COURT OF APPEALS
DECISION
DATED AND FILED

January 13, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2160 **Cir. Ct. No. 2011FO710**

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

CITY OF WEST ALLIS,

PLAINTIFF-RESPONDENT,

V.

WILLIAM H. MCCARVER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Affirmed.*

¶1 KESSLER, J.[1] William H. McCarver appeals a judgment, following a jury trial, in which McCarver was found guilty of placing food in an

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

area accessible to rats, a violation of WEST ALLIS REVISED MUNICIPAL ORDINANCE § 7.14(3) (2010). We affirm.

BACKGROUND

¶2 This case has a relatively long and confusing procedural history, rife with a multitude of motions. We discuss only the facts relevant to this appeal.

¶3 On August 31, 2010, the City of West Allis (the City) issued McCarver a summons and complaint for violating WEST ALLIS REVISED MUNICIPAL ORDINANCE § 7.14(3), "Elimination of Rat Feeding Places." The complaint alleged that McCarver had violated the ordinance by placing peanuts for squirrels and birds on his front lawn, sidewalk, and the public roadway, in areas accessible to rats, and by failing to remove the accumulated food waste. The ordinance in place at the time of McCarver's citation stated:

> No person, firm or corporation shall place or allow to accumulate, any materials that may serve as food for rats in a site accessible to rats. Any waste materials that may serve as food for rats shall be stored in rat-proof containers. Food for birds shall be placed on raised platforms or such feed shall be placed where it is not accessible to rats. Premises upon which food is provided for birds shall be cleaned at least once during each twenty-four (24) hour period to remove food material which has fallen to the ground. It shall be the responsibility of the occupant or the owner of record to see that the premises are kept free of material which could provide food for rats.

¶4 On March 1, 2011, McCarver was found guilty in Municipal Court of violating WEST ALLIS REVISED MUNICIPAL ORDINANCE § 7.14(3) on twenty days. On March 15, 2011, McCarver appealed the ruling to the circuit court.

¶5 On February 9, 2012, the City asked for an adjournment while the West Allis Common Council considered changes to its municipal code. The City

indicated that if the council changed the ordinance regarding the feeding of wildlife, the City would move to remand and dismiss the complaint against McCarver. McCarver indicated he wished to go to trial. The circuit court adjourned until April 5, 2012.

¶6 On April 5, 2012, the City informed the circuit court that an ordinance had passed prohibiting the feeding of all wildlife, including squirrels, and that the City had conveyed an offer to McCarver to remand and dismiss the citation if McCarver followed the new ordinance, but McCarver refused to agree.[2] The City requested that the circuit court remand the matter back to the municipal court for dismissal and again asked McCarver to follow the new ordinance. The circuit court remanded the case to the municipal court for dismissal, over McCarver's insistence for a jury trial.

¶7 A West Allis Municipal Court record indicates that on August 21, 2012, the City did not move to dismiss the complaint and that McCarver still sought a jury trial. The municipal court record stated that the matter should be reviewed by the circuit court.

¶8 McCarver proceeded *pro se* and filed several motions with the circuit court. At one of the multiple status conferences before the circuit court, prior to the jury trial, the circuit court expressed concern about McCarver's ability to try his case himself when McCarver stated that he was being accused of "felonious crimes." The circuit court stated: "It is very plain to me that there is a

[2] The new ordinance provides: "No person, firm or corporation shall place or allow to accumulate any materials that may serve as food for rats in a site accessible to rats. Any waste materials that may serve as food for rats shall be stored in rat-resistant containers. It shall be the responsibility of the occupant or the owner of record to see that the premises are kept free of material which could provide food for rats." The ordinance at issue in this appeal is cited in paragraph three of this opinion.

substantial chance that… [McCarver] …will mistry [his case] in front of the jury by making statements like, I'm accused of a felony … or say things that will cause prejudice to the City of West Allis." The circuit court also noted that McCarver filed several motions with the circuit court, including a motion to dismiss, and many other motions that McCarver himself was unfamiliar with and unprepared to discuss. McCarver also attempted to present the court with papers detailing his medical conditions, to which the court stated: "Sir, if you aren't capable of trying the case yourself because of your medical condition, I suggest you hire a lawyer to try it for you." The circuit court also informed McCarver that he did not have a constitutional right to a court-appointed attorney in his civil case.

