COURT OF APPEALS
DECISION
DATED AND FILED

December 2, 2014

Diane M. Fremgen
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 Nos. 2013AP1626-CR
2013AP1628-CR

Cir. Ct. Nos. 2012CM715
2012CF1649

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ELAN JOE JOHNSON,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Milwaukee County: ELLEN R. BROSTROM, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Elan Joe Johnson appeals judgments of conviction entered after a jury found him guilty of the misdemeanor offenses of battery and bail jumping and the felony offenses of substantial battery and false imprisonment.

He contends that the State violated its discovery obligations under ***Brady v. Maryland***, 373 U.S. 83 (1963) and WIS. STAT. § 971.23 (2011-12).[1] We disagree and affirm.

BACKGROUND

¶2 Multiple claims of domestic violence over several months underlie these consolidated appeals. In case No. 2012CM715, the State charged Johnson with one count of misdemeanor battery as an act of domestic abuse based on an allegation that he battered his girlfriend Kristin P., a/k/a Karrie P., by punching her in the face on February 3, 2012.[2] In case No. 2012CM1100, the State charged Johnson with an additional count of misdemeanor battery as an act of domestic abuse based on an allegation that he punched Kristin P. in the stomach on March 6, 2012. Finally, in case No. 2012CF1649, the State charged Johnson with one count of misdemeanor bail jumping and with three felonies, namely, substantial battery, false imprisonment, and strangulation and suffocation, all as acts of domestic abuse. In support of the latter four charges, the State alleged in the complaint that, on April 7, 2012, while Johnson was out of custody on bond with conditions that he commit no new crimes and have no contact with Kristin P., he restrained her, choked her, bit her, and struck her with sufficient force to cause

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] The criminal complaint in case No. 2012CM715 names "Karrie P." as the victim of the battery charged in that case. The record establishes that Kristin P. identified herself by a false name when she reported the crime to police. We identify her as Kristin P. throughout the remainder of this opinion.

a concussion. The complaint also included the allegation that "[i]n a charging conference with the Milwaukee County District Attorney's Office [Kristin P.] stated that as of April 12, 2012, she was hospitalized for multiple days and had injuries all over [her] body from the defendant's attack, including two fractured ribs."

¶3 The State indicated during pretrial proceedings that it had provided discovery materials to Johnson, and Johnson acknowledged that he had received such materials. On July 2, 2012, the matters proceeded to trial.

¶4 Before jury selection began, Johnson's trial counsel advised the circuit court that counsel "realized reading the complaint again this weekend that there was a mention of a statement that [Kristin P.] had made during a charging conference. [The defense] didn't receive a supplemental report." The record reflects that the State directed its investigator to prepare a supplemental report and that the State submitted the report to defense counsel the next day.[3] Upon receiving the supplemental report, Johnson moved for a mistrial on the ground that the disclosure was not sufficient to satisfy the State's discovery obligation. The circuit court disagreed and denied the motion.

¶5 The State's first witness, Kristin P., then took the stand. She was reluctant to testify, and she pleaded with the circuit court to excuse her from the courtroom. Eventually, however, she described a series of physical attacks by Johnson on February 3, 2012, March 6, 2012, and April 7, 2012.

[3] The supplemental report is not in the appellate record.

¶6 The State next presented testimony from police officers who told the jury about the investigations into Kristin P.'s allegations, the injuries to Kristin P. that the officers observed, and her statements inculpating Johnson. A nurse also testified, and described meeting Kristin P. in a hospital emergency room on April 7, 2012, and discharging her that night.

¶7 Dr. Adrian Stull, the doctor who treated Kristin P. in the emergency room on April 7, 2012, arrived at the courthouse to testify on the third day of trial. He brought with him medical reports reflecting Kristin P.'s treatment, not only on April 7, 2012, but also on April 24, 2012, and April 28, 2012. The latter two sets of reports included Kristin P.'s statements to medical personnel that her "boyfriend" had battered her on April 22, 2012.[4] Both the State and Johnson expressed surprise about the existence of medical reports from April 24, 2012, and April 28, 2012, and Johnson moved again for a mistrial. He argued that the State had neither provided him with medical reports from those dates in advance of trial nor advised him that such reports existed. Further, as the State conceded, Johnson had been continuously in custody since April 8, 2012. Therefore, Johnson argued, the reports were exculpatory evidence showing that Kristin P. had falsely accused him. The State responded that it was previously unaware of the reports because Kristin P. had been uncooperative during pretrial proceedings and that it therefore had good cause for failing to produce the reports earlier. The circuit court accepted the State's arguments and denied Johnson's motion for a mistrial.

