COURT OF APPEALS
DECISION
DATED AND FILED

March 7, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2015AP2154-CR
2015AP2155-CR

Cir. Ct. Nos. 2013CF2723
2013CM2488

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EARNEST LEE NICHOLSON,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed*.

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 KESSLER, J. Earnest Lee Nicholson appeals a judgment of conviction, following a jury trial, of one count of aggravated battery and one count of violating a no-contact order, both as a domestic violence offender and as a

repeater. He also appeals an order denying his motion for postconviction relief. We affirm.

BACKGROUND

¶2 This is a consolidated appeal with a complicated factual background. In November 2011, Nicholson was charged with aggravated battery and resisting an officer in Milwaukee County Circuit Court Case No. 2011CF5715. According to the facts adduced at Nicholson's trial, on November 24, 2011, Milwaukee police officers were dispatched to the home of M.D.F., Nicholson's then-live-in girlfriend, to investigate a battery complaint. When officers arrived at M.D.F.'s home, they found M.D.F. screaming in pain with an eye injury. M.D.F. told officers that Nicholson punched her in the face. Officers searched the neighborhood for Nicholson but could not locate him. Ultimately, M.D.F.'s eye was surgically removed as a result of the injury.

¶3 Later on November 24, 2011, Milwaukee police returned to M.D.F.'s apartment building after receiving a call that Nicholson had returned to the residence. A struggle between Nicholson and the officers ensued. Ultimately, Nicholson was taken into custody and charged with aggravated battery and resisting an officer.

¶4 The matter proceeded to trial where the aggravated battery charge was dismissed without prejudice because M.D.F. failed to appear for trial. A jury found Nicholson guilty of resisting an officer. At sentencing, the sentencing court entered a no-contact order prohibiting Nicholson from having contact with M.D.F. and her son.

Charges Underlying This Appeal

¶5 On June 6, 2013, Milwaukee police responded to a domestic violence complaint at M.D.F's residence. Upon arrival, police observed Nicholson outside of M.D.F.'s apartment. Nicholson was charged with violating the no-contact order in Milwaukee County Circuit Court Case No. 2013CM2488. The aggravated battery charge stemming from the November 24, 2011 incident was also reissued in Milwaukee County Circuit Court Case No. 2013CF2723. The domestic abuse and repeater penalty enhancers were added to the charges in both cases. The cases were joined for trial.

The Trial

¶6 Prior to trial, the State filed a motion to admit statements M.D.F. made to Milwaukee police officers who were dispatched to her residence on November 24, 2011. Specifically, the State sought to admit M.D.F.'s statements to Officer Jeffrey Waldorf, in which M.D.F. told Waldorf that Nicholson choked her and struck her with his fist four to five times. The motion alleged that M.D.F. was screaming in pain as she was talking to Waldorf, had blood streaming down her face and had "some sort of [other] wetness on her right cheek." Nicholson opposed the motion, arguing that the admission of M.D.F's statements violated his right to confront M.D.F. because she was not going to testify at trial. Following a hearing on the motion, the trial court granted the State's motion, finding that M.D.F.'s statements qualified as excited utterances.

¶7 Waldorf testified that at approximately 1:30 a.m. on the morning of November 24, 2011, he responded to a battery complaint at a Milwaukee apartment building. When Waldorf entered the building, he heard a female voice

"screaming" and was directed to the second floor of the unit by downstairs tenants. When Waldorf arrived on the second floor, he saw M.D.F. standing in the doorway of the entrance to her apartment with an obvious eye injury. Waldorf said that M.D.F. "had blood coursing down her face, but at the same time there was blood on her face, there was a trail of clear viscous fluid. She was holding her eye closed, and between her eyelashes, I could see that there was a white, meatlike substance between her eyelashes." Waldorf said that M.D.F. was crying and screaming in pain, but she was able to relay the "basic details" that "her live in boyfriend, Earnest Nicholson, had punched her in the face and choked her."

