COURT OF APPEALS DECISION DATED AND FILED

December 11, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-3317-CR

Cir. Ct. No. 01-CF-560

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BOBBIE TORRY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed*.

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Bobbie Torry appeals from a judgment of conviction. He raises a number of issues related to his trial. We affirm.

¶2 A jury found Torry guilty of attempted first-degree intentional homicide, false imprisonment, second-degree sexual assault, and substantial

battery in connection with one incident. Postconviction counsel was appointed for Torry, but he dismissed counsel and proceeded pro se. He did not file a postconviction motion in circuit court before bringing this appeal from the judgment of conviction. Because most of the issues that Torry argues in his brief were never raised in circuit court, those issues are arguably not properly before us in this appeal. *See* WIS. STAT. § 974.02(2) (2001-02)[1]; ***State v. Monje***, 109 Wis. 2d 138, 153-53a, 327 N.W.2d 641 (1982) (on reconsideration).

¶3 Torry first argues that he was denied his right to effective assistance of counsel when his original attorney withdrew due to a conflict of interest with the victim, and his second attorney was not appointed until October 8, 2001, for a trial that began October 31, 2001. As the State points out, the record contains no information as to the date successor counsel was appointed. The absence of that information is due primarily to the fact that Torry did not file a postconviction motion, which might have led to a hearing at which these facts could be developed. Therefore, we regard this issue as waived under ***Monje***, 109 Wis. 2d at 153-53a.

¶4 Torry next argues that he was denied a fair trial for several reasons related to jurors. The first is that two jurors already knew about the case from newspapers. On the morning of trial, two jurors responded to the court's question about recent media reports by indicating that they had seen them. The court asked the jurors if they could set aside whatever was presented in the reports and decide the case solely on the evidence presented. Both responded that they could. There

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

was no motion to strike either juror at that time, and the court then continued reading the preliminary instructions. On appeal, Torry gives us no reason to believe either juror was subjectively or objectively biased under the standards described in ***State v. Oswald***, 2000 WI App 2, ¶¶19, 25, 232 Wis. 2d 62, 606 N.W.2d 207.

¶5 Torry argues that many jurors on the panel already knew each other before being selected as jurors. Although several jurors in the venire panel knew each other, only one person from most of those relationships actually served on the petit jury. Those who served together on the petit jury appear to be a grocery store employee and one or more customers of the store. Torry offers no legal authority showing that this level of relationship is grounds to remove jurors, or otherwise impedes a fair trial.

¶6 Torry argues that he was deprived of a fair trial because there were no black members of the venire panel. However, Torry points to no evidence in the record of the racial composition of the jury, except for a statement by defense counsel during voir dire that "none of you are black. I can tell by looking." Torry does not claim that any motion on this issue was presented to the circuit court, or that the court made any decision on the issue. There is simply no factual record, of either the composition of this panel or the community from which it was drawn, to which we can apply the legal standards that are raised by his argument.

¶7 Torry next argues that the court erred by barring him from cross-examining the victim about an incident in September 1996. Torry had argued the incident was admissible to prove a pertinent trait of the victim's character, namely, a tendency to be the "first aggressor." *See* WIS. STAT. § 904.04(1)(b). The court denied the motion because it believed this incident did not sufficiently show the

victim as the "first aggressor," was subject to a factual dispute that would risk confusion of the jury, and was remote in time. However, the court did allow cross-examination about a different incident, in October 1996. Torry develops no specific argument on appeal as to why the court's exercise of discretion was erroneous. We conclude that the court's decision was a reasonable one.

¶8 Torry argues that the court erred by not allowing two witnesses to testify as to the victim's reputation for violence. Torry is referring to testimony that he believes would have been given by Ron Stace and Anthony Searvogel. The State does not respond to this argument. Torry does not provide record citations for any decision by the circuit court as to these witnesses on the subject of the victim's reputation for violence. It appears that the focus of counsel's pretrial argument and the court's decision about these witnesses was related to allegations of prior prostitution by the victim. In other words, we are unable to find a decision by the court for us to review on this issue, and therefore we reject the argument.

¶9 Torry argues that the jury should have been instructed on attempted second-degree intentional homicide, rather than attempted first-degree. His argument appears to be that, because he was charged with attempted first-degree intentional homicide, a class B felony, this must mean he was charged with attempted *second*-degree, since completed second-degree is a class B felony, while completed first-degree is class A. In other words, Torry argues the felony class stated in the charge describes the *completed* crime he is alleged to have attempted. However, the reality is that the felony class describes the penalty for *attempt* of the named crime. Penalties for attempts are provided in WIS. STAT. § 939.32, which provides in para. (1)(a) that it is a class B felony to attempt a crime for which the

penalty is life imprisonment. First-degree intentional homicide is such a crime. WIS. STAT. §§ 939.50(3)(a), 940.01(1)(a).

¶10 Torry argues that his attorney failed to call two witnesses. This is essentially a claim of ineffective assistance of counsel. However, because Torry did not file a postconviction motion, there is no factual record before us as to how the witnesses would have testified, or why counsel did not call the witnesses, and therefore this issue is not properly before us on appeal.

¶11 Torry argues that the court erred by barring testimony about the victim's alleged prior prostitution activities. The court's ruling was under WIS. STAT. § 972.11(2). Torry does not argue that the evidence was admissible under the provisions of that statute, or explain why this alleged error is otherwise grounds for reversal.

By the Court.—Judgment affirmed.

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