COURT OF APPEALS
DECISION
DATED AND FILED

June 1, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1978-CR **Cir. Ct. No. 2014CM62**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL A. DURHAM,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Pierce County: JOSEPH D. BOLES, Judge. *Reversed*.

¶1 STARK, P.J.[1] Michael Durham appeals a judgment convicting him of resisting an officer. He argues the evidence was insufficient to support his

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

conviction. We disagree, concluding the evidence introduced at trial was sufficient to sustain the jury's verdict.[2]

¶2 Durham also argues the circuit court erred by denying his motion to suppress evidence obtained after police entered his home without a warrant. The circuit court concluded the warrantless entry was permissible under both the community caretaker and exigent circumstances exceptions to the warrant requirement. We conclude neither exception applies. Accordingly, the circuit court should have granted Durham's motion to suppress all evidence obtained as a result of the warrantless entry. We therefore reverse the judgment of conviction.[3]

BACKGROUND

¶3 At the suppression hearing, a witness testified she called police at about 6:30 p.m. on January 26, 2014. The circuit court listened to an audio recording of the witness's call to police, during which the witness told dispatch she heard "yelling," which she could not understand, and "banging," which shook the wall of her neighbor's residence. Sergeant Mark Schultz and officer Jesse Neely of the Prescott Police Department testified they were dispatched to the neighbor's apartment. Dispatch informed them there was a "possible domestic incident," and a neighbor had reported hearing "yelling and banging."

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[2] *See* ***State v. Ivy***, 119 Wis. 2d 591, 610, 350 N.W.2d 622 (1984) ("[W]here a defendant claims on appeal … that the evidence is insufficient to sustain the conviction, the appellate court is required to decide the sufficiency issue even though there may be other grounds for reversing the conviction that would not preclude retrial.").

[3] In addition to the arguments identified above, Durham also argues reversal is warranted because the circuit court incorrectly instructed the jury regarding the elements of resisting an officer. Because we reverse on other grounds, we need not address this argument. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (appellate court need not address every issue raised by the parties when one is dispositive).

¶4 When the officers arrived at the residence, Neely knocked on the front door twice and rang the doorbell twice, while announcing "police department." He received no response. Neely testified he did not see or hear anything at that point that corroborated the report of a domestic incident.

¶5 Meanwhile, Schultz entered the residence's attached garage through the open overhead door. He then knocked on the interior door leading into the residence two to four times. He did not announce "police." He did not hear any yelling, banging, cries for help, or complaints of pain coming from inside the residence. After receiving no response to his knocks, Schultz opened the unlocked door and proceeded inside. Less than two minutes elapsed between his arrival at the scene and his entry into the residence.

¶6 Once inside, Schultz drew his firearm and announced, "Prescott police." He did not call out to ask if everyone was okay or if anyone needed help. The lights in the entry level of the residence were off, but there were lights on in the upper floor. Using his weapon-mounted flashlight, Schultz could see Neely standing outside the front door. He went to the front door and let Neely in. Once inside, Neely identified himself as a police officer and drew his firearm. He did not call out to ask whether everyone was okay. Neither officer turned on the lights. Neither officer observed anything suggesting there had been a fight or disturbance.

¶7 Schultz and Neely proceeded toward the stairs leading to the residence's upper level with their weapons drawn. At that point, a male, later identified as Durham, descended the stairs toward the officers. It is undisputed that Durham lived in the residence. Schultz repeatedly ordered Durham to show

his hands, and Durham refused to do so. Schultz ultimately used a Taser to subdue Durham.

¶8 The circuit court concluded the officers' warrantless entry into Durham's residence was constitutionally permissible, pursuant to the community caretaker and exigent circumstances exceptions to the warrant requirement. With respect to the community caretaker exception, the court reasoned:

> Given the totality of the circumstances, knowing the danger of these types of domestic disturbances and the potential for violence, knowing that violence of some nature had occurred which was such that walls had been shaken, knowing that a person had been yelling, and knowing that people were inside the residence but would not respond to knocking at the door, a very rational concern was that someone was inside who needed [the officers'] help either to be safe or receive aid. The public interest in this intrusion outweighed Mr. Durham's right to privacy. The police, in exercising their community caretaker function, reasonably entered the defendant's residence.

