STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2014AP1053-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TYRON JAMES POWELL,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE TIMOTHY G. DUGAN PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

Cases

Page

Page

Page

Page

Page

Statutes

Other Authorities

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin does not request oral argument or publication. This case can be resolved by applying well-established legal principles to the facts of the case.

SUPPLEMENTAL STATEMENT OF THE CASE

As the plaintiff-respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2.[1]

ARGUMENT

Powell was convicted of one count of carrying a concealed weapon, contrary to Wis. Stat. § 941.23 (2009-10),[2] and one count of fleeing an officer by vehicle, contrary to Wis. Stat. § 346.04(3) (2009-10) (36:1-3). Powell was convicted on retrial following two mistrials. At the first trial, counsel asserted during his opening statement that Powell was brutalized by police after his arrest and the charges were fabricated to cover up that assault (65:2-7).[3] Because there was no mention of police brutality until the second day of trial, the court granted the defense's motion for mistrial with the understanding that Powell's allegation would be investigated (65:17-20).[4] At the second trial, Powell's allegation that the charges against him were fabricated was never presented to the jury. Instead, Powell presented a slightly different version of events than the testifying officers presented. At the end

[1] All citations to Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] Powell was alleged to be carrying a concealed handgun on January 8, 2011 (12:2), which was before carrying a concealed handgun was decriminalized in some circumstances by the adoption of 2011 Wisconsin Act 35.

[3] The record does not contain counsels' opening statements. It appears that opening statements should have been contained in Record No. 66, but that record is only an excerpt of the proceedings (66:1). It is also noted that Record Nos. 65 and 66 are not in chronological order. The proceedings documented in Record No. 66 came before the proceedings documented in Record No. 65 (1:5).

[4] The court concluded that double jeopardy was not implicated because there was no evidence of wrongful conduct by the State (65:20).

of the second trial, the jury was unable to reach a unanimous verdict and the court declared a mistrial (80:8).

Powell presents three issues for review. First, the trial court ruled that the State could use Powell's lack of testimony regarding police brutality at the second trial to impeach Powell if he chose to testify at the third trial that he was assaulted after his arrest. Was that pretrial ruling an erroneous exercise of discretion and did that ruling prejudice Powell even though that evidence was never presented?

Second, in his postconviction motion, Powell asserted that his counsel at the third trial was ineffective for not moving to suppress the handgun on the ground that officers unlawfully approached Powell's vehicle. Did the court properly exercise its discretion in denying Powell's postconviction motion without a hearing when the court concluded that a suppression motion on that ground would have been unsuccessful?

Finally, the State sought to introduce the nature and year of Powell's prior convictions after Powell volunteered that he was never convicted of a felony. Did the court erroneously exercise its discretion in allowing the State to present that evidence when Powell made the nature of his convictions an issue, and was Powell prejudiced by that evidence?

The State will address each argument in turn and asks this Court to affirm Powell's judgment of conviction and the order denying postconviction relief as Powell failed to establish error, and if there was error – the errors were harmless.

I. THE COURT'S PRETRIAL RULING REGARDING POWELL'S ALLEGATION OF POLICE BRUTALITY WAS PROPER AND HARMLESS.

Powell asserts the court erred when it ruled that, if Powell alleged his charges were a cover-up for an assault he endured after his arrest, the State could impeach Powell with his testimony at the second trial that never mentioned an assault and cover-up (Powell's Br. at 9). In a pretrial ruling, the trial court concluded that Powell's assertion that the charges against him were fabricated to cover-up an assault was relevant and admissible as it would affect the testifying officers' credibility (88:14-15, 37). The court further concluded that the State could introduce that Powell did not raise this issue at his second trial because that would affect the jury's determination of Powell's credibility (88:15, 22, 27-28, 54-55).

The court clarified that Powell's allegation of police brutality after his arrest was relevant only to the issue of credibility because the jury was not asked to decide whether officers violated Powell's civil rights (88:37). As such, a jury instruction would be necessary to inform the jury of the purpose of the evidence (88:37-38, 39-41). At trial, Powell never testified that the charges were fabricated or that he was assaulted by officers, and therefore, Powell was never cross-examined about that allegation.

