

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 9, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP2656-CR

Cir. Ct. No. 2006CF640

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROLAND PRICE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Roland Price appeals from a judgment of conviction, entered upon a jury's verdict, for one count of armed robbery with use of force. He contends that the circuit court erred by refusing to suppress evidence that police found when they entered his home without a warrant. We affirm.

BACKGROUND

¶2 A gunman wearing a ski mask robbed a Milwaukee County Pick-'n-Save and one of its customers on December 26, 2005. A gunman wearing a ski mask also robbed a Milwaukee County Kohl's Department Store on January 18, 2006. Surveillance video of the Kohl's parking lot showed the suspect in the Kohl's robbery wearing a black ski mask and driving away from the scene in a vehicle that police subsequently determined matched a vehicle owned by Lakeshia Thomas Price.¹ On January 25, 2006, investigating officers searched both Thomas Price's vehicle and the apartment that Thomas Price shared with her husband, Price. The State thereafter charged Price with three counts of armed robbery with use of force.

¶3 Price filed two pretrial motions to suppress evidence, contending that police officers entered his residence unlawfully and that they seized a ski mask in the home before they obtained a search warrant. After conducting a series of hearings, the circuit court determined that the police entered Price's home with consent, and that they found the ski mask in plain view.² The court therefore denied the suppression motions.

¹ Lakeshia Thomas Price variously identified herself throughout the proceedings as Lakesha Price, Lakeshia Price, and Lakeshia Thomas Price. In this opinion, we identify her by the name that she used when she spoke on Price's behalf at sentencing, and we refer to her throughout the remainder of this opinion as Thomas Price.

² The Honorable Charles F. Kahn, Jr., conducted the proceedings to determine whether police had consent for the warrantless entry of Price's home. The Honorable Elsa C. Lamelas conducted the proceedings to determine whether the officers lawfully seized a ski mask in the home before they obtained a search warrant. The Honorable Dennis P. Moroney presided over the trial and sentencing proceedings.

¶4 Thomas Price and two police detectives, Gregory Heyrman and Jacques Sampon, testified at the hearing held to address whether the police lawfully entered Price's home. Heyrman testified that during the afternoon of January 25, 2006, he and fellow officers conducted surveillance on a vehicle parked outside of a Milwaukee apartment building because the vehicle matched the one used by the suspect in the robbery of Kohl's Department Store. After determining that Thomas Price was the registered owner of the parked vehicle, the officers decided to conduct a "knock and talk" investigation. Heyrman explained that during a "knock and talk" investigation, officers knock at the door of a residence and talk to the person who answers in an effort to gather information. Heyrman testified that at approximately 5:30 p.m., Thomas Price answered Sampon's knock on the door of 6050 W. Calumet Road, apartment 203G.

¶5 Heyrman and Sampon both testified that Thomas Price opened the apartment door when Sampon knocked. Sampon testified that he identified himself as a police detective and introduced both himself and Heyrman to Thomas Price. According to Sampon, he explained to Thomas Price that he and Heyrman wanted to talk to her because they had information that her car had been used in a crime, and Sampon told Thomas Price that "it would be better to talk inside the apartment." Both officers testified that Thomas Price responded by opening the door wider and stepping back to permit the officers to enter.

¶6 Sampon testified that he understood Thomas Price's actions as "a welcome in." Therefore, he entered the apartment with Heyrman and several other officers involved in the investigation. Sampon described Thomas Price as cooperative with the officers after they entered. He testified that he asked Thomas Price for permission to search her vehicle, and Thomas Price gave both verbal and written consent for such a search.

¶7 Thomas Price testified somewhat differently from the officers. She told the circuit court that the police pushed her front door open and entered her home after she “cracked” the door in response to a knock. She further testified that, as several officers walked towards the back of her residence, she ordered them to “get the f*** out of my house.” She explained that she spoke to the officers in the apartment because “there was a lot of tension” after the officers entered, and she “didn’t know ... what to do.” Thomas Price also acknowledged, however, that she was “very cooperative” with the officers and that she consented to a search of her vehicle. At the conclusion of the hearing, the circuit court determined that the officers entered the apartment with Thomas Price’s consent.

¶8 Both Price and Thomas Price were in the apartment when police entered, and Price did not consent to a search of the home. Heyrman left the premises to seek a search warrant while other officers waited in the apartment to make sure that the scene remained secure until Heyrman returned. Two of the officers waiting in the apartment seized a ski mask, and the circuit court held a hearing to determine whether the seizure was lawful.

