STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP1014-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER D. WILSON,

Defendant-Appellant-Petitioner.

APPEAL FROM A DECISION OF THE COURT OF APPEALS, AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING SUP0PRESSION ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DAVID L. BOROWSKI AND THE HONORABLE JEAN M. KIES, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUE PRESENTED

Did the court of appeals correctly affirm the judgment of conviction and the circuit court's decision denying suppression because police did not violate Christopher Wilson's Fourth Amendment rights?

The circuit court answered: Police did not violate Wilson's Fourth Amendment rights because the officers had probable cause that Wilson had committed jailable offenses and exigent circumstances of continuous pursuit of Wilson after he climbed the fence to unlock a gate and went into the backyard, which justified the officers' warrantless entry.

The court of appeals affirmed on an alternative basis: the officers acted reasonably and did not violate Wilson's Fourth Amendment rights when they entered the backyard through the open gate pathway and knocked on the door to the garage to conduct a "knock and talk" investigation, and Wilson was not seized until he freely walked back to his car parked in the public alley.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has indicated that oral argument and publication are appropriate.

INTRODUCTION

The encounter at issue in this case began when police responded to a citizen 911 call reporting a reckless driver who drove into an alley, parked next to a detached garage, climbed up a fence to reach over and open a gate, and went into the backyard. After determining that the car was not registered to that address or anywhere nearby, police entered the open gate and, seeing no one in the backyard, knocked on the side

door into the garage. Wilson answered the door. He matched the citizen's description of the driver who had climbed the fence to open the gate into the backyard, and police did not know he lived at that address. Wilson told the officers that he had been driving after taking prescription drugs and exhibited signs of intoxication. After he asked to retrieve his identification, Wilson led the officers back to his car parked in the public alley. While Wilson was trying to open the locked car door, the officer saw a handgun on the front seat. Police patted Wilson down, found pills in his pocket, and arrested him.

The circuit court denied Wilson's motion to suppress, holding that the officers' warrantless entry into the backyard was justified by hot pursuit of Wilson, who the officers continually pursued and had probable cause to believe had committed jailable offenses of OWI, burglary/trespass, or both. The court of appeals affirmed on an alternative basis: the officers conducted a knock and talk investigation by entering the yard using the pathway Wilson had taken through the open gate and knocking on the side door of the garage. After Wilson answered and voluntarily spoke to officers, he led them back to the car in the alley, where police lawfully seized him. Under either basis, this Court should affirm because the officers acted reasonably and did not violate Wilson's Fourth Amendment rights.

SUPPLEMENTAL STATEMENT OF THE CASE

Criminal charges. On the afternoon of January 16, 2017, a citizen 911 call reported a grey BMW driving recklessly before stopping at 1426 Missouri Avenue where the driver got out, wearing a black hat and bright orange shoes. (R. 1:3.) Police responded at that address and spoke to the person who answered the door of the garage. The person, later identified as Wilson, matched the 911 call description, had "thick slurred speech, constricted pupils, exaggerated

movements and poor balance," and admitted driving after taking pills. (R. 1:3.) After police saw a loaded handgun on the car's passenger seat, they arrested Wilson, searched him, found prescription drugs in his pocket, and determined he was intoxicated based on field sobriety tests and a blood sample containing methadone and alprazolam. (R. 1:3.) The State charged Wilson with operating a motor vehicle while intoxicated, second offense; endangering safety by use of a dangerous weapon (under the influence of intoxicant); and possession of a prescription drug without a valid prescription. (R. 1:2–3.)

Suppression motion and hearing. Wilson filed a motion to suppress, alleging that the "warrantless seizure that took place within the curtilage of a home to which Mr. Wilson had lawful access" violated his Fourth Amendment rights. (R 8:1.)

Officer Nathan Siefert testified that at 1:43 p.m. on January 16, 2017, police received a citizen complaint of a possible OWI, to which he and his partner responded, arriving at an alley behind 1426 Missouri Avenue within "a few minutes." (R. 42:11–12, 18, 26.) The 911 caller had reported a gray or silver BMW driving erratically, failing to stop for a red light, and weaving in and out of lanes, before parking in the alley, where the driver wearing orange shoes got out, climbed onto the fence, reached over it, unlocked and opened the gate, and entered the backyard. (R. 42:13–14, 32.)

The officers saw a BMW matching the caller's description parked "strangely" in the alley next to the garage, still running, with an open back tailgate, and determined that it was not registered to any nearby address. (R. 42:12–13, 18, 26.) Siefert observed that there was no one around and that the gate of the back fence was "ajar." (R. 42:13.) Based on the citizen report that the BMW driver had climbed the fence and gone into the backyard, Siefert's determination that the BMW

was not registered in the area, and his observation that the BMW was left running with the tailgate open, possibly "for a quick get-away," Siefert believed that this could be an OWI, a burglary, "or both." (R. 42:14.)

Siefert and his partner entered the fenced backyard through the open gate after moving a garbage can so that they could walk through. When he did not see anyone in the yard, he and his partner knocked on the door to the garage. (R. 42:14, 19–20, 29–30.) Wilson, a white male wearing orange shoes and a black hat, "fairly quickly" answered the knock. (R. 42:14–15, 22.) To investigate the possible OWI and burglary, Siefert first asked Wilson whether he had been drinking, smoking, or taken pills, and then asked him if he lived there because if he did, "it is not a burglary." (R. 42:14–15, 22–23.) Siefert noted that Wilson had slurred speech and stumbled on the "dry level concrete floor of the garage." (R. 42:15.) Wilson told the officers that he had been driving the BMW, had taken prescribed methadone that day, and that he did not have his identification with him. (R. 42:15–16.) Wilson asked to go back to the BMW to get his identification and went with the officers back to the BMW in the alley. (R. 42:16.) After Wilson tried to open the locked passenger door, Siefert saw a gun inside the car, which if the car had "been open, it would have been right there." (R. 42:16.) Believing Wilson was impaired, Siefert patted him down for weapons, found a bottle of pills in his left pocket, determined that he had a revoked driver's license and an unpaid citation, and arrested Wilson. (R. 42:16–17, 24.)

Decision denying suppression. In its oral decision denying Wilson's motion to suppress (R. 43:1), the circuit court made the following findings of fact:

- Police were dispatched after a citizen report of a reckless driver of a silver or gray BMW SUV driving

erratically, running a red light, weaving, that was possibly an OWI. (R 43:3–4.)

- The BMW had stopped in an alley behind 1426 Missouri Avenue and parked on a parking slab parallel with the garage door, not "perpendicular as you would normally park your car on a parking slab." (R. 43:4.)
- The citizen described that a white male wearing orange shoes and a black hat got out of the BMW, left it running and the tailgate open, "climb[ed] over or jumped the locked fence of the house," and "disappeared into the backyard." (R 43:4–5.)
- Officers arrived "not very long" after the driver had gone into the backyard, reasonably a "matter of a couple of minutes," and saw that "the gate to the fence was ajar," a "recycling bin that was sort of blocking the entrance to the gate," and as the caller had described, the BMW parked on the parking slab, still running with a wide-open tailgate. (R. 43:5.)
- Based on the citizen report that the reckless driver had climbed the fence to enter the yard and the officers' observation of the parked, running BMW with the tailgate open, Officer Siefert "thought a burglary might be happening." (R. 43:5–6.)
- Because the driver was not in the BMW and the caller said that the driver entered the backyard after jumping up on the fence to reach over and open the gate, the officers entered the open gate to look for the driver, knocked on "the door that human beings would walk through" into the garage, and Wilson, wearing orange shoes and a black hat, answered the door. (R. 43:6.)
- Wilson told officers that he had been driving the BMW and officers observed that his speech was thick and slurred and that he stumbled as he walked. The officers

> went with Wilson to the BMW in the alley to retrieve his identification, saw a gun inside the BMW on the front seat, patted Wilson down, found pills, and arrested Wilson. (R. 43:6–7.)

Based on these facts, the court concluded that the officers' warrantless entry into the backyard was "justified by exigent circumstances of a hot pursuit of a fleeing suspect who had committed jailable offenses," determining that officers were continuously pursuing Wilson with probable cause that he "had committed jailable offenses of perhaps OWI" or burglary because they "did not know, in fact, that this was Mr. Wilson's legal residence." (R. 43:8–9.) Officers knew that "a white man, wearing orange tennis shoes and a black hat" had "jumped the fence" and observed the "BMW running outside the fence with its tailgate open," so they immediately pursued Wilson "to prevent the continued flight" by entering the backyard through the open gate and knocking on the garage side door that "Wilson voluntarily answered," wearing orange shoes and a dark hat. (R. 43:9.) The court concluded that the officers' actions did not violate Wilson's Fourth Amendment rights and "were constitutionally reasonable." (R. 43:9.) Under "the totality of the circumstances," the officers' "hot pursuit" of Wilson "was supported by probable cause" that Wilson was committing jailable offenses and "justified by exigent circumstances" of their continuous pursuit of Wilson after he climbed the fence to unlock and open the gate and retreat into the backyard. (R. 43:11–20.) Thus, the officers' warrantless entry into the backyard was constitutionally reasonable and the court denied his motion to suppress. (R. 43:20.)

