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April 24, 2019

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

2017AP2274-CR State of Wisconsin v. Kayveon Barnett (L.C. # 2015CF692)

Before Brennan, Brash and Dugan, 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).

Kayveon Barnett appeals a judgment of conviction entered after a jury found him guilty of two felonies. The sole issue on appeal is whether the circuit court erroneously denied his motion to declare a mistrial after a witness became emotional during her testimony. Upon our

review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] We summarily affirm.

The State alleged in a criminal complaint that Barnett shot and killed a seventeen-year-old boy, T.S., during the late afternoon of December 10, 2014, following a confrontation in the 6000 block of North 84th Street, in Milwaukee, Wisconsin. The State further alleged that Barnett could not lawfully possess a firearm on December 10, 2014, because he had previously been adjudicated delinquent for committing a felonious act. The State charged Barnett with first-degree reckless homicide by use of a dangerous weapon and unlawful possession of a firearm. The matters proceeded to trial.

Y.S., the victim's mother, was the State's first witness. Towards the end of her testimony, the State asked her if she could identify her son from a photograph taken while he was hospitalized following the shooting. Y.S. responded that she had never seen such a photograph but that she "d[id]n't mind looking." The record reflects that upon viewing the photograph, Y.S. cried out and, as described by trial counsel, "collapsed." The circuit court excused the jury, and Barnett moved for a mistrial. In support of the motion, he asserted that the jury had been "contaminated" by the witness's emotional display, and he suggested that the State was "looking for the kind of emotionalism that could perhaps sway the jury." The circuit court responded that Barnett had failed to demonstrate a "manifest injustice" because a jury would expect a photograph of the hospitalized victim to have an emotional impact. The circuit court therefore

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

denied the motion, and the trial resumed. The jury found Barnett guilty as charged, and he appeals.

Barnett offers two interrelated theories in support of his claim that the circuit court should have declared a mistrial following Y.S.'s testimony: (1) the circuit court erroneously exercised its discretion; and (2) the prosecutor engaged in misconduct. Neither theory persuades us to grant relief.

The decision to deny a mistrial normally rests in the sound discretion of the circuit court, and we will not disturb the decision absent a clear showing of an erroneous exercise of discretion. *See* ***State v. Ford***, 2007 WI 138, ¶29, 306 Wis. 2d 1, 742 N.W.2d 61. "[I]n cases where there is no structural error, the circuit court must decide, in light of the entire facts and circumstances, whether the defendant can receive a fair trial. It examines whether the claimed error is sufficiently prejudicial to warrant a mistrial."[2] ***Id.***

Barnett asserts, and the State concedes, that the circuit court erred when it assessed his motion for a mistrial in light of whether he had demonstrated a "manifest injustice." We agree. The circuit court should have considered whether Y.S.'s display of emotion was sufficiently prejudicial in light of the entire proceeding as to warrant a new trial. *See* ***State v. Ross***, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 659 N.W.2d 122. We will affirm a circuit court, however, if it "reached the right result, but for the wrong reason." *See* ***Doe v. General Motors Acceptance***

[2] Structural errors are subject to automatic reversal, but the class of cases giving rise to structural error is small. *See* ***State v. Ford***, 2007 WI 138, ¶43 & n.4, 306 Wis. 2d 1, 742 N.W.2d 61 (listing structural errors as the complete denial of counsel, a biased trial judge, racial discrimination in grand jury selection, denial of self-representation at trial, denial of public trial, and a defect in the reasonable-doubt instruction). Neither party suggests that the instant case falls within such a class.

Corp., 2001 WI App 199, ¶7, 247 Wis. 2d 564, 635 N.W.2d 7 (citation omitted). We search the record for reasons to sustain a circuit court's discretionary decision. *See* ***State v. Hershberger***, 2014 WI App 86, ¶43, 356 Wis. 2d 220, 853 N.W.2d 586. Here, upon a review of the entirety of the record, we conclude that the circuit court did not err when it denied Barnett's motion for a mistrial.[3]

First, although Barnett argues that Y.S.'s emotional reaction necessarily "aroused the jury's sense of horror and provoked its instinct to punish," the circuit court instructed the jurors to consider the case impartially and to "free [their] mind[s] of all feelings of sympathy, bias, or prejudice." The circuit court further instructed the jurors to decide the case solely on the basis of the evidence, which the circuit court defined as sworn testimony, exhibits received into the record, and stipulated facts.[4] "We presume that the jury follows the instructions given to it." ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989).

Second, emotional outbursts at trial by victims and grieving relatives occur with some frequency. *See* Jay M. Zitter, Annotation, *Emotional Manifestations by Victim or Family of*

[3] Barnett contends in his reply brief that, because Y.S. was the State's first witness, the circuit court's decision to deny a mistrial following her testimony could not have been based on an assessment of the entire trial. Barnett fails, however, to offer any authority in support of his implied contention that this court should review whether he received a fair trial by considering only the evidence available to the circuit court when he moved for a mistrial. Accordingly, we adhere to the long-established principle that we will not reverse a circuit court's discretionary decision "if, after our independent review of the entire record, we can conclude that there are facts which would support the [circuit] court's decision had it properly exercised its discretion." *See* ***State v. Hines***, 173 Wis. 2d 850, 860-61, 496 N.W.2d 720 (Ct. App. 1993).

[4] Barnett did not ask the circuit court to give a cautionary instruction immediately after Y.S.'s testimony. The instructions set forth above are excerpted from the instructions that the circuit court gave to the jury at the close of the case. In the absence of a request for a specific cautionary instruction, Barnett may not object to the instructions as given. *See* ***State v. Schenk***, 53 Wis. 2d 327, 333, 193 N.W.2d 26 (1972).