¶8 Officer Jacob Spano testified that on November 24, 2011, he arrived at M.D.F.'s residence at the same time as Waldorf, but could not locate Nicholson in the thirty to thirty-five minutes that Spano remained on the scene. Spano stated that he was again dispatched to the same apartment building later that morning following a phone call indicating that Nicholson had retuned to the building. Spano testified that when he and his partner located Nicholson and instructed Nicholson to put his hands behind his back because he was under arrest, Nicholson refused, telling the officers: "I ain't going to do shit. You're going to have to turn me around." A struggle ensued between the officers and Nicholson with Nicholson pushing one of the officers onto a dining table. Spano testified that Nicholson kept resisting, prompting Spano to call for backup. Eventually, Nicholson was taken into custody.

¶9 Officer Michael Valuch testified that on June 6, 2013, he was dispatched to M.D.F.'s apartment in response to a domestic violence complaint. Valuch observed Nicholson, M.D.F., and M.D.F.'s children outside of the apartment building. The State then introduced multiple exhibits to show that

Nicholson was subject to a no-contact order at the time Valuch observed him with M.D.F. Specifically, the State introduced: (1) Nicholson's judgment of conviction in case No. 2011CF5715, which states "no contact with victim"; (2) the actual no-contact order; and (3) a letter from Nicholson to the trial court asking the court to lift the no contact order.

¶10 After the State rested, the trial court asked Nicholson if he planned to exercise his right to testify; however, Nicholson did not respond:[1]

> It's the time in the trial where the defense, yourself, the defendant, has to decide whether to produce any evidence in this case. You've heard us explain to the jury that you have no obligation to present any evidence whatsoever, but you have the opportunity to present evidence if you choose to. You may testify in this case or you may remain silent. It's up to you and your choice. Would you like to testify at this time, sir?
>
> You're demonstrating your silence by remaining silent at the moment to my question … [I]f you remain silent - continue to remain silent in the courtroom, I can't - I have to presume that that's what you want to do and you do not want to testify, unless you tell me that you want to testify, sir.

Nicholson did not respond.

¶11 Defense counsel then moved to dismiss the case. The trial court denied the motion and again addressed the question of whether Nicholson would testify:

> Okay. The court does agree that Mr. Nicholson is capable of speaking and listening, … obviously would be available to testify if he chose to testify. He's indicated by his silence -- I gave him the choice of testifying or

[1] As will be discussed later, Nicholson's refusal to answer the trial court's questions about his plans to testify was just one of many instances of Nicholson's defiant behavior towards the end of the trial.

> remaining silent -- and he's made a choice, he's remained silent in this courtroom….
>
> ….
>
> So if I am reading his silence, correctly, and if I'm not please tell me, I am assuming that you do not want to testify, sir. And if I am wrong please speak up and let me know.
>
> He continues to look down and not respond, so I am finding that he is waiving his testimony and his right to testify in this proceeding, and the evidence is closed at this time.

¶12 The trial court continued to give Nicholson additional opportunities to decide whether he wanted to testify. Each exchange with the court resulted in Nicholson evading the court's questions, insisting that he was not represented by counsel, and insisting that he was not waiving his right to testify, despite refusing to answer the court's questions about whether he actually would testify. Ultimately, the court stated: "Now, as I understand it then you're not testifying and we will … bring[] [the jury] down and we'll go into closings."

¶13 The jury found Nicholson guilty of aggravated battery, as charged in case No. 2013CF2723, and of violating a no-contact order, as charged in case No. 2013CM2488.

The Postconviction Motion

¶14 Nicholson filed a postconviction motion for relief, alleging, as relevant to this appeal, that: (1) the no-contact order upon which the charge in case No. 2013CM2488 was premised was void; (2) trial counsel was ineffective for failing to challenge the no-contact order; (3) he was denied his constitutional right to a fair trial because the admission of M.D.F.'s statements to police was not an excited utterance and it violated his right to cross-examine M.D.F.; and (4) he

was denied his constitutional right to testify in his own defense. The postconviction court denied the motion. This appeal follows.

DISCUSSION

¶15 On appeal, Nicholson raises the same issues he raised in his postconviction motion. We address each issue in turn.

The No-Contact Order

¶16 Nicholson contends that the trial court improperly denied his motion to dismiss case No. 2013CM2488 on the grounds that the no-contact order that was imposed in case No. 2011CF5715 was void and that he was denied the effective assistance of counsel. Nicholson argues that the no-contact order was void when imposed because it was based on the sentencing court's finding that M.D.F. was a victim in case No. 2011CF5715 for the purposes of WIS. STAT. § 973.049(1)(b) (2011-12),[2] which allows a court to prohibit contact between a defendant and a victim of a "crime considered at sentencing." Because the aggravated battery charge was dismissed in case No. 2011CF5717 and Nicholson was convicted only of resisting an officer, Nicholson contends M.D.F. was not a victim of a crime considered at sentencing. He contends that his trial counsel was ineffective for not moving to dismiss on the same ground. We disagree.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶17 WISCONSIN STAT. § 973.049(2) (2009-10)[3] allows a sentencing court to place restrictions on a defendant's contact with a victim of a crime considered at sentencing when imposing a sentence. The statute provides:

> When a court imposes a sentence on an individual or places an individual on probation for the conviction of a crime, the court may prohibit the individual from contacting victims of, or co-actors in, a crime considered at sentencing during any part of the individual's sentence or period of probation if the court determines that the prohibition would be in the interest of public protection. For purposes of the prohibition, the court may determine who are the victims of any crime considered at sentencing.

¶18 In ***State v. Campbell***, 2011 WI App 18, 331 Wis. 2d 91, 794 N.W.2d 276, we held that the language in WIS. STAT. § 973.049(2) grants the court discretion to prohibit a defendant from contacting victims of a crime considered at sentencing, as well as to decide who are the victims of a crime considered at sentencing. ***Campbell***, 331 Wis. 2d 91, ¶23. We will uphold a trial court's discretionary decisions as long as the trial court "'examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.'" *See* ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789 (citation omitted).

¶19 We conclude that the sentencing court properly exercised its discretion in determining that M.D.F. was a victim of a crime considered at sentencing. As stated, Nicholson was convicted of resisting an officer. The crime of resisting an officer has four elements: (1) the defendant resisted or obstructed

[3] As Nicholson notes in his brief, WIS. STAT. § 973.049 was amended by 2011 Wis. Act 267. The amended statute provides that a court may order no contact with witnesses of a crime, *see* § 973.049(2), and that a court shall include the prohibition on contact in the judgment of conviction. Sec. 973.049(3). As Nicholson also points out, 2011 Wis. Act 267 took effect on April 24, 2012, after Nicholson was sentenced in case No. 2011CF1575, on April 3, 2012. Therefore, the 2009-10 version of the statute applies in this case.

an officer; (2) the officer was doing an act in an official capacity; (3) the officer was acting with lawful authority; and (4) the defendant knew the officer was acting in an official capacity with lawful authority. *See* WIS JI—CRIMINAL 1765. Here, the officers were acting in an official capacity and within their lawful authority in response to a domestic violence incident in which M.D.F. was severely injured. Nicholson's arrest stemmed from the officers' reasonable belief that Nicholson caused M.D.F. to sustain those severe injuries. Had officers not been responding to an incident in which M.D.F. was obviously seriously hurt, Nicholson would not have been arrested and the resulting resisting an officer charge would not have been issued. Nicholson's resistance to his arrest, as the postconviction court noted, "was part of a larger criminal episode" that resulted in his arrest. Thus, the sentencing court properly exercised its discretion in determining that M.D.F. was a victim of a crime considered at sentencing. Accordingly, the no-contact order was valid. Because the sentencing court properly exercised its discretion and the no-contact order was valid, defense counsel was not ineffective for failing to challenge the validity of the no-contact order. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (counsel is not ineffective for failing to pursue a meritless issue).

M.D.F.'s statements to police

¶20 Nicholson contends that he is entitled to a new trial in case No. 2013CF2723 (aggravated battery) because the trial court erroneously admitted statements M.D.F. made to Waldorf in which M.D.F. told Waldorf that Nicholson choked her and punched her in the face. Nicholson contends that M.D.F.'s statements were not excited utterances, as the trial court found, and that the

admission of the statements violated his right to confront M.D.F. pursuant to ***Crawford v. Washington***, 541 U.S. 36 (2004).

