FILED
06-04-2021
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2020AP1068-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

KEVIN LEE WILKE,
Defendant-Appellant.

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

On Appeal from Brown County Circuit Court,
the Honorable Timothy A. Hinkfuss, presiding
Trial Court Case No. 19CF263

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ISSUES FOR REVIEW

1. Did the State fail to provide discovery to Wilke prior to trial?

   Wilke failed to raise this issue in his post-conviction motion to the Trial Court; therefore, the Trial Court did not address this issue.

2. Did the State present sufficient evidence at trial to support the jury's findings that Wilke was guilty on counts 2, 3, and 4?

   The Trial Court held that the State did introduce sufficient evidence at trial to support the jury's verdicts. This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin believes this is a one-judge case, in which the arguments can be adequately addressed in briefing and can be decided by straightforward application of law to the facts. Therefore, neither oral argument nor publication is requested.

STATEMENT OF THE CASE AND FACTS

Wilke appeals from judgments of conviction (82-83) entered February 4, 2020, and from a Decision and Order denying direct

postconviction relief, entered February 11, 2020, in Brown County Circuit Court, the Honorable Timothy A. Hinkfuss, presiding (87).

On February 26, 2019, officers from the Ashwaubenon Department of Public Safety responded to call for a physical disturbance between a male and a female at 949 Rasmussen Place in the Village of Ashwaubenon, located in Brown County, Wisconsin. The male was later identified during the course of the investigation as the defendant, Kevin L. Wilke, date of birth 9/9/1967. The female involved was later identified as N.V.

Based upon the investigation conducted by Ashwaubenon Public Safety officers, Wilke was ultimately taken into custody and charged in Brown County Circuit Court case number 19CF263 with four counts: (1) strangulation and suffocation as a repeater pursuant to sections 940.235(1) and 939.62(1)(b) of the Wisconsin Statutes; (2) battery as a repeater pursuant to Wis. Stats. §§ 940.19(1) and 939.62(1)(a); (3) disorderly conduct as a repeater pursuant to Wis. Stats. §§ 970.01(1) and 939.62(1)(a); and (4) intimidation of a victim as a repeater pursuant to Wis. Stats. §§ 940.44(1) and 939.62(1)(a). (1:1-4).

From very early on in the criminal proceedings, Wilke elected to waive his right to be represented by an attorney and proceed *pro se*. The jury trial in this case commenced on November 20, 2019, and again the Court found that Wilke had made a free, voluntary, and knowing decision to proceed *pro se*, with Attorney Timothy O'Connell acting as standby counsel. (127:7). After a two-day trial, the jury found Wilke guilty of three separate charges in the information (13).

The State introduced sufficient evidence to convince the jury beyond a reasonable doubt that Wilke was guilty, as alleged in count 2 of the information, of battery to N.V., committed in Brown County on February 26, 2019. (127:166,168).

The State introduced sufficient evidence to convince the jury beyond a reasonable doubt that Wilke was guilty, as alleged in count 3 of the information, of engaging in disorderly conduct in Brown County on February 26, 2019. (127:166-167).

The State introduced sufficient evidence to convince the jury beyond a reasonable doubt that Wilke was guilty, as alleged in count 4

of the information, of intimidation to N.V., who had been the victim of a crime, committed in Brown County on February 26, 2019. (127:167).

The jury found Wilke not guilty of count 1 as charged in the information.

STANDARD OF REVIEW

The Wisconsin Court of Appeals will uphold a circuit court's findings of historical fact unless they are clearly erroneous. *State v. Russ*, 2009 WI App 68, ¶ 9, 317 Wis.2d 764, 767 N.W.2d 629. Whether a party has properly preserved an objection for purposes of appeal is a question of law that the Wisconsin Court of Appeals reviews independently. *State v. Mercado*, 2021 WI 2, ¶ 32, 395 Wis. 2d 296, 953 N.W.2d 337.

ARGUMENT

I. WILKE HAS FAILED TO DEMONSTRATE THAT THE STATE VIOLATED WIS. STAT. § 971.23 IN THIS CASE.

1. Wilke has forfeited his objection to the timing in which he received discovery materials in this case, because this argument was not properly preserved during trial or raised during Wilke's post-conviction motion.

"Forfeiture occurs when a party fails to raise an objection." *Mercado*, ¶ 35. In general, courts will not address "issues raised for the first time on appeal since the [circuit] court has had no opportunity to pass upon them." *Hopper v. City of Madison*, 79 Wis. 2d 120, 137, 256 N.W.2d 139 (1977).

Here, Wilke seems to argue that all of the evidence in this case was improperly admitted because he did not receive it until "the night before trial" and therefore did not have adequate opportunity to prepare. Under questioning from the trial court, however, Wilke indicated that he wanted to proceed with a trial on the scheduled date. On the morning of trial, Wilke did advise the court that:

> I ended up getting a pack of discovery last night. And I was able to go out of my room and spend some time listening to the 911 tape and some other things. And I have not been able to get the law that I need or the statutes I need for this motion, but I'm going to bring it up just – just so the court at least gets a gist of what I'm coming from.

(127:34). However, this information was provided by Wilke to the Court as a basis to dismiss the case for insufficient evidence, not because of any perceived prejudice from delay in receiving discovery.

Furthermore, Wilke failed to raise this argument in his post-conviction motion filed with the Circuit Court on February 7, 2020. (86). Because this motion was not properly litigated before the circuit court, this Court should not address this argument further at this time.

2. The State complied with Wis. Stat. 971.23 and supplied Wilke with all discovery materials within a reasonable time before trial.

Even if the Court finds that Wilke did not forfeit his right to raise the discovery issue on appeal, the record is replete with information from Wilke himself which undermines the argument that he did not have discovery in this case until the "night before" trial. As a preliminary matter, the State's discovery obligations in a criminal case is governed by Wis. Stat. § 971.23(1).

During the final pretrial on November 18, 2019, Wilke told the court that "a lot of [his] paperwork is still at home," and that he did not have it with him when he was arrested during the pendency of this case. (Tr. 11/8/2019, 24). On the second day of the trial, the State clarified for the Court Wilke's statements regarding discovery that he had just received discovery and did not have adequate time to prepare:

> Now, I understand Mr. Wilke has said several times throughout the course of this trial that he doesn't know what he's doing, he's pro se, he's been not able to prepare.
>
> I just want to make it very clear for the record Mr. Wilke has had all of the discovery from the state from very early on in this case. And we gave him a second complete copy after the final pretrial when he made a record at the pretrial that he didn't have all of his papers because some of them were at his house. Out of an abundance of caution we made an identical copy of all of the discovery and gave it to Mr. Wilke so that he would have absolutely everything he would need for court.
>
> Mr. Wilke has said multiple times that we're springing things on him at the last moment. That he insinuated earlier we withheld evidence or maybe we destroyed evidence of cameras or videos that might have been taken of the roads that night. That's preposterous, Your Honor. From the very beginning we have turned over everything we have had in this case.

(128:92-93). In fact, this record is supported by Wilke's own statement in his post-conviction motion that "the first [911 tape] I received didn't even work." (86:4). Wilke's own statements to the circuit court corroborate the fact that he was given multiple copies of discovery in this case; the most recent of which was provided on the eve of trial after Wilke raised concerns with the court about his ability to prepare.

The role of the Court of Appeals is not to settle factual disputes like the one Wilke now raises, which is exactly the reason this argument

should have been raised at the circuit court level. However, the fact of the matter is that Wilke, as a *pro se* defendant, was provided discovery months in advance of the trial, and was even provided with a duplicate copy when he was unable to access his original version due to being incarcerated. The State therefore complied with the requirements of Wis. Stat. § 971.23 by disclosing all of the materials and information prescribed by the statute within a "reasonable time before trial."

II. THE STATE INTRODUCED SUFFICIENT EVIDENCE AT TRIAL TO SUPPORT THE JURY'S VERDICTS OF GUILTY ON COUNTS 2, 3, AND 4.

When a defendant challenges a conviction on the grounds that there was insufficient evidence to support that conviction, the test applied upon appeal "is whether the evidence adduced, believed and rationally considered by the jury was sufficient to prove the defendant's guilt beyond a reasonable doubt." *Gauthier v. State*, 28 Wis. 2d 412, 416, 137 N.W.2d 101 (Wis. 1965). Although Wilke now tries to rehash all of the evidence that was submitted to the jury at trial, Wilke did in fact vigorously argue these points to the jury. The jury rationally

considered these arguments, and even acquitted him on the sole felony count charged in the information, but convicted him of the remaining three misdemeanors. While Wilke's brief enumerates approximately five topics for discussion as to why he feels the evidence in this case was insufficient to convict him, these arguments can be essentially summarized in two categories: (1) Wilke believes that N.V. was not a credible witness and (2) that the State did not produce "physical evidence" in this case.

