COURT OF APPEALS
DECISION
DATED AND FILED

December 12, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2340-CR **Cir. Ct. No. 2014CF5632**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERMAINE CONTRELL WESTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: THOMAS J. McADAMS and FREDERICK C. ROSA, Judges. *Affirmed*.

Before Brennan, P.J., Kessler and Dugan, JJ.

¶1 PER CURIAM. Jermaine Contrell Weston appeals from a judgment of conviction for one count of first-degree recklessly endangering safety by use of a dangerous weapon and one count of being a felon in possession of a firearm, contrary to WIS. STAT. §§ 941.30(1), 939.63(1)(b), and 941.29(2) (2013-14).[1] Weston argues that he is entitled to a new trial because: (1) the trial court erroneously admitted hearsay testimony from an unidentified witness; (2) the admission of that hearsay testimony violated Weston's confrontation rights; and (3) the erroneous admission of the hearsay testimony and the denial of Weston's confrontation rights were not harmless. We affirm.

BACKGROUND

¶2 It is undisputed that someone shot a man named J.V. multiple times, causing serious injury. At issue at Weston's jury trial was whether he was the shooter. The victim, J.V., did not cooperate with the police investigation and did not testify at trial. To prove that Weston was the shooter, the State presented the testimony of J.V.'s cousin, LaToya Davis, who witnessed the shooting.

[1] Weston also appeals from an order denying his postconviction motion, although his brief does not address the ineffective assistance of counsel issue raised in his motion. Because Weston has not briefed that issue, we will not discuss the subject of the motion or the trial court's ruling. *See* ***Reiman Assocs., Inc. v. R/A Advert., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (Issues not briefed are deemed abandoned.).

We note that the judgment of conviction erroneously indicates that Weston pled guilty to both charges. On remand, this apparent clerical error in the judgment of conviction should be corrected to reflect that Weston entered pleas of "Not Guilty" to each offense. *See* ***State v. Prihoda***, 2000 WI 123, ¶27, 239 Wis. 2d 244, 618 N.W.2d 857 (trial court may correct clerical error in written judgment or direct the clerk of courts to make the correction).

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶3 Davis testified that on "a sunny summer afternoon" she was driving a car accompanied by her cousin, Roderick Thompson, who was in the front passenger seat. Davis said they stopped the car and spent time "laughing and talking" with J.V., who had run up to the car to talk with them.

¶4 Davis testified that shortly after they drove away, J.V. called Davis and asked her to return so he could retrieve cigars that he had left in her car. Davis said that as she drove back toward J.V., he ran toward her car. Davis continued: "That's when all [the] chaos happened." She said she heard what she thought were firecrackers as J.V. ran toward her car. But then J.V. "started running the other way." Davis looked in her rearview mirror and saw a "man coming around my car to the … middle of the street," shooting a gun as he ran. Davis said the man was "chasing [J.V.] down the street, shooting."

¶5 Davis testified that she "ducked down" and put her car into drive. She said that as she started to execute a U-turn, the man with the gun started "running back towards my way" and "ran right past my car." Davis said she drove away and found J.V. nearby at a home across the street from his mother's house. The police arrived and J.V. was taken to the hospital.

¶6 Later that day, as police tried to identify the shooter, they showed Davis a photo array of six individuals that did not include Weston's photograph. Davis was not able to identify any of the individuals as the shooter.[2]

[2] Thompson, who was in the front passenger seat of Davis's car during the shooting, also reviewed the photo array. He told the officer that he could not identify anyone. He was not shown any other photo arrays—including the one that contained Weston's photograph—in the days that followed.

¶7 The next day, Davis reviewed a second photo array that included Weston's photograph. Davis identified Weston as the shooter. She wrote on the back of the photograph: "I saw this man shooting at my cousin." At trial, Davis indicated that she would not have made the identification unless she was "a hundred percent sure." The officer who showed Davis the photo array testified that when Davis picked Weston's photograph from the photo array, she told him "she was a hundred percent sure" he was the shooter.

¶8 At trial, although Davis testified that Weston was the man in the photograph, she also said that looking at Weston in the courtroom, she could not say for certain that Weston was the shooter. She explained: "I don't want to lie. I don't remember vividly [] his face. So I'm not going to lie…. At the time it happened, yes. I was positive."

¶9 The officer who showed Davis both of the photo arrays was Damon Wilcox. He testified about the process of creating a photo array, stating as follows:

> [T]he first step is we have to have a suspect to develop a photo array. And then after we have developed a suspect, then … I put that suspect into the computer, and with the assistance of the computer, I generate some filler photographs, 5 of them to be exact, along with the developed suspect. And then with similar characteristics being, you know, usually race, hair, things like that. And then I assemble that photo array. I cut out the pictures, and if we have a witness, then I will conduct the photo array with the witness that I assembled.

(Testimony combined into a single paragraph.)

