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DISTRICT II

December 15, 2021

To:

Hon. Robert S. Repischak
Circuit Court Judge
Electronic Notice

Samuel A. Christensen
Clerk of Circuit Court
Racine County
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Patricia J. Hanson
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You are hereby notified that the Court has entered the following opinion and order:

2020AP1457-CR State of Wisconsin v. Shemaiah A. Mitchell (L.C. #2018CF991)

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

Shemaiah A. Mitchell appeals from a judgment convicting him of attempted first-degree intentional homicide, physical abuse of a child, first-degree recklessly endangering safety, and disorderly conduct, all as a repeater and with the 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 (2019-20).[1] We affirm.

On July 8, 2018, Mitchell attacked his wife AMM and struck her in the head with a hammer. Her 17-year-old son KD intervened to protect her, so Mitchell attacked him as well and hit him in the shoulder with the hammer. Mitchell eventually fled, leaving AMM unconscious and bleeding in front of KD, her 13-year-old son KDM, and her 7-year-old daughter KM. Mitchell was later arrested and charged with attempted first-degree intentional homicide, physical abuse of a child, first-degree recklessly endangering safety, and disorderly conduct, all as a repeater and with the use of a dangerous weapon.

The matter proceeded to trial. There, police officers testified that AMM, KD, and KDM gave consistent accounts of what happened—that Mitchell attacked AMM and KD with a hammer. Additionally, police introduced statements of KM, who did not appear at trial, as well as photographs of AMM's severe head injuries. The jury watched a police interview in which Mitchell claimed he blacked out and had no memory of the night in question.[2] In an apparent attempt to protect Mitchell, AMM, KD, and KDM all testified that they also had no memory of the night in question.[3] No alternative explanation was offered for AMM's injuries.

Ultimately, the jury found Mitchell guilty on all charges, and the circuit court imposed an aggregate sentence of twenty-eight years of initial confinement and seventeen years of extended

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

[2] Although Mitchell claimed to have no memory of his actions, he admitted in the interview that he had "messed up" and indicated that AMM was not lying when she told him about the attack afterward.

[3] The circuit court later described the "depth of the contrived amnesia" as "ridiculous."

supervision. Mitchell now appeals, arguing that the admission of KM's statements violated 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, Mitchell's argument centers on two statements of KM that were introduced at trial by one of the responding police officers. The first occurred while the officer was wrapping AMM's head. KM, who was described by the officer as "petrified" and "shaking," cried out to her mother, "I don't want you to die." The second statement was KM's subsequent description of events. She told the officer that "she heard yelling and things breaking," and then saw her mother bleeding on the ground. She also saw that Mitchell "had a hammer in his hand and was trying to hit her brother." Mitchell objected to the statements based on hearsay and confrontation grounds. The circuit court overruled the objection, citing the excited utterance exception to the hearsay rule and the nontestimonial nature of the statements.

With respect to the first statement, we are satisfied that the circuit court properly admitted it. To begin, the statement plainly qualified as an exited utterance under WIS. STAT.

§ 908.03(2),[4] which Mitchell does not dispute. Moreover, the statement was nontestimonial in nature as its primary purpose was not to create a substitute for trial testimony; rather, it was simply to express KM's immediate and reasonable fear that she could lose her mother. Because the statement was nontestimonial in nature, the right to confrontation was not implicated.[5] *See* ***Reinwand***, 385 Wis. 2d 700, ¶23.

With respect to the second statement, we conclude that any error in its admission was harmless. Even without KM's description of events, the jury heard statements from three eyewitnesses that Mitchell attacked AMM and KD with a hammer. Thus, KM's statement was cumulative at best. The jury also saw several photographs of AMM's severe head injuries and no alternative explanation of their cause was offered. This lack of any plausible innocent explanation, combined with consistent pretrial statements implicating Mitchell, would have led a reasonable jury to find Mitchell guilty absent KM's statement.

[4] 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."

[5] KM's young age also supports our conclusion. *See* ***Ohio v. Clark***, 576 U.S. 237, 247-48 (2015) ("Statements by very young children will rarely, if ever, implicate the Confrontation Clause.").

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