Guilty plea, conviction, and appeal. Wilson pled guilty to count one, OWI, second offense, and count two, intoxicated use of a firearm, the State recommended concurrent sentences totaling four months in the house of

corrections and agreed to dismiss and read in count three and, after a colloquy, the court accepted Wilson's pleas and found him guilty of both charges. (R. 21; 41:2–8, 16.) The court sentenced Wilson to 90 days on count one, concurrent to four months on count two, and entered the judgment of conviction. (R. 24; 41:12–15.) Wilson appealed. (R. 24; 33.)

Court of appeals' decision. The court of appeals affirmed Wilson's conviction and the order denying suppression, holding that "the officers' entry into the backyard and interaction with Wilson were covered by the 'knock and talk' exception to the Fourth Amendment's warrant requirement." (A-App. 4.) Based on its findings of fact, the circuit court had held that "the warrantless entry into Mr. Wilson's backyard was 'justified by exigent circumstances of a hot pursuit of a fleeing suspect who had committed jailable offenses.'" (A-App 4–6.) The court of appeals did "not address whether exigent circumstances justified the entry into the backyard" because it concluded that under the facts of this case, the officers conducted a lawful "knock and talk" investigation, which was "dispositive." (A-App. 7–8.)

The court of appeals determined that although the officers did not approach the front door, they were "justified in approaching by an alternative or back entryway." (A-App. 8–9.) "Under the specific facts of this case," the officers had an "implicit license" to walk into "the backyard in the middle of the day from the alley," through the gate that "was not latched or locked shut" and gave "no clear indication that visitors were intended to be excluded from entering." (A-App. 9.) Because the citizen had reported an erratic and reckless BMW driver who had gone into the backyard through an open gate, and not seeing Wilson in the yard, the officers followed Wilson through the open gate and knocked on "the side garage door." (A-App. 9.) Wilson answered, although "had no

obligation to open the door or speak with the officers." (A-App. 9.) The court concluded "that the officers conducted a permissible knock and talk investigation" and because the seizure did not happen "until *after* Wilson left the backyard and returned to the car" parked in the alley, Wilson was not "unlawfully seized in the backyard." (A-App. 9–10.) Thus, the court of appeals affirmed the circuit court's order denying suppression and the judgment of conviction. (A-App. 10.)

STANDARD OF REVIEW

"[W]hether police conduct violated the constitutional guarantee against unreasonable searches and seizures" and a "curtilage determination" present this Court with questions of constitutional fact. *State v. Dumstrey*, 2016 WI 3, ¶ 12, 366 Wis. 2d 64, 873 N.W.2d 502 (citation omitted.) This Court reviews the lower court's findings of historic fact unless they are clearly erroneous, but independently applies the relevant constitutional principles to these historical facts. *Id.* ¶ 13.

SUMMARY OF THE ARGUMENT

The circuit court denied Wilson's motion to suppress, concluding that the officers lawfully entered Wilson's backyard because they had probable cause that he had committed the jailable offenses of OWI, burglary, or criminal trespass, and exigent circumstances that the officers were in continuous pursuit of Wilson. The court of appeals affirmed on an alternative basis, holding that the "knock and talk" exception to the warrant requirement allowed the officers to enter the yard using a pathway through the unlocked gate that Wilson had gone through and that was open to the public, knock on the door, and talk to Wilson, without violating the Fourth Amendment. Moreover, the court of appeals concluded that the officers did not seize Wilson until after he freely walked back to the alley. Under either theory, the officers acted reasonably and did not violate Wilson's constitutional rights.

ARGUMENT

The officers acted reasonably when they followed Wilson's path through a gate to enter his backyard and did not violate Wilson's Fourth Amendment rights.

A. Police did not violate the Fourth Amendment by conducting a permissible knock and talk investigation.

1. A suspect is not seized by police questioning during a "knock and talk" investigation, which allows police to approach a residence through a pathway open to the public, knock, and ask questions without violating the Fourth Amendment.

Both the United States and the Wisconsin Constitutions protect against "unreasonable searches and seizures." U.S. Const. amend. IV; Wis. Const. art. 1, § 11.[1] "The touchstone of the Fourth Amendment is reasonableness." *State v. Tullberg*, 2014 WI 134, ¶ 29, 359 Wis. 2d 421, 857 N.W.2d 120 (citation omitted.) Fourth Amendment protections extend to the home's curtilage: "the area immediately surrounding and associated with the home" that is "intimately linked to the home" and "where privacy expectations are most heightened." *Florida v. Jardines*, 569 U.S. 1, 6–7 (2013) (citation omitted); *see Dumstrey*, 366 Wis. 2d 64, ¶ 23 ("curtilage is the area to which extends the

[1] 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." *State v. Dumstrey*, 2016 WI 3, ¶ 14, 366 Wis. 2d 64, 873 N.W.2d 502.

intimate activity associated with the sanctity of a [person's] home and the privacies of life." (alteration in original) (citation omitted)).[2]

Not all police-citizen contacts constitute a seizure, and many such contacts do not fall within the safeguards afforded by the Fourth Amendment. *State v. Young*, 2006 WI 98, ¶18, 294 Wis. 2d 1, 717 N.W.2d 729. "As long as a reasonable person would have believed he [or she] was free to disregard the police presence and go about his [or her] business, there is no seizure and the Fourth Amendment does not apply." *Id.* A "knock and talk" investigation is not a seizure of an occupant of the resident if a "reasonable person" in the occupant's position would "feel free to decline the officers' requests or otherwise terminate the encounter." *Florida v. Bostick*, 501 U.S. 429, 436 (1991).

To conduct a "knock and talk" investigation, police have an "implicit license" to enter a curtilage without a warrant, such as a yard or a porch as a "semi-public area," to "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). After entering the curtilage and knocking on the door, the officer may "wait

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[2] Four factors determine whether an area is curtilage: 1) proximity of the area to the home, 2) whether the area is inside an enclosure surrounding the home, 3) the uses of the area, 4) steps the resident took to protect the area from observation by passersby. *United States v. Dunn*, 480 U.S. 294, 304 (1987); *Dumstrey*, 366 Wis. 2d 64 ¶¶ 4, 35,46 (applying *Dunn* factors to conclude that parking garage underneath an apartment building was not curtilage because it was a "far cry" from an attached garage that courts have held to be curtilage, was not "intimately tied to Dumstrey's home" and did not "warrant[] Fourth Amendment protection.")

briefly to be received, and then (absent invitation to linger longer) leave." *Id.* Police do not need a warrant or even probable cause to effectuate a "knock and talk" investigation. *State v. Robinson*, 2010 WI 80, ¶ 32, 327 Wis. 2d 302, 786 N.W.2d 463. A knock and talk "is a powerful investigative technique" where police may "go to people's residences, with or without probable cause, and knock on the door to obtain plain views of the interior of the house, to question the residents, to seek consent to search, and/or to arrest without a warrant, often based on what they discover during the 'knock and talk.'" *State v. Phillips*, 2009 WI App 179, ¶ 11 n.6, 322 Wis. 2d 576, 778 N.W.2d 157 (quoting Craig M. Bradley, *"Knock and Talk" and the Fourth Amendment*, 84 Ind. L.J. 1099, 1099 (2009)).[3]

A consensual "knock and talk" at a private residence is not a seizure. *City of Sheboygan v. Cesar*, 2010 WI App 170, ¶¶ 9 n.5, 13, 330 Wis. 2d 760, 796 N.W.2d 429. To further the "legitimate business" of a police investigation, officers "may enter the areas of the curtilage which are impliedly open to use by the public" by "[a] sidewalk, pathway, common entrance or similar passageway" that offer "an implied permission to the public to enter." *State v. Edgeberg*, 188 Wis. 2d 339, 347, 524 N.W.2d 911 (Ct. App. 1994) (citation omitted). In *Edgeberg*, officers did not infringe on Fourth Amendment rights by reasonably entering a curtilage of an enclosed porch through an unlocked screen door and knocking on the door going from the porch to the home to investigate a citizen complaint. *Id.* at 344–45. The Fourth Amendment is not implicated by police entry onto private land to knock on a

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[3] A "knock and talk" is different from the "knock and announce" rule, which requires "that police officers entering a dwelling must knock on the door and announce their identity and purpose before attempting *forcible entry*." *Richards v. Wisconsin*, 520 U.S. 385, 387 (1997)(emphasis added).

citizen's door for "legitimate [police] purposes." *Edgeberg*, 188 Wis. 2d at 347. Police do not act unreasonably or unlawfully create exigent circumstances simply by knocking on a door without a warrant and requesting the opportunity speak with the person who answers it. *King,* 563 U.S. at 469 (2011). The occupant has no obligation to open the door, speak to officers, or allow the officers to enter. *Id.* at 460.

2. The officers did not need a warrant to conduct a "knock and talk" investigation by entering the backyard from the alley through the open gate pathway and knocking on the garage side door to talk to Wilson, who voluntarily answered and spoke to officers, and was not seized until he freely went back to the alley.

Wilson seeks reversal of the court of appeals' decision that the officers did not violate his Fourth Amendment rights on the theory that "[t]he police trespass in this case occurred in a small, fenced-in yard—a prototypical form of curtilage" that was "in close proximity to his residence." (Wilson's Br. 14–16.) Wilson also claims that the State "did not contest" that the backyard is curtilage and should "be deemed to have admitted this argument." (Wilson's Br. 17, n. 3.) But the issue before this Court is not whether the backyard is curtilage. Rather, the issue is whether the court of appeals correctly concluded that the officers did not violate Wilson's Fourth Amendment rights when they entered the backyard without a warrant to knock on the side door of his garage, which was not a seizure but instead an investigatory action that fell squarely into the exception to the warrant requirement for a "knock and talk" investigation.

