COURT OF APPEALS
DECISION
DATED AND FILED

June 28, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1322-CR **Cir. Ct. No. 2013CF4034**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TORY C. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 CURLEY, P.J. Appellant Tory Johnson was convicted, after a jury trial, of causing substantial bodily harm to a police officer while resisting the

officer, contrary to WIS. STAT. §§ 946.41(1), (2r) (2013-14).[1] On appeal, Johnson argues that the evidence was insufficient to establish that he resisted the officer because: (1) there is no evidence of physical resistance to the stop or questioning; (2) the officers were acting without lawful authority; and (3) the officers did not have probable cause. Johnson also argues that the jury instructions were erroneous and justice has miscarried because the "Legal Issue" jury instruction misstated the law and because the State was relieved of its burden of proof regarding the self-defense instruction. For the reasons discussed, we affirm.

BACKGROUND

¶2 On August 26, 2013, Milwaukee police officers Dwain Monteilh and Roy Horn were on patrol in the 2800 block of West Auer Avenue in Milwaukee, a high crime area. While driving west, they observed a white Saturn without a front license plate traveling in the opposite direction. The officers also observed that neither the driver, later identified as Tory Johnson, nor the passenger, later identified as K.J., appeared to be wearing seatbelts. At trial, Monteilh, who was driving the marked squad car at the time, testified that he and his partner decided to pull the Saturn over for the traffic violations and that rather than stopping in the middle of the street, he continued to the intersection of 29th and Auer and made a u-turn for the purpose of stopping the vehicle. Monteilh further testified that while he was doing so, he observed the Saturn quickly pull over near 2815 West Auer Avenue.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶3 Monteilh parked his squad car behind the Saturn and observed that it was improperly parked more than eighteen inches from the curb and was too close to the alley. By the time he parked behind the Saturn, Johnson and K.J. had already exited the Saturn and walked to the front porch of the house near where Johnson had parked. The porch was inside a fenced front yard.

¶4 Both Monteilh and Horn testified extensively at trial as to what occurred when they made contact with Johnson and K.J. After exiting their squad car, Monteilh and Horn approached the fence and asked Johnson and K.J. to return to the street and explained that they wanted to discuss the parking and other observed traffic issues. Monteilh testified that when they did not comply, the officers entered the yard and approached the front porch where Johnson and K.J. were standing and again asked them to come down off the porch and for identification. Monteilh explained that they needed Johnson's identification for the parking and traffic issues.

¶5 When Johnson continued to refuse to come off the porch or to provide identification, Monteilh approached Johnson and placed him in an "escort hold"—which Monteilh described as holding onto Johnson's right wrist and upper arm—and attempted to move Johnson from the porch to the street.[2] While escorting Johnson to the street to conduct the traffic stop, Monteilh felt Johnson attempt to pull away, and a struggle between Monteilh and Johnson ensued. Monteilh explained that he tried to handcuff Johnson when he continued to struggle, that both he and Johnson ended up on the ground, and that Johnson ended up on top of him. During the struggle, Monteilh believed he felt Johnson reach for

[2] Officer Horn likewise escorted K.J. from the porch at that time.

his gun. Monteilh also testified that Johnson punched him in the face multiple times and that Johnson kicked him in the right eye.

¶6 While Monteilh struggled with Johnson, Horn was engaged in a struggle with K.J. At some point during the struggle, Horn was able to radio for back-up, and shortly thereafter, multiple officers arrived on the scene and took Johnson into custody. As a result of the struggle with Johnson, Monteilh sustained a laceration above his eyebrow that required stitches and an orbital floor fracture of his right eye. From the time the officers first made contact with Johnson to the time the back-up officers arrived lasted no more than a few minutes.