¶9 The circuit court held a hearing on McCarver's motion to dismiss. At that hearing, McCarver insisted that the ordinance was unconstitutionally vague, and argued, among other things, that: (1) he was not feeding rats, nor was there a presence of any rats in his area; (2) he cleaned his property thoroughly; and (3) squirrels get fed inadvertently because McCarver keeps bird feeders in his yard. Therefore, he insisted, he did not violate any ordinance regarding wildlife feeding. The circuit court denied McCarver's motion to dismiss, along with his multiple other motions, stating "I personally think based upon the previous filings that you made here, that you don't know how to conduct a jury trial. I would strongly encourage you to retain counsel, the services of an attorney, to represent you in that jury trial." (Some formatting altered.)

¶10 Eventually, the case proceeded to a jury trial, where McCarver continued to proceed *pro se*. As relevant to this appeal, the City presented the following exhibits:

(a) Exhibit 1: an affidavit from Virginia Stuller, one of McCarver's neighbors, logging all of the times she witnessed McCarver feeding squirrels;

(b) Exhibit 2: an affidavit from Sandra Sutnin, another neighbor, logging all of the times she witnessed McCarver feeding squirrels;

(c) Exhibits 3, 4, 5, and 6: pictures of homes and yards in McCarver's neighborhood; and

(d) Exhibit 9: a video of McCarver allegedly throwing peanuts into his yard.

¶11 Stuller verified the accuracy of the photos in exhibits three through six, and testified that she witnessed McCarver throwing peanuts from his porch onto other porches. Stuller prepared a log of all the times she witnessed McCarver feeding animals. Stuller also stated that McCarver did not clean the debris left on her property. At the close of Stuller's testimony, the City asked to enter Exhibits one, three, four, five and six into evidence. McCarver did not object.

¶12 The City also called Sutnin, McCarver's across-the-street neighbor. Sutnin testified that she witnesses McCarver feed wild animals daily by throwing peanuts that land "on lawns down the block … [and] underneath trees on people's property." Sutnin testified that because of McCarver's feeding habits, squirrels were "running all over the road," leaving peanut and peanut shell debris "all over the place." Sutnin stated that McCarver did not clean up the mess left behind by his feeding activities. Sutnin also verified the authenticity of Exhibit two, her affidavit logging her observations of McCarver's animal-feeding, and Exhibit nine, a video showing McCarver throwing peanuts from his yard. At the end of

Sutnin's testimony, the City moved to admit Exhibits two and nine into evidence. McCarver objected to the video on the grounds that "it shows nothing other than [me] making a throwing motion." The circuit court noted that McCarver's objection was "not grounds," as the jury would decide whether McCarver was actually throwing peanuts.

¶13 McCarver also called multiple witnesses. McCarver's second witness, however, did not appear when called. When no witness came to the stand, the court ordered McCarver to call his next witness. McCarver responded, "Your Honor, I paid and served—[,]" but was cut off by the court's statement that McCarver was responsible for ensuring the appearance of his witnesses. The court ordered McCarver to move on with his case. McCarver continued with his next witness.

¶14 During deliberations, the jury asked to see Exhibits one and two. After denying the request, the City reminded the circuit court that it had introduced the exhibits into evidence and that the court received the exhibits. The circuit court asked whether either party objected to the exhibits going to the jury. Both parties responded "no."

¶15 On June 11, 2013, the jury determined that McCarver violated WEST ALLIS REVISED MUNICIPAL CODE § 7.14(3) on nine separate occasions. On September 10, 2013, the circuit court ordered McCarver to pay a fine of $10.00 for each of the nine counts, plus court costs. This appeal follows.

DISCUSSION

¶16 On appeal, McCarver raises a multitude of issues. McCarver challenges the admission of Exhibits one, two and nine. He also contends that:

(1) the circuit court should have compelled the appearance of two of McCarver's witnesses; (2) the circuit court should have ordered a competency test for McCarver; and (3) the circuit court should have appointed counsel for McCarver. We disagree.

Standard of Review.

¶17 This court's review of a jury verdict is "'severely circumscribed.'" ***Kinship Inspection Serv., Inc. v. Newcomer***, 231 Wis. 2d 559, 566, 605 N.W.2d 579 (Ct. App. 1999) (citation omitted). The court of appeals will "sustain a jury verdict if there is any credible evidence to support it. ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659. The court does not search the record for credible evidence to support a verdict that the jury could have reached but did not. *See* ***Kinship***, 231 Wis. 2d at 566. Evidence will be viewed in the light most favorable to sustain the jury's decision. *See* ***Morden***, 235 Wis. 2d 325, ¶39. The standard of review of a jury's verdict is even more stringent where the circuit court has approved the jury's verdict. ***Id.***, ¶40.

Evidentiary Arguments.

¶18 As to McCarver's contentions that Exhibits one and two should not have been admitted, we conclude that McCarver forfeited the opportunity to challenge those exhibits on appeal because he did not object to their admission at the time of trial. Failure to object normally forfeits a party's right to appellate review. *See* ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612. Contrary to McCarver's implications, it is not the circuit court's responsibility to prompt McCarver to object, as McCarver implies by suggesting that he did not have an opportunity to object. Moreover, the circuit court did specifically ask—twice—whether there were objections to Exhibits one and two. McCarver did not

respond when first asked about Exhibits one and two, and he did not object when the circuit court sent the exhibits to the jury. McCarver cannot now challenge these exhibits on appeal.

¶19 As to the admission of Exhibit nine, we conclude that contrary to McCarver's contention, the video was authenticated and properly admitted. Sutnin testified that she witnessed McCarver's actions on the day the video was recorded and stated that the video was an accurate depiction of what she observed. WISCONSIN STAT. § 909.01 states that "[t]he requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The statute does not suggest that it was necessary for Sutnin to record the video she was authenticating. Exhibit nine was not erroneously admitted.[3]

Alleged Circuit Court Errors.

¶20 McCarver makes several arguments alleging circuit court error, namely that the circuit court should have compelled the appearance of his witnesses, the circuit court should have ordered a competency test, and the circuit court should have appointed counsel for McCarver. We disagree with all of McCarver's contentions.

¶21 As to the two missing witnesses, we conclude that McCarver did not preserve this issue for appeal. When the first missing witness did not appear, the circuit court ordered McCarver to call his next witness. McCarver complied without requesting the court to take action. As to the second witness, the record

[3] McCarver contends also that the City misled the jury about the meaning of the ordinance by presenting the exhibits at issue. The record does not support McCarver's contention that the City misled the jury, nor was the evidence wrongfully admitted.

does not indicate that McCarver even called a second missing witness. We do not consider issues raised for the first time on appeal. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) ("The general rule is that issues not presented to the circuit court will not be considered for the first time on appeal."); *see also* ***Schill v. Wisconsin Rapids Sch. Dist.***, 2010 WI 86, ¶45 & n.21, 327 Wis. 2d 572, 786 N.W.2d 177 (appellate courts generally do not address forfeited issues).

¶22 McCarver also argues that because the circuit court questioned his ability—multiple times—to act as his own counsel, the court should have ordered a competency evaluation. The record does not indicate that the circuit court's concern about McCarver's ability to represent himself stemmed from an unease about McCarver's mental state. Rather, the circuit court's multiple remarks to McCarver about his ability to try his own case stemmed from McCarver's demonstrated lack of knowledge about the legal system, as was evidenced by his statements and his multiple irrelevant filings. Moreover, the record does not indicate that the medical documents McCarver attempted to admit concerned his mental state.

¶23 Finally, McCarver contends that because the circuit court lacked confidence in his ability to try his own case, the court should have appointed counsel for him. The circuit court was under no obligation to appoint counsel for McCarver. Generally, civil litigants are not entitled to the appointment of counsel, unless their freedom is at stake. *See* ***Piper v. Popp***, 167 Wis. 2d 633, 645-46, 482 N.W.2d 353 (1992). McCarver's personal freedom was not at risk—upon a guilty finding the circuit court could only impose forfeiture. Therefore, McCarver was not entitled to court-appointed counsel.

¶24 To the extent McCarver raises issues not addressed by this opinion, we conclude that the record does not support McCarver's arguments and that this opinion resolves all dispositive issues. Accordingly, we affirm the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.