STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP878-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

AVAN RONDELL NIMMER,

Defendant-Appellant.

ON REVIEW FROM A DECISION OF THE COURT OF APPEALS REVERSING A DECISION AND JUDGMENT OF CONVICTION ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE GLENN H. YAMAHIRO, PRESIDING

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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ARGUMENT

Law enforcement had reasonable suspicion to stop Nimmer under the circumstances here.

The officers who stopped Avan Nimmer—the only person outside an address where ShotSpotter sensors detected four gunshots a minute earlier—had reasonable suspicion to stop him under the totality of the circumstances. Those circumstances included: (1) the reliability of the ShotSpotter tip; (2) that the reported crime (shots fired in a residential city neighborhood) implicated criminal activity and pressing public safety concerns; (3) that the officers arrived at the reported address within a minute of the ShotSpotter alert; (4) that Nimmer was the only person visible outside the address; and (5) that upon seeing the officers, Nimmer looked away, quickened his walking pace away from them, dug at his left side, and bladed that side of his body away from the officers in a way that was consistent with his trying to conceal a weapon.

The circuit court correctly concluded as much. This Court should reverse the court of appeals' decision to the contrary.

Nimmer's response does not persuade otherwise.

A. Nimmer was functionally at the address, and the residential nature of the neighborhood does not factor against reasonable suspicion.

Nimmer claims that the State downplays the residential nature of the neighborhood and that he was "away" from the address that ShotSpotter provided. (Nimmer's Br. 13–14.) Nimmer does not make clear, however, how the residential nature of the neighborhood factors against reasonable suspicion here. In the State's view, that

the neighborhood is residential heightens the urgency of the police investigation. Indeed, gunshots discharged in a dense residential neighborhood are more likely to find a victim than in a non-residential area.

In addition, the record contradicts Nimmer's suggestion that he was too far "away" from the address when police responded for them to focus on him. The address that the officers responded to was 3390 North 21st Street, which is on the southeast corner of the intersection of 21st and Townsend. (R. 25:7–8, 12, 14–15.) Nimmer was on that southeast corner of Townsend, walking west, when police saw him. (R. 25:14–15.) That location is, as Officer Milone testified, "basically" the exact address that ShotSpotter provided, and it supported the circuit court's finding that the police found Nimmer in "very close proximity" to the ShotSpotter report location. (R. 25:8, 35.)

Nimmer seizes on Milone's statement that there was a "small field" and a sidewalk between the home at 3390 and Townsend to suggest that Nimmer was not close to the address. But Nimmer brought out no additional details at the hearing about the size of this "small field" or how it established a meaningful buffer or distance between Nimmer and the address. Nor did Nimmer argue to the circuit court that he was not close enough to the address to have reasonably caught the responding officers' attention.

Even without those details, this Court may take judicial notice that the Street View feature on Google Maps[1] shows a

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[1] *See Cloe v. City of Indianapolis*, 712 F.3d 1171, 1177 n.3 (7th Cir. 2013) ("We have taken judicial notice of—and drawn our distance estimates from—images available on Google Maps, 'a source whose accuracy cannot reasonably be questioned, at least for the purpose of determining' general distances."), *overruled on*

house at 3390 North 21st St., with a side-yard-sized area of grass separating it from the sidewalk running along Townsend.[2] *See* Wis. Stat. § 902.01(2)(b), (3) (Wisconsin appellate courts may take judicial notice of facts capable of accurate and ready determination). Given that view, a person walking on that southeast corner of Townsend and 21st Street would be, "basically the exact location where the ShotSpotter came in" and support the circuit court's finding that Nimmer was in "very close proximity" to the address. (R. 25:8, 35.)

B. The facts, taken together, establish reasonable suspicion.

Nimmer, like the court of appeals, focuses on the facts in isolation, rather than taken together, to argue that they don't support reasonable suspicion. As discussed in the State's opening brief (State's Br. 6–11), the facts taken together support a reasonable inference that Nimmer, the only person visible outside a location where shots were fired a minute earlier, and who visibly reacted to the police presence, was involved in criminal activity. And to that end, the officers did not need to rule out the possibility that Nimmer was innocent and simply in the wrong place at the wrong time. *State v. Waldner*, 206 Wis. 2d 51, 59–60, 556 N.W.2d 681 (1996) (when police draw a reasonable inference of unlawful conduct, they do not need "to rule out the possibility of innocent behavior before initiating a brief stop").

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other grounds by Ortiz v. Werner Enterprises, Inc., 834 F.3d 760 (7th Cir. 2016).

[2]*See* https://www.google.com/maps/place/3390+N+21st+St,+Milwaukee,+WI+53206/@43.08091,87.9387571,19z/data=!4m5!3m4!1s0x88051c00d4570407:0x525763b86c26871c!8m2!3d43.0809061!4d-87.9382099 (last visited June 16, 2021).

Nimmer wrongly asserts that the State "indicated essentially that [he] had fled the police"; he seems to argue that the officers could not have stopped Nimmer for fleeing under the circumstances. (Nimmer's Br. 15–16.) But the State's brief cannot be reasonably read to suggest that the officers here had reasonable suspicion to stop Nimmer for fleeing, i.e., disregarding a lawful command by police to stop. Rather, the officers—who again arrived at the intersection where Nimmer was because they were investigating a report of a crime occurring there—could factor their observations of Nimmer's reactions to them and draw reasonable inferences that Nimmer wanted to avoid police contact because he was involved in the crime they were investigating.

C. A ShotSpotter report provides a reliable tip indicating an ongoing crime with immediate public safety concerns.

Nimmer next minimizes the value and reliability of the ShotSpotter report, given that it cannot identify a suspect when reporting shots fired. (Nimmer's Br. 16–17.) He accuses the State of attempting to establish that a ShotSpotter report alone can create wide latitude for law enforcement to stop individuals. (Nimmer's Br. 17–19.)

No one disputes that ShotSpotter does not identify who the shooter is. Rather, it reliably and quickly reports that a particular number of gunshots were fired and where those gunshots occurred. That reporting is inevitably going to reach patrol officers more quickly than a citizen call, given the many steps a citizen generally would need to take if they decided to report the gunshots (i.e., recognizing that the sound was gunshots, estimating where the shots occurred, dialing police, communicating with whomever picks up, conveying that information to dispatch, etc.). Certainly some citizen calls could provide a description of a suspect and an exact location,

but that does not depreciate the reliability of the ShotSpotter report in alerting police to the precise location and number of shots fired within seconds of the event. And given that shots fired in a residential neighborhood raise significant public safety concerns and a need for a prompt police response, ShotSpotter is a reliable source that may factor into an officer's formulation of reasonable suspicion to stop a suspect.

Moreover, the State is not trying to suggest that ShotSpotter technology alone broadens the standard under which police may conduct a stop. Reasonable suspicion remains a totality-of-the-circumstances analysis. The ShotSpotter report—given its timing, precision, and the potential risk to public safety—is important, but it is just a piece of the reasonable-suspicion analysis. Here, it was one factor justifying the stop along with the facts that officers saw Nimmer alone at the address where they learned shots had been fired a minute earlier and saw him react to their presence in a suspicious and evasive manner.

D. Reversal here would conform with Wisconsin law addressing reasonable suspicion to stop in shots-fired investigations.

Nimmer attempts to align the facts here with *State v. Washington*, 2005 WI App 123, 284 Wis. 2d 456, 700 N.W.2d 305, and *State v. Pugh*, 2013 WI App 12, 345 Wis. 2d 832, 826 N.W.2d 418, and to distinguish the facts from the line of unpublished Wisconsin cases involving reasonable suspicion to stop in shots-fired cases. (Nimmer's Br. 20–31.) None of his arguments are persuasive.

Contrary to Nimmer's assertion (Nimmer's Br. 19–22), *Pugh* did not involve police investigating any report of "expected criminal activity." At most, the officers there were reasonably suspicious that Pugh illegally parked, a potential

forfeiture. *Pugh*, 345 Wis. 2d 832, ¶¶ 3–4. Even without that reasonable suspicion, the officers were permitted to initiate contact with Pugh. *Id.* ¶ 10 (citing *Florida v. Bostick*, 501 U.S. 429, 434 (1991)). The officers simply stopped Pugh too soon by physically seizing him as he tried to walk away from them without sufficient suspicion that a crime had occurred or was occurring, let alone that he was involved in one. *Id.* ¶ 12.

In contrast, here, the officers were investigating a very recent and more serious crime implicating public safety and found Nimmer alone at the location ShotSpotter provided. At that point, they had—though they did not need—ample reasonable suspicion to approach him and ask questions about the shots-fired report. *See Florida v. Royer*, 460 U.S. 491, 497 (1983) ("[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place" and asking them some questions.). Even if reasonable suspicion was in question before Nimmer saw the officers, it was certainly established once the officers observed Nimmer speeding his walking pace, looking away, digging at his waistband, and blading one side of his body away as if to conceal a weapon.

Nimmer also mischaracterizes *Pugh* as holding that blading cannot be a ground supporting reasonable suspicion. (Nimmer's Br. 16, 24.) *Pugh* stands for the proposition that blading, *without more*, does not supply reasonable suspicion. But nothing in *Pugh* holds that an officer cannot consider a suspect's blading or other evasive movements to formulate reasonable suspicion. Indeed, furtive behavior informed by other facts and context routinely supports a finding of reasonable suspicion. *See, e.g.*, *State v. Roy S. Anderson,* 2019 WI 97, ¶¶ 49–50, 389 Wis. 2d 106, 935 N.W.2d 285 (officers had reasonable suspicion based on tip that Anderson was selling drugs, Anderson's recent history of drug dealing, Anderson's abruptly changing direction upon seeing officers,

and his appearing to conceal something from them); *State v. Sumner*, 2008 WI 94, ¶ 26, 312 Wis. 2d 292, 752 N.W.2d 783 (unexplained reaching or furtive movements during traffic stop "can be a factor" in reasonable-suspicion analysis).

Indeed, it is well-established that a defendant's nervous, evasive, or furtive reactions to police color the reasonable suspicion analysis. "Although avoidance of the police and refusal to cooperate may be founded in wholly innocent intentions and without more do not create reasonable suspicion, 'cases have also recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion.'" *State v. Olson*, 2001 WI App 284, ¶ 8, 249 Wis. 2d 391, 639 N.W.2d 207 (citing *Bostick*, 501 U.S. at 437, and *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000)).

Nimmer insists that *Washington* supports him because in that case, police were investigating a specific crime, Washington was outside the alleged location of the crime, and Washington moved away from officers when they approached him. (Nimmer's Br. 23–24.) But in *Washington*, there was no indication when the complaint (which was a vague allegation of loitering and possible drug dealing) directing police to the location was made, who made it, or whether it was reliable. *Washington*, 284 Wis. 2d 456, ¶ 7. Given that, there was insufficient reasonable suspicion for police to stop when Washington simply started walking in a particular direction after seeing the police who were investigating "a vague complaint of loitering." *Id.* ¶ 17. Moreover, Washington's subsequent actions—looking nervous and taking a few steps backward after stopping and putting his hands in the air—did not supply reasonable suspicion that he was fleeing. *Id.* ¶ 18.

Like *Pugh*, *Washington* reflects a situation in which law enforcement observed someone in a high crime area, stopped the person, and formed reasonable suspicion *after* the stop.

While the officers in *Washington* were investigating a report of loitering and drug dealing, there was no evidence presented on the recency or reliability of the tip. In contrast, here, officers were investigating a reliable tip of an immediate crime that put the public at risk. The officers, upon seeing Nimmer, did not need reasonable suspicion to approach him and ask him some questions. Yet when Nimmer responded to that approach with multiple actions suggesting that he was nervous, concealing a weapon, and actively trying to evade that contact, police had reasonable suspicion to stop him. This was not the stop-first, develop-suspicion-later situation that was present in *Pugh* and *Washington*.

Nimmer's attempts to draw parallels between the facts here and those in *Gordon* and *Lewis* also fall flat. (Nimmer's Br. 25–26.) As noted (State's Br. 13–14), *Gordon* is like *Pugh* where police simply stopped someone for being in a high crime neighborhood and reacting subtly to seeing the police. *See State v. Gordon*, 2014 WI App 44, ¶ 18, 353 Wis. 2d 468, 846 N.W.2d 483. Further, *Lewis* presents a different shots-fired situation from the one here. *See State v. Lewis*, No. 2017AP234-CR, 2017 WL 3149755 (Wis. Ct. App. July 25, 2017) (unpublished) (Pet-App. 115–17). There, officers were responding to what appears to have been a citizen report of shots fired "in the area" of a particular address, with a report that multiple actors "were fleeing southbound." In that general area, police noticed Lewis walking and holding his waistband, but they saw no reaction from him to their presence, they saw no one else with him, and Lewis did not match the description that police had received of one of the actors. *Id.* ¶ 8 (Pet-App. 116).

Lewis is distinguishable from this case because there, police had to search a broader "general area" south of a report of shots fired, it was not apparent when police in *Lewis* responded, and by the time police saw Lewis, he did not match

the description they had received of a group of actors running, let alone the description of one of the actors. To that end, Lewis, like the defendants in *Pugh*, *Washington*, and *Gordon*, was doing little more than walking in a high-crime area. In contrast, here, Nimmer was at the address where police reliably learned shots were fired a minute earlier, he was conspicuously alone, and he responded in multiple ways to the police presence before the officers stopped him.

Finally, the State maintains that the reasoning and results in the unpublished shots-fired cases add persuasive weight to the conclusion that the officers here had reasonable suspicion to stop Nimmer. (State's Br. 15–16.) Nimmer distinguishes *Tally-Clayborne*[3] by the fact that Tally-Clayborne walked away from police and touched his waistband after they stopped him and his companions and started patting down the companions. (Nimmer's Br. 28.) He distinguishes *Norton*[4] because Norton made a furtive movement in a car, which in his view was more consistent with a shots-fired report. (Nimmer's Br. 29–30.) Nimmer further seems to suggest that the parties and this Court cannot rely on any of these cases because they did not involve ShotSpotter. (Nimmer's Br. 31.)

Those are all distinctions without a difference. In formulating reasonable suspicion, police may consider a defendant's evasive and furtive behavior, whether it occurs in response to seeing the officers patting down others, catching sight of officers or a squad car approaching, or having a spotlight shined in a car where they are sitting.

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[3] *State v. Tally-Clayborne*, No. 2016AP1912-CR, 2017 WL 4676647 (Wis. Ct. App. Oct. 17, 2017) (unpublished) (Pet-App. 118–20).

[4] *State v. Norton*, No. 2019AP1796-CR, 2020 WL 2049123 (Wis. Ct. App. Apr. 14, 2020) (unpublished) (Pet-App. 121–24).

Moreover, that the unpublished cases involved shots-fired reports from people, not ShotSpotter, does not depreciate their persuasive value. As discussed, ShotSpotter functions as a generally faster and more precise version of a citizen's shots-fired report. Those features, along with the fact that the discharge of a gun is linked to both criminal activity as well as a significant and pressing risk to public safety, suggest that the ShotSpotter report functions as a particularly reliable tip in the reasonable-suspicion analysis.

In all, and as argued (State's Br. 6–11), under circumstances where police respond within a minute to a ShotSpotter report of shots fired at a precise location, they see an individual outside that location, and the individual reacts furtively or evasively to the police, the officers have reasonable suspicion to conduct the brief *Terry* stop that they conducted here.

CONCLUSION

This Court should reverse the decision of the court of appeals.

Dated this 28th day of June 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,772 words.

Dated this 28th day of June 2021.

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

I hereby certify that:

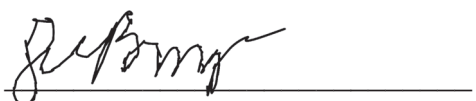
I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

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 28th day of June 2021.



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