Powell challenges the trial court's evidentiary ruling as erroneous and prejudicial (Powell's Br. at 10-11). He argues that his lack of prior testimony is irrelevant and that he would have been unduly prejudiced by the State informing the jury that he did not previously allege that the charges were a cover-up for police brutality (Powell's Br. at 10-11). Powell is attempting to usurp that function of the jury, and this Court should conclude that the trial court's evidentiary ruling was a proper exercise of discretion. Alternatively, this Court should conclude that

if the trial court erroneously exercised its discretion, the error was harmless.

A. It is relevant to the assessment of Powell's credibility that Powell never asserted at his second trial that officers fabricated the charges to cover-up an assault.

The admission or rejection of evidence is within the trial court's discretion. *State v. Alsteen*, 108 Wis. 2d 723, 727, 324 N.W.2d 426 (1982). The question on review is "whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record." *State v. Wollman*, 86 Wis. 2d 459, 464, 273 N.W.2d 225 (1979). "This court will not find an abuse of discretion if there is a reasonable basis for the trial court's determination." *Alsteen*, 108 Wis. 2d at 727-28 (citing *Boodry v. Byrne*, 22 Wis. 2d 585, 589, 126 N.W.2d 503 (1964)).

Here, the State sought a pretrial ruling preventing Powell from testifying that he was assaulted after his arrest (20:4; 87:54). In considering this motion, the court noted that after the first trial, a mistrial was declared so the State could investigate Powell's allegation (87:57). The allegation was investigated, but not substantiated, and ultimately not raised at the second trial (87:58). The court, however, concluded that Powell could testify at the third trial that he was assaulted after his arrest because it was relevant to the assessment of the credibility of the testifying officers (87:61). The court also concluded that Powell's lack of testimony regarding that allegation at the second trial was equally relevant to the assessment of Powell's credibility (87:61, 64, 69-70).

Powell alleges that his failure to testify about the alleged assaults at the second trial is irrelevant because his lack of testimony *might* have been trial strategy, which would have no bearing on his credibility (Powell's Br. at

10). Powell is incorrect. Relevant evidence is evidence that has a tendency to make a fact of consequence more or less probable than it would be without the evidence. *State v. Pharr*, 115 Wis. 2d 334, 344, 340 N.W.2d 498 (1983); Wis. Stat. § 904.01. "A witness's credibility is always relevant . . . ." 7 Daniel D. Blinka, *Wisconsin Practice Series: Wisconsin Evidence* § 401.1, at 98 (3rd ed. 2008). Evidence that Powell did not assert that officers fabricated the charges at the second trial would make whether he is now telling the truth about that allegation less probable. The trial court explained:

> That's all relevant to the jury because this is going to be . . . . a critical part of the defense, and the jury has to decide whether or not Mr. Powell is being truthful about these allegations and the misconduct of the officers such that they are lying to cover up for themselves.
>
> And if that's the nature of what this case is going to be, then the full picture needs to be presented to the jury for them to decide whether or not Mr. Powell is being truthful, whether or not the officers are being truthful.

(87:75).

After the court's initial ruling, Powell re-raised his objection (88:5-6). The court then painstaking explained its conclusion (88:5-55). Defendants have an obligation to testify truthfully on the stand. *State ex rel. Simos v. Burke*, 41 Wis. 2d 129, 137, 163 N.W.2d 177 (1968). And at the second trial, Powell admitted to speeding away from the scene and to carrying a weapon.[5] If Powell asserted that those charges were made up at the third trial, the fact that

[5] Powell testified at the second trial that he initially fled because he was unaware that the individuals approaching his vehicle were police officers (77:148-50, 158). He further testified that once he knew he was being pursued by officers, he stopped and fully complied with the officers' orders (77:151-52, 154-58). Powell admitted that he had a handgun that evening, but denied that it was concealed, testifying that he carried the gun on the outside of his clothing and in a holster (79:36-37, 41).

Powell did not assert that at the second trial would be relevant. The court explained: "It's for the jury to weigh. If it comes out in this third trial, the jury is going have [sic] to determine whether or not it's credible and whether or not Mr. Powell is being credible and truthful." (88:54-55).

Moreover, while Powell does not expressly raise a due process argument,[6] Powell's claim could be viewed as asserting that the court's pretrial ruling prevented him from raising a complete defense (*see* Powell's Br. at 11 "the order improperly undermined Powell's defense"). However, in *State v. Hanson*, our supreme court reiterated that "the rules of evidence generally have been held to comply with the constitutional right to present a defense." 2012 WI 4, ¶ 45, 338 Wis. 2d 243, 808 N.W.2d 390. Here, the court did not prevent Powell from asserting that the officers fabricated the charges. Rather, the court expressly ruled that Powell could testify about the alleged assault and cover-up.