¶10 Wilcox was asked to explain how he identified Weston as a suspect to include in the second photo array. Trial counsel objected, asserting that the

question called for hearsay. After talking with the attorneys at a sidebar, the trial court overruled the objection and allowed Wilcox to answer. Wilcox testified:

> On August 13, 2014, as I do during investigations, I call the caller who actually called the shooting in or one of the callers, and just spoke with her, just so I could get some more information.
>
> She wouldn't give me her name but she said that she did observe the shooting, and she knew the subject who was shooting the gun at [J.V.]. And she identified that subject as Pooh, P-O-O-H, and she later called me and said that Pooh was known as Jermaine Weston.

¶11 Wilcox said that after receiving this information, he looked up Weston in the police department computer. When Wilcox started to provide additional testimony, the trial court interrupted him, as follows:

> [Wilcox]: … I looked up Jermaine Weston, and we had information on some of his previous bookings with our department of a nickname that—
>
> [Trial Court]: Okay. At this point, I think we're going a little bit farther afield than we anticipated. Ladies and gentlemen, that information was just admitted to show why he did what he did. It's not being admitted for its truth.

The parties then had a side bar conference with the trial court, after which the State asked Wilcox how he identified a different suspect to create the first photo array. Wilcox said that he was given the name of that suspect by his sergeant and was told the suspect "fit the general description given by witnesses."

¶12 Later, outside of the jury's presence, trial counsel said that the trial court should declare a mistrial because Wilcox testified that he "obtained the photograph of Jermaine Weston from other cases that were on file with the police department," which implied that "Weston is a bad guy, a bad character or something." The trial court denied the motion, explaining:

> The record should reflect we did have a side bar before that testimony came out. It didn't come out quite the way I expected, and it went on a little bit farther than I expected.
>
> And in another kind of trial, I may be inclined to grant [trial counsel's] request, but the fact is [that] in this case, they've been told on a number of occasions that Mr. Weston is a felon…. So I think in the context of this particular case, the error is harmless.
>
> I did attempt to clear up for the jury that this information was just being admitted to show context, and it wasn't being admitted for its truth. I'm going to consider giving them a curative instruction.

¶13 Before the case was submitted to the jury, trial counsel told the trial court that he "for sure" wanted a curative instruction. The trial court drafted a curative instruction and shared it with trial counsel and the State. Trial counsel explicitly approved the instruction, suggesting the addition of one word, which the trial court added. The trial court instructed the jury as follows:

> Information came in during this trial that Officer Wilcox spoke over the phone with an unidentified woman and from that conversation developed a suspect in this case. That information was not admitted in this trial for its truth, but instead so you would know how the photo of Mr. Weston got in the photo array. Because the woman did not testify in this case, the information she gave to Officer Wilcox must not be used or considered in any way against Mr. Weston.

¶14 The jury found Weston guilty of first-degree recklessly endangering safety and being a felon in possession of a firearm. The trial court sentenced Weston to a total of ten years of initial confinement and five years of extended supervision.

¶15 Represented by postconviction counsel, Weston filed a postconviction motion alleging that trial counsel provided ineffective assistance concerning an alibi defense. After conducting a ***Machner*** hearing, the trial court

denied the motion.[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). This appeal follows.

DISCUSSION

¶16 Weston argues that he is entitled to a new trial for the following reasons: (1) the trial court erroneously admitted hearsay testimony when it allowed Wilcox to testify that an unidentified woman told him Weston was the shooter; (2) the admission of that hearsay testimony violated Weston's confrontation rights; and (3) the erroneous admission of the hearsay testimony and the denial of Weston's confrontation rights were not harmless.

¶17 We begin with the trial court's decision to permit Wilcox to testify about what the unidentified woman told him. We review a trial court's decision to admit or exclude evidence as a discretionary determination that will not be upset on appeal as long as it has "a reasonable basis" and was made "'in accordance with accepted legal standards and in accordance with the facts of record.'" *See* ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983) (citation omitted).

¶18 Weston asserts that the unidentified woman's statement about Weston was inadmissible hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3). Hearsay is inadmissible unless a recognized exception applies. *See* WIS. STAT. §§ 908.02 and 908.03. However, "[t]he hearsay rule is inapplicable to out-of-court assertions if

[3] The Honorable Thomas J. McAdams presided over the trial and sentenced Weston. The Honorable Frederick C. Rosa denied the postconviction motion.

the statement is not offered to prove the truth of the matter asserted." ***State v. Britt***, 203 Wis. 2d 25, 38, 553 N.W.2d 528 (Ct. App. 1996). For instance, we have held that a police report that "was offered for the limited purpose of explaining the actions of investigating officers" and not "to prove the truthfulness of the informant's statements" was not hearsay. *See* ***State v. Hines***, 173 Wis. 2d 850, 859, 496 N.W.2d 720 (Ct. App. 1993).

¶19 In this case, the trial court explicitly told the jury at the time Wilcox testified about his conversation with the unidentified witness that the "information was just admitted to show why he did what he did" and was "not being admitted for its truth." This made sense in the context of this trial, where trial counsel asserted during his opening statement that the evidence would show that the police did not exercise "due diligence" with respect to showing witnesses the photo arrays and investigating other evidence, such as a videotape from a grocery store camera showing potential witnesses who were in the area.

