COURT OF APPEALS
DECISION
DATED AND RELEASED

June 12, 1997

NOTICE

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

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

No. 96-1575-CR-NM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES M. MORAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: MARK A. FRANKEL, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Deininger, JJ.

PER CURIAM. After a trial in which he represented himself, a jury found James M. Moran guilty of two counts of attempted first-degree homicide while armed and one count of first-degree reckless injury while armed, in violation of §§ 939.32(1)(a), 940.01(1), 940.23(1), and 939.63(1)(a)2, STATS. Prior to submission of the case to the jury, Moran pled guilty to a second count of reckless

injury while armed and one count of operating a vehicle without the owner's consent, in violation of §§ 940.23(1), 939.63(1)(a)2, and 943.23(2), STATS. The charges resulted from the stabbings of Moran's ex-girlfriend, Corrine A. Pinchard, and her male companion, Jacob L. Jensen, in Madison, Wisconsin. After the stabbings, Moran fled to La Crosse, Wisconsin, in a stolen vehicle.

The trial court imposed ten-year sentences for each reckless injury count, twenty-five-year sentences for each attempted homicide count, and a two-year sentence for the car theft. All sentences were consecutive, and Moran received 397 days credit for presentence incarceration. The court specifically requested that the parole board deny discretionary parole until Moran accepted responsibility for his actions.

The state public defender appointed John P. Schuster to represent Moran on appeal. Attorney Schuster has filed a no merit report pursuant to RULE 809.32, STATS., and ***Anders v. California,*** 386 U.S. 738 (1967). Moran received a copy of the no merit report and was advised of his right to file a response. He has filed a response, an amendment to the response, and a motion deemed to be a supplemental response.

The information issued after the preliminary hearing charged Moran with two counts of attempted homicide and operating a vehicle without consent. Approximately six weeks before trial and over Moran's objection, the trial court permitted the filing of an amended information, which added the reckless injury counts. Moran was not arraigned on the additional charges until after both sides had rested at trial.

The no merit report addresses whether the trial court was deprived of subject matter jurisdiction because Moran was not arraigned on the additional

charges before trial. Schuster concludes that this possible issue lacks arguable merit. Based upon our independent review of the record, we conclude that he is correct. Subject matter jurisdiction over criminal matters attaches with the filing of the complaint and continues until final disposition of the case. ***State v. Webster***, 196 Wis.2d 308, 316-17, 538 N.W.2d 810, 813 (Ct. App. 1995).

In his response to the no merit report, Moran contends that the amendment to the information was illegal. It was not. The State may amend an information with leave of the court after arraignment and before trial if the defendant's rights are not prejudiced. ***Whitaker v. State***, 83 Wis.2d 368, 373, 265 N.W.2d 575, 578 (1978). Amended charges are permissible if they relate to the evidence presented at the preliminary hearing. ***State v. Neudorff***, 170 Wis.2d 608, 616-17, 489 N.W.2d 689, 693 (Ct. App. 1992). Here, the reckless injury charges were the result of injuries the victims received in the attempted homicide, and the preliminary hearing testimony regarding the number, location, and description of the stab wounds was direct evidence regarding the amended charges.

Moran claims he was prejudiced because he did not prepare to defend the additional charges. An amended information is prejudicial if a defendant is deprived of sufficient notice to prepare and defend against the charges. *See* ***id.*** at 619, 489 N.W.2d at 694. Here, the amended information was filed approximately six weeks before the trial. Moran had notice of the additional charges. He failed to prepare a defense at his own risk, and he is not relieved of the consequences of misunderstanding the significance of a particular legal proceeding.

Moran also contends that the delayed arraignment was prejudicial because the jury was incorrectly informed that he pled not guilty to the additional

charges when, in fact, he pled guilty to one of the counts when belatedly arraigned. Moran has not explained how he was harmed. After he pled, the jury was told that two counts had been resolved; it was not told that Moran had pled guilty.

Moran also contends that the amended information was multiplicitous because first-degree reckless endangering safety is a lesser included offense of both first-degree intentional homicide and first-degree reckless injury. The test of multiplicity is not whether the two offenses share a common lesser included offense. Crimes are not multiplicitous if "each offense requires proof of an additional element or fact which the other offense or offenses do not." ***State v. Sauceda***, 168 Wis.2d 486, 493 n.8, 485 N.W.2d 1, 4 (1992).

The elements of attempted first-degree intentional homicide are a specific intent to take another's life and an unequivocal act that would have resulted in death except for the intervention of some extraneous factor. *See* ***State v. Dix,*** 86 Wis.2d 474, 482, 273 N.W.2d 250, 254, *cert. denied,* 444 U.S. 898 (1979). Actual injury or harm is not required. *See* ***id.*** at 483, 273 N.W.2d at 254. First-degree reckless injury requires proof of great bodily harm to the victim, and it does not require intent to kill. *See* § 940.23, STATS. Thus, the two offenses require proof of different elements and are not multiplicitous.