¶9 As for the exigent circumstances exception, the court stated it is "common knowledge that responding to domestic incidents are some of the most dangerous to law enforcement." The court continued:

> Knowing that, and having received a call of a report of a possible domestic incident where the next-door neighbor reported loud yelling and banging on the walls which was so severe that the walls shook, and knowing that at least two people were in the residence, and after having knocked on the door multiple times and receiving no response, it was very reasonable for the officers to enter the residence through the unlocked door. It is possible that there was no threat to safety of anyone inside the residence. However, given the facts, it is more reasonable to believe that someone inside the residence was in danger.

Accordingly, the court denied Durham's suppression motion, and the case proceeded to trial.

¶10 At trial, the evidence regarding the officers' entry into Durham's home was essentially the same as the evidence introduced at the suppression hearing. The State also presented additional evidence to support its argument that Durham committed the crime of resisting an officer during his subsequent interactions with Schultz and Neely.

¶11 Schultz testified that, when he and Neely encountered Durham inside the home, Schultz yelled, "[F]reeze, police." Schultz was pointing his weapon at Durham, and his weapon-mounted light was shining on Durham. Durham "yelled out what the fuck or fuck you … something with a fuck in it." Schultz then yelled, "[P]olice, show me your hands," to which Durham responded, "[F]uck you." That exchange occurred at least twice.

¶12 Schultz testified he then took out his Taser and aimed it at Durham's chest. At that point, Durham threw down an object, later identified as a coat, and "c[a]me at" or "[l]unged for" Schultz. Schultz then fired the Taser at Durham. Durham remained standing, "backed up a little bit," and yelled "fuck." He then made a flexing motion with his arms and ran up the stairs, away from the officers.

¶13 Schultz followed Durham and tackled him at the top of the stairs. Durham was face down on the floor, with both officers on top of him. According to Schultz, Durham was "[f]lailing … kicking, trying to get away," and "[m]oving [his] arms, legs, body, twisting, turning." Neely similarly testified Durham was "wrestl[ing] with" the officers in attempt to get away. Schultz testified he yelled, "[P]olice, stop resisting me," at least once. After struggling with Durham for thirty to ninety seconds, Schultz fired the Taser at Durham a second time, which caused Durham to soil himself. After that, there was "a little bit more wriggling,"

but Durham then put his hands behind his back and complied with the officers' commands.

¶14 On cross-examination, Schultz conceded that being shot with a Taser disrupts the brain's ability to send signals to a person's muscles and causes the person to "tense up." Schultz further conceded that, while being tased, a person is generally unable to control his or her movements. However, he also clarified that the actual tasing lasts for only five seconds.

¶15 Durham testified in his own defense. He testified he was not expecting visitors on the night in question, and he did not know police would be coming to his home. He did not hear anyone knocking on the door or ringing the doorbell, nor did he hear sirens or see flashing lights outside.

¶16 When Durham encountered the officers on the stairs, he was on his way out of his residence. The stairway was dark, and as he made his way down the stairs, Durham could not see anything except two shadows and "red lights." Believing the red lights were weapons, he said, "What the fuck." He was then immediately shot with a Taser. Durham denied lunging at the officers, and he testified they did not identify themselves as police.

¶17 Describing his behavior after he was tased the first time, Durham stated, "I turned and I looped my arm … because I knew there had to be wires there or something, and tried to pull them out as I turned and I ran back up the flight of steps." When he reached the top of the stairs, he was tased a second time. Durham testified he "didn't have any control over anything" when he was tased the second time. He fell to the floor, with the officers on top of him. One of the officers told Durham to calm down and stop resisting. Durham testified it was only then that he realized the men in his home were police officers. Durham

stated he did not think, at the time, that police "could legally come into your house and shoot you," and he did not believe the officers were acting with lawful authority.

