to the house closest to the garage. (R. 53:20.)

Gajewski points to no evidence in the record indicating that her back porch and back door were not a place that the public would go to in order to knock and make contact with her. While Gajewski may have had an expectation of privacy on her back porch such that it could not be searched without a warrant, she did not have an expectation of privacy that would make it improper for a person to go onto the porch to knock. Just like any other person, the officers could properly go onto the porch to knock. They did not violate the Fourth Amendment by doing so.

C. When Gajewski came out of her home onto her porch after a police officer knocked on her door, she voluntarily engaged officers in a semi-public place and subjected herself to arrest.

When officers knocked on the front and back door of Gajewski's trailer home, she was not required to answer the door. *King*, 563 U.S. at 469–70. Gajewski could have chosen not to answer the door, or to answer it but not respond or speak to the officers or come outside. *Id.* at 470. And even after Gajewski answered the door, she had no obligation to allow the officers into her home. *Id.* But when the officer who knocked on the back door stepped off of the porch, Gajewski came out and engaged the officers, and opted to answer questions. (R. 53:12, 24–25.)

Gajewski argues that even after she came out of her home onto the porch, "her reasonable expectation of privacy remained intact." (Gajewski's Br. 19.) She points out that she was on her back porch, which was behind her home, and hidden from public view. (Gajewski's Br. 19.)

But while Gajewski had an expectation of privacy while in her home, when she came out of her home to talk to the police, she left the privacy of her home and stepped onto her porch, she put herself in a semi-public place. See *Dumstrey*, 366 Wis. 2d 64, ¶ 88 (A.W. Bradley, J., dissenting) (recognizing that under *Jardines*, a home's porch is a semi-public place where the general public may go to knock on the door to a home). And she did so in order to speak to police. As the circuit court found, when Gajewski came out of her home onto her porch, she "was willing to engage law enforcement." (R. 56:7.) As the court concluded, "if the defendant exits the home and comes onto a porch," when an officer knocks on the door, "that is an invitation to further subject yourself to law enforcement." (R. 56:8.) As the court recognized, "That's what happened in this case." (R. 56:8.) Gajewski had a reasonable

expectation of privacy when she was inside her home. But when she voluntarily came out of her home to speak to the officers, she no longer had any expectation of privacy in relation to the officer, much less a reasonable expectation. Gajewski was no longer in her home.

The situation here is somewhat like the one in *U.S. v. Santana*, 427 U.S. 38, 42 (1976), where the Supreme Court concluded that a person standing in her home's doorway was in a public place in which police could arrest her. In *Santana*, officers encountered a suspect standing in the doorway of her home and attempted to arrest her. *Id.* at 40. The suspect "retreated into the vestibule of her house." *Id.* The officers pursued the suspect and caught her in the vestibule. *Id.* The Court acknowledged that "the threshold of one's dwelling is 'private,' as is the yard surrounding the house." *Id.* at 42. But the Court concluded that when the suspect was in her home's doorway, she was in a "public" place, "not in an area where she had any expectation of privacy." *Id.* And the Court noted that "What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection." *Id.* (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)). The Court said that the defendant "was not merely visible to the public but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house." *Santana,* 427 U. S. at 42 (citing *Hester v. United States*, 265 U.S. 57, 59 (1924)).

The same is true here. Like the suspect in *Santana*, Gajewski was "standing completely outside her house." *Id.* And she was exposed to anyone who came to her door and knocked, in this case the police officers. As the Supreme Court put it in *Santana*, she was "not merely visible," but exposed to "public view, speech, hearing, and touch." *Id.*

Gajewski points out that her back porch and back door were not exposed to the street like the doorway in Santana. (Gajewski's Br. 19.) But again, she came out of her back door after the officers knocked on that door. While she did not expose herself to members of the public who might pass by on the road in front of her home, she exposed herself to Deputy Stroik, who had just knocked on the door and was standing just off of her porch. And she remained on her porch when Deputy Stroik moved toward the porch to speak to her, close enough that he could smell alcohol emanating from her and observe that her eyes were glassy and bloodshot and that she sounded like other intoxicated people to whom he had spoken. (R. 53:25.)

Gajewski spoke to the officers and answered their questions. When she no longer wanted to talk to the police, she attempted to retreat into the safety of her home. She attempted to retreat from a semi-public place—the porch—to a private place—her home. Had Gajewski gone back into her home, the police would not have been able to lawfully arrest her unless there were exigent circumstances. However, officers stopped her while she was on the porch before she entered her home. As the circuit court concluded, when Gajewski exited her home and went onto her porch, a place open to the public, the police could lawfully arrest her.

Gajewski argues that *Santana* does not apply. She claims that the Court "held that Santana was not standing in the curtilage of her home when in her doorway." (Gajewski's Br. 29 n.8.)

But the Court held nothing of the sort. It never mentioned "curtilage," and it said nothing even suggesting that a home's doorway is not entitled to Fourth Amendment protection for some purposes. The Court explicitly acknowledged that "the threshold of one's dwelling is 'private,' as is the yard surrounding the house." *Santana*, 427 U.S. at 42. But the Court held that when the suspect was standing in

her home's doorway, she was in a public place for purposes of arrest, and therefore could be arrested. *Id.*

Gajewski argues that *Jardines*, 569 U.S. at 5–8, controls this case and that under *Jardines*, her porch was in her home's curtilage. (Gajewski's Br. 29 n.8.) But *Jardines* says nothing about whether police may go onto a porch to arrest a person. The issue in *Jardines* was whether going onto the porch with dogs to conduct a dog sniff was "an unlicensed physical intrusion." *Id.* at 7. The Court held "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence" was impermissible. *Id.* at 9. The Court said that since the police dog was "on the constitutionally protected extension of Jardines' home, the only question is whether [the homeowner] had given his leave (even implicitly) for them to do so." *Id.* at 8. The Court concluded that the homeowners "had not." *Id.*

The Court in *Jardines* explicitly differentiated between taking a police dog onto a porch to sniff "in hopes of discovering incriminating evidence" from simply going onto the porch to knock. *Id.* The Court concluded that while a dog sniff is impermissible, "a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'" *Id.* (quoting *King*, 563 U.S. at 469).

As the circuit court recognized in the current case, this is not a search case, but a "stop and arrest case." (R. 56:7.) Under *Jardines*, while it may have been improper to go onto the porch to search it, the officers were justified in going onto the porch to knock on the door.

The State acknowledges that in *State v. Walker*, 154 Wis. 2d 158, 453 N.W.2d 127 (1990) (abrogated on another grounds), the Wisconsin Supreme Court concluded that under *Payton*, 445 U.S. 573, and *Oliver*, 466 U.S. 170, a person's fenced-in backyard is in the curtilage of the person's home, so

in the absence of exigent circumstances, a warrantless arrest in the backyard was unlawful.

However, in *Dumstrey*, 366 Wis. 2d 64, four members of the Wisconsin Supreme Court questioned the correctness of Walker's conclusion that an arrest may not be made in an area that is considered curtilage for the purposes of a search. The lead opinion in *Dumstrey* recognized "an eventual difficulty in reconciling the notion that curtilage is afforded the same protections as the home against warrantless entry for arrest" with the United States Supreme Court's holding in *Santana* those police can lawfully arrest a person standing in his doorway. *Id.* ¶ 31 n.7 (lead opinion). The lead opinion acknowledged that it may be that under *Jardines* and *Santana*, a person can be in the "constitutionally protected curtilage for one purpose, such as a warrantless search, while not for another purpose, such as a warrantless arrest." *Id.* But the lead opinion declined to decide the issue because it was not presented with "the proper factual scenario for us to define these specific contours today." *Id.*

A concurring opinion in *Dumstrey* expressed disagreement with the idea that "police may not arrest a person on probable cause when the person is within the person's own curtilage but not within the home." *Id.* ¶ 55 (Prosser, J., concurring). The concurrence said that "a broad principle to this effect would constitute a serious mistake of law and an impractical hardship for law enforcement." *Id.*

The *Dumstrey* lead opinion's suggestion that what may be a protected area for purposes of a warrantless search may not be a constitutionally protected area for purposes of a warrantless arrest, is borne out by the circumstances of this case. A search of Gajewski's porch for evidence without a warrant likely would have been impermissible because it would have violated Gajewski's reasonable expectation of privacy. But when Gajewski exited her home and went outside onto her porch to talk to officers, she no longer had an

expectation of privacy. And when she committed a crime while standing on her porch (obstruction, by lying to police), she surely had no expectation that police would not step onto her porch to arrest her. After all, when she gave the police false information she attempted to retreat into the safety of her home.

