COURT OF APPEALS
DECISION
DATED AND FILED

March 12, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1621-CR **Cir. Ct. No. 99 CF 663**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROOSEVELT BENNETT, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Roosevelt Bennett, Jr., appeals from an order of commitment after a two-part jury trial where, in phase one, a jury found him guilty of carrying a concealed weapon, disorderly conduct, and bail jumping, contrary to

WIS. STAT. §§ 941.23, 947.01, and 946.49(1)(b) (1999-2000)[1] but, during phase two, found him not guilty by reason of mental disease. Bennett claims his federal and state constitutional rights were violated and/or the trial court erred when: (1) it found Bennett should be committed to an institution rather than be conditionally released; (2) it failed to grant his motion to dismiss alleging there was insufficient evidence to sustain his convictions for disorderly conduct, carrying a concealed weapon, and bail jumping; and (3) it ordered Bennett removed from his preliminary hearing. Because the trial court did not erroneously exercise its discretion when it determined that Bennett should be committed rather than conditionally released, because there was sufficient evidence for the trier of fact to convict Bennett on the disorderly conduct, carrying a concealed weapon, and bail jumping charges, and because no constitutional rights were implicated by Bennett's removal from his preliminary hearing, we affirm.

I. BACKGROUND

¶2 Bennett has a long history of mental illness and run-ins with the law, including battery of a public official. On January 14, 1999, Bennett was at the George Webb restaurant located at 812 North Old World Third Street in Milwaukee, Wisconsin. An argument between Bennett and a friend began regarding who was going to pay for the breakfast. The waitress repeatedly asked Bennett to leave and, when he refused, she called the police.

¶3 According to the police officers who testified, Bennett was yelling so loudly that he could be heard from the outside of the building. From outside

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

the restaurant, the police officers could see Bennett standing by the cash register, yelling and flailing his arms. The officers noted that the subject of Bennett's outburst was the domination of minorities by white people, and that Bennett was loud and belligerent, causing some of the George Webb patrons to become fearful; some huddled against the wall; while others simply left. Upon approaching Bennett, the police officers noticed a bulge in Bennett's left boot. A closer inspection revealed that Bennett had a knife wrapped in a cardboard sheath inside his boot. The knife was a fillet-type knife with a five-inch blade and a sharp, pointy end. One of the officers testified that although the blade part of the knife was in the boot, an inch of the handle was sticking out. When the police asked Bennett why he was carrying the knife, Bennett responded, "[b]ecause you carry a gun." Bennett was charged with carrying a concealed weapon and bail jumping, due to a previous pending felony charge.

¶4 On November 15, 2000, Bennett was found not guilty by reason of mental disease or defect following a bifurcated trial. Dr. John Pankiewicz, a board certified forensic psychiatrist, diagnosed Bennett as suffering from bipolar affective disorder and thus, he opined that Bennett lacked the capacity to understand the wrongfulness of his behavior and was unable to conform his behavior to the requirements of the law. The psychiatrist testified that at the time of the incident, Bennett was not psychologically stable and continued to fluctuate between euphoria and deep depression. Because Bennett's bipolar affective disorder is exacerbated by numerous other medical problems, including morbid obesity, hypertension, and arthritis, Dr. Pankiewicz recommended a period of inpatient stabilization. The trial court entered an order placing Bennett in the custody of the Department of Health and Family Services, and ordered him committed to institutional care.

II. DISCUSSION

A. Commitment and Conditional Release.

¶5 Bennett first contends that his constitutional rights were violated when the trial court found that he should be committed rather than conditionally released.

¶6 Under WIS. STAT. § 971.17(1), the trial court must commit a defendant adjudged not guilty by reason of mental disease or defect to the Department of Health and Family Services for a period not exceeding two-thirds of the maximum sentence. The court may make this determination immediately after trial, without ordering further examination of the defendant. WIS. STAT. § 971.17(2)(a). If the court feels it needs further information, then a predisposition report and/or a supplementary mental examination can be ordered. ***Id.***

¶7 Immediately after trial, the trial court made the determination to place Bennett in an institution. Bennett never requested the court to order a predisposition report or a supplemental medical examination. Moreover, Bennett never objected to the trial court's determination that commitment, rather than conditional release, was more appropriate. Therefore, Bennett has waived his right to claim on appeal that a separate hearing with alternatives to commitment was required by law. ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727.