¶18 The jury found Durham guilty of resisting an officer but found him not guilty of a second charge, disorderly conduct. Durham now appeals the resisting-an-officer conviction.

DISCUSSION

I. Sufficiency of the evidence

¶19 When a defendant challenges the sufficiency of the evidence to support his or her conviction, we may not reverse the conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). It is not our function to resolve conflicts in the testimony, weigh the evidence, or draw reasonable inferences from basic facts to ultimate facts; those duties belong to the trier of fact. ***Id.*** at 506. If there is any possibility the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the defendant guilty, we will not overturn the verdict, even if we believe the trier of fact should not have found guilt based on the evidence before it. ***Id.*** at 507.

¶20 Durham was charged with resisting an officer, contrary to WIS. STAT. § 946.41. To prove Durham violated that statute, the State had to establish four elements: (1) that Durham resisted an officer; (2) that the officer was doing an act in an official capacity; (3) that the officer was acting with lawful authority;

and (4) that Durham knew the officer was acting in an official capacity and with lawful authority and knew his conduct would resist the officer. *See* WIS JI—CRIMINAL 1765 (Apr. 2012). Durham argues the State failed to prove that he resisted Schultz and Neely, that he knew his conduct would resist the officers, and that he knew the officers were acting with lawful authority.

¶21 With respect to the resisting element, the State had to prove that Durham "oppose[d]" an officer "by force or threat of force." *See* ***id.*** On appeal, the State contends the evidence was sufficient to prove Durham opposed Schultz and Neely "by force." We agree. At trial, Schultz testified that, after Durham was tased the first time, Durham ran upstairs, away from the officers. Schultz followed Durham and tackled him at the top of the stairs. Schultz testified Durham was "[f]lailing … kicking, trying to get away," and was "[m]oving [his] arms, legs, body, twisting, turning." Schultz testified this continued for thirty to ninety seconds. Neely similarly testified Durham was "wrestl[ing] with" the officers in attempt to get away. Accepting the officers' testimony, a reasonable jury could easily conclude Durham "opposed" Schultz and Neely "by force." *See* ***id.***

¶22 Durham argues the officers' testimony does not establish that he opposed them by force because the officers conceded he was trying to get away from them. Durham argues that trying to get away from police cannot constitute opposing them by force. However, the only authority Durham cites for this proposition is ***Brown v. State***, 127 Wis. 193, 106 N.W. 536 (1906), which addressed whether the evidence in a sexual assault case was sufficient to prove the victim resisted her attacker. ***Brown*** is inapposite, as it does not address what it means for a person to resist a police officer in violation of WIS. STAT. § 946.41.

¶23 Durham also claims Schultz conceded at trial that Durham did not use force against the officers. However, Durham takes Schultz's testimony out of context. Schultz testified Durham did not use physical force against the officers before he was tased the first time. Schultz later testified that, after Durham was tased the first time, Durham did not immediately use force against the officers, but instead turned and ran away. Contrary to Durham's suggestion, Schultz did not testify that Durham never used force against the officers, or that Durham's flailing, kicking, and wrestling did not constitute force.

¶24 Durham next argues he did not *knowingly* resist the officers. Based on Schultz's testimony about the effects of being shot with a Taser, Durham argues he "did not have control over his muscles once he was tased." He therefore contends it "cannot be said that [he] intentionally used force against the officers based on any of [his] conduct after being tased." We disagree. Schultz testified a person is generally unable to control his or her movements while being tased. However, Schultz did not testify that effect continues for any appreciable period of time after the person has been tased, and he specifically testified the actual tasing lasts for only five seconds. Moreover, it was undisputed at trial that, after Durham was tased the first time, he turned and ran away from Schultz and Neely. Thus, the evidence, including Durham's own testimony, shows he regained control of his muscles shortly after he was tased the first time, before the flailing, kicking, and wrestling testified to by Schultz and Neely.

