COURT OF APPEALS
DECISION
DATED AND FILED

April 2, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 01-2981-CR
02-0640-CR

Cir. Ct. No. 99-CF-61

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL D. MORRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Green Lake County: DANIEL W. KLOSSNER, Judge. *Affirmed.*

Before Nettesheim, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Michael D. Morris appeals pro se from a judgment convicting him of escape, battery by a prisoner and resisting or obstructing an officer after a court trial and from an order denying his postconviction motions. Morris raises numerous issues on appeal relating to pretrial discovery,

prosecutorial misconduct, circuit court bias, and inaccurate transcripts. We are not persuaded by any of Morris's arguments, and we affirm the judgment and the order.

¶2 The charges against Morris arose from an incident at the Green Lake County Jail. While he was in jail, Morris became very agitated while viewing the deposition of a child in a matter against him. Morris leapt for the jail conference room window, and the sheriff, sheriff's department personnel and the jail administrator tried to subdue him. The jail administrator alleged that in the course of trying subdue Morris, Morris kicked her in the head.

¶3 At the outset, we observe that most of Morris's complaints stem from his decision to proceed without an attorney in the circuit court. We cannot grant a new trial just "to rescue [the] defendant from the folly of his choice to represent himself." ***State v. Clutter***, 230 Wis. 2d 472, 477-78, 602 N.W.2d 324 (Ct. App. 1999). Morris also attempts to reargue his case on appeal. This he cannot do. We now turn to the appellate issues.

¶4 Morris argues that his due process rights were violated, and the State took advantage of his pro se status when it came to discovery issues. A defendant's due process rights may be violated if the State suppressed evidence favorable to the defendant and there is a reasonable probability that the suppressed evidence would have produced a different verdict. ***State v. Chu***, 2002 WI App 98, ¶¶29-30, 253 Wis. 2d 666, 643 N.W.2d 878, *review denied*, 2002 WI 109, 254 Wis. 2d 263, 648 N.W.2d 478 (Wis. June 11, 2002) (No. 01-1934-CR), *cert. denied*, ___ U.S. ___, 123 S. Ct. 443 (Oct. 21, 2002) (No. 02-356). We will address this claim in conjunction with our discussion of the other issues raised on appeal.

¶5 Morris moved the circuit court for pretrial discovery of all materials in the State's possession. This discovery request did not comply with WIS. STAT. § 971.23(1) (1999-2000).[1] Section 971.23(1) specifies which evidence the prosecutor must disclose to the defendant. For example, the prosecutor must disclose statements of the defendant, § 971.23(1)(a) and (b), evidence which the State intends to introduce at trial, § 971.23(1)(bm) and (g), a list of witnesses and their relevant statements, § 971.23(1)(d) and (e), and any exculpatory evidence, § 971.23(1)(h). The statute does not require the prosecutor to disclose every item he or she possesses in connection with the case, which is what Morris requested. Therefore, Morris's discovery request was improper.

¶6 Morris argues that the prosecutor violated his statutory right to discovery because, on the day of trial, the prosecutor handed him police photographs of the crime scene. The prosecutor did not intend to and did not offer any of the photographs into evidence at trial. Therefore, they were not a proper subject of discovery because discovery is limited to those items which the prosecutor intends to offer into evidence at trial. WIS. STAT. § 971.23(1)(g). Additionally, there is no proof that the photographs constituted exculpatory evidence such that the prosecutor would have had an obligation to disclose them. Sec. 971.23(1)(h). We do not discern a due process violation because there is no indication that the photographs constituted evidence favorable to Morris and that their late disclosure prejudiced Morris because they make it reasonably probable he would have been acquitted of one or more of the charges against him. *See* ***Chu***, 2002 WI App 98 at ¶¶29-30.

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

¶7 Morris argues that he would have asked different questions at trial if the photographs had been disclosed before trial. We have already held that Morris was not entitled to discovery of the photographs. Moreover, when the photographs were disclosed on the first day of trial, Morris did not object to the timeliness of their disclosure or seek a continuance to permit him to evaluate the photographs and their significance for his case. Therefore, claims relating to the photographs are waived. *See* ***State v. Kaster***, 148 Wis. 2d 789, 804-05, 436 N.W.2d 891 (Ct. App. 1989) (we do not consider issues raised for the first time on appeal).