[4] No medical reports are in the appellate record. Our description of their content is taken from the testimony and discussion about them.

¶8 Stull then testified. He described providing emergency room treatment to Kristin P. on April 7, 2012, and he testified that he diagnosed her with a concussion at that time.

¶9 Stull went on to testify that he treated Kristin P. for pain on April 28, 2012. He stated that, in conjunction with the treatment he provided that day, he reviewed a medical report from her visit to a hospital emergency room on April 24, 2012. The April 24, 2012 report, he said, reflects a statement by Kristin P. to medical personnel that "she had been assaulted by her boyfriend two days prior. He is now in jail." Stull told the jury that Kristin P. made similar statements to him on April 28, 2012. Stull went on to say that the records of Kristin P.'s treatment on April 24, 2012, included a chest x-ray that revealed rib fractures. He acknowledged that he did not diagnose her with rib fractures on April 7, 2012.

¶10 After Stull testified, Kristin P. returned to the witness stand for further examination in light of the newly-discovered medical reports. She denied telling medical personnel that her boyfriend battered her on April 22, 2012, "because it all happened on April 7, 2012."

¶11 Johnson did not call any witnesses. His theory of defense was that Kristin P. lacked credibility and that she had falsely accused him.

¶12 The jury acquitted Johnson of the battery allegedly committed in March 2012, and the jury also acquitted him of the charge of strangulation and suffocation. The jury found him guilty of the remaining four crimes.

¶13 On appeal, Johnson complains that he did not receive timely disclosure of the supplemental report regarding Kristin P.'s statement of April 12, 2012, and that he did not receive timely disclosure of the medical reports from April 24, 2012, and April 28, 2012. Johnson asserts that the circuit court erroneously denied his requests for a mistrial as the remedy for these alleged discovery violations, and he seeks a new trial. We discuss additional facts relevant to our resolution of his claims as necessary.

DISCUSSION

¶14 Johnson alleges that the State failed to comply with its discovery obligations. Pursuant to ***Brady***, the State is required to disclose exculpatory evidence. *See* ***State v. Harris***, 2004 WI 64, ¶12, 272 Wis. 2d 80, 680 N.W.2d 737. The obligation is based on the right to due process at trial, and the obligation exists "although there has been no formal request by the accused." ***Id.***, ¶12 & n.8. The burden to show a ***Brady*** violation rests with the defendant. *See* ***Harris***, 272 Wis. 2d 80, ¶13. To satisfy the burden, a defendant must establish that the evidence at issue is favorable, the State suppressed the evidence, either willfully or inadvertently, and the defense was thereby prejudiced. *See* ***id.***, ¶15.

¶15 The State also has obligations to disclose evidence pursuant to WIS. STAT. § 971.23(1). As relevant here, the State must disclose on demand written or

recorded witness statements, medical reports that it intends to use at trial, and exculpatory evidence. *See* § 971.23(1)(e) & (h).[5]

¶16 We analyze alleged discovery violations in three steps, each of which presents a question of law that we consider *de novo*. ***State v. Rice***, 2008 WI App 10, ¶14, 307 Wis. 2d 335, 743 N.W.2d 517. The first step is to determine whether the State failed to make a disclosure required under WIS. STAT. § 971.23(1). ***Id.*** If we conclude that the State failed to make such a disclosure, the second step is to determine whether the State had "good cause for any failure to disclose." ***Id.*** If the State did not have good cause, "we decide whether admission of the evidence was harmless." *See* ***id.***

¶17 With the foregoing principles and standards of review in mind, we turn to the claims at issue here. We conclude that they earn Johnson no relief.

---

[5] WISCONSIN STAT. § 971.23 provides, in pertinent part:

> **(1)** WHAT A DISTRICT ATTORNEY MUST DISCLOSE TO A DEFENDANT. Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the state:
>
> ....
>
> (e) Any relevant written or recorded statements of a [named] witness ... any reports or statements of experts made in connection with the case ... and the results of any physical or mental examination, scientific test, experiment or comparison that the district attorney intends to offer in evidence at trial.
>
> ....
>
> (h) Any exculpatory evidence.

a. Claimed discovery violations related to Kristin P.'s April 12, 2012 statement.

¶18 The criminal complaint in case No. 2012CF1649, dated April 12, 2012, states, as relevant here:

> I am a city of Milwaukee law enforcement officer and I base this complaint upon the statement of Kristin P.[].... In a charging conference with the Milwaukee County District Attorney's Office [Kristin P.] stated that as of April 12, 2012, she was hospitalized for multiple days and had injuries all over [her] body from the defendant's attack, including two fractured ribs.

The complaint is signed by a police officer and by an assistant district attorney.

¶19 The record is clear that Johnson received a copy of the complaint on April 14, 2012, when he made his initial appearance in case No. 2012CF1649. The record is also clear that Johnson first demanded a supplemental report about Kristin P.'s April 12, 2012 statement on the first day of trial and that the State gave him such a report the next day.

¶20 The circuit court found that the April 12, 2012 statement was exculpatory in light of the inconsistencies between the statement and the information from medical personnel who treated Kristin P. on April 7, 2012. The circuit court concluded, however, that the State timely disclosed Kristin P.'s statement by including it in the complaint. The circuit court therefore rejected Johnson's claim that he was entitled to a mistrial based on an allegedly belated supplemental report about the statement.

¶21 On appeal, Johnson does not dispute the circuit court's conclusion that the substance of Kristin P.'s statement appears in the criminal complaint. Moreover, he does not suggest that anything in the supplemental report is

materially different from or adds to the substance of the statement. Critically, the supplemental report is not in the record. We therefore assume that the document supports the circuit court's ruling. *See* ***State v. Benton***, 2001 WI App 81, ¶10, 243 Wis. 2d 54, 625 N.W.2d 923. Accordingly, Johnson does not carry his burden to show that the State violated its obligations under ***Brady*** to disclose Kristin P.'s statement, because the record demonstrates that the State provided—and thus did not suppress—the evidence. *See* ***Harris***, 272 Wis. 2d 80, ¶¶13, 15.

¶22 We next reject the suggestion that the State failed to comply with its obligations under WIS. STAT. § 971.23(1)(e). That statute requires the State to provide upon demand "any relevant written or recorded statements of a witness." ***Id.*** Section 971.23(1)(e) is not implicated here, however, because nothing in the record supports an inference that Kristin P. wrote or recorded a statement on April 12, 2012. To the contrary, the State explained in open court—and Johnson did not dispute—that Kristin P. made her statement orally during a charging conference that she attended via speakerphone. The supreme court has made clear that § 971.23(1)(e) does not impose an obligation on the State to prepare a written summary of a witness's oral statements. *See* ***State v. Nelis***, 2007 WI 58, ¶37, 300 Wis. 2d 415, 733 N.W.2d 619.

¶23 As to WIS. STAT. § 971.23(1)(h), the State is required under that provision to disclose upon demand "[a]ny exculpatory evidence." *See* ***id.*** As already explained, however, the circuit court found that the State timely disclosed Kristin P.'s exculpatory statement. Further, the circuit court accepted the State's assertion that no additional information about the April 12, 2012 statement exists other than the supplemental report created and promptly disclosed in response to Johnson's demand for such a report on the first day of trial. Johnson points to

nothing in the record that should have led the circuit court to reject the State's contention. Accordingly, the record shows that the State satisfied its discovery obligations under § 971.23(1)(h). *See* ***Nelis***, 300 Wis. 2d 415, ¶37.

b. Claims of discovery violations related to medical reports of April 24, 2012, and April 28, 2012.

¶24 Johnson complains that the State violated its discovery obligations because it first disclosed two sets of medical reports on the third day of trial. As we have noted, the reports are not in the appellate record, so we do not know exactly what they say. The parties do not dispute, however, that the reports document Kristin P.'s medical treatment on April 24, 2012, and April 28, 2012, and show that Kristin P. told medical personnel on those days that her boyfriend injured her on April 22, 2012.

