STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP224-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KAVIN K. NESBIT,

Defendant-Appellant.

APPEAL FROM THE DECISION DENYING A MOTION TO SUPPRESS AND THE JUDGMENT OF CONVICTION, ENTERED IN KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE CHAD G. KERKMAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

ANNE C. MURPHY
Assistant Attorney General
State Bar #1031600

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9224
(608) 266-9594 (Fax)
murphyac@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Statutes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case can be resolved on the briefs by applying well-established legal principles to the facts; accordingly, the State requests neither oral argument nor publication.

SUPPLEMENTAL STATEMENT OF THE CASE

The State charged Nesbit with one count of possession of a firearm by a felon and one count of possession of THC, second offense. (1; 9.) According to the complaint, a state trooper, Trooper Fowles, was patrolling on Interstate 94 and saw two people, Nesbit and another individual who was carrying a gas can, walking southbound on the right shoulder at around 7:30 p.m. After Trooper Fowles pulled over, the men told him that they had run out of gas, so Trooper Fowles told them that he would give them a ride to the gas station and then to their car. (1:1-2.)

In response to Trooper Fowles' question, both men stated that they had no weapons. However, when Trooper Fowles patted them down, he found a .22 revolver in Nesbit's waistband. A review of Nesbit's criminal record showed that he had been previously convicted of felony possession with intent to deliver THC in Milwaukee County. Nesbit later admitted that he had "two roaches" and Trooper Fowles found two marijuana cigars on his person. (1:2.)

Nesbit filed a motion to suppress his statements and the evidence recovered from him – the .22 revolver, five ammunition rounds and two marijuana cigars – alleging

that the pat down was an illegal search because an officer cannot frisk a citizen for weapons solely because the officer intends to give a citizen a squad car ride, citing *State v. Hart*, 2001 WI App 283, 249 Wis. 2d 329, 639 N.W.2d 213, *overruled on other grounds by State v. Sykes*, 2005 WI 48, 279 Wis. 2d 742, 695 N.W.2d 277. (14, A-App. 103-04.) At the suppression hearing, counsel and the circuit court discussed the precedential effect of *Hart*, with Nesbit's counsel arguing that the proposition that "Wisconsin law does not allow officer to frisk citizen for weapons solely because the officer tends to give a citizen a squad car ride" was not overruled by *Sykes,* and the State agreeing that "what remains of the *Hart* case is a declaration that if an officer has no other bases tha[n] merely putting a person in the back of a squad car," then that "is not, [by] itself, a sufficient factual basis" for the pat down or frisk. (36:4-5, A-App. 108-09.) However, the State asserted that *Hart*

> in no way states that . . . that cannot be a part of the calculus. That, in fact, the case takes great pains to say they're quite aware of the danger of an officer who has hands on the wheel and is no longer facing the individual or individuals behind him and what a precarious and dangerous situation that is.
>
> So the *Hart* case explains all of that. It simply says you cannot . . . have zero additional facts to go ahead.

(36:5-6, A-App. 109-10.)

At the suppression hearing, Trooper Fowles testified that at 7:30 p.m. he saw two individuals walking on the shoulder of Interstate 94. Although he had not seen a

disabled car on the side of the highway in the direction they were walking from, one of them was carrying a gas can, and the other one was Nesbit. (36:7-8, A-App. 111-12.) When Trooper Fowles pulled over behind them they told Trooper Fowles that they had run out of gas. Both individuals seemed "perfectly normal" and were "talkative." (36:9-10, A-App. 113-114.) Trooper Fowles testified that walking on the interstate was not safe and was not allowed – in fact, there are signs that prohibit walking on the interstate and say "no pedestrians" – and therefore, he told Nesbit and his companion that he would give them a ride to get gas and bring them back to their car. (36:11, 19, A-App. 115, 123.)

Because he was alone and in order to determine his own safety, Trooper Fowles asked Nesbit and his companion if they had any weapons and they both responded no. (36:10, 12, A-App. 114, 116.) Trooper Fowles specifically testified that in response to his question about weapons, Nesbit "all of a sudden . . . seemed very deflated" and had a "very different change in demeanor as compared to Mr. Hudson." (36:12-14, A-App. 116-18.) Based on his observations of Nesbit's "change in his attitude," Trooper Fowles "made a decision to pat down Mr. Nesbit first." (36:14, A-App. 118.) About two seconds after starting the pat-down of Nesbit, Trooper Fowles felt a gun, which was loaded with five rounds of ammunition, pulled it out of Nesbit's waistband and directed both Nesbit and Hudson to the ground. (36:17, A-App. 121.)

