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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 20, 2026 9:48 AM
v	No. 371006 Otsego Circuit Court
JASON ALLEN EVANS, Defendant-Appellant.	LC No. 2021-006127-FH

Before: BORRELLO, P.J., and BAZZI and LIEVENSE, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating while intoxicated—third offense, MCL 257.625, assaulting or resisting a police officer, MCL 750.81d(1), and driving while license suspended, MCL 257.904. The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to 36 months to 10 years' imprisonment for his operating while intoxicated conviction, 30 to 48 months' imprisonment for his assaulting or resisting a police officer conviction, and one year imprisonment for his driving while license suspended conviction, with the sentences to be served concurrently. Defendant now appeals as of right. For the reasons set forth in this opinion, we affirm.

I. FACTUAL BACKGROUND

This case arises out of a single vehicle crash that occurred on the night of February 27, 2021. That night, law enforcement received a report from OnStar indicating that there had been a motor vehicle accident on Karslake Road in Otsego County. It was reported that OnStar was not receiving any response to its attempts to contact the occupant of the vehicle. Deputies Keith Sterly and Jackson Jones, from the Otsego County Sheriff's Office, and Michigan State Police Trooper Joshua Burleson, were dispatched to the scene at approximately 11:00 p.m. There was testimony that the area was very rural, with only four or five houses on the road.

Trooper Burleson was the closest officer to the reported location[1] of the accident and began driving to the scene. He testified that "it was dispatched as a[n] unresponsive," so he had his lights and siren activated as he drove. He did not recall whether he had been told at that point that the airbags deployed.[2] Karslake Road was snowy and icy that night. Burleson was in a fully marked patrol vehicle and wearing his Michigan State Police uniform. Before arriving at the scene of the crash, Burleson encountered defendant walking south along Karslake Road. According to Burleson, he did not know at that point how much further north the crash scene was located, but he saw defendant stumbling and leaning to the right as he walked along the shoulder of the road. The temperature was approximately zero to negative two degrees, and defendant was only wearing a light jacket, so Burleson stopped to check on defendant. Burleson testified that although he had not yet made it to the crash site, he was investigating a car crash and had "reasonable suspicion to believe that [defendant] was walking away from that crash."

Burleson testified on direct examination as follows regarding his initial contact with defendant:

> *Q*. Did you connect him immediately to the scene of the accident?
>
> *A*. Not immediately. I tried to question him and ask him where he was coming from. Right off the bat, he was uncooperative. Well, just, first contact with him he was uncooperative. Tried explaining to him multiple times that there was a report of a crash just up the road where we currently were, and I was asking him if he was coming from that area.
>
> *Q*. So you -- you were able to observe his direction of travel in relation to where you later determined the accident to be?
>
> *A*. Yes. He was walking away from the scene of the crash.

Burleson also indicated that he smelled a strong odor of alcohol emanating from defendant, which he could smell while he was still inside his vehicle with the window down. Combined with defendant's "slurred speech, unsteady walk, [and] bloodshot eyes," Burleson concluded that defendant was intoxicated. Although defendant expressed a desire to leave, Burleson testified that he had a reasonable suspicion that defendant was driving the vehicle that had crashed and was walking away from the crash, rather than just being "out for a midnight stroll," based on the time of night, cold temperature, and snow on the ground. Burleson testified that it is very common in his experience to see people attempt to leave the scene after being involved in an accident while driving drunk.

Burleson also indicated that he "tried to identify" defendant, but defendant "refused" to give his information and tried to walk away. Burleson testified, "I told [defendant] to stop. I

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[1] Trooper Burleson testified that OnStar usually provided coordinates for the accident location from which dispatch could determine a map location for the accident.

[2] He apparently noticed that airbags had deployed when he eventually viewed the vehicle at the scene of the crash.

wanted to further question him to make sure that, you know, if there's anybody else at the vehicle, if he was the driver of the vehicle, if he was coming from that vehicle." Defendant did not comply. Instead, according to Burleson, defendant

> didn't answer any questions. He -- I won't say mumbled, but asked me if I was good multiple times. He also tried to walk away. I tried to, essentially, grab his arm to stop him from walking away. He also tried to walk through me. I wouldn't say he directly pushed me, but essentially, when -- when you try to walk through somebody, you just keep walking and don't stop when somebody is in your way. I eventually detained [defendant] and informed him he is being detained until I could figure out and prove that he was not coming from the vehicle.
>
> * * *
>
> At this point, we're at the side of my patrol vehicle just outside of camera view. I placed him in handcuffs after I informed him he was being detained, and I clearly stated to him multiple times he was not under arrest at that time, he was only being detained, and then I -- once I handcuffed [defendant], I moved him to the front of my patrol vehicle, because I knew that's where the camera was.
>
> * * *
>
> He continued try to walk away. I told him he had to stay there. And eventually he does walk around, and he goes to the driver's side of my patrol vehicle again, and I do grab Mr. Evans, not forcefully, but guide him back to the front of my vehicle.

Burleson indicated that he detained defendant because of his investigation into the traffic accident and suspicion that defendant was the driver. Before putting handcuffs on defendant, Burleson had told him to "stay put," but defendant refused. He decided to put handcuffs on defendant because defendant was not following Burleson's verbal commands to remain on the scene and was instead trying to leave. Burleson also tried to obtain defendant's name and information, and defendant refused to provide it. Further,

> [w]hen I went to go put the handcuffs on him, told him to place his hands behind his back, which he did not. I, again, wasn't forceful, but had to guide his hands behind his back. He tried tensing on up. I had to give him multiple commands to either rotate his wrists or to stop tensing up.

Defendant did not follow any of those commands and instead "[t]ensed up, kept trying to move his hands, kept trying to walk away." Burleson eventually got the handcuffs on defendant.

At some point, Burleson tried to get defendant into his patrol vehicle because defendant "kept trying to walk away." Burleson testified:

> I informed him that he's detained, he's not able to leave at that time, and to sit in my patrol vehicle to either try and talk with me or even also keep warm. He refused to try and get into the patrol vehicle multiple times, said he wanted to stand up, said

> he wanted to walk away, and refused to get into the vehicle. At one point, I did have to push or tug on [defendant] to get him into the patrol vehicle, and at which point Deputy Jones arrived on scene to assist.

Burleson and defendant were shouting at each other, and defendant was "not cooperating." Burleson indicated that defendant was "showing passive resistance and dropping his weight." Jones helped Burleson put defendant into the vehicle.

Trooper Burleson testified that, during his interaction with defendant, defendant appeared intoxicated. According to Burleson, defendant slurred his speech, was unsteady on his feet, and emitted a strong odor of intoxicants. Due to defendant's general lack of cooperation, Burleson did not administer any field sobriety tests. During a pat down, Burleson located a wallet in defendant's back right pocket containing defendant's identification card, but no driver's license. It was later determined that defendant's driver's license had been revoked.

