NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JARRAIL CHAUENCEY BROWN, DOC #D14173, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D18-2743

Opinion filed July 1, 2020.

Appeal from the Circuit Court for Lee County; Joseph C. Fuller, Jr., Judge.

Howard L. Dimmig, II, Public Defender, and Robert D. Rosen, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and C. Todd Chapman, Assistant Attorney General, Tampa, for Appellee.

ROTHSTEIN-YOUAKIM, Judge.

Jarrail Chauencey Brown appeals his judgment and sentences for two counts of battery on a law enforcement officer and one count of resisting an officer with violence. Because the evidence did not establish that the deputies who detained Brown had been engaged in the lawful execution of a legal duty, we reverse and remand for

the trial court to instead adjudicate and sentence Brown on two counts of simple battery, a first-degree misdemeanor, and for entry of a judgment of acquittal on the charge of resisting an officer with violence.

Around 11:00 p.m. on June 1, 2017, Deputies Inesmary Velasquez and Michael Vivian were dispatched to a motel in Lee County. The deputies were advised only that the motel's owner had reported a "disturbance" at the motel and had provided a description of a male subject. Within minutes of the dispatch call, Deputy Velasquez arrived at the motel in her patrol car and observed Brown walking alone in the parking lot from the direction of the motel office. Because Brown matched the description of the subject, Deputy Velasquez began to walk over to him.

As Deputy Velasquez approached Brown, a woman who was later identified as the owner of the motel came out of the office and pointed at Brown. Deputy Velasquez, who was dressed in full uniform, asked Brown, who was obviously agitated, for identification. Brown complied with the deputy's request, but he became irate as the deputy began to inquire about the reported disturbance. Brown began yelling profanities, and he attempted to walk away several times, indicating that he wanted to gather his belongings and leave the motel.

Approximately three minutes after Deputy Velasquez's arrival at the motel, Deputy Vivian arrived and observed Deputy Velasquez and Brown talking to one another. As Brown spoke to Deputy Velasquez, he swayed back and forth, clenching his fists. According to Deputy Vivian, Brown appeared "like he was ready to approach [Deputy Velasquez] in an aggressive manner." Deputy Vivian joined them, and shortly after, Brown began to walk away, indicating again that he wanted to leave.

The deputies ordered him to stop, informing him that he was being detained for an investigation. Deputy Velasquez admitted at trial that when she and Deputy Vivian had ordered Brown to stop, she had been unsure whether a crime had been committed, understanding only that a disturbance had taken place:

> [DEPUTY VELASQUEZ:] We weren't sure if a crime was committed. So, therefore, he was detained at that time for us to do a thorough investigation of what had taken place.
>
> [DEFENSE COUNSEL:] Is a disturbance a crime?
>
> [DEPUTY VELASQUEZ:] At that time, no.
>
> . . .
>
> [DEFENSE COUNSEL:] Did it appear that a crime had been committed?
>
> [DEPUTY VELASQUEZ:] I don't know.

Deputy Vivian also admitted that he had not known whether Brown had committed a crime but testified that he had detained Brown in part because he had been concerned for his and Deputy Velasquez's safety.

In spite of the deputies' verbal commands to stop, Brown continued to walk away from them. The deputies followed, instructing him to place his hands behind his back. When Brown did not comply, Deputy Vivian grabbed Brown's arms in an attempt to handcuff him, and Brown began swinging his arms to avoid being cuffed. In that struggle, Brown hit Deputy Vivian's mouth with his elbow. Deputy Velasquez then reached for her taser and tased Brown. Brown fell to the ground, continuing to swing his arms. Deputy Velasquez attempted to tase Brown a second time, but Brown temporarily blocked her by grabbing her hand and then grabbing her taser. Brown was

eventually apprehended and arrested. He was charged with two counts of battery on a law enforcement officer and one count of resisting an officer with violence.

At trial, Brown timely but unsuccessfully moved for a judgment of acquittal on all three counts, arguing that the evidence had not established that the officers had been engaged in the lawful execution of a legal duty. The jury found Brown guilty on all counts, and he was sentenced to a total of five years' imprisonment followed by five years' probation.

On appeal, Brown argues that the trial court erred in denying his motion for a judgment of acquittal because the State did not meet the "lawful execution" element of the crimes for which he was convicted. We agree.

We review de novo the trial court's denial of Brown's motion for a judgment of acquittal. See Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002). This court will not reverse a conviction if it is supported by competent substantial evidence. Id. "If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction." Id.