¶7 Johnson's trial testimony regarding the interaction differed from the officers' testimony. Specifically, Johnson testified that after Monteilh got out of his squad car, he asked Johnson questions about his license plates and improper parking and that he responded to some of those questions. Johnson stated that the officers did not come up to the porch and that they stayed by the fence. Johnson further testified that he and the officers began "debating back and forth" and that he told the officers he "ha[s] rights, and [he] know[s] the law." He then testified that he and K.J. stepped down from the porch when asked, that they walked down to the fence where the officers were standing, and that he was standing at the front entrance of the gate when the officers first had physical contact with him. Johnson testified that Monteilh then grabbed his arm and slammed him toward the fence, and he also described the physical altercation between himself and Monteilh—including that he hit Monteilh in the face.

¶8 Johnson was ultimately arrested and charged with resisting an officer causing substantial bodily harm to an officer, battery to a law enforcement officer, and attempt to disarm a peace officer. The jury acquitted Johnson of the latter two

charges but found him guilty of resisting an officer causing bodily harm to an officer contrary to WIS. STAT. §§ 946.41(1) and (2r). Johnson filed a postconviction motion arguing his conviction should be set aside because: (1) he was illegally stopped and arrested without probable cause of a crime; (2) the seizure did not occur in a "public place"; (3) the trial court erroneously denied his motion to dismiss the resisting an officer charge based on lack of lawful authority; (4) there was insufficient evidence to establish "lawful authority" and "lawful arrest"; (5) the jury instructions were erroneous; and (6) he received ineffective assistance of counsel to the extent that trial counsel failed to raise certain issues before the trial court. The trial court denied Johnson's motion, and he now appeals from the judgment of conviction and the order denying postconviction relief.

ANALYSIS

¶9 Johnson challenges his conviction on two grounds: (1) sufficiency of the evidence; and (2) jury instruction errors. He argues that the evidence was insufficient to establish that he physically resisted the "stop or questioning," that the investigatory traffic stop violated WIS. STAT. § 968.24 because the stop did not occur in a "public place," and that there was no probable cause. Stated differently, we view Johnson's sufficiency of the evidence argument as one that his constitutional rights were violated because the traffic stop was not lawful and the officers therefore were not acting with lawful authority. As to his erroneous jury instruction claim, Johnson argues that the "Legal Issue" instruction misstated the law and that the State was relieved of its burden of proving that he had been lawfully arrested because the self-defense instruction failed to define the term "lawful arrest." We begin by addressing Johnson's challenges to the sufficiency of the evidence.

I. The evidence was sufficient to establish Johnson resisted an officer causing substantial bodily harm.

¶10 Johnson was convicted of resisting an officer causing substantial bodily harm contrary to WIS. STAT. §§ 946.41(1) and (2r). To establish that an individual has resisted an officer, the State must prove: (1) the defendant resisted an officer; (2) the officer was engaging in an act in an official capacity; (3) the officer was acting with lawful authority; and (4) the defendant knew the officer was an officer acting in an official capacity and with lawful authority and that the defendant knew his conduct would resist the officer. *See* § 946.41(1); *see also* WIS JI—CRIMINAL 1765. The elements Johnson challenges are that the officers were not acting with lawful authority and that he did not resist an officer. He does not challenge the finding that he caused substantial bodily harm to the officer.

¶11 The standard for reviewing the sufficiency of the evidence "is whether the evidence was sufficient to prove the defendant's guilt beyond a reasonable doubt." ***State v. Sharp***, 180 Wis. 2d 640, 658-59, 511 N.W.2d 316 (Ct. App. 1993). If there is any possibility the trier of fact "could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt," we may not overturn the verdict even if we believe "that the trier of fact should not have found guilt based on the evidence before it." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). The jury determines the credibility of witnesses and the weight of the evidence, and we will not substitute our judgment for the trier of fact's "unless the evidence supporting the jury's verdict conflicts with nature or the fully established facts, or unless the testimony supporting and essential to the verdict is inherently and patently incredible." ***Sharp***, 180 Wis. 2d at 659; *see also* ***Poellinger***, 153 Wis. 2d at 507 ("[A]ppellate court may not substitute its judgment for that of the trier of fact unless the

evidence, viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.”). This standard applies regardless of whether the evidence is direct or circumstantial. *See* ***Poellinger***, 153 Wis. 2d at 501.

