COURT OF APPEALS
DECISION
DATED AND FILED

June 20, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1180-CR **Cir. Ct. No. 2008CF514**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK COLEMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: MARK A. WARPINSKI, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Mark Coleman appeals a judgment convicting him of battery by a prisoner contrary to WIS. STAT. § 940.20(1) (2009-10),[1] as well an

[1] All references to the Wisconsin Statutes are to the 2009-10 version.

order denying his postconviction motion for a new trial. On appeal, Coleman argues that he should be granted a new trial because his waiver of the right to a jury trial was not knowing, voluntary, and intelligent and because a surveillance video of the battery incident was improperly deleted by the State. We affirm the judgment and order of the circuit court.

BACKGROUND

¶2 Mark Coleman was charged with battery by a prisoner after he struck a correctional officer at Green Bay Correctional Institution (GBCI) while the officer was attempting to move Coleman to a segregation area. *See* WIS. STAT. § 940.20(1). Prior to trial, Coleman informed the court on the record that he wished to have a bench trial instead of a jury trial. After the bench trial, the court convicted Coleman of battery by a prisoner and sentenced him to four years and one month of imprisonment.

¶3 Coleman filed a postconviction motion, alleging that the court's colloquy with him was insufficient to establish a valid waiver of his constitutional right to a trial by jury. Coleman further alleged that a video recording of the incident at GBCI was made, but that it was improperly recorded over, leaving no visual record as to what occurred during the incident. He argued that the destruction of the video recording by taping over it was a due process violation warranting dismissal under ***State v. Greenwold***, 189 Wis. 2d 59, 525 N.W.2d 294 (Ct. App. 1994). The circuit court denied Coleman's postconviction motion after a hearing, and Coleman now appeals.

STANDARD OF REVIEW

¶4 Whether Coleman's waiver of his right to a jury trial was knowing and voluntary is a question of constitutional fact that this court reviews independently as a question of law. *See* ***State v. Anderson***, 2002 WI 7, ¶12, 249 Wis. 2d 586, 638 N.W.2d 301. We review the circuit court's findings of historical fact under the clearly erroneous standard. ***State v. Hajicek***, 2001 WI 3, ¶15, 240 Wis. 2d 349, 620 N.W.2d 781.

¶5 The issue of whether the destruction of evidence rises to a due process violation involves the application of constitutional standards to the conduct of the State in preserving evidence. *See* ***Greenwold***, 189 Wis. 2d at 66. Whether the circuit court erred as a matter of law is a constitutional fact which we review de novo. ***Id.***

DISCUSSION

¶6 Coleman argues two issues on appeal. First, he argues that the colloquy that preceded his waiver of the right to a jury trial was insufficient, such that the waiver was not knowing, voluntary, and intelligent. Second, Coleman argues that a video recording of the battery incident was improperly deleted by the State, in violation of his due process rights. We will address each argument in turn.

Waiver of jury trial

¶7 Coleman stated during a status conference, in open court with his counsel present, that he wished to waive his right to a jury trial. When a defendant has made a statement on the record waiving his right to a jury trial in accordance with WIS. STAT. § 972.02(1), a postconviction challenge to the validity of the

waiver is governed by the two-part test in ***Anderson***, 249 Wis. 2d 586, ¶¶24-26. The record must show that the circuit court conducted a colloquy to ensure that the defendant made a deliberate choice to proceed without a jury, without threats or promises, that the defendant was aware of the nature of a jury trial and the nature of a court trial, and that the defendant had enough time to discuss the decision with his attorney. ***Anderson***, 249 Wis. 2d 586, ¶24. If the record does not show that these colloquy requirements were met, then the burden shifts to the State to show by clear and convincing evidence that the waiver was knowing, voluntary, and intelligent. ***Id.***, ¶26.

¶8 An examination of the record reveals that, prior to accepting Coleman's waiver of his right to a jury trial, the court engaged in a colloquy with him. The court asked whether he understood the difference between a bench trial and a jury trial. Coleman stated that, in a bench trial, the court decided guilt or innocence, and in a jury trial, the jury decided. The court asked Coleman if he wanted the "collective wisdom of twelve to be replaced by the wisdom of one" and he responded, "Correct." This certainly suggests that Coleman understood that a jury verdict is decided by twelve people unanimously, and not a subset of twelve. The court also asked Coleman during the colloquy if anyone was forcing him to give up his constitutional right to a jury trial, and Coleman replied in the negative. Coleman then had a discussion with his attorney, Shannon Viel, off the record. Afterward, Viel explained to the court on the record that Coleman understood the procedural differences between a jury trial and bench trial and that Coleman believed it would be to his strategic advantage to avoid a jury trial. The court also asked Viel if he was satisfied that his client was waiving his right to a jury trial freely and voluntarily, and Viel said yes.

¶9 At the postconviction motion hearing, the circuit court conceded that it "didn't do a very good job in this colloquy." The court then heard testimony from both Viel and Coleman. Viel testified that, although he did not recall whether he went over the issue of unanimity with Coleman in this specific case, he typically goes over the issue of unanimity with his clients. Viel further testified that Coleman preferred a court trial because he believed the court would be fair to him, and he worried that a jury would hold his status as a prisoner against him.

¶10 Coleman testified at the postconviction motion hearing that he did not understand that all twelve jurors had to agree on a verdict. He further stated that he could not remember whether Viel had gone over the unanimity requirement with him. Coleman testified that he had waived a jury trial and pled guilty on three prior occasions in 1983, 1990, and 2000.

¶11 The circuit court found Viel's testimony more credible than Coleman's, and found that Viel did advise Coleman as to the unanimity requirement of a jury trial. It is for the circuit court to resolve conflicts in testimony; we will uphold its determinations as to witness credibility unless they are inherently or patently incredible, and we will not second-guess the circuit court's reasonable factual inferences. ***Dickman v. Vollmer***, 2007 WI App 141, ¶14, 303 Wis. 2d 241, 736 N.W.2d 202. In this case, the circuit court's findings are supported by the record and are not clearly erroneous. *See* WIS. STAT. § 805.17(2). Based upon the record before us, we conclude independently of the circuit court that Coleman's waiver was knowing, voluntary, and intelligent.

Video recording of incident

¶12 Coleman argues that he should be granted a new trial because his due process rights were violated when a prison surveillance video of the battery

incident was recorded over with other footage. The State argues that the video was not apparently exculpatory and that, even if the video had been potentially exculpatory, prison officials did not record over it in bad faith.

¶13 The due process clause of the Fourteenth Amendment to the United States Constitution requires the State to preserve exculpatory evidence. ***State v. Greenwold***, 181 Wis. 2d 881, 885, 512 N.W.2d 237 (Ct. App. 1994) (***Greenwold I***). The due process analysis for the loss, destruction, or nonpreservation of evidence is two-pronged. ***State v. Greenwold***, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994) (***Greenwold II***). A defendant's due process rights are violated if the State (1) failed to preserve evidence that is apparently exculpatory or (2) acted in bad faith by failing to preserve evidence that is potentially exculpatory. ***Id.***

¶14 The inquiry on the first prong of the test in ***Greenwold II*** is whether the State failed to preserve evidence that might be expected to play a significant role in the defense. ***Greenwold II***, 189 Wis. 2d at 67; ***State v. Oinas***, 125 Wis. 2d 487, 490, 373 N.W.2d 463 (Ct. App. 1985). To satisfy this standard of materiality, the evidence must both possess an exculpatory value that was apparent to those who had custody of the evidence before it was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. ***Oinas***, 125 Wis. 2d at 490. Under the second prong of the ***Greenwold II*** analysis, the relevant inquiry is whether the State, acting in bad faith, failed to preserve evidence that is potentially useful. ***Greenwold I***, 181 Wis. 2d at 884-85. If so, the defendant has the burden of proving bad faith by showing that the State acted with official animus or made a conscious effort to suppress the evidence. ***Greenwold II***, 189 Wis. 2d at 69-70.

¶15 Upon our review of the record, we conclude that Coleman has failed to show that the video recording had exculpatory value that was apparent to the correctional officials who had custody of the video. Even if we were to assume that the recording had potential exculpatory value, the defendant has failed to show that it was destroyed in bad faith. At trial, a correctional officer who witnessed the altercation testified that he viewed a video recording of the incident a few days afterward. The administrative captain of GBCI testified that the camera that would have captured the incident was set to record for approximately thirty-six hours, at which point it would have rewound and begun a new recording over the old one. The captain testified that it was not standard practice to make copies of the videos, and the record does not show that GBCI had any policy to retain recordings of incidents for a particular period of time.

¶16 At trial, Coleman did not dispute that his elbow struck the correctional officer's eye and caused him injury. Coleman only disputed the allegation that the injury was intentional. One of the correctional officers who witnessed the incident testified that Coleman stared directly at the victim before striking him. The circuit court considered this testimony in finding that Coleman intentionally injured the victim. The administrative captain of GBCI testified that the camera that would have caught footage of the battery incident was positioned on the ceiling of a two-story-high rotunda, focused on an entry gate, such that it would not have shown much relevant information about the altercation.

¶17 Coleman testified at trial that he knew he struck something with his elbow, but that he didn't know it had been an officer until after the fact. The circuit court did not find Coleman's version of the incident credible, in light of testimony from the victim and other officers who had been present, who all testified that Coleman had turned his head to look directly at the victim before

striking him. It is the role of the circuit court, not the appellate court, to judge the credibility of witnesses and the weight of their testimony. ***Appleton Chinese Food Serv., Inc. v. Murken Ins., Inc.***, 185 Wis. 2d 791, 799-800, 519 N.W.2d 674 (Ct. App. 1994). Here, the circuit court's credibility determinations are supported by the record and are not clearly erroneous, such that they will not be disturbed on appeal. *See* WIS. STAT. § 805.17(2).

By the Court.—Judgment and order affirmed.

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