While neither the circuit court nor the court of appeals made an express curtilage determination[4], the court of appeals implicitly found that the backyard was "curtilage" that was "impliedly open to use by the public." (A-App. 8.) Wilson argues that the officers did not conduct a valid "knock and talk" investigation because they did not have "implicit license" to enter his backyard "curtilage" through the open gate "to knock on the side door of his garage." (Wilson's Br. 16–18.) In support, Wilson claims that the backyard "was surrounded by a tall, solid privacy fence that clearly indicated it was not open to the public"; that it was not "common practice for members of the public to enter Mr. Wilson's residence through the fenced-in backyard"; that while "the gate to the fence happened to be open at the moment police arrived, a garbage can blocked entry"; and that "unlike a home's front door" where police would have an implicit license to conduct a "knock and talk," the officers "made no attempt to knock on the front door of Mr. Wilson's home, did not approach the home from the front path, and were under no illusion that they were approaching the front of the home." (Wilson's Br. 18.) Wilsons' arguments, either separately or in the aggregate, do not support reversal.

Wilson presents no authority for his claim that the fence "clearly indicated" that entry through the gate not "open to the public" or that the presence of a moveable garbage can in front of the open gate negated that the gate was open and accessible. In fact, he ignores that the gate was unlocked and open when officers arrived, that officers knew that Wilson had

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[4] The State argued in its brief in opposition to Wilson's suppression motion that Wilson was not seized in the backyard, but rather in the back alley after he voluntarily led the officers back to his car to retrieve his identification, and that the back alley is not curtilage. (R. 9:3.)

climbed the fence to unlock it, that it was reasonable to infer that he used the garbage can to climb the fence, and that the officers moved the garbage can to follow Wilson's pathway through the open gate leading to the side door of the detached garage to knock on the door. Similarly, Wilson's claim that it was not "common practice" to approach the garage side door through the backyard gate and that the officers only had an implicit license to approach by the front door is unsupported. Here, the facts supported that the officers were conducting "legitimate business" of investigating criminal activity by following Wilson into the backyard, using a pathway through the unlocked and ajar gate, which was "impliedly open to use by the public." *Edgeberg*, 188 Wis. 2d at 347 (citation omitted). Wilson fails to refute that the officers' entry through the open gate in order to conduct an investigatory "knock and talk" was reasonable under these circumstances.

Wilson argues that the court of appeals' analogy to the facts in *Edgeberg*, 188 Wis. 2d 339, was misplaced and that *Edgeberg* does "not support a [conclusion] that police lawfully entered Mr. Wilson's backyard." (Wilson's Br. 19.) The court of appeals cited its decision in *Edgeberg* because, like the officers' entry into the backyard through an unlocked gate, *Edgeberg* involved officers' entry into a screen porch through an unlocked screen door, which that gave "no clear indication that visitors were intended to be excluded from entering. *See Edgeberg*, 188 Wis. 2d at 346–47 (distinguishing the entry of a porch with an unlocked screen door leading to an interior front door from the entry of a locked hallway that was only accessible to a limited group)." (A-App. 9.) Wilson claims that this case "presents a much different factual scenario" because it was not "common practice for members of the public to enter" the fenced backyard through the gate and "a garbage can blocked entry through the gate." (Wilsons' Br. 20.) Wilson again ignores the findings of fact that the gate was open with no attempt to exclude the public from entering and that the

police were following Wilson's path through the open gate to the side garage door just as a member of the public could do. The moveable garbage can in front of the gate to the fence that Wilson had climbed up to unlock, minutes before the officers followed him through the open gate to knock on the garage side door, does not negate the court's conclusion, based on the facts, that the officers' entrance through the open gate that was impliedly open to the public was constitutionally permissible.

Wilson also argues that the officers violated his constitutional rights by entering through the back gate to conduct the knock and talk because, "unlike in *Edgeberg*," they did "believe they were approaching the front" and "made no attempt to approach Mr. Wilson's front door." (Wilson's Br. 20.) Because of the lack of Wisconsin case law addressing whether the "knock and talk" exception required the officers to enter by the front entrance, the court of appeals cited two federal cases, which Wilson claims the court "relied heavily on" (Wilson's Br. 21), as examples of situations where "officers are justified in approaching by an alternative or back entryway. *See e.g. Alvarez v. Montgomery Cty.*, 147 F. 3d 354, 356 (4th Cir. 1998) (stating that the Fourth Amendment does not prohibit police from entering into a backyard when circumstances indicate they might find the homeowner there); *United States v. Garcia,* 997 F. 2d 1273, 1279–80 (9th Cir. 1993) (stating that "if the front and back of a residence are readily accessible from a public place, like the driveway and parking area . . . the Fourth Amendment is not implicated when officers go to the back door reasonably believing it is used as a principal entrance to the dwelling." (A-App. 8–9.)

