STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBB RAY DODSON,

Defendant-Appellant.

UNPUBLISHED
September 30, 2021

No. 354202
Mason Circuit Court
LC No. 19-003525-FH

Before: MURRAY, C.J., and M. J. KELLY and O'BRIEN, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial conviction of assaulting, resisting, or obstructing a police officer causing injury, MCL 750.81d(2). We affirm.

I. BACKGROUND

This case arises out of a physical altercation between defendant and Sergeant John Balowski of the Mason County Sherriff's Department (MCSD). On February 13, 2019, Sergeant Balowski and Deputy Hildegardo Hinojosa, also of the MCSD, were dispatched to the parking lot of a Dollar General store in Walhalla, Michigan. The officers were to act in a peacekeeping capacity during the return of defendant's nephew from defendant to Dana Hull, the child's mother and defendant's sister. The child had been staying with defendant for approximately four days while Hull was detained for a parole violation. It was Sergeant Balowski's understanding that the child had been placed lawfully into defendant's custody, but since Hull was released, she was legally entitled to the return of the child. It was also Sergeant Balowski's understanding, based on representations by Hull, that there might be difficulty recovering the child from defendant.

In the days leading up to the incident, defendant had been in phone contact with Deputy Matt Murphy of the MCSD, and Agent Aaron Sailor of Children's Protective Services (CPS). Sergeant Balowski had likewise been in contact with Deputy Murphy and, by extension, Agent Sailor. Sergeant Balowski understood that the child was to be returned to Hull on the condition that Hull had adequate transportation and a child car seat. Sergeant Balowski arrived at the Dollar General before defendant and confirmed that Hull had adequate transportation.

Eventually, defendant arrived at the Dollar General in his truck. According to Sergeant Balowski, defendant exited his truck, approached the officers, and asked if they were looking for him. Sergeant Balowski described defendant's demeanor at this time as "agitated." Sergeant Balowski confirmed defendant's identify, then told defendant that the officers were indeed looking for him, and explained that the officers were there to oversee the return of Hull's child to her. According to Sergeant Balowski, defendant said "no" and that he wanted to talk to Agent Sailor. Sergeant Balowski told defendant that Agent Sailor was off-duty and unavailable. Defendant then walked away from Sergeant Balowski and went into the store.

While defendant was in the store, Sergeant Balowski was able to reach Agent Sailor by phone. Agent Sailor told Sergeant Balowski that he would call defendant to tell him that the child was to be returned to Hull. When defendant emerged from the store, he again approached Sergeant Balowski, who explained that he had just spoken with Agent Sailor and that Agent Sailor would call defendant soon to explain that the child should be returned to Hull. Sergeant Balowski told defendant that he needed to stay there until Agent Sailor called so that they could resolve the situation. Defendant ultimately refused to stay and walked away towards his truck. Sergeant Balowski followed defendant. At the truck, defendant opened the driver's door and placed his keys in the ignition.

At that point, Sergeant Balowski, believing that defendant was going to leave, partially entered the truck and grabbed defendant with both hands, placing one hand behind defendant's neck and the other by his shoulder. According to Sergeant Balowski, defendant responded by grabbing the back of Sergeant Balowski's neck with one hand and, with the other hand, making a fist and raising it as though he was about to strike Sergeant Balowski. Sergeant Balowski responded by striking defendant multiple times and then stepping away from the truck to disengage defendant. Sergeant Balowski and Deputy Hinojosa then removed defendant from his truck and arrested him. When Sergeant Balowski stepped away from the truck while attempting to disengage defendant, he sprained his ankle and aggravated a pre-existing abdominal injury.

After defendant was charged, he moved to dismiss, arguing that Sergeant Balowski's initial detention of defendant was an unlawful seizure, so defendant could lawfully resist. The trial court denied defendant's motion, finding that the seizure was lawful because Sergeant Balowski had reasonable suspicion to detain defendant.