¶25 Johnson was continuously in custody from April 8, 2012, through trial, and the circuit court found that the medical reports of April 24, 2012, and April 28, 2012, could serve to undermine Kristin P.'s credibility and were therefore exculpatory. On appeal, the State concedes that it had an obligation to disclose relevant and exculpatory medical reports. Nonetheless, the timing of the disclosure does not require a new trial here.

¶26 We first conclude that the appellate record does not support a claim that the State violated its obligations under ***Brady***. "***Brady*** does not require pretrial disclosure of exculpatory evidence. ***Brady*** instead requires that the prosecution disclose evidence to the defendant in time for its effective use." ***State v. Harris***, 2008 WI 15, ¶63, 307 Wis. 2d 555, 745 N.W.2d 397 (footnote omitted). Thus, "'for most exculpatory evidence, the prosecution should be able to satisfy its

constitutional obligation by disclosure at trial.'" ***Id.***, ¶63 n.33 (citation and brackets omitted).

¶27 In this case, Johnson received the medical reports in time to use them effectively at trial. During his cross-examination of Stull, Johnson used the reports to show that: (1) Stull did not diagnose Kristin P. with fractured ribs when he treated her on April 7, 2012; (2) the diagnosis of fractured ribs first appears in a medical report created on April 24, 2012; (3) Kristin P. reported to medical personnel on April 24, 2012, that her boyfriend assaulted her "two days ago"; and (4) on April 28, 2012, Kristin P. went to the hospital for follow-up treatment of her rib injuries and told medical personnel that her "boyfriend" struck her "on April 22." Additionally, Kristin P. remained an available witness throughout the trial, and she returned to the witness stand after Stull testified.[6] Johnson therefore was able to cross-examine her about the information she gave medical personnel on April 24, 2012, and April 28, 2012. Finally, at Johnson's request, the circuit court took judicial notice in front of the jury that he remained continuously in custody after April 8, 2012. Because Johnson had the medical reports in time to use them effectively at trial, he shows no violation of his rights under ***Brady***. *See* ***Harris***, 307 Wis. 2d 555, ¶63.

¶28 We turn to Johnson's claim for a new trial on the ground that the State did not disclose the medical reports of April 24, 2012, and April 28, 2012, "within a reasonable time before trial," as required by WIS. STAT. § 971.23(1)(e) and (h). The State argues, as it also argued in circuit court, that the State had good cause for failing to produce the reports before trial and therefore committed no

[6] Kristin P. was in custody at the time of trial.

discovery violation. *See* ***Rice***, 307 Wis. 2d 335, ¶14. Specifically, the State asserts that it did not have the reports, Kristin P. was uncooperative and did not make herself available to sign a medical release, and the State had no knowledge that she went to the hospital for additional treatment two weeks after Johnson was incarcerated. Johnson, citing supreme court authority, responds that "'[t]he test of whether evidence should be disclosed is not whether in fact the prosecutor knows of its existence but, rather, whether by the exercise of due diligence the prosecutor should have discovered it.'" *See* ***State v. Delao***, 2002 WI 49, ¶22, 252 Wis. 2d 289, 643 N.W.2d 480 (citations and brackets omitted).

¶29 We need not resolve whether the State had good cause for the belated disclosure of the medical reports or whether the State exercised due diligence in seeking out evidence, because we conclude that any discovery violation was harmless. *See* ***State v. Hughes***, 2011 WI App 87, ¶14, 334 Wis. 2d 445, 799 N.W.2d 504 (we decide cases on narrowest possible ground). Our supreme court has stated the test for harmless error in several ways. *See* ***Harris***, 307 Wis. 2d 555, ¶42. "[The] standard is whether the State's nondisclosure of the evidence sufficiently undermines the court's confidence in the outcome of the judicial proceeding," and, alternatively, an error is harmless when "it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***Harris***, 307 Wis. 2d 555, ¶¶42-43 (citations and footnotes omitted). We determine whether an error is harmless in light of the totality of the circumstances. *See* ***id.***, ¶48. We agree with the State that the totality of the circumstances here shows that Johnson's delayed receipt of the medical reports from April 24, 2012, and April 28, 2012, was harmless under any formulation of the harmless error test.

¶30 First, as we have discussed, the delayed disclosure of the medical reports did not prevent Johnson from showing that they contained information about injuries, specifically, fractured ribs, that Kristin P. alleged she received from Johnson while he was incarcerated and had no access to her. Thus, notwithstanding the delayed disclosure, Johnson could, and did, use the reports to cross-examine Stull and Kristin P., and Johnson could, and did, use the reports to challenge Kristin P.'s credibility.

