COURT OF APPEALS
DECISION
DATED AND FILED

August 22, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1580-CR **Cir. Ct. No. 2003CF1883**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAYNARD R. JACKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

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

¶1 KESSLER, J. Raynard R. Jackson appeals from a judgment of conviction for being a felon in possession of a firearm, carrying a concealed weapon and obstructing an officer. He also appeals from an order denying his postconviction motion for relief. He argues: (1) the trial court erroneously denied

Jackson's motion to suppress evidence; and (2) he was denied the effective assistance of counsel when trial counsel failed to object during the State's closing argument. We reject his arguments and affirm the judgment and order.

BACKGROUND

¶2 According to testimony at the hearing on Jackson's motion to suppress, four City of Milwaukee police officers were on routine patrol in an unmarked squad car on the afternoon of March 25, 2003, near the Guru Food Store. A few weeks earlier, there had been an armed robbery and car jacking in the parking lot of the store, and the officers had received complaints about drug dealing in the parking lot, which contained a pay phone that dealers used to conduct drug sales.

¶3 As the four officers drove by the store, they saw two men in the parking lot. Officer Paul Lough testified that as the squad car approached the two men, who they later identified as Jackson and Morris Rash, the men "made eye contact [with the officers], or looked in our area of the squad vehicle, [and then] they went inside the store very quickly." Another officer, Ala Awadallah, said the men "ran into Guru foods."

¶4 Lough testified that they drove the squad around the block and then returned to the area near the store. Lough saw Jackson and Rash walking toward the squad, in the roadway. Lough noted that they did not have anything in their hands, which led him "to believe they didn't purchase anything in the store."

¶5 Lough said that as the squad car continued to approach Jackson and Rash, the two men "looked in the direction of our squad vehicle, [and then] they both took unprovoked flight and ran." Awadallah said the men started running

while the squad car was still moving. Lough said he got out of the squad and chased Jackson down two streets and through a park. Lough, who was wearing his police uniform, "called out to [Jackson] when we got to the park area to stop." Lough said Jackson did not stop. Lough saw Jackson take a "black semi-automatic firearm" from his waistband and discard it. Lough picked up the firearm, put it in his own waistband, and continued to chase Jackson. Jackson was then tackled by another officer.

¶6 Jackson was arrested and charged with being a felon in possession of a firearm, carrying a concealed weapon and obstructing an officer. Jackson moved to suppress evidence of the firearm and derivative evidence on grounds that the officers lacked reasonable suspicion to approach Jackson and Rash, and lacked probable cause to pursue them.

¶7 The trial court conducted a hearing on Jackson's motion. Lough and Awadallah testified as described above. Neither Jackson nor Rash testified. The trial court implicitly found the officers' testimony credible and concluded that the officers had reasonable suspicion to pursue the two men as they ran, based on the fact that it was a high-crime area and the men had behaved in a suspicious manner, by walking hurriedly into the store and then running away from the squad car.

¶8 The case was tried to a jury.[1] During closing argument, the prosecutor briefly discussed the role of the police:

> And when people run—and they run from the police, and they discard guns—I think that our community would want a police officer to pursue that person, and to take that

[1] Jackson and Rash were tried at the same time. The charges against Rash are not at issue in this appeal and will not be addressed.

> weapon, and especially to take that weapon from a felon who's possessing it, and not leave it in a park or on a vacant lot where some other person might come upon it. So you can consider all of the facts and circumstances that the State has presented. You can consider the defendant's motives, although motive is not an element of the proof in this case. But you can consider their motive and how those things go to prove their intent, and that their actions were intentional.

Jackson's trial counsel did not object to these statements.

¶9 Jackson was found guilty on all counts and sentenced to five years of initial confinement and five years of extended supervision on the charge of being a felon in possession of a firearm. On the two misdemeanor charges, carrying a concealed weapon and obstructing an officer, Jackson was sentenced to nine months in the House of Correction for each, to be served consecutive to each other, the prison sentence, and any other sentences.

¶10 Jackson moved for postconviction relief on two grounds, asserting that: (1) the suppression motion should have been granted; and (2) trial counsel provided ineffective assistance by failing to effectively cross-examine witnesses and object to the prosecutor's closing argument, which Jackson alleged included a forbidden "golden rule" argument. The trial court denied the motion without a hearing and this appeal followed.[2]

DISCUSSION

¶11 At issue on appeal is whether the trial court erroneously denied Jackson's motion to suppress evidence, and whether Jackson was denied the

[2] The postconviction motion was decided by the Hon. Michael B. Brennan. The Hon. Victor A. Manian presided over the jury trial and sentencing.

effective assistance of counsel when trial counsel failed to object during the State's closing argument.[3] We examine each issue in turn.

I. Motion to suppress

¶12 When reviewing a trial court's decision on a motion to suppress evidence on Fourth Amendment grounds, we will uphold the trial court's factual findings unless they are clearly erroneous. ***State v. Eskridge***, 2002 WI App 158, ¶9, 256 Wis. 2d 314, 647 N.W.2d 434. However, we independently decide whether the facts establish that a particular search or seizure occurred and, if so, whether it violated constitutional standards. *See* ***State v. Richardson***, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830 (1990).

¶13 Jackson argues that his Fourth Amendment rights were violated because the officers stopped and detained him without reasonable suspicion or probable cause. He contends that the officers who pursued Jackson and Rash formed the intent to stop them before they fled, "not after or at the time that they fled." Jackson states:

> Because the officer[s] did not possess reasonable suspicion to believe that these men were engaged in criminal activity they did not possess probable cause to detain the defendant as part of a Terry[4] stop. The trial court judge therefore erroneously … [denied Jackson's motion] based on a lack

[3] Two of Jackson's brief headings also assert that his trial counsel was ineffective for failing to effectively cross-examine witnesses, which was an issue he addressed in his postconviction motion to the trial court. However, on appeal, Jackson presents no argument with respect to this issue, and we deem it abandoned. *See* ***Reiman Assocs., Inc. v. R/A Advertisting***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (an issue raised but not briefed or argued is deemed abandoned).

