COURT OF APPEALS
DECISION
DATED AND FILED

October 7, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP744-CR **Cir. Ct. No. 2012CM2861**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALBERT LORENZO FINCH, SR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

¶1 CURLEY, P.J. Albert Lorenzo Finch, Sr., appeals the judgment convicting him of knowingly violating a domestic abuse injunction, contrary to WIS. STAT. §§ 813.12(4), 813.12(8)(a), and 968.075(1)(a) (2011-12).[1] He

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

contends that the trial court erred when it admitted at trial a recording of a 911 cell phone call by R.I., the woman who had obtained a domestic abuse injunction against him. Because the admission of the 911 recording is immaterial and irrelevant to the actual charge for which Finch was found guilty, and because there is ample other evidence supporting the conviction, any error resulting from the admission of the 911 call was harmless. Therefore, we leave for another day the determination of whether calls such as this one are testimonial, and the judgment is affirmed.

BACKGROUND

¶2 Finch was charged with violating a domestic abuse injunction and disorderly conduct (domestic abuse). According to the complaint, the incident that led to these charges occurred on May 20, 2012, when Finch went to the apartment of R.I., who had obtained a domestic abuse injunction against him, and threatened her. When R.I. told Finch to leave, Finch yelled at her, walked into the garage of the apartment building, returned with a crowbar, and began striking R.I.'s car. However, R.I. was able to wrest the crowbar from Finch and then chased him with it, ultimately striking Finch across his back. Finch fled, getting into his mother's car, but not before threatening to kill R.I. and her family.

¶3 Finch pled not guilty to the charges and the matter was set for trial. Before trial, the trial court granted the State's motion seeking to admit a recording of the 911 call that R.I. made to police shortly after Finch fled her apartment. The jury heard the 911 cell phone call and read a transcript of the call. The jury did not, however, hear the testimony of R.I., as she failed to appear at trial.

¶4 At trial, the process server testified that on January 18, 2012, he handed the domestic abuse injunction to Finch, and told him that he had been

served. The injunction—which was admitted into evidence without objection—ordered Finch to: avoid contacting R.I., including contacting her in person; avoid R.I's residence; and refrain from committing any acts of domestic abuse until October 24, 2015. When asked what he observed Finch do after getting the papers, the process server said Finch looked at the papers and got upset.

¶5 Finch also testified. He admitted being at R.I.'s apartment on the day in question, but he denied hitting R.I., pushing her down or threatening to kill her. He also claimed he never tried to pry open her car with a crowbar. Regarding the injunction, Finch insisted that he never read the papers, nor did anyone else read them to him. He maintained that he talked to R.I. after receiving the papers and she said it was not a restraining order. However, later in the trial, the State introduced a statement that Finch gave to the police after his arrest, in which Finch told the police that he moved out of R.I.'s residence and got his own place because he knew about the injunction.

¶6 Finch's mother testified as well. She related that on the day in question her son called her and asked her to pick him up at R.I.'s apartment. When she arrived, she saw R.I. chasing her son with what looked like a big stick. She also witnessed R.I. strike her son with the "stick." She urged her son to get into the car, and while he was doing so, R.I. shattered one of the car windows with the "stick."

¶7 The jury determined that Finch was guilty of violating the domestic abuse injunction, but not guilty of disorderly conduct (domestic abuse). The trial court sentenced him to nine months in the House of Correction, stayed that sentence, and placed him on probation for two years. This appeal follows. Additional facts will be developed below.

ANALYSIS

¶8 The issue raised on appeal deals with the admission of the recording of R.I.'s 911 call. Finch argues that the trial court violated his right to confront his accusers guaranteed by the Sixth Amendment by permitting the jury to hear what R.I. said to the 911 dispatcher after R.I. failed to appear at trial. Finch argues that the primary purpose of the call was not to obtain help for an ongoing emergency. He points out that at the time of the call, R.I. had already chased him and struck him with the crowbar and he had hurriedly gotten into his mother's car and fled. Finch also notes that R.I. told the 911 operator that she wanted to press "every" charge, which would suggest that the statement was testimonial. "While 'a circuit court's decision to admit evidence is ordinarily a matter for the court's discretion, whether the admission of evidence violates a defendant's right to confrontation is a question of law subject to independent appellate review.'" ***State v. Deadwiller***, 2013 WI 75, ¶17, 350 Wis. 2d 138, 834 N.W.2d 362 (citation omitted). Moreover, "[a] Confrontation Clause violation does not result in automatic reversal, but is subject to harmless error analysis." *See* ***id.***, ¶41.

¶9 This court need not determine whether the trial court erred in admitting the 911 call, however, because any error resulting therefrom was harmless. *See* ***id.***; *see also* ***State v. Zien***, 2008 WI App 153, ¶3, 314 Wis. 2d 340, 761 N.W.2d 15 (we decide cases on the narrowest possible ground). "This court has formulated the test for harmless or prejudicial error in a variety of ways." *See* ***State v. Harris***, 2008 WI 15, ¶42, 307 Wis. 2d 555, 745 N.W.2d 397. Stated one way, our inquiry is whether "the evidence sufficiently undermines the court's confidence in the outcome of the judicial proceeding." *See* ***id.*** Stated another way, we ask "whether it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***Id.***, ¶43 (citation

omitted). We consider several factors in our analysis, including the frequency of the error, the importance of the admitted evidence, the presence or absence of evidence corroborating or contradicting that evidence, "the nature of the defense, the nature of the State's case, and the overall strength of the State's case." *See* ***id.***, ¶45.

¶10 First, whether the trial court erred by permitting the jury to hear what R.I. said to the 911 dispatcher is totally immaterial and irrelevant to the question of whether Finch knowingly violated the domestic abuse injunction. Finch argues the 911 call was material to the charge he was convicted of. This court disagrees. The 911 call would have been relevant had Finch been convicted of disorderly conduct, but it played no part in his conviction for knowingly violating a domestic abuse injunction.

¶11 Second, there was ample evidence making it "'clear beyond a reasonable doubt that a rational jury would have found [Finch] guilty absent the error.'" *See* ***Harris***, 307 Wis. 2d 555, ¶43 (citation omitted). Finch admitted being at R.I.'s apartment on the day of the incident. While there was trial testimony supporting Finch's defense that he never knew the contents of the papers handed to him and therefore did not know there was a domestic abuse injunction prohibiting him from having any contact with R.I.,[2] there was also plenty of evidence at trial for the jury to determine otherwise. For example, the process server testified that when Finch looked at the papers served upon him he became upset, which suggests Finch *did* know the contents of the papers.

[2] For example, Finch's brother claimed that, shortly after Finch was served, Finch handed him the papers but that neither Finch's brother nor Finch read them at that time. Moreover, Finch's brother testified that Finch is somewhat illiterate.

In addition, the State elicited testimony that Finch told a police officer that he had moved out of R.I.'s apartment because of the injunction.

¶12 The jury chose to believe that Finch had knowledge of the injunction and found him guilty of violating it by contacting R.I. There is sufficient evidence to support the conviction. Given that the 911 call's admission was immaterial and irrelevant to whether Finch knew of the existence of the injunction, we leave for another day whether 911 calls such as the one here are testimonial.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.