The circuit court reviewed the testimony of Trooper Fowles, a trooper with seventeen years of experience, found his testimony credible, and determined that the totality of the circumstances justified the frisk. Thus, the circuit court denied the motion to suppress. (36:35-48, A-App. 139-42.)

In so doing, the circuit court distinguished this case from *Hart* because in *Hart,* there was only one defendant, who the police officer pulled over but then told that he would not be arrested, and no other factors supported the frisk. In this case, Trooper Fowles initially stopped when he saw the two suspects, Nesbit and Hudson, walking on the shoulder of I-94 because they were not supposed to be walking on the interstate; therefore, there was a "two-to-one ratio between the defendant and his companion and the trooper." Further, Nesbit "seemed to have a change of countenance and perhaps attitude when the trooper mentioned frisking . . . and ask[ed] if they had any weapons." (36:37-38, A-App. 141-42.) Based on the circuit court's findings of fact supporting the frisk by Trooper Fowles, the circuit court denied the motion to suppress. (36:38, A-App. 142.)

Nesbit pled guilty to count one for possession of a firearm by a felon, and count two for possession of THC was dismissed. (19; 29; 37:7-8.) The judgment of conviction was entered, sentencing Nesbit to four years of probation, sentence withheld, with a condition of probation of nine months in county jail with Huber and work crew privileges.

(27, A-App. 101.) Nesbit appeals from the judgment of conviction. (31.)

ARGUMENT

I. The initial stop of Nesbit was justified because Nesbit and his companion were violating the statute prohibiting pedestrians on the interstate.

Wis. Stat. § 346.16(2)(a) prohibits pedestrians from walking on the interstate "when official signs have been erected prohibiting" pedestrians.[1] The penalty for violating this section is a forfeiture of "not less than $20 nor more than $40 for the first offense and not less than $50 nor more than $100 for the 2nd or subsequent conviction within a year." Wis. Stat. § 346.17.

On appeal, Nesbit does *not* contest the validity of the initial stop by Trooper Fowles when he saw him and Hudson walking on the shoulder of Interstate 94. The initial *Terry*[2] stop was clearly justified by reasonable suspicion and probable cause that Nesbit and Hudson were in violation of

---

[1] Wis. Stat. § 346.16(2)(a) provides in pertinent part:

> Use of controlled-access highways, expressways and freeways.
>
> . . . .
>
> (a) Except as provided in par. (b), no pedestrian or person riding a bicycle or other nonmotorized vehicle and no person operating a moped or motor bicycle may go upon any expressway or freeway when official signs have been erected prohibiting such person from using the expressway or freeway.

[2] *Terry v. Ohio*, 392 U.S. 1 (1968)

the statute prohibiting pedestrians on the interstate highway. *See State v. Colstad*, 2003 WI App 25, ¶¶ 11-14, 260 Wis. 2d 406, 659 N.W.2d 394 (stop justified by reasonable suspicion of non-criminal traffic infraction). The circuit court found that Trooper Fowles' credibly testified that he pulled over when he saw Nesbit and Hudson walking on the interstate because there were signs posted stating "no pedestrians" and therefore, they "could not be on the interstate." (36:35.)

These factual findings should be upheld on appeal, because they are not clearly erroneous. *State v. Sumner*, 2008 WI 94, ¶ 17, 312 Wis. 2d 292, 752 N.W.2d 783. Accordingly, the initial stop was justified by both reasonable suspicion and probable cause. *See Arizona v. Johnson*, 555 U.S. 323, 327 (2009) (police lawfully seize everyone in vehicle pending investigation into vehicular violation; police do not need additional cause to believe passenger is involved in other criminal activity).

II. Trooper Fowles had reasonable suspicion to frisk Nesbit.

A. Relevant law and standard of review.

Police officers face critical dangers every time they perform their investigative duties, and should not be expected to take unnecessary risks in the performance of those duties. *Terry v. Ohio*, 392 U.S. 1, 23-24 (1968) (many officers are killed or wounded in the line of duty). It is clearly unreasonable to deny officers the power to take

necessary measures to determine whether suspects are carrying weapons, and to neutralize the threat of physical harm to themselves or others. *Id.* Under Wis. Stat. § 968.25, when an officer has stopped a person for temporary questioning, and reasonably suspects that someone is in danger of physical injury because the suspect may be armed or dangerous, the officer may conduct a protective frisk, or pat-down, of the suspect for weapons. *State v. Morgan*, 197 Wis. 2d 200, 208-09, 539 N.W.2d 887 (1995) (pat-down of suspect's outer clothing justified if officer has reasonable suspicion that suspect may be armed); *State v. Flynn*, 92 Wis. 2d 427, 438 n.1, 285 N.W.2d 710 (1979) (Wis. Stat. § 968.25 codifies *Terry* frisks in Wisconsin).

Reasonable suspicion is less than probable cause, but more than a hunch that someone is armed. *State v. Guy*, 172 Wis. 2d 86, 94, 492 N.W.2d 311 (1992). However, an officer need not be absolutely certain that the individual is armed for a protective search to be legal. *Terry*, 392 U.S. at 27. Courts determine whether reasonable suspicion exists by applying an objective, common-sense test, *State v. Kelsey C.R.*, 2001 WI 54, ¶ 41, 243 Wis. 2d 422, 626 N.W.2d 777, which considers "whether a reasonably prudent [person] in the circumstances [of the officer] would be warranted in the belief that his [or her] safety or that of others was in danger." *Terry*, 392 U.S. at 27. Pursuant to this test, courts analyze the totality of the circumstances known to the searching officer at the time of the frisk and whether there

were "'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant[ed] that intrusion.'" *Morgan*, 197 Wis. 2d at 209. *See also Kelsey C.R.*, 243 Wis. 2d 422, ¶¶ 48-49; *State v. McGill*, 2000 WI 38, ¶ 22, 234 Wis. 2d 560, 608 N.W.2d 795.

The purpose of a protective frisk is to determine whether the person is, in fact, carrying a weapon, in order to neutralize the threat of physical harm. *Sumner*, 312 Wis. 2d 292, ¶ 21; *State v. Kyles*, 2004 WI 15, ¶ 9, 269 Wis. 2d 1, 675 N.W.2d 449. The officer, however, need not subjectively feel fear in order for the protective frisk to be reasonable or valid. *Kyles*, 269 Wis. 2d 1, ¶¶ 20-25, 29-34 (officer's subjective fear may be considered, but reasonable suspicion does not turn on officer's subjective belief). Rather, a weapons frisk is governed by the same *objective* test of reasonableness that attends an investigative stop, requiring consideration of the totality of the circumstances. *State v. Johnson*, 2007 WI 32, ¶ 21, 299 Wis. 2d 675, 729 N.W.2d 182; *State v. Williams*, 2001 WI 21, ¶ 22, 241 Wis. 2d 631, 623 N.W.2d 106.

Wisconsin's protective frisk jurisprudence has consistently emphasized that the totality of all circumstances present and known to the officer must be taken into account in order for the courts to assess the legality of the procedure. *Sumner*, 312 Wis. 2d 292, ¶ 23. Naturally, some factors will be of greater import than others in the reasonable suspicion calculus in each particular case.

Id. Accordingly, the cases first break down the reasonable suspicion issue into an analysis of each primary factor present, and then analyze those factors under the totality of circumstances. *Id.* ¶¶ 23, 50 (proper for appellate court to list factors and then evaluate them in their totality); *Kyles*, 269 Wis. 2d 1, ¶¶ 17-18, 68-72 (same). Although some of the facts may not support reasonable suspicion if taken separately, in the aggregate they can provide "building block[s]" of facts and inferences that provide reasonable suspicion under the totality of the circumstances. *State v. Allen*, 226 Wis. 2d 66, 75-76, 593 N.W.2d 504 (Ct. App. 1999).

The reasonable suspicion inquiry is broad and is not limited to specific evidence about weapons, as demonstrated in *Sumner*, where the Wisconsin Supreme Court found that several factors – Sumner's "reaching gestures," nervousness and repeatedly putting his hands in his pockets, and the police officer's concern about his safety – provided, under the totality of circumstances, reasonable suspicion that Sumner was armed and dangerous. *Sumner*, 312 Wis. 2d 292, ¶¶ 24-25. Other facts that courts have found relevant to a finding of reasonable suspicion include that a suspect was twitchy and appeared unusually nervous and acting out of the ordinary, *McGill*, 234 Wis. 2d 560, ¶¶ 7-8; a suspect had an unusual number of air fresheners that could be used to hide smell of drugs, *State v. Malone*, 2004 WI 108, ¶ 36, 274 Wis. 2d 540, 683 N.W.2d 1; a suspect could not adequately

explain behavior or "demeanor in sitting in a huddled position with a hood over her head," *Kelsey C.R.*, 243 Wis. 2d 422, ¶¶ 49-50; the officer conducting the search was alone, *McGill*, 234 Wis. 2d 560, ¶ 33; a search occurred in the evening hours when an "officer's visibility is reduced by darkness and there are fewer people on the street to observe the encounter," *Id.* ¶ 32; a search occurred in a home were officer "ha[d] to deal with suspects on the suspects' own turf," *Guy*, 172 Wis. 2d at 98.

When reviewing a decision on a motion to suppress, this Court will uphold the circuit court's findings of fact unless they are clearly erroneous and reviews *de novo* whether those facts constitute reasonable suspicion. *Sumner*, 312 Wis. 2d 292, ¶ 18. In determining reasonableness, this Court "may look 'to any fact in the record, as long as it was known to the officer at the time he conducted the frisk and is otherwise supported by his testimony at the suppression hearing.'" *Id.* ¶ 22 (quoting *Kyles*, 269 Wis. 2d 1, ¶ 10.)

B. Under the totality of the circumstances, the circuit court correctly found that the frisk of Nesbit for officer safety was justified by Trooper Fowles' credible testimony that he reasonably suspected that Nesbit may have been armed and dangerous.

As *Sumner* instructs, this Court should look to the facts in the record, including the testimony at the suppression hearing, and then analyze the factors identified first individually and then in totality, to determine whether

Trooper Fowles had the required reasonable suspicion to conduct the protective frisk of Nesbit. *Sumner*, 312 Wis. 2d 292, ¶¶ 23, 50. In this case, there are multiple factors that provided reasonable suspicion for the protective frisk in the aggregate. *Allen*, 226 Wis. 2d at 75-76.

1. Walking on the shoulder of the interstate was suspicious behavior because it violates a state statute and because, although Nesbit said they had run out of gas, Trooper Fowles had not seen a disabled vehicle while patrolling the interstate.

As set forth in part I of this brief, it is undisputed that Trooper Fowles had probable cause that Nesbit and Hudson were violating the statute prohibiting walking on the interstate and therefore the initial stop was justified.

In addition, the suspicious nature of this behavior is one factor justifying Trooper Fowles' protective frisk of Nesbit. The circuit court found that Trooper Fowles, who had been a trooper for seventeen years, testified credibly about his reasons for conducting the frisk of Nesbit. (36:35, A-App. 139.) In denying the motion to suppress, the circuit court considered that the interstate had posted signs forbidding pedestrians and Trooper Fowles' testimony that "the two gentlemen could not be on the interstate." (36:35, A-App. 139.)

After Trooper Fowles informed Nesbit and Hudson that they were not allowed to be walking on the interstate, Nesbit and Hudson told Trooper Fowles that they had run

out of gas and left their vehicle (36:36, A-App. 140.) However, Trooper Fowles had not seen any disabled vehicle, which the circuit court found "could raise some suspicion" because what the men told him was not consistent with what Trooper Fowles had seen when patrolling the interstate. (36:36, A-App. 140.) Therefore, the fact that Nesbit was on the interstate where he was not supposed to be, supposedly because he ran out of gas, coupled with Trooper Fowles' not seeing a disabled vehicle in the vicinity, is a factor supporting the circuit court's determination that Trooper Fowles had reasonable suspicion to frisk Nesbit.

2. Because Nesbit acted nervous and his demeanor and attitude changed when Trooper Fowles asked him if he had a weapon, Trooper Fowles' suspicion that Nesbit may have been armed was reasonable.