In any event, the circumstances here are very different than those in *Jardines*, which as the circuit court recognized is a search case (R. 56:7), or *Walker*, which concerned officers arresting a suspect "in the fenced-in backyard of his home." *Walker*, 154 Wis. 2d at 162. Here, officers drove into Gajewski's driveway, went onto her porches and knocked on the doors, and an officer was next to the back porch when Gajewski exited her home and engaged the officers. And the back door that Gajewski exited to engage the officers was the door that "appeared to be the door that the homeowner would use as a front door." (R. 53:17.)

Santana—an arrest case—plainly controls over *Jardines*—a search case. And under *Santana*, police may arrest a person in the doorway of her home. Nothing in *Santana* suggests that police may not arrest a person on her porch, when she is outside of her home.

The Supreme Court's recent opinion in *Lange v. California*, 141 S. Ct. 2011 (2021), confirms the continued validity of *Santana*. In *Lange*, the Court addressed whether police are always justified in going into a home without a warrant when they are pursuing a suspected misdemeanant. *Id.* at 2016. The Court held that the pursuit of a fleeing misdemeanant will often constitute an exigency warranting a warrantless entry into a home, but that it does not do so categorically. *Id.* The Court relied heavily on *Santana*, reiterating that the suspect in *Santana* was standing in the doorway of her home, and that this was a "public place" for purposes of arrest. *Id.* at 2019. Like in *Santana* itself, the Court said nothing in *Lange* suggesting that a home's porch

leading to the doorway to a home is somehow entitled to more Fourth Amendment protection than the doorway to the home.

Here, like in *Santana*, Gajewski was in a semi-public place with no expectation of privacy when police encountered her. Gajewski intentionally put herself in a public place when she exited her home and went onto the porch to speak to officers. When probable cause that Gajewski committed a crime then developed, the officers were justified in stepping onto the porch to arrest Gajewski before she entered her home.

D. The officer's observations while they talked to Gajewski outside her home gave them probable cause that she operated a motor vehicle while under the influence of an intoxicant, and that she obstructed an officer.

The circuit court did not determine whether the officers had probable cause that Gajewski had driven while under the influence of an intoxicant. The State's position is that they did. "Probable cause to arrest for operating while under the influence of an intoxicant refers to that quantum of evidence within the arresting officer's knowledge at the time of the arrest that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant." *State v. Lange*, 2009 WI 49, ¶ 19, 317 Wis. 2d 383, 766 N.W.2d 551.

When the officers knocked on Gajewski's doors, they knew that minutes before, a citizen had called the police to report that a blue Saturn was on a road, not moving, with its lights off. (R. 53:5, 21.) They knew that the citizen had made contact with the driver and thought she might be intoxicated. (R. 53:5, 22.) The officers saw a blue Saturn in Gajewski's driveway. (R. 53:7, 24.) And Officer Goetsch knew that Gajewski had been driving the blue Saturn minutes before,

because he had encountered Gajewski while she was driving. (R. 53:5, 8.)

When Gajewski came out of her home and spoke to the officers, the officers observed that she had slurred speech, glassy and bloodshot eyes, a strong odor of alcohol, and that she had difficulty following the questioning. (R. 53:12, 25.) All of this information was easily sufficient for probable cause that Gajewski operated a motor vehicle while under the influence of an intoxicant. It plainly was enough to "lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant." *Lange*, 317 Wis. 2d 383, ¶ 19.

The officers also had probable cause that Gajewski obstructed an officer. A person violates Wis. Stat. § 961.41 "Resisting or obstructing an officer," when she "knowingly resists or obstructs an officer while such officer is doing any act in an official capacity and with lawful authority." Wis. Stat. § 946.41(1). A person "obstructs" an officer "by knowingly giving false information to the officer." Wis. Stat. § 946.41(2)(a). Obstruction of an officer is punished as a Class A misdemeanor. Wis. Stat. § 946.41(1).

