COURT OF APPEALS DECISION DATED AND FILED

May 17, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2010AP1499-CR **Cir. Ct. No. 2009CM1182**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JENNY L. NOWAK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County: GREGORY B. HUBER, Judge. *Affirmed*.

¶1 BRUNNER, J.[1] Jenny Nowak appeals her convictions for failing to stop and resisting an officer. Nowak asserts her convictions must be dismissed because the officer unlawfully entered her garage without a warrant; the circuit

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

court erred by rejecting her proposed jury instruction and by failing to instruct the jury on exigent circumstances; the State prevented her from testifying; and she was never identified at trial.

¶2 We conclude the officer lawfully entered Nowak's garage because he had probable cause to believe Nowak was committing a jailable offense and he was in hot pursuit. We also determine the circuit court did not err by using the pattern jury instruction, and we decline to exercise our discretionary reversal power for the other, unobjected to, instruction. Finally, we conclude the State did not preclude Nowak from testifying and Nowak was identified at trial. We affirm.

BACKGROUND

¶3 On May 27, 2009, officer Nicholas Marcell was running stationary radar in a posted twenty-five miles-per-hour zone. He noticed a vehicle that appeared to be speeding and locked his radar on the vehicle. The radar device indicated the vehicle was traveling thirty-five miles per hour and then accelerated to thirty-nine miles per hour.

¶4 Marcell pulled out behind the vehicle and activated his emergency lights. The vehicle did not stop. Marcell then activated his sirens. The vehicle still did not stop. Marcell continued following the vehicle. He testified, "At that point in time, it seemed to me like the vehicle wasn't going to stop. It was going to proceed [to] wherever the vehicle was going or [it was] trying to elude my presence."

¶5 The vehicle turned into a residential driveway and pulled into a garage that was attached to a house. Marcell pulled into the driveway behind the vehicle. A woman, later identified as Nowak, immediately exited the vehicle.

She denied speeding and told Marcell that she did not see his lights or hear his sirens. Marcell entered her garage, collected her driver's license, and instructed her to wait in her vehicle. He returned to his squad car to run her information through dispatch.

¶6 Marcell testified that although he knew resisting by failure to stop was a criminal violation, he originally planned to only issue a citation for speeding. As Marcell was writing the speeding citation, Nowak exited her vehicle and approached the squad car. She told Marcell she had given him plenty of time and was going to go inside her house to let her dog out.

¶7 Marcell ordered Nowak back into her vehicle. Nowak ignored his commands, walked back into the garage past her vehicle, and began to enter her house. Marcell followed her into the garage and grabbed her. A struggle ensued, and Marcell subsequently arrested Nowak.

¶8 The State charged Nowak with resisting a traffic officer by failure to stop when given both visible and audible signals, contrary to WIS. STAT. § 346.04(2t), and resisting an officer, contrary to WIS. STAT. § 946.41(1).[2] Nowak, pro se, brought a motion to dismiss both charges or, in the alternative, to suppress all evidence because Marcell unlawfully entered her garage without a warrant. Following an evidentiary hearing, the court denied Nowak's motion in a written decision, finding that Marcell lawfully entered Nowak's garage because he

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[2] Nowak also received a speeding citation. At a separate trial, a jury found her guilty of speeding, and we affirmed her conviction. *See* ***Village of Marathon City v. Nowak***, No. 2010AP462, unpublished slip op. ¶1 (WI App Sept. 30, 2010).

was in hot pursuit and he had probable cause to believe she committed a jailable offense.

¶9 Nowak represented herself at trial. At the close of the State's evidence, she informed the court she did not want to testify. The court conducted a colloquy regarding her right to testify. During the colloquy, the court inquired, "Has anyone made any threats or promises to influence your decision as to whether you will testify?" Nowak responded, "No."

¶10 After waiving her right to testify, Nowak moved for a directed verdict. She argued the State failed to identify her as the person who committed the crimes. The court denied her request, reasoning that based on "the discussions … [you and the officer] had when you cross[-]examined the officer, … the jury has enough to decide whether or not you, indeed, were the person …."