[4] *See* ***Terry v. Ohio***, 392 U.S. 1 (1968).

> of probable cause to pursue, detain and arrest the defendant.

¶14 In response, the State asserts that this case is governed by ***California v. Hodari D.***, 499 U.S. 621 (1991), which we discuss below. Relying on ***Hodari D.***, the State argues that Jackson's motion was properly denied because he was not "seized" until he was tackled by an officer, and the officers had probable cause to detain and arrest Jackson at that time because he had discarded a firearm. We agree.

¶15 ***Hodari D.*** involved a group of youths who fled at the approach of an unmarked police car. ***Id.*** at 622-23. One of the youths, Hodari, ran and, as an officer was about to tackle him, he tossed down a rock of crack cocaine. ***Id.*** at 623. The United States Supreme Court held that Hodari had not been seized until he was tackled, because in order to effect a seizure for Fourth Amendment purposes, an officer must make a show of authority, and the citizen must actually yield to that show of authority.[5] ***Id.*** at 626. The Court concluded that the discarded cocaine was not the fruit of an illegal seizure because Hodari was not seized until after he threw away the cocaine. ***Id.*** at 629.

¶16 The Wisconsin Supreme Court recognized ***Hodari D.***'s holding and adopted it for use in Wisconsin in ***State v. Kelsey C.R.***, 2001 WI 54, ¶¶30, 33, 243 Wis. 2d 422, 626 N.W.2d 777. The court recently reaffirmed its adoption of the ***Hodari D.*** standard in ***State v. Young***, 2006 WI 98, ___ Wis. 2d ___, 717 N.W.2d 729, a case decided after briefing in this case was completed.

[5] The Court recognized that a person is also seized when there is a physical touching between the officer and the citizen. ***California v. Hodari D.***, 499 U.S. 621, 626-27 (1991).

¶17 ***Young*** recognized that ***Hodari D.*** had been criticized, but ultimately concluded that ***Hodari D.***'s holding should continue to be applied in Wisconsin. ***Id.***, ¶47. Thus, where the defendant Young fled in response to a show of authority—thereby not yielding to that show of authority—he was not legally "seized" for Fourth Amendment purposes until he was physically apprehended. ***Id.***, ¶52.

¶18 Applying these principles here, we begin by noting that Jackson does not challenge the trial court's findings of fact. These facts are not clearly erroneous, and we do not disturb them. *See* ***Eskridge***, 256 Wis. 2d 314, ¶9. The trial court accepted the officers' testimony that Jackson ran as the squad approached him, that he threw a firearm on the ground as he was running, and that he was then tackled by a police officer. Consistent with ***Hodari D.***, we conclude that Jackson was not "seized" until he was tackled. *See* ***id.***, 499 U.S. at 626, 629.

¶19 The question then becomes whether the police had sufficient cause to tackle and arrest Jackson. Jackson does not appear to dispute the State's assertion that once Jackson threw down the firearm, the police had probable cause to arrest him. We agree with the State's assertion. Probable cause to arrest is "that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime." ***State v. Dubose***, 2005 WI 126, ¶36 n.13, 285 Wis. 2d 143, 699 N.W.2d 582 (internal quotation marks and citation omitted). There was sufficient evidence that Jackson "probably committed a crime" when he threw the firearm to the ground and continued to run from the officer. Jackson's Fourth Amendment rights were not violated.

II. Prosecutor's closing argument

¶20 Jackson argues that his trial counsel provided ineffective assistance when he failed to object during the prosecutor's closing argument. In order to prove ineffective assistance, a defendant must prove both that his counsel's conduct was deficient and that counsel's errors were prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. ***Id.*** at 697.

¶21 Jackson asserts that his trial counsel should have objected to the prosecutor's statement that "our community would want a police officer to pursue that person, and to take that weapon, and especially to take that weapon from a felon who's possessing it, and not leave it in a park or on a vacant lot where some other person might come upon it." He contends that this statement constituted a prohibited "golden rule" argument.

¶22 "Generally, a golden rule argument involves asking the jurors to place themselves in the position of someone claiming injury or damage and asking the jurors to determine what they would want as compensation." ***State v. DeLain***, 2004 WI App 79, ¶23, 272 Wis. 2d 356, 679 N.W.2d 562, *aff'd on other grounds*, 2005 WI 52, ¶2, 280 Wis. 2d 51, 695 N.W.2d 484. "In a criminal case, a golden rule argument asks the jurors to place themselves in the victim's shoes." ***Id.*** This is not proper because the statements "appeal to the jurors' sympathy for persons who have been injured or victimized by a crime." ***Id.***

¶23 We disagree that the prosecutor's statement asked the jurors to place themselves in a victim's shoes. The prosecutor basically told the jurors that our society expects police officers to fulfill their public safety mission by stopping

people who throw guns on the ground, and by retrieving those guns. As the State notes, one element of the crime of obstructing an officer was proving that the officer was doing an act within his official capacity and with lawful authority. The prosecutor's statements were consistent with argument on that element and did not constitute a "golden rule" argument.

¶24 Because we conclude the prosecutor's statements were not objectionable, we reject Jackson's argument that trial counsel provided deficient performance by not objecting. Jackson has therefore not proven ineffective assistance of counsel. *See* ***Strickland***, 466 U.S. at 687.

By the Court.—Judgment and order affirmed.

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