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DISTRICT II

November 6, 2024

To:

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Circuit Court Judge
Electronic Notice

Connie Mueller
Clerk of Circuit Court
Ozaukee County Justice Center
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Jonathan D. Gunderson
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Anne Christenson Murphy
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You are hereby notified that the Court has entered the following opinion and order:

2023AP930-CR State of Wisconsin v. Joseph Perez (L.C. #2020CF367)

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

Joseph Perez appeals from a judgment of conviction following a jury trial and an order denying his postconviction motion for a new trial. Perez argues that the trial court committed prejudicial error in allowing, over defense counsel's objection, a detective's testimony identifying Perez from a still photo taken from video surveillance of the crimes in question. 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 facts relevant to this appeal are undisputed. Perez was charged with stalking, two counts each of felony and misdemeanor bail jumping, and criminal damage to property and disorderly conduct, both with domestic abuse enhancers, based on incidents involving Perez's former live-in girlfriend, N.N.[2] A jury trial was conducted on all seven charges.

At Perez's trial, N.N. testified extensively about the events giving rise to the criminal charges against Perez. N.N. stated that in October 2020, she was informed that Perez had been released from jail because she had two no-contact orders against Perez in effect at that time. Early in the morning following Perez's release, N.N. left the supermarket where she worked the overnight shift and discovered she had two flat tires. N.N. drove to a nearby gas station, pulled up to the air pumps to fill the flats, and then noticed that both of her driver's side tires had been slashed.

N.N.'s trial testimony next involved what happened after discovering that her tires were not just flat, but had been slashed. N.N. said that another individual at the gas station offered to help fix her tires when N.N. told the person that she did not have a jack. While N.N. was speaking to the person who had offered to help, Perez pulled into the gas station in a Jeep that N.N. recognized, noting that she had driven the Jeep when she and Perez were together. Perez yelled at N.N. from his Jeep: "[H]a ha, bitch. How are you going to get home now[?]" Once

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

[2] We refer to the victim by initials to protect her privacy.

Perez started yelling, the individual who had offered to assist N.N. quickly drove away from the gas station before he could help at all.

N.N. then got out of her car to run for help, but she was scared that she would not "make it into the gas station" and Perez would "jump out of the car and do something to" her or "try to hit" her with the Jeep, so N.N. got back in her car. While N.N. was sitting in her car, Perez drove his Jeep close enough to N.N.'s car that he leaned out his window and tried to open her passenger door. N.N. testified that Perez was "tormenting" her by looping around the parking lot several times and "[t]hroughout the entire time he was looping around" saying "horrible things" to her:

> Well, one of the first things he said was, ha ha, bitch. How are you going to get home now. How does it feel to lose everything. Just saying horrible things towards me. I never loved you. I've been cheating on you this whole time. You ain't shit. Why do you think I'm doing all this to you. Just saying horrible things to me of that nature.

N.N. stated that she did not feel safe getting out of her car based on her past experiences with Perez when he was "under the influence" and would say similar things to her. After about ten minutes of encircling N.N.'s car with his Jeep and yelling at N.N., Perez finally drove away from the gas station. N.N. then ran into the gas station and called 911. The 911 call was played for the jury, as was the surveillance video from the grocery store where N.N. worked at the time of the incident.

When testifying, N.N. was able to positively identify Perez in the surveillance video. N.N. described Perez's hairstyle as "a ponytail on top" and "shaved on the bottom," and she stated she recognized Perez's outfit in the video because N.N had washed those clothes "a million times for him." N.N. also positively identified in the video surveillance her car and the

Jeep Perez drove. She narrated video footage depicting Perez walking between N.N.'s car and the Jeep, then bending down by the driver's side "where the flat tires were," at which point there was a "hissing" sound. Perez then got back into the Jeep.

The State also played the gas station surveillance video for the jury at trial. The video shows that Perez pulled into the gas station parking lot in "[t]he same Jeep that we just watched in the video at the" grocery store. N.N. again identified the Jeep as Perez's based on its appearance and the "loud" engine sound.

The only other witness to testify at Perez's trial was the investigating detective involved with the case. The detective testified to her opinion that a still photograph taken from the surveillance video at the supermarket depicted Perez. The detective's testimony was based on her review of Perez's photo identification card, her research into the Jeep's dimensions as compared to the man in the video, and the Jeep's registration, which came back to Perez's mother. At trial, defense counsel objected to the detective's identification of Perez as the man in the photograph. The trial court overruled the objection, explaining that it was the detective's "belief it's Mr. Perez" and that "the jury's going to evaluate the evidence and determine that question ultimately."

The jury ultimately convicted Perez on all counts brought against him. Perez filed a postconviction motion for a new trial, alleging that the trial court improperly exercised its discretion by admitting the detective's testimony identifying Perez as the man in the photo. The court denied Perez's motion for a new trial. It concluded that it had properly allowed the detective's identifying testimony into evidence, and even assuming that it was improperly

admitted, it did not amount to a prejudicial error warranting a new trial, but instead was a harmless error with no effect on the outcome of the trial. Perez appeals.

Perez argues that he is entitled to a new trial because the detective's identification testimony was improperly admitted. "We review a circuit court's decision to admit or exclude evidence under an erroneous exercise of discretion standard." ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. However, "[a]n erroneous exercise of discretion in admitting or excluding evidence does not necessarily lead to a new trial. [We] must conduct a harmless error analysis to determine whether the error 'affected the substantial rights of the party.' If the error did not affect the substantial rights of the party, the error is considered harmless." ***Id.***, ¶30 (citation omitted); *see also* WIS. STAT. § 805.10.

"An error affects the substantial rights of a party if there is a reasonable probability of a different outcome." ***State v. Kleser***, 2010 WI 88, ¶94, 328 Wis. 2d 42, 786 N.W.2d 144. The burden of proof is on the beneficiary of the error, here the State, to show that the error was harmless. *See* ***State v. Dyess***, 124 Wis. 2d 525, 544 n.11, 370 N.W.2d 222 (1985). Assessing harmless error presents a question of law we review de novo. *See* ***State v. Ziebart***, 2003 WI App 258, ¶26, 268 Wis. 2d 468, 673 N.W.2d 369.

With this standard in mind, we conclude that the result in this case would have been the same beyond a reasonable doubt even if the trial court had sustained defense counsel's objection and prohibited the detective's identification testimony. In other words, we assume, without

deciding, that the testimony was improperly admitted, but conclude that it in no way affected the outcome of the trial. Therefore, the admission of the testimony constituted harmless error.[3]

In his principal brief on appeal, Perez concedes that "because other identification existed means this error may have been harmless." In his reply brief, in response to the State's detailed argument as to why even assuming admission of the testimony was erroneous, allowing it was harmless error, Perez merely argues that it "was not harmless error because it served as government endorsement to shore up any doubts as to the only other witness'[s] credibility." He develops no argument addressing the overwhelming evidence of Perez's guilt at trial without the detective's identification testimony, nor does he engage the proper standard to explain how or why the result would have been different absent the detective's sole instance of presenting identifying testimony. We could simply end our inquiry here, concluding that Perez failed to refute the State's harmless error argument. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (stating that appellant's failure to dispute respondent's arguments in a reply brief may be taken as a concession). Nonetheless, we now address the State's harmless error argument and why it forms the basis for our conclusion that Perez is not entitled to a new trial.

To explain, the State relied primarily on N.N.'s identification of Perez to prove its case—N.N. identified Perez as her tormentor from both the video surveillance and her real-time interactions with him at the gas station. N.N. had a six-month dating relationship with Perez as

[3] Because we conclude that the detective's identification of Perez constituted harmless error even assuming the trial court should not have allowed the identification testimony in, we need not address Perez's argument that the evidence was inadmissible. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (stating that cases should be decided on the narrowest possible grounds).

the foundation. She identified Perez by his hairstyle, his body type, his clothes that she had washed, his Jeep that she had driven, his voice and tone when he was yelling at N.N., and, finally, by his actions at the gas station, which were not dissimilar from his past actions. The detective's single identification of Perez from a still photo that was also available for the jury to view in no way changed the outcome of Perez's trial. The other evidence at trial identifying Perez as the perpetrator was overwhelming.

In sum, our review of the trial transcript confirms that the vast majority of the information the jury received as to the identity of the man in the surveillance videos came from N.N.'s testimony and was based on her intimate familiarity with Perez. The remainder came from the juror's own conclusions gleaned from watching the surveillance footage themselves. Having viewed the same videos as the testifying detective, the jurors were free to rely on their own experiences to determine whether they agreed with the identification of Perez. *See* ***State v. Small***, 2013 WI App 117, ¶¶15-16, 351 Wis. 2d 46, 839 N.W.2d 160 (holding no "prejudice" from allowing officer testimony regarding content of surveillance footage because jurors were "able to use their own life experiences in assessing whether [the lay] opinion was accurate"). There is no reasonable doubt that the jury would have convicted Perez of the charged crimes even without the detective's identification of Perez.

Upon the foregoing reasons, even assuming, without deciding, that the trial court erred in admitting the detective's identification testimony over defense counsel's objection, we conclude that it was a harmless error. Thus, the court did not err in denying Perez's motion for a new trial.

Therefore,

IT IS ORDERED that the judgment and order of the circuit court 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