¶8 Morris argues that the prosecutor should have disclosed a report prepared by the first individual to respond to the altercation. Morris argues that the report is significant because the jail administrator did not tell the first responder she had been kicked in the head. Therefore, Morris argues, she was not kicked in the head. The court was required to determine whether the jail administrator was kicked in the head. The facts and circumstances of the altercation suggest that she was kicked in the head, as she testified.

¶9 Moreover, the prosecutor did not call a first responder as a witness at trial and did not intend to do so. Therefore, any report of the first responder was not discoverable under WIS. STAT. § 971.23(1)(e) or (g).[2]

[2] Morris argues that the testimony of Sarah Guenther suggests the existence of a first responder's report. However, Morris did not ask Guenther, a deputy sheriff, about the existence of such a report, and her testimony does not refer to it. Morris asked Guenther about the use of a stun gun in the conference room where the altercation occurred and about whether he was subject to a seventy-two hour mental health commitment after the altercation.

In the appendix to his appellant's brief, Morris includes Guenther's May 29, 1999 report regarding the incident. In that report, she states that "first responders arrived" and refers to an attached medical report. Morris did not question Guenther about this report at trial.

¶10 Morris argues that there was insufficient evidence of battery because the deputy did not immediately report a head injury. The deputy testified that Morris kicked her in the head. The evidence was sufficient in this regard.

¶11 Morris argues that he lacked the requisite intent to cause bodily harm under the battery by a prisoner statute. WIS. STAT. § 940.20(1). The court properly inferred intent from his conduct. *See* ***State v. Stewart***, 143 Wis. 2d 28, 35, 420 N.W.2d 44 (1988) (intent may be inferred from the defendant's conduct in the context of the circumstances).

¶12 Morris argues that the real controversy was not tried due to prosecutorial misconduct. We disagree. There was sufficient evidence presented at trial, and the real issues were tried. It was for the circuit court, acting as the fact finder, to determine the weight of the evidence and the credibility of the witnesses, and we will not overturn those findings unless they are clearly erroneous. ***Micro-Managers, Inc. v. Gregory***, 147 Wis. 2d 500, 512, 434 N.W.2d 97 (Ct. App. 1988).

¶13 Morris claims that his attempt to leave the conference room via a third-floor window was actually a suicide attempt. He argues that because he intended to commit suicide, the conduct which resulted in the battery was not intentional. However, the circuit court inferred that Morris was attempting to escape, not commit suicide. This inference is supported in the record and the court's credibility assessments. The question of escape versus suicide was fully tried, and the circuit court, as the finder of fact, was free to reject Morris's suicide theory.

¶14 The circuit court denied Morris's postconviction motions after a hearing. He complains that the court erred in not holding a full evidentiary hearing on his various motions. Morris was attempting to retry his case and arguing that the court should have found him more credible than the other witnesses. As we have

said, determining credibility was for the circuit court. Morris's claims did not warrant a full evidentiary hearing.

¶15 Morris argues that the circuit court was biased against him. That the circuit court ruled against Morris does not mean that the court was biased against him.

¶16 Morris alleges that the court reporter altered the transcript. A defendant may receive a new trial if the trial transcript is so deficient that the defendant cannot meaningfully appeal the conviction. ***State v. Perry***, 136 Wis. 2d 92, 99, 401 N.W.2d 748 (1987).

¶17 Morris contends that the circuit court never asked him if he wanted to make an opening statement, and the court reporter inserted the court's inquiry about opening statements after the fact. There is no basis for this allegation except for Morris's rank speculation. The court found that Morris's allegations about the transcript were not credible. This was a determination for the circuit court to make.

¶18 Morris also complains that the transcripts were altered to make it appear that he gave up his right to counsel. That right was validly waived in February 2000, and Morris reiterated thereafter that he intended to proceed pro se.[3]

[3] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

By the Court.—Judgment and order affirmed.

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