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DISTRICT I

March 5, 2024

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

2022AP190-CR State of Wisconsin v. QuoVaun Xavier Southward
(L.C. # 2015CF4552)

Before White, C.J., Donald, P.J., and Geenen, 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).

QuoVaun Xavier Southward appeals his judgment of conviction and from the order partially denying his postconviction motion in which he alleged plain error and ineffective assistance of counsel relating to evidence that was admitted regarding his prior convictions. 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 (2021-22).[1] We summarily affirm.

The charges against Southward stem from incidents that occurred in October 2015 with D.B., the mother of his child. On October 4, 2015, D.B. reported to police that Southward had come to her apartment that day to pick up their child. However, Southward was agitated and appeared to be under the influence, so D.B. would not let him take the child. D.B. stated that Southward then punched her in the face several times and threatened to kill her. D.B. told the responding officer that Southward had a history of threatening her and had pulled a gun on her in the past.

Ten days later, police responded to a report of shots fired and of a female—later determined to be D.B.—who had been hit by a vehicle. Officers found D.B. lying in a driveway not far from her residence. She told police that she had been walking to an ATM when Southward pulled up next to her in a blue Jeep and attempted to force her into the vehicle. She tried to get away, but he punched her in the face several times and again threatened to kill her. D.B. was running back to her residence when Southward made a U-turn and drove back toward her, striking her with the Jeep.

D.B. said that as she was lying in the driveway, a silver vehicle pulled up. D.B. recognized the driver of the silver vehicle as "Fat Mac." D.B. stated that Fat Mac pointed a firearm at her and fired multiple shots. Both the silver vehicle and the Jeep then sped away.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Two weeks after that incident, police responded to the report of a stolen vehicle. Police found two people sleeping in the vehicle—a blue Jeep—one of whom was Southward. The responding officers also discovered a loaded firearm in the door compartment where Southward was seated in the Jeep.

Southward was arrested. The police found that he had previously been convicted of witness intimidation and disorderly conduct as domestic abuse incidents where D.B. was the victim; as a condition of his sentence in that case, he was ordered to have no contact with D.B. Southward was thus charged with two counts of violating a no-contact order, two counts of misdemeanor battery, and one count of first-degree recklessly endangering safety using a dangerous weapon, all with domestic abuse enhancements. He was also charged with carrying a concealed weapon, with a habitual criminality enhancer.

The matter proceeded to trial in June 2016. Prior to the start of testimony, the State raised the issue of whether Southward wanted to stipulate to his previous convictions. Proof of these prior convictions was necessary to establish the first element of the charge of violating a no-contact order, *see* WIS JI—CRIMINAL 1375, so a stipulation would have eliminated the need to present evidence regarding the convictions to the jury. The circuit court explained that this was a "strategic" decision for Southward and his trial counsel to make. Southward indicated to the circuit court that D.B. was "basically contacting [him]" and had "dropped the restraining order." His counsel confirmed that there was "no agreement" for a stipulation.

At trial, the jury heard testimony from D.B., who described both of the incidents and her resulting injuries, and saw photos of those injuries. During D.B.'s testimony, Southward had several outbursts in the presence of the jury. At one point, a sidebar was held to address how

Southward was "visibly responding" to D.B.'s testimony. Shortly thereafter, Southward announced "I don't want to be here no more." Outside the presence of the jury, the circuit court explained to Southward that he had the "absolute constitutional right" to participate in his defense, and that he should discuss with his trial counsel about how "strategically" it would not "look[] good in front of the jury" for Southward not to be present. D.B. then continued with her testimony, but moments later Southward began shouting at her, "[y]ou don't love me no more" and "you can't do me like that," and using profanity. Upon the agreement of Southward's trial counsel and the State, the court removed Southward from the courtroom to the bullpen, where he could listen to the remainder of D.B.'s testimony.

Also testifying for the State was D.B.'s stepfather, who witnessed the second incident where D.B. was hit by the Jeep driven by Southward, causing her to "fly[] in the air." He also testified about seeing Southward's friend, Fat Mac, shoot at D.B.

Furthermore, the jury heard a recording of a phone call Southward made to his mother from jail in which he discussed the second incident. During that call, he blamed D.B. for escalating the situation by involving her stepfather, and said that was the reason he had called Fat Mac to the scene for "backup." Additionally, a ballistics expert testified that the bullet casing and bullet fragment found at the scene matched the firearm that was in Southward's possession when he was arrested.

Evidence of Southward's previous convictions and the no-contact order was introduced, as well. An officer who had responded to the second incident testified about the no-contact order and contents of the judgment of conviction including the nature of the charges; that D.B. was the victim in that case as well; that there was an additional battery charge with a domestic abuse

modifier that was dismissed but read in for purposes of sentencing; and that there was a no-contact order in place as a result of those convictions. D.B. also testified that Southward's prior convictions were crimes "against [her]."

Southward testified in his own defense. He denied hitting D.B. in the face during the first incident, and denied hitting her with the Jeep in the second incident. Rather, he explained that during the second incident, he and D.B. were arguing over money when she went "crazy" and "jumped in the moving vehicle." He stated that D.B.'s injuries occurred when she "tripped and fell" getting out of the vehicle, and from him "defending [himself]." During cross-examination, Southward admitted that he knew about the no-contact order with D.B. and was nevertheless with her during both incidents. Southward was also asked about the number of prior criminal convictions he had, as discussed by the circuit court and the parties prior to his testimony, but he was not asked any details about the offenses underlying those convictions.

The jury found Southward guilty of all but one of the charges, acquitting him of the battery charge relating to the first incident at D.B.'s home.

Southward subsequently filed a postconviction motion asserting claims of plain error and ineffective assistance of counsel. The circuit court granted a hearing for Southward's claims that his trial counsel had conceded his guilt on the charges of violating a no-contact order without his consent. Because the court ultimately granted Southward a new trial on those charges, and his convictions on those counts were vacated, those claims are not at issue in this appeal.

The remainder of Southward's claims in his postconviction motion were denied by the circuit court without a hearing. Southward argued that the "introduction and [State's] use" of his prior convictions during trial constituted plain error, and that his trial counsel was ineffective for

failing to object to the State's conduct.[2] Specifically, Southward pointed to the State's opening statement and closing argument, where several times the prosecutor made references about Southward's prior convictions being for abuse against D.B. In rejecting his arguments, the circuit court concluded that "the purported errors were harmless" and that Southward "failed to demonstrate that he was prejudiced by counsel's performance." This appeal follows.

On appeal, Southward's claims focus on the introduction of Southward's prior convictions; in particular, that the charges included domestic abuse modifiers. Southward argues that these details constituted other-acts evidence that was improperly admitted. He further argues that the State's specific references to the domestic abuse nature of the charges were impermissibly used to demonstrate Southward's propensity to commit the current acts with which he was charged. Southward contends that this was plain error, which warrants a new trial.

The plain error doctrine "allows appellate courts to review errors that were otherwise waived by a party's failure to object." ***State v. Jorgensen***, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77. Plain error is "error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time." ***Id.*** (citations and one set of quotation marks omitted). The error that was not objected to must be "fundamental, obvious, and substantial" to be deemed plain error, such as "where a basic constitutional right has not been extended to the accused." ***Id.***, ¶¶21, 23 (citations and one set of quotation marks omitted).

[2] Southward raised other ineffective assistance claims in his postconviction motion alleging counsel's failure to request or object to certain jury instructions, and the failure to advise Southward regarding his testimony at trial. In his appellant's brief, Southward indicates that these other claims related to the convictions that were subsequently vacated, and are thus not relevant for this appeal. We will not discuss them further.

We "employ this doctrine sparingly." ***State v. Bell***, 2018 WI 28, ¶12, 380 Wis. 2d 616, 909 N.W.2d 750.

Southward's claims call into question whether his constitutional right of due process was violated. *See* ***State v. Mayo***, 2007 WI 78, ¶43, 301 Wis. 2d 642, 734 N.W.2d 115 ("When a defendant alleges that a prosecutor's statements and arguments constituted misconduct, the test applied is whether the statements 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" (Citation and internal quotation marks omitted.)). This is a question of law that we review *de novo*. ***Bell***, 380 Wis. 2d 616, ¶8.

We conclude that the introduction of and reference to Southward's prior domestic abuse convictions does not constitute plain error. First, as Southward concedes, the introduction of the prior convictions was necessary to establish the first element of the charge of violating a no-contact order. *See* WIS JI—CRIMINAL 1375. Therefore, this evidence was not other-acts evidence. *See* ***State v. Dukes***, 2007 WI App 175, ¶30, 303 Wis. 2d 208, 736 N.W.2d 515 (evidence that is "central to the charge" being prosecuted is not other-acts evidence).

Furthermore, Southward declined to enter into a "sanitized stipulation" of those charges, which would have obviated the need for testimony relating to his prior convictions. *See* ***State v. Warbelton***, 2009 WI 6, ¶53, 315 Wis. 2d 253, 759 N.W.2d 557 ("When the defendant agrees to a sanitized stipulation admitting the prior conviction, there is no need for further proof relating to the nature of the conviction.").

Moreover, even if the State's references specifically relating to the domestic abuse modifiers were improper, the error was harmless. In cases where plain error is demonstrated, the burden then shifts to the State to show that the error was harmless. ***Jorgensen***, 310 Wis. 2d 138,

¶23. A harmless error inquiry asks "whether the State can prove 'beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error[.]'" ***Id.*** (citation and one set of quotation marks omitted).

In making this determination, the "quantum of evidence properly admitted" is an important factor. ***Id.***, ¶22. To that end, the "overall strength of the State's case" is properly considered. ***Id.***, ¶23. Here, the State presented testimony from D.B. about the incidents and her injuries; testimony from her stepfather, who was on the scene for the second incident; testimony from the investigating police officer and ballistic expert; and evidence of the phone call Southward made from jail to his mother.

The nature of the defense is also considered in this assessment. *See* ***id.*** Southward admitted to having contact with D.B. despite the no-contact order. The jury was also able to assess the credibility of his testimony that he had not hit D.B. with the Jeep, despite her and her stepfather's testimony to the contrary. Furthermore, Southward's outbursts during D.B.'s testimony, which took place in the presence of the jury, were also likely considered.

Therefore, the record supports that the State could prove beyond a reasonable doubt that the jury would have found Southward guilty absent any error relating to admitting the evidence of the domestic abuse assessments of his prior convictions. As a result, any error was harmless. *See* ***id.***

Furthermore, this conclusion is fatal to Southward's claim of ineffective assistance of his trial counsel for failing to object to the State's introduction of and references to that evidence. In order to establish ineffective assistance, a defendant must show both that counsel's performance was deficient and that such performance prejudiced the defense. ***Strickland v. Washington***, 466

U.S. 668, 687 (1984). We need not address both components of the analysis if the defendant fails to make a sufficient showing on either one. ***Id.*** at 697.

To demonstrate prejudice, the defendant must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. Given our conclusion regarding Southward's plain error claim—that the jury here would still have found Southward guilty absent any error regarding the admission of the domestic abuse enhancements included with the prior convictions—Southward has not established that he was prejudiced by the failure of his trial counsel to object to the State's use of this evidence. *See* ***id.***

Accordingly, because Southward's remaining claims fail, we affirm his judgment of conviction and the order partially denying his postconviction motion with regard to these claims.

Upon the foregoing,

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.

Samuel A. Christensen
Clerk of Court of Appeals