As addressed above, if Powell testified about the assault at the third trial, Powell's lack of testimony at a previous hearing becomes relevant. Powell does not have a right to present a defense that the State is precluded from challenging. If Powell testified that officers fabricated the charges, the key issue for the jury would be Powell's credibility. As such, the court's ruling is in full accord with the "axiom of the law, and an elementary principle, that in all jury cases the credibility of the witnesses must be determined by the jury alone." *Roberts v. State*, 84 Wis. 361, 364, 54 N.W. 580 (1893). Powell was asking the court to usurp that function of the jury and the court properly denied that invitation.

[6] "The Due Process Clause of the Fourteenth Amendment requires that criminal prosecutions conform to fundamental notions of fairness and that criminal defendants are given 'a meaningful opportunity to present a complete defense.'" *State v. Weissinger*, 2014 WI App 73, ¶ 8, 355 Wis. 2d 546, 851 N.W. 2d 780 (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

B. If the court's pretrial ruling was erroneous, it was harmless.

"Wisconsin's harmless error rule is codified in Wis. Stat. § 805.18 and is made applicable to criminal proceedings by Wis. Stat. § 972.11(1)." *State v. Sherman*, 2008 WI App 57, ¶ 8, 310 Wis. 2d 248, 750 N.W.2d 500 (citing *State v. Leonard Harvey*, 2002 WI 93, ¶ 39, 254 Wis. 2d 442, 647 N.W.2d 189) (footnote omitted). Whether a trial error is harmless is a question of law reviewed de novo. *In re Commitment of Harrell*, 2008 WI App 37, ¶ 37, 308 Wis. 2d 166, 747 N.W.2d 770.

Erroneous evidentiary rulings are subject to harmless error analysis. *State v. Harris*, 2008 WI 15, ¶ 85, 307 Wis. 2d 555, 745 N.W.2d 397. The State has the burden to establish that the error was harmless. *State v. Thoms*, 228 Wis. 2d 868, 873, 599 N.W.2d 84 (Ct. App. 1999) (citation omitted). "The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction." *Thoms*, 228 Wis. 2d at 873. The claimed error does not contribute to the conviction if this Court concludes that a rational jury would have found the defendant guilty absent the error. *Leonard Harvey*, 254 Wis. 2d 442, ¶ 49.

In this case, the harmless error analysis is rather simple. The evidence that Powell complains of, that he did not previously allege the charges were a cover-up for police brutality, was never admitted. Because it was never admitted, there is no possibility that it could have contributed to the conviction. As such, if the court's pretrial ruling was erroneous, it was also harmless.

In a similar vein, Powell's assertion that the court "invaded" his attorney-client privilege is meritless. Powell's privilege was not affected by the court's ruling and the court clearly communicated that if Powell wanted to waive his privilege and present evidence of trial strategy, the relevancy and admissibility of that evidence

would be considered at that time (88:54-55). The court's ruling did not require the disclosure of any privileged information, but moreover, no privileged information was actually disclosed. Therefore, any error was harmless.

II. THE COURT PROPERLY DENIED POWELL'S CLAIM OF INEFFECTIVE ASSISTANCE WITHOUT A HEARING.

Powell asserts that his counsel at the third trial was ineffective for failing to seek suppression of physical evidence (Powell's Br. at 11). Powell's allegation that counsel was ineffective rests on his assertion that officers violated the Fourth Amendment when they approached Powell's vehicle without reasonable suspicion that Powell was engaged in illegal activity (Powell's Br. at 12-13). Powell's suppression argument focuses on the handgun because it is the one piece of physical evidence that the State needed to establish that Powell was carrying a concealed weapon (Powell's Br. at 14). Police recovered the handgun after Powell discarded it during his flight from officers (75:66; 94:44-46, 66).

The court denied Powell's postconviction motion after it concluded that the officers had reasonable suspicion to conduct an investigatory stop (51:2). In furtherance of the court's conclusion that a hearing was not warranted, the State submits that no Fourth Amendment violation occurred that would have warranted suppression. First, officers lawfully approached Powell's vehicle on a reasonable suspicion that Powell was carrying a concealed weapon. Second, Powell fled when the officers approached, and therefore, evidence discarded during that flight could be lawfully seized. And finally, at the time of arrest, officers had probable cause to believe that Powell had committed a variety of crimes. Absent any Fourth Amendment violation, counsel could not be found ineffective for failing to bring a motion to suppress and the court properly denied Powell's claim without a hearing.

A. Powell is entitled to a *Machner*[7] hearing only if he alleges facts that, if true, would establish that he is entitled to relief.

A postconviction motion alleging ineffective assistance of counsel does not automatically trigger a right to a *Machner* hearing. *State v. Phillips*, 2009 WI App 179, ¶ 17, 322 Wis. 2d 576, 778 N.W.2d 157. "[N]o hearing is required if the defendant fails to allege sufficient facts in his or her motion, if the defendant presents only conclusory allegations or subjective opinions, or if the record conclusively demonstrates that he or she is not entitled to relief." *Id.* (citing *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996)).

On review, this Court first determines whether Powell pled sufficient facts to entitle him to relief. *Phillips*, 322 Wis. 2d 576, ¶ 17. Sufficient facts are facts that establish both deficient performance and prejudice under *Strickland v. Washington*, 466 U.S. 668, 687, 697 (1984). *State v. Allen*, 2004 WI 106, ¶¶ 12, 26, 274 Wis. 2d 568, 682 N.W.2d 433. "If the motion fails to allege sufficient facts, the trial court has the discretion to deny the motion without an evidentiary hearing. This discretionary decision will only be reversed if the trial court erroneously exercised that discretion." *Phillips*, 322 Wis. 2d 576, ¶ 17 (citing *Bentley*, 201 Wis. 2d at 310-11).

B. Officers lawfully approached Powell's parked vehicle on a reasonable suspicion that Powell was carrying a concealed weapon.

A law enforcement officer may lawfully stop an individual if he or she reasonably suspects that criminal activity may be afoot. *Terry v. Ohio*, 392 U.S. 1 (1968). In

[7] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

determining whether a *Terry* stop is lawful, courts employ the totality of the circumstances test. *Alabama v. White*, 496 U.S. 325, 328 (1990).

In this case, a key factor in the officers' formulation of reasonable suspicion was an anonymous tip by a concerned citizen. An anonymous tip, suitably corroborated, may provide reasonable suspicion for an investigatory stop. *Florida v. J.L.*, 529 U.S. 266, 269 (2000). In assessing the reliability of a tip, the court should give due weight to both the informant's veracity and the informant's basis of knowledge. *State v. Rutzinski*, 2001 WI 22, ¶ 18, 241 Wis. 2d 729, 623 N.W.2d 516. In certain cases, veracity can establish sufficient reliability to justify an investigative stop. *Id*. at ¶ 21. The corroboration of innocent details lends credibility to the tip, *State v. Glen Richardson*, 156 Wis. 2d 128, 142, 456 N.W.2d 830 (1990), and reliability is bolstered by corroboration of innocent but significant details. *State v. Williams*, 2001 WI 21, ¶ 39, 241 Wis. 2d 631, 623 N.W.2d 106. When significant details are independently corroborated, the inference arises that the tipster is telling the truth. *Id*. at ¶ 40.

Here, a concerned citizen who lived in the neighborhood flagged down an unmarked police vehicle to inform officers that she observed an African-American man, dressed in all black, with a handgun (2:2; 66:5, 8). The man exited a black Mitsubishi and entered 1913 N. 13th Street in Milwaukee, which was a suspected drug house (2:2; 66:8, 11). Undercover officers set up surveillance of the area, confirmed that the department had received previous reports of suspected drug activity at that address, and immediately identified the black Mitsubishi parked across the street (66:9, 11-12; 92:64). Approximately two hours later, Powell exited the home and he matched the description, given by the citizen informant, of the man with the gun (55:5; 66:14; 92:68-69).

Officers then observed Powell patting his right side, which the officers understood to be a "security check" for a firearm, but a firearm was not visible (55:5; 66:14-18, 49-50; 92:71-73). Powell and another man crossed the street and got into the black Mitsubishi (92:69). The undercover officers then radioed for marked squads to stop Powell on the suspicion that he was carrying a concealed weapon (66:22; 92:76).

Powell seeks to diminish the importance of the substantial corroboration of the details provided by the citizen informant by arguing that the details corroborated were also consistent with innocent behavior (Powell's Br. at 12-13). Such an argument ignores established Wisconsin law that corroboration of innocent details can be the foundation for finding an informant credible:

> Contrary to the defendant's assertion, we conclude that the corroboration by police of innocent details of an anonymous tip may under the totality of the circumstances give rise to reasonable suspicion to make a stop. The corroborated actions of the suspect, as viewed by the police acting on an anonymous tip, need not be inherently suspicious or criminal in and of themselves.

Glen Richardson, 156 Wis. 2d at 142. In a similar vein, the *Williams* court referenced *Glen Richardson* in rejecting the defendant's argument that the police need to corroborate asserted illegal activity to reasonably rely on the tip. *Williams*, 241 Wis. 2d 631, ¶ 41.

Therefore, the officers had specific articulable facts that would lead a reasonable officer to believe that criminal activity was afoot. Reasonable suspicion must be more than a hunch, but officers do not have to rule out innocent explanations before performing an investigatory stop. *State v. Washington*, 2005 WI App 123, ¶ 16, 284 Wis. 2d 456, 700 N.W.2d 305. When officers encounter a situation that, such as the case here, leads to a reasonable inference of unlawful behavior, it is reasonable for the officer to perform a brief stop. *See State v. Begicevic*, 2004 WI App 57, ¶ 7, 270 Wis. 2d 675, 678 N.W.2d 293

(citing *State v. Waldner*, 206 Wis. 2d 51, 61, 556 N.W.2d 681 (1996)). *See also, State v. Jackson*, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1989). In fact, it is considered the "essence of good police work" to freeze the situation to dispel ambiguity. *Begicevic*, 270 Wis. 2d 675, ¶ 7.

The fact that the officers approached Powell's vehicle with guns drawn does not change the analysis.[8] An investigatory detention can lawfully include strong police measures such as the brandishing of weapons under certain circumstances. *State v. Pounds*, 176 Wis. 2d 315, 500 N.W.2d 373 (Ct. App. 1993). For example, in *Pounds* the police made a routine traffic stop and released the passengers. *Id.* at 318. Shortly thereafter, the police found a firearm in the vehicle and a state trooper was asked to find the passengers and return them to the scene. *Id.* The trooper found the passengers, one of whom was Pounds. *Id.* Pounds was ordered to the ground at gunpoint, handcuffed, and transported back to the scene of the traffic stop. *Id.* While the appellate court held that Pounds was in custody for *Miranda* purposes, it also concluded that the trooper's actions did not constitute an arrest and were reasonable steps to take for an investigatory detention under the circumstances. *Pounds*, 176 Wis. 2d at 321-22.

The officers in this case were dealing with a man they reasonably believed to be armed, and the officers knew that Powell had just exited a suspected drug house and entered a vehicle with another man. This heightened the need for protective measures. *See, e.g., United States v. Diaz-Lizaraza*, 981 F.2d 1216, 1221 (11th Cir. 1993) ("Drug dealing is known to be extremely violent, and [the drawing of guns] was a reasonable way for the agents to

[8] Marked squads approached Powell's vehicle with emergency lights activated (55:6; 66:24; 92:79, 84; 94:7-9, 16-17, 19). The siren was chirped; the officers exited the squads in full uniform, and announced "police" as they approached with guns drawn in the low ready position (55:6-7; 66:28, 35; 92:79, 81; 94:19, 23, 25, 27-28, 30).

protect themselves from a possible concealed weapon."). *See also Glen Richardson*, 156 Wis. 2d at 144 ("Several cases have found that drug dealers and weapons go hand in hand . . . ."). Any reasonable law enforcement officer would have believed that his or her safety was in jeopardy.

Here, the officers knew that a man matching Powell's description was seen with a gun. They knew Powell was leaving a suspected drug house. The drug trade and guns go hand in hand. The officers observed Powell perform "security checks" for a weapon, but the weapon was not visible on Powell's person. Those are sufficient and articulable facts that would lead to a reasonable belief that Powell was carrying a concealed weapon. Therefore, the officers could lawfully perform an investigatory stop.

C. Officers lawfully seized the handgun that Powell discarded when he fled.

Next, it is important to the Fourth Amendment inquiry that Powell fled. Because he fled, officers did not seize him when they approached his vehicle. *California v. Hodari D.*, 499 U.S. 621 (1991). Therefore, the handgun, which Powell discarded during his flight, could not be suppressed on a motion alleging a lack of reasonable suspicion to perform an investigatory stop.