¶20 As noted, when the trial court instructed the jury, it again emphasized the proper use of the testimony, stating:

> That information was not admitted in this trial for its truth, but instead so you would know how the photo of Mr. Weston got in the photo array. Because the woman did not testify in this case, the information she gave to Officer Wilcox must not be used or considered in any way against Mr. Weston.

¶21 Weston disputes the trial court's determination that the unidentified woman's statement was not being offered for its truth and was therefore not hearsay. He asserts that the trial court was employing "a 'course of investigation rationale' for admitting out-of-court statements by non-testifying declarants" that "has been highly criticized as an area of 'widespread abuse'" that "pos[es] too

great a risk of being credited by the jury to establish the truth of the specific allegation made by the nontestifying declarant." (Citations omitted.) Weston cites a number of federal cases for those propositions.

¶22 For instance, Weston cites ***Jones v. Basinger***, 635 F.3d 1030 (7th Cir. 2011). ***Jones*** involved the testimony of "two police detectives [who] testified in detail about an informant's double-hearsay statement accusing Jones as the leader of the robbery and murders." ***Id.*** at 1035. ***Jones*** explained that the "testimony was allowed on the theory that it was offered not to show the truth of the informant's statement but for the purpose of showing the course of the police investigation that led to Jones'[s] arrest." ***Id.*** In a lengthy decision discussing what it termed "the 'course of investigation' exception," the Court of Appeals for the Seventh Circuit explained that the exception "is most readily applied to admit only those brief out-of-court statements that bridge gaps in the trial testimony that would otherwise substantially confuse or mislead the jury." *See* ***id.*** at 1046.

¶23 ***Jones*** held that, contrary to the trial court's conclusion, "[t]he record of Jones'[s] trial shows beyond reasonable dispute that the [declarant's] statement was offered for the purpose of showing its truth, and that the trial court actually allowed its use to prove its truth." *See* ***id.*** at 1042. ***Jones*** noted that the prosecution had repeatedly indicated that it wanted to use the statement "to show that 'other independent evidence' linked Jones to the killings" and had also been permitted to present testimony in support of its argument that the declarant whose statement was offered through the police detectives "was a credible source of evidence." *See* ***id.*** at 1042-43.

¶24 While the facts in ***Jones*** led the federal appeals court to conclude that the declarant's statement was actually offered for its truth, we are not

persuaded that the same conclusion applies here. Wilcox offered only brief testimony about the unidentified woman's statement. The State never attempted to bolster her credibility. Further, as the State points out on appeal, the prosecutor "did *not* argue that the anonymous tip helped prove that Weston was the shooter" and "did not even mention the anonymous tip during closing argument or rebuttal." Instead, the State explains, the prosecutor "*indirectly* referred to it once during rebuttal" when he stated: "The second day after they got Jermaine Weston's name and put his photo in the photo array, Ms. Davis was able to make that identification." Finally, the trial court explicitly instructed the jury that "the information [the unidentified woman] gave to Officer Wilcox must not be used or considered in any way against Mr. Weston."[4]

¶25 Under these circumstances, we are not persuaded that the unidentified woman's statement was admitted for its truth. Unlike the federal cases that Weston cites, the context in which the statement was admitted and the limited way it was used do not indicate that it was offered as substantive evidence that Weston was the shooter. Therefore, we reject Weston's argument that the trial court erroneously admitted hearsay.

¶26 In his second argument, Weston again argues that the unidentified woman's statement was inadmissible hearsay and he further asserts that the admission of that statement violated Weston's constitutional right to confront his accuser, in violation of ***Crawford v. Washington***, 541 U.S. 36 (2004). We have already concluded that the unidentified woman's statement was not hearsay

[4] We note that "[j]uries are presumed to follow the [trial] court's instructions." ***State v. Delgado***, 2002 WI App 38, ¶17, 250 Wis. 2d 689, 641 N.W.2d 490.

because it was not offered for its truth. We decline to discuss ***Crawford*** and its potential application to Weston's case because Weston did not object to Wilcox's testimony on confrontation grounds and, therefore, he forfeited his claim.[5] *See* ***State v. Nelson***, 138 Wis. 2d 418, 439, 406 N.W.2d 385 (1987) ("[A]n objection on the grounds of hearsay does not serve to preserve an objection based on the constitutional right to confrontation."); ***State Farm Mut. Auto. Ins. Co. v. Hunt***, 2014 WI App 115, ¶32, 358 Wis. 2d 379, 856 N.W.2d 633 ("'Arguments raised for the first time on appeal are generally deemed forfeited.'") (citation omitted).

¶27 Weston's final argument is that the erroneous admission of hearsay and the violation of his confrontation rights were not harmless errors. Because we have concluded that the unidentified woman's statement was not hearsay and we have declined to address the forfeited confrontation argument, we do not address Weston's harmless error argument. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground.").

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[5] Weston's reply brief did not refute the State's assertion that he forfeited his confrontation challenge. We may take as a concession the failure to refute in a reply brief a proposition asserted in a response brief. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).