¶25 Durham next argues there was insufficient evidence to prove he knew the people in his home were police officers at the time he resisted them. In support of this argument, Durham cites his own trial testimony that he did not realize Schultz and Neely were officers until after the second time he was tased. However, Durham ignores Schultz's testimony that, after the officers encountered

Durham on the stairs, Schultz yelled, "[F]reeze, police," and subsequently yelled, "[P]olice, show me your hands," at least twice. The jury was entitled to find Schultz's testimony on this point more credible than Durham's, and we will not upset that credibility determination on appeal. *See* ***State v. Bembenek***, 111 Wis. 2d 617, 640-41, 331 N.W.2d 616 (Ct. App. 1983) ("The only time an appellate court will upset a jury's determination of the witnesses' credibility is when the evidence that the trier of fact has relied upon is inherently or patently incredible."). Accepting Schultz's testimony, the jury could reasonably conclude Durham knew Schultz and Neely were police officers at the time he resisted them.

¶26 Finally, Durham contends he did not know Schultz and Neely were acting with lawful authority. He cites his own trial testimony that he did not think police could legally enter his home and tase him. The jury was not, however, required to accept Durham's testimony on that point. Based on all of the evidence adduced at trial, we conclude the jury could reasonably find that Durham knew Schultz and Neely were acting with lawful authority at the time he resisted.[4] For the foregoing reasons, Durham's argument that there was insufficient evidence to convict him of resisting an officer fails.

II. Motion to suppress

¶27 When reviewing a circuit court's ruling on a suppression motion, we accept the court's factual findings unless they are clearly erroneous. ***State v.***

[4] Notably, Durham does not argue on appeal that there was insufficient evidence to establish the third element of resisting an officer—that the officer was acting with lawful authority. *See* WIS JI—CRIMINAL 1765 (Apr. 2012). We therefore do not address whether there was sufficient evidence to support the jury's finding that Schultz and Neely were acting with lawful authority when Durham resisted them.

Maddix, 2013 WI App 64, ¶12, 348 Wis. 2d 179, 831 N.W.2d 778. However, the application of constitutional principles to the facts is a question of law that we review independently. ***Id.***

¶28 The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures. ***Id.***, ¶13. Warrantless searches are considered per se unreasonable, subject to a few well-delineated exceptions. ***Id.*** The State bears the burden to establish that a warrantless entry into a home was permitted by a recognized exception to the warrant requirement. ***Id.*** Here, the State argued, and the circuit court agreed, that both the community caretaker and exigent circumstances exceptions permitted the officers to enter Durham's residence without a warrant. Based on the evidence presented at the suppression hearing, we conclude neither exception applies.

A. Community caretaker exception

¶29 "The United States Supreme Court and courts of this state have recognized that a police officer serving as a community caretaker to protect persons and property may be constitutionally permitted to perform warrantless searches and seizures." ***State v. Pinkard***, 2010 WI 81, ¶14, 327 Wis. 2d 346, 785 N.W.2d 592. To determine whether the community caretaker exception applies, we must consider:

> (1) whether a search or seizure within the meaning of the Fourth Amendment has occurred; (2) if so, whether the police were exercising a bona fide community caretaker function; and (3) if so, whether the public interest outweighs the intrusion upon the privacy of the individual such that the community caretaker function was reasonably exercised within the context of a home.

Id., ¶29.

¶30 In this case, it is undisputed that a search occurred when Schultz and Neely crossed the threshold into Durham's garage and then entered Durham's residence. Moving on to the second step of the analysis, "[w]hen evaluating whether a community caretaker function is bona fide, we examine the totality of the circumstances as they existed at the time of the police conduct." ***State v. Kramer***, 2009 WI 14, ¶30, 315 Wis. 2d 414, 759 N.W.2d 598. "The question is whether there is an 'objectively reasonable basis' to believe there is 'a member of the public who is in need of assistance.'" ***State v. Ultsch***, 2011 WI App 17, ¶15, 331 Wis. 2d 242, 793 N.W.2d 505 (quoting ***Kramer***, 315 Wis. 2d 414, ¶¶30, 32).