Afterwards, but still before trial, defendant gave notice of his intention to use prior-acts evidence under MRE 404(b). Defendant sought to admit evidence that Sergeant Balowski used excessive force at a previous law enforcement job in Dearborn, Michigan (the Dearborn Incident), and resigned because of that incident. The prior incident occurred in 2013 when Sergeant Balowski was a Dearborn police officer. In the Dearborn Incident, Sergeant Balowski came in contact with Ali Beydoun at approximately 4:00 a.m., in an area known for car break-ins. At the time, Beydoun was returning home from work when the bike chain fell off his bike, and Beydoun was attempting to repair it. Beydoun spoke limited English and suffered from a mental illness, so he did not respond to Sergeant Balowski's requests to present identification or when Sergeant Balowski said he was going to pat Beydoun down. As a result, when Sergeant Balowski attempted to pat down Beydoun, Beydoun began struggling and pulling away, saying no. Sergeant Balowski then took Beydoun to the ground, and multiple officers assisted Sergeant Balowski in handcuffing Beydoun. Sergeant Balowski submitted his resignation less than a month after the incident.

The prosecution sought to exclude this evidence as impermissible propensity evidence. In response, defendant argued that the purpose of offering the evidence was not for propensity purposes but to demonstrate Sergeant Balowski's system of doing an act or absence of a mistake when in the performance of his duty. According to defendant, the evidence showed Sergeant Balowski's system of escalating situations by manufacturing unrealistic threats and "acting first and investigating later."

After a hearing, the trial court concluded that the evidence was not substantively admissible, but may be admissible for impeachment purposes. The court explained:

> [I]t does appear to be propensity evidence; however, I do also see that there could be something that comes up in trial regarding escalation and de-escalation and tactics and how an officer does this on a regular basis. So I think the door could be opened during trial and during testimony where this may become relevant or some portion of it may become relevant.

The case proceeded to trial, and a jury convicted defendant of assaulting a police officer causing injury. Defendant now appeals as of right.

II. MOTION TO DISMISS

Defendant first argues that the trial court erred by denying his motion to dismiss because Sergeant Balowski lacked reasonable suspicion to detain defendant. According to defendant, he had the right to resist the arrest because Sergeant Balowski did not have reasonable suspicion. See *People v Moreno*, 491 Mich 38, 57-58; 814 NW2d 624 (2012). We disagree.

A. STANDARD OF REVIEW

This Court reviews a trial court's ruling on a motion to dismiss for an abuse of discretion. *People v Stephen*, 262 Mich App 213, 218; 685 NW2d 213 (2004). An abuse of discretion occurs when the trial court's decision "falls outside the range of principled outcomes." *People v Nicholson*, 297 Mich App 191, 196; 822 NW2d 284 (2012). A trial court necessarily abuses its discretion when it makes an error of law. *People v Al-Shara*, 311 Mich App 560, 566; 876 NW2d 826 (2015). This Court reviews de novo the trial court's application of Fourth Amendment principles. *People v Slaughter*, 489 Mich 302, 310; 803 NW2d 171 (2011).

B. ANALYSIS

The Fourth Amendment of the United States Constitution protects individuals from unreasonable searches and seizures, and the same protections are included in the Michigan Constitution. *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). See also US Const, Am IV; Const 1963, art 1, § 11. In the context of police-citizen encounters, there are "three tiers" of Fourth Amendment protections. *People v Shabaz*, 424 Mich 42, 56; 378 NW2d 451 (1985). The first tier consists of consensual encounters between citizens and police: " [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions,

by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." *Id*. (quotation marks and citation omitted).

"The second tier of contact is the *Terry*[1] stop," *id*. at 57, which is a brief investigative detention based on reasonable suspicion that criminal activity is afoot, *People v Jenkins*, 472 Mich 26, 32; 691 NW2d 759 (2005). Reasonable suspicion is a particularized suspicion, based upon some objective manifestation, that a person has been, is, or is about to be engaged in some type of criminal activity. *United States v Arvizu*, 534 US 266, 273; 122 S Ct 744; 151 L Ed 2d 740 (2002); *People v Champion*, 452 Mich 92, 98-99; 549 NW2d 849 (1996). Our Supreme Court has summarized the requirements for making a valid investigatory stop based on reasonable suspicion as follows:

> The brief detention of a person following an investigatory stop is considered a reasonable seizure if the officer has a "reasonably articulable suspicion" that the person is engaging in criminal activity. The reasonableness of an officer's suspicion is determined case by case on the basis of the totality of all the facts and circumstances. "[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."
>
> Although this Court has indicated that fewer facts are needed to establish reasonable suspicion when a person is in a moving vehicle than in a house, some minimum threshold of reasonable suspicion must be established to justify an investigatory stop whether a person is in a vehicle or on the street. [*People v Oliver*, 464 Mich 184, 192; 627 NW2d 297 (2001) (citations omitted; alterations in *Oliver*).]