Here, as the circuit court recognized, there was probable cause that Gajewski obstructed the officers by giving them false information, when she told the officers she had not left her home that evening and had not been driving. (R. 56:7–8, 10.)

As the circuit court recognized, Gajewski came out of her home and onto the porch to engage with Deputy Stroik, who was standing just off of her porch. (R. 56:10.) Neither Deputy Stroik nor Officer Goetsch went immediately onto Gajewski's porch to arrest her. Instead, Deputy Stroik asked Gajewski a few questions, including about where she had been and what she had been doing that night. (R. 53:25.) And when Gajewski gave the officers false information, there was

probable cause she committed the crime of obstruction of an officer.

Gajewski does not appear to dispute that she knowingly gave false information when Deputy Stroik asked her where she had been and what she had done that evening. But she claims that there was no probable cause because she lied to Officer Goetsch, not to Deputy Stroik. (Gajewski's Br. 23.) Gajewski argues that "what is relevant to the legality of the arrest under review is the information known to—and the conduct of—the arresting officer," Deputy Stroik, not the information known to Officer Goetsch. (Gajewski's Br. 22 n.5.)

Gajewski is correct that when Deputy Stroik stepped onto her porch and grabbed her, he did not personally know that she had lied by saying that she had not been driving that night. (Gajewski's Br. 23.) Officer Goetsch testified that immediately before Deputy Stroik stepped onto the porch, Officer Goetsch heard Gajewski lie about not having driven, and he said that he "had seen her earlier driving her car." (R. 53:12.) Officer Goetsch testified that Gajewski "quickly ended the conversation and tried running back in the house." (R. 53:12.) Officer Goetsch testified that Deputy Stroik would have heard what he said. (R. 53:18.) However, Deputy Stroik testified that he did not recall hearing Officer Goetsch say that he had seen Gajewski driving that evening. (R. 53:31.)

Gajewski claims that the officers realized that they did not have probable cause to arrest her for obstruction because they arrested her for OWI rather than obstruction. (Gajewski's Br. 23.) And she argues that there was no probable cause because she was not charged with obstruction. (Gajewski's Br. 23.) But whether there is probable cause is determined objectively, based on what a reasonable officer would believe on the known facts. *State v. Sykes*, 2005 WI 48, ¶ 18, 279 Wis. 2d 742, 695 N.W.2d 277. And whether to charge a person with a crime is a matter of prosecutorial discretion. *State v. Karpinski*, 92 Wis. 2d 599, 607, 285 N.W.2d 729

(1979) ("the prosecutor is not required to prosecute all cases in which it appears that the law has been violated.") A decision to prosecute for OWI and not for obstruction does not even suggest that there was no probable cause that Gajewski obstructed the officers

Gajewski also seems to be arguing that Officer Goetsch could properly have arrested her for obstruction, but Deputy Stroik could not. However, it is not required that the arresting officer has knowledge sufficient for probable cause, only that the officers together had sufficient knowledge. The Wisconsin Supreme Court has rejected the notion that "the arresting officer must personally have in his mind knowledge sufficient to establish probable cause for the arrest," as "an incorrect view of the law." *State v. Mabra*, 61 Wis. 2d 613, 625, 213 N.W.2d 545 (1974). It is an "undeniable fact that police officers often properly act on the basis of the knowledge of other officers without knowing the underlying facts." *State v. Pickens*, 2010 WI App 5, ¶ 12, 323 Wis. 2d 226, 779 N.W.2d 1. "Under the collective knowledge doctrine, there are situations in which the information in the hands of an entire police department may be imputed to officers on the scene to help establish reasonable suspicion or probable cause." *State v. Alexander*, 2005 WI App 231, ¶ 13, 287 Wis. 2d 645, 706 N.W.2d 191 (quoting *State v. Orta*, 2000 WI 4, ¶ 20, 231 Wis. 2d 782, 604 N.W.2d 543) (Prosser, J., concurring) (citations omitted).