¶8 We also reject Bennett's claim on the merits. The trial court must order institutional care if it finds that conditional release of the defendant would "pose a significant risk of bodily harm to himself or herself or to others or of serious property damage." WIS. STAT. § 971.17(3)(a). The state bears the burden

of proving by clear and convincing evidence that conditional release of the defendant would pose the requisite risk of bodily harm or property damage. The factors that the trial court can consider to determine whether the defendant will be sent to institutional care or given a conditional release include: (1) the nature and the circumstances of the crime; (2) the defendant's mental history and present mental state; (3) where the defendant will reside; (4) what arrangements will ensure that the defendant has access to and will take the necessary medication; and (5) other possible treatments beyond medication. ***Id.***

¶9 A trial court's decision in regard to a release under WIS. STAT. § 971.17 is of a discretionary nature and will not be set aside by the appellate court unless the record reveals an erroneous exercise of discretion. ***State v. Cook***, 66 Wis. 2d 25, 27-28, 224 N.W.2d 194 (1974).

¶10 In this case, the trial court had sufficient evidence with which to conclude that Bennett posed a risk of serious property damage or bodily harm to himself and others. Bennett had a dangerous weapon concealed on his person while he created a disturbance in a public restaurant. In addition, he has had a prior history of violence towards others. Undoubtedly, this type of conduct poses a danger of bodily harm to others. Moreover, Bennett is an individual with a long history of mental illness, but does not take his medication regularly because he believes he is not sick. Due to Bennett's manic behavior, even Bennett's own psychiatrist, Dr. Pankiewicz, recommended placement in an institution as opposed to conditional release. The trial court's decision was reasonable and did not violate any constitutional rights.

B. Sufficiency of Evidence.

1. Carrying a Concealed Weapon Charge

¶11 Bennett's second claim is that there is insufficient evidence to support a conviction for carrying a concealed weapon. Bennett further claims that the knife was not a weapon, and he intended to use the knife to prepare a fish boil.

¶12 The standard of review in a challenge to the sufficiency of the evidence is whether the trier of fact could have reasonably been convinced of the defendant's guilt to the required degree of certainty. ***State v. Poellinger***, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990). The appellate court will not apply a *de novo* review, but rather will consider whether the jury had sufficient evidence to support its findings of guilt. ***Id.*** at 504, 506. The trier of fact alone is able to determine the credibility of the witnesses, weigh the evidence, resolve conflicts in testimony, and draw reasonable inferences from the facts. ***Id.***

¶13 The test for insufficiency of evidence is whether the evidence is so insufficient in probative value and force that, as a matter of law, no reasonable jury could have found guilt beyond a reasonable doubt. ***State v. Pankow***, 144 Wis. 2d 23, 30, 422 N.W.2d 913 (Ct. App. 1988). The appellate court may substitute its judgment for that of the trier of fact only if the trier of fact relied on evidence that was inherently or patently incredible. ***State v. Daniels***, 117 Wis. 2d 9, 17, 343 N.W.2d 411 (Ct. App. 1983).

¶14 This court must evaluate the sufficiency of the evidence in the light most favorable to the conviction. ***Poellinger***, 153 Wis. 2d at 503-04. In regard to the concealed weapon conviction, the State was not required to prove that Bennett intended to use the knife as a weapon. The elements necessary for carrying a

concealed weapon are as follows: (1) the accused had a dangerous weapon on his or her person or within his or her reach; (2) the accused was aware of the presence of the weapon; and (3) the weapon was concealed or hidden from ordinary view. ***State v. Walls,*** 190 Wis. 2d 65, 69, 526 N.W.2d 765 (Ct. App. 1994). Thus, to be guilty of carrying a concealed weapon, the accused must have an awareness that the weapon is present, but he or she need not have culpability or bad purpose. ***State v. Dundon***, 226 Wis. 2d 654, 664, 594 N.W.2d 780 (1999).

¶15 There was ample evidence for the jury to convict Bennett on the charge of carrying a concealed weapon. The knife, which had a five-inch blade and a sharp, pointy end, was concealed inside Bennett's boot. The handle of the knife was bulging out of the boot and, after further inspection, was visible to the police officers. Bennett even acknowledged that he placed the knife in a cardboard sheath because it could be dangerous: "… a knife like that, it can cut you. It was very sharp. If it touches you, you can cut yourself …."

¶16 Bennett also makes two related arguments. First, Bennett asserts that the knife was not concealed and, therefore, he should not have been convicted of carrying a concealed weapon. Second, Bennett further claims that the instructions to the jury were incomplete by not defining "hidden." We reject each of these arguments in turn.