The third and final tier of police-citizen contact "is the arrest of a person based on probable cause." *Shabaz*, 424 Mich at 58.

The trial court described this case as a fast-moving situation that escalated quickly, and we agree with that description. Sergeant Balowski was at the Dollar General on the day of the incident to oversee the return of Hull's child to her. He was informed by persons familiar with the situation that Hull was legally entitled to the return of the child, and that Hull feared that there would be difficulty recovering the child from defendant. When defendant arrived at the Dollar General, he approached the officers and engaged in a consensual encounter—the first tier under *Shabaz*. Defendant appeared agitated, and after Sergeant Balowski confirmed defendant's identity and told him that they were there to oversee the return of Hull's child to her, defendant said that he would not return the child and that he wanted to speak with CPS Agent Sailor. Defendant then walked into the Dollar General, and Sergeant Balowski called Agent Sailor, who told Sergeant Balowski that he would call defendant to confirm that defendant was to return the child to Hull.

---

[1] *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

When defendant exited the store, Sergeant Balowski informed him that Agent Sailor would be calling him and asked him to "wait there while we resolved the situation" because the sergeant was concerned that defendant was refusing to return the child. Sergeant Balowski explained that, in light of defendant's apparent obstinance in returning the child, the sergeant was concerned that defendant would take actions to escalate the situation if he left, such as barricading himself in his home and refusing to return the child, absconding with the child, or even using the child in "some sort of hostage situation." Defendant ignored the sergeant's request to remain until the situation was resolved, and began walking towards his truck. Sergeant Balowski repeated to defendant that he needed defendant to stay until the situation was resolved, and defendant became oppositional, demanding to know whether Sergeant Balowski had a warrant. Sergeant Balowski told defendant that he did not have a warrant but explained that he did not need a warrant because he was detaining defendant "pending investigation," in response to which defendant opened his truck door and entered the truck. At that point, Sergeant Balowski seized defendant, and we agree with the trial court's conclusion that the sergeant had reasonable suspicion to do so.

To explain how we reached this result, we first note that no seizure took place until Sergeant Balowski grabbed defendant. The United States Supreme Court and this Court have both explained that for a person to be seized within the meaning of the Fourth Amendment, that person must either submit to the show of authority by law enforcement or be physically restrained. *California v Hodari D*, 499 US 621, 628-629; 111 S Ct 1547; 113 L Ed 2d 690 (1991); *People v Lewis*, 199 Mich App 556, 559-560; 502 NW2d 363 (1993) (explaining that the defendant was not seized until an officer "actually laid his hands on him" because, assuming that there was a show of authority, the defendant did not submit to it). Despite Sergeant Balowski telling defendant that he was being detained prior to grabbing him, defendant refused to submit to the sergeant's show of authority. Thus, contrary to defendant's argument on appeal, defendant was not seized until Sergeant Balowski "actually laid his hands on" defendant. *Id*. at 559-560.

The next question is whether Sergeant Balowski had reasonable suspicion when he grabbed defendant. Sergeant Balowski noticed that defendant was agitated when he first approached the officers. Then, when the officers told defendant that they were there to ensure the return of Hull's child to her, defendant informed them that he did not intend to return the child and that he wished to speak with CPS Agent Sailor. Defendant's refusal to return the child to Hull—despite Hull's being legally entitled to the child—raised concerns for Sergeant Balowski that defendant would take actions to ensure that the child was not returned to Hull, such as barricading himself in his home with the child, absconding with the child, or even using the child in "some sort of hostage situation." On the basis of these concerns, Sergeant Balowski repeatedly asked and ordered defendant to stay until the situation was resolved, but defendant ignored the sergeant's requests, walked towards his truck, and opened the door. When defendant did this, it was reasonable for Sergeant Balowski to believe that defendant was intending to leave, return to wherever he was keeping the child, and take one of the actions described above to ensure that the child was not returned to Hull, consistent with his stated intent to not return the child to Hull.[2] At that point, Sergeant Balowski had a particularized suspicion, based upon objective manifestations, that

[2] In *Jenkins*, 472 Mich at 34, our Supreme Court similarly cited a defendant's attempt to leave an encounter with a police officer as a basis for finding reasonable suspicion to detain the defendant.

defendant was about to be engaged in some type of criminal activity, and therefore he had reasonable suspicion to detain defendant.