Deputy Sterly arrived at the scene shortly after Trooper Jones. At that time, Jones and Burleson were standing outside the Michigan State Police vehicle, which was parked a short distance south of the accident scene, while defendant was seated in the front passenger seat of Burleson's patrol vehicle. Sterly proceeded to the accident location, where he observed a black Chevrolet Impala that had collided with a tree on the east side of the roadway. Based on the position of the accident and the vehicle's tracks, Sterly opined that the Impala failed to negotiate a curve, traveling straight into the tree. The driver's side of the vehicle remained partially on the roadway, while the passenger side had struck the tree, causing damage to the vehicle's front end. Using a flashlight, Sterly observed a single set of what appeared to be fresh shoeprints in the newly fallen snow, starting from the driver's side of the Impala and continuing south along the road toward the location where defendant was detained with the other officers, approximately a couple of hundred yards away. The site of the crash was not visible from the location where defendant was detained due to a slight curve in the road. Sterly did not observe any other footprints leaving the crash site, nor any fresh footprints leading north. Upon inspecting the interior of the Impala, Sterly found mail addressed to defendant and to a company owned by defendant, both at the same address. Sterly followed the single set of footprints back to the other officers and reported his observations. Sterly concluded, based on these facts, that defendant was the driver of the Impala at the time of the collision.

Trooper Jones estimated the accident scene to be approximately half a mile from the location where he first encountered defendant and Burleson, whereas Burleson testified that the crash site was no more than a quarter-mile north of where defendant was detained. Burleson observed no signs of braking and opined that the vehicle had driven straight off the roadway rather than attempting to navigate the curve. The officers discovered a 24-pack of beer in the front seat of the Impala, along with several empty beer cans inside the vehicle. Burleson returned to his patrol vehicle, made a final unsuccessful attempt to question defendant, and then placed defendant under arrest. Burleson advised defendant of his chemical test rights, but defendant refused to consent to a blood test. Burleson then obtained a search warrant and transported defendant to the hospital for a blood draw. Analysis by the Michigan State Police Laboratory revealed that defendant's blood contained 0.204 grams of alcohol per 100 milliliters, more than twice the legal limit.

The entirety of Burleson's interaction with defendant was recorded on the patrol car's camera system and body microphone. The video evidence was consistent with Burleson's trial testimony as summarized above.

Defendant's theory at trial was that he was not the driver of the vehicle. Steve Vanwert, a friend of defendant, testified that he, not defendant, was operating defendant's car at the time of the crash. According to Vanwert, he dropped defendant off at a friend's house around noon on the day of the accident and later picked him up from the same location at approximately 10:00 p.m. Vanwert was driving defendant's vehicle, and after retrieving defendant, drove him to another friend's house about a mile away, where he dropped defendant off. Vanwert further testified that defendant had been drinking. Subsequently, Vanwert lost control of the vehicle, resulting in a collision with a tree. Vanwert exited the car, walked down the road, flagged down a passing truck, and left the area. He explained that, at the time, he was absconding on parole and feared arrest if he encountered law enforcement.

Defendant's friend, Joseph Charles, testified that he resided near Karslake Road, approximately three miles from the accident site. According to Charles, defendant was at his residence for much of the day on which the crash occurred. Charles stated that a friend dropped defendant off at his house early in the afternoon, and the two spent the day cleaning Charles' garage and consuming beer. Charles noted that defendant often relied on others for transportation because he did not possess a valid driver's license. Defendant departed around 10:00 p.m. When asked how defendant left, Charles responded that he assumed the same friend who had dropped defendant off also picked him up. Charles further testified that defendant did not have a vehicle at his house that day and that defendant's residence was approximately ten miles from the crash site.

II. PROCEDURAL HISTORY

Defendant filed a pretrial motion to dismiss, arguing that he was unlawfully arrested without probable cause when he was handcuffed and placed into the patrol car, that the pat down that resulted in the search of his wallet for his identification was an illegal search that exceeded the permissible scope of a *Terry*[3] search, and that all evidence obtained after the unlawful detention, including statements by defendant, the in-car video, and the blood test must be suppressed. He also contended that the search warrant for his blood was facially defective because it relied on conclusory statements and information from an unidentified individual and that he was wrongfully subjected to custodial interrogation without being provided the necessary *Miranda*[4] warnings.[5]

In response, the prosecution argued that defendant was lawfully arrested based on probable cause because he was observed walking away from the direction of a known car crash, smelled

[3] *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

[4] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[5] The *Miranda* argument is somewhat less than clearly framed and argued. However, it appears evident that defendant intended to make this argument.

strongly of alcohol, and was visibly intoxicated, thus giving the officer probable cause to believe that he had been operating a motor vehicle while intoxicated. Further, the search that uncovered defendant's wallet was a lawful search incident to arrest, and the search warrant for defendant's blood was supported by a valid affidavit demonstrating that the officer independently verified information received from a third party.

At the hearing on defendant's motion to suppress and dismiss, Trooper Burleson testified, and the dash camera video of the incident was admitted into evidence. The trial court, in a written opinion and order, denied the motion. The court found that Trooper Burleson responded to a report of a vehicle crash and that defendant was the only person present in the vicinity, observed walking away from the location of the crash, and exhibiting signs of intoxication. Based on these facts, the trial court concluded that Burleson had a reasonable suspicion, supported by articulable facts, that criminal activity was occurring, thereby justifying an investigative stop of defendant. The court further found that defendant's refusal to comply with Burleson's lawful commands to stop and answer questions provided additional justification for his continued detention. The trial court also determined that the search of defendant's wallet was reasonable and, even if it were not, the evidence obtained would have been admissible under the inevitable discovery doctrine. Finally, the court concluded that probable cause existed to arrest defendant for operating while intoxicated, and that issuance of the search warrant by the magistrate was reasonable based on the information presented. Following a trial before a jury, defendant was found guilty as previously stated. This appeal followed.

III. MOTION TO SUPPRESS: SEARCH AND SEIZURE

Defendant first contends that the trial court erred in denying his motion to suppress evidence, asserting that he was subjected to an unlawful seizure and subsequent unlawful search. Defendant maintains that Trooper Burleson, upon first encountering him, lacked any individualized suspicion of wrongdoing. According to defendant, his mere presence in the vicinity of a reported car crash did not provide Burleson with reasonable suspicion or probable cause to believe that defendant had committed a crime. Defendant further asserts that Burleson, who only knew a car crash had occurred, escalated the encounter into a de facto arrest without justification, and subsequently conducted a pat down for weapons.

The trial court's factual findings regarding a motion to suppress are reviewed for clear error. *People v Pagano*, 507 Mich 26, 31; 967 NW2d 590 (2021). A factual finding is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *People v Wiley*, 324 Mich App 130, 165; 919 NW2d 802 (2018). The application of constitutional standards and the ultimate decision on a motion to suppress are reviewed de novo. *People v Custer*, 465 Mich 319, 326; 630 NW2d 870 (2001); *Pagano*, 507 Mich at 31.

Both the United States Constitution and the Michigan Constitution guarantee a person's right to be secure against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *Pagano*, 507 Mich at 31-32. Michigan courts generally interpret Const 1963, art 1, § 11 to provide the same protection as the Fourth Amendment, unless a compelling reason warrants otherwise. *People v Brcic*, 342 Mich App 271, 277; 994 NW2d 812 (2022). The benchmark for Fourth Amendment rights is reasonableness, determined by a fact-specific inquiry considering the totality of the circumstances. *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009).

The Fourth Amendment applies to all seizures of the person, including those involving only a brief detention short of a traditional arrest. *United States v Brignoni-Ponce*, 422 US 873, 878; 95 S Ct 2574; 45 L Ed 2d 607 (1975).

A person is seized when a police officer accosts an individual and restrains his or her freedom to walk away. *Terry v Ohio*, 392 US 1, 16; 88 S Ct 1868; 20 L Ed 2d 889 (1968). However, a police officer may, in appropriate circumstances and in an appropriate manner, approach a person to investigate possible criminal behavior even in the absence of probable cause to arrest. *Id*. at 22. The reasonableness of a seizure or search depends on whether the officer's action was justified at its inception and whether it was reasonably related in scope to the circumstances that justified the interference in the first place. *Id*. at 19-20; *Hyde*, 285 Mich App at 437.

The United States Supreme Court in *Florida v Royer*, 460 US 491; 103 S Ct 1319; 75 L Ed 2d 229 (1983), described escalating levels of police-citizen encounters, each requiring greater justification as the level of intrusion increases. Initially, law enforcement officers do not violate the Fourth Amendment by merely approaching an individual in a public place, asking if the person is willing to answer questions, or offering in evidence a person's voluntary answers. *Id*. at 497. An officer's identification as law enforcement, without more, does not automatically transform the encounter into a seizure requiring objective justification. *Id*. Individuals approached in this manner are not required to answer, may decline to listen to questions, and may go on their way. *Id*. at 497-498. They may not be detained, even momentarily, without reasonable, objective grounds, and a refusal to cooperate does not by itself provide such grounds. *Id*. at 498. In the absence of a seizure, no constitutional rights are implicated. *Id*.

Second, under *Terry* and its progeny, reasonable suspicion of criminal activity justifies a temporary seizure for questioning limited to the purpose of the stop. *Royer*, 460 US at 498. Such limited, temporary seizures—commonly referred to as *Terry* stops—are permissible on less than probable cause to arrest, requiring only a reasonable and articulable suspicion that a person has committed or is about to commit a crime. *Id*. However, there are limits to a permissible *Terry* stop: "reasonable suspicion of crime is insufficient to justify custodial interrogation even though the interrogation is investigative," and the police may not "seek to verify their suspicions by means that approach the conditions of arrest." *Id*. at 499. Furthermore, in "the name of investigating a person who is no more than suspected of criminal activity, the police may not carry out a full search of the person or of his automobile or other effects." *Id*. "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Id*. at 500. The prosecution has the burden of demonstrating that a seizure based on reasonable suspicion "was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Id*.

Finally, the general rule, to which *Terry* only provides a limited exception, is that a restraint of the person amounting to a seizure for purposes of the Fourth Amendment must be justified by probable cause to arrest. Thus, if a detention exceeds the permissible bounds of an investigative *Terry* stop, the detention must be justified by probable cause. *Id*. at 498-501, 507.

In beginning the analysis of whether the stop in this case was justified at its inception and appropriate in scope and duration, the central inquiry under the Fourth Amendment is whether the particular governmental invasion of defendant's personal security was reasonable under all of the circumstances. *Terry*, 392 US at 19. This necessarily requires consideration of "the evolving circumstances with which the officer is faced." *People v Williams*, 472 Mich 308, 315; 696 NW2d 636 (2005). "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Adams v Williams*, 407 US 143, 145-146; 92 S Ct 1921; 32 L Ed 2d 612 (1972). However, when the encounter "reveals a new set of circumstances, an officer is justified in extending the detention long enough to resolve the suspicion raised." *Williams*, 472 Mich at 315. It is therefore necessary to carefully consider all of the evolving factual circumstances throughout the encounter because although the evolving circumstances may justify the length and scope of the detention, *id*., it is also true that "a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." *Terry*, 392 US at 18.

Here, the encounter between defendant and law enforcement began when Trooper Burleson was driving to the scene of a reported vehicle crash and stopped his patrol car after seeing defendant walking along the side of the road. Burleson asked defendant if he had been involved in a vehicle crash. Defendant indicated that he had not been in a vehicle crash and attempted to continue on his way. There was nothing improper about Burleson stopping to ask defendant that question, and defendant at that point was not required to remain in place or answer Burleson's questions. *Royer*, 460 US at 497-498. The mere fact that Burleson stopped his marked patrol vehicle and directed questions to defendant did not make the encounter a seizure at that point for purposes of the Fourth Amendment. *Id*.

However, Burleson then ordered defendant to "stay right here." As defendant apparently tried to walk away, Burleson got out of his vehicle and continued ordering defendant to come back and to remain in place. Burleson also indicated that he would detain defendant if he did not stop. Although Burleson's initial attempts to approach defendant and ask him questions if he was willing to listen clearly did not violate the Fourth Amendment, Burleson was not permitted to detain defendant "even momentarily without reasonable, objective grounds for doing so," and defendant's "refusal to listen or answer [did] not, without more, furnish those grounds." *Id*. A "seizure" for purposes of the Fourth Amendment occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen" such that a reasonable person would not feel free "to disregard the police and go about his business." *Florida v Bostick*, 501 US 429, 434; 111 S Ct 2382; 115 L Ed 2d 389 (1991) (quotation marks and citations omitted). The "crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Id*. at 437 (quotation marks and citation omitted). "[T]he 'reasonable person' test presupposes an *innocent* person." *Id*. at 438. Considering the totality of the circumstances, it is clear that Burleson seized defendant within moments of initiating the encounter. Burleson ordered defendant to stay put and threatened to detain him if he did not comply. Defendant persisted in attempting to walk away, Burleson ordered him to come back, and Burleson eventually put defendant in handcuffs and informed defendant that he was being "detained." No reasonable person would have felt free to ignore Burleson and

go about his business, and a Fourth Amendment seizure thus occurred. *Id*. at 437-438; see also *People v Jenkins*, 472 Mich 26, 32-33; 691 NW2d 759 (2005).

Accordingly, the next question becomes whether there were reasonable, objective grounds to justify the seizure, and the mere fact that defendant refused to answer questions is insufficient standing alone to justify Burleson's decision to detain defendant. *Royer*, 460 US at 497-498. "[A] refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." *Bostick*, 501 US at 437. However, "reasonable suspicion of criminal activity warrants a temporary seizure for the purpose of questioning limited to the purpose of the stop." *Royer*, 460 US at 498. Reasonable suspicion must be based on more than an inchoate or unparticularized "hunch." *Terry*, 392 US at 27. But reasonable suspicion may arise from specific rational inferences that may be drawn, in light of the officer's experience, from articulable facts available to the officer at the time. *Id*. at 21-22, 27. The facts supporting a reasonable suspicion may be gathered from the officer's personal observation and information supplied by other reliable sources. *Adams*, 407 US at 147. When a reasonable articulable suspicion that an individual has committed or is about to commit a crime exists, an officer may temporarily seize that person for limited questioning to verify or dispel that suspicion. *Royer*, 460 US at 498.

Here, Burleson knew that there had been a vehicle crash reported in the area, and he had information about the approximate location of the crash from OnStar. He was in a rural, remote location, and saw defendant walking alone down the road, away from the direction of the vehicle crash. Moreover, Burleson saw that defendant was staggering and leaning to one side as he walked, and defendant was wearing only a light jacket despite the extremely cold outside temperature. It is rational to infer from these facts that defendant was intoxicated and walking away from the nearby vehicle crash. It is also reasonable to infer that defendant was driving the vehicle when it crashed, which would have provided a motive for trying to walk away from the scene and avoid detection despite the frigid temperature and defendant's apparent lack of clothing appropriate for the weather. Burleson therefore possessed a reasonable suspicion that defendant had been driving while intoxicated, which justified a temporary seizure to verify or dispel the suspicion of criminal activity. *Royer*, 460 US at 498; *Brignoni-Ponce*, 422 US at 881. Burleson was thus authorized to command defendant to stop walking away. "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. . . . A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Adams*, 407 US at 145.

Nonetheless, the situation escalated with defendant's refusal to stay and talk to Burleson and Burleson's response of placing him in handcuffs. "[R]easonable suspicion of crime is insufficient to justify custodial interrogation even though the interrogation is investigative," and the police may not "seek to verify their suspicions by means that approach the conditions of arrest." *Royer*, 460 US at 499. The use of handcuffs gives an appearance more akin to an arrest, despite Burleson's characterization of his conduct and his statements to defendant at the time indicating that defendant was not under arrest. Whether Burleson considered the detainment an "arrest" at this point is irrelevant. The reasonableness of a seizure is "judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man

of reasonable caution in the belief' that the action taken was appropriate?" *Terry*, 392 US at 21-22 (citations omitted). It is well established that law enforcement officers cannot avoid the protections of the Fourth Amendment by "stop[ping] short of something called a 'technical arrest' or a 'full-blown search.' " *Id*. at 19. In this context, the "proper focus is on the *actions* of the officer, not his *thoughts*." *Custer*, 465 Mich at 330.

The circumstances of the instant case provide another illustration of the "difficult line-drawing problems in distinguishing an investigative stop from a *de facto* arrest." *United States v Sharpe*, 470 US 675, 685; 105 S Ct 1568; 84 L Ed 2d 605 (1985). Indeed, defendant argues that he was subjected to a *de facto* arrest and considering that he was handcuffed and placed in the patrol vehicle, defendant's contention is not illogical. However, there is no "litmus-paper test . . . for determining when a seizure exceeds the bounds of an investigative stop." *Royer*, 460 US at 506. Because there is no "bright-line" rule for evaluating the reasonableness of an investigative detention, "common sense and ordinary human experience must govern over rigid criteria." *Sharpe*, 470 US at 685.

In conducting this analysis, there are multiple factors to consider in light of the endless variations in circumstances that may exist. *Royer*, 460 US at 506. Although an investigative stop that continues indefinitely ceases at some point to be justifiable as an investigative stop, there is "no rigid time limitation on *Terry* stops." *Sharpe*, 470 US at 685. The Supreme Court has explained that "[w]hile it is clear that the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion, we have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes." *Id*. (quotation marks and citation omitted). There is also an "important need to allow authorities to graduate their responses to the demands of any particular situation." *Id*. at 686 (quotation marks and citation omitted).

"In assessing whether a detention is too long in duration to be justified as an investigative stop," it is "appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." *Id*. "A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing." *Id*. A court should also consider whether the officer pursued the investigation in a "reasonable manner" in light of the circumstances and whether any delay was primarily attributable to "evasive actions" of the defendant attempting to "elude the police," rather than the actions of the officer. *Id*. at 687-688.

Moreover, in considering the nature of the detention and the level of restriction imposed on the defendant, the Supreme Court has recognized that "there are undoubtedly reasons of safety and security that would justify moving a suspect from one location to another during an investigatory detention, such as from an airport concourse to a more private area." *Royer*, 460 US at 504-505. In that case, Royer was stopped by police at the airport concourse because they suspected him of transporting narcotics, and they asked him to accompany them to an isolated room that was essentially a large storage closet with a desk and chairs. *Id*. at 493-494. Combined with the facts that Royer was never informed that he could leave and board his plane if he chose

to do so, and the officers had Royer's identification, plane ticket, and luggage, the Court concluded that as a practical matter, Royer was subjected to an arrest that exceeded the bounds of a permissible *Terry* stop. *Id*. at 502-504. In reaching this conclusion, the Court explained that there was no evidence that the officers' decision to move Royer to the interrogation room was prompted by reasons of safety or security. *Id*. at 505.

Returning to the present factual circumstances, placing an individual in handcuffs and into a marked patrol vehicle more closely resembles an arrest than does a conversation held on the side of the road. However, under *Royer* and *Sharpe*, it is important to consider the evolving circumstances with which Burleson was faced and the reasonableness of his response to those circumstances. As previously discussed, Burleson had a reasonable suspicion that defendant was intoxicated and was walking away from a nearby vehicle crash that had occurred while defendant was driving. Defendant refused to comply with Burleson's valid requests to remain in place so Burleson could confirm or dispel those suspicions, and defendant instead attempted multiple times to leave the scene. Burleson thus resorted to the more restrictive method of detention, handcuffing defendant and placing him in the patrol car, to effectuate the purpose of his investigative stop, which was to confirm or dispel his reasonable suspicion that defendant had been driving a vehicle while intoxicated. Clearly, Burleson could not have accomplished that purpose without resorting to more restrictive methods because defendant was not willing to cooperate with *any* level of detention. Thus, the increase in both the length of the stop, and the necessity of more restrictive methods for accomplishing it, are primarily attributable to defendant. Burleson's conduct was not unreasonable under the circumstances. *Royer*, 460 US at 500.

Moreover, even if the detention became an arrest when defendant was placed in handcuffs, the facts within Burleson's knowledge at that point support a conclusion that there was probable cause to justify the arrest. Burleson knew that there had been a motor vehicle crash in the vicinity. The area was rural and deserted, and defendant was walking alone in frigid temperatures with a light jacket. Burleson had not seen anyone else in the area. Furthermore, defendant was stumbling and staggering as he walked, and defendant gave off such a strong odor of alcohol that Burleson was able to smell it once he rolled down his vehicle window. Burleson also testified that defendant was slurring his speech and had bloodshot, glossy looking eyes. He testified that in his experience, it was common for intoxicated drivers to try to walk away from the scene of a crash. "Probable cause to arrest depends upon whether, at the moment the arrest was made . . . the facts and circumstances within (the arresting officers') knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing an offense." *Adams*, 407 US at 148 (ellipsis in original; quotation marks and citation omitted). The facts available to Burleson at the point that he put handcuffs on defendant were sufficient to warrant a prudent person in believing that defendant had been driving while intoxicated and there was probable cause to arrest. "Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction." *Id*. at 149.

Defendant's argument that he was within his right to resist an unlawful arrest is accordingly without merit. "[T]he right to resist *unlawful* arrests, and other *unlawful* invasions of private rights, is well established in our state's common law." *People v Moreno*, 491 Mich 38, 46-47; 814 NW2d 624 (2012). The common-law right to resist an unlawful arrest permits one to "use such reasonable

force as is necessary to prevent an illegal attachment and to resist an illegal arrest," and "the basis for such preventive or resistive action is the illegality of an officer's action, to which [a] defendant immediately reacts." *Id*. at 47 (quotation marks and citation omitted; alteration in original). Our Supreme Court held in *Moreno* that this common-law right to resist unlawful police conduct was not abrogated by MCL 750.81d.[6] *Id*. at 48.

In general terms, MCL 257.625(1) prohibits the operation of a motor vehicle while intoxicated. A violation of this statutory provision is generally a misdemeanor that may be punishable by up to 93 days' imprisonment. MCL 257.625(9)(a). Subsequent convictions may be more severely punished. For example, as ultimately occurred in the present case, "[i]f the violation occurs after 2 or more prior convictions, regardless of the number of years that have elapsed since any prior conviction, the person is guilty of a felony . . . ." MCL 257.625(9)(c).

Here, at the time defendant was placed in handcuffs, it does not appear that Burleson was aware of defendant's prior convictions for operating while intoxicated. Thus, Burleson only had probable cause at that point to believe that defendant had committed the misdemeanor offense of operating while intoxicated. Under MCL 764.15(1)(d), a "peace officer, without a warrant, may arrest a person" if the "peace officer has reasonable cause to believe a misdemeanor punishable by imprisonment for more than 92 days or a felony has been committed and reasonable cause to believe the person committed it." Furthermore, MCL 764.15(1)(h) specifically authorizes an arrest without a warrant if the "peace officer has reasonable cause to believe the person was, at the time of an accident in this state, the operator of a vehicle involved in the accident and was operating the vehicle in violation of section 625(1), (3), (6), or (7) or section 625m of the Michigan vehicle code . . . or a local ordinance substantially corresponding to section 625(1), (3), (6), or (7) or section 625m of that act." Furthermore, "[b]ecause probable cause is an objective standard, an arrest is lawful if the officer had probable cause to arrest for any offense, not just the offense cited at the time of arrest or booking." *People v Nordstrom*, ___ Mich App ___, ___; ___ NW3d ___ (Docket No. 375550); slip op at 4 (quotation marks and citation omitted; alteration in original).

In short, because all of Burleson's actions in detaining defendant were supported by reasonable suspicion or probable cause, as discussed extensively above, and Burleson was lawfully authorized to arrest defendant, none of Burleson's actions constituted unlawful conduct that defendant was somehow entitled to resist. *Moreno*, 491 Mich at 46-47.

Defendant also contends that he was subjected to an unlawful search when Burleson patted him down and found his wallet with his identification. "A police officer may perform a limited

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[6] This statute provides in relevant part that "an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both." MCL 750.81d(1). The protected "persons" in this statute include police officers. MCL 750.81d(7)(b). The statute further defines "obstruct" to "include[] the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command." MCL 750.81d(7)(a).

patdown search for weapons if the officer has a reasonable suspicion that the individual is armed, and thus poses a danger to the officer or to other persons." *Custer*, 465 Mich at 328. "*Terry* strictly limits the permissible scope of a patdown search to that reasonably designed to discover guns, knives, clubs, or other hidden instruments that could be used to assault an officer." *People v Champion*, 452 Mich 92, 99; 549 NW2d 849 (1996). However, the "plain feel exception to the warrant requirement . . . allows the seizure without a warrant of an object felt during a legitimate patdown search for weapons when the *identity of the object is immediately apparent and the officer has probable cause to believe that the object is contraband*." *Custer*, 465 Mich at 331 (quotation marks and citation omitted; emphasis in original).

Here, even assuming that Burleson possessed a reasonable suspicion that defendant was armed, he did not claim that he thought defendant's wallet was a weapon or contraband. Burleson was unequivocal about the fact that he was trying to determine defendant's identity. Thus, the search cannot be justified by the plain feel exception. *Id*. However, the search that revealed defendant's wallet was a lawful search incident to arrest. Our Supreme Court has explained the legal contours applicable to a search incident to arrest as follows:

> A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment. By statute, an arresting officer must possess information demonstrating probable cause to believe that an offense has occurred and that the defendant committed it. Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.
>
> A search of a person incident to an arrest requires no additional justification. The permissible scope of a search incident to arrest extends to the opening of containers found within the control area of the arrestee.
>
> A search conducted immediately before an arrest may be justified as incident to arrest if the police have probable cause to arrest the suspect before conducting the search. [*Champion*, 452 Mich at 115-116 (citations omitted).]

Our Supreme Court has also held "that a search without a warrant of persons whom the police had probable cause to arrest was proper, even though the persons searched had not been formally arrested." *Id*. at 116.

Here, Trooper Burleson had probable cause to arrest defendant for operating while intoxicated. The search of defendant's person that revealed his wallet and identification was therefore a valid search incident to arrest. *Id*. at 115-116. Accordingly, the trial court did not err

by denying defendant's motion to suppress and dismiss the charges based on defendant's asserted claims that he was subjected to an unlawful seizure and search.[7]

IV. SEARCH WARRANT AFFIDAVIT

Next, defendant argues that the affidavit supporting the search warrant for his blood was facially deficient because it did not contain sufficient facts to infer a fair probability that defendant was the driver of the vehicle.

Appellate review of a magistrate's decision to approve a search warrant "involves neither de novo review nor application of an abuse of discretion standard." *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992). A "search warrant and the underlying affidavit are to be read in a common-sense and realistic manner." *Id*. at 604. The question is "whether a reasonably cautious person could have concluded that there was a 'substantial basis' for the finding of probable cause." *Id*. at 603. "Affording deference to the magistrate's decision simply requires that reviewing courts ensure that there is a substantial basis for the magistrate's conclusion that there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id*. at 604 (quotation marks and citation omitted). Application of constitutional standards is reviewed de novo as a question of law. *People v Mullen*, 282 Mich App 14, 21; 762 NW2d 170 (2008). The ultimate determination on a motion to suppress is also reviewed de novo. *Id*.

Defendant appeals the trial court's denial of his pretrial motion to suppress evidence obtained pursuant to a search warrant. The search warrant affidavit, attached to the motion, reflects that Officer Burleson responded to a traffic crash at the intersection of Karslake Road and Whithouse Trail. Upon arrival, Officer Burleson observed defendant, Jason Allen Evans, walking south on Karslake Road, away from the scene of the crash. Officer Burleson's investigation identified Evans as the driver of the vehicle involved. The affidavit further states that Officer Burleson personally observed signs of intoxication, including a strong odor of alcohol, bloodshot eyes, a flushed face, staggering, and slurred speech. Based on these observations, Officer Burleson concluded that defendant was under the influence of alcohol.

It is well established that the act of drawing a defendant's blood for analysis constitutes a search within the meaning of the Fourth Amendment. *People v Woodard*, 321 Mich App 377, 385; 909 NW2d 299 (2017). The Fourth Amendment generally requires law enforcement officers to obtain a warrant for a search to be considered reasonable. *Brcic*, 342 Mich App at 277-278. A warrant must be supported by probable cause and affirmed under oath. US Const, Am IV; Const 1963, art 1, § 11. Probable cause to search must exist at the time the search warrant is issued. *Russo*, 439 Mich at 606. Probable cause is established when the facts and circumstances would lead a reasonably prudent person to believe that a crime has been committed and that evidence of

[7] We note that even if the justification for Burleson's actions does not perfectly align with his subjective state of mind that night, "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *People v Estabrooks*, 175 Mich App 532, 539; 438 NW2d 327 (1989) (quotation marks and citation omitted).

the crime will be found in the place to be searched. *Mullen*, 282 Mich App at 27. The determination of probable cause depends on the information known to law enforcement at the time of the search. *Id*.

Here, a reasonable reading of the affidavit demonstrates that Officer Burleson responded to the accident scene, encountered defendant walking away from the crash, and observed multiple indicators of intoxication. The facts set forth in the affidavit support a finding that a reasonably prudent person would believe defendant committed the offense of operating a vehicle while intoxicated and that evidence of his blood-alcohol content would be found through a blood draw. See *Mullen*, 282 Mich App at 27. Probable cause does not require certainty, but only a probability or substantial chance of criminal activity. *Id*. Contrary to defendant's arguments, courts are not required to read search warrant affidavits in an overly technical or restrictive manner. *Id*. Accordingly, the magistrate did not err in finding probable cause to issue the warrant, and the trial court properly denied defendant's motion to suppress.

V. *MIRANDA*

Defendant contends that he was placed in custody almost immediately after his encounter with Trooper Burleson commenced, and that he was subsequently interrogated without first being advised of his *Miranda* rights. He further asserts that, due to the lack of *Miranda* warnings, his conduct and statements were improperly introduced against him at trial through the testimony of law enforcement and the dash camera footage presented to the jury.

This Court reviews a trial court's factual findings on a motion to suppress for clear error. *People v Tanner*, 496 Mich 199, 206; 853 NW2d 653 (2014). To the extent the trial court's ruling involves questions of law or the application of a constitutional standard to undisputed facts, review is de novo. *Id*. The ultimate decision regarding a motion to suppress is also reviewed de novo. *People v Mathews*, 324 Mich App 416, 424; 922 NW2d 371 (2018). To enforce constitutional protections against compelled self-incrimination, *Miranda* established that law enforcement must advise suspects of their rights under the Fifth and Fourteenth Amendments before initiating custodial interrogation. *Florida v Powell*, 559 US 50, 59 (2010); 130 S Ct 1195; 175 L Ed 2d 1009. The Michigan Constitution contains a self-incrimination clause identical to its federal counterpart. *Tanner*, 496 Mich at 207, citing Const 1963, art 1, § 17. Individuals subjected to custodial interrogation are entitled to *Miranda's* procedural safeguards, regardless of the nature or severity of the suspected offense. *Berkemer v McCarty*, 468 US 420, 434; 104 S Ct 3138; 82 L Ed 2d 317 (1984). The required Miranda warnings are as follows:

> [A suspect] must be warned prior to any questioning [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. [*Powell*, 559 US 59-60 (quotation marks and citation omitted; alterations in original).]

The central issue for *Miranda's* applicability is whether there was a "custodial interrogation." *Id*. Failure to give *Miranda* warnings before a statement made during custodial

interrogation renders that statement inadmissible except for impeachment purposes. *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997).

The threshold question is whether the defendant was in "custody." Generally, a motorist detained for a routine or investigative traffic stop is not considered to be in custody for *Miranda* purposes. *Miranda* warnings are required only when a person is in custody or otherwise deprived of freedom in a significant manner. *People v Campbell*, 329 Mich App 185, 202 (2019). Routine traffic stops are more analogous to *Terry* stops than to formal arrests. *Berkemer*, 468 US at 439. During such stops, an officer may ask limited questions to determine identity and investigate suspicions, but the detainee is not obligated to respond and must be released unless probable cause for arrest develops. *Id*. at 439-440. Thus, temporary detention during a *Terry* stop does not constitute custody under *Miranda*. *Id*. at 440.

Miranda safeguards apply once a suspect's freedom is curtailed to a degree associated with formal arrest. *Id*. If a motorist detained during a traffic stop is subsequently subjected to treatment tantamount to custody, he or she is entitled to *Miranda* protections. Whether a defendant is in custody for *Miranda* purposes is determined by the totality of the circumstances, focusing on whether a reasonable person would feel free to leave. *Campbell*, 329 Mich App at 202; See also *Maryland v Shatzer*, 559 US 98, 112; 130 S Ct 1213; 175 L Ed 2d 1045 (2010) ("To determine whether a suspect was in *Miranda* custody we have asked whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.") (quotation marks and citation omitted).