¶12 Moreover, on review of the sufficiency of circumstantial evidence to support a conviction, an appellate court decides only “whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence to sustain the verdict rendered,” and the appellate court “need not concern itself in any way with evidence which might support other theories of the crime.” ***Id.*** at 507-508.

¶13 Because Johnson repeatedly argues that there was *never* a lawful stop and that the officers were therefore not acting with lawful authority, we begin by examining whether the officers were justified in conducting the traffic stop and placing Johnson in an escort hold, and then address whether the stop occurred in a private or public place. We conclude this section by addressing whether there was sufficient evidence that Johnson physically resisted an officer within the scope of WIS. STAT. § 946.41(1).

A. The officers were acting with lawful authority because the stop was justified in its inception and because the officers’ actions were reasonably related to the purpose of the stop.

¶14 “[W]hether a traffic stop is reasonable is a question of constitutional fact.” ***State v. Post***, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. “A question of constitutional fact is a mixed question of law and fact to which we apply a two-step standard of review.” ***Id.*** “We review the [trial] court’s findings of historical fact under the clearly erroneous standard, and we review independently the application of those facts to constitutional principles.” ***Id.***

¶15 The Fourth Amendment of the United States Constitution and article I, sec. 11 of the Wisconsin Constitution guarantee citizens the right to be free from unreasonable searches and seizures. "The temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of the Fourth Amendment." ***State v. Popke***, 2009 WI 37, ¶11, 317 Wis. 2d 118, 765 N.W.2d 569 (citation and one set of quotations omitted). Whether a seizure is reasonable within the context of a traffic stop depends on whether: (1) "the seizure was justified at its inception"; and (2) the "officer's action was 'reasonably related in scope to the circumstances which justified the interference in the first place.'" *See* ***State v. Arias***, 2008 WI 84, ¶¶29-30, 311 Wis. 2d 358, 752 N.W.2d 748 (citation omitted).

¶16 A police officer may stop a vehicle when the officer reasonably believes the driver is violating a traffic law. *See* ***State v. Hogan***, 2015 WI 76, ¶34, 364 Wis. 2d 167, 868 N.W.2d 124. Our supreme court recently concluded that "reasonable suspicion that a traffic law has been or is being violated is sufficient to justify all traffic stops." ***State v. Houghton***, 2015 WI 79, ¶30, 364 Wis. 2d 234, 868 N.W.2d 143. Reasonable suspicion requires that "[t]he officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop." ***Popke***, 317 Wis. 2d 118, ¶23 (two sets of quotation marks and citation omitted).

¶17 A vehicle registered in Wisconsin is generally required to have a license plate affixed to the front of the vehicle, *see* WIS. STAT. §§ 341.12(1), 341.15(1), and another traffic regulation, WIS. STAT. § 347.48(2m)(b), requires use of seat belts. Both Monteilh and Horn testified that while on patrol in a marked squad car, they observed a white Saturn without a front license plate

traveling in the opposite direction and that neither the driver, later identified as Johnson, nor the passenger, were wearing seatbelts.[3] The officers also observed additional parking violations—parking more than eighteen inches from the curb and parking less than four feet from an alley entrance—after parking behind the vehicle. *See* WIS. STAT. §§ 346.53(4), 346.54(1)(d) and (2), and 343.01(2)(cg). Based on these facts, the officers had reasonable suspicion that traffic and parking violations had occurred, and a traffic stop was therefore justified.

¶18 Johnson repeatedly argues there was never a lawful stop; however, we also understand him to be arguing, at least in part, that the traffic stop concluded when he refused to provide identification and that he was therefore no longer "stopped" but rather under arrest at the time Monteilh thereafter placed him in an escort hold. Thus, we consider whether the traffic stop had concluded and whether the officer's actions—placing Johnson in an escort hold and leading him toward the street after he refused to comply with the officers' requests during the stop—were reasonably related to the circumstances justifying the traffic stop. *See* ***Arias***, 311 Wis. 2d 378, ¶30. We conclude that the traffic stop had not concluded and that the officers' actions were reasonably related to the purpose of the stop.

