COURT OF APPEALS
DECISION
DATED AND FILED

March 25, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3176-CR **Cir. Ct. No. 00 CF 4176**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DION MATTHEWS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Dion Matthews appeals from a judgment of conviction, following a jury trial, for three counts of first-degree intentional homicide by use of a dangerous weapon, as a party to a crime, contrary to WIS.

STAT. §§ 940.01(1)(a), 939.63, 939.05, and three counts of armed robbery by use of force, contrary to WIS. STAT. § 943.32(2) (1999-2000).[1] He argues that his statements to police were coerced and, therefore, that the trial court erred in denying his motion to suppress. He also argues that the court "failed to exercise proper discretion" when it "allowed into evidence" a portion of a videotape that he claims only served to "inflame the jury." We affirm.

I. BACKGROUND

¶2 On March 3, 2000, Milwaukee police were dispatched to 2640 North Fourth Street to investigate a citizen report that bodies had been discovered inside a house. On arrival, police found three men lying face down in the living room—each man had been shot multiple times. Police also found a small amount of cocaine and numerous spent gun shell casings on the floor.

¶3 On August 6, 2000, a Milwaukee police detective received a tip that Robert Williams and another individual had been involved in a triple homicide. Williams was questioned and he implicated Matthews in the homicides. Matthews, who was incarcerated on other charges at the time Williams implicated him, was questioned by police and, after many hours of interrogation, stated that he was involved in the robbery but was not responsible for the homicides.

¶4 The State charged Matthews with three counts of felony murder, party to a crime, and ultimately filed an amended information charging him with

[1] All references to the Wisconsin Statutes are to the 1999-2000 version. Dion Matthews' name is spelled differently throughout the record. He spelled his name for the court reporter two different ways: "Mathews" and "Matthews." In this opinion, we defer to the spelling in the parties' briefs: "Matthews."

three counts of first-degree intentional homicide while armed, as a party to a crime, and three counts of armed robbery with use of a dangerous weapon. Matthews filed a motion to suppress his statements and the trial court held a ***Miranda/Goodchild*** hearing. *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 262, 133 N.W.2d 753 (1965). The court denied Matthews' motion to suppress his statements and he was brought to trial on December 11, 2000.

¶5 At trial, the State presented a videotape to the jury showing the crime scene and the victims; the final forty-five seconds showed the victims after they had been rolled over by the medical examiner. After the video presentation, defense counsel objected and moved for a mistrial. The trial court overruled the objection. On December 15, 2000, the jury returned guilty verdicts on all counts.

II. DISCUSSION

A. Matthews' Statements

¶6 Matthews argues that the trial "court erred in its finding that [his] statements [to the police] were voluntary and subsequently allowing the statements into evidence." He contends his statements were involuntary because: (1) he was deprived of "sleep and other creature comforts for the purpose of breaking down his voluntary will"; and (2) he was coerced by repeated, lengthy interrogations.[2]

[2] In his statement of the facts, Matthews refers to his motion hearing testimony in which he claimed that he repeatedly requested counsel during the interrogation. Four detectives, however, testified that Matthews never asserted his right to counsel. The trial court found that Matthews was advised of his ***Miranda*** rights and never asserted his right to an attorney or to silence. Matthews does not challenge those findings, and does not separately argue that he was denied the right to counsel. *See* ***State v. Friday***, 147 Wis. 2d 359, 370-71, 434 N.W.2d 85 (1989) (appellate court is bound by trial court's reasonable findings of fact); and ***Barakat v. DHSS***, 191 (continued)

We disagree.

¶7 On August 10, 2000, the Milwaukee police transported Matthews from the Columbia Correctional Institution in Portage, Wisconsin, where he was incarcerated for other offenses, to the Milwaukee Police Administration Building. He arrived at about 3:00 p.m. and was placed in a holding cell until 9:20 p.m., at which time he was taken to an interrogation room. An initial interrogation, conducted by two detectives, ended at approximately 2:00 a.m. on August 11. A subsequent interrogation commenced at 3:00 a.m. Prior to its conclusion at 6:05 a.m., Matthews made statements implicating himself in the robbery but denying any responsibility for the homicides.

¶8 At the ***Miranda/Goodchild*** hearing, the court heard conflicting testimony regarding the conditions under which Matthews was interrogated. Matthews described the holding cell as containing "a bench where a bed could go, no sheet, no cover … no pillow." He also testified that he did not have anything to eat and he felt "extremely exhausted" during the interrogation. Detective Michael Dubis, however, testified that the holding cells were equipped with steel frame cots where Matthews could have "slept and laid down if he wished to." Detective Kent Corbett testified that Matthews was given spaghetti and left alone to eat, and was allowed bathroom breaks. Detective Chad Wagner testified that Matthews received coffee, soda, cigarettes, and bathroom breaks, was "alert and attentive" throughout the interview, and did not indicate that he was tired.

Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995) (appellate court need not consider "amorphous and insufficiently developed" arguments).

¶9 At the conclusion of the ***Miranda/Goodchild*** hearing, the trial court determined that in "[e]ach and every single one of the interviews," Matthews "was in fact advised of his ***Miranda*** Rights" and he "was apparently in the system before, so he understood … his ***Miranda*** Rights." The court determined that Matthews "never asked for an attorney, never asserted his right to silence, …was given bathroom breaks and … food and soda…." Also, "no promises or threats … were made … [and Matthews] was not under the influence of alcohol [during the interviews]." The court found that Matthews' "statements … were certainly a voluntary product of his free and unconstraint [sic] will, which reflected deliberateness of thought and … of choice, and certainly [were] not coerced or the product of any type of … improper police … practice."

¶10 When the State seeks to introduce a defendant's custodial statements, it must show by a preponderance of the evidence that: (1) the defendant was informed of his or her ***Miranda*** rights, understood them, and knowingly and voluntarily waived them; and (2) the defendant's statements were voluntary. ***State v. Santiago***, 206 Wis. 2d 3, 19, 29, 556 N.W.2d 687 (1996); *see also* ***State v. Agnello***, 226 Wis. 2d 164, 181-82, 593 N.W.2d 427 (1999). "In determining whether a confession was voluntarily made, the essential inquiry is whether the confession was procured via coercive means or whether it was the product of improper pressures exercised by the police." ***State v. Clappes***, 136 Wis. 2d 222, 235-36, 401 N.W.2d 759 (1987). We look to the totality of the circumstances to determine whether a confession is voluntary, balancing the personal characteristics of the defendant against coercive or improper police pressure. ***State v. Pheil***, 152 Wis. 2d 523, 535-36, 449 N.W.2d 858 (Ct. App. 1989). Absent evidence of improper or coercive police conduct, we need not apply the balancing test. ***Id.*** at 535.

¶11 The determination of whether the facts in a case meet the appropriate legal standards presents a question of law which we decide independently of the trial court. ***State v. Armstrong***, 223 Wis. 2d 331, 352-53, 588 N.W.2d 606 (1999). "[T]his court will not set aside the [trial] court's findings of fact unless they are 'clearly erroneous.'" ***Id.*** at 352 (citation omitted). "We must give 'due regard' to the [trial] court's opportunity to observe the witnesses and determine their credibility." ***Id.*** at 352-53 (citation omitted).

¶12 On appeal, Matthews does not specifically challenge any of the trial court's factual findings. Instead, simply recounting his version of the events, he asserts that "it is clear that there were improper pressures" and that the officers "clearly badgered [him], deprived him of sleep and other creature comforts for the purposes of breaking down his voluntary will." Nothing in the record, however, establishes that the manner or circumstances of the questioning overpowered Matthews.[3] *See* ***id.***; *see also* ***State v. Friday***, 147 Wis. 2d 359, 370-71, 434 N.W.2d 85 (1989) (appellate court is bound by trial court's reasonable findings of fact). Thus, the trial court properly denied his motion to suppress.

[3] *See* ***Crooker v. California***, 357 U.S. 433, 437 (1958) (fourteen hours of questioning was not coercive when the suspect is permitted to eat, drink, smoke and told he does not have to answer questions); ***Chavez v. State***, 832 So. 2d 730, 749 (Fla. 2002) (fifty-four hours of repeated interrogation was not coercive when suspect receives creature comforts upon request, breaks in questions, and time alone); ***State v. Turner***, 136 Wis. 2d 333, 362, 401 N.W.2d 827 (1987) (twelve and one-half hours of interrogation over the course of two days, "interspersed with frequent accommodations to [defendant's] personal needs," was not so coercive as to render statements involuntary); ***State v. Verhasselt***, 83 Wis. 2d 647, 657-58, 266 N.W.2d 342 (1978) ("Although late night interrogations and a defendant's lack of sleep ordinarily weigh against the voluntariness of a confession, these concerns are offset by the fact that the defendant … did not indicate that he was tired or sleepy" (citations omitted)); ***Schilling v. State***, 86 Wis. 2d 69, 89, 271 N.W.2d 631 (1978) (an interrogation over the course of twenty-two hours was not coercive when suspect received food, drinks and breaks); ***Kutchera v. State***, 69 Wis. 2d 534, 546-47, 230 N.W.2d 750 (1975) (twelve hours of interrogation was not coercive when the defendant was given breaks to eat, provided with beverages and cigarettes, and never indicated that he would like the questioning to stop).

B. Videotape Evidence

¶13 At trial, the State presented a videotape with the final forty-five seconds showing the victims after they had been rolled over by the medical examiner. The State argued that, although the videotape was "obviously prejudicial," the jury had a right to see "how these men were executed … to see where they were situated, … how they were begging for their lives as they were shot to death…." The court ruled that the videotape was "not only relevant material but that it outweigh[ed] any prejudicial effect."

¶14 On appeal, the State first argues waiver. The State contends that Matthews never specifically asked the court to redact the final forty-five seconds of the video. We disagree. Before the trial commenced, Matthews' counsel filed a motion *in limine*, objecting to the videotape. At the motion hearing, counsel argued:

> There is a scene in the videotape that shows apparently where the bodies were when they were first discovered with them face down but later in that videotape there is a portion of it that indicates that these bodies had been turned over. There is all sorts of blood. Whatever the defenses are in this case I don't think it's that these people weren't killed so I don't see why the jury has to see that … [and] I strongly object to that on behalf of the defendant for those reasons.

At the motion hearing, defense counsel also stated: "One of my objections is not to where the bodies were found. That video contains pictures of the bodies having been moved. They are all blood soaked and the bodies were turned over. I don't see any reason why that has to be shown to the jury." Thus, we conclude, defense counsel's argument was sufficiently focused, implicitly calling on the court to order redaction of the final portion of the video.

¶15 Matthews argues that the exhibition of the final portion of the videotape "was not substantially necessary or instructive to show material facts or conditions." He contends, therefore, that the trial court erred in allowing the full video because the "only purpose" of the final portion was to "inflame the jury." Although we conclude that the final portion of the video should not have been shown to the jury, we also conclude that the trial court's error was harmless.

¶16 At trial, a Milwaukee police detective narrated while the prosecution showed the videotape. After the presentation, defense counsel objected and moved for a mistrial due to the manner in which the video had been shown—the jury left the jury box to sit in a semi-circle around two large televisions, thus enabling some of the jury members to also see the reactions of the spectators in the courtroom. Defense counsel argued that "this kind of evidence and the likelihood it elicits this kind of emotional response [from the spectators] in front of the jury is highly prejudicial." The trial court overruled the objection, stating that it "believe[d that the] probative value outweighed any prejudicial effect." The trial court, however, explicitly applied an incorrect standard and erroneously exercised discretion.

¶17 WISCONSIN STAT. § 904.03 provides, in part, "Although relevant, evidence may be excluded if its probative value is *substantially outweighed by the danger of unfair prejudice*…."[4] (Emphasis added.) Relevant and highly probative evidence often is "prejudicial" and, in the estimation of the protesting party, may seem "unduly prejudicial." But the evidence also may be fair. If the balance

[4] WISCONSIN STAT. § 904.03 also allows the exclusion of relevant evidence if its probative value is substantially outweighed by the danger that it: (1) misleads the jury; (2) confuses the issue; or (3) presents needless cumulative evidence.

between probative value and unfair prejudice is close, the evidence is admissible because its probative value is not *substantially* outweighed by the danger of unfair prejudice.

¶18 Showing photographs or videos to a jury is within the trial court's discretion. *See* ***State v. Thompson***, 142 Wis. 2d 821, 841, 419 N.W.2d 564 (Ct. App. 1987). The trial court is in the best position to determine whether a videotape will assist the jury in a rational, dispassionate determination of the facts. *See* ***Simpson v. State***, 83 Wis. 2d 494, 505-06, 266 N.W.2d 270 (1978). On review, "[w]e will uphold the trial court's discretion unless it is wholly unreasonable or the only purpose of the photographs [or videos] is to inflame and prejudice the jury." *See* ***Thompson***, 142 Wis. 2d at 841. We agree with the trial court that the final forty-five seconds of the video was relevant and probative—it showed the crime scene and the victims. In this case, however, its probative value was substantially outweighed by the danger of unfair prejudice.

¶19 At the motion hearing, the State argued that the video established how the victims were shot, how the bodies were situated, how they were executed and how they were begging for their lives. At trial, however, the narrating detective did not describe any of these factors during the final forty-five seconds of the video presentation. The only narration that he provided during this portion was: "This is the back in the living room after the victims had been rolled over by the medical examiner. That's [one victim]. [Another victim] is at the bottom." The detective did not describe how the bodies were situated or how they were shot. He did not describe how the victims begged for their lives.

