COURT OF APPEALS
DECISION
DATED AND FILED

September 13, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2014AP2666-CR
2014AP2667-CR

Cir. Ct. Nos. 2011CF4809
2012CF69

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARY ABDULLAH SALAAM,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed in part; reversed in part and cause remanded with instructions*.

Before Curley, P.J., Kessler and Brash, JJ.

¶1 KESSLER, J. Gary Abdullah Salaam appeals the judgments of conviction, following a jury trial, of one count of recklessly endangering safety as

an act of domestic abuse, one count of being a felon in possession of a firearm, and three counts of witness intimidation. We affirm the judgment of conviction on the charges of recklessly endangering safety and felon in possession of a firearm; however, we reverse the judgment of conviction on the witness intimidation charges. Accordingly, we dismiss Salaam's conviction as to three counts of witness intimidation.

BACKGROUND

¶2 This is a consolidated appeal arising from an incident that took place on September 19, 2011. According to the criminal complaint, on that date, T.A. was walking with her sister, A.R., and K.H. in the area of 13th Street and West Arthur Street, when she noticed a gold Jeep drive past them. T.A. told police that the gold Jeep immediately made a U-turn, at which point she saw Salaam, her former boyfriend, behind the wheel. T.A. yelled "It's Gary." Salaam then pulled out a firearm and fired four shots at T.A. while shouting "Die Bitch!" Salaam did not hit any of the women, but did strike a parked car. Salaam was subsequently arrested and charged with one count of recklessly endangering safety as an act of domestic abuse and one count of possession of a firearm by a felon in Milwaukee County Circuit Court Case Number 2011CF4809. The State added the "repeater" penalty enhancer to both charges. Salaam was ordered not to contact T.A. or any of the other known witnesses to the shooting.

¶3 The State requested that T.A. appear at the preliminary hearing; however, T.A. failed to appear. The State told the court that it believed Salaam intimidated T.A. and discouraged her from attending the hearing. The State's belief was based on three phone calls made from Salaam to T.A., while Salaam was housed at the Milwaukee County House of Corrections, in advance of the

hearing.[1] Salaam was formally charged with three counts of felony witness intimidation in Milwaukee County Circuit Court Case Number 2012CF69. According to the complaint, Salaam placed one call to T.A. on November 15, 2011, in which he told T.A. to avoid the police. In the second phone call, also placed on November 15, 2011, Salaam told T.A. to "keep [her] ass in the house" and "not [to] show around that building." In the third phone call, placed on the evening of November 15, 2011, Salaam told T.A. to "stay off Layton" because his "life depends on it."

¶4 The State moved to consolidate case Numbers 2011CF4809 and 2012CF69 on the grounds that "[t]he State would have to prove that [it has] a witness relating to [case Number] 2011-CF-4809, and that subsequent intimidation occurred." Salaam opposed the motion and also moved to sever the charges in case Number 2011CF4809. The circuit court denied Salaam's motion to sever the charges in case Number 2011CF4809, finding that the reckless endangerment and felon in possession charges arose out of the same act or transaction. The court also granted the State's motion to consolidate case Numbers 2011CF4809 and 2012CF69, finding that any potential prejudice to Salaam "is not significant enough to outweigh … the interest of the public in conducting a trial on multiple counts" and that "all of these counts … are ultimately quite intertwined."

¶5 Prior to trial, Salaam filed a motion asking the trial court to order T.A. to identify all of her mental health providers and to order the release of T.A.'s mental health records on the grounds that "Salaam … believes that the

[1] T.A. eventually appeared as a hostile witness at a continued preliminary hearing on November 30, 2012.

alleged victim, [T.A.] … suffers from paranoia and delusions." The trial court denied the motion, stating the presence of multiple witnesses to the shooting "would really undercut the defense assertion that it was all made up out of paranoia … or was actually a delusion." Salaam also filed a motion requesting the use of certain children's court records, which he claimed supported his contention that T.A. suffered from mental illness. Following an *in camera* review of the children's court documents, the trial court denied the motion.

