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May 19, 2020

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

2019AP290-CR

State of Wisconsin v. Tony Tran (L.C. # 2015CF4012)

Before Brash, P.J., Dugan and Donald, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Tony Tran appeals from a judgment, entered on a jury's verdicts, convicting him of two offenses. Tran also appeals from an order denying his postconviction motion without a hearing. 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 (2017-18).¹ The judgment and order are summarily affirmed.

In September 2015, the State charged Tran with one count of first-degree sexual assault with a dangerous weapon and one count of armed robbery with the use of force against J.V.H.² J.V.H. told police that she had been walking down the street when a man driving a black Chevrolet Impala stopped and offered her a ride. She accepted and when she got into the car, the man put a box cutter to her neck. He drove into an alley, forced her to remove her jeans and underwear, and then forced penis-to-vagina intercourse at knifepoint. Before letting her go, the man kept her purse and cell phone. J.V.H. left the car with only her shirt and sweater but managed to grab her jeans before the car drove off. She ran toward the street, saw a friend, and used his phone to call 911.

J.V.H. had provided a possible license plate number—906-GXR or 609-GXE—for the Impala, so police saturated the area. Officer Kenneth Justus stopped a black Impala with license plate number 906-JXE. The driver, later identified as Tran, was detained, and J.V.H. later identified him in a photo lineup.

Tran was charged as described, and the case was tried to a jury. At trial, J.V.H. testified that she was out walking after fighting with her boyfriend, Devin Buford, when Tran pulled up.

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

² Tran was also charged with, but acquitted of, one count of attempted first-degree sexual assault with a dangerous weapon and one count of armed robbery with the use of force against A.D.M. The sole issue on appeal does not relate to the counts involving A.D.M., so we do not discuss those charges further.

J.V.H. further testified that, after she was able to flee Tran's car, she walked to the nearest gas station and called Buford, and they contacted police.

Tran testified that he was out looking for a prostitute and J.V.H. signaled to him to stop. He told her that he only had twenty dollars. She said that she usually did not accept less than forty dollars but would make an exception. They then had consensual intercourse. When Tran went to pay, J.V.H. discovered he had more than twenty dollars and became angry. J.V.H. demanded more money and threatened to call her guy around the corner. Her phone lit up; Tran attempted to grab it and it fell to the center console. Tran armed himself with his box cutter and told J.V.H. to get out of the car. She got out of the car, and he drove away.

As part of the investigation, the police had accessed J.V.H.'s phone, and the jury heard that her phone contained text messages, sent to a contact identified as D.B., that said: "in a car wit a trick. How much?" and "\$40 head dun." Detectives testified that these messages were "indicative of prostitution activity" and that the area in question was a high prostitution area. J.V.H. denied that she had engaged Tran as a prostitute.

Officer Justus, who performed the traffic stop, was called by the State. On cross-examination, defense counsel asked Justus about his training and handling of prostitution investigations; this training included attending seminars and conferences and investigating "four or five" human trafficking cases. Defense counsel next asked Justus, "Does the name Devin Buford mean anything to you?" Justus answered affirmatively. Defense counsel then asked, "How do you know the name Devin Buford?" The State objected to this question. The trial court held a sidebar, after which it sustained the State's objection. After Justus's testimony

concluded, the jury was excused and the trial court made a further record, which we will discuss in greater detail below.

The jury convicted Tran. He was sentenced to thirty years' imprisonment on each charge, to be served concurrent with each other but consecutive to any other sentence. Tran filed a postconviction motion in which he alleged a speedy trial violation and plain error from the State's cross-examination of him. The trial court denied the motion, and Tran appeals.

While the notice of appeal indicates that Tran challenges both the judgment of conviction and the order denying postconviction relief, Tran has not renewed the two postconviction issues on appeal. We therefore consider those issues abandoned and we address them no further. *See Reiman Assocs., Inc. v. R/A Advert., Inc.*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not briefed are deemed abandoned). The sole issue on appeal is whether the trial court erred in sustaining the State's objection and excluding Justus's answer to the defense question, "How do you know the name Devin Buford?"

"The exclusion of evidence is subject to the [trial] court's discretion." *State v. Sarfraz*, 2014 WI 78, ¶35, 356 Wis. 2d 460, 851 N.W.2d 235. In reviewing evidentiary issues, the inquiry is not whether this court would have admitted the evidence in question but whether the trial court properly exercised its discretion in accord with accepted legal standards and the facts of record. *See State v. Hunt*, 2003 WI 81, ¶42, 263 Wis. 2d 1, 666 N.W.2d 771.

Tran's theory behind asking Justus about Buford, as paraphrased by the trial court, was that "Buford is a pimp and that [J.V.H.] is one of his prostitutes," which the defense claimed to know because Buford "pays her bills and things like that." The trial court rejected this particular reasoning, explaining it "would mean that any married couple where the wife is a stay-at-home

mom is therefore a prostitute. So that logic doesn't flow." The trial court did, however, ask Justus some questions "to preserve for the record the testimony about Mr. Buford[.]"

The trial court inquired, "So [O]fficer Justus, are you familiar with Devin Buford?" Justus recounted that defense counsel had asked if the name meant anything to him, and Justus explained that he "said yes because I heard the name before, but I don't specifically know anything about Devin Buford." Justus also said that Buford's name did not come up in prostitution investigations "as much as other names"; he had "heard the name before in those circles ... but nothing specifically in regards to human trafficking or just like that. He's somebody that's around."

The trial court then asked Justus about conducting field interviews in anti-prostitution investigations. Justus explained, by way of responding to the court's questions, that he sometimes "will hear different names of people that the person to whom [he is] speaking to believes may be involved in prostitution," but these may be the names of prostitutes, customers, or pimps, and this information varies in reliability from "good quality" to "just wrong." Beyond hearing Buford's name "more than once" during his investigations, though, Justus had no other information about Buford.

The trial court then proceeded to determine whether Justus's knowledge of Buford should be admitted. Generally, all relevant evidence is admissible. *See* WIS. STAT. § 904.02. "Evidence is relevant if it has any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence." *See State v. Burton*, 2007 WI App 237, ¶13, 306 Wis. 2d 403, 743 N.W.2d 152; WIS. STAT. § 904.01. Although evidence may be relevant, it nonetheless "may be excluded if its

probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]” See WIS. STAT. § 904.03; *Burton*, 306 Wis. 2d 403, ¶13.

The trial court first determined that the fact that Buford’s name came up in prostitution investigations was “barely relevant, but it is relevant.” It explained:

If Mr. Buford is a pimp, there is an inference that [J.V.H.] was one of his prostitutes and then there is an inference that this particular contact was an act of prostitution. So information that tends to make it more likely that Mr. Buford is a pimp is indeed relevant to that chain of logic and it does make the fact that it could be consensual more likely.

However, the trial court noted that the evidence’s probative value was low because there were “three or four steps in logic,” each of which reduced the evidence’s probative value, and because “the information that Officer Justus has is of the most speculative type.” The record reflects that Justus could not recall when, how often, from whom, or in what context Buford’s name had come up during his investigations.

The trial court went on to explain that the low probative value of Justus’s testimony was “substantially outweighed by the risk of confusion of the issues and the possibility of misleading the jury” by shifting the focus “away from the defendant and away from the victim and ... onto Mr. Buford and what information can be ferreted out about [him.]” Thus, the trial court upheld its sidebar ruling sustaining the State’s objection and excluding Justus’s answer.

On appeal, Tran asserts that the trial court erred in its ruling because Justus’s testimony was “admissible to the assessment of J.V.H.’s credibility.” He contends that there was no danger of misleading the jury—it already knew Buford’s name and that prostitution was part of the

case—but rather, the evidence “sheds light on the conflicting stories before the jury because the evidence is additional evidence that supports [Tran’s] defense.”³

The trial court acknowledged the relevance of Justus’s testimony to Tran’s case, but concluded that it was not sufficiently probative given other considerations. Considering the dubious basis on which defense counsel claimed to know Buford was a pimp and that Justus’s “evidence” was simply hearing Buford’s name more than once, the trial court was understandably concerned about the danger of misleading the jury and shifting its focus.⁴ The trial court appropriately applied accepted legal standards to the facts of record, and we cannot

³ Tran thus attempts to analogize his case to that of *State v. Missouri*, 2006 WI App 74, 291 Wis. 2d 466, 714 N.W.2d 595, where we concluded that the trial court had erroneously excluded evidence going to a witness’s credibility. *Missouri* involved the admission of other acts evidence against the witness whose credibility was to be challenged, see *id.*, ¶1, but Tran was not seeking to admit evidence that directly impugned J.V.H.’s credibility. Instead, he wanted to admit evidence against a third party, from which the jury was to draw a conclusion about that party, and then draw another conclusion about J.V.H. that Tran hoped would undermine her credibility. *Missouri* is, therefore, distinguishable.

⁴ The State also argues that Justus’s testimony, about information he had heard from others, would have been inadmissible hearsay testimony. See WIS. STAT. §§ 908.01(3), 908.02. Tran complains that the State did not make a hearsay objection in the trial court. However, a respondent may advance any argument that would allow us to sustain the trial court’s ruling. See *State v. Darcy N.K.*, 218 Wis. 2d 640, 651, 581 N.W.2d 567 (Ct. App. 1998). We agree with the State’s assessment that Justus’s testimony about what people said to him about Buford also would have been inadmissible hearsay.

In his reply brief, Tran counters that, even if it were hearsay, Justus’s testimony was admissible as expert testimony under WIS. STAT. § 907.02 because Justus “was asked his opinion, based upon his training and experience, of whether Devin Buford was involved in prostitution,” and expert testimony may be based on hearsay. See WIS. STAT. § 907.03; *State v. Weber*, 174 Wis. 2d 98, 106-07, 496 N.W.2d 762 (Ct. App. 1993).

This “expert witness” argument is raised for the first time in the reply brief, so we need not consider it. See *Northwest Wholesale Lumber, Inc. v. Anderson*, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995). However, assuming without deciding that there was sufficient foundation to establish Justus as an expert in prostitution investigations, an expert’s testimony must be based on “sufficient facts or data” and must be “the product of reliable principles and methods” applied “reliably to the facts of the case.” See WIS. STAT. § 907.02(1). Justus might have general experience with conducting prostitution investigations, but he admitted having almost no facts or data about Buford’s involvement in prostitution beyond the mere mention of his name, making any specific opinion about Buford inherently unreliable and, thus, inadmissible.

say the trial court's ruling was "a decision that no reasonable judge could make." *See State v. Payano*, 2009 WI 86, ¶52, 320 Wis. 2d 348, 768 N.W.2d 832.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals