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DISTRICT II

March 10, 2021

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

2020AP764-CR State of Wisconsin v. Matthew Robert Watts (L.C. #2018CF565)

Before Neubauer, C.J., Reilly, P.J., and Davis, J.

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).

Matthew Robert Watts appeals from a judgment of conviction entered after a jury trial for three domestic abuse charges, as a repeater. Watts claims that the circuit court improperly admitted

statements made by the victim, Tammy,[1] when she did not appear at his trial, in violation of his 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. We reject Watts' challenge, as the circuit court properly determined that Watts forfeited his confrontation rights by wrongdoing, and thus, we affirm.

As pertinent to this appeal, the State charged Watts with misdemeanor battery, disorderly conduct, and strangulation and suffocation. All were charged as domestic abuse, as a repeater. The complaint alleged that on May 8, 2018, police went to Tammy's house in response to her 911 call. Tammy informed police that Watts "charged at [her], picked her up by the waist, and [drove] her back into a wooden chair in the bedroom." Watts grabbed Tammy by the throat, such that she was unable to yell for help. Tammy freed herself, but Watts then tried to choke her a second time. Tammy was able to free herself again. Watts tackled Tammy again, positioning her "in a way that her face was in the corner of the couch cushions and it became difficult for her to breathe." Tammy repositioned herself, but Watts choked her again, telling her, "If I didn't love you I would kill you."

Tammy told the police that she "did not wish to provide a written statement or have their conversation recorded because the previous time [Watts] was arrested for domestic violence, he requested her statements through the court discovery process and retaliated against her for having him arrested and she believed he would do the same this time."

[1] In accordance with WIS. STAT. RULE 809.86 (2017-18), we protect the privacy of crime victims by avoiding use of their full names. We use a pseudonym here to identify the victim. All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

On the first day of trial, Tammy was at the courthouse. Three witnesses testified about incidents involving Watts in which he engaged in physically abusive behavior. When the State sought to call Tammy, she could not be located.[2] The court issued a material witness warrant.

On the second day of trial, Tammy did not appear. Police were not able to locate her. The State moved to admit the statements that she made to law enforcement under the forfeiture by wrongdoing doctrine. The State argued that Watts forfeited his right to confront this witness, because he intentionally encouraged Tammy to evade appearance. The State played a five-minute jail call that Watts made to Tammy after the first day of trial. The call was made under someone other than Watts' account.

At the onset of the call, Watts told Tammy to go "by Eva" or to "Ola's house." He told Tammy that there was a warrant for her to appear but said that it would "go away" after the charges were dismissed the next day. Tammy expressed concern over being charged with a felony if she testified she could not remember the incident, which she intended to do, even if she did remember.[3]

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[2] The State submitted an affidavit from the Family Violence Specialist with the Victim Witness Office in the district attorney's office who stated that she spoke to Tammy the first day of trial, explaining that she needed to return after lunch, which Tammy did, but that Tammy then left shortly after the specialist emphasized the importance of telling the truth. Tammy's departure was captured on camera.

[3] Key portions of the call, after the operator advised that the call was subject to recording and monitoring, and Watts and Tammy said hello, include:

> MR. WATTS: You should go by Eva or go by Ola's [ph] house.
>
> [TAMMY]: Is there a warrant out?
>
> ….
>
> MR. WATTS: Yep.
>
> [TAMMY]: Ugh.

Watts again advised Tammy to go to "Ola's," assured her that she would not suffer legal consequences, and said he would see her at home soon. Watts also advised that if he took a plea, he would be subject to four years in prison.

The circuit court determined that Watts had forfeited his challenge to the admission of Tammy's statements by wrongdoing. At trial, after hearing Tammy's statements to the police, as well as testimony from three officers who were involved in the response to Tammy's call to the police, and testimony from Watts, who denied the allegations, the jury found Watts guilty of all domestic abuse charges: battery, disorderly conduct, strangulation and suffocation.

On appeal, Watts argues that the court erred in admitting the hearsay statements of Tammy in violation of his right to confrontation. He contends that the evidence fails to show that he intentionally encouraged and caused Tammy not to appear. He contends that the evidence instead shows that she chose not to appear because she was concerned that if she recanted she would be charged with a felony, presumably for perjury.

….