To support Brown's convictions for battery on a law enforcement officer and resisting an officer with violence, the evidence had to establish that the deputies had been engaged in the lawful execution of a legal duty when the offenses occurred. See § 784.07(2)(b), Fla. Stat. (2017) (reclassifying battery from a first-degree misdemeanor to a third-degree felony if the battery is committed "upon a law enforcement officer . . . while the officer . . . is engaged in the lawful performance of his or her duties"); § 843.01, Fla. Stat. (2017) (stating that a person commits the offense of

resisting an officer with violence if the person "knowingly and willfully resists, obstructs, or opposes any officer . . . in the lawful execution of any legal duty . . . by offering or doing violence to the person of such officer"); Tillman v. State, 934 So. 2d 1263, 1266 n.2 (Fla. 2006) (explaining that the language in section 784.07(2) that the officer be "engaged in the lawful performance of his or her duties" and the language in section 843.01 requiring that the officer be "in the lawful execution of any legal duty" are "functionally identical"), superseded by statute on other grounds, § 776.051(1), Fla. Stat. (2008).

To prove that Deputy Velasquez and Deputy Vivian had been engaged in the lawful execution of a legal duty when they detained Brown, the evidence "had to show that the [deputies] had a reasonable suspicion of criminal activity—'a reasonable suspicion that [Brown] ha[d] committed, [was] committing, or [was] about to commit a crime.' " See McClain v. State, 202 So. 3d 140, 142 (Fla. 2d DCA 2016) (quoting Popple v. State, 626 So. 2d 185, 186 (Fla. 1993)). "For reasonable suspicion justifying a detention to exist, 'the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.' " Tillman, 934 So. 2d at 1273 (quoting United States v. Cortez, 449 U.S. 411, 417-18 (1981)). "Whether an officer's suspicion is reasonable is determined by the totality of the circumstances which existed at the time of the stop and is based solely on facts known to the officer before the stop." Exantus-Barr v. State, 193 So. 3d 936, 939 (Fla. 4th DCA 2016) (quoting Slydell v. State, 792 So. 2d 667, 671 (Fla. 4th DCA 2001)).

In this case, the evidence did not establish any basis for the deputies to reasonably suspect Brown of any criminal activity. Initially, the dispatch call that sent

the deputies to the motel was based on information that a "disturbance" had occurred at the motel and that a man matching Brown's description had been involved. Standing alone, the information the deputies learned from the call did not provide them with reasonable suspicion to detain Brown because the call did not indicate that the "disturbance" had involved any criminal activity. See Davis v. State, 973 So. 2d 1277, 1279 (Fla. 2d DCA 2008).

In Davis, two police officers were dispatched to a restaurant to investigate a "suspicious incident." Id. at 1278. The officers arrived at the restaurant wearing their police uniforms, and they spoke to the employees who had reported the incident. Id. Davis was seated at a table, and the employees pointed him out to the officers. Id. When the officers approached Davis, they asked him if he could move from the table where he was sitting to a closed off portion of the restaurant. Id. Davis became agitated, and the officers told him to relax and stay put. Id. Davis then jumped out of his seat and pushed one of the officers into some tables. Id. At trial, the defense moved for a judgment of acquittal, arguing that the evidence did not establish that the officers had been engaged in the lawful execution of a legal duty when they detained Davis because the officers had not had reasonable suspicion to support the detention. Id. at 1278-79. The trial court denied the motion, and we concluded that was error. Id. We explained as follows:

> We reject the State's argument that it established the element of a lawful execution of a legal duty with testimony that the officers were responding to a complaint by the employees of the Green Room Restaurant. The fact that an employee on private property makes a complaint to the police does not vitiate the requirement that a detention to investigate the complaint be supported by reasonable suspicion of criminal activity.

Id. at 1279.

Here, just as in Davis, the information that the deputies learned from the call lacked details about the nature of the incident they were sent to investigate. Although upon their arrival at the motel, the deputies were able to ascertain that Brown matched the description of the subject involved in the disturbance, they were no better informed of the nature of the disturbance and had no reasonable basis to suspect that Brown had been involved in any criminal activity. See Domingues v. State, 159 So. 3d 1019, 1021-22 (Fla. 4th DCA 2015) (concluding that an officer did not have reasonable suspicion to support a stop when the officer had been dispatched to a home to investigate a domestic disturbance but nothing in the dispatch call suggested that a crime had occurred at the home and all the officer observed upon arriving at the home was the suspect driving away); Cooks v. State, 28 So. 3d 147, 148-50 (Fla. 1st DCA 2010) (rejecting the argument that officers had reasonable suspicion to support a stop based on a call about suspicious activity that had occurred at a hotel because although the officers were able to corroborate innocent details of identification upon their arrival at the hotel, neither the information they learned from the call nor their subsequent observations of the subject described in the call suggested that criminal activity was afoot). Although it quickly became apparent that Brown was very angry, neither deputy witnessed Brown engaged in any unlawful acts, unusual conduct, or suspicious behavior.

Without question, both deputies were in the lawful execution of their legal duties when they approached Brown to ask questions and investigate the reported disturbance. See Yarusso v. State, 942 So. 2d 939, 942 (Fla. 2d DCA 2006) ("[A]s a

general proposition, a law enforcement officer who engages a citizen in a consensual encounter is engaged in the lawful execution of his or her legal duties."); see also Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring) ("There is nothing in the Constitution which prevents a police [officer] from addressing questions to anyone on the streets."). But also without question, during this consensual encounter, Brown was free to walk away from the deputies and ignore them. See Popple, 626 So. 2d at 186 ("During a consensual encounter a citizen may either voluntarily comply with a police officer's requests or choose to ignore them."). And what began as a consensual encounter transformed into an investigatory stop when, after Brown began to walk away, the deputies ordered him to stop and Deputy Vivian grabbed his arms to handcuff him. See Parsons v. State, 825 So. 2d 406, 408 (Fla. 2d DCA 2002) ("A citizen encounter becomes an investigatory, or Terry, stop, once an officer shows authority in a manner that restrains the defendant's freedom of movement such that a reasonable person would feel compelled to comply." (citing Popple, 626 So. 2d at 186)). Once the deputies detained Brown, they were in the lawful execution of their legal duties only to the extent that they had a well-founded reasonable suspicion to support the detention. See McClain, 202 So. 3d at 142.

The evidence failed to establish that the deputies had the requisite reasonable suspicion. As previously explained, the dispatch call that sent them to the motel did not create reasonable suspicion, and neither did their observations of Brown upon their arrival at the motel. Their consensual encounter with Brown also did not furnish reasonable suspicion. During that encounter, Brown became increasingly irate, yelled profanities, and refused to cooperate. He clenched his fists, swayed back and

forth, and, ultimately, attempted to walk away. But although he was clearly upset, nothing about Brown's behavior during that encounter suggested that he had just committed, was committing, or was about to commit a crime. And although he may have frustrated the deputies by walking away from them, the act of walking away did not create reasonable suspicion in this case. Cf. Yarusso, 942 So. 2d at 943 ("If we were to hold that the act of walking . . . away from a consensual encounter constituted 'resisting' or 'obstructing,' we would criminalize the act that is the very essence of such an encounter."); see also Florida v. Bostick, 501 U.S. 429, 437 (1991) ("We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure."). Notably, the deputies themselves testified that when they detained Brown, they did not know whether Brown had been involved in any criminal activity—indeed, that was what they were detaining him to find out.[1]

Deputy Vivian further testified that the detention also had been prompted by officer safety concerns. Neither deputy, however, testified that they believed Brown had been armed or dangerous, and nothing in the evidence presented at trial suggested any reason for them to have believed that. Moreover, to the extent that the deputies may have detained Brown to search for weapons, the detention would have been lawful only if it was initially supported by reasonable suspicion that Brown had committed, was committing, or was about to commit a crime. See Smith v. State, 592 So. 2d 1206, 1208 (Fla. 2d DCA 1992) ("The fact that one of the officers testified that they were going

[1]At trial, the State failed to identify any criminal offense that the deputies reasonably could have believed that Brown had committed before they ordered him to stop.

to search the appellant for weapons because they were afraid for their safety also did not make the appellant's detention lawful. The lawfulness of a pat down search for weapons presupposes that a stop is valid and that the officer then forms the necessary suspicion that a suspect is armed and dangerous." (citing Daniels v. State, 543 So. 2d 363, 365 (Fla. 1st DCA 1989))). In this case, the deputies lacked reasonable suspicion to support the detention in the first place. Therefore, any subsequent search for weapons would not have been valid.

In sum, we conclude that Deputy Velasquez and Deputy Vivian did not have reasonable suspicion to detain Brown. Because the detention was not supported by reasonable suspicion, it was unlawful. And because the detention was unlawful, the State did not prove the "lawful execution" element to sustain the charges of battery on a law enforcement officer and resisting an officer with violence.

Consequently, we reverse Brown's convictions for battery on a law enforcement officer and resisting an officer with violence. While the evidence did not establish an unlawful battery on either Deputy Velasquez or Deputy Vivian under section 784.07, the evidence did establish the lesser included offenses of simple battery under section 784.03(1)(a). We therefore remand with instructions to the trial court to adjudicate Brown guilty of two counts of simple battery, a first-degree misdemeanor. See C.B. v. State, 979 So. 2d 391, 395 (Fla. 2d DCA 2008); Rodriguez v. State, 964 So. 2d 833, 838 (Fla. 2d DCA 2007); see also § 924.34, Fla. Stat. (2020) ("When the appellate court determines that the evidence does not prove the offense for which the defendant was found guilty but does establish guilt of a lesser statutory degree of the offense or a lesser offense necessarily included in the offense charged, the appellate

court shall reverse the judgment and direct the trial court to enter judgment for the lesser degree of the offense or for the lesser included offense."). We also remand with instructions to the trial court to enter a judgment of acquittal on the charge of resisting an officer with violence.

Reversed and remanded.

VILLANTI and ATKINSON, JJ., Concur.