¶31 Here, the only information Schultz and Neely had when they arrived at Durham's residence was: (1) that a neighbor had reported hearing yelling and banging and observing a shaking wall; and (2) that dispatch characterized the situation as a "possible domestic incident." When the officers arrived at the residence, they did not observe any additional evidence indicating anyone inside was in need of assistance, nor did they observe anything that corroborated the neighbor's report. They did not attempt to contact the neighbor for further information or call the residence to determine whether anyone was inside. Instead, Schultz immediately entered the home's curtilage by proceeding into the attached garage.[5] After knocking on the interior door and receiving no response, Schultz entered the residence. Once inside, he did not call out to ask if everyone was okay

[5] As used in the search and seizure context, the term curtilage refers to "the land and buildings immediately surrounding a house." ***State v. Martwick***, 2000 WI 5, ¶1 n.2, 231 Wis. 2d 801, 604 N.W.2d 552. "The protections of the Fourth Amendment extend beyond the walls of the home to the 'curtilage.'" ***State v. Davis***, 2011 WI App 74, ¶9, 333 Wis. 2d 490, 798 N.W.2d 902. An attached garage is part of a home's curtilage. ***Id.***, ¶12.

or if anyone needed help. Rather, he immediately went to the front door to let Neely inside. Although it was dark in the lower floor of the residence, neither Schultz nor Neely turned on any lights. Neither officer observed anything suggesting there had been a fight or disturbance. Nevertheless, they proceeded farther into the home, with their weapons drawn.

¶32 On these facts, the officers lacked an objectively reasonable basis to conclude anyone inside Durham's residence needed assistance. An uncorroborated report of yelling, banging, and a shaking wall, without more, is insufficient to allow a reasonable officer to conclude a member of the public requires aid. Moreover, although officers' subjective intent "does not invalidate an otherwise reasonable exercise of the community caretaker function," ***State v. Gracia***, 2013 WI 15, ¶19, 345 Wis. 2d 488, 826 N.W.2d 87, their subjective intent is relevant to determining whether there was an objectively reasonable basis to conclude a member of the public required assistance, ***id.***, ¶21. In ***Gracia***, for instance, our supreme court considered it significant that the police "consistently stated their concern" for the defendant's well-being. ***Id.***, ¶21. In contrast, upon entering Durham's home, neither Schultz nor Neely called out to ask if anyone was hurt or needed assistance.

¶33 The State asserts that, in ***Pinkard***, an uncorroborated tip provided a sufficient basis to allow officers to enter an apartment in the exercise of a bona fide community caretaker function. ***Pinkard***, however, is distinguishable. While characterizing the circumstances as a "close case," our supreme court concluded in ***Pinkard*** that officers' warrantless entry into a residence was permissible under the community caretaker exception because they had an objectively reasonable basis to conclude entry was necessary to ensure the occupants' health and safety. ***Pinkard***, 327 Wis. 2d 346, ¶¶33, 35. In reaching this conclusion, the court

reasoned that, based on an anonymous tip by a person who claimed to have just left the residence, an officer could reasonably be concerned the occupants had overdosed on drugs or were victims of a crime. ***Id.***, ¶¶35, 37. The court also noted the officers were able to corroborate one aspect of the anonymous tip, that the exterior door of the residence was standing open when they arrived. ***Id.***, ¶37.

¶34 Unlike the officers in ***Pinkard***, Schultz and Neely were unable to corroborate any of the information provided by Durham's neighbor before they entered Durham's residence. In addition, a report of yelling, banging, and a shaking wall in a neighboring residence is far less suggestive of anyone being in need of assistance than the anonymous tip in ***Pinkard***, which reported the presence of two apparently sleeping individuals in a room with cocaine and other drug paraphernalia, inside a residence whose exterior door was ajar. *See* ***id.***, ¶2.

