STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2018AP926-CR

TROY K. KETTLEWELL,

Defendant-Appellant.

ON APPEAL OF JUDGMENT OF CONVICTION AND DECISION DENYING SUPPRESSION MOTION, ENTERED IN THE WINNEBAGO COUNTY CIRCUIT COURT, THE HONORABLE DANIEL J. BISSETT, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

PAGE

Table of Authorities 3

Argument 4

I. THE STATE HAS CONCEDED THAT A SEARCH TOOK PLACE, HAS OFFERED NO ANALYSIS AS TO WHY THE FACTS AS FOUND BY THE CIRCUIT COURT SUPPORTED AN OBJECTIVELY REASONABLE BASIS FOR THE EXERCISE OF THE COMMUNITY CARETAKER FUNCTION, AND HAS COMPLETELY FAILED TO ADDRESS THE QUESTION OF WHETHER THE COMMUNITY CARETAKER ACTION WAS EXECUTED REASONABLY.

Conclusion 6

Certification and Certificate of Compliance 7-8

TABLE OF AUTHORITIES

Cases Cited

	PAGE
Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp., 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979)	6
State v. Anker, 2014 WI App 107, ¶13, 357 Wis.2d 565, 855 N.W.2d 483	6
State ex rel. Harris v. Smith, 220 Wis. 2d 158, 165, 582 N.W.2d 131 (Ct. App. 1998)	5
State v. Pettit, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992)	5

Constitutional Provisions Cited

United States Constitution, Fourth Amendment	5
Wisconsin Constitution, Article I, Section 11	5

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ARGUMENT

I. THE STATE HAS CONCEDED THAT A SEARCH TOOK PLACE, HAS OFFERED NO ANALYSIS AS TO WHY IT BELIEVES THE FACTS AS FOUND BY THE CIRCUIT COURT SUPPORTED AN OBJECTIVELY REASONABLE BASIS FOR THE EXERCISE OF THE COMMUNITY CARETAKER FUNCTION, AND HAS COMPLETELY FAILED TO ADDRESS THE QUESTION WHETHER THE COMMUNITY CARETAKER ACTION WAS EXECUTED REASONABLY, THEREBY CONCEDING THAT THE SEARCH WAS NOT A VALID EXERCISE OF THE COMMUNITY CARETAKER FUNCTION.

The State concedes on appeal as it did below that a

search took place when Deputy Schuh entered the curtilage of Kettlewell's home and systematically and intrusively peered into each and every window he came to while circling the home until he located Kettlewell asleep in his own bed. (State's brief: 2). It relies entirely upon the community caretaker doctrine to justify the search as consistent with the dictates of the Fourth Amendment to the United States Constitution and Article I, section 11 of the Wisconsin Constitution. *Id.* In arguing that the search represented a bona fide exercise of the community caretaker function, however, it engages in substantive argument which totals 29 words in length, and which is reproduced in its entirety below:

> In short, knocking on a curtilage window after discovery of a car in a ditch with airbags deployed is a search, in the course of bona fide community caretaking[.]

(*Id.* at 3) (brackets added). Insufficiently developed arguments are generally disregarded by this court, and the argument above is without doubt undeveloped at best with respect to the question whether the police had an objectively reasonable basis upon which to act in their capacity as community caretakers. *See* ***State ex rel. Harris v. Smith***, 220 Wis. 2d 158, 165, 582 N.W.2d 131 (Ct. App. 1998) ("The court of appeals does not create issues or develop arguments for a litigant."). "[This court] cannot serve as both advocate and judge." ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992). Accordingly, the State has conceded that there was not an objectively reasonable for a community caretaker action as argued in Kettlewell's brief. (Brief in chief: 14-25). ***Id.***

Finally, Kettlewell's brief argued extensively that even if the police were engaged in a bona fide community caretaker action, the actions they in fact took were nonetheless unreasonable. (Brief in chief: 25-32). The State's sole statement with respect to the reasonableness of the execution of the alleged community caretaker action is wholly conclusory, and as such, it has failed to respond to Kettlewell's argument that the alleged community caretaker action was unreasonably executed in any meaningful fashion other than to state the contrary as an *ipse dixit* conclusion. (State's brief: 3) (simply stating without an explanation as to

why that "the public interest in police attending to a crash in this matter outweighs the intrusion upon the privacy of an individual."). Failure to directly respond to an argument concedes the issue. *See* ***State v. Anker***, 2014 WI App 107, ¶13, 357 Wis.2d 565, 855 N.W.2d 483 ("We will not abandon our neutrality to develop arguments for the parties, so we take the State's failure to brief the issue as a tacit admission.").

The State's complete failure to meaningfully respond to any of Kettlewell's arguments regarding the reasonableness of the actions the police took in purported reliance upon their community caretaker function thus means that it has conceded Kettlewell's argument that the purported community caretaker action at issue here was unreasonably conducted. ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). The search at issue here was therefore not a valid exercise of a bona fide community caretaker action, nor was it justified on any other basis, whether or not identified by the State.

CONCLUSION

For the reasons discussed above, and in conjunction with his arguments in his brief-in-chief, the defendant, Troy H. Kettlewell, respectfully reiterates his request that this court reverse and vacate his judgment of conviction, reverse the circuit court's order denying his motion to suppress, and remand to the circuit court for further proceedings with instructions that the circuit court shall grant his motion to suppress.

Respectfully submitted 10/1/18:

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 700 words.

Dated 10/1/18:

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CERTIFICATE OF COMPLIANCE
WITH 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 s. 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 10/1/18:

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