¶17 Exposing part of the knife handle does not mean the knife was not concealed. A weapon is concealed within the meaning of the statute when it is carried "so as not to be discernible by ordinary observation." ***Mularkey v. State***, 201 Wis. 429, 432, 230 N.W. 76 (1930) (citation omitted). Ordinary observation would not likely discern a wooden handle to be a knife. A wooden handle can be found on many tools and instruments. Additionally, because Bennett did not raise

any objections to the jury instructions or request any modifications, he has waived any right to challenge the instructions on appeal.

2. Bail Jumping

¶18 Bennett argues that there was insufficient evidence to convict him on the charge of bail jumping. Specifically, Bennett states that his then pending charge for which he was convicted of battery to a public official was somehow "wiped away" because he was found not guilty by reason of mental disease or defect.

¶19 To prove bail jumping in this case, the State had the burden to prove that the defendant was charged with a felony; the State was not required to prove that the defendant was ultimately convicted of that felony. ***State v. Hansford***, 219 Wis. 2d 226, 244, 580 N.W.2d 171 (1998). At trial, the trial court took judicial notice of the remaining elements of bail jumping—(1) at the time of the instant offenses, Bennett had been charged with a felony (battery to a public transit operator) and (2) he was released on bond with the condition that he not commit any crime while released. Thus, there was sufficient evidence for the jury to convict on bail jumping.

¶20 Bennett also claims that he cannot be found guilty of the bail jumping charge because he did not have the requisite intent to carry a concealed weapon. This is an incorrect assumption of the law. Bennett intentionally placed a knife in his boot before he entered the George Webb restaurant and he intentionally concealed the blade in his boot, while allowing the handle to protrude from the boot. Even if Bennett honestly believed that by allowing the handle to protrude he would not be liable for carrying a concealed weapon, this does not allow him to escape liability under the law. Even a good faith mistaken belief that

one's conduct is legal does not relieve an individual of criminal liability for engaging in that conduct. ***State v. Collova*****,** 79 Wis. 2d 473, 488, 255 N.W.2d 581 (1977).

3. Constitutionality of the Restriction on Carrying a Concealed Weapon

¶21 Bennett's next claim is that the law prohibiting the carrying of a concealed weapon is incompatible with the right to bear arms. Indeed, Bennett points out that we certified this exact issue to our Wisconsin Supreme Court in ***State v. Adam S. Gonzales***, No. 01-0224-CR, unpublished slip op. (Wis. Ct. App. Oct. 3, 2001). However, the Wisconsin Supreme Court has not made a final decision on whether or not to take the case.

¶22 Regardless, Bennett failed to raise this issue in the trial court and, therefore, he has waived his right to have this issue reviewed on appeal. Moreover, Bennett's constitutional challenge has been inadequately briefed, and we decline to review the issue. ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

4. Disorderly Conduct

¶23 Bennett also contends the evidence was insufficient to support the disorderly conduct finding. We disagree.

¶24 The elements of disorderly conduct include: (1) "… engag[ing] in … boisterous, unreasonably loud or otherwise disorderly conduct …"; and (2) "which … tends to cause or provoke a disturbance …." WIS. STAT. § 947.01.

¶25 The evidence here demonstrates that Bennett's loud and disturbing behavior scared patrons in the restaurant, caused others to leave, and was heard

outside the restaurant. This is sufficient to support the jury's finding that Bennett was guilty of disorderly conduct.

C. Removal from Preliminary Hearing.

¶26 Lastly, Bennett claims that his federal and state constitutional rights were violated when the trial court commissioner had him removed from the courtroom during a preliminary hearing. We are not persuaded.

¶27 There is no constitutional right to a preliminary hearing. Moreover, a conviction resulting from a fair and errorless criminal trial cures any error that occurred at the preliminary hearing. ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991). If the defendant does not obtain relief before trial from any errors at the preliminary hearing, the defendant has effectively waived his or her right to challenge those errors in the appellate court. ***Id.***

¶28 Bennett did not contemporaneously object to his removal before or during trial. Thus, Bennett has waived his right to challenge that issue. Bennett further claims that the court commissioner had two other options rather than ordering him to be removed from the preliminary hearing. First, the commissioner could have asked for a competency examination. Second, the commissioner could have postponed the preliminary hearing until Bennett was willing to cooperate. Since Bennett offers no authority to prove his assertions, we decline to hold that Bennett's removal constituted a violation of his constitutional rights.

By the Court.—Order affirmed.

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