Powell argues that the officers' conduct provoked his flight (Powell's Br. at 13, 14). Provoked flight, e.g., fleeing from disguised gunmen that happen to be police officers, is not evidence of consciousness of guilt. *See Marshall ex rel. Gossens v. Teske*, 284 F.3d 765, 771 (7th Cir. 2002). However, that is not what occurred in this case[9] and the officers did not need to rely on Powell's

[9] During trial, Powell asserted that he was unaware that the men approaching his vehicle were police officers (96:16, 18-19). However, based on the overwhelming show of authority in this case, it was opined that Powell had to know that officers were approaching his vehicle (94:30, 34). The officers were in full uniform, approached

flight as evidence of consciousness of guilt to seize the discarded handgun. Since Powell fled, he was not seized when officers approached his vehicle, and therefore, the gun was not the fruit of an unlawful seizure.

A seizure only exists when an officer, by means of physical force or show of authority, has restrained the liberty of a citizen. *Florida v. Bostick*, 501 U.S. 429, 434 (1991); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). When police action involves a show of authority rather than use of physical force, the Fourth Amendment is not implicated until the individual yields to that show of authority. *Hodari D.*, 499 U.S. 621; *State v. Kelsey C.R.*, 2001 WI 54, ¶¶ 32-33, 243 Wis. 2d 422, 626 N.W.2d 777; *State v. Young*, 2006 WI 98, ¶ 26, 294 Wis. 2d 1, 717 N.W.2d 729.

In addressing a suspect's flight after a show of authority, the United States Supreme Court concluded in *Hodari D.* that a person who flees is not seized. In *Hodari D.*, officers observed a group of youths gathered around a car. 499 U.S. at 622. When officers approached the group, the youths fled. *Id*. at 622-23. This raised the officers' suspicion, so the officers gave chase on foot. *Id*. at 623. During the chase, Hodari D. threw away what looked like a small rock. *Id*. After Hodari D. was apprehended and handcuffed the "rock" was determined to be crack cocaine. *Id*. Hodari D. sought suppression of the cocaine, but his motion was denied. *Id*. The United States Supreme Court concluded that because Hodari D. fled when he saw officers approaching him, he was not seized until he was tackled by the officer. *Id*. at 629. Therefore, "[t]he cocaine abandoned while he was running was . . . not the fruit of a seizure, and his motion to exclude evidence of it was properly denied." *Id*.

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from marked squads with emergency lights activated, and announced their presence by yelling "police" (55:6-7; 66:24, 28, 35; 92:79, 81, 84; 94:7-9, 16-17, 19, 23, 25, 27-28, 30).

Here, when officers approached Powell's vehicle, Powell appeared to acknowledge the officers' presence, but immediately sped away (55:6; 94:23, 25, 34-35, 37-38; 95:14, 17, 21-22, 37). While fleeing, Powell grabbed something from his right side and threw it out the front passenger window. Officers recovered the item, which was a firearm and a holster (94:44-46, 66).

Powell's argument that the court would have suppressed the gun if counsel would have sought its suppression must fail. As in *Hodari D.*, Powell fled in response to the officers' show of authority. Because he fled, he was not seized when the officers approached his vehicle. *Young*, 294 Wis. 2d 1, ¶¶ 26-52. Powell was not seized when he discarded his handgun, so there was no Fourth Amendment violation for Powell to complain of. *Young*, 294 Wis. 2d 1, ¶¶ 26, 50, 52, 70. When the evidence sought to be suppressed was abandoned during fight, it is not "the fruit of a seizure" and any motion to exclude evidence on that ground would be meritless. *Hodari D.*, 499 U.S. at 629.

D. Officers had probable cause to arrest Powell.

While Powell does not specifically argue that counsel should have sought suppression on grounds that the officers did not have probable cause to arrest him, the State will complete its analysis of the officers' conduct to establish that no Fourth Amendment violation took place that would have resulted in the suppression of evidence.