Defendant contends that there was no basis to believe that defendant was going to leave, and that Sergeant Balowski's concerns were all unparticularized suspicions or hunches, because defendant said that he would return the child after speaking with Agent Sailor. Yet there is no basis for this conclusion in the record; Sergeant Balowski said that defendant told him "that he was not going to return the child and he wanted to talk to Agent Sailor." To any extent that this issue comes down to how to interpret Sergeant Balowski's testimony—whether this should be interpreted as defendant saying that (1) he would not return the child and wanted to speak with Agent Sailor or (2) he would not return the child until he confirmed with Agent Sailor that he could—the trial court determined that the sergeant said that "defendant made the statement that he would not return the child," not that he would return the child after conferring with Agent Sailor. We agree with the trial court's interpretation of the sergeant's testimony, as it is the plainest reading of that testimony. Accordingly, we reject the premise of defendant's argument because Sergeant Balowski did not testify that defendant told him that he would return the child after speaking with Agent Sailor.

For the reasons stated, we conclude that Sergeant Balowski had reasonable suspicion to detain defendant, and so defendant did not have the right to resist the detention. Accordingly, the trial court did not err by denying defendant's motion to dismiss.

III. 404(B) EVIDENCE

Defendant next argues that the trial court abused its discretion by ruling that evidence of the Dearborn Incident was inadmissible because that evidence was offered to show Sergeant Balowski's absence of mistake or a system of doing an act. We disagree.

A. STANDARD OF REVIEW

This Court reviews for an abuse of discretion preserved claims of evidentiary error. See *People v Bergman*, 312 Mich App 471, 482; 879 NW2d 278 (2015). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Id*. at 483 (quotation marks and citation omitted).

B. ANALYSIS

MRE 404(b)(1) generally governs admission of other-acts evidence. It provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b), other-acts evidence must (1) be offered for a proper purpose, (2) be relevant, and (3) not have a probative value substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 675 NW2d 366 (2017). A proper purpose is one other than establishing the person's character to show his propensity to commit the other act. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993).

Defendant first asserts that his proper purpose for presenting evidence of the Dearborn Incident was to prove the absence of mistake. This is a recitation of a proper purpose, but defendant does not explain how the Dearborn Incident relates to this purpose. As our Supreme Court has explained, the mere recitation of a proper purpose for the admission of 404(b) evidence "without explaining how the evidence relates to the recited purpose[] is insufficient to justify admission under MRE 404(b)." *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998). Moreover, it is not apparent what role, if any, mistake played in this case. The prosecution was bound to show that Sergeant Balowski legally detained defendant. See *Moreno*, 491 Mich at 52. Whether Sergeant Balowski had reasonable suspicion to detain defendant is based on the objective facts known to the sergeant at the time, not on which facts Sergeant Balowski subjectively relied upon. See *Whren v United States*, 517 US 806, 813; 116 S Ct 1769; 135 L Ed 2d 89 (1996) (explaining that subjective intent is not relevant to the objective validity of a Fourth-Amendment detention); *Oliver*, 464 Mich at 200 ("Accordingly, objective facts known to the police officers who effected the traffic stop should be considered in determining whether the stop was justified by reasonable suspicion regardless of whether the officers subjectively relied on those facts."). That is, even if Sergeant Balowski was subjectively mistaken about some unidentified fact, his detention of defendant was still supported by the objective facts outlined in Section II.B.

Defendant alternatively—and more concretely—argues that the proper purpose for admitting the Dearborn Incident was to establish Sergeant Balowski's system of doing an act. This, again, is a recitation of a proper purpose. According to defendant, the Dearborn Incident demonstrated that it was Sergeant Balowski's system to escalate situations and then use "violence to control a citizen in what started as a casual encounter." Defendant therefore has explained how the Dearborn Incident relates to the recited purpose for admitting the evidence, so we move to the next step of the analysis: whether the evidence is relevant. *Knox*, 469 Mich at 509.

"Other-acts evidence is logically relevant if two components are present: materiality and probative value." *People v Denson*, 500 Mich 385, 401; 902 NW2d 306 (2017). When determining whether evidence is material, courts should ask "is the fact to be proven truly in issue?" *Crawford*, 458 Mich at 388. Here, the answer is no. There was no question that Sergeant Balowski and defendant's encounter started as casual and then escalated—despite Sergeant Balowski purportedly trying to de-escalate—to the point the Sergeant Balowski used force to control defendant. The pertinent inquiry was whether that force was justified.

As for whether the evidence was probative, the "inquiry asks whether the proffered evidence tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id*. at 389-390 (quotation marks and citation omitted). This threshold is minimal. *Id*. "In the context of prior acts evidence, however, MRE 404(b) stands as a sentinel at the gate: the proffered evidence truly must be probative of something *other* than the [actor's] propensity to [do the other act]." *Denson*, 500 Mich at 402 (quotation marks and citation omitted). To determine whether the other act is

probative of something other than the actor's propensity to do the other act, we examine the similarity between the other act and the act at issue to determine whether the proponent of the other-acts evidence "has provided an intermediate inference other than an impermissible character inference[.]" *Id*. When the "theory of relevance" is "based on the alleged similarity between" the other act and the act at issue, "we require a 'striking similarity' between the two acts to find the other act admissible." *Id*. at 403, quoting *VanderVliet*, 444 Mich at 67.

There is clearly not a "striking similarity" between the Dearborn Incident and the facts in this case. In the Dearborn Incident, Sergeant Balowski came upon Beydoun at 4 a.m. in an area known for car break-ins. When Beydoun did not respond to Sergeant Balowski's request—due to some combination of Beydoun's limited understanding of English and a mental illness—Beydoun resisted Sergeant Balowski's attempt to pat him down for weapons, leading Sergeant Balowski to strike Beydoun. In this case, there was no concern about whether defendant was armed and needed to be patted down, nor was there an issue with defendant not understanding the situation. Defendant clearly understood what was happening, and he deliberately ignored Sergeant Balowski while the sergeant was attempting to ensure the safe return of Hull's child to her. Accordingly, the Dearborn Incident was not strikingly similar to this case, and therefore could not to be relevant based on its alleged similarity to this case.

Even assuming that the Dearborn Incident was material and probative—and therefore relevant—the trial court did not abuse its discretion by concluding that MRE 403 precluded admission of the Dearborn Incident as substantive evidence. Evidence of the Dearborn Incident was likely to confuse the issues because, for evidence of the Dearborn Incident to have value for a jury, that jury would need to determine whether Sergeant Balowski's detention of Beydoun was unlawful. The trial court characterized this problem as requiring a "trial within a trial," and we agree.[3]

Accordingly, the trial court did not abuse its discretion when it ruled that the Dearborn Incident was impermissible propensity evidence prohibited by MRE 404(b).

IV. SUFFICIENCY OF THE EVIDENCE

In his final argument, defendant contends that there was insufficient evidence to support his conviction. We disagree.

[3] Defendant at one point argues that the Dearborn Incident would have been relevant because "[t]he prosecution made [defendant] the aggressor," and the Dearborn Incident would have shown "how [Sergeant Balowski] handled low-risk situations." This demonstrates the problem with defendant's argument. He offered the evidence to show that on a previous occasion, Sergeant Balowski overreacted to a low-risk situation and, therefore, likely did so again in this case. That is a propensity inference, and it is prohibited. See MRE 404(b)(1).

A. STANDARD OF REVIEW

This Court reviews a sufficiency of the evidence claim de novo. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). As explained by our Supreme Court:

> [W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. [*People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).]

Appellate courts do not hear testimony of witnesses and, therefore, defer to the jury's credibility determinations. *People v Henderson*, 306 Mich App 1, 9; 854 NW2d 234 (2014), overruled in part on other grounds *People v Reichard*, 505 Mich 81; 949 NW2d 64 (2020). It is the province of the trier of fact to determine what inferences may be fairly drawn from the evidence. *Id*.

B. ANALYSIS

Defendant first argues that the evidence was not sufficient to show that Sergeant Balowski's detention of defendant was justified by reasonable suspicion. We disagree.

As stated earlier, a brief, investigatory stop or detention, in order to determine whether crime is afoot, is permissible under the Fourth Amendment if the stop is justified by reasonable suspicion. *Jenkins*, 472 Mich at 32. Reasonable suspicion is a particularized suspicion, based upon some objective manifestation, that a person has been, is, or is about to be engaged in some type of criminal activity. *Arvizu*, 534 US at 273; *Champion*, 452 Mich at 98-99.