¶6 On the first day of trial, January 22, 2013, the State moved to admit the testimony of Elizabeth Brunner, a Milwaukee police dispatcher, regarding a call made to Milwaukee police by T.A.'s mother, K.M., on the evening of September 19, 2011, hours after the shooting incident. The State argued that K.M. told Brunner that Salaam "called [K.M.] … saying that if she does not have her daughter call him in 2 hours, he won't miss next time." Along with Brunner's testimony, the State sought to admit information contained in Brunner's computer-assisted dispatch entry (CAD) because K.M. did not respond to a subpoena to appear for trial and because the actual audio recording of the call between K.M. and Brunner was purged following Salaam's arrest. Over Salaam's objections, the trial court permitted entry of the CAD and allowed Brunner to testify.

¶7 Multiple witnesses testified at trial. T.A. told the jury that she and Salaam were in an intimate relationship for about one year prior to the shooting incident. She stated that on September 19, 2011, she left a food market near her home in the vicinity of South 13th Street and Harrison Street in Milwaukee when she saw her sister, A.R., with K.H. T.A. crossed the street to meet them when she saw Salaam's vehicle and said "there's Gary" to A.R. and K.H. T.A. said that Salaam made a U-turn, at which point she started running. T.A. heard gunshots and observed a black gun in Salaam's hand.

¶8 T.A. also told the jury that Salaam called her house three times on November 15, 2011, and indicated that he did not want either T.A. or her sister to go to court.

¶9 A.R. testified that on September 19, 2011, she was walking with her friend K.H. near the area of South 13th Street and Cleveland Avenue. She stated that she met up with her sister, T.A., on the bridge at 13th Street. A.R. stated that T.A. suddenly yelled "there's Gary," at which point A.R. saw Salaam driving his gold Jeep in their direction. A.R. saw Salaam's face and his gun and she heard his gun cock, prompting her to run away from the Jeep. A.R. told the jury that she was hit by "something" during the incident because she "had a burning sensation on [her] leg and a small burn mark."

¶10 Brunner testified, telling the jury that she was a dispatcher for the Milwaukee Police Department. Brunner identified the CAD report of a call made on the evening of September 19, 2011. Brunner said that a caller who identified herself as K.M. (T.A.'s mother) called the non-emergency administrative police department line stating that "she received a call from Gary Salaam, who stated that she needed to have her daughter call him within two hours or he won't miss again. And she was concerned for her safety, her daughter's safety and she couldn't get ahold of her, and so that's why she called the police." Defense counsel objected, arguing that the State lacked foundation both as to K.M.'s identity and K.M.'s identification of Salaam's voice. The trial court overruled counsel's objection.

¶11 Outside of the presence of the jury, the parties stipulated that Salaam was previously convicted of a felony in 2006. Defense counsel then moved to dismiss counts two and three of case Number 2012CF69 (felony witness intimidation) on the grounds of "multiplicitous charging." The trial court denied

the motion. Upon the jury's return, the trial court informed the jury that the parties stipulated that Salaam was convicted of a felony prior to September 19, 2011.

¶12 Salaam then testified in his own defense. He denied any wrongdoing on September 19, 2011, telling the jury that he was not in the vicinity of South 13th Street, did not possess a firearm, and did not shoot at T.A. Salaam admitted to calling T.A. from the Milwaukee County House of Corrections, but stated that he did so to protect her. Specifically, he stated that he told T.A. to "stay off Lincoln" because T.A. had stolen money and goods from retailers on Lincoln Avenue and wanted her to stay out of jail because she was pregnant with his child. Salaam said that he called T.A. again to tell her to stay away from the building where she purchased drugs.