Before Powell sped away from officers, he acknowledged the officers' presence (55:6; 94:23, 25, 34-35, 37-38; 95:14, 17, 21-22, 37). The officers pursued Powell, who was driving at a rate of 40 or 50 mph in a residential area (94:39, 43; 95:21). Shortly after the chase began, the passenger threw himself from the car and surrendered (94:49-51). The squad continued to pursue Powell and observed Powell drive through a controlled intersection without stopping (94:50-52). When Powell

finally began to slow – indicating that he was about to stop – he did so in a manner that led the officer to believe that Powell was looking for a break in the fence along a gangway to flee on foot (94:56-58). The officer pulled the squad in front of Powell's car, forcing him to stop (94:57). The officer then exited the squad, pulled his weapon, ran to the back of the squad for cover, and ordered Powell to stay in his vehicle (94:57). Eventually, officers ordered Powell out of the vehicle and onto the ground (94:62).

Probable cause exists "when the totality of the circumstances within the arresting officer's knowledge would lead a reasonable police officer to believe that the defendant probably committed a crime." *State v. Kutz*, 2003 WI App 205, ¶ 11, 267 Wis. 2d 531, 671 N.W.2d 660; *Dane County v. Sharpee*, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990). Under the totality of the circumstances, there was probable cause to arrest Powell for fleeing an officer, on suspicion of carrying a concealed weapon, or for multiple traffic violations. Therefore, the record establishes that, from the moment the officers approached to the moment Powell was arrested, there was no Fourth Amendment violation that would result in the suppression of evidence.

E. The court properly denied Powell's request for a *Machner* hearing because he failed to establish either prong of his ineffective assistance claim.

When, as in the case here, it is alleged that counsel failed to do something, a defendant must show that if counsel would have done what is alleged should have been done, it would have altered the result of the proceeding. *State v. Byrge*, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477 (citation omitted). Powell has failed to make such a showing.

As addressed above, there were no Fourth Amendment violations in this case that would have resulted in the suppression of evidence. Therefore, any motion would have been meritless and counsel cannot be found ineffective for failing to raise a meritless argument. *See State v. Wheat*, 2002 WI App 153, ¶ 14, 256 Wis. 2d 270, 647 N.W.2d 441 ("Failure to raise an issue of law is not deficient performance if the legal issue is later determined to be without merit.") (citing *State v. Reynolds*, 206 Wis. 2d 356, 369, 557 N.W.2d 821 (Ct. App. 1996)).

Because it is Powell's burden to prove both prongs of his ineffective assistance claim and his motion failed to allege sufficient facts to establish that he was entitled to relief, the court properly denied his motion without a hearing. *Phillips*, 322 Wis. 2d 576, ¶ 17 (citing *Bentley*, 201 Wis. 2d at 310-11).

III. THE COURT'S EVIDENTIARY RULING CONCERNING POWELL'S PRIOR CONVICTIONS WAS PROPER AND HARMLESS.

Finally, Powell asserts that the court erred when it ruled that Powell opened the door for the State to introduce the nature and year of Powell's prior convictions (Powell's Br. at 15). As with the first issue, the admission or rejection of evidence is within the trial court's discretion. *Alsteen*, 108 Wis. 2d at 727. The court reviews "whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record." *Wollman*, 86 Wis. 2d at 464.

A. The court properly concluded that Powell opened the door for the State to introduce the nature of Powell's prior convictions.

Under Wis. Stat. § 906.09, a witness's character can be attacked by the fact that the witness has been previously convicted of a crime. Blinka, *Wisconsin Evidence* § 609.01, at 504-06. To go beyond the fact and number of convictions, the defendant must testify inaccurately, *Moore v. State*, 83 Wis. 2d 285, 295, 265 N.W.2d 540 (1978), or otherwise "open the door" for the prosecutor to inquire into the nature of the prior convictions.

In this case, the State does not dispute that Powell truthfully admitted the number of his prior convictions (95:53). However, when Powell was asked "Have you ever been convicted of crime?" he responded with "Of a crime, yes. Of a felony, no." (95:53). That response added details concerning the nature of the charges, presumably done to mitigate the effect of his prior convictions on the jury's assessment of his credibility. In doing so, Powell made the nature of his prior convictions an issue.

Powell urges this Court to find that the trial court erroneously exercised its discretion because it did not weigh the probative value of Powell's prior convictions against their prejudicial impact when it ruled that Powell "opened the door" (Powell's Br. at 16). Powell's request is misplaced. That weighing did occur at the proper time, i.e., prior to trial (87:7-9). *Gyrion v. Bauer*, 132 Wis. 2d 434, 438, 393 N.W.2d 107 (Ct. App. 1986). A court is required to make a preliminary determination of the "fact" and "number" of *admissible* prior convictions. Blinka, *Wisconsin Evidence* § 609.01, at 506. Here the court determined, after weighing the relevant factors, that the fact and number of admissible prior convictions was three (87:7-9). This case involves what happens after the court has made the determination of relevancy and

admissibility, and the defendant offers information about his prior convictions that would normally be inadmissible.