Moran also challenges the convictions for both attempted first-degree intentional homicide and first-degree reckless injury with respect to each victim. He argues that the single attack on each victim could not be both intentional and reckless. The two are not mutually exclusive, however. Criminal intent requires that an actor have the purpose of doing an act or causing a result or that the actor is aware that the conduct is practically certain to cause the result.

See § 939.23, STATS. Criminal recklessness requires that the actor create an unreasonable and substantial risk of death or great bodily harm and that the actor is aware of the risk. *See* § 939.24, STATS. A defendant may undertake acts that are both intended to cause death and sufficient to create a risk of death or great bodily harm. If he or she intends the acts to cause death, clearly the defendant is aware of the risk that the acts will do so.

Because the guilty verdicts for both attempted first-degree intentional homicide and first-degree reckless injury are not mutually exclusive, we also reject Moran's claim that the jury did not determine to the required degree of certainty which version of events it believed. Clearly, the jury believed the testimony of the victims and did not believe Moran's testimony.

Moran also contends that the evidence was not sufficient to prove either count of attempted first-degree intentional homicide. We must affirm a conviction unless the evidence, considered in the light most favorable to the verdict, is so lacking in probative value that no jury, acting reasonably, could have found guilt. ***State v. Barksdale,*** 160 Wis.2d 284, 289-90, 466 N.W.2d 198, 200 (Ct. App. 1991). The jury is the sole judge of the credibility of the witnesses. *See* **id.** at 290, 466 N.W.2d at 201.

According to testimony that supports the conviction, Pinchard broke off her relationship with Moran and became friends with Jensen. On the afternoon before the stabbings, Moran and Pinchard discussed why Pinchard ended the relationship. Sometime around 1:00 a.m., Pinchard received a telephone call from Moran, who pretended to be someone else. Afterwards, she and Jensen left her apartment to close the building's back door. Moran rushed past Jensen in the hallway, threw Pinchard into her apartment, and locked the door. Moran told

Pinchard, "Cori, I'm going to kill myself, I'm going to die and I'm taking you with me." Moran had a knife and stabbed Pinchard four times in the chest and three times on the arm. As Pinchard ran from Moran into her bedroom, Moran also stabbed her twice in the back. Moran then left the apartment and charged Jensen. Jensen ended up on the floor with Moran on top of him. Jensen testified that Moran was taking practice strokes aimed at Jensen's heart before Jensen grabbed Moran's hand to keep the knife away. During their struggle, Moran switched hands and stabbed Jensen twice in the arm, inflicting permanent damage to the muscle. Sometime during the incident, Moran also slashed the back of Jensen's left hand, severing nerves and tendons and chipping the bone.

The evidence was sufficient to prove intent to kill each victim (the statement to Pinchard and the apparent aiming for Jensen's heart) and to show intentional acts in furtherance of that intent (the repeated stabbing of each victim). Moran is not relieved of responsibility because Pinchard escaped or because Jensen successfully fought with him.

Moran also challenges the convictions for first-degree reckless injury by claiming that the evidence failed to prove that the victims suffered great bodily injury. Moran pled guilty to this charge as to Pinchard; therefore, he waived this issue as to her.

The claim lacks merit as to Jensen. The statute defines great bodily injury as "bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement." Section 939.22, STATS. Jensen's doctor testified that Jensen's hand was permanently disabled because Moran cut every tendon responsible for straightening the thumb and fingers of the hand and the nerve to the back of the hand.

Moran also objects to the trial court's failure to give instructions on specific lesser included offenses. A lesser included offense is to be submitted to the jury only when a reasonable view of the evidence, considered in the light most favorable to the defendant, reasonably supports both acquittal on the greater offense and conviction on the lesser. ***State v. Werlein***, 136 Wis.2d 445, 457, 401 N.W.2d 848, 853 (Ct. App. 1987). Further, a trial court has no obligation to instruct on lesser included offenses in the absence of a specific request to do so. *See* ***State v. Myers***, 158 Wis.2d 356, 364, 461 N.W.2d 777, 780-81 (1990). Thus, a trial court's failure to instruct, *sua sponte*, on a lesser included offense is not error.

The trial court refused Moran's request for a lesser included offense instruction on second-degree intentional attempted homicide, while armed. Moran waived this claim as to Jensen when, at the instruction conference, he conceded that the requested instruction was inappropriate as to Jensen. He argues that the instruction was proper as to Pinchard by suggesting that the jury could have believed he acted in self-defense, albeit unreasonably, to stop Pinchard from unlocking the apartment door and allowing Jensen to enter. The trial court denied the request because the issue raised by the trial testimony was whether Moran was the aggressor or whether he was a victim who believed himself to be in danger of great bodily harm. The trial court's conclusion that Moran did not testify he feared Pinchard is supported by our review of Moran's testimony.

