

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

August 7, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3453

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE INTEREST OF EVERETT O.,
A PERSON UNDER THE AGE OF 18:
STATE OF WISCONSIN,**

PETITIONER-RESPONDENT,

v.

EVERETT L.O.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
ROBERT DE CHAMBEAU, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

DEININGER, J.¹ Everett L.O. appeals an order adjudging him delinquent based on a jury verdict that he resisted an officer, contrary to

¹ This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS.

§ 946.41(1), STATS. He argues that the trial court erred by refusing to give an instruction regarding the right to resist an officer who uses unreasonable or excessive force. Everett L.O. also challenges the trial court's exclusion of a police training manual which was offered to show that the level of force used by the officer who arrested him was unreasonable. We conclude the trial court erred in instructing the jury, and, accordingly, reverse and remand for proceedings consistent with this opinion. In addition, we conclude that the trial court properly exercised its discretion in excluding the training manual.

BACKGROUND

On September 15, 1995, Madison Police Detective Steve Reinstra was on duty outside the Rollerdrome Skating Rink when a parent reported a disturbance inside the rink. Reinstra testified at trial that once inside the skating rink, he saw a teenage male whom he later identified as Everett L.O., "facing off" with the rink manager. Reinstra testified that he approached Everett L.O. to escort him outside, but as he reached for Everett L.O.'s arm, Everett L.O. pulled away. Reinstra testified that he then grabbed Everett L.O.'s arm and began guiding him to the exit. Reinstra stated that as they proceeded out the doors of the rink, he placed Everett L.O. in a "pain compliance hold," and, once outside the rink, told Everett L.O. that he was under arrest. Reinstra stated that Everett L.O. struggled with him, so he "took him down" to the ground by placing Everett L.O. on the ground face down, kneeling on his back, and attempting to handcuff him. Reinstra testified that at about this time a group of teenagers from the skating rink had gathered around him and attempted to pull him off Everett L.O. After dispersing the group of teenagers, he handcuffed Everett L.O. Additional facts will be discussed below.

ANALYSIS

a. Court's Instruction on Lawful Authority

Everett L.O. was charged with resisting an officer under § 946.41(1), STATS. The elements of resisting an officer are: 1) that the defendant resisted an officer; 2) that the officer was doing an act in an official capacity; 3) that the officer was doing an act with lawful authority; 4) that the defendant knew that the officer was acting in an official capacity and with lawful authority and that the defendant knew his conduct would resist the officer. *See* WIS J I—CRIMINAL 1765.

The trial court instructed the jury as follows:

The third element requires that the officer was acting with lawful authority. Police officers act with lawful authority if their acts are conducted in accordance with the law. In this case *it is alleged that Detective Reinstra was attempting to keep the peace, and subsequently, arrest Everett L.O.*

(Emphasis added). Everett L.O. requested the following addition to the element of lawful authority:

In this case, it is the theory of the defense that the arresting officer, Steve Reinstra, used an unreasonable amount of force during his initial contact with and subsequent arrest of Everett L.O. An essential element of the offense which the State is required to prove beyond a reasonable doubt is that Detective Reinstra was “acting with lawful authority”. An officer making an arrest may only use the amount of force reasonably necessary to take the person into custody. [*Graham v. Connor*, 109 S.Ct. 1865 (1985); *State v. Barrett*, 96 Wis.2d 174[, 180]-181 (1980).] An accused has a legal right to resist or obstruct an unlawful arrest. *State v. Reinwa[n]d*, 147 Wis.2d 192 (Ct. App. 1988). If you find from your review of the evidence that the amount of force used by [the] Detective

was unreasonable then he was not acting with “lawful authority” and Everett L.O. had the right to resist or obstruct the arrest.

Everett L.O. argues, citing *State v. Reinwand*, 147 Wis.2d 192, 433 N.W.2d 27 (Ct. App. 1988), that the trial court’s refusal of his proposed instruction deprived him of both due process, by relieving the State of its burden to prove the lawful authority element beyond a reasonable doubt, and the right to present an adequate defense. We conclude that the trial court’s instruction to the jury regarding lawful authority was in error and that, based on the evidence, Everett L.O. was entitled to an instruction discussing whether Reinstra used unreasonable force in arresting Everett L.O.

A defendant is entitled to an instruction on a theory of defense if, viewing the evidence in the most favorable light it will reasonably admit from the standpoint of the accused, the defense is supported by the evidence. *State v. Stoehr*, 134 Wis.2d 66, 87, 396 N.W.2d 177, 185 (1986). The appropriateness of giving a proposed instruction turns on a case-by-case review of the evidence so that a trial court may properly refuse a proposed instruction if unsupported by the evidence. *Id.*

Since Everett L.O.’s claim of error is dependent on the existence of evidence in the record to support a defense theory that excessive force was used in Everett L.O.’s arrest, we review the evidence offered at trial on the issue. R.N., a thirteen-year-old boy, testified that Everett L.O. was not involved in the original altercation which drew Reinstra’s attention. R.N. stated that when Reinstra asked Everett L.O. if the skating rink manager had asked him to leave and Everett L.O. replied “no, she didn’t tell me to leave,” Reinstra grabbed Everett L.O. and “put his arm behind his back.” R.N. also testified that after Reinstra had gotten

Everett L.O. outside the rink, Reinstra “started to force Everett down to the ground, to the grass” by “putting his knee in [Everett L.O.’s] back when he was forcing him down,” and that Everett L.O. “was crying during this time.”

Katherine Stewart, an adult woman, was at the rink to pick up her children. As she was leaving the rink in her car, she could see “the officer was dragging Everett down the street.” She stated that “Everett [was] with his hands behind his back and he was -- his face was forward and his legs were dragging behind him.” She circled around in front of the rink and parked her car. She testified that as she approached Reinstra and Everett L.O. she saw Everett L.O. “face down on the sidewalk” and “handcuffed” and noticed that Everett L.O. “was bleeding on his forehead ... [a]round his eyebrow.”

Detective Reinstra testified that when Everett L.O. tried to pull away from him inside the rink, he put Everett L.O. in a “pain compliance hold” by “grab[bing] hold of [Everett L.O.’s] left arm with my right hand and with my left hand used a pain compliance hold on [Everett L.O.’s] left wrist.” He then “took [Everett L.O.] down to the grassy area next to the sidewalk, between the sidewalk and building, and attempted to handcuff him at that point.” Reinstra also testified that “[a]fter [Everett L.O.] was handcuffed” he “put [his] knees in [Everett L.O.’s] back [and] also sat on him.” Everett L.O. did not testify.

In *Reinwand*, a police officer attempted to arrest Christopher Reinwand for violating a city fireworks ordinance. A struggle occurred as the police officer attempted to subdue Reinwand, and several members of Reinwand’s family attempted to pull the officer away from Reinwand. Reinwand was charged with battery to a police officer, and the family members were charged with resisting arrest. *Reinwand*, 147 Wis.2d at 197-98, 433 N.W.2d at 29. All

defendants requested a jury instruction on their right to resist an unlawful arrest. The trial court denied the request and instead instructed the jury that “[an] officer making an arrest is doing an act ... with lawful authority” and that if they found that the officer “was making an arrest,” they should find that he was acting within his lawful authority. *Id.* at 195 n.1, 433 N.W.2d at 28. We concluded the instruction was “based on an erroneous view of the law and ... deprived the Reinwands of an instruction on the theory of their defense and relieved the State of its obligation to prove every element of the crime beyond a reasonable doubt.” *Id.*

As in *Reinwand*, the instruction given by the trial court essentially required the jury to find that the State had proved this element of lawful authority by showing simply that Reinstra was attempting to make an arrest. The State’s burden was to show beyond a reasonable doubt that Reinstra was acting with “lawful authority,” that is, that “the officer’s actions are conducted in accordance with the law.” *See State v. Barrett*, 96 Wis.2d 174, 181, 291 N.W.2d 498, 501 (1980). An officer does not act with lawful authority simply by making an arrest. *See id.* We conclude that under *Reinwand*, the trial court erroneously relieved the State of its obligation to prove each element beyond a reasonable doubt.²