¶13 The jury found Salaam guilty as charged. Defense counsel renewed his motion challenging the sufficiency of the evidence of the felony witness intimidation charges. Counsel stated that "there was no evidence as to the nature of the charge[s]." Counsel argued that while Salaam stipulated to his status as a felon for the purposes of the felon in possession charge, there was no evidence that the witness intimidation charges were connected to felony proceedings. Specifically, counsel argued that there was no evidence that T.A. failed to appear for any of Salaam's felony proceedings. Ultimately, the trial court denied the motion, stating:

> I think in today's day and age, in this society, at this time, there is an understanding of how serious that type of conduct is, both shooting at somebody and being a felon in possession of a firearm. Those are things that I think people understand to be felony offenses and not misdemeanor offenses…. [I]t's a circumstantial type of argument here, because [the jury wasn't] told it was a

> felony. But I do think it rises to the level of sufficiency of the evidence.

¶14 This appeal follows.

DISCUSSION

¶15 Salaam raises numerous issues on appeal. He contends that: (1) the trial court improperly joined case Number 2011CF4809 (recklessly endangering safety and felon in possession of a firearm) with case Number 2012CF69 (witness intimidation); (2) the admission of Brunner's testimony regarding the CAD report violated his sixth amendment right to confrontation and the report was not properly authenticated; (3) the trial court erroneously denied his motion to admit T.A.'s mental health records; and (4) the evidence presented at trial was insufficient to support the jury's finding of guilt for three counts of witness intimidation. We address each issue.

Joinder.

¶16 Salaam contends that "[t]he trial court improperly joined and failed to sever the recklessly endangering safety and felon in possession of a firearm case with the felony intimidation of a witness case." (Bolding omitted.) He argues that the cases were not of the same or similar character and that the joinder of the cases was unfairly prejudicial. We disagree.

¶17 WISCONSIN STAT. § 971.12(4) (2013-14)[2] authorizes joinder of two or more cases for a single trial if the crimes could have been joined in a single

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

complaint or information. *See* ***id.*** Section 971.12(1) describes when separate crimes may be joined together in the same complaint:

> JOINDER OF CRIMES. Two or more crimes may be charged in the same complaint, information or indictment in a separate count for each crime if the crimes charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan.

¶18 "The initial decision on joinder is a question of law that we review de novo." *See* ***State v. Salinas***, 2016 WI 44, ¶30, 369 Wis. 2d 9, 879 N.W.2d 609. "'On appeal, review of joinder is a two-step process. First, the court reviews the initial joinder determination. Whether the initial joinder was proper is a question of law that we review without deference to the trial court.'" ***Id.*** (citation omitted). "'Second, … even after initial joinder, the court may order separate trials of the charges if it appears that a defendant is prejudiced by a joinder of the counts. A motion for severance is addressed to the trial court's discretion.'" ***Id.*** (brackets and citation omitted).

¶19 "The joinder statute is to be broadly construed in favor of initial joinder." ***Id.***, ¶31. "The statute provides four separate provisions under which initial joinder is deemed proper: (1) when two or more crimes are of the 'same or similar character'; (2) when two or more crimes are based on the 'same act or transaction'; (3) when two or more crimes are based on two or more acts or transactions that are 'connected together'; or (4) when two or more crimes are based on two or more acts or transactions that constitute 'a common scheme or plan.'" ***Id.*** (citing WIS. STAT. § 971.12(1)).