Wilson argues that these cases do not support the court of appeals' conclusion that the officers reasonably and constitutionally entered the backyard to conduct the "knock and talk" because "unlike in *Alvarez*, there was no sign directing anyone to enter Mr. Wilson's backyard and no indication that the police would be unable to speak with someone if they knocked on his front door" and unlike in *Garcia*, the officers here "were under no belief that they were in fact approaching the home's front door." (Wilsons' Br. 22–23.) The facts in this case and the federal cases are not identical, but both *Alvarez* and *Garcia* demonstrate that a "knock and talk" conducted at a back entrance does not per se violate the Fourth Amendment. Here, the officers used the open back gate to enter the yard looking for Wilson, who they knew had unlocked the gate and gone into the backyard, in order to conduct a "knock and talk" investigation of the citizen report of a reckless driver and a possible burglary. The officers' actions were reasonable and not constitutionally infirm. None of Wilson's arguments provide a basis to reverse the court of appeals' decision that the officers conducted an investigatory "knock and talk" that did not require a warrant.

Finally, and importantly, the court of appeals concluded that Wilson had no obligation to answer the officers' knock or speak to the officers and that he was not seized "until *after*" he freely walked out of the garage, left the "backyard and returned to the car." (A-App. 9–10.) When the officers patted Wilson down and arrested him in the alley, he was outside of the fenced backyard on the parking slab, which was not an area "associated with sanctity of a person's home." *Jardines*, 569 U.S. at 6; *see Dumstrey*, 366 Wis. 2d at 72, 88 (underground parking garage was not curtilage because it was not closely proximate to the home and was a "far cry" from an attached garage that courts have held to be curtilage.) Contrary to Wilson's argument "that police did not have implicit license to enter the curtilage" or backyard (Wilson's

Br. 24), the officers' entry through an open gate to knock on his garage side door did not violate his Fourth Amendment rights because the officers were conducting a reasonable investigation and did not seize him until he was outside of the fenced backyard and in the public alley.

The aggregate facts supported the court of appeals' conclusion that that the officers' entry into the backyard through an open gate to investigate and knock on the side door to the detached garage was constitutionally permissible. The court of appeals determined that although the yard "was surrounded by a fence, the gate was open" and "not latched or locked shut," indicating that public visitors were not "intended to be excluded from entering," and that the officers had "reason to believe that someone was in the backyard" because the 911 caller described that the reckless and erratic BMW driver had opened the gate by climbing the fence "and entered the backyard." (A-App. 9.) Based on these "specific facts," the court of appeals concluded that the officers had an "'implicit license' . . . to enter the backyard in the middle of the day from the alley, walk to the side garage door and knock," just as a private citizen could do, through the unlocked and open gate with no intent to exclude the public. (A-App. 9.) The court also concluded that the "knock and talk" was not a seizure, rejected "Wilson's argument that he was unlawfully seized in the backyard," and held that Wilson was not seized until he voluntarily walked back to his car parked in the public alley. (A-App. 9–10.) The "knock and talk" investigation by police was constitutionally permissible. This Court should affirm.

B. Alternatively, the officers were in hot pursuit of Wilson when they entered the backyard.

The circuit court denied Wilson's suppression motion based on its conclusion that under the fact of this case, the officers did not violate Wilson's Fourth Amendment rights when they entered the fenced backyard because they were in continuous pursuit of Wilson and had probable cause that he had committed jailable offenses. Because the circuit court's findings of fact supported this legal conclusion, this Court can affirm on this basis.

1. Police may continually pursue a suspect into a residence or curtilage without a warrant with probable cause the suspect is committing a jailable offense.

"In deciding whether an officer's actions are permissible under the Fourth Amendment, [courts] need only determine that the law enforcement action was reasonable under the circumstances." *State v. Harwood*, 2003 WI App 215, ¶ 17, 267 Wis. 2d 386, 671 N.W.2d 325.