As we have noted, Everett L.O. argues not only that the instruction given on lawful authority was erroneous, but also that the court should have given the instruction he requested on the issue. We commented in *Reinwand* that there has been a general trend in other jurisdictions to limit the common-law right to

² We do not conclude that the State must show beyond a reasonable doubt the absence of each possible way in which an arrest may be unlawful; we merely hold that where, as we discuss below, the evidence raises an arguable claim that the officer may have acted without lawful authority, the State must show that the officer’s actions were, in fact, in accordance with the law.

resist an unlawful arrest. See *Reinwand*, 147 Wis.2d at 199-200, 433 N.W.2d at 30. In *Reinwand*, however, we concluded that “we need not decide” whether such a right existed in Wisconsin, and Wisconsin courts have neither explicitly accepted nor rejected a common-law right to resist an officer making an unlawful arrest.³

Here, however, Everett L.O.’s argument is that he was entitled to resist an officer because the officer used unreasonable or excessive force, not that he was entitled to resist Reinstra merely because the arrest was unlawful. In *Reinwand*, we made the following distinction between resisting an officer who is making an unlawful arrest and resisting an officer who is using unreasonable force:

[T]he rule permitting reasonable resistance to excessive force of the officer, whether the arrest is lawful or unlawful, is designed to protect a person’s bodily integrity and health and so permits resort to self-defense. Simply stated, the law recognizes that liberty can be restored through legal processes but life or limb cannot be repaired in a courtroom. And so it holds that *the reason for outlawing resistance to an unlawful arrest and requiring disputes over its legality to be resolved in the courts has no controlling application on the right to resist an officer’s excessive force.*

Reinwand, 147 Wis.2d 192, 201, 433 N.W.2d 27, 31 (Ct. App. 1988) (quoting *State v. Mulvihill*, 270 A.2d 277, 280 (N.J. 1970) (emphasis added)).

We conclude that, regardless of whether an individual is entitled to resist an officer making an unlawful arrest, an individual is entitled to resist an

³ On March 13, 1997, we certified the following question to the Wisconsin Supreme Court: “Whether Wisconsin recognizes a common-law right to forcibly resist an unlawful arrest.” *State v. Hobson*, No. 96-0914-CR (Ct. App. Mar. 13, 1997) *pet. for certification granted* (Wis. S. Ct. Apr. 15, 1997).

officer using unreasonable force to effect an arrest. To hold otherwise would vitiate the distinction drawn in *Reinwand*. The State also argues that, under *Reinwand*, an individual may not raise the use of unreasonable force as a defense to a charge of resisting an officer, but may only raise it as a claim of self-defense to a charge of battery to a police officer. *Reinwand* contains no such limitation.

From our review of the record, we conclude that while there is ample evidence from which a jury could find that Reinstra did *not* use an unreasonable amount of force in subduing and arresting Everett L.O., there is also evidence, summarized above, which, if believed by the jury, could lead a jury to find that Everett L.O. was entitled to resist Reinstra. In determining whether the evidence supports a requested instruction, neither we nor the trial court may weigh the amount or credibility of the evidence, or look to the totality of the evidence, for to do so would invade the province of the jury. See *State v. Mendoza*, 80 Wis.2d 122, 152, 258 N.W.2d 260, 273 (1977); *State v. Coleman*, 206 Wis.2d 198, 212-13, 556 N.W.2d 701, 707 (1996). The trial court is “merely obliged to examine the evidence to determine whether the proposed instruction is based upon mere conjecture” and whether, had the proposed instruction been given and a verdict returned in the defendant’s favor, the trial court “would be obliged to set it aside.” See *Mendoza*, 80 Wis.2d at 152-53, 258 N.W.2d at 273.

We conclude that while the evidence to support the use of unreasonable force in arresting Everett L.O. was, at best, ambiguous, it did not cross the line into “mere conjecture.” The trial court was not required to adopt Everett L.O.’s proposed instruction verbatim. See *State v. Vick*, 104 Wis.2d 678, 690, 312 N.W.2d 489, 495 (1981) (both choice of language and emphasis are

within trial court discretion). However, we conclude that Everett L.O. was entitled to an instruction discussing his right to resist the use of unreasonable force.⁴

Although we conclude that the trial court committed error, that does not end our analysis. We will not reverse a judgment for error unless there is a reasonable possibility that the error contributed to the judgment. *See State v. Coleman*, 206 Wis.2d 198, 214-15, 556 N.W.2d 701, 708 (1996). We conclude that there is such a reasonable possibility here. The jury may well have concluded that the State showed that Reinstra acted with lawful authority based on the evidence that he was attempting to arrest Everett L.O., without considering whether the officer's actions were in accordance with the law. Accordingly, we reverse the adjudication of delinquency based on resisting an officer and remand for proceedings consistent with this opinion.

b. Exclusion of Police Training Standards Manual

Everett L.O. also argues that the trial court erred in excluding an excerpt from the Demonstrate Defensive and Arrest Tactics manual relating to the use of excessive force by law enforcement officers and the “force option continuum.” Everett L.O. sought to introduce the training manual to show that Reinstra used unreasonable force.

We review a trial court's evidentiary ruling to determine whether the court exercised discretion in accordance with accepted legal standards and the

⁴ The trial court gave WIS J I—CRIMINAL 1765, Resisting an Officer. The comment to instruction 1765 “suggests specifying the lawful function being performed and, if raised by the evidence, instructing the jury on the applicable legal standard.” WIS J I—CRIMINAL 1765 n.8. When the legality of an arrest is at issue, the comment further suggests instructing the jury that “[a]n officer making an arrest may use only the amount of force reasonably necessary to take the person into custody.” *Id.*

facts of record. *Bittner v. American Honda Motor Co.*, 194 Wis.2d 122, 146-47, 533 N.W.2d 476, 486 (1995). We will sustain a discretionary determination of the trial court if the record shows “that the court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law.” *Burkes v. Hales*, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991) (footnote omitted). The trial court need not exhaustively state the reasons for its decision; we will affirm the decision if the trial court’s determination indicates to the reviewing court that the trial court “‘under[took] a reasonable inquiry and examination of the facts’ and ‘the record shows there is a reasonable basis for the ... court’s determination.’” *Id.* at 590-91, 478 N.W.2d at 39 (quoted source omitted). We generally look for reasons to sustain a trial court’s discretionary decision. *Id.*

Under § 904.01, STATS., the test of relevancy is whether the evidence sought to be introduced has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Even relevant evidence may be excluded, however, if its probative value is substantially outweighed by the risk of confusion of the issues, misleading the jury, undue delay, waste of time, needless presentation of cumulative evidence or other considerations. Section 904.03, STATS.; see *Nowatske v. Osterloh*, 201 Wis.2d 497, 503, 549 N.W.2d 256, 258 (Ct. App. 1996).

We conclude that the manual may have been relevant as an aid to the jury in determining the reasonableness of Reinstra’s actions. However, we also conclude that the trial court could reasonably determine that the probative value of the evidence was substantially outweighed by the risk of confusion of the issues or waste of time. See § 904.03, STATS. First, the trial court could reasonably

conclude that the manual was of only marginal relevance. The manual, designed for use in training police officers, recommends a wide range of options in any one potential situation, and its guidelines are not, as the trial court noted, mandatory. Second, the introduction of the manual may have lead to a substantial waste of time on essentially collateral issues, including the origin of the manual's content and its role in the police training process.

Everett L.O. also argues that the exclusion of the manual violates his due process right to present an adequate defense. Due process only entitles a defendant to present relevant evidence not substantially outweighed by the factors listed in § 904.03, STATS. See *State v. Evans*, 187 Wis.2d 66, 82-83, 522 N.W.2d 554, 559-60 (Ct. App. 1994). We have concluded that the trial court properly excluded the manual under § 904.03. Thus, Everett L.O.'s due process rights were not violated by the exclusion.

We reverse the adjudication of delinquency based on resisting an officer and remand for further proceedings consistent with this opinion. The dispositional order from which Everett L.O. appeals includes findings of delinquency based upon several other charges as well. Everett L.O. has not appealed the adjudications on the remaining charges or the related dispositions. We therefore affirm the remainder of the order.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.

