



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III/IV

March 10, 2016

To:

Hon. John P. Anderson
Circuit Court Judge
Bayfield County Courthouse
117 East 5th Street
Washburn, WI 54891

Kerrie Ferrando
Clerk of Circuit Court
Ashland County Courthouse
201 West Main Street
Ashland, WI 54806-1688

Sarah K. Larson
Assistant Attorney General
P. O. Box 7857
Madison, WI 53707-7857

Kelly J. McKnight
District Attorney
201 W. Main Street, Room 102
Ashland, WI 54806-1660

Dennis Schertz
Schertz Law Office
P.O. Box 133
Hudson, WI 54016

You are hereby notified that the Court has entered the following opinion and order:

2015AP319-CR

State of Wisconsin v. Sylvester J. Works (L.C. # 2012CF46)

Before Kloppenburg, P.J., Lundsten and Higginbotham, JJ.

Sylvester J. Works appeals from a judgment of conviction of attempted first-degree intentional homicide, and from an order denying his postconviction motion for resentencing. He argues that he was sentenced on the basis of inaccurate information about whether his seventeen-month old child witnessed the crime and that the provision that he have no contact with his child in the judgment should be vacated. Based upon our review of the briefs and record, we conclude

at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).¹ We affirm the judgment and order.

Works assaulted the mother of his child in the kitchen of her home while the seventeen-month-old child was on the couch in the living room. Works beat the mother and cut her with a saw; he told her he was going to kill her and he cut her on her hand, a wrist, and neck. The mother told police that when she heard her child crying for her, she yelled to the child to stay on the couch and wait for her on the couch. The mother managed to get outside of the home where the assault continued. When the police entered the home they found blood all over the kitchen. The child was found in a bedroom crying and there was vomit on the child's clothing.

Works entered a guilty plea to the attempted homicide charge. Four other charges, including a charge of exposing a child to harmful material, were dismissed and read in. At sentencing, the prosecutor described the assault as "committed in the presence of their child," and that the mother "heard the child screaming, the child was there." The mother at sentencing stated that Works "did it in front of my child," and that she heard her son crying. The sentencing court found the offense extremely aggravated because Works tried to "dismember the [mother] while she was alive ... in front of a seventeen-month old child." The court found that the child is a victim of the crime and ordered Works to have no contact with the child. Works was sentenced to thirty years' initial confinement and twenty years' extended supervision.

Works first argues that the sentencing court erroneously exercised its discretion in determining that the child is a victim of the attempted homicide and, for that reason, ordered no

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

contact with the child. *See State v. Campbell*, 2011 WI App 18, ¶23, 331 Wis. 2d 91, 794 N.W.2d 276 (the sentencing court has discretion to determine who is a victim of a crime considered at sentencing). Works acknowledges that the sentencing court may prohibit contact with a person who witnessed the crime. *See id.*, ¶26; WIS. STAT. § 973.049(2). He contends there was no proof that the child saw the assault in the kitchen.

Works' "victim" argument is premised on the false notion that a witness to a crime can only be a person who sees the crime. However, "witness" is defined in general usage as "one who has seen *or heard* something." THE AMERICAN HERITAGE DICTIONARY, 1471 (New College ed. 1980) (emphasis added).

To the extent Works suggests that the child did not hear anything that would have suggested the attempted homicide was taking place, the argument is meritless. The postconviction court found that the child was in near proximity to where the attack occurred and perceived its violence and viciousness. The court's finding is not clearly erroneous. *See* WIS. STAT. § 805.17(2). Works admitted at the postconviction hearing that during the attack in the kitchen "there was noise," including yelling and "struggling." The mother reported that during the attack she heard the child cry out "No[,] daddy, no! Mamma, Mamma!" There can be no doubt that the child heard the crime taking place and in that respect was a witness to the crime. It was a proper exercise of discretion for the sentencing court to order no contact with the child.

Works argues that the sentencing court relied on inaccurate information because the court assumed the child actually saw the assault in the kitchen. To establish that a defendant's due process right to be sentenced based upon accurate and valid information has been violated, the defendant must show both that the information was inaccurate and that the court actually relied

on the inaccurate information in the sentencing. *State v. Tiepelman*, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. If those showings are made, the State’s burden is then to show that the inaccuracy was harmless. *Id.* If there is no reasonable probability that the inaccurate information contributed to the outcome, reliance on inaccurate information at sentencing is harmless error. *State v. Payette*, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423.

Here we assume without deciding that Works met his burden of proof that it was inaccurate that the child saw the assault and that the sentencing court relied on that inaccuracy.² However, the error was harmless.

At sentencing the court described the crime as “an act of such viciousness that even to say it shocks the conscience of the community would undermine what really happened.” The court indicated that the nature of the crime warranted the maximum penalty but for a few mitigating circumstances. The sentence was driven by the viciousness of Works’ attack as aggravated by the use of a saw. There is no reasonable probability that the inaccurate information contributed to the length of the sentence.

Works asserts that the inaccurate information cannot be harmless because it resulted in the provision that he not have contact with the child. However, the no-contact order was plainly a proper exercise of discretion, regardless whether the child was in the same room or the next room.

Upon the foregoing reasons,

² At the postconviction hearing, the court found that “[w]e will never know what the child saw, or did not see.”

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS.
STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals