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DISTRICT II

September 23, 2020

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

2019AP1178-CR State of Wisconsin v. Christopher S. Brown (L.C. #2014CF470)

Before Reilly, P.J., Gundrum and Davis, 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).

Christopher S. Brown appeals from a judgment convicting him of second-degree reckless homicide and second-degree recklessly endangering safety, both with use of a dangerous weapon. He contends that the circuit court erroneously admitted hearsay testimony in violation of his constitutional right to confrontation. 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] We affirm.

On the night of March 28-29, 2014, a street fight broke out between two groups of people in Racine. One group consisted of Anthony Boudreaux (Anthony), Santos Boudreaux (Santos), Mauricio Gomez, Gregory Tirado, and Brown. The other group consisted of Dulonden Ratliff, his sister V.V., and his friend D.L. During the fight, Ratliff was killed. The State accused Brown of fatally shooting Ratliff while V.V. stood next to him.

The matter proceeded to trial. There, the jury heard from multiple witnesses including Anthony. Anthony recounted the moments leading up to the fight, the sound/smell of a gun being fired, and the chaotic aftermath in which he, Santos, Gomez, and Tirado "took off" running to Santos' apartment three to four blocks away. By then, Brown was no longer with the group, as he had fled in a different direction.

Anthony acknowledged that "everybody" in Santos' apartment was "kind of surprised" and "kind of shocked" because everything "had happened so fast." When asked by the prosecutor whether anyone made statements about what just occurred while "in this mindset," Anthony replied, "Yeah." Defense counsel objected on the ground of hearsay, and the circuit court overruled the objection, citing the excited utterance exception. Anthony then explained that Tirado, who did not testify at trial, "made a statement about what had happened": "that Chris shot that guy."

[1] All references to the Wisconsin Statutes are to the 2017-18 version.

On the basis of this and other evidence, the jury convicted Brown of second-degree reckless homicide and second-degree recklessly endangering safety, both with use of a dangerous weapon. The circuit court sentenced him to a total of thirty years of initial confinement and fifteen years of extended supervision. Brown now appeals, arguing that the circuit court erroneously admitted the hearsay testimony in violation of his constitutional right to confrontation.

A circuit court's decision to admit evidence is discretionary and reviewed under the erroneous exercise of discretion standard. ***State v. Reinwand***, 2019 WI 25, ¶17, 385 Wis. 2d 700, 924 N.W.2d 184. Whether such evidence violates a defendant's constitutional right to confrontation, meanwhile, presents a question of law that we review independently. ***Id.*** The erroneous admission of evidence and the violation of the right to confrontation are both subject to harmless error analysis. *See* ***State v. Britt***, 203 Wis. 2d 25, 41, 553 N.W.2d 528 (Ct. App. 1996); ***State v. Williams***, 2002 WI 118, ¶2, 256 Wis. 2d 56, 652 N.W.2d 391.

Here, we are satisfied that the circuit court properly exercised its discretion to admit Tirado's statement under the excited utterance exception to the hearsay rule. WISCONSIN STAT. § 908.03(2) defines an excited utterance as a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." As recounted by Anthony, Tirado's statement falls squarely within this definition. The statement related to a startling event (i.e., the shooting) and was made while Tirado and three others were still in the mindset of surprise and shock. The fact that it occurred shortly after the shooting does not alter our conclusion. *See* ***Phifer v. State***, 64 Wis. 2d 24, 36, 218 N.W.2d 354 (1974) (holding that a hearsay statement identifying a shooter ten to fifteen minutes after the shooting occurred was admissible as an excited utterance).

Likewise, we are satisfied that the admission of Tirado's statement did not violate Brown's constitutional right to confrontation. As a threshold matter, Brown forfeited this issue by failing to raise it in the circuit court. *See* ***State v. Nelson***, 138 Wis. 2d 418, 439, 406 N.W.2d 385 (1987). In any event, the right to confrontation applies only to statements that are testimonial in nature. ***Reinwand***, 385 Wis. 2d 700, ¶22. In this case, Tirado's statement was nontestimonial in nature, as it was part of a private conversation among a group of friends and its primary purpose was not to create a substitute for trial testimony. *See* ***id.***, ¶24. Consequently, the right to confrontation was not implicated.[2]

Finally, even if the circuit court erred in admitting Tirado's statement, we conclude that the error was harmless. The case against Brown was strong. Multiple eyewitnesses placed him at the scene of the fight, and one eyewitness observed a person matching his description running away with a gun in his hand. During a police interview, Brown admitted that he was given the gun used in the shooting and that, during the altercation, he fired it into the air. Brown also acknowledged running from the scene and disposing of the gun, which was later found dismantled in a park. Additionally, two inmates testified that Brown confessed to the shooting. Another man testified that he received a letter from Brown and turned it over to police, in which Brown made inculpatory statements such as, "I smoked his ass because he was a King" and

[2] Citing the cases ***State v. Manuel***, 2005 WI 75, 281 Wis. 2d 554, 697 N.W.2d 811 and ***State v. King***, 2005 WI App 224, 287 Wis. 2d 756, 706 N.W.2d 181, Brown asserts that the right to confrontation can be violated by the admission of a nontestimonial statement. We agree with the State that such cases have been abrogated by the Supreme Court's subsequent clarification in ***Giles v. California***, 554 U.S. 353, 376 (2008) that "only testimonial statements are excluded by the Confrontation Clause." *See also* ***State v. Jensen***, 2011 WI App 3, ¶26, 331 Wis. 2d 440, 794 N.W.2d 482 (recognizing that adherence to ***Giles*** is required on matters of confrontation law even when faced with a conflicting state court decision).

indicating that he was trying to "blame it all" on Tirado. Given such evidence, Brown would still have been convicted absent Tirado's statement.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to 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