Here, the initial interaction—where Trooper Burleson stopped defendant and inquired about a vehicle crash—fell outside *Miranda's* scope, as defendant was not yet in custody. *Berkemer*, 468 US at 440. However, shortly thereafter, defendant was effectively arrested: he was ordered to remain, placed in handcuffs, informed that he was being detained, and placed in the patrol car. Under these circumstances, no reasonable person would have believed they were free to leave, so defendant was in custody for *Miranda* purposes. *Campbell*, 329 Mich App at 202; *Shatzer*, 559 US at 112. It is undisputed that no *Miranda* warnings were given during this period.

The next issue is whether defendant's statements resulted from interrogation. Interrogation includes direct questioning and any words or actions by police that they should know are reasonably likely to elicit an incriminating response. *Raper*, 222 Mich App at 479. Voluntary statements made by individuals in custody are not subject to *Miranda's* exclusionary rule. *Id*.

Defendant contends that his conduct and statements were improperly admitted at trial in violation of *Miranda*, referencing their introduction through officer testimony and dash camera footage. However, defendant overlooks the requirement that a *Miranda* violation arises only when unwarned statements are the product of police interrogation—not merely because the statements were made while in custody without *Miranda* warnings.

It is not a violation of *Miranda* to admit into evidence an unwarned statement made by a defendant in custody if the statement was not made in response to police interrogation. *Raper*, 222 Mich App at 480-481. Not all statements obtained by the police after a person is taken into custody are "considered the product of interrogation." *Rhode Island v Innis*, 446 US 291, 299; 100 S Ct 1682; 64 L Ed 2d 297 (1980). The Court in *Innis* held that "the special procedural safeguards

outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation," which in turn reflects "a measure of compulsion above and beyond that inherent in custody itself." *Id*. at 300. Hence,

> the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response. [*Id*. at 300-302.]

Accord *Raper*, 222 Mich App at 479. An "incriminating response," in this context, is "any response—whether inculpatory or exculpatory—that the *prosecution* may seek to introduce at trial." *Innis*, 446 US at 301 n 5.

Here, by focusing only on the issue of "custody," and completely ignoring the equally important issue of "interrogation," defendant has failed to present a complete argument on which he could be entitled to relief. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Therefore, defendant's *Miranda* issue is abandoned. *Id*.

Defendant also argues in the alternative that he was denied the effective assistance of counsel. "In order to establish the right to a new trial premised on ineffective assistance of counsel, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Abcumby-Blair*, 335 Mich App 210, 228; 966 NW2d 437 (2020). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. (quotation marks and citation omitted). Because defendant has failed to demonstrate that his *Miranda* rights were violated, he also has failed to establish that his trial counsel performed deficiently on this basis or that there is a reasonable probability that the outcome of his trial would have been different had his trial counsel taken different actions. Defendant has not given us any reason that would undermine our confidence in the trial outcome, and he thus has not shown that he is entitled to relief on this issue. *Id*.

VI. JURY INSTRUCTIONS: RIGHT TO RESIST UNLAWFUL POLICE CONDUCT

Defendant next argues that the trial court erred by declining to instruct the jury that defendant had a right to resist an unlawful arrest and the right to decline to follow police questions before he was detained or arrested. Defendant contends that this violated his right to a properly instructed jury and his right to present a defense.

This Court reviews de novo claims of instructional error, as well as the constitutional question whether a defendant's constitutional right to present a defense was denied. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). However, "the trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). "A criminal defendant has a state and federal constitutional right to present a defense." *Kurr*, 253 Mich App at 326. A criminal defendant also "is entitled to have a properly instructed jury consider the evidence against him or her." *Dobek*, 274 Mich App at 82.

On appeal, defendant asserts that because the trial court denied his requested special jury instructions, defendant "was unable to offer a defense for his actions as the jury was unable to consider the legality of the officer's actions." However, defendant completely fails to address the actual basis of the trial court's ruling, which was that the evidence did not provide a factual basis supporting the specific instructions that the trial court declined to give. "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). It is not up to this Court to discover and rationalize the basis for defendant's claim. *Id*.

VII. JURY INSTRUCTIONS: UNANIMITY INSTRUCTION

Next, defendant argues that the trial court plainly erred by failing to sua sponte instruct the jury that it had to unanimously agree about the specific acts that constituted resisting and obstructing a police officer to convict defendant of this charge. In the alternative, defendant argues that defense counsel was ineffective for failing to request this instruction.

Defendant's trial counsel requested certain special instructions regarding the right to resist unlawful police conduct and presented oral argument in support of those instructions. The trial court granted defense counsel's request with respect to one of those instructions and denied the request regarding the other instructions. Defense counsel raised one specific objection to that ruling, which the trial court overruled. The trial court subsequently asked defense counsel if there were any further objections, and he replied, "No. Not -- not beyond the objection I've already made." During final instructions, the jury was instructed:

> A verdict in a criminal case must be unanimous. That means that in order to return a verdict, it is necessary that each of you agrees on that verdict. In the jury room you will discuss the case among yourselves, but ultimately each of you will have to make up your own mind. Any verdict must represent the individual, considered judgment of each juror.

In *People v Miller*, 326 Mich App 719, 726; 929 NW2d 821 (2019), this Court explained:

> A defendant may waive his or her challenge to jury instructions. Waiver extinguishes any error, leaving nothing for this Court to review. A defendant

> waives an issue by expressly approving of the trial court's action. When the trial court asks whether a party has any objections to the jury instructions and the party responds negatively, it is an affirmative approval of the trial court's instructions.

Here, defendant's trial counsel's response to the trial court's question about further objections to the jury instructions constituted an affirmative approval of the general unanimity instruction, and defendant's claim of error on appeal related to a specific unanimity instruction is therefore waived. *Id*.

We therefore need only address defendant's argument that he was entitled to a specific unanimity instruction in the context of his ineffective assistance of counsel claim.

Ineffective assistance of counsel claims present a mixed question of fact and constitutional law. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). This Court reviews the trial court's factual findings for clear error and its conclusions of constitutional law de novo. *Id*. "A finding is clearly erroneous if this Court is left with a definite and firm conviction that the trial court made a mistake." *Abcumby-Blair*, 335 Mich App at 227-228 (quotation marks and citation omitted). Because a *Ginther*[8] hearing was not held, this Court's review is limited to mistakes apparent on the record. *People v McMillan*, 213 Mich App 134, 141; 539 NW2d 553 (1995).

"In order to establish the right to a new trial premised on ineffective assistance of counsel, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Abcumby-Blair*, 335 Mich App at 228. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. (quotation marks and citation omitted).

Michigan's constitution protects a criminal defendant's right to a unanimous jury verdict. *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994), citing Const 1963, art 1, § 14; see also MCR 6.410(B). Accordingly, the trial court must properly instruct the jury on the unanimity requirement. *People v Chelmicki*, 305 Mich App 58, 67-68; 850 NW2d 612 (2014). "[I]f alternative acts allegedly committed by defendant are presented by the state as evidence of the actus reus element of the charged offense, a general instruction to the jury that its decision must be unanimous will be adequate unless 1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt." *Cooks*, 446 Mich at 524. However, "[w]hen a statute lists alternative means of committing an offense which in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theory." *Chelmicki*, 305 Mich App at 68 (quotation marks and citation omitted; alteration in original). In that case, a "defendant may be properly convicted on multiple theories that represent the same element of the offense." *Id*.