¶9 Officer Jill Zeise testified that she saw a little boy in the household, Jaylan, walk into the living room area of the home while she was waiting for the search warrant. Zeise observed that Jaylan was wearing a ski mask and pulling it up and down over his face. Zeise testified that she immediately recognized the potential evidentiary significance of the ski mask because she had information that the suspect who committed the armed robberies under investigation wore a ski mask. A second police officer, Mark Rooney, described Zeise nudging him to call his attention to the ski mask. Both Zeise and Rooney testified that they discussed how to proceed and that Zeise contacted a superior officer for guidance. Rooney then seized the ski mask and placed it in an evidence bag.

¶10 Jaylan also testified. He told the circuit court that he was seven years old and that he recalled the night that police came to his house. According to Jaylan, “Jill” questioned him that night about what he wore when he accompanied his father, Price, on a paper route. Jaylan testified that he told “Jill” that he had a mask and she directed him to get the mask and bring it to her. Jaylan described getting his ski mask and bringing it to “Jill,” who put it in a paper bag and took it from the house.

¶11 The circuit court concluded that the officers discovered the ski mask in plain view when Jaylan spontaneously produced it while the officers waited for a search warrant. The circuit court therefore denied Price’s motion to suppress the mask.

¶12 A jury convicted Price of committing the armed robbery of Kohl’s Department Store and acquitted him of the other two charges. Price appeals, contending that the circuit court erroneously denied his motions to suppress evidence seized from his home.

DISCUSSION

¶13 Price first challenges the circuit court’s conclusion that officers entered his home with consent. We are not persuaded.

¶14 “The Fourth Amendment generally prohibits the warrantless entry of a person’s home.” *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990). The prohibition is inapplicable, however, when the police enter the home with consent from a person with authority over the premises. *See id.* Whether an individual gave consent for the police to enter is a question of historical fact, and we will uphold the circuit court’s determination of that issue unless the court’s finding is

contrary to the great weight and clear preponderance of the evidence. *State v. Tomlinson*, 2002 WI 91, ¶36, 254 Wis. 2d 502, 648 N.W.2d 367. Voluntariness of consent, however, is a question of constitutional fact that we review in two steps, giving deference to the circuit court’s findings of historical fact but independently applying constitutional principles to those facts. *State v. Hartwig*, 2007 WI App 160, ¶7, 302 Wis. 2d 678, 735 N.W.2d 597.

¶15 The parties do not dispute that Price and Thomas Price lived together, nor do the parties dispute that Thomas Price had authority to permit the police to enter the home she shared with Price. Price contends, however, that the testimony does not support a finding that Thomas Price consented to the officers’ entry. In Price’s view, the evidence shows only that the officers “knocked, didn’t talk, and entered the apartment.” We disagree.

¶16 Consent need not be given verbally, and may be demonstrated by gesture or conduct. *Tomlinson*, 254 Wis. 2d 502, ¶37. In this case, the circuit court believed the officers’ testimony that Thomas Price’s conduct demonstrated consent for the police to enter the apartment. Credibility determinations lie with the circuit court because it can observe the witnesses and assess their demeanor and overall persuasiveness. *State v. Hughes*, 2000 WI 24, ¶2 n.1, 233 Wis. 2d 280, 607 N.W.2d 621. We uphold the circuit court’s credibility determinations unless they are “against the great weight and clear preponderance of the evidence.” *Id.* Here, Thomas Price contended that the police pushed their way into the apartment, but the circuit court rejected that testimony. The circuit court determined instead that the “entire course of events [on the evening of January 25, 2006] ... caught [Thomas] Price off guard,” and that the officers therefore recalled more accurately than did Thomas Price the “details” and the “step-by-step events” at the threshold of the apartment. The record offers no reason to reject the circuit

court's credibility determination in this case. Based on the officers' testimony, the circuit court found that Thomas Price gave the officers implicit consent to enter, and we accept that conclusion.

¶17 We next consider whether Thomas Price gave her consent voluntarily. Consent is voluntary when "given in the absence of duress or coercion, either express or implied." *State v. Phillips*, 218 Wis. 2d 180, 197, 577 N.W.2d 794 (1998). "Voluntariness is determined by looking at the totality of the circumstances, including events surrounding the consent and the character of the individual whose consent is sought. No single criterion controls." *Hartwig*, 302 Wis. 2d 678, ¶8 (citation omitted).

¶18 In this case, the circuit court found that the officers correctly described the details of what took place before they entered the apartment: the police came to the door early in the evening, they identified themselves to Thomas Price, and they explained to her why they wanted to enter the apartment. No one disputed Sampon's testimony that Thomas Price appeared alert, oriented, and sober. Additionally, the circuit court found that the events surrounding the consent to enter included Thomas Price's voluntary cooperation with the police after the entry, and the court noted particularly that she gave the officers both oral and written consent to search her vehicle.

¶19 Price contests the circuit court's findings, and in support he points to Thomas Price's testimony that she swore at the police and told them to leave. The circuit court, however, did not believe that testimony. The court found that the police did not recall Thomas Price ordering them out of the house, and the court further found that the officers recalled the events more accurately than did Thomas Price. Because the court's findings are not against the great weight and clear

preponderance of the evidence, we will not disturb them. See *Tomlinson*, 254 Wis. 2d 502, ¶36.

¶20 The totality of the circumstances supports the circuit court's determination that Thomas Price voluntarily, and without duress or coercion, consented to the officers' entry into the home that she shared with Price. Accordingly, the circuit court properly concluded that the officers' entry was not unconstitutional. We reject Price's contention on appeal that the officers' warrantless entry into the apartment tainted the evidence that the officers found inside.

¶21 Price next contends that, even if the police lawfully entered his home, the circuit court erred by refusing to suppress the ski mask that the officers seized there before they obtained a search warrant. The parties agree that the police did not have consent to search the apartment, that several officers waited in the apartment to secure the scene while another officer left the premises to seek a warrant, and that the police in the apartment seized a ski mask from Price's seven-year-old son several hours before a fellow officer arrived with a warrant to search the premises. Price argues that the circuit court erroneously concluded that the ski mask was in the officers' plain view when it was seized.

¶22 Application of the plain view doctrine requires that:

(1) the evidence must be in plain view; (2) the officer must have a prior justification for being in the position from which [he or] she discovers the evidence in "plain view"; and (3) the evidence seized "in itself or in itself with facts known to the officer at the time of the seizure, [must provide] probable cause to believe there is a connection between the evidence and criminal activity."

State v. Guy, 172 Wis. 2d 86, 101-02, 492 N.W.2d 311 (1992) (citation omitted; brackets in *Guy*). When objects fall within the plain view of an officer who is lawfully in a position to see them, they may be seized and introduced as evidence. *State v. Edgeberg*, 188 Wis. 2d 339, 345, 524 N.W.2d 911 (Ct. App. 1994).

¶23 In this case, Zeise and Rooney testified that they were waiting for a search warrant when they observed a seven-year-old child in the household wearing and playing with a ski mask. On appeal, Price discounts the officers' version of events as too "miraculous" to be credible, and Price insists that Jaylan was "inher[ent]ly believable" when describing how Zeise questioned him and used him as a surrogate to search for a mask. The circuit court, however, believed the officers. The court explained that, based on its experience, nothing in the officers' description of a young child playing with winter clothing in January appeared unusual or inconsistent with an ordinary child's behavior.

¶24 We have no basis for disturbing the circuit court's conclusion that the officers testified credibly. See *Hughes*, 233 Wis. 2d 280, ¶2 n.1. A circuit court may, as may any factfinder, apply its common knowledge and day-to-day observations in assessing the evidence. See *State ex rel. Cholka v. Johnson*, 96 Wis. 2d 704, 713, 292 N.W.2d 835 (1980). The circuit court did so here. The circuit court also discussed the officers' description of their responses to seeing the incriminating evidence, and the court concluded that the details provided by the officers in this regard enhanced their credibility.

¶25 In light of the credible evidence, the plain view doctrine applies to the officers' seizure of the ski mask. The officers were properly in Price's apartment incident to obtaining valid consent to enter; the ski mask was in plain view when Jaylan handled it in the officers' presence; and the officers had facts

providing probable cause to connect the ski mask with the robberies under investigation. *See Guy*, 172 Wis. 2d at 101-02. Accordingly, the officers did not conduct an illegal search in the apartment when they seized the mask.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