Police may detain or arrest a person if the knowledge of the arresting officer and other officers is sufficient for reasonable suspicion or probable cause. "[U]nder the collective knowledge doctrine, an investigating officer with knowledge of facts amounting to reasonable suspicion may direct a second officer without such knowledge to stop and detain a suspect." *Pickens*, 323 Wis. 2d 226, ¶ 12 (citing *Tangwall v. Stuckey*, 135 F.3d 510, 517 (7th Cir.1998)). And in finding probable cause that a person committed an offense,

"the officer may rely on the collective knowledge of the officer's entire department." *State v. Wille*, 185 Wis. 2d 673, 683, 518 N.W.2d 325 (Ct. App. 1994).

Here, the collective knowledge of Deputy Stroik and Officer Goetsch was sufficient for probable cause that Gajewski operated a motor vehicle while intoxicated, and that she obstructed an officer. A citizen reported seeing a woman in a blue Saturn stopped on a road with its lights on. (R. 53:4–5, 21.) The citizen reported that she made contact with the woman, and believed the woman was under the influence of something. (R. 53:5, 22.) Officer Goetsch encountered a blue Saturn a short time later, and spoke to Gajewski, who was driving it. (R. 53:6, 8–9.) When Officer Goetsch and Deputy Stroik encountered Gajewski at her home minutes later, they observed that she had slurred speech, glassy and bloodshot eyes, and difficulty following the questioning. (R. 53:25.) That Deputy Stroik, who arrested Gajewski, did not personally make contact with Gajewski while she was driving the blue Saturn makes no difference, because Officer Goetsch made contact with her.

And Officer Goetsch knew that Gajewski gave the officers false information when she told them she had been home all night and had not been driving. Deputy Stroik could properly "rely on the collective knowledge" of the other officer involved, Officer Goetsch. *Wille*, 185 Wis. 2d at 683. Collectively, the officers had probable cause to arrest Gajewski for OWI and for obstructing an officer.

The State acknowledges that Officer Goetsch did not tell Deputy Stroik that he had observed Gajewski driving until after Deputy Stroik had gone onto the porch and grabbed Gajewski. But even without considering Officer Goetsch's observation of Gajewski driving that evening, the facts known to Deputy Stroik were sufficient for probable cause that Gajewski drove while under the influence of an intoxicant. Deputy Stroik knew about the call to dispatch reporting a blue

Saturn in the roadway with its light off, and that the caller made contact with the driver and believed the driver might be intoxicated. (R. 53:21–22.) He knew that Officer Goetsch was investigating and had gone to Gajewski's home. (R. 53:22.) He met Officer Goetsch at Gajewski's home about 32 minutes after the first dispatch and observed a blue Saturn in the driveway. (R. 53:21–24.) And he saw a blonde female inside the house looking out a window at him. (R. 53:23.) Then, when Gajewski came out of her home to speak to him, Deputy Stroik observed that she showed clear signs of intoxication—slurred speech, glassy and bloodshot eyes, and a strong odor of intoxication. (R. 53:25.) At that point, Deputy Stroik did not know for certain that Gajewski was the driver. But no other potential driver was present, the blue Saturn was parked in the driveway, and Gajewski showed clear signs of intoxication. What Deputy Stroik knew was sufficient for probable cause that she was the driver, and that she had been under the influence of an intoxicant when she drove.

The officers had probable cause that Gajewski operated a motor vehicle while under the influence of an intoxicant, and that she obstructed the officers. And since Gajewski had left the privacy and safety of her home and come out onto her porch to engage the officers, she had no reasonable expectation of privacy towards the officers. The officers therefore did not violate the Fourth Amendment when they went onto Gajewski's porch—but not inside her home—and arrested her.[4]

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[4] Gajewski argues that her arrest would only have been valid had there been probable cause and exigent circumstances. (Gajewski's Br. 20–34.) She argues that there were no exigent circumstances because the officers were not in hot pursuit of her when Deputy Stroik grabbed her on her porch. (Gajewski's Br. 20–34.) The circuit court did not rely on the hot pursuit doctrine when it denied Gajewski's suppression motion, because it concluded that the officers did not enter Gajewski's home to arrest her. (R. 56:7–8.) Because the circuit court was correct, the State will not address hot pursuit in this brief.

CONCLUSION

This Court should affirm the judgment of conviction.

Dated: August 23, 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 6969 words.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 23rd day of August 2021.

Electronically signed by:

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