¶11 Finally, Nowak objected to the pattern jury instruction's definition of "resisting." Specifically, she proposed the definition of resisting be modified from "To resist an officer means to oppose the officer by force or threat of force" to "To resist an officer means to oppose the officer by *active* force or threat of force, and does not include *passive* force or threat of force." (Emphasis added.) The court denied Nowak's request, reasoning, "By its own definition, force is a positive thing … [and] I'm not sure there is such a thing as a passive force." The court opted to use the pattern jury instruction. Nowak did not object to any other jury instructions. The jury found her guilty of both counts.

DISCUSSION

¶12 Nowak raises four arguments on appeal.[3] First, she asserts Marcell unlawfully entered her garage without a warrant and, consequently, both convictions must be dismissed. Second, Nowak argues the circuit court erred by rejecting her proposed jury instruction and by failing to instruct the jury on exigent circumstances. Third, Nowak asserts the State precluded her from testifying in her defense. Fourth, she contends she was never identified at trial.

I. Warrantless Entry

¶13 Nowak first asserts her resisting by failure to stop conviction must be dismissed because Marcell unlawfully entered her garage.[4] Nowak offers no legal authority as to why her conviction for conduct that occurred prior to Marcell's alleged unlawful entry must be dismissed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (We decline to address issues that are inadequately briefed.). Moreover, assuming the warrantless entry was unlawful, "[a]n illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction." ***State v. Ferguson***, 2009 WI 50, ¶22, 317 Wis. 2d 586, 767 N.W.2d 187 (citations omitted). We affirm Nowak's resisting by failure to stop conviction.

¶14 Next, Nowak contends her resisting conviction should be dismissed because the conduct that formed the basis for the conviction occurred after

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[3] Nowak is represented by counsel on appeal.

[4] Neither party asserts the attached garage is not subject to the warrant requirement. We accept the parties' characterization.

Marcell's unlawful entry. She also argues the court should have granted her suppression motion. A warrantless entry is presumptively unlawful under the Fourth Amendment. ***Id.***, ¶18. However, a warrantless entry is lawful if the State can prove the entry was justified by "exigent circumstances." ***Id.***, ¶¶19-20. "Exigent circumstances exist when 'it would be unreasonable and contrary to public policy to bar law enforcement officers at the door.'" ***Id.***, ¶19 (quoting ***State v. Richter***, 2000 WI 58, ¶28, 235 Wis. 2d 524, 612 N.W.2d 29). There are four well-recognized categories of exigent circumstances: "1) hot pursuit of a suspect, 2) a threat to the safety of a suspect or others, 3) a risk that evidence will be destroyed, and 4) a likelihood that the suspect will flee." ***Id.***, ¶20 (citation omitted). "[I]n evaluating whether a warrantless entry is justified by exigent circumstances, [courts] should consider whether the underlying offense is a jailable or nonjailable offense …." ***Id.***, ¶29.

¶15 Marcell unequivocally testified that Nowak failed to stop her vehicle after he activated his emergency lights and sirens. When Nowak did not stop, he continued to pursue her to the attached garage at her residence, and ultimately entered her garage to effectuate the stop. When Marcell entered Nowak's garage, he had probable cause to believe Nowak committed a jailable offense—specifically, resisting by failure to stop—and he was in hot pursuit. *See* WIS. STAT. § 346.17(2t) ("Any person violating s. 346.04(2t) [resisting by failure to stop] may be fined not more than $10,000 or imprisoned for not more than 9 months or both."); *see also* ***Richter***, 235 Wis. 2d 524, ¶32 ("Hot pursuit" is established "where there is an immediate or continuous pursuit of [a suspect] from the scene of a crime." Citation omitted). We conclude Marcell lawfully entered Nowak's garage on both occasions without a warrant because he was in "hot pursuit"; therefore, the circuit court properly denied Nowak's suppression motion.