Police generally may not enter a person's home or curtilage to search it or to arrest the person without a search warrant: "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). Police do not need a warrant to enter a home or its curtilage where there are exigent circumstances making it "unreasonable and contrary to public policy to bar law enforcement officers." *State v. Ferguson*, 2009 WI 50, ¶ 19, 317 Wis. 2d 586, 767 N.W.2d 187 (citation omitted). "The State bears the burden of proving that a warrantless home entry is justified by exigent circumstances." *Id.* ¶ 20. One "well-recognized" exigent circumstance authorizing an officer's warrantless entry into a

residence or its curtilage is "hot pursuit of a suspect." *Id.; see also State v. Weber*, 2016 WI 96, ¶ 28, 372 Wis. 2d 202, 887 N.W.2d 554 (both the United States Supreme Court and this Court "have recognized that 'law enforcement officers may make a warrantless entry onto private property . . . to engage in "hot pursuit" of a fleeing suspect.'") (citation omitted).[5]

Under the doctrine of hot pursuit, an officer may follow a suspect into a home to make an arrest when the officer has "probable cause to make an arrest for a jailable crime," either a felony or a misdemeanor, and there is an "immediate or continuous pursuit of the [suspect] from the scene of a crime." *State v. Sanders*, 2008 WI 85, ¶ 117, 311 Wis. 2d 257, 752 N.W.2d 713 (Prosser, J., concurring) (citation omitted); *see also Ferguson*, 317 Wis. 2d 586, ¶¶ 20, 27 (clarifying that the underlying offense does not need to be a felony and adopting Justice Prosser's concurrence in *Sanders*, which discussed the hot pursuit doctrine at length); *Weber*, 372 Wis. 2d 202, ¶¶ 28, 32 (same). Probable cause of the commission of a crime requires an objective determination that the officer had more than a possibility or suspicion that the defendant committed a crime, but less than evidence beyond a reasonable doubt. *State v. Lange*, 2009 WI 49, ¶ 20, 317 Wis. 2d 383, 766 N.W. 2d 551. The hot pursuit exception to the warrant requirement does not require that the officer observed the commission of the crime, but may rely on a witness. *State v. Richter,* 2000 WI 58, ¶ 29, 235 Wis. 2d 524, 612 N.W. 2d 29. Thus, immediate or continuous pursuit of the suspect does not

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[5] The lead opinion in *Weber,* authored by Justice Ziegler, was joined in full by Chief Justice Roggensack and Justice Gableman. Although Justice Kelly wrote separately on the issue of probable cause, he noted that the "lead opinion's explanation of the 'hot pursuit' doctrine [was] well-stated, and need[ed] no further treatment" in his concurrence. *State v. Weber*, 2016 WI 96, ¶ 48 n.1, 372 Wis. 2d 202, 887 N.W.2d 554 (Kelly, J., concurring).

require that the officer personally observed the crime or fleeing subject, but instead focuses on the circumstances known to the officer; the officer need not be correct, but must be reasonable. *Id.*

"The necessity—and thus the intuitive reasonableness—of a hot pursuit doctrine in our constitutional law is apparent": it "helps ensure that a criminal suspect will not be rewarded for fleeing the police and that the police will not be penalized for completing a lawful attempt to apprehend a suspect, who, by his own actions, has drawn the police into his home." *Weber*, 372 Wis. 2d 202, ¶ 30. "Law enforcement is not a child's game of prisoner[']s base, or a contest, with apprehension and conviction depending upon whether the officer or the defendant is fleetest of foot." *Id.* (quoting *Sanders*, 311 Wis. 2d 257, ¶ 133 (Prosser, J., concurring) (alteration in original)). Accordingly, an "officer in continuous pursuit of a perpetrator of a crime . . . must be allowed to follow the suspect into a private place" without the requirement of obtaining a warrant. *Id.* (quoting *Sanders*, 311 Wis. 2d 257, ¶ 133 (Prosser, J., concurring)). Because the hot pursuit doctrine "serves [that] important public policy purpose," hot pursuit is a sufficient and independent justification for a warrantless entry and arrest. *Id.* ¶¶ 30, 41–42. *see also United States v. Santana*, 427 U.S. 38, 42–43 (1976) (hot pursuit justified an officer's warrantless entry into the home when the suspect was standing in the curtilage, or a semi-private threshold, and the suspect "retreated into . . . her house.")

2. The officers' warrantless entry into the backyard was justified by probable cause that Wilson had committed jailable offenses and exigent circumstances of their continuous pursuit of Wilson.

Applying the legal principles of hot pursuit to the facts of this case, the officers' entry into Wilson's backyard was justified because the officers had probable cause that Wilson was committing the jailable offenses of OWI, burglary, or criminal trespass, they knew Wilson had gone into the backyard, and they immediately and continuously pursued Wilson into the backyard. The circuit court denied Wilson's motion to suppress on this basis. In its well-considered and lengthy oral decision, the circuit court made detailed findings of fact based on Officer Seifert's testimony, which this Court defers to unless clearly erroneous, and then applied those facts to the constitutional principles, which this Court reviews independently. *State v. Iverson,* 2015 WI 101, ¶¶ 18–19, 365 Wis. 2d 302, 871 N.W.2d 661. The circuit court concluded that police had both probable cause and exigent circumstances that justified their warrantless entry into Wilson's backyard through the open gate. (R. 43:14–20.) The circuit court was correct.

On appeal, Wilson asserts that because the court of appeals did not affirm on the basis of "hot pursuit" and he did not raise the issue in his petition for review, this Court "will often remand the case for consideration of the issue not reached." (Wilson's Br. 11 fn. 1.) Wilson implies that this Court cannot consider the alternative grounds to affirm and must remand to the court of appeals for it to address his "unresolved arguments." (Wilson's Br. 25.) Wilson is wrong. As the respondent, the State may "defend the court of appeals' ultimate result or outcome based on any ground, whether or not that ground was ruled upon by the lower courts, as long

as the supreme court's acceptance of that ground would not change the result or outcome below." Wis. Stat. § 809.62(3m)(b)1. Moreover, remand is not required because this Court is in as good a position as the court of appeals to apply the circuit court's historical findings of fact to the law and decide the constitutional issue. Thus, this Court may hear and decide whether the officers' entry into the backyard was justified by their hot pursuit of the suspect Wilson.

The circuit court's findings of fact based on Officer Siefert's suppression hearing testimony support its legal conclusion that when Siefert and his partner entered the backyard through the open gate, they were in continuous pursuit of Wilson and had probable cause that Wilson had committed or was committing jailable offenses. Seifert's testimony related to the citizen complaint and his own observations, upon which the circuit court based its findings of fact, established that minutes before officers arrived, Wilson drove the BMW erratically and recklessly, parked it strangely, left it running with the tailgate open, climbed up the fence to unlock the gate, and entered the backyard through the open gate. (R. 42:11–14, 43:4–6.) Additionally, Officer Siefert discovered that the BMW was not registered to that address and the officers did not know that it was Wilson's legal residence. (42:12–13, 22–23.) The circuit court found that the "body cam video shows that the officers entered the yard through the open gate," then "knocked on the garage door," and Wilson, who "fit the exact description" of the reckless driver, "answered the man door of the garage" and "almost immediately" stepped out, talked with "slow and slurred" speech, "had trouble balancing, and his eyes were constricting." (R. 43:14–15.)

Based on all of these facts, the circuit court concluded that under "the totality of the circumstances," the officers "had probable cause" that Wilson was committing "a jailable offense of burglary or "at a minimum a criminal trespass," and that Wilson had been "operating a motor vehicle under the influence of an intoxicant." (R. 43:13–15.) The court further concluded that exigent circumstances allowed the officers to enter the open gate because they were in continuous pursuit of Wilson, who they knew had gone into the backyard. (R. 43:16–18.) Because the officers reasonably believed Wilson was committing a jailable offense and "was trying to evade capture" by "climbing up on the recycling big and then jumping over the fence and then going and hiding in the garage," the circuit court held that the officers' warrantless entry in the backyard in pursuit of Wilson was reasonable. (R. 43:19–20.) The court correctly concluded that the officers' continuous pursuit of Wilson into the backyard through the open gate without a warrant, believing that Wilson had committed a crime or crimes, was constitutionally reasonable and did not violate Wilson's Fourth Amendment rights.

The basic ingredient of the exigency of hot pursuit is "immediate or continuous pursuit of [a suspect] from the scene of a crime." *Weber*, 372 Wis. 2d 202, ¶ 28. That basic ingredient was present here. The circuit court's findings of fact based on Officer Siefert's testimony demonstrated that the officers were immediately pursuing Wilson and had probable cause that he had committed jailable offenses. Moreover, the intrusion by the officers was limited and was the result of Wilson's actions of climbing the fence to open the gate and retreating through the backyard into the garage. *See Weber*, 372 Wis. 2d 202, ¶ 77 (Kelly, J., concurring) ("The reason the events at issue took place in Mr. Weber's garage is because that is where Mr. Weber chose for them to take place.") Accordingly, this Court can affirm the judgment of conviction and the order denying suppression because the

officers' entry into the backyard was reasonable and justified by hot pursuit of Wilson.

In sum, and under the specific facts of this case, the officers acted reasonably when they entered the open gate that they knew minutes before Wilson had climbed the fence to unlock, followed Wilson's pathway, and when they did not see him, knocked on the side door to the detached garage to conduct an investigatory "knock and talk." And the officers acted reasonably by continually pursuing Wilson through the open gate into the backyard with probable cause he had committed jailable offenses. After officers knocked and Wilson voluntarily answered, their questions sought his cooperation and Wilson voluntarily answered before he freely led the officers out of the fenced backyard into the alley, where officers arrested him. The officers' actions were reasonable and did not violate Wilson's Fourth Amendment rights. This Court should affirm.

CONCLUSION

For all these reasons, this Court should affirm the court of appeals decision affirming the circuit court's order denying suppression and the judgment of conviction.

Dated: February 1, 2022.

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), (c) (2019-20) for a brief produced with a proportional serif font. The length of this brief is 7075 words.

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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 1st day of February 2022.

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