[8] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Here, defendant was convicted of violating MCL 750.81d(1), which provides that "an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers" a police officer "who the individual knows or has reason to know is performing his or her duties is guilty of a felony." The statute thus expressly provides alternate theories of committing the offense, and jury unanimity is not required as to the specific theory where, as here, the alternative acts were part of the same course of conduct and were not materially distinct. *Chelmicki*, 305 Mich App at 68. A specific unanimity instruction was not required. *Id*. at 69. Accordingly, defendant's trial counsel was not ineffective for declining to request one because "defense counsel is not required to make a meritless request or objection." *Id*.

VIII. CUMULATIVE ERROR

Next, defendant contends that he was denied a fair trial by the cumulative effect of multiple errors. Because defendant has not established that any errors occurred, he is not entitled to reversal based on cumulative error. "Absent the establishment of errors, there can be no cumulative effect of errors meriting reversal." *Dobek*, 274 Mich App at 106; accord *Kelly*, 231 Mich App at 646.

IX. SENTENCING

Finally, defendant argues that he is entitled to resentencing because the trial court impermissibly punished him for asserting his constitutional right to a trial by jury when the trial court imposed a sentence that was founded on defendant's refusal to admit guilt for the offenses. Defendant contends that his rights to due process and a jury trial were violated.

Defendant frames his claim of sentencing error as an alleged violation of his constitutional rights to a jury trial and due process. Constitutionally based claims of sentencing error must be raised by timely objection in the trial court. *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015). Defendant does not claim to have raised this issue in the trial court. Instead, he claims that he preserved it by filing a motion to remand in this Court, pursuant to *People v Kimble*, 470 Mich 305; 684 NW2d 669 (2004). However, the circumstances in *Kimble* involved the preservation of a challenge to the scoring of the statutory sentencing guidelines. See *id*. at 309. Defendant in this case raises a constitutionally based challenged, not a challenge to the scoring of his guidelines. Therefore, his appellate issue is unpreserved because he failed to properly raise it in a timely fashion. *Lockridge*, 498 Mich at 392. Unpreserved constitutional sentencing issues are reviewed for plain error affecting substantial rights, which requires the defendant to show "that an error occurred, that the error was plain, i.e., clear or obvious, and that the plain error affected substantial rights." *Id*. at 392-393.

"[A] court cannot base its sentence even in part on a defendant's refusal to admit guilt." *People v Pennington*, 323 Mich App 452, 467; 917 NW2d 720 (2018) (quotation marks and citation omitted). This Court considers "three factors to determine if a sentencing court improperly considered a defendant's refusal to admit guilt: (1) the defendant's maintenance of innocence after conviction; (2) the judge's attempt to get the defendant to admit guilt; and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have been so severe." *People v Payne*, 285 Mich App 181, 194; 774 NW2d 714 (2009) (quotation marks and citation omitted). However, a court may properly consider "evidence of a lack of remorse" when determining an individual's potential for rehabilitation. *Dobek*, 274 Mich App at 104.

Here, the trial court sentenced defendant at the top of his guidelines range for his operating while intoxicated offense. His guidelines for that offense were 12 to 36 months, and he was sentenced to 36 months to 10 years' imprisonment. Defendant was sentenced to 30 to 48 months' imprisonment for resisting or obstructing, and he was sentenced to one year in jail for driving with a suspended license. The sentences were ordered to be served concurrently. In justifying the sentence, the trial court focused extensively on defendant's extensive history of consistently, and regularly, committing similar criminal offenses, spanning "more than 30 years." The court emphasized the dangers that defendant's consistent pattern of conduct posed to the public, as well as the danger defendant posed to others on the night of the offenses for which he was convicted in this case by driving while highly intoxicated on a particularly difficult section of road to navigate, due to its many curves and narrow width.

On appeal, defendant complains that certain specific statements by the trial court evidenced an intent to punish him for exercising his right to a jury trial. However, defendant cherry picks certain statements and discusses them out of context. The full context that includes the statements selected by defendant is as follows:

> The witness that you called at trial, nobody's mentioned that, but to me, that was absolutely ridiculous. I mean, the idea that that individual picked you up from Mr. Charles' house and drove you -- dropped you off at some friends house, and then left, and he got in the accident, and then somehow you end up walking down the road away from the accident when there's absolutely no evidence of more than one person being there, it's just -- it's a joke.
>
> I mean, you clearly – [defense counsel] has to take your word for it and present evidence on your behalf, but there's no question in my mind that you got that individual to come up on the stand and lie for you. And that just happened a couple of weeks ago, so again, all this, you know, letters and everything about you changing and want to turn things around, well, you didn't want to turn things around well enough up to a couple weeks ago, to stop yourself from calling somebody to lie under oath in front of a jury in open court about what happened.
>
> It's one thing to challenge your case and – and make every fair attempt at advocating for yourself, but to suborn and make a mockery out of whole [sic] process is ridiculous. I mean, it's so clear what happened. You -- you drove home from Mr. Charles. You were drunk. You ran into the tree and your idea was to walk back to Mr. Charles' place. That's the exact direction you were going in, and that's what really happened, and I think the jury saw right through that.
>
> So, again, I think that goes to, number one, your view of the process and your likelihood of some kind of rehabilitation, and so your past, history, what you did in this current offense, your actions and in deliberately calling somebody to lie for you on the stand, all of that convinces me that rehabilitation should not be a goal of the sentence, but the goal of the sentence ought to be punishment and the protection of the community and to get you in a place where you're not going to be drunk driving, that you're not going to put other innocent people in danger.

> With your history and your behavior, it's clear to me that you either can't or aren't going to conform your behavior to what's expected of everybody else in society. Somehow, you believe that you're exempt from all of that, so the focus needs to be on punishment, and again, protection of the community.

It is clear from the trial court's statements that it was not chastising defendant for exercising his right to have a jury trial. Instead, the trial court was reacting to defendant's blatant attempts to assert his innocence in a *disingenuous and dishonest* manner as well as negating defendant's claim at sentencing that he was turning his life around. The trial court did not punish defendant for calling a witness but instead pointed out the utter lack of credibility in the witness's testimony that was entirely inconsistent with the record evidence. Defendant has not established plain error based on his assertion that the trial court punished him for refusing to admit guilt. *Pennington*, 323 Mich App at 467.

Affirmed.

/s/ Stephen L. Borrello
/s/ Mariam S. Bazzi
/s/ Andrew J. Lievense