Victim During or Immediately Before or After Own Testimony During Criminal Trial as Ground for Reversal, New Trial, or Mistrial, 99 A.L.R. 6th 113, § 1 (2014). In the instant case, Y.S.'s reaction to the photograph of the victim was, as Barnett concedes, both "understandable" and "sincere." Moreover, Y.S. expressed grief in the courtroom, but she did not make accusatory remarks about Barnett or express hostility towards him. The decisions of other jurisdictions reflect that under these circumstances, an emotional display such as Y.S. exhibited would not prejudice the jury against Barnett. *See, e.g.* ***Tolbert v. State***, 391 N.E.2d 823, 825-26 (Ind. 1979) (no prejudice and therefore no error in denying a mistrial where victim's ten-year-old son became emotional but did not refer to the defendant or implicate the defendant in the victim's homicide); ***State v. Lindsey***, 631 So. 2d 486, 489-90 (La. Ct. App. 1994) (no prejudice and therefore no error in denying a mistrial where victim's twelve-year-old son cried on the witness stand because the trauma of his mother's death "was surely no surprise to the jury"); ***People v. Hairston***, 294 N.E.2d 748, 753-54 (Ill. App. Ct. 1973) (no prejudice and no right to a new trial where victim's mother cried on the stand, because the emotional display was a natural reaction to the circumstance).

Third, and most critically, the evidence against Barnett was overwhelming. *See* ***State v. Sigarroa***, 2004 WI App 16, ¶27, 269 Wis. 2d 234, 674 N.W.2d 894 (explaining that the extent of the inculpatory evidence is significant in assessing whether an alleged error prejudiced the defendant). An eyewitness to the homicide testified that the gunman was wearing a red and black jacket. A second witness, Kevin Butler, testified that late in the afternoon of December 10, 2014, he was outside his home near the corner of North 84th Street when he heard a gunshot and then saw a young man in a red and black jacket running behind some bushes. Butler picked

Barnett out of a lineup and at trial identified him in the courtroom as the person that Butler saw running in a red and black jacket on December 10, 2014.

A police officer testified that he searched the area near the crime scene and found a red and black jacket in a window well and a firearm in the grass. Margaret Cairo, a forensic scientist, testified that DNA found on the red and black jacket matched Barnett's DNA profile. Cairo also testified that two individuals contributed DNA found on the firearm's magazine, that DNA from the major contributor was consistent with Barnett's DNA profile, and that the probability of randomly selecting a person with the same profile as the major contributor was one in nine million.

Tamara Reed, the mother of Barnett's child, testified that she saw Barnett leave her home wearing a red and black coat approximately thirty minutes before the shooting. She said that Barnett had a gun with him at the time. She examined the red and black jacket that police found near the crime scene and told the jury that the jacket was the same one that Barnett was wearing when he left her home with a gun in his hand. Reed went on to say that she later discussed the shooting with Barnett and "he told [Reed] that he did it.... He shot [T.S.]."

Finally, the parties stipulated that, prior to December 10, 2014, Barnett was adjudicated delinquent for committing an act that would constitute a felony if committed by an adult. The circuit court read the stipulation to the jurors and told them that the stipulation constituted "an agreed fact."

In sum, Y.S.'s reaction to the photograph was readily understandable, the circuit court correctly instructed the jurors to rely only on the evidence when determining whether Barnett was guilty, and the evidence against Barnett was overwhelming. Accordingly, Barnett was not

prejudiced by Y.S.'s display of emotion on the witness stand, and the circuit court's decision to deny a mistrial therefore constituted a proper exercise of discretion. *See* ***id.***

Barnett nonetheless alleges that he is entitled to relief because "the prosecutor here infected the trial with unfairness." Specifically, he asserts that the State improperly introduced identification evidence for the purpose of eliciting an emotional reaction from Y.S., and he therefore suffered a violation of his constitutional right to due process when the circuit court denied his motion for a mistrial. In support, Barnett cites ***State v. Wolff***, 171 Wis. 2d 161, 491 N.W.2d 498 (Ct. App. 1992), and ***State v. Adams***, 221 Wis. 2d 1, 584 N.W.2d 695 (Ct. App. 1998). Both cases acknowledge that a prosecutor's misconduct may rise to a level that deprives the defendant of his or her due process right to a fair trial. *See* ***Wolff***, 171 Wis. 2d at 167; ***Adams***, 221 Wis. 2d at 19.

Assuming only for the sake of argument that the prosecutor's actions in this case rose to the level of misconduct, Barnett must show that he was prejudiced by any alleged prosecutorial misconduct in order to be entitled to a new trial.[5] *See* ***State v. Patterson***, 2010 WI 130, ¶56, 329 Wis. 2d 599, 790 N.W.2d 909. In this case, as we have already explained, Barnett was not prejudiced by Y.S.'s emotional reaction to her son's photograph. The reaction was of a type that the jury could reasonably expect under the circumstances and did not include an accusation against Barnett. Further, the evidence overwhelmingly demonstrated Barnett's guilt, and the circuit court's instructions ensured that the jurors relied solely on the evidence to reach their

[5] We observe that the parties and Y.S. would all have been better served had the State prepared Y.S. for the experience of identifying her deceased son in the courtroom by showing her his photograph before she took the stand. We urge the State to use such a procedure in the future.

verdicts. Accordingly, Y.S.'s display of emotion did not "so infect the trial with unfairness as to make the resulting conviction a denial of due process." *See* ***id.***, ¶64 (citation and one set of brackets omitted).

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* 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