MR. WATTS: Go by (inaudible). Go by Ola, Ola's old house.

[TAMMY]: Yeah, I know.

MR. WATTS: Okay.

[TAMMY]: I'm not going. No. I'm fine.

MR. WATTS: Well, what are you going to do?

[TAMMY]: I'm fine. Don't worry about it.

MR. WATTS: All right. Because they swear the jury tomorrow, I'm not sure what they're going to do. But once they drop charges, they can't bring them back up.

Whether the admission of Tammy's statements "violates [Watts'] Sixth Amendment right to confrontation is a question of constitutional law subject to [this court's] independent review." *See* ***State v. Mattox***, 2017 WI 9, ¶19, 373 Wis. 2d 122, 890 N.W.2d 256. The trial court's findings of fact are accepted on appeal "unless they are clearly erroneous." ***State v. Baldwin***, 2010 WI App 162, ¶30, 330 Wis. 2d 500, 794 N.W.2d 769.

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." *See* U.S. Const. amend. VI; WIS. CONST. art. I, § 7. The clause bars the use of "testimonial" hearsay statements unless the witness is unavailable "and the defendant had had a prior opportunity for cross-examination." ***Crawford v. Washington***, 541 U.S. 36, 53-54 (2004).

One exception to the general rule is forfeiture by wrongdoing. ***Id.*** at 62. "[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce." ***Davis v. Washington***, 547 U.S. 813, 833 (2006) ("[O]ne who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.").

As the circuit court appropriately recognized, the exception applies when it is shown that the defendant engaged in conduct intended to prevent the witness from testifying. *See* ***Giles v. California***, 554 U.S. 353, 359 (2008); ***Baldwin***, 330 Wis. 2d 500, ¶39. The State carries the burden to prove by a preponderance of the evidence that the forfeiture by wrongdoing doctrine applies. *See* ***State v. Rodriquez***, 2007 WI App 252, ¶14, 306 Wis. 2d 129, 743 N.W.2d 460.

We have reviewed the transcript of the phone call and agree with the circuit court's conclusion that it was "clear" in the phone call that Watts told Tammy there was a warrant, that he told her where to hide twice, and that he determined that this would benefit him.[4] In addition to the clear message conveyed to Tammy in the phone call that she should not testify, the court found that making the call from someone else's account in jail evidenced an attempt by Watts to hide their conversation and knowledge that this was wrong. We adopt these findings by the court as the record demonstrates that they are not clearly erroneous. Moreover, Watts' past physical violence toward Tammy[5] is "highly relevant" to a finding of wrongdoing by forfeiture, even if alone such evidence is not sufficient proof of his present intent to prevent a witness from appearing and testifying. *See* ***Giles***, 544 U.S. at 377.

We find wholly uncompelling Watts' contention that Tammy's real motivation not to appear was a concern that she would be charged with a felony. First, as the circuit court observed, the material witness warrant was certainly a compelling reason to appear. Moreover, that Tammy had her own motivations to avoid testifying against Watt, about which she expressed trepidation and fear, does not detract from his unequivocal attempt to play on her concerns to persuade her not to appear. Watts made clear to Tammy that her non-appearance would benefit him—and his attempt to dissuade her from appearing was successful. Her vague responses to his suggestion—assuring him that she would "be fine," etc.—presumably reflect the fact that Watts was making his request that she evade a warrant during a recorded call. All told, the phone call and surrounding

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[4] At trial, Watts said that the phone call "speaks for itself," and admitted that he told Tammy that if she went to Ola's house, his case would be dismissed.

[5] Watts admitted at trial that he was in a domestic abuse incident with Tammy in the past.

circumstances, as detailed above, clearly met the State's burden to show by a preponderance of the evidence that Watts intended to prevent Tammy from testifying, and in fact, caused her to do so. We thereby reject Watts' challenge to the circuit court's admission of Tammy's statements and affirm the judgment of conviction.[6]

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

[6] Given our decision that the evidence was properly admitted, we need not reach the harmless error argument furthered by the State. *See* ***Lake Delavan Prop. Co. v. City of Delavan***, 2014 WI App 35, ¶14, 353 Wis. 2d 173, 844 N.W.2d 632 (when one appellate issue is dispositive, we need not address other issues).