Sergeant Balowski testified that Hull had predicted difficulty recovering the child from defendant, and that defendant appeared agitated when he first approached the officers. Sergeant Balowski also testified that defendant repeatedly refused to turn over Hull's child or to tell Sergeant Balowski where the child was.[4] These refusals caused Sergeant Balowski to fear that defendant would take actions to ensure that the child was not returned to Hull, such as barricading himself in his home with the child, absconding with the child, or even using the child in "some sort of hostage situation." Both Sergeant Balowski and Deputy Hinojosa testified that defendant ignored Sergeant Balowki's requests and demands to stay until they resolved whether defendant would return Hull's child to her, and instead returned to his truck. Both further testified that when

[4] That defendant refused to tell Sergeant Balowski the child's location was omitted from this opinion's earlier analysis about whether defendant's detention was constitutional because both defendant's motion to dismiss and the lower court's ruling on that motion were based on Sergeant Balowski's preliminary examination testimony. At the preliminary examination, Sergeant Balowski did not testify that defendant refused to reveal the child's location. But Sergeant Balowski did testify to that at trial, and this portion of the opinion concerns whether the evidence at trial was sufficient to sustain defendant's conviction.

defendant got to his truck, opened the door, and got inside, it appeared that he was going to leave the scene. On the basis of this evidence, a reasonable trier of fact could conclude that someone in Sergeant Balowski's position would have a particularized suspicion that defendant was about to engage in some type of criminal activity. Accordingly, there was sufficient evidence upon which the jury could rely to conclude beyond a reasonable doubt that defendant's initial detention did not violate the Fourth Amendment and was otherwise legal.

In arguing that Sergeant Balowski did not have reasonable suspicion, defendant essentially just points to other evidence that, in his opinion, creates reasonable doubt about whether it would be reasonable to believe that he was not intending to return the child to Hull. This argument overlooks that "the prosecution need not negate every reasonable theory consistent with the defendant's innocence, but need merely introduce evidence sufficient to convince a reasonable jury in the face of whatever contradictory evidence the defendant may provide." *People v Hardiman*, 466 Mich 417, 424; 646 NW2d 158 (2002) (quotation marks and citation omitted). Defendant essentially asks us to reweigh the evidence, which this Court cannot do. See *Henderson*, 306 Mich App at 9.

Defendant next argues that there was insufficient evidence to support a conviction for assaulting, resisting, or obstructing a police officer. We disagree.

Defendant was convicted under MCL 750.81d(2), which provides, "An individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties causing a bodily injury requiring medical attention or medical care to that person is guilty of a felony . . . ." Sergeant Balowski testified that during his encounter with defendant, he was in full uniform, identified himself as a police officer, and explained to defendant his role in the exchange of Hull's child. According to Sergeant Balowski, while he was trying to stop defendant from leaving, defendant grabbed the sergeant and prepared to punch him. Sergeant Balowski described the injuries that he sustained as a result of this altercation with defendant, and also explained how those injuries required medical care. The prosecution also presented the testimony of a doctor, who testified that Sergeant Balowski was treated for his injuries. On the basis of this evidence, a reasonable jury could find beyond a reasonable doubt (1) that defendant assaulted Sergeant Balowski, (2) that defendant knew Sergeant Balowski was a police officer when defendant assaulted him, and (3) that Sergeant Balowski required medical care as a result of defendant's assault. Accordingly, there was sufficient evidence to support defendant's conviction under MCL 750.81d(2).

Affirmed.

/s/ Christopher M. Murray
/s/ Colleen A. O'Brien

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBB RAY DODSON,

Defendant-Appellant.

UNPUBLISHED
September 30, 2021

No. 354202
Mason Circuit Court
LC No. 19-003525-FH

Before: MURRAY, C.J., and M. J. KELLY and O'BRIEN, JJ.

M. J. KELLY, J. (*dissenting*).

Because I believe that the trial court's failure to grant defendant's motion to dismiss fell outside the range of principled outcomes and thereby constituted an abuse of discretion, I respectfully dissent.

This case gives credence to the maxim that it is unwise to disobey the commands of law enforcement. I certainly do not endorse defendant's conduct, which even his lawyer rightly conceded was both physically and legally perilous. But a suspect has the right to resist unlawful police action. *People v Moreno*, 491 Mich 38, 52, 57-58; 814 NW2d 624 (2012). Therefore, "the prosecution must establish that the officers' actions were lawful" in order to prove resisting or obstructing a police officer under MCL 750.81d. *Id*. at 52.