¶35 Our supreme court's recent decision in ***State v. Matalonis***, 2016 WI 7, 366 Wis. 2d 443, 875 N.W.2d 567, is also distinguishable. In ***Matalonis***, the officers were confronted with an injured individual who reported having been battered by multiple people. ***Id.***, ¶4. They followed a blood trail to a nearby residence. ***Id.***, ¶¶5-7. They heard loud bangs coming from inside that home. ***Id.***, ¶7. When Matalonis opened the door, he was shirtless and out of breath, and police observed additional blood inside. ***Id.***, ¶9.

¶36 The officers subsequently searched the residence "to make sure that no one else was inside the house or even injured in the house that needed medical attention." ***Id.***, ¶11. During that search, they found additional blood in the living room, kitchen, and on the stairs leading to the upper floor. ***Id.***, ¶12. Upstairs, one of the officers found blood spatters on a locked door. ***Id.***, ¶13. The officer later entered the locked room and found a large marijuana plant. ***Id.***, ¶19. On appeal,

our supreme court concluded the search of Matalonis' residence, including the search of the locked room, was permissible under the community caretaker exception to the warrant requirement. ***Id.***, ¶67. These circumstances are a far cry from those of the instant case, where the only information the officers had before entering Durham's residence was an uncorroborated report of yelling, banging, and a shaking wall.

¶37 Even assuming for argument's sake the officers in this case were acting pursuant to a bona fide community caretaker function when they entered Durham's residence, the public interest in exercising that function did not outweigh the intrusion upon Durham's privacy. *See* ***Pinkard***, 327 Wis. 2d 346, ¶29. Under this third step of the community caretaker analysis, the State must demonstrate that the officers exercised their community caretaker function reasonably. ***Matalonis***, 366 Wis. 2d 443, ¶58. To determine whether the State has met its burden, we must consider:

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

Kramer, 315 Wis. 2d 414, ¶41 (quoting ***State v. Kelsey C.R.***, 2001 WI 54, ¶36, 243 Wis. 2d 422, 626 N.W.2d 777).

¶38 With respect to the first factor, the public certainly has an interest in police ensuring the well-being of individuals who are involved in domestic disturbances. However, in this case, there was little evidence to support a belief that anyone in Durham's residence was in danger. While Durham's neighbor reported observing yelling, banging, and a shaking wall, and while dispatch

characterized the incident as a "possible domestic incident," nothing the officers observed when they arrived at the scene corroborated the belief that a domestic disturbance had occurred or was occurring, much less that someone inside the residence was injured.

¶39 The second factor—the time and location of the search, and the degree of overt authority and force displayed—also weighs against a conclusion that the officers in this case reasonably exercised their community caretaker function. The officers entered Durham's residence in the evening. Although it was dark inside, they did not turn on any lights. They did not call out to determine if anyone was hurt or needed help. Instead, they immediately began climbing the stairs, with their weapons drawn. When Durham, whom they had no basis to conclude was not a resident of the home, refused to comply with their command to show his hands, they used a Taser to obtain his compliance. The degree of overt authority and force displayed by the officers was considerable.

¶40 The third factor we must consider is whether an automobile was involved. The police conduct here involved a home, not an automobile.

¶41 Turning to the fourth and final factor, we must consider the availability, feasibility, and effectiveness of alternatives to the warrantless entry. Here, there were several feasible alternatives available to the officers when they arrived at Durham's residence, which would have effectively permitted them to verify whether there was anyone in the residence, and whether a person was in danger. They could have called the residence to determine whether anyone was inside. They could have contacted Durham's neighbor to determine whether she had heard any additional noises since her initial call to police and how many voices she heard. They could have waited a few minutes and knocked again.

They could have turned on their squad cars' sirens or lights in attempt to make their presence known to anyone inside the residence. They could have applied for a warrant, while continuing to watch the residence for any indications of a disturbance. The officers failed to take any of these steps, choosing instead to enter the home without a warrant immediately after arriving.

