COURT OF APPEALS
DECISION
DATED AND FILED

October 9, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1458-CR **Cir. Ct. No. 2012CF3955**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARREL ANTHONY DUKES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: STEPHANIE ROTHSTEIN, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Bradley, JJ.

¶1 PER CURIAM. Darrel Anthony Dukes appeals a judgment of conviction entered after a jury found him guilty of possessing with intent to deliver more than fifteen but less than forty grams of cocaine. *See* WIS. STAT.

§ 961.41(1m)(cm)3. (2011-12).[1] He contends that the trial court erroneously denied his motion to suppress physical evidence and failed to address his concerns about an allegedly inattentive and disruptive juror. We reject his claims and affirm.

BACKGROUND

¶2 The State charged Dukes with one count of possessing cocaine with intent to deliver. He moved to suppress items, including a digital scale and $1816, that police found on August 8, 2012, when they searched him after a foot chase. Dukes also moved to suppress 26.4401 grams of cocaine found under a car parked in the path Dukes followed during his flight from police.

¶3 Milwaukee Police Officers David Bettin and Matthew Gadzalinski were the only witnesses who testified at the suppression hearing. The testimony established that they are seasoned officers with, respectively, thirteen years and seven years of law enforcement experience.[2] The testimony also established that both officers are members of the Neighborhood Task Force, a police unit deployed to areas where crime is the highest. The officers testified that, shortly after midnight on August 8, 2012, each was in police uniform and in a marked squad car patrolling on the 3300 block of North 28th Street in Milwaukee, Wisconsin.

[1] All subsequent references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] Bettin testified at trial about his years of service as a police officer. When reviewing a suppression order, we are not limited to the suppression hearing record but may also review the evidence adduced at trial. *See* ***State v. Gaines***, 197 Wis. 2d 102, 106-07 n.1, 539 N.W.2d 723 (Ct. App. 1995).

Bettin testified that the neighborhood is part of a "high crime, high drug trafficking area" and that, as he patrolled, he saw two people in the road:

> [Bettin] observed one of the subjects [who] was later identified as Mr. Dukes, he reached with his right hand towards another subject.... [T]hey made contact with their right hands. [Bettin] observed that [Dukes] clinched his fist when he came back from making contact and he went to his right waistband and then he proceeded to walk up onto the ... porch of the residence located at 3377 North 28th Street.

¶4 Bettin believed that he had observed Dukes conduct a narcotics transaction, and he wanted to talk to Dukes about the incident:

> [Bettin] stopped [his] squad car and [he] exited it and Mr. Dukes was walking up toward the porch. [Bettin] ... asked [Dukes] "hey can I speak to you?" [Dukes] turns around and takes off in a sprint towards the front door of the residence. He's frantically trying to open the front door. He couldn't get it open. He jumps off the porch. And at that point [Bettin was] chasing after him.

¶5 Bettin went on:

> Officer Gadzalinski was right with me, proceeded towards the alley. [Dukes] ran west through the gangway towards the alleyway of the residence at 3377 and [Bettin] ordered [Dukes] to stop. He continued to run. [Bettin] lost si[gh]t [of Dukes] for a second. Gadzalinski was right there and he was in pursuit and [Bettin] heard [Gadzalinski] yell "he threw something" over by this car when he was running east.

Bettin said that Dukes eventually "ran right into the[] arms" of several other uniformed officers patrolling in the area.

¶6 Gadzalinski testified that he chased after a subject—subsequently identified as Dukes—and shouted "police. Stop," but Dukes "turned and ran north.... As he c[a]me out of the alleyway and ma[d]e a right hand turn ... [Gadzalinski] observed [Dukes's] right arm come out and discard an object."

Gadzalinski "one last time yelled 'Police. Stop.'" Shortly thereafter, the chase ended as a fellow officer seized Dukes.

¶7 Both Bettin and Gadzalinski testified that police searched Dukes after seizing him and found approximately $1800 and a digital scale in his pockets. Bettin also described finding a packet underneath a car that Dukes passed as he ran from the officers. The packet proved to contain 26.4401 grams of cocaine.

¶8 The trial court denied Dukes's suppression motion, concluding that the cocaine discovered under the car was abandoned property and that police found the other items pursuant to a lawful search of Dukes's person. The matter proceeded to a jury trial.

¶9 On the opening day of trial, the State examined its first witness and the jury was then released for the evening. Before the trial court closed the day's proceedings, Dukes, by counsel, advised the trial court that he believed juror twenty-two had slept "for about ten minutes" and, in addition, the juror had made unusual noises that Dukes associated with Tourette's syndrome.[3] Dukes suggested talking to the juror "just to see if he feels comfortable continuing on this jury," but added: "we don't have to make a decision now." The State responded that it had not noticed a problem with any juror because the State was focused on examining its witness, but the State said it did not object if the trial court elected to question juror twenty-two. The trial court then advised the parties that it had observed juror twenty-two holding his hands over his face "maybe in an attempt to control the sounds that he's making." The court said it also observed the juror close his eyes

[3] Tourette's syndrome is a disorder characterized by vocal and motor tics. *See* STEDMAN'S MEDICAL DICTIONARY 1769 (27th ed. 2000).

"at some point" but "oftentimes people do that when they are concentrating." The court told the parties that it would take their remarks "under advisement," "see how tomorrow progresses," and "see what tomorrow brings." Neither the parties nor the trial court mentioned the matter again, and the trial continued to completion with juror twenty-two seated on the panel. The jury found Dukes guilty as charged, and he appeals.

ANALYSIS

¶10 We first consider whether the trial court properly denied the motion to suppress evidence. "We review suppression motions using a two-step process. First, we uphold the [trial] court's findings of historical fact unless clearly erroneous. Whether those facts require suppression is a question of law reviewed without deference to the [trial] court." ***State v. Pender***, 2008 WI App 47, ¶8, 308 Wis. 2d 428, 748 N.W.2d 471 (internal citations omitted).

¶11 Dukes asserts that the police stopped him without reason. "The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures." ***State v. Artic***, 2010 WI 83, ¶28, 327 Wis. 2d 392, 786 N.W.2d 430. Wisconsin courts consistently interpret the search and seizure provision of the Wisconsin Constitution identically to the protections of the Fourth Amendment of the United States Constitution. *See* ***State v. Dearborn***, 2010 WI 84, ¶14, 327 Wis. 2d 252, 786 N.W.2d 97. When police conduct an unconstitutional search or seizure, the usual remedy is suppression of the evidence obtained. *See* ***State v. Ferguson***, 2009 WI 50, ¶21, 317 Wis. 2d 586, 767 N.W.2d 187.

¶12 The Fourth Amendment is not offended when the police conduct an investigatory stop and briefly detain a person based on "'reasonable suspicion,

grounded in specific articulable facts and reasonable inferences from those facts, that an individual is or was violating the law.'" *See* ***State v. Colstad***, 2003 WI App 25, ¶¶7-8, 260 Wis. 2d 406, 659 N.W.2d 394 (citation and brackets omitted). "The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience." ***State v. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997). The standard is the same under the Wisconsin Constitution. *See* ***id.***

¶13 With these principles in mind, we turn to the specifics of Dukes's arguments. Dukes maintains in his appellate brief that he was on a family member's porch when he heard noises he mistook for gunfire and ran for cover. He claims the police had no reasonable cause to stop him because he "was not on the street at the time of the suspected hand-to-hand transaction and therefore could not have been seen doing anything suspect." Further, he asserts he surrendered to police voluntarily after realizing that the noises he heard were the sounds of police squad car engines. These assertions do not aid Dukes, however, because they do not comport with the facts as found by the trial court.

¶14 At the conclusion of the suppression hearing, the trial court found that uniformed police officers were patrolling a high crime area late at night in marked squad cars. One of those officers, Bettin, saw Dukes and a third party engage in a hand-to-hand interaction that Bettin believed was a drug transaction, based on his experience and familiarity with the neighborhood. Bettin approached Dukes and asked to speak with him. Instead of answering, Dukes fled. We accept the trial court's findings of fact, which are supported by the testimony and are not clearly erroneous. *See* ***Pender***, 308 Wis. 2d 428, ¶8. We therefore must

determine whether those facts support the actions of the police in stopping Dukes. *See* ***Colstad***, 260 Wis. 2d 406, ¶¶7-8.

¶15 "[E]vasion and flight ... can properly give rise to reasonable suspicion when viewed in the totality of the circumstances." ***State v. Young***, 2006 WI 98, ¶75, 294 Wis. 2d 1, 717 N.W.2d 729. Here, key components of the circumstances are the hand-to-hand transaction that Bettin observed and Dukes's attempt to escape into a locked residence at the sight of an approaching officer. *See* ***Young***, 212 Wis. 2d at 431 (citing multiple cases holding that reasonable suspicion exists for a stop "where individual in high drug-trafficking area is observed exchanging objects or appearing to look at object in another's hand, together with evasive action once he spots police"). Additionally, the hand-to-hand transaction occurred a few minutes after midnight in a neighborhood known for drug trafficking. The lateness of the hour and the reputation of the area properly contribute to an officer's reasonable suspicion. *See* ***State v. Allen***, 226 Wis. 2d 66, 74, 593 N.W.2d 504 (Ct. App. 1999). The facts as found by the trial court thus amply support a reasonable suspicion that Dukes was involved in criminal activity. Accordingly, police could lawfully detain Dukes for an investigatory inquiry. *See* ***Colstad***, 260 Wis. 2d 406, ¶¶7-8.

¶16 The trial court went on to find that Dukes continued running from police after Gadzalinski both identified himself as a police officer and ordered Dukes to stop. Because police had reasonable suspicion justifying an investigatory detention when Gadzalinski shouted, "[p]olice[, s]top," Dukes's continued flight gave officers probable cause to arrest him for the crime of obstructing an officer. *See* ***Young***, 294 Wis. 2d 1, ¶¶76-77. A search incident to a lawful arrest is an exception to the requirement that police conduct searches pursuant to a warrant. ***Id.***, ¶77. Accordingly, the police lawfully searched Dukes

after catching him in flight. *See* ***id.*** Because the search was lawful, the trial court properly denied the motion to suppress the items found during that search.

¶17 Dukes next contends that the trial court erred by failing to suppress the cocaine police found under a car following his arrest. According to Dukes, "anything recovered during the search of the area should be suppressed, as it was discovered incident to an unlawful arrest." We cannot agree. First, as we have already explained, officers lawfully seized Dukes. Second, the police found the cocaine abandoned on a public street.[4] Warrantless seizure of abandoned property does not violate the Fourth Amendment. ***State v. Bauer***, 127 Wis. 2d 401, 407, 379 N.W.2d 895 (Ct. App. 1985); *see also* ***Molina v. State***, 53 Wis. 2d 662, 668, 193 N.W.2d 874 (1972) (picking up narcotics scattered on a public street is not a search).

¶18 We turn to the last issue raised on appeal, namely, whether the trial court erroneously responded to Dukes's complaint on the first day of trial that juror twenty-two appeared to have fallen asleep "for about ten minutes" and had made unusual noises in the jury box. The trial court has discretion to determine how to proceed when faced with an assertion of juror inattentiveness. ***State v. Saunders***, 2011 WI App 156, ¶28, 338 Wis. 2d 160, 807 N.W.2d 679. We will uphold a trial court's discretionary ruling if the trial court examined the relevant facts and reasoned its way to a rational and legally sound conclusion, even if we might have chosen a different course from that chosen by the trial court. *See* ***id.***

[4] Gadzalinski testified that he saw Dukes throw a packet under a car as he fled from the officers. The trial court concluded that the question of whether Dukes threw away the cocaine police found under that car or whether cocaine appeared there for some other reason was a question that the jury should resolve.

¶19 Dukes argues that the trial court erred because it "simply failed to address a sleeping and disruptive juror." We disagree with Dukes's characterization of the proceedings.

¶20 When Dukes raised concerns about juror twenty-two, he suggested talking to the juror "just to see if he feels comfortable continuing on this jury," and Dukes opined that "we don't have to make a decision now." The trial court acknowledged Dukes's remarks, then described its own observations of the juror's behavior, noting that it could indicate that the juror had been concentrating. The trial court decided to "see how tomorrow progresses" and "see what tomorrow brings." Dukes did not object.

¶21 We are satisfied that the trial court properly exercised its discretion in response to Dukes's concerns about juror twenty-two. The juror's behavior was ambiguous, and the trial court reasonably determined that the best approach was to observe the juror further. Moreover, Dukes himself took the position that the trial court was not required to make any immediate decisions about the juror and acquiesced in the trial court's decision to wait and see how the next day's proceedings unfolded. He therefore cannot complain on appeal about the trial court's response to his complaint about the juror. *See* ***Zindell v. Central Mut. Ins. Co.***, 222 Wis. 575, 582, 269 N.W. 327 (1936) (where a party has induced certain action by the trial court, he or she cannot later complain about that action on appeal).

¶22 Dukes nonetheless argues that the trial court erred because it did not *sua sponte* revisit his complaint that juror twenty-two appeared inattentive. We agree with the State that he forfeited this issue. *See* ***State v. Joseph P.***, 200 Wis. 2d 227, 233, 546 N.W.2d 494 (Ct. App. 1996) (if appellant is provided

opportunity to renew an objection but does not do so, he or she fails to preserve the issue for appeal). As we have seen, Dukes raised no objection when the trial court addressed his complaint about juror twenty-two on the first day of trial by deciding to "see what tomorrow brings." During the remaining two days of trial, Dukes failed to suggest at any point that juror twenty-two was disruptive or inattentive, and Dukes never moved for a mistrial based on the juror's conduct. The trial court had no reason to believe that Dukes had ongoing concerns about the jury composition or thought he was entitled to a mistrial. We are satisfied that Dukes abandoned any complaint he might have had regarding juror twenty-two. *Cf.* ***Bishop v. City of Burlington***, 2001 WI App 154, ¶8, 246 Wis. 2d 879, 631 N.W.2d 656 ("A litigant must raise an issue with sufficient prominence such that the trial court understands that it is being called upon to make a ruling.").

¶23 We add that, were we to conclude that Dukes preserved his complaint about juror twenty-two, we would also conclude that he has not adequately briefed the issue on appeal. A mere showing that a juror was inattentive for a period of time does not demonstrate a basis for relief absent a companion showing that the inattentiveness prejudiced the defendant. *See* ***State v. Novy***, 2013 WI 23, ¶47, 346 Wis. 2d 289, 827 N.W.2d 610. Here, even assuming Dukes could show inattentiveness on the part of juror twenty-two during the first day of trial, Dukes has not offered anything that explains why he believes he suffered prejudice as a result of that alleged inattentiveness. Although he observes that he had a right to due process, an impartial jury, and a fair trial, he does not demonstrate that the behavior he complains about was prejudicial to him under the specific facts and circumstances here. *Cf.* ***State v. Hampton***, 217 Wis. 2d 614, 623-24, 579 N.W.2d 260 (Ct. App. 1998) (no prejudice to defendant where juror was inattentive during testimony of detective who corroborated testimony of the

victims and other State witnesses). We normally do not review issues that are inadequately briefed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). For all of the foregoing reasons, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.