¶20 It is clear in this case that the witness intimidation charges were intertwined with the recklessly endangering safety and felon in possession of a

firearm charges. The reckless endangerment and felon in possession charges were set for a preliminary hearing on November 17, 2011. As a condition of release, the trial court ordered Salaam not to have contact with T.A.—the person he recklessly endangered with a firearm. However, on November 15, 2011, two days before the preliminary hearing, Salaam placed three phone calls to T.A. in which he discouraged T.A.'s cooperation. During those calls, Salaam told T.A. to "stay in the house," that the police were looking for her, not to go to "that building," and to "stay off Layton" because his "life depend[ed] on it." T.A. told Salaam that she would not go to court and kept her word by failing to appear at the hearing, despite receiving a subpoena to appear. The joinder was proper.[3] Given the propriety of the initial joinder, it is presumed that Salaam suffered no prejudice when the trial court refused to sever the charges. *See* ***State v. Linton***, 2010 WI App 129, ¶20, 329 Wis. 2d 687, 791 N.W.2d 222. Because of the substantial overlap in evidence, we agree with the trial court "that the prejudice to the defendant has got to be quite high to override the public's interest in the efficiency and in not basically trying a case twice." The trial court properly exercised its discretion.

The CAD Report and Brunner's Testimony.

¶21 Salaam also contends that Brunner's testimony and the CAD report were improperly admitted. Specifically, he contends that statements from K.M.'s phone call were testimonial in nature and therefore violated confrontation rights under ***Crawford v. Washington***, 541 U.S. 36 (2004). He also contends that the CAD report was not properly authenticated.

[3] We do not discuss whether the trial court should have severed the felon in possession and reckless endangerment charges because both charges stem from the same event and involve the same evidence.

¶22 We decline to address either of Salaam's arguments because any potential error by the trial court in admitting the testimony and report was harmless. *See* ***State v. Weed***, 2003 WI 85, ¶28, 263 Wis. 2d 434, 666 N.W.2d 485 (A violation of the Confrontation Clause is subject to harmless-error analysis.). An "error is harmless if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189 (citation omitted).

¶23 As stated, T.A., A.R., and K.H. all testified that they were in the vicinity of South 13th Street on September 19, 2011, when they all saw a gold Jeep coming down the street. All three witnesses testified that T.A. identified Salaam as the driver of the car when the car was approaching them. All three witnesses saw Salaam with a gun, started running, and heard gunshots. A.R. testified that she has a burn mark on her leg as a result of the incident. K.H. testified that she was struck by a ricochet, causing a burn on her shoulder. Even without Brunner's testimony and the CAD report, the jury still would have heard from three witnesses who physically saw Salaam pull out a gun from a gold Jeep and start shooting on September 19, 2011. We conclude from our analysis of the evidence that it is clear beyond a reasonable doubt that a rational jury would have found Salaam guilty even if Brunner's testimony and the CAD report had been excluded from the evidence.

T.A.'s Mental Health Records.

¶24 Salaam also contends that his "due process right to present a defense" was denied when the trial court denied his motions to access T.A.'s mental health records and to present certain children's court records into evidence. (Bolding omitted.)

¶25 The right to present a defense is "'subject to reasonable restrictions,'" and is therefore not absolute. ***State v. Shomberg***, 2006 WI 9, ¶35, 288 Wis. 2d 1, 709 N.W.2d 370 (citation omitted). Defendants generally "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." ***Chambers v. Mississippi***, 410 U.S. 284, 302 (1973). Defendants do not have a constitutional right to present irrelevant evidence. *See* ***Shomberg***, 288 Wis. 2d 1, ¶35.

¶26 Salaam filed a ***Shiffra-Green***[4] motion seeking to access T.A.'s mental health records to prove that T.A. suffered from paranoia and delusions. Salaam also requested that the trial court allow him to introduce certain children's court records addressing T.A.'s possible drug use and mental health issues to support his contention that T.A. suffered from delusions. The trial court conducted an *in camera* inspection of the children's court records, but ultimately denied both of Salaam's motions.

¶27 Granting access to privileged and confidential records for an *in camera* review requires that a court balance the competing interests of the victim's right to privacy and the defendant's right to a fair trial. ***State v. Robertson***, 2003 WI App 84, ¶12, 263 Wis. 2d 349, 661 N.W.2d 105. This balancing turns primarily on the materiality of the evidence under the ***Shiffra-Green*** analysis. ***Robertson***, 263 Wis. 2d 349, ¶¶1, 13.