After Trooper Fowles asked Nesbit and Hudson if they had any weapons, Hudson responded no, remaining talkative and without any change in his demeanor. (36:12, A-App. 116.) However, Nesbit's response to Trooper Fowles' question about weapons was in stark contrast: "all of a sudden he seemed very deflated." (36:12-13, A-App. 116-17.) Trooper Fowles testified that Nesbit responded by shaking "his head to the negative very slightly" and demonstrated "a very, very different change in demeanor as compared to Mr. Hudson." (36:13-14, A-App. 117-18.) The change in demeanor was stark and obviously connected to Trooper Fowles' question about weapons; Trooper Fowles testified that before

asking Nesbit whether he had any weapons, Nesbit had been "talking and pointing and everything else" and after the question, "[a]ll of a sudden his arms were down at his side. And when I looked at him, he shook his head to the negative just slightly. Just it was a change in his countenance." (36:14, A-App. 118.) Based on Trooper Fowles' observations of Nesbit after Trooper Fowles specifically asking Nesbit if he had a weapon, Trooper Fowles "made a decision to pat down Mr. Nesbit first." (36:14, A-App. 118.)

In its decision denying suppression, the circuit court considered Trooper Fowles' testimony that "at first the defendant seemed normal. He was talkative. He was pointing. The trooper told the defendant and his companion that it wasn't safe to be walking on the interstate and they were not allowed to be walking on the interstate." (36:36, A-App. 140.) However, when Trooper Fowles asked if they had any weapons, he observed that Nesbit "seemed to be deflated. His demeanor seemed to have changed. He seemed to have shaken his head in the negative and the trooper observed a change in attitude." (36:36-37, A-App. 140-141.) Therefore, this "change in attitude" caused Trooper Fowles to become "suspicious of Mr. Nesbit." (36:37, A-App. 141.) Nesbit's clear and obvious change in attitude and demeanor in response to Trooper Fowles' specific question about weapons provides another factor supporting Trooper Fowles' protective frisk of Nesbit.

3. Trooper Fowles was reasonably concerned for his safety because Nesbit and Hudson outnumbered him and when he transported them in his squad car he would be vulnerable and in potential danger.

At the suppression hearing, Trooper Fowles testified credibly that his decision to frisk Nesbit took into consideration his own safety because he would be transporting Nesbit and Hudson in the back of his squad car while Trooper Fowles had both hands on the wheel and was concentrating on his driving, which would "compromise [his] ability to defend [himself] or be able to utilize his hands if there was a problem in the back of the squad." (36:15, A-App. 119.) At that point, Trooper Fowles was the only officer present and therefore the ratio of himself to the persons transported was "two-to-one." (36:16, A-App. 120.) Trooper Fowles also testified that another safety concern was that the glass separating him from the back of the squad car was not bulletproof. (36:16, A-App. 120.) Further evidencing his concern for his own safety, when Trooper Fowles patted down Nesbit he positioned Nesbit between himself and Mr. Hudson because he "didn't know as of yet what Mr. Hudson had" and therefore he "put Mr. Nesbit between the two of us." (36:16, A-App. 120.)

Based on this testimony that Trooper Fowles was alone in his squad car when he pulled over after seeing Nesbit and Hudson walking on the interstate, the circuit court found that there was a "two-to-one ratio of two people

on the road versus him." (36:35-36, A-App. 139-40.) The circuit court further found that Trooper Fowles conducted the frisk of Nesbit after he observed a change in attitude and became suspicious of Nesbit, because he considered that when "the two men were to be seated in [his] squad car, there would be glass in between [him] and the defendant . . . and his companion, but that glass would not be bulletproof." (36:37, A-App. 141.)

Based on these safety concerns testified to by Trooper Fowles – he was outnumbered and he would be alone transporting the suspects in his squad car without the protection of bulletproof glass – the circuit court correctly found that the safety factor justified Trooper Fowles' protective frisk of Nesbit. The circuit court determined that the "two-to-one ratio between the defendant and his companion" and Trooper Fowles (36:37-38, A-App. 141-42) created a dangerous situation that supported Trooper Fowles' decision to conduct a protective frisk of Nesbit.

4. In the aggregate, these factors created reasonable suspicion under the totality of the circumstances that supported the weapons frisk.

Based on the factors outlined above, the circuit court properly found that Trooper Fowles had reasonable suspicion that Nesbit may have been armed. In addition to the violation of the statute forbidding pedestrians on the highway, Trooper Fowles' frisk of Nesbit was supported by the following facts under the totality of the circumstances:

- Trooper Fowles, in patrolling the interstate, had not seen a disabled vehicle to verify Nesbit's story that they ran out of gas;
- Trooper Fowles noticed a dramatic change in Nesbit's demeanor as soon as Trooper Fowles asked him if he had a weapon, from talkative and demonstrative to quiet and subdued;
- Trooper Fowles was alone and therefore, when he stopped Nesbit and Hudson and when he would transport them in his squad car, Trooper Fowles was outnumbered and there was no bulletproof glass separating them.

The circuit court's decision validating the weapons frisk here was consistent with *Morgan,* upholding reasonable suspicion for a weapons frisk because the facts in the aggregate, created reasonable suspicion that the vehicle's occupants may be armed and dangerous. In *Morgan*, the Wisconsin Supreme Court upheld a weapons frisk of a driver who exhibited in suspicious (although not criminal) behavior by leaving and entering two alleyways in rapid succession in a vehicle with expired plates, and, when police asked for his license, he acted very nervous and could not locate it. *Morgan*, 197 Wis. 2d at 212-13. Thus, the court held it was the combination of those facts, not just the high crime area, which properly led to the weapons frisk. *Id.* at 213.

Similarly, here it was not just the fact that Nesbit was violating a statute by walking on the interstate, but it was the combination of factors that validated the frisk under the totality of the circumstances. *Sumner*, 312 Wis. 2d 292, ¶¶ 23, 50. All the factors outlined above, in the aggregate, provided the building blocks supporting reasonable suspicion that Nesbit may have been armed and dangerous. *Allen*, 226 Wis. 2d at 75-76. *See also State v. Limon*, 2008 WI App 77, ¶ 32, 312 Wis. 2d 174, 751 N.W.2d 877 (absolute certainty that individual is armed is not required; officer making *Terry* stop need not reasonably believe individual *is* armed, only that there exists reasonable suspicion individual *may be* armed).

On appeal, Nesbit argues that all of these factors, including "Nesbit's 'change of demeanor,' the ratio of two individuals to one officer, the fact that Mr. Nesbit and his companion were walking along the interstate at the time of the stop" provided Trooper Fowles with no more than an "'inchoate and unparticularized suspicion or "hunch," instead of the requisite reasonable suspicion that Mr. Nesbit was armed and dangerous.'" (Nesbit's Br. 17-18.) Nesbit is incorrect.

Trooper Fowles' testimony about his multiple reasons for conducting the protective frisk is uncontroverted and further, he was entitled to act on the inference supported by the suspiciousness of Nesbit's behavior of walking on the interstate and dramatic change of demeanor when asked if

he had a weapon, without first being required to rule out the inference supporting the innocence of Nesbit's behavior and demeanor. *State v. Nieves*, 2007 WI App 189, ¶ 14, 304 Wis. 2d 182, 738 N.W.2d 125 (police need not rule out innocent explanations for behavior when there are reasonable inferences that favor reasonable suspicion); *State v. Anderson,* 155 Wis. 2d 77, 84-86, 454 N.W.2d 763 (1990) (suspicious conduct by its very nature is ambiguous, and principle function of investigative stop is to quickly resolve that ambiguity). If any reasonable inference of wrongful conduct can be objectively discerned from a suspect's behavior, notwithstanding the existence of other innocent inferences that can be drawn, police can rely on the inference of suspicious behavior and have the right to act on the inference supporting reasonable suspicion. *Williams*, 241 Wis. 2d 631, ¶ 46.

Thus, it was proper for the circuit court to hold that based on the factors set forth above, Trooper Fowles had reasonable suspicion that Nesbit may have had a weapon. Under the totality of the circumstances outlined by Trooper Fowles' uncontroverted testimony – including that Nesbit was walking on the interstate in violation of the statute and without verified explanation, Nesbit's demeanor and attitude changed dramatically when asked if he had a weapon, and Trooper Fowles was outnumbered and thus had safety concerns – the frisk of Nesbit was entirely justified.

CONCLUSION

For all the foregoing reasons, this Court should affirm the decision denying Nesbit's motion to suppress and the judgment of conviction.

Dated this 14th day of June, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

ANNE C. MURPHY
Assistant Attorney General
State Bar #1031600

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9224
(608) 266-9594 (Fax)
murphyac@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 4,368 words.

Dated this 14th day of June, 2016.

_____
ANNE C. MURPHY
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 14th day of June, 2016.

_____
ANNE C. MURPHY
Assistant Attorney General