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DISTRICT II

December 29, 2021

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Walworth County
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You are hereby notified that the Court has entered the following opinion and order:

2020AP1456-CR State of Wisconsin v. Roger W. Holmes (L.C. #2016CF3)

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).

Roger W. Holmes appeals from a judgment convicting him of strangulation/suffocation, substantial battery, and disorderly conduct, all arising from a December 25, 2015 fight with his live-in girlfriend, K.K. Holmes argues that the circuit court erred in disallowing the testimony of a defense witness and by failing to grant Holmes's motion for a mistrial. 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 For the reasons that follow, we affirm.

Prior to trial, the circuit court granted the State's motion to introduce other-acts evidence pursuant to the greater latitude rule in WIS. STAT. § 904.04(2)(b). Specifically, the court deemed admissible evidence concerning (1) a November 2013 incident wherein Holmes smashed a bowl of spaghetti in K.K.'s face, causing visible injury to her nose; and (2) Holmes's statement, made the day after a December 11, 2015 argument, warning K.K. that "the next time this happens," he would "kill her."

At trial, K.K. testified that on December 25, 2015 (Christmas 2015), an argument began over K.K.'s inability to contact her family over the holidays. The argument escalated and became physical. Holmes punched K.K. many times, pushed her onto the bed, smothered her with a pillow, and, after she broke free, punched her again. K.K. waited for the punching to stop and ran to a neighbor's apartment for help. K.K. was taken to the hospital where a CT scan revealed that the orbital bone around her left eye was fractured. The treating physician's assistant testified that K.K.'s face and neck were bruised and swollen and there were "linear red marks on [her] throat" which were "consistent with somebody grabbing her neck."

K.K. also testified about the November 2013 and December 11, 2015 incidents. When the prosecutor asked K.K. if she and Holmes had other arguments between the November 2013 incident and the Christmas offense for which Holmes was on trial, K.K. responded that they "had many" fights but that she was "not supposed to bring up other past physical ones." Trial counsel

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

did not immediately object because she “didn’t want to be rude and interrupt the flow” but later asked the circuit court to remind the State and its witnesses that such comments violated the court’s order limiting other-acts evidence.

Officer Kimberly Bass testified that she responded to the November 2013 and Christmas 2015 incidents. She met again with K.K. two days after the Christmas incident. K.K.’s face was “extremely bruised” and “still swollen,” so Bass took photos of her injuries. Bass stated that during the meeting, K.K. “wanted to tell me about an incident that had happened in Florida regarding [her and Holmes].” Trial counsel moved for a mistrial. The circuit court denied the motion, determining that Bass’s reference to a Florida “incident” was not prejudicial and offering to provide a limiting instruction if requested by the defense.

At the end of the first day of trial, defense counsel asked the circuit court whether Holmes could call Tyler Reynolds to testify about injuries he purportedly saw on Holmes’s face on December 17, 2015, six days after the December 11 incident. Trial counsel noted that the State had called multiple witnesses to testify that Holmes had threatened to kill K.K. the day after the December 11 incident, and explained that she wanted to offer Reynolds’s testimony to explain “why [Holmes] would make that kind of statement.” Trial counsel conceded that Reynolds could not offer any hearsay testimony about what Holmes might have told him about the injuries. Counsel said that Reynolds would testify that on December 17, 2015, Holmes “stopped by to see him at his business,” and Reynolds “noticed he had cuts and bruises on his face, head and neck area.”

The circuit court declined to admit Reynolds’s testimony, determining that because Reynolds lacked first-hand knowledge of how Holmes sustained the injuries or the context in

which they were sustained, his testimony was unfairly prejudicial. The jury found Holmes guilty on all three counts. Holmes appeals.

Holmes first argues that his constitutional right to present a defense was violated when the circuit court precluded Reynolds from testifying about injuries he allegedly observed on Holmes's face on December 17, 2015, six days after the December 11 other-acts incident.

“This court reviews a circuit court’s decision to admit or refuse to admit evidence for an erroneous exercise of discretion.” *State v. Wilson*, 2015 WI 48, ¶47, 362 Wis. 2d 193, 864 N.W.2d 52. A court errs if it exercises its discretion in a manner that deprives a defendant of the constitutional right to present a defense. *Id.*, ¶48. Whether a court’s evidentiary ruling implicates a defendant’s right to present a defense is a question of constitutional fact that this Court independently reviews. *Id.*, ¶47. The test for whether the exclusion of evidence violates a defendant’s right to present a defense is “whether the proffered evidence was ‘essential to’ the defense, and whether without the proffered evidence, the defendant had ‘no reasonable means of defending his case.’” *State v. Williams*, 2002 WI 58, ¶70, 253 Wis. 2d 99, 644 N.W.2d 919 (citation omitted).

We conclude that the circuit court properly exercised its discretion in declining to admit Reynolds’s testimony. As the court explained, Reynolds was not present during the December 11 incident and had no first-hand knowledge of what occurred. Therefore, he could not offer any testimony about the December 11 incident or tie the injuries he purportedly witnessed many days later either to the December 11 incident or to K.K. The court reasonably determined that Reynolds’s testimony would be unfairly prejudicial under WIS. STAT. § 904.03.

Additionally, Holmes cannot show that Reynolds's testimony was essential to his defense. Holmes was charged with crimes based on the physical abuse he inflicted on K.K. on Christmas 2015. Reynolds's proffered testimony concerning injuries he witnessed eight days earlier could not have impacted the jury's guilty verdicts.

Next, Holmes argues that the circuit court erred in denying his motion for a mistrial after Officer Bass testified that K.K. "wanted to tell me about an incident that had happened in Florida regarding [her and Holmes]." Whether to grant a mistrial is a decision that lies within the sound discretion of the trial court. *Haskins v. State*, 97 Wis. 2d 408, 419, 294 N.W.2d 25 (1980). "A mistrial is appropriate only when a 'manifest necessity' exists for the termination of the trial." *State v. Adams*, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998).

We conclude that the circuit court properly exercised its discretion in denying Holmes's mistrial motion. Officer Bass's reference to "an incident" in Florida was vague and did not necessarily indicate any abuse at all. Additionally, as the court noted, the jury already heard that the Christmas incident for which Holmes was on trial "was not the first time that something physical happened between the victim and the defendant." As such, the court determined that there was no "serious prejudice" to Holmes that would "rise[] to the level of a manifest necessity for the Court to grant a mistrial here." The court offered to provide a limiting instruction if requested by the trial counsel, noting that whether to seek one was a strategic decision to be made by the defense. The court then went off the record so that the State could "instruct its witnesses as to what can be said and what can't." The court's decision constituted a demonstrably proper exercise of discretion.

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