STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2021AP1656 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JESSE E. BODIE,

Defendant-Appellant.

Appeal from an order denying suppression
and a judgment of conviction, both entered
in the Dane County Circuit Court,
the Honorable John D. Hyland, presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

No specific, articulable facts gave rise to a reasonable suspicion that Bodie was armed and dangerous.

The issue here is whether specific, articulable facts gave rise to a reasonable suspicion that Jesse Bodie was armed and dangerous when Officer Xiong frisked him. The State attempts to drive a wedge between the parties' approach to the reasonable suspicion analysis, but there is no dispute that this Court will review the totality of the circumstances. No single fact is dispositive, nor is any fact off the table.

The totality of the circumstances did not suggest that Bodie had a weapon and might use it. The State argues otherwise by pointing to Bodie's driving record and his "serious" statement that he'd rather not get inside Xiong's squad car. These facts, while valid considerations, did nothing to indicate that Bodie had a weapon. By inviting the Court to draw that inference, the State asks it to sanction an unreasonable, and thus unconstitutional, weapons frisk. The Court should say no.

A. Bodie's driving record did not suggest he had a weapon.

The State first points to Bodie's driving record—his "revoked license, OWI charge, and arrest warrant."[1] *See* State's Br. 13. The State offers no reason that Bodie's

[1] This was a non-serviceable Indiana warrant issued for driving without a valid license. (101:20-21).

record suggested he was armed on the night in question. Instead, it recites Bodie's driving infractions and says Xiong was "not required to ignore that information." *See* State's Br. 13 (quotations omitted). Of course not; the totality of the circumstances governs. But not every fact Xiong was *permitted* to consider suggested that Bodie had a weapon. Bodie's driving record did not involve weapons or violence. It gave Xiong no reason to suspect he was armed and dangerous.

Consider, in this vein, the case law governing extensions of traffic stops. Imagine an officer pulls a driver over because of a burnt-out taillight. It is settled law that the officer cannot continue the traffic stop beyond the time it reasonably takes to question the driver about the burnt-out taillight and issue a citation for it, *unless* the officer gains new information establishing reasonable suspicion for another offense. *State v. Hogan*, 2015 WI 76, ¶¶34-35, 364 Wis. 2d 167, 868 N.W.2d 124. Why not? Because an officer's knowledge that a person has done one thing wrong does not create reasonable suspicion that the person did something else wrong, too. *See generally State v. Betow*, 226 Wis. 2d 90, 93-95, 593 N.W.2d 499 (Ct. App. 1999).

This is common sense. A person's shortcomings in one domain often have little connection to her strengths or weaknesses in another. There is no reason to suspect that someone with a tax fraud conviction will commit sexual assault. A person who habitually drives ten miles over the speed limit may carefully adhere to the Bluebook's rules for legal citation.

The constitutional constraints on extending a traffic stop stem from the principle that reasonable suspicion for one offense does not establish reasonable suspicion for any other offense. That same logic shows

why Bodie's record of driving infractions did not establish reasonable suspicion that he was armed and dangerous. The two are not reasonably related. The existence of one does not create reasonable suspicion for the other.

B. Bodie's interactions with Xiong before the frisk revealed only that he did not want to sit in a cop car while he waited for his ride. They did not suggest he had a weapon.

Beyond Bodie's record, the State focuses on his interactions with Xiong after Xiong suggested that Bodie wait in his squad car. There are two threads to its discussion:

1. The State emphasizes Xiong's perception that Bodie's demeanor shifted. It correctly notes that a demeanor shift can contribute to reasonable suspicion, but it incorrectly asserts that that's what happened here.

2. The State also argues that preferring to wait on the side of a highway, at night and in cold weather, is inherently suspicious. The State's incredulity is hard to square with the reality of police-citizen tensions, conflict, and violence—especially when the citizen is a 20-something Black man, like Bodie when Xiong urged him to get in his squad car. (*See* 1:1). In any case, Bodie was permitted to decline Xiong's offer of aid.

Neither Bodie's demeanor shift nor his desire to keep standing in the cold gave Xiong reason to suspect he was armed. The State's contrary arguments fail.

1. Bodie's demeanor shift when Xiong asked him to sit in his squad car did not reasonably suggest that he was armed and dangerous.

The State contends that Bodie's reluctance to wait for his ride in Xiong's squad car indicated that he was armed and dangerous. Why else, it asks, would someone want to stand in the cold on the side of a highway? The inferential leap the State asks this Court to make is too great for the Fourth Amendment to abide. This is not *State v. Nesbit*, a case deemed "close" by the court of appeals, where the defendant's demeanor shift came after a question regarding weapons. 2017 WI App 58, ¶¶10-12, 278 Wis. 2d 65, 902 N.W.2d 266. The timing and context of Bodie's demeanor shift gave Xiong no reason to suspect he was armed.

The parties agree that *Nesbit* is the key precedent here. The *Nesbit* court noted that, while at first Nesbit was "talking and pointing" with an officer, he became "deflated" when asked whether he had a weapon, just slightly shaking his head "no." *Id.*, ¶¶11-12. Under these circumstances, the court held that Nesbit's demeanor shift would have led a reasonably prudent officer to suspect his slight head shake was a lie and he in fact had a weapon. *Id.*, ¶12.

The State wants this Court to conclude that Bodie, like Nesbit, shifted his demeanor in a way that suggested he was armed and dangerous. It notes that, as a general matter, a demeanor shift may be relevant to the reasonable suspicion analysis even when the shift is detached from any question about weapons. Again, of course; the totality of the circumstances govern. But in its protests about the validity of considering various facts, the State sidesteps the critical principle that courts view

such facts *reasonably* and *in context* to determine whether they give rise to reasonable suspicion. *See, e.g., State v. Kyles*, 2004 WI 15, ¶¶53, 72, 269 Wis. 2d 1, 675 N.W.2d 449. The reasonable suspicion inquiry is not a checklist. You don't automatically get a point for observing a demeanor shift.

When a person's demeanor shifts, the question is whether the specifics of his behavior would lead "a reasonably prudent officer" to believe "'his safety and that of others [are] in danger' because the individual may be armed with a weapon and dangerous." *Nesbit*, 278 Wis. 2d 65, ¶6 (quoting *Kyles*, 269 Wis. 2d 1, ¶13). Untethered from any conversation about weapons or a weapons frisk, or anything related to the two, Bodie's demeanor shift did not suggest he was armed and dangerous. The circuit court erred in holding that it did.

2. Bodie's preference for standing on the side of the highway instead of getting into Xiong's squad car did not reasonably suggest that he was armed and dangerous.

According to the State, the fact that Bodie didn't immediately want to get into Xiong's squad car suggests he was armed and dangerous. But Bodie was not required to accept Xiong's offer, and declining it shouldn't be held against him. Most importantly, a reasonably prudent officer would not have interpreted Bodie's preference for waiting outside as an indication that he had a weapon and posed a threat.

The State refers to Bodie's response to Xiong's first squad car offer as an "inexplicable refusal … to take shelter." State's Br. 14, 16. The State points out that Bodie wanted to wait outside even though cars were driving by

at 70 miles per hour and he "appear[ed] to be cold." State's Br. 14, 16.

There are three main problems with the State's reasoning.

First, there is nothing objectively unreasonable about a young Black man's decision to avoid getting into a police car—even one offered up as "shelter." Cases from the United States Supreme Court and numerous state and federal jurisdictions have recognized that the history of violent police-citizen confrontations in this country means many Americans feel less, not more, safe in the "shelter" police have to offer. *See, e.g.*, *United States v. Mendenhall*, 446 U.S. 544, 558 (1980) (the fact that a Black woman might have "felt unusually threatened" by white male police officers was "not irrelevant"); *United States v. Brown*, 925 F.3d 1150, 1151 (9th Cir. 2019) (citing Justice Stevens's concurring/dissenting opinion in *Illinois v. Wardlow*, 528 U.S. 119, 132 (2000), for the proposition that "some citizens, particularly minorities … believ[e] that contact with the police can itself be dangerous").

Second, even if it was unreasonable to keep standing outside, Bodie had the right to be unreasonable. There is no allegation that he was breaking the law or had received an order from police and refused to comply. If he wanted to be cold, he could be cold. If he wanted to decline help from police, he could decline help from police. *See United States v. Monsivais*, 848 F.3d 353, 360 (5th Cir. 2017) ("While it may be true that many individuals would gladly welcome police presence during an automobile malfunction, the Constitution does not command individuals to enthusiastically greet law enforcement under such circumstances."). The Constitution gives people the right "to ignore the police" and carry on with their day, reasonably or not, absent a

valid seizure. *Id.* This Court should not hold Bodie's attempt at exercising that right against him. *Cf. State v. Forrett*, 2022 WI 37, ¶6, 401 Wis. 2d 678, 974 N.W.2d 422 (the government cannot punish a person for exercising a constitutional right).

Finally, it only matters that Bodie's conduct was unreasonable if it was unreasonable in a way that indicated he was armed and dangerous. The State persistently skirts around the absence of a link between Bodie's allegedly suspicious conduct and the question of whether he was armed and dangerous. It insists he appeared cold, though the weather was far from extreme. But assuming he *was* cold, why does standing outside in the cold indicate possession of a weapon? It does not. The State does not explain why one suggests the other, because it can't. The remaining facts the State highlights, particularly Bodie's driving record and his demeanor change, present the same problem. Xiong lacked the particularized facts necessary to establish reasonable suspicion that Bodie was armed and dangerous. He thus had no lawful basis to conduct a frisk.

CONCLUSION

Here is what Xiong knew when he frisked Jesse Bodie: a 29-year-old Black man with a record of driving infractions had car trouble late one January night on a highway outside Madison. Emergency responders dealt with the car, which eventually burst into flames, and the man called a friend for a ride. He then stood on the side of the highway, waiting. He seemed cold. He was still waiting about an hour later. When an officer asked him to wait inside his squad car instead of on the side of the highway, the man took a "more serious" tone and said he "would rather not."

These facts fall short of establishing reasonable suspicion for a weapons frisk. Xiong may have had concerns about Bodie—even a hunch that he had a weapon—but he did not have reasonable suspicion that Bodie was armed and dangerous. Bodie asks this Court to reverse the circuit court's order denying suppression.

Dated this 9th day of November, 2022.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 1,942 words.

Dated this 9th day of November, 2022.

Signed:

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