Moran contends that the trial court erroneously exercised its discretion when it denied his motion for a mistrial because the prosecutor violated a pretrial order and approached Moran while cross-examining him. In the exercise of fairness, the court had extended an order prohibiting Moran from approaching witnesses to the prosecutor. Prior to Moran's testimony, the prosecutor obtained

permission to approach Moran during cross-examination. Therefore, the prosecutor did not violate the order.

Moran filed a pretrial motion to prevent photographs of the victims' injuries from being shown to the jury. The trial court deferred decision on the motion. Throughout the trial, the photographs were shown to witnesses but not to the jury. During Moran's cross-examination, the prosecutor asked permission to show both Moran and the jury photographs of Jensen's injuries. When asked, Moran indicated he did not object to showing the photographs to the jury. Moran now contends that he was trapped into doing so because objection would have had a negative impact on the jury. Moran did not present this argument in his motion for a mistrial; therefore, he waived the right to claim error. Moran claims this situation occurred because the prosecutor approached him while he testified. We disagree. Even if the prosecutor had been required to remain at counsel table, the same scenario could have occurred.

Moran asks this court to reverse his conviction in the interests of justice because the real controversy has not been tried. *See* § 752.35, STATS. He claims this occurred because exculpatory evidence was not preserved. We have read the transcript of the jury trial. The victims' testimony and Moran's testimony presented the jury with two very different versions of the events surrounding the stabbings. The victims' version was corroborated, in part, by testimony of other witnesses. To believe Moran's version, the jury was required to disbelieve the State's witnesses, including Pinchard's friend who testified about Moran's obsession with Pinchard, the man who saw Moran in the building stairwell after the stabbings, and the men who followed him from the apartment back to his car. The jury would also have had to believe Moran's implausible explanations. The real controversy, whether Moran committed an unprovoked attack on Pinchard

and Jensen or whether he acted in self-defense, was thoroughly tried to the jury, and the jury found Moran guilty.

Also the police did not violate Moran's due process rights by failing to preserve the brick and 911 calls or by not obtaining blood samples from the scene immediately. At the time of the initial investigation, the police had no reason to believe these items were inherently material to any defense. *See* ***State v. Oinas***, 125 Wis.2d 487, 490, 373 N.W.2d 463, 465 (Ct. App. 1985) (state's duty to preserve evidence limited to evidence for which exculpatory value is readily apparent). Moran has not shown that the significance of the items to his defense was apparent before they were destroyed.

Moran's amended response contends that the trial court sentenced him on the basis of erroneous information. The trial court stated, "The whole idea that Mr. Jensen could have been carrying a brick in his right hand after all the tendons in that hand were severed is ludicrous on its face." The trial court's statement was incorrect because Jensen's left hand, not his right, was severely injured. The error was not significant, however, when considered in the context of the court's comments during the sentencing hearing. In particular, the court's questions to Moran suggest that it found his version unbelievable, in part, because he could not explain how Pinchard was unintentionally stabbed nine times. Thus, Moran has not shown that he was prejudiced by the incorrect statement. *See* ***State v. Coolidge***, 173 Wis.2d 783, 789, 496 N.W.2d 701, 705 (Ct. App. 1993) (defendant has burden of proving by clear and convincing evidence that challenged statements inaccurate and that he or she was prejudiced by error).

In his supplemental response, Moran also raises the issue of the constitutionality of the attempted first-degree homicide jury instruction. Moran

did not object to the jury instruction at conference. Therefore, he waived any error in the instruction. S*ee* § 805.13(3), STATS.; ***State v. Schumacher,*** 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988) (court of appeals lacks power to directly review unobjected-to jury instructions).

Moran's supplemental response also raises an issue regarding the disposition of unrelated charges against Jensen. He claims that the charges were dropped. In a hearing on Moran's discovery motion, the prosecutor represented that "any plea negotiations would be basically to enter pleas to the charge and argue sentence." Moran now claims that the dismissal of the charges was preferential treatment suggesting the prosecutor misled the trial court and the defense.

The dismissal of charges against Jensen, if related to his testimony against Moran, would be newly discovered evidence. To obtain a new trial on this basis, however, a defendant must show that there is a reasonable probability that a new trial would reach a different result. ***State v. Boyce,*** 75 Wis.2d 452, 457, 249 N.W.2d 758, 760 (1977). Moran cannot do so. At best the evidence raises a question of Jensen's credibility. It does not make Pinchard's testimony or the testimony of the other witnesses less credible. Nor does it make Moran's own testimony more credible. Further, Jensen's testimony, not Moran's, was consistent with the unaffected evidence, and a new trial would not produce a different outcome.

Our independent review of the record did not disclose any additional potential issues for appeal. Therefore, any further proceedings on Moran's behalf would be frivolous and without arguable merit within the meaning of ***Anders*** and

RULE 809.32(1), STATS. Accordingly, the judgment of conviction is affirmed, and Schuster is relieved of any further representation of Moran on this appeal.

By the Court.—Judgment affirmed.