¶31 Second, and relatedly, the appellate record and the briefs fail to reveal any way in which the belated disclosure of the medical reports contributed to the guilty verdicts. Although Johnson asserts that "the late disclosure gave him an insufficient amount of time to prepare for examination of [Kristin P.] and Dr. Stull," Johnson offers no hint as to what further preparation would have allowed him to accomplish or how it would have assisted him. Nothing presented to us shows that the delay hobbled the defense or aided the State.

¶32 Third, as the circuit court explained when rejecting Johnson's request for a mistrial, the record contains "plenty of ... evidence" that Johnson caused substantial bodily harm to Kristin P. on April 7, 2012. The evidence included the observations of the police officer who responded to a domestic violence report on April 7, 2012, and discovered Kristin P. with a swollen forehead and "covered in blood" in Johnson's home. The evidence further included testimony about Kristin P.'s contemporaneous statements on April 7, 2012, that "Elan Johnson" caused her injuries. The jury heard Stull's testimony describing the injuries that Kristin P. exhibited upon her arrival in the emergency room on April 7, 2012, including a "concussion injury to the brain," and heard him describe the treatment that she required at that time. Additionally, a police officer

from the fugitive apprehension unit testified that he searched for Johnson at his home on April 8, 2012, and found him in a storage unit "hiding behind a cardboard sheet." *See* ***State v. Knighten***, 212 Wis. 2d 833, 839, 569 N.W.2d 770 (Ct. App. 1997) (evidence of flight or related conduct is circumstantial evidence of guilt).

¶33 Fourth, the circuit court gave a limiting instruction about the elements of substantial battery. *See* WIS. STAT. § 940.19(2). After explaining to the jury that it could not convict Johnson of that crime unless the State proved he caused substantial bodily harm to Kristin P., the circuit court instructed that "'substantial bodily harm' means bodily harm that causes a concussion. The State is not seeking to prove substantial battery by fractured ribs, only by concussion." Moreover, the circuit court prepared a special verdict form specifically providing that any guilty verdict for the charge of substantial battery must be "based on the concussion suffered by Kristin P." *Cf.* ***State v. Miller***, 2002 WI App 197, ¶16, 257 Wis. 2d 124, 650 N.W.2d 850 (form of special verdict rests in circuit court's discretion). Thus, the circuit court instructed the jury in a way that avoided giving the State a benefit from the medical reports of April 24, 2012, and April 28, 2012. We presume that a jury follows instructions. *See* ***State v. LaCount***, 2008 WI 59, ¶23, 310 Wis. 2d 85, 750 N.W.2d 780.

¶34 Finally, no medical reports are in the record. We must assume that whatever is in those missing documents supports the circuit court's conclusion that their belated disclosure did not warrant a mistrial. *See* ***Benton***, 243 Wis. 2d 54, ¶10.

¶35 In sum, the appellate record reflects that the State presented strong and ample evidence that Johnson caused substantial bodily harm to Kristin P. on

April 7, 2012. The record also shows that Johnson had a full opportunity to support his theory of defense with the information in the medical reports of April 24, 2012, and April 28, 2012. The delayed disclosure of those reports does not undermine our confidence in the outcome of the trial; it is clear beyond a reasonable doubt that a rational jury would have convicted Johnson if he had received the reports earlier in the criminal prosecution.[7] We affirm.

By the Court.—Judgments affirmed.

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

[7] Although we do not reverse in this case, we observe that the State should have explored more carefully during pretrial proceedings the extent of the available medical reports and their contents. The significance of medical reports is obvious in a case such as this, where the defendant is charged with a crime that requires proof of causing "substantial bodily harm," and the nature and extent of the victim's injuries are therefore relevant and necessary for proving guilt. The State must assess with some measure of skepticism not only the statements of the accused but also the statements of the accuser, particularly where, as here, the State knows that the accusing witness gave police false information about the most basic of facts—her name—at the outset of the proceedings. A delay in producing medical reports could easily prove prejudicial in a future case. We therefore remind the State that a heavy workload does not justify less-than-meticulous attention to pretrial discovery obligations.