COURT OF APPEALS
DECISION
DATED AND FILED

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Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 00-2386-CR **Cir. Ct. No. 99-CF-551**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BENJAMIN MORA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: EMILY MUELLER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Benjamin Mora appeals from a judgment convicting him of first-degree reckless homicide, two counts of first-degree recklessly endangering safety, and three counts of discharging a firearm from a

vehicle. On appeal, he argues that the circuit court should have suppressed statements he gave after he received ***Miranda***[1] warnings because the statements were coerced and involuntary. He also complains that the circuit court erroneously exercised its discretion when it sent an inculpatory letter to the jury room at the jury's request. We reject these arguments and affirm.

¶2 Sixteen-year-old Mora was taken into custody and later charged with ten counts in connection with a gang-related drive-by shooting. Before receiving his ***Miranda*** warnings and while in custody, Mora gave two statements to police. In the first statement, he offered an alibi or explanation of his activities on the night of the shooting. After being told that his alibi could not be verified, Mora made a second statement in which he asserted that he "was messed up. I was high" on drugs. The circuit court suppressed both of these statements because even though they were voluntary and not the product of coercion, they were obtained in violation of Mora's rights because he was interrogated in custody and should have been given his ***Miranda*** warnings.

¶3 After Mora gave the first two statements, he was given his ***Miranda*** warnings. Thereafter, he made two more inculpatory statements. In the third statement, Mora admitted being in the vehicle which was involved in the shooting, although he denied wielding the weapon. After speaking with his parents, Mora gave a fourth statement which amounted to another confession of his involvement in the crime.

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

¶4 Although the circuit court suppressed Mora's first two statements as having been given in violation of ***Miranda***, the court declined to suppress his post-***Miranda*** statements after determining that they were voluntarily given and not the product of coercion by police. The court found that as to the third statement, there were no promises, threats or undue coercion. The court also declined to suppress the fourth statement. The jury convicted Mora of six of the ten counts.

¶5 Mora argues that because his first two statements were taken in violation of ***Miranda,*** the taint of those statements should have rendered the subsequent post-***Miranda*** statements involuntary. To resolve a defendant's claim that a statement was made in violation of his or her constitutional rights, we apply constitutional principles to the facts of the case. ***State v. Owen***, 202 Wis. 2d 620, 640, 551 N.W.2d 50 (Ct. App. 1996). Although we review the claim de novo, we will uphold the circuit court's findings of fact unless they are clearly erroneous. ***Id.***

¶6 For Fifth Amendment purposes, a statement is involuntary if it was obtained by coercive police activity. ***Id.*** at 641-42. "If the defendant fails to establish that the police used actual coercive or improper pressures to compel the statement, the inquiry ends." ***Id.*** at 642. In the absence of actual coercion, failure to give ***Miranda*** warnings does not mean the statements were per se coercive. ***State v. Armstrong***, 223 Wis. 2d 331, 362-63, 588 N.W.2d 606 (1999).

¶7 The circuit court found that while Mora was handcuffed at the scene, the handcuffs were removed when he arrived at the police station. While Mora was being held at the police station, officers asked him if he wanted something to drink while he was waiting to be questioned. These findings are not clearly erroneous.

¶8 Although we uphold the circuit court's findings of fact, Mora suggests that other facts support a finding of coercion and a conclusion that his statements were involuntary. Mora contends that his youth made the situation coercive. In the absence of coercive acts by the police, a suspect's youth does not preclude a voluntary statement. ***Shawn B.N. v. State***, 173 Wis. 2d 343, 365, 497 N.W.2d 141 (Ct. App. 1992). We also reject Mora's contention that the fact that he was not able to see his parents before his police interviews rendered the first three statements involuntary. *See* ***Theriault v. State***, 66 Wis. 2d 33, 42-44, 223 N.W.2d 850 (1974). Although two and one-half hours elapsed before Mora met with officers, this was not, by itself, sufficient to create a coercive environment. *See* ***State v. Turner***, 136 Wis. 2d 333, 364, 401 N.W.2d 827 (1987).

¶9 Mora contends that being told the police could not confirm his alibi was coercive. We disagree. The police confronted Mora with possibly incriminating evidence—that his alibi could not be confirmed. Had Mora received ***Miranda*** warnings, this confrontation would not have rendered his statements involuntary. *See* ***Schilling v. State***, 86 Wis. 2d 69, 87, 271 N.W.2d 631 (1978). We do not conclude that telling Mora that his alibi could not be confirmed was coercive in the absence of ***Miranda*** warnings.

¶10 Mora next argues that the third and fourth (post-***Miranda***) statements were coerced. The circuit court found that they were not. We note that Mora testified at the suppression hearing that he voluntarily waived his ***Miranda*** rights and agreed to speak with the officers and that he had not been threatened.

¶11 Under the totality of the circumstances, ***State v. Moats***, 156 Wis. 2d 74, 94, 457 N.W.2d 299 (1990), Mora's first and second statements were voluntary. His third and fourth statements, which were given after ***Miranda***

warnings, were not tainted by the first and second statements. The circuit court found that Mora waived his ***Miranda*** rights before making the third and fourth statements and the third and fourth statements were voluntary. We agree.

¶12 Mora next argues that the circuit court erred when it permitted a letter exhibit to go the jury room rather than merely reading it to the jury during deliberations. While in custody, Mora wrote a letter to Eric Ynocencio. During trial, the jurors held copies of the letter while a police officer read it and offered his interpretation of its contents. In her closing argument, the prosecutor argued that the letter incriminated Mora, amounted to a confession to his involvement in the shooting and contained threats to others. Defense counsel argued that the letter was not threatening.

¶13 During deliberations, the jury asked to see the letter. Mora objected on the grounds that the letter contained prejudicial matters which were not relevant to trial and that allowing the jury to see the letter during deliberations would give undue weight to the letter's contents. The court noted that the jurors held copies of the letter during the trial, and the closing arguments gave very different interpretations to the letter. Because the letter could be interpreted in different ways, the court allowed the letter to be sent to the jury room to permit the jurors to see the text themselves and be aided in considering the case. The court found that neither party would be unduly prejudiced by the jurors' perusal of the letter.

¶14 Whether to submit an exhibit to the jury during deliberations is discretionary with the circuit court. ***State v. Mayer***, 220 Wis. 2d 419, 423-24, 583 N.W.2d 430 (Ct. App. 1998). We will affirm a discretionary decision if the circuit court considered the facts of record, applied the proper legal standard and reached a reasonable conclusion using a rational mental process. ***Id.*** at 424.

¶15 Although the letter was not a witness's statement, the circuit court properly considered the law governing submission of a witness's statement to a deliberating jury. The factors to be considered include: "(1) whether the statement will aid the jury in proper consideration of the case; (2) whether a party will be unduly prejudiced by submission of the statement; and (3) whether the statement could be subjected to improper use by the jury." ***Id.***

¶16 The circuit court properly exercised its discretion in permitting the letter to be reviewed by the jury during deliberations. It considered the proper legal standard and found that the jury would be aided and neither party would be unduly prejudiced by sending the letter to the jury room. We fail to see the prejudice to Mora of permitting the jurors to see the letter while deliberating when each juror saw the letter during trial.

By the Court.—Judgment affirmed.

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