¶42 On these facts, even if the officers were acting pursuant to a bona fide community caretaker function when they entered Durham's garage, and then residence, their exercise of that function was not reasonable. *See* ***Matalonis***, 366 Wis. 2d 443, ¶58. Accordingly, the circuit court erred by determining the officers' conduct was permissible under the community caretaker exception to the warrant requirement.

B. Exigent circumstances exception

¶43 The circuit court also concluded the officers' warrantless entry into Durham's residence was justified by the exigent circumstances exception. The exigent circumstances exception applies when the State can demonstrate "both probable cause and exigent circumstances that overcome the individual's right to be free from government interference." ***State v. Hughes***, 2000 WI 24, ¶¶17-18, 233 Wis. 2d 280, 607 N.W.2d 621. As relevant here, exigent circumstances may exist when there is a threat to the safety of a suspect or others. *See* ***State v. Richter***, 2000 WI 58, ¶29, 235 Wis. 2d 524, 612 N.W.2d 29. When determining whether exigent circumstances exist, we apply an objective test, considering whether a police officer under the circumstances known to the officer at the time of entry could reasonably believe delay in procuring a warrant would gravely endanger life. ***Id.***, ¶30.

¶44 At the outset, we observe the circuit court did not apply the correct legal standard when concluding the exigent circumstances exception applied. The court stated that, based on the facts known to Schultz and Neely, it was "reasonable to believe that someone inside the residence was in danger." The court did not determine whether an officer could reasonably conclude delay in procuring a warrant would gravely endanger the life of anyone inside the residence. *See* ***id.***

¶45 Applying the correct standard, under the facts known to Schultz and Neely at the time they entered Durham's residence, a reasonable officer could not conclude anyone inside the residence was in grave danger or that delay in procuring a warrant would cause such danger. Despite a report from a neighbor of yelling, banging, and a shaking wall, and dispatch's characterization of the incident as a possible domestic disturbance, there was no report that anyone inside Durham's residence had been hurt or was in danger, and the officers could not reasonably draw either of those conclusions based on the information provided. Further, when they arrived at Durham's residence, neither Schultz nor Neely heard any yelling or banging to corroborate the neighbor's report, nor did they hear any cries for help or observe anything else to indicate that anyone inside the residence was in danger or in need of assistance. In addition, while the circuit court stated the officers knew there were at least two people in the residence, that finding is clearly erroneous. None of the evidence at the suppression hearing suggested the officers were aware there were two people in the residence. At most, the officers could have inferred that at least one person, or possibly two people, were inside,

based on the fact there were lights on in the upper floor and the neighbor's report of yelling and banging.[6]

¶46 The State argues this case is analogous to ***State v. Mielke***, 2002 WI App 251, 257 Wis. 2d 876, 653 N.W.2d 316. However, the circumstances encountered by the officers in this case are much different from the facts presented in ***Mielke***. In ***Mielke***, there was a report the defendant had hit a woman in their shared home and she was spitting blood. ***Id.***, ¶2. One of the officers had responded to previous domestic violence calls at the defendant's residence. ***Id.*** The officers made contact with the woman reported to be the victim of the domestic violence, and they observed she was crying, shaking, and cowering in a corner. ***Id.***, ¶3. Nothing similar occurred here. The officers here had no reason to believe a delay in procuring a warrant for entry into Durham's home would gravely endanger life. Accordingly, ***Mielke*** does not compel a conclusion that the exigent circumstances exception applies in this case.

By the Court.—Judgment reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[6] In addition, we observe the State does not argue, and the circuit court did not conclude, that the warrantless entry into Durham's residence was supported by probable cause. Probable cause to search exists when there is a fair probability evidence of a crime will be found in a particular place. ***State v. Hughes***, 2000 WI 24, ¶21, 233 Wis. 2d 280, 607 N.W.2d 621. Again, Schultz and Neely were dispatched to Durham's residence in response to a possible domestic incident, based on a neighbor's report of yelling, banging, and a shaking wall. They were not able to corroborate that report upon their arrival. This set of circumstances does not constitute a fair probability that evidence of a crime would be found inside the residence.