1. Wilke had sufficient opportunity to confront N.V. as a witness and her testimony was properly admitted and considered by the jury.

Much of Wilke's appeal focuses on the testimony of N.V. In this case, N.V. testified during the State's case-in-chief (127:158-192), and was later allowed to be re-called by Wilke over the State's objection (128:106-115). When called by the State, N.V. did originally state that she did not independently recall the night of the incident, however testified that she remembered giving a statement to law enforcement. (127:164-166). She went on to testify about the details of that incident that she provided to law enforcement. (127:166-168). Wilke cross-

examined N.V. at length on the first day of the trial, and elicited testimony from N.V. that she was using medications at the time, was having adverse effects to them, and that those adverse effects included anger, blackouts, and self-harm. (127:174, 175, 180). Wilke further repeatedly asked N.V. about her use of alcohol both on the date of the incident and generally. (127:171-172, 175). The record demonstrates that Wilke not only had, but took full advantage of, his Constitutional rights to confront this witness.

Wilke also argued both to the trial court and now argues that he was unprepared for cross-examination of N.V. as a witness because he did not know that she would testify that she did not remember the date in question. First, the record demonstrates that Wilke was clearly able to effectively cross-examine N.V. and elicit his desired testimony from her on both cross- and direct-examination.

Further, the reality of litigation is that while parties may anticipate how any given witness may testify, it is part of the nature of testimony of live witnesses that unexpected things may happen during the course of a trial. When Wilke repeatedly advised the Court that he

wanted to proceed *pro se*, and was prepared and able to do so, he undertook the responsibility of being able to question a witness whose testimony he did not perfectly anticipate. Finally, even if Wilke was not fully prepared for his cross-examination of N.V. on the first day of the trial, any potential error was remedied when he was given the opportunity to re-call N.V. as his own witness on the second day. (128:106).

It is a well-established principle of our legal system that "the credibility of witnesses is properly the function of the jury or the trier of fact." *Gauthier*, 28 Wis. 2d at 416. Wilke was fully able to, and did, confront the witness on the topics that he wished to raise and later argued how he thought those topics were relevant to the jury. It was the purview of the jury to determine which, if any, of N.V.'s statements presented during the course of the trial were credible and the weight to give to those statements. The evidence submitted during the trial is clearly sufficient to uphold the jury's findings of guilt on the relevant counts.

2. The totality of the evidence submitted in this case is sufficient to uphold the jury's verdicts on counts 2, 3, and 4.

Wilke's brief primarily focuses on his perception that the State's evidence submitted at trial was insufficient to support the convictions. He specifically raises the issues that there were no direct witnesses to the incident other than N.V., that he believed testimony of the officers was inconsistent or could only lead to the conclusion that he was not involved, and that the officers did not pursue certain avenues of inquiry during their investigation. However, all of these points were argued by Wilke at length to the jury. (128:191-213).

Further, Wilke's position that the State failed to present "physical" evidence in this case ignores the legal definition of evidence that the court properly instructed the jury about in this case. Namely, "the sworn testimony of witnesses, both on direct and cross examination," is evidence that the jury can and must consider when rendering their verdict. WIS JI-CRIMINAL 103 (2000). The jury was also instructed that they could properly consider circumstantial evidence which was presented in this case, and clearly did so. WIS JI-

CRIMINAL 170 (2000) ("Circumstantial evidence is evidence from which a jury may logically find other facts according to common knowledge and experience.")

At the end of the day, the jury rejected Wilke's interpretation of the evidence, or at least the idea that his interpretation raised a reasonable doubt, on counts 2, 3, and 4 when they found him guilty.

CONCLUSION

Wilke has forfeited his argument that the State failed to turn over discovery in a timely manner because that argument was not properly raised at trial or in Wilke's subsequent post-conviction motion. Even if Wilke has not forfeited the argument, the record shows that the State did comply with the discovery requirements set forth in Wis. Stat. § 971.23. Finally, there is sufficient evidence in the record to support the jury's verdicts and Wilke's convictions for the crimes of battery, disorderly conduct, and intimidation of a victim. Therefore, the Court should uphold the circuit court's decision and Wilke's convictions for those counts, and deny his appeal.

Respectfully submitted this 4th day of June, 2021.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: Times New Roman proportional serif font, minimum printing resolution of 200 dots per inch, 14 point body text, 12 point for footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,563 words, including footnotes.

There is no appendix attached to this brief as any items that would have been included were included in the Defendant-Appellant's appendix.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02 and § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 4th day of June, 2021.

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