II. Jury Instructions

¶16 Nowak next argues the court erred when instructing the jury on the definitions of "resisting" and "lawful authority." "A [circuit] court has broad discretion in deciding whether to give a particular jury instruction …." ***State v. Draughon***, 2005 WI App 162, ¶9, 285 Wis. 2d 633, 702 N.W.2d 412. However, the court must exercise its discretion to "fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence." ***Id.*** (citation omitted). We independently review whether a particular jury instruction is appropriate under the facts of a given case. ***Id.***

¶17 Nowak first asserts the circuit court erred by failing to instruct the jury: "To resist an officer means to oppose the officer by *active* force or threat of force, and does not include *passive* force or threat of force." (Emphasis added.) Nowak argues the court's failure to distinguish between active force and passive force was improper because "[t]he testimony at trial indicated that Nowak never did anything to threaten the officer and she never touched the officer."

¶18 We conclude the circuit court did not erroneously exercise its discretion when it opted to use the pattern instruction.[5] Moreover, even if the circuit court had used Nowak's proposed instruction, the evidence shows Nowak "actively resisted" Marcell. When describing her resistive conduct, Marcell testified, "I placed her in … an escort hold, … [and] she started resisting from me.

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[5] The court instructed the jury, "To resist an officer means to oppose by force or threat of force." *See* WIS JI—CRIMINAL 1765.

She started pulling her arm away and trying to evade my escort hold." He continued:

> I put … a compliance hold on her wrist … [and] she kept trying to shrug away from me and pull away from me ….
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> ….
>
> [S]he then actually slipped back into the car while I still had her arm in an escort hold and her wrist in a compliance hold.
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> Once she got into the car, she was holding onto the steering wheel and would not let go, and at that point I couldn't pull her out.

We conclude the circuit court properly instructed the jury on the definition of "resisting."

¶19 Nowak also argues the trial court erred when it instructed the jury on lawful authority. Specifically, she contends that the court's definition of lawful authority should have included an explanation of exigent circumstances. At trial, Nowak never objected to this instruction or proposed an alternative instruction.

¶20 Nowak has not properly preserved this objection for appeal, and our review of a waived objection to a jury instruction is limited. *See* WIS. STAT. § 805.13(3); ***Steinberg v. Jensen***, 204 Wis. 2d 115, 121, 553 N.W.2d 820 (Ct. App. 1996). We will only reverse if it appears the real controversy has not been tried. *See* WIS. STAT. § 752.35. We exercise our discretionary reversal power sparingly. ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990). Nowak has not persuaded us that the court's allegedly deficient jury instruction prevented the real controversy from being tried. Therefore, we decline to exercise our discretionary reversal power.

III. Nowak's Right to Testify

¶21 Nowak contends the State made a comment six months prior to trial that caused Nowak not to testify. Specifically, at an earlier hearing, the State informed the court that Nowak had used quotations in her signed pretrial motion and "if she were to testify differently [at trial], my intentions would be to use that to impeach her as a prior inconsistent statement."

¶22 Nowak argues this comment "caused Nowak not to testify for fear that assertions that she may have made in argument during her briefing … would be held against her as inconsistent statements, if they differed from her in-court testimony." We reject Nowak's argument. First, the statement by the assistant district attorney was nothing more than the law—she can be impeached by a prior inconsistent statement. *See* WIS. STAT. §§ 906.13, 908.01. Second, at trial, the court engaged Nowak in a colloquy regarding her right to testify. The court specifically asked, "Has anyone made any threats or promises to influence your decision as to whether you will testify?" Nowak replied, "No." Nowak cannot take one position at trial and a contrary one on appeal. *See* ***State v. Gove***, 148 Wis. 2d 936, 944, 437 N.W.2d 218 (1989) ("It is contrary to fundamental principles of justice and orderly procedure to permit a party to assume a certain position in the course of litigation … and then after the court maintains that position, argue on appeal that the action was error.").

IV. Identification

¶23 Finally, Nowak asserts she was not identified at trial. We disagree. First, the jury viewed the video of Nowak's interaction with Marcell and could identify Nowak from the video. Second, during Nowak's cross-examination of Marcell, he referred to Nowak in the second-person. Specifically, Marcell's

responses to Nowak's questions included, "I was informed by dispatch that the defendant, *yourself*, did not have any warrants" and "So I guess I was not going to allow *you* to enter into that house and get that dog, … no matter what *you* said." (Emphasis added.) We determine Nowak was identified at trial.

By the Court.—Judgment affirmed.

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