¶21 Both the "United States and Wisconsin Constitutions guarantee criminal defendants the right to confront the witnesses against them." ***State v. Hale***, 2005 WI 7, ¶43, 277 Wis. 2d 593, 691 N.W.2d 637. The Confrontation Clause "bars 'admission of testimonial statements of a witness who did not appear at trial unless he [or she] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" ***Davis v. Washington***, 547 U.S. 813, 821 (2006) (quoting ***Crawford***, 541 U.S. at 53-54).

¶22 The threshold question when determining whether evidence violates a defendant's confrontation right is whether the evidence is admissible under the rules of evidence. ***State v. Lenarchick***, 74 Wis. 2d 425, 433, 247 N.W.2d 80 (1976). If the evidence is inadmissible under the rules of evidence, our analysis ends. If the evidence is admissible, we next examine whether admitting the statements violated the defendant's right to confront his or her accusers. *See* ***State v. Savanh***, 2005 WI App 245, ¶13, 287 Wis. 2d 876, 707 N.W.2d 549.

¶23 We agree with the trial court that M.D.F.'s statements to Waldorf fall under the excited utterance exception to the hearsay rule. An excited utterance is a "statement relating to a startling event ... made while the declarant was under the stress of excitement caused by the event...." WIS. STAT. § 908.03(2). A statement qualifies as an excited utterance if it meets three requirements. ***State v. Huntington***, 216 Wis. 2d 671, 682, 575 N.W.2d 268 (1998). "First, there must be a 'startling event or condition.'" ***Id.*** (citation omitted). Next, the out-of-court statement must relate to the startling event or condition. ***Id.*** Finally, the

"statement must be made while the declarant is still 'under the stress of excitement caused by the event or condition.'" ***Id.*** (citation omitted); *see also* § 908.03(2).

¶24 Timing is a key consideration of the excited-utterance exception. "'The excited utterance exception ... is based upon spontaneity and stress' which, like the bases for all exceptions to the hearsay rule, 'endow such statements with sufficient trustworthiness to overcome the reasons for exclusion of hearsay.'" ***Huntington***, 216 Wis. 2d at 681-82 (citation omitted; ellipsis in ***Huntington***). The interval between the startling event and the utterance is key, and "time is measured by the duration of the condition of excitement rather than mere time lapse from the event or condition described." ***Christensen v. Economy Fire & Cas. Co.***, 77 Wis. 2d 50, 57, 252 N.W.2d 81 (1977). "The significant factor is the stress or nervous shock acting on the declarant at the time of the statement." ***Id.*** at 57-58. "The statements of a declarant who demonstrates the opportunity and capacity to review the [event] and to calculate the effect of his [or her] statements do not qualify as excited utterances." ***Id.*** at 58.

¶25 Here, M.D.F.'s statements that Nicholson choked and punched her in the face were made to Waldorf during an obvious medical emergency—M.D.F. was literally holding her eye in place as blood and fluids ran down her face. Waldorf testified that M.D.F. was screaming in pain and could only provide the "basic details" of the incident leading to her injury—namely, that Nicholson was responsible. Clearly, M.D.F.'s statements to Waldorf were made in response to a "startling event" (having her eye punched out), were related to that startling event, and were made while she was still under "the stress of excitement caused by the event," as she was literally holding her eye in place. *See* WIS. STAT. § 908.03(2).

In short, the trial court did not erroneously exercise its discretion in admitting M.D.F.'s statements to Waldorf.

¶26 Because we conclude that M.D.F.'s statements were admissible as excited utterances, our next step is to examine whether admission of the statements violated Nicholson's right to confront his accuser. *See* ***State v. Tomlinson***, 2002 WI 91, ¶41, 254 Wis. 2d 502, 648 N.W.2d 367. Whether admission of hearsay evidence violates a defendant's right to confrontation presents a question of law we review *de novo*. *See* ***State v. Weed***, 2003 WI 85, ¶10, 263 Wis. 2d 434, 666 N.W.2d 485.

¶27 In ***Crawford***, the United States Supreme Court held that a defendant's confrontation rights are violated if the trial court received evidence of out-of-court statements by someone who does not testify at trial if those statements are "testimonial" and the defendant had no prior opportunity to cross-examine the witness. ***Id.***, 541 U.S. at 51. "Statements are non[-]testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." ***Davis***, 547 U.S. at 822 (footnote omitted). "Insofar as a victim's excited utterances to a responding law-enforcement officer encompass injuries for which treatment may be necessary, or reveal who inflicted those injuries, which may facilitate apprehension of the offender, they serve societal goals other than adducing evidence for later use at trial." ***State v. Rodriguez***, 2006 WI App 163, ¶23, 295 Wis. 2d 801, 722 N.W.2d 136.

¶28 The record demonstrates that M.D.F.'s statements to Waldorf were made amidst an ongoing medical emergency and were intended to "enable police assistance to meet an ongoing emergency"; as such, they are not testimonial. *See* ***Davis***, 547 U.S. at 822. M.D.F. received medical treatment following her statement to Waldorf. As we detailed above, M.D.F. was highly emotional, in tremendous pain, bleeding, and attempting to hold her eye in place. The tone and content of the statements makes it clear that M.D.F. was seeking police and medical assistance when the statements were made. As such, the statements were not testimonial and Nicholson's confrontation rights were not violated.

Nicholson's Right to Testify

¶29 Finally, Nicholson contends that he was denied his constitutional right to testify in his own defense. While Nicholson acknowledged that the trial court conducted a colloquy with him, he contends that "[t]here was no distinct conclusion to that colloquy," and that "[t]he record is devoid of evidence that he had waived the right to testify." He asserts that "[h]e should have been allowed to testify and the total denial of that right violated his right to a fair trial."

¶30 A defendant's right to testify on his own behalf in defense of a criminal charge is a fundamental constitutional right. ***Rock v. Arkansas***, 483 U.S. 44, 53 n.10 (1987). A trial court's findings of historical fact relevant to whether a violation of a constitutional right has occurred will not be overturned unless they are clearly erroneous. ***State v. Landrum***, 191 Wis. 2d 107, 113-14, 528 N.W.2d 36 (Ct. App. 1995). Application of constitutional principles to the facts of a case is subject to *de novo* review. ***Id.*** at 114. A criminal defendant may forfeit his right to testify by exhibiting behavior '"incompatible with the assertion of [that]

right.'" ***State v. Anthony***, 2015 WI 20, ¶55, 361 Wis. 2d 116, 860 N.W.2d 10 (citation omitted).[4]

¶31 Here, the trial court engaged in multiple colloquies with Nicholson in which the court explained Nicholson's right to testify and asked whether he wanted to testify. Nicholson refused to respond to the court's questions, meeting the court's questions either with silence or with his insistence that he fired his counsel. Each time the court asked Nicholson whether he wished to testify, Nicholson refused to answer. Nicholson's refusal was just one of many instances of his disruptive behavior. Prior to the court's multiple colloquies, Nicholson interrupted a State's witness and insisted to the court that he was not represented by counsel, despite defense counsel's presence next to him. When the court attempted to gauge Nicholson's intent to testify, Nicholson continued to insist that he was unrepresented and refused to answer the court's questions. After at least four attempts to clarify Nicholson's intent, the court ultimately determined that Nicholson forfeited his right to testify in his own defense. Nicholson's behavior was incompatible with his supposed desire to testify in his own defense. Accordingly, we conclude that the trial court did not err when it determined that Nicholson forfeited his right to testify.

[4] Although the trial court found that Nicholson *waived* his right to testify, we conclude that Anthony actually *forfeited* that right. "'We have recognized two distinct ways in which a defendant may give up his rights: waiver and forfeiture.'" ***State v. Anthony***, 2015 WI 20, ¶54, 361 Wis. 2d 116, 860 N.W.2d 10 (citation omitted). While waiver "is the intentional relinquishment or abandonment of a known right," it "typically applies to those rights so important to the administration of a fair trial that mere inaction on the part of a litigant is not sufficient to demonstrate that the party intended to forgo the right." ***Id.*** (citations and quotation marks omitted). Forfeiture, however, involves "the failure to make the timely assertion of a right." ***Id.*** (citation and quotation marks omitted). A party can forfeit a right by "doing something incompatible with the assertion of a right." ***Id.*** (citation and quotation marks omitted). Such was the case here.

¶32 For the foregoing reasons, we affirm the trial court.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.