When the police conduct a search or seizure without a warrant and the conduct of the police does not fall within one of the exceptions to the warrant requirement, the search or seizure is considered unreasonable. *People v Hellstrom*, 264 Mich App 187, 192; 690 NW2d 293 (2004). As noted by the majority, one exception to the warrant requirement is the well-known "*Terry* stop," an exception created by the United States Supreme Court over half a century ago in *Terry v Ohio*, 392 US 1, 30-31; 88 S Ct 1868; 20 L Ed 2d 889 (1968). *People v Steele*, 292 Mich App 308, 314; 806 NW2d 753 (2011). A *Terry* stop is a brief investigative detention that "requires specific and articulable facts sufficient to give rise to a reasonable suspicion that the person detained has committed or is committing a crime." *People v Shankle*, 227 Mich App 690, 693; 577 NW2d 471 (1998).

Reasonable suspicion is a particularized suspicion, based upon some objective manifestation, that a person has been, is, or is about to be engaged in some type of criminal activity. *United States v Arvizu*, 534 US 266, 273; 122 S Ct 744; 151 L Ed 2d 740 (2002); *People v Champion*, 452 Mich 92, 98-99; 549 NW2d 849 (1996). "[T]he officer making the stop must be able to articulate specific facts that, taken together with rational inferences from those facts, reasonably warrant the intrusion." *People v Rice*, 192 Mich App 512, 518; 482 NW2d 192 (1992); *Terry*, 392 US at 21.

When determining the reasonableness of an officer's suspicion, the trial court must look at the totality of the facts and circumstances and consider whether an officer of reasonable precaution would have suspected that criminal activity was afoot. *Steele*, 292 Mich App at 314. "A determination regarding whether a reasonable suspicion exists must be based on commonsense judgments and inferences about human behavior." *People v Jenkins*, 472 Mich 26, 32; 691 NW2d 759 (2005) (quotation marks and citation omitted).

In this case, Sergeant Balowski gave the sole testimony at the preliminary hearing. Neither he nor the trial court articulated specifically what crime defendant was suspected of engaging in, but it is clear that the trial court concluded that Sergeant Balowski suspected defendant of engaging in some form of kidnapping. The legal rule, of course, is not so stringent as to demand that an officer state with perfect precision which statute defendant is suspected of violating. The rule demands only that an officer reasonably suspect criminal conduct on the basis of commonsense inferences from articulable facts. *Jenkins*, 472 Mich at 26. But the prosecution bears the burden to demonstrate exactly that. *Hellstrom*, 264 Mich App at 192. Therefore, it is appropriate to demand that the officer's inferences are reasonable, drawn from facts articulated on the record, and ultimately lead toward conduct that is actually criminal. I do not believe that standard has been met in this case.

Like the majority, I agree that defendant was not detained until Sergeant Balowski physically restrained him after defendant walked back to his truck. However, I disagree with the majority's determination that Sergeant Balowski had reasonable suspicion of *criminal conduct* at the time he grabbed defendant.

During his testimony at the preliminary hearing, Sergeant Balowski essentially invoked Michigan's kidnapping statute, MCL 750.349, when explaining his reasoning for detaining defendant. Sergeant Balowski testified:

> Based on his demeanor and his responses to my questions I was concerned that if he returned to wherever the child was that the situation would be escalated. I visualized three possible scenarios in my head if he was truly intent on not returning the child. One, most likely scenario, would be that he would simply lock his doors and I would not be able to gain entry into the home, in essence he would barricade himself in the home. Two, is that he would take the child and move the child elsewhere and I would not be able to find the child to return the child, or three, the least likely scenario of course would be that there would be some sort of hostage situation. So those were the scenarios that ran through my head if I were to allow him to leave at that point.

In ruling on the motion to dismiss, the trial court explained

> What we have is the possibility of criminal activity, withholding a child when you should turn the child over. There's a statute on it that escapes me right now but it's a form of kidnapping and the—in this case if the child was to be returned, that's an unlawful detention of that child and at that point the officer is investigating that, whether the child is being unlawfully detained instead of turned over to the mother.

Under the circumstances present in this case, I do not find reasonable Sergeant Balowski's assumptions that defendant might barricade himself in his home with the child, or secret the child away. Furthermore, I do not believe that whatever was reasonable to suspect defendant's actions amounted to any other criminal behavior that would justify defendant's detention.

Sergeant Balowski was aware that there were conditions placed on returning the child to Hull. He was aware that defendant had taken legal custody of the child only four days earlier. And although Sergeant Balowski testified that defendant said "no" when asked to return the child, in each instance, that was followed by a demand to talk to Agent Sailor or to CPS. Indeed, the record reflects that defendant voluntarily drove to a meeting point for returning the child, and that once there, every time defendant was asked to return the child, defendant asked—if not demanded—to talk to CPS Agent Sailor. It is, therefore, not a commonsense inference, that having finally been told that Agent Sailor would soon call him, defendant would choose that moment to flee and barricade himself at home with the child or to abduct the child. See *Jenkins*, 472 Mich at 32. Therefore, I do not believe that those concerns which Sergeant Balowski expressed on the record are reasonable under these circumstances.