The doctrine of curative admissibility is applicable here, as Powell purposefully took advantage of evidence that would normally be inadmissible. *State v. Dunlap*, 2002 WI 19, ¶ 14, 250 Wis. 2d 466, 640 N.W.2d 112 (citations omitted). By declaring that he had never been convicted of a felony, Powell made the nature of his prior convictions an issue. As such, the court was within its discretion to allow the State to introduce otherwise inadmissible evidence to prevent unfair prejudice. *Id*.

In other words, Powell opened the door and cannot now complain that the State offered evidence on the same subject to counteract his attempt to mitigate the nature of his prior convictions. *State v. Steven Harvey*, 2006 WI App 26, ¶ 40, 289 Wis. 2d 222, 710 N.W.2d 482; *State v. Rodriguez*, 2006 WI App 163, ¶ 35, 295 Wis. 2d 801, 722 N.W.2d 136; *State v. Dalvell Richardson*, 2001 WI App 152, ¶ 11, 246 Wis. 2d 711, 717, 632 N.W.2d 84. Once the door had been opened, fair play dictated that the prosecution be able to correct the impression that Powell's prior convictions were insignificant because they were not felonies.

B. The State's introduction of the nature and year of Powell's prior convictions was harmless.

If this Court disagrees and concludes the trial court erred, the court should find the error harmless as a rational jury would have found Powell guilty absent the error. *Leonard Harvey*, 254 Wis. 2d 442, ¶ 49. Powell was able to use the nature of his prior convictions to his advantage. After the court ruled that the State could introduce the nature and year of Powell's prior convictions, the court

also ruled that Powell could explain those convictions (95:65). Powell took advantage of that ruling when he testified on direct examination:

> Before in the past I had got arrested for CCW, so this time I wanted to do it by the law and by the book with a registered handgun in my name legally because I'm not a felon and I'm able to possess a firearm, so I went to the store for personal protection for my family and for my own personal safety, sir.

(95:71). He used his prior convictions to argue that this time he was openly carrying a firearm because he wanted to do everything "by the book" (95:71-72). This was Powell's only proffered defense to the charge of carrying a concealed weapon.

In addition to Powell's use of the nature of his prior convictions, the court gave a curative instruction informing the jury that Powell's prior convictions are "not proof of guilt of the crimes now charged" (97:14). This Court should assume that the jury followed that instruction. *State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989).

At trial, it was undisputed that Powell sped away from officers when they approached and it was undisputed that Powell was carrying a handgun. The question for the jury was whether Powell knowingly fled officers and whether Powell was carrying a concealed handgun. Powell asserted that he was unaware that the men approaching his vehicle were police officers (96:16, 18-19). However, the evidence established an overwhelming show of police authority in this case. The officers were in full uniform, approached from marked squads with emergency lights activated, and announced their presence by yelling "police" (92:79, 81, 84; 94:7-9, 16-17, 19, 23, 25, 27-28, 30). Based on that evidence, a reasonable jury would have discredited Powell's claimed obliviousness and would have concluded that Powell knowingly fled police officers.

As to the charge of carrying a concealed weapon, Powell asserted that he was openly carrying the weapon on the left side of his body (96:13-14). However, the jury heard testimony that undercover officers observed Powell patting his right side, indicating that he was doing a "security check" for a firearm, but no firearm was visible (92:71-73). Further, during their pursuit of Powell, officers observed Powell grab something from his right side and throw it out of the vehicle (94:44-46). The item that Powell threw from the vehicle was a handgun and holster (94:66). Based on that evidence, a reasonable jury would have discredited Powell's claim that he carried the gun openly on his left side and would have concluded that Powell was carrying the handgun under his clothing and on his right side.

The jury would have reasonably reached those conclusions even if they were unaware of the nature of Powell's prior convictions. Therefore, even if the court erred in allowing the State to introduce the nature and year of Powell's prior convictions, the error was harmless.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of conviction and order denying postconviction relief.

Date the 23rd day of October, 2014

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,408 words.

Dated this 23rd day of October, 2014.

_____
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 23rd day of October, 2014.

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