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COURT OF APPEALS

No. 2022AP001555

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

JUSTIN J. KAHLE,
Defendant-Appellant.

Appeal from the Circuit Court for Waukesha County
The Honorable Judge J. Arthur Melvin III Presiding
Case No. 2021CT000741

REPLY BRIEF OF DEFENDANT-APPELLANT, JUSTIN J. KAHLE

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ARGUMENT

I. The State has conceded all but one of Mr. Kahle's arguments by failing to acknowledge, much less respond to, four of the five arguments raised in his brief.

Mr. Kahle filed his Brief and Appendix on December 21, 2022. In it, he made five distinct arguments: the use of the high-intensity police spotlight in the manner and close distance in this case was sufficient to constitute an unreasonable seizure; that the Fourth Amendment requires that trial courts perform the *Mendenhall* analysis faithfully without being swayed by policy implications; that the use of the legally fictitious “reasonable person” standard permits violations of the Fourth Amendment’s prohibition on unreasonable searches and seizures; that the trial court erred by limiting the analysis required under *Mendenhall* to two factors and not the totality of the circumstances; and that under the circumstances Mr. Kahle was seized at the point Officer Liu knocked on his passenger window. Of these, the State responded only to the last.

It is axiomatic that arguments advanced on appeal are deemed conceded if they are not refuted in the opposing party’s appellate brief. *See, e.g., Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W. 2d 493 (Ct. App. 1979). Where, as here, the State has failed to even acknowledge the majority of Mr. Kahle’s arguments and has not replied to them, the forfeiture rule must apply. The Court of Appeals will not develop an argument for the State. *See State v. West*, 179 Wis. 2d 182, 195-96; 507 N.W. 2d 343 (Ct. App. 1993).

In responding to the sole argument Mr. Kahle made that the State acknowledged, the State failed to acknowledge the most recent Court of Appeals decision on point, *State v. Christensen*, No. 2022AP500-CR, unpublished slip op. (WI App. September 9, 2022), 2022 WI App. 55.

Christensen concerned facts more similar to Mr. Kahle's encounter than either *Evans*¹ or *Mullen*² and was referenced repeatedly throughout Mr. Kahle's brief. Although Mr. Kahle discussed *Christensen* at length, the State neither acknowledged, cited, nor replied to Mr. Kahle's contention that it was the most factually similar and therefore the most persuasive.

The State's response brief inaccurately argues that the record does not support Mr. Kahle's argument that the spotlight was used to blind him as "that is not the testimony presented by Officer Liu or the facts presented before this Court." This is simply incorrect—Officer Liu testified specifically that the purpose of using the spotlight was to illuminate the cabin of the vehicle to ensure that he could safely approach to make contact with the occupant, *and that it also served the purpose of disabling the driver by making it impossible to see him as he approached.* (R. 32; 16:12-17:17) (emphasis added). Mr. Kahle's testimony was not necessary to establish what Officer Liu readily conceded—that another purpose served by Officer Liu aiming the spotlight in close proximity at Mr. Kahle was in order to disable and blind him to conceal Officer Liu's approach. Officer Liu then testified that it was a fair assumption that Mr. Kahle was looking out the driver's side window expecting him to approach from that direction because he was unable to see Officer Liu's approach due to the spotlight. (R. 32; 17:22-18:10). While this testimony is inconvenient for the State, it is disingenuous to argue that Mr. Kahle failed to establish that the use of Officer Liu's spotlight blinded and disabled him simply because the

¹ *State v. Evans*, No. 2020AP286-CR, unpublished dis. (WI App. January 28, 2021), 2021 WI App. 14, 396 Wis. 2d 195, 956 N.W. 2d 468.

² *State v. Mullen*, Nos. 2019AP1187, 2019AP1188, unpublished disp. (WI App. May 20, 2020), 2020 WI App 41, ¶ 2, 392 Wis. 2d 909, 945 N.W. 2d 373.

testimony came in through the State's witness and not Mr. Kahle himself. Furthermore, the analysis is an objective one unconcerned with Mr. Kahle's own state of mind, so Mr. Kahle's testimony was unnecessary.

Mr. Kahle reiterates the arguments set forth in his Brief and Appendix, as it is impossible to meaningfully reply to the State's single undeveloped argument which omitted acknowledgement or analysis of a case critical to Mr. Kahle's argument. *See, e.g., State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W. 2d 633 (Ct. App. 1992) (Court of Appeals may decline to review arguments which are not developed themes reflecting any legal reasoning but instead are only supported by general statements).

CONCLUSION

Under the totality of the circumstances, Mr. Kahle was seized, either at the point that Officer Liu directed the high-intensity spotlight at his face or at the point Officer Liu knocked on his window. No reasonable person would have felt free to disregard Officer Liu and leave the encounter. This Court, in applying the *Mendenhall* analysis, should apply it faithfully without substituting means-ends analyses which focus on policy and practical considerations, and should do so in a manner which recognizes that the legal fiction of the "innocent reasonable person" as developed through case law fails to protect the interests secured by the Fourth Amendment and Article I, Section 11 of the Wisconsin Constitution, even if that requires deviating from the federal analysis and recognizing the greater protections offered by the Wisconsin Constitution. Based on this analysis, Mr. Kahle is entitled to the suppression of all evidence derivative of his unlawful seizure.

Dated at Waukesha, Wisconsin this 6th day of March, 2023.

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CERTIFICATION AS TO FORM AND 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 1066 words as calculated by Microsoft Word's word count function.

Electronically signed by Bradley W. Novreske
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