Correspondingly, I do not believe that it was reasonable to suspect defendant of current or future conduct that was *actually criminal*. The trial court seems to have assumed that failing to return the child immediately, so long as Hull was entitled to the child, was criminal conduct as soon as it happened. But the crime of kidnapping requires that certain *actus reus* elements must be met. It is not enough to say that defendant's conduct vaguely paralleled some kidnapping-type offense.

Additionally, the trial court erred by its use of defendant leaving the scene as a fact to justify his detention. It appears, on the basis of Sergeant Balowski's testimony that defendant spent much of their encounter disobeying, and generally ignoring, Sergeant Balowski's questions. But Sergeant Balowski ultimately chose to detain defendant when defendant began to move back toward his truck and to enter it. Sergeant Balowski testified that defendant put his keys in the ignition and that, at that point, Sergeant Balowski physically restrained defendant. Also, it appears that by that point Sergeant Balowski was aware that the child was not in the truck. Sergeant Balowski asked repeatedly where the child was, which defendant appears to have ignored. Sergeant Balowski testified that he "was concerned that if [defendant] *returned to wherever the child was* that the situation would be escalated." However, the trial court appears to have accepted Sergeant Balowski's reasoning that defendant's leaving the scene helped to support a reasonable inference that defendant was illegally holding the child in some way.

The clear problem with that reasoning is that defendant never left. Sergeant Balowski himself testified that defendant did not turn on the car, did not shut the door to the truck, and did not leave because Sergeant Balowski stopped him from doing so. It is possible that when defendant went to his truck, he intended to leave the parking lot. It is also possible that he intended to wait there for Agent Sailor's call. But the inarguable fact is that defendant did not leave. Therefore, defendant's leaving was not a fact that Sergeant Balowski could have observed, let alone relied upon, because it did not occur. The Fourth Amendment does not require an officer to wait until a crime is committed before intervening. *Terry*, 392 US at 21. However, it does require that an officer wait until a suspect actually manifests observable conduct that supports a reasonable suspicion of criminality. *Id.*

That is not to say that Sergeant Balowski's belief that defendant would leave is not a rational inference derived from defendant walking to his truck. See *id.* Nevertheless, it is highly attenuated from any inference of criminality. In effect, Sergeant Balowski seems to have reasoned that because defendant had been obstinate and walked to his truck, there was reasonable suspicion defendant would leave. He then speculated that, if defendant left, it was reasonable to believe that defendant would spirit the child away, or detain him, or engage in some other element that a criminal statute required. Again, this is not a reasonable suspicion under the totality of the circumstances.

Moreover, leaving in the truck would not have been criminal by itself. If it had occurred, it might have provided reasonable suspicion of some other crime. But it is not, directly, any form of kidnapping. Sergeant Balowski cannot have reasonably believed that it was because he was aware that the child was not in the truck. And most importantly, it would not have amounted to obstructing a police officer because the order not to leave was not tethered to a reasonable suspicion of kidnapping or to any other crime, beyond obstructing an officer. See *People v Trapp*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 345293); slip op 12 (holding that if a *Terry* stop is unreasonable and unlawful, a defendant will not be guilty of resisting it under MCL 750.81d).

In sum, the record in this case describes an incident in which defendant was rude; ignored an officer of the law; refused to answer his questions; and when he no longer wished to speak to that officer, walked away. That is precisely the freedom that the Fourth Amendment guarantees. In my opinion, the totality of the circumstances on record do not support a reasonable suspicion to detain defendant in order to investigate kidnapping or any like crime. Furthermore, Sergeant Balowski conflated criminality with defendant's wish to ignore him, and Sergeant Balowski relied in large part on defendant's disobedience to justify stopping him. Under *Terry* and under *Moreno*, a person may disobey an officer's unlawful order. For the reasons stated, I would hold that the *Terry* stop was unlawful and therefore respectfully dissent.[1]

/s/ Michael J. Kelly

[1] Given my conclusion, I need not address defendant's remaining arguments regarding MRE 404(b) or the sufficiency of the evidence.