¶28 The test requires that the defendant establish "a specific factual basis demonstrating a reasonable likelihood that the [victim's] records contain relevant

[4] *See* ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993); *see also* ***State v. Green***, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298.

information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence available to the defendant." ***State v. Green***, 2002 WI 68, ¶34, 253 Wis. 2d 356, 646 N.W.2d 298. The court must look at the existing evidence and determine if the records will provide information that is "independently probative to the defense." ***Id.*** Such a fact-specific evidentiary showing may also not be based on mere speculation or conjecture, or the mere possibility that the records will contain useful evidence. ***Id.***, ¶33. A "[trial] court's materiality decision is reviewed under the clearly erroneous standard." ***State v. Solberg***, 211 Wis. 2d 372, 386, 564 N.W.2d 775 (1997). "A [trial] court properly exercises its discretion when it applies the relevant law to the applicable facts and reaches a reasonable conclusion." ***Id.***

¶29 We agree with the trial court that T.A.'s mental health records and evidence of past drug use would have been irrelevant. Multiple eyewitnesses, in addition to T.A., described the events of September 19, 2011. All of the eyewitnesses placed Salaam at the scene, in a gold Jeep, with a firearm. All of the eyewitnesses stated that Salaam shot a firearm out of his driver's side window. The presence of multiple third-party witnesses significantly undercuts Salaam's argument that T.A.'s mental health is relevant to this case.

¶30 Moreover, the trial court did not restrict Salaam's defense counsel from asking T.A. whether she ingested drugs on the day of the shooting incident, nor did the trial court prohibit all discussions about T.A.'s mental health; rather, the court prohibited Salaam from discussing specific mental health records. The court reasoned that a detailed inquiry into T.A.'s mental health had the potential to "sidetrack[]" the jury and take away from the question of "whether Mr. Salaam did or did not commit these offenses." The trial court sufficiently explained its reasoning and properly exercised its discretion.

Sufficiency of the Evidence.

¶31 Finally, Salaam contends that the evidence presented at trial was insufficient to support the jury's conclusion that Salaam committed three acts of felony witness intimidation contrary to WIS. STAT. § 940.43(7). We agree and consequently vacate Salaam's conviction of three counts of felony witness intimidation.

¶32 A charge of felony witness intimidation requires the State to prove that: (1) the victim was a witness; (2) the defendant prevented or dissuaded or attempted to prevent or dissuade the victim from attending or giving testimony at a proceeding authorized by law; (3) the defendant acted knowingly and maliciously, which requires that the defendant knew the victim was a witness; and (4) the act was committed by a person who is charged with a felony in connection with a trial, proceeding, or inquiry for that felony. *See* WIS. STAT. §§ 940.42, 940.43(7); WIS JI—CRIMINAL 1292.

¶33 Salaam contends that "the record is clear that the State did not proffer sufficient evidence from which a reasonable jury could conclude that the nature of the charge in 2011CF4809 was a felony." The State concedes that "the record does not support entry of the judgments for the felony witness intimidation," but contends that the facts in the record support a conviction for misdemeanor witness intimidation. We will not direct the trial court to enter a judgment on the lesser-included offense. *See* ***State v. Myers***, 158 Wis. 2d 356, 359, 461 N.W.2d 777 (1990) (The court of appeals may not direct the trial court to enter a judgment of conviction of a lesser-included offense when a jury verdict of guilty of the greater offense is reversed for insufficient evidence and the jury was not instructed on the lesser-included offense.). Because the State essentially

concedes that the evidence was insufficient for the greater offense, and because our independent review of the record supports this concession, we reverse the trial court on this matter and vacate Salaam's conviction for three counts of felony witness intimidation.

By the Court.—Judgments affirmed in part; reversed in part and cause remanded with instructions.

Not recommended for publication in the official reports.