¶20 Thus, this final portion of the video and the detective's narration did not elucidate any of the factors the State argued to the trial court at the motion

hearing. In fact, the prosecutor, in closing arguments, never claimed that the video evidence established any such thing. And on appeal, the State concedes that "the final 45 seconds are disturbing." Clearly, the probative value of the final forty-five seconds was negligible, at best; any limited value was substantially outweighed by the danger of unfair prejudice. Therefore, the trial court should have ordered its redaction.

¶21 The court's failure to do so, however, was harmless. An error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189 (citation omitted). We consider the entire record when determining whether an error is harmless. ***State v. Moore***, 2002 WI App 245, ¶16, 257 Wis. 2d 670, 653 N.W.2d 276.

¶22 We have reviewed the entire record (and viewed the videotape) and conclude the trial court's failure to order redaction of the video was harmless because: (1) during *voir dire* the jury was notified that it would be exposed to graphic evidence; and (2) the evidence, irrespective of the videotape, was overwhelming and established that Matthews was guilty beyond a reasonable doubt.

¶23 During *voir dire*, Matthews' attorney told the prospective jurors that if they were chosen, they "may have to see and hear some rather graphic evidence." He asked, "Is there anyone here who feels that [he or she] would have a problem either seeing photographs or hearing pretty graphic testimony, to such an extent that you don't think you could do it?" No prospective jurors raised their hands. Thus, having been forewarned, the jurors were less likely to be "inflam[ed]

and prejudice[d]" by the final forty-five seconds. *See* ***Thompson*****,** 142 Wis. 2d at 841.

¶24 Moreover, it is "clear beyond a reasonable doubt" that, regardless of the video, "a rational jury would have found [Matthews] guilty." *See* ***Harvey***, 2002 WI 93 at ¶49. In addition to Matthews' admissions to the police, testimony from the State's witnesses—Matthews' accomplices, citizen witnesses, and a firearm and tool mark expert from the Wisconsin State Crime Laboratory—proved, beyond a reasonable doubt, that Matthews was guilty.

¶25 At trial, a citizen witness testified that, while helping his cousin move, he heard "bangs" inside the house where the homicides occurred. While taking a speaker out to his cousin's van, the witness testified that he saw a man with a "Looney Tune jacket" and a gun run out of the house where he had heard the "bangs." Robert Johnson, one of Matthews' two accomplices, testified that Matthews was wearing the "Looney Tune jacket" on the night of the homicides.

¶26 In addition, Johnson testified that Matthews and Robert Williams, Matthews' other accomplice, intended to rob the drug house on the night of the homicides and, that night, while Johnson waited in the car, they left for the drug house armed—Williams with a .45-caliber pistol, and Matthews with a 9mm semi-automatic pistol. Johnson stated that while he was waiting in the car he heard loud voices and multiple shots and, soon thereafter, Matthews and Williams returned to the car with blood on them. According to Johnson, they subsequently fled to Williams' home where Matthews and Williams divided the proceeds from the robbery. Johnson also testified that after the homicides, while Matthews was incarcerated for other crimes, he telephoned Johnson asking him to take possession of his personal property, including the "Looney Tune jacket."

Matthews' uncle, William Matthews, testified that Matthews asked him to keep some boxes of his personal items while he was incarcerated. William Matthews testified that when the police confiscated the boxes, they found Matthews' 9mm pistol.

¶27 Williams, Matthews' other accomplice, also testified at trial. He confirmed that Matthews had a 9mm pistol on the night of the homicides. He testified that Matthews pulled out his gun first, with the intention of robbing the three victims. Further, he stated that as soon as Matthews pulled his gun, one of the three victims attempted to pull out his own gun and Matthews shot him. Matthews then picked up the victim's gun, told the other two men to get on the floor, went through their pockets and, according to Williams, shot the other two men. The State's firearms expert testified that "no gun in the world" other than Matthews' 9mm pistol could have fired the bullets that killed the three victims.[5]

¶28 Therefore, based on the entire record, we conclude that although the final forty-five seconds of the videotape should have been redacted, showing that portion to the jury was harmless error.

By the Court.—Judgment affirmed.

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

[5] Police also recovered .45-caliber pistol shell casings at the crime scene and at least two of the victims had been shot by a .45-caliber pistol in addition to the 9mm. Police, however, have never recovered the .45-caliber pistol.