¶19 The facts in this case are somewhat atypical because before the officers were able to pull Johnson's vehicle over, Johnson parked, exited the vehicle, and walked onto a front porch attached to a nearby house.[4] The officers

[3] Although Monteilh testified that it later became apparent that Johnson's vehicle had a temporary license plate affixed to its rear and that a front license plate was therefore not required, *see* WIS. ADMIN. CODE § Trans 132.04(1)(a) (2012), we need not determine the impact of the latter observation because the officers observed additional violations.

[4] It is unclear whether the officers ever activated the squad car's flashing lights.

therefore initiated the traffic stop by walking up to the fence in front of the porch Johnson was standing on and asked him to come down to discuss the traffic violations.[5] He refused, and the officers walked to the porch and instructed him to return to his vehicle. Johnson again refused, and he also refused to provide identification upon request. Monteilh then placed him in an escort hold. Monteilh's testimony regarding why he placed Johnson in the escort hold was conflicting—he stated both that he believed he could arrest Johnson for obstructing at that point and also that he placed Johnson in the escort hold to direct him back to his car to continue the traffic stop and because the officers knew nothing about potential occupants of the home the porch was attached to, which posed a potential safety concern.

¶20 Our supreme court has held that "a traffic stop ends when a reasonable person, under the totality of the circumstances, would feel free to leave." ***State v. Hogan***, 2015 WI 76, ¶63, 364 Wis. 2d 167, 868 N.W.2d 124. While there is no bright-line rule as to when a reasonable driver would feel free to leave, "it is not uncommon for officers to tell drivers they are 'free to leave,' may be 'on their way,' or to 'have a nice day' at the conclusion of a traffic stop." ***Id.*** Here, the officers informed Johnson of the reasons they wished to speak with him and asked him to return to his vehicle. Johnson refused. The officers then approached the porch and renewed their request. Johnson refused again, and he also refused to provide identification. Johnson suggests the traffic stop concluded

[5] While Johnson argues on appeal that the stop occurred in a private location—the front porch of his sister's home—at trial, he testified that he *did* leave the porch upon request, that the officers *did not* come onto the porch, and that the first physical interaction between Johnson and Officer Monteilh occurred at the fence. For the purpose of Johnson's appeal, we assume that the initial physical interaction and escort hold occurred on or near the front porch rather than at the fence along the sidewalk.

at this point, arguing he was not required to provide identification. However, under the totality of the circumstances, a reasonable person would not have felt that the traffic stop had concluded at that point.

¶21 When Johnson refused to return to his vehicle or provide identification, Monteilh placed him in an escort hold and led him from the porch back toward the street. While the escort hold amounted to a seizure, *see* ***State v. Williams***, 2002 WI 94, ¶20, 255 Wis. 2d 1, 646 N.W.2d 834 ("[t]he general rule is that a seizure has occurred when an officer, 'by means of physical force or show of authority, has in some way restrained the liberty of a citizen'" (citation omitted)), an officer may physically restrain an individual to continue an investigation, *see* ***State v. Goyer***, 157 Wis. 2d 532, 538, 460 N.W.2d 424 (Ct. App. 1990). An officer may also transport a suspect to the scene of a traffic violation during the course of the temporary investigative stop. *See* ***State v. Quartana***, 213 Wis. 2d 440, 448-49, 570 N.W.2d 618 (Ct. App. 1997). Transporting Johnson back to his vehicle during the course of the temporary investigative stop is exactly what Monteilh sought to do when he placed Johnson in an escort hold and led him off the porch toward his car.

¶22 In ***Arias***, our supreme court stated:

> when a seizure that was lawful at its inception and does not encompass an arrest is reviewed, the scope of the continued investigative detention is examined to determine whether it lasted 'no longer than is necessary to effectuate the purpose of the stop' … and whether the investigative means used in the continued seizure are 'the least intrusive means reasonably available to verify or dispel the officer's suspicion.'"

Id., 311 Wis. 2d 379, ¶32 (citation and two sets of quotation marks omitted). Based on the totality of the facts and circumstances, Monteilh's actions were

reasonably related to the traffic stop, and the continued detention was minimally intrusive and lasted for a short period of time. The questions the officers asked of Johnson—that he return to the vehicle to continue the traffic stop and for identification—were directly related to the stop, and it is well-recognized that an officer conducting a traffic stop to investigate a violation is authorized to request identification. *See* WIS. STAT. §§ 968.24, 343.18(1); *see also* ***State v. Griffith***, 2000 WI 72, ¶¶35, 46, 236 Wis. 2d 48, 613 N.W.2d 72. A request for identification is reasonably related to the purpose of a traffic stop, and no further justification is required. *See* ***State v. Gammons***, 2001 WI App 36, ¶13, 241 Wis. 2d 296, 625 N.W.2d 623; *see also* ***Griffith***, 236 Wis. 2d 48, ¶45. Moreover, WIS. STAT. § 343.18(1) requires every licensee to "have his or her license document in his or her immediate possession at all times when operating a motor vehicle *and shall display the license document upon demand from any … traffic officer*." (Emphasis added.) *See also* ***State v. Williams***, 2002 WI App 306, ¶20, 258 Wis. 2d 395, 655 N.W.2d 462.

¶23 Accordingly, we conclude that the traffic stop did not conclude when Johnson refused to provide his identification, that the escort hold occurred during the course of the investigatory stop, and that the officers' actions were reasonably related to the traffic stop and did not violate constitutional requirements. The traffic stop was therefore lawful.

B. The stop did not violate WIS. STAT. § 968.24.

¶24 We must also consider the location of the stop and seizure in this case, as Johnson argues that the officers were not acting with lawful authority within the meaning of WIS. STAT. §§ 946.41(1) and (2r) because the stop occurred while he was standing on the front porch of a house—a place he argues is not a

public location. Specifically, he argues that the stop did not comply with WIS. STAT. § 968.24,[6] which allows for temporary questioning without arrest in a public location, and also that the officers trespassed by entering the yard. We disagree.

¶25 Johnson's argument relies primarily on the requirement in WIS. STAT. § 968.24 that temporary investigative stops occur in a public location. He also states that the officers trespassed when they entered the gated front yard—the fence was described as a metal chain-link fence—and approached the front porch without permission; however, Johnson does little to develop that aspect of his argument.[7] Nevertheless, because the Fourth Amendment and Wisconsin Constitution guard against unreasonable searches and seizures, we comment on Fourth Amendment jurisprudence and its implications on this case, as resisting an officer requires that the officer was acting with lawful authority.

¶26 Fourth Amendment jurisprudence "has evolved into two seemingly different, but somewhat interrelated, methods of identifying protectable interests" relating to the home. *See* ***Powell v. State of Florida***, 120 So. 3d 577, 582 (Fla. Dist. Ct. App. 2013). One method of evaluation focuses on a person's expectation

[6] WISCONSIN STAT. § 968.24 provides:

> After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

[7] As previously pointed out, Johnson actually testified at trial that he did leave the porch upon request, that he walked down to the fence surrounding the yard to talk with the officers, and that the officers did not approach the porch but rather stayed by the fence.

of privacy. *See* ***Katz v. United States***, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). "Justice Harlan's concurring opinion [in ***Katz***] stated the test in its most familiar form: first that a person [has] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize." *See* ***Powell***, 120 So. 3d at 582 (citing ***Katz***, 389 U.S. at 361 (Harlan, J., concurring)) (quotation marks omitted). The other method is known as the intrusion or trespass test, and it "focuses on whether government agents engaged in an 'unauthorized physical penetration' into a constitutionally protected area." *See* ***Powell***, 120 So. 3d at 582 (collecting cases) (citation omitted). A Fourth Amendment violation may be founded upon either method. *See* ***Florida v. Jardines***, 133 S. Ct. 1409, 1417 (2013).

¶27 Applying the intrusion or trespass standard, we conclude that the officers did not violate Johnson's constitutional rights when they entered the front yard and approached the front porch of the home to conduct the traffic stop. Although the front porch of a home "is the classic exemplar of an area adjacent to the home and 'to which the activity of home life extends,'" *see* ***id.*** at 1415 (citation omitted), the threshold of a house, such as a porch, may nevertheless be a "public" place. *See* ***United States v. Santana***, 427 U.S. 38, 42 (1976); *cf.* ***State v. Larson***, 2003 WI App 150, ¶14, 266 Wis. 2d 236, 668 N.W.2d 338 (defendant, who had been inside his apartment, had not "exposed himself to public view and relinquished his expectation of privacy"). Thus, even though the law may treat a front porch as part of a home's curtilage, societal norms may imply that there is a license to approach the home "'justifying ingress to the home by solicitors, hawkers and peddlers of all kinds.'" *See* ***Jardines***, 133 S. Ct. at 1415-16 (citation omitted). "Thus, 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.*** (citation omitted).

¶28 Based on the foregoing, it is apparent that an officer may enter the front porch area of a home without a warrant for the purpose of asking questions without running afoul of the Fourth Amendment, *see* ***id.***, and, moreover, an officer may take custody of a person standing there if there is legal justification for the detention, *see* ***Santana***, 427 U.S. at 42-43 ("a suspect may not defeat an arrest which has been set in motion in a public place … by the expedient of escaping to a private place."). Here, the officers testified they intended to pull Johnson over on a public street to conduct a traffic stop immediately after observing traffic violations but that Johnson parked and walked onto a front porch before they could do so. Johnson had not retreated into the house, and the officers were justified in engaging Johnson while he was on the front porch.

¶29 Johnson relies on ***State v. Popp***, 2014 WI App 100, 357 Wis. 2d 696, 855 N.W.2d 471, in support of his argument that the front porch was a private location. ***Popp*** is distinguishable. In ***Popp***, we concluded that officers "trespassed on [Popp's] property when they, without permission, went up to the *back steps and onto the porch* … to peer into the window." *See* ***id.***, ¶20 (emphasis added). In reaching our conclusion, we pointed out that "this was not a situation where the officers went to the areas in question to simply knock on the door and ask a few questions." *See* ***id.*** Here, the officers did not walk around the house, go into the backyard, or peer into the windows. Rather, the officers observed potential traffic violations, decided to conduct a traffic stop, and approached the front porch—where Johnson was undisputedly visible to the public at large—to conduct the stop and ask Johnson questions.

¶30 To the extent Johnson implies he had a reasonable expectation of privacy on the front porch of a home where he has not claimed he resided, we reject his argument. *See* ***Katz***, 389 U.S. at 361 (Harlan, J., concurring) (the reasonable expectation test looks first to whether an individual has a subjective expectation of privacy and then to whether that expectation is one that society would recognize as reasonable). The party complaining that a seizure was unlawful carries the burden of establishing a reasonable, subjective expectation of privacy in the place where the seizure occurred and that the expectation was objectively reasonable. *See* ***State v. Earl***, 2009 WI App 99, ¶9, 320 Wis. 2d 639, 770 N.W.2d 775; *see also* ***State v. Bruski***, 2007 WI 25, ¶¶22-23, 299 Wis. 2d 177, 727 N.W.2d 503. Johnson has presented no such argument or evidence. Even assuming Johnson had an actual subjective expectation of privacy while standing on the front porch, we are not convinced such expectation was reasonable in this case. *See* ***Jardines***, 133 S. Ct. at 1416 (officers may approach the front door of a home without a warrant). Accordingly, there was no violation of the Fourth Amendment or WIS. STAT. § 968.24 when the officers approached the porch to conduct and continue the investigative stop.

¶31 For all of these reasons, we conclude there is sufficient evidence establishing that Officer Monteilh was acting with lawful authority.

C. There is sufficient evidence in the record that Johnson physically resisted an officer.

¶32 Johnson next argues there is insufficient evidence to establish he physically resisted an officer because "he was tried for resisting the officer's attempt to stop and question him" and "was not on trial for resisting an escort hold or resisting an arrest." We do not determine whether any such distinction is

accurate or relevant here because, as explained, the escort hold occurred during the course of—and was part of—the investigative stop.

¶33 "To resist an officer means to oppose the officer by force or threat of force," and "resisting" is "interpreted to require physical interference." WIS JI—CRIMINAL 1765. Monteilh testified as to Johnson's conduct after he placed Johnson in the escort hold, and he explained that he sustained serious injuries as a result of Johnson having punched and kicked him. Horn's testimony likewise described the physical struggle between Johnson and Monteilh. Johnson himself testified that he punched Monteilh in the face. Contrary to Johnson's belief, there is ample evidence in the record that he physically resisted Monteilh by first attempting to pull away from the escort hold and then punching and kicking him while Monteilh was attempting to investigate the alleged traffic and parking violations.

¶34 Under these circumstances, we conclude there is sufficient evidence in the record that Johnson physically resisted an officer during the course of the investigatory traffic stop, which included the escort hold.

II. The trial court did not commit reversible error in instructing the jury.

¶35 Johnson next raises multiple issues related to the jury instructions. First, he argues that the investigatory stop instruction misstated the law because it instructed the jury that an individual can be detained for the purpose of obtaining identification after the individual has refused to provide identification. Second, he argues the State was relieved of its burden of proof because the self-defense jury instruction was incomplete because it failed to define the term "lawful arrest."

¶36 The State argues that Johnson forfeited his right to complain that the jury was not instructed that an investigative stop must occur in a public location and that he also forfeited his right to complain that the self-defense instruction did not include the definition of "lawful arrest." Johnson fails to respond to the State's forfeiture arguments in a meaningful manner. Because Johnson did not refute the State's forfeiture argument regarding the self-defense instruction, we deem that argument admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted deemed admitted). Accordingly, we address only Johnson's argument that the "Legal Issue" incorrectly instructed the jury.

¶37 A trial court has broad discretion in determining the jury instructions to give, and it properly exercises discretion when it "fully and fairly informs the jury of the law that applies to the charges for which a defendant is tried." ***State v. Ferguson***, 2009 WI 50, ¶9, 317 Wis. 2d 586, 767 N.W.2d 187. Whether an instruction fully and fairly informs the jury of the applicable law is a question of law we review *de novo*. *See* ***id.***

¶38 Where a jury instruction does not accurately state the controlling law, we consider whether the error was harmless. *See* ***State v. Williams***, 2015 WI 75, ¶34, 364 Wis. 2d 126, 867 N.W.2d 736. Our harmless error analysis looks to the totality of the circumstances and "whether it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***State v. Beamon***, 2013 WI 47, ¶27, 347 Wis. 2d 559, 830 N.W.2d 681 (citation and one set of quotations omitted). "[W]e will not overturn the jury verdict 'unless the evidence, viewed most favorably to sustaining 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.'" ***Williams***, 364 Wis. 2d 126, ¶34 (citation and one set of quotations omitted). The party benefiting from the error carries the burden of establishing that the error was harmless. *See* ***State v. Stuart***, 2005 WI 47, ¶40, 279 Wis. 2d 659, 695 N.W.2d 259.

¶39 The trial court instructed the jury on the law for investigatory stops as follows:[8]

> Police officers may stop, detain and question a person when they reasonably believe that the person has committed a traffic violation, such as failure to wear [a] seatbelt. The police officers had the legal authority to request identification. If a person refuses to provide an identification, they can be detained to obtain the subject's identification.

Johnson primarily takes issue with the last sentence of that instruction—that a person may be detained to obtain identification if the person refuses to provide identification—and argues that that the instruction "very clearly … misstates the law" because, "[b]y omission, it permits a temporary stop anywhere … without regard for whether the location of the stop is public or private." He also argues that it "expands the provisions of the temporary stop to permit detention of an individual who refuses to provide identification" and that "[t]here is no such law."

¶40 We have already rejected Johnson's "private location" argument in this case. Accordingly, even assuming that the given instruction erroneously instructed the jury that a stop may occur in public *or* in private—or did not specifically state that a stop must occur in public—it would be of no consequence here and any error was therefore harmless.

[8] In his brief, Johnson refers to this instruction as the "Legal Issue" instruction.

¶41 There is also no question that the trial court properly instructed the jury that police officers have legal authority to request identification during the course of a traffic stop. WISCONSIN STAT. § 968.24 allows an officer to demand identification, and WIS. STAT. § 343.18(1) states that "[e]very licensee shall have his … license document in his … immediate possession at all times when operating a motor vehicle *and shall display the license document upon demand from any ... traffic officer.*" (Emphasis added.) *See also* ***State v. Black***, 2000 WI App 175, ¶¶14-15, 238 Wis. 2d 203, 617 N.W.2d 210.

¶42 We are left with the question of whether the trial court erroneously instructed the jury that "[i]f a person refuses to provide identification they can be detained to obtain the subject's identification." In ***Black***, we discussed our supreme court's decision in ***State v. Flynn***, 92 Wis. 2d 427, 285 N.W.2d 710 (1979), in determining whether, after receiving oral identification from a person, an officer may perform a limited search for identification documents, such as may be found in one's wallet, to confirm the person's identity. *See* ***Black***, 238 Wis. 2d 203, ¶1. We concluded that the "frisk for identification" under those circumstances was justified. *See* ***id.***

¶43 The circumstances here differ, as Johnson flat-out refused to provide identification. However, in ***Black***, we looked to the supreme court's statement in ***Flynn*** that "'unless the officer is entitled to at least ascertain the identity of the suspect, the right to stop him can serve no useful purpose at all.'" *See* ***Black***, 238 Wis. 2d 203, ¶14 (quoting ***Flynn***, 92 Wis. 2d at 442). We also noted the ***Flynn*** court's recognition that "police authority would be diminished where an officer had the right to request identification but the suspect could simply refuse without any detriment to the subject." *See* ***Black***, 238 Wis. 2d 203, ¶14. Thus, under

certain circumstances, an officer may be justified in detaining or searching an individual for identification during the course of a valid investigatory stop.

¶44 Here, Monteilh explained to Johnson that he and Horn had observed Johnson commit traffic and parking violations and that they wished to speak with him to discuss the violations. Johnson refused, and he also refused to provide identification after having been requested to do so. Not only did this thwart the officers' justified investigation of traffic and parking violations, it was also contrary to WIS. STAT. § 343.18(1), which required Johnson to provide his driver's license upon demand. *See* ***id.***; *see also* ***Williams***, 258 Wis. 2d 395, ¶¶20-22. Under these circumstances, we cannot conclude that the jury instruction "clearly … misstates the law."

¶45 Even if we were to conclude that the trial court's instruction was erroneous, any such error was harmless in this case because Johnson's refusal to provide identification was not the sole reason Monteilh placed him in an escort hold. Rather, Monteilh testified that he placed Johnson in an escort hold to lead him back to the street for the purpose of continuing the traffic stop, and as we have already explained, the officers were acting with lawful authority when they did so.

¶46 To the extent Johnson requests that we exercise our authority to grant a new trial pursuant to WIS. STAT. § 752.35, he does little more than cite the statute's directive that we may grant a discretionary reversal where the record shows the real controversy has not been tried. We do not address undeveloped arguments, *see* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992), and we decline to exercise our discretionary reversal authority in this case.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.