COURT OF APPEALS
DECISION
DATED AND FILED

May 10, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1363-CR **Cir. Ct. No. 2015CF168**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC LAVON ULMER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: RICHARD T. WERNER and JOHN M. WOOD, Judges. *Affirmed*.

Before Lundsten, P.J., Blanchard and Kloppenburg, JJ.

¶1 PER CURIAM. Eric Ulmer appeals a judgment of conviction for child abuse, second-degree recklessly endangering safety, being a felon in possession of a firearm, and felony intimidation, all as a repeater. Ulmer also appeals the denial of his postconviction motion.[1] Ulmer argues that the evidence was insufficient to support his conviction for second-degree recklessly endangering safety, and also makes various arguments relating to an error in two of the verdict forms. We reject Ulmer's arguments and affirm.

BACKGROUND

¶2 Ulmer was charged with four offenses after he assaulted a fifteen-year-old victim. The victim was trying to buy marijuana when Ulmer told him to get off the block and attacked him as the victim walked away. Ulmer struck the victim's forehead with a gun and fired two shots as the victim ran away.

¶3 Ulmer was charged with physical abuse of a child (Count 1), second-degree recklessly endangering safety (Count 2), possession of a firearm by a felon (Count 3), and felony intimidation of a victim (Count 4). He was charged as a repeater for all four counts, and Counts 1, 2, and 4 were also charged with a dangerous weapon sentence enhancer.

¶4 The jury returned a verdict of guilty on all four counts as a repeater. However, the jury acquitted Ulmer of the dangerous weapon sentence enhancers on Counts 1, 2, and 4.

[1] The Honorable Richard T. Werner presided over Ulmer's trial and entered the judgment of conviction. The Honorable John M. Wood entered the order denying Ulmer's postconviction motion.

¶5 Ulmer filed a postconviction motion raising three arguments relating to two of the verdict forms. The circuit court denied this motion without a hearing. Ulmer appeals.

DISCUSSION

¶6 In this appeal, Ulmer argues that there was not sufficient evidence to support his conviction for second-degree recklessly endangering safety. Ulmer also repeats the three arguments raised in his postconviction motion relating to the two verdict forms. We address each of these arguments below.

A. The Evidence Was Sufficient to Support Ulmer's Conviction for Second-Degree Recklessly Endangering Safety

¶7 We start with Ulmer's challenge to the sufficiency of the evidence to support his Count 2 conviction for second-degree recklessly endangering safety. When reviewing the sufficiency of the evidence, "we consider the evidence in the light most favorable to the State and reverse the conviction only where the evidence 'is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" ***State v. Smith***, 2012 WI 91, ¶24, 342 Wis. 2d 710, 817 N.W.2d 410 (quoted source omitted).

¶8 A conviction under WIS. STAT. § 941.30(2)[2] for second-degree recklessly endangering safety requires proof that a defendant endangered the safety of a victim by criminally reckless conduct. *See* WIS JI—CRIMINAL 1347. Conduct is criminally reckless if it "creates an unreasonable and substantial risk of

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

death or great bodily harm to another human being and the [defendant] is aware of that risk." WIS. STAT. § 939.24(1). "Great bodily harm" is defined as "bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury." WIS. STAT. § 939.22(14).

¶9 The evidence was easily sufficient to support the endangering safety conviction. A reasonable reading of the testimony reveals the following.

¶10 The victim was trying to buy marijuana from a group of people on a street corner when Ulmer verbally accosted him and told him to get off the block. As the victim walked away, Ulmer hit the victim on the back of the head. The victim turned around, and Ulmer "[s]lammed [the victim] on [his] back" and hit him on the forehead with the back of a gun. Bystanders intervened to stop the attack, which allowed the victim to run away. As the victim ran away, Ulmer fired two shots. The victim ran home, where police found him. According to a responding officer, the victim had "a very substantial wound to his forehead," as well as swelling on his nose and scratches on his neck.

¶11 Ulmer contends that the testimony that Ulmer hit the victim on his forehead with a gun only establishes "bodily harm" and not "great bodily harm," as required for Ulmer's conviction. Ulmer asserts that the "injuries were relatively minor ... and there was no testimony that these injuries could possibly create a risk of death or great bodily harm."

¶12 Among other arguments, the State responds by pointing to ***State v. Blair***, 164 Wis. 2d 64, 473 N.W.2d 566 (Ct. App. 1991), in which we upheld a

conviction for first-degree reckless homicide where the defendant beat the victim with a gun, which accidentally discharged and killed the victim. ***Id.*** at 67. We explained that the jury could reasonably find that beating a victim "over the head with a loaded pistol … creates a substantial risk of discharge." ***Id.*** at 73. Moreover, the ***Blair*** jury could reasonably find that the defendant was aware of the risk, even though he did not intend for the gun to discharge. ***Id.*** at 73-74.

¶13 In his reply brief, Ulmer does not respond to the State's argument that ***Blair*** controls the outcome here. That is, Ulmer makes no attempt to distinguish ***Blair***. A proposition asserted by a respondent on appeal and not disputed by the appellant in the reply brief is taken as admitted. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994). On the basis of this implicit concession, we reject Ulmer's insufficiency of the evidence argument. We also observe that the jury here, based on the gunshots heard, could have found that Ulmer's gun was loaded, as was the gun in ***Blair***, thus making the two cases factually comparable.

¶14 In addition, we note that Ulmer's sufficiency of the evidence argument is flawed, regardless of ***Blair***. As stated, Ulmer's argument is that the evidence, at best, supports a finding that the victim suffered "bodily harm," not "great bodily harm." This argument misapprehends the crime. The State need not prove that a defendant inflicted great bodily harm. Rather, the State is required to prove that a defendant's conduct created "an unreasonable and substantial *risk* of ... great bodily harm." *See* WIS. STAT. § 939.24(1) (emphasis added). The evidence here satisfies this requirement.

¶15 We therefore conclude that there was sufficient evidence to support Ulmer's conviction for second-degree recklessly endangering safety.[3]

B. Challenges Relating To Verdict Forms

¶16 As we explain below, two of the verdict forms contained an error. Ulmer makes three arguments based on these verdict form errors. He argues that (1) the errors violated his right to have the jury determine his guilt beyond a reasonable doubt for corresponding charges, (2) he received ineffective assistance of counsel due to his attorney's failure to object to the errors, and (3) his right to a public trial was violated because a correction to the verdict forms did not take place in open court.

¶17 We address and reject each argument below, but first provide context.

¶18 Although there was no error in the jury instructions, the verdict forms for Counts 1 and 2 contained an error in the question regarding the dangerous weapon sentence enhancer. There is a mismatch between the underlying crime and the crime referenced in the enhancer question. Using Count 1 as an example, the verdict form states that the jury finds Ulmer "GUILTY, of *Physical Abuse of a Child*" (emphasis added). The form then states: "If you find the defendant guilty, answer the following question 'yes' or

[3] Ulmer also contends that the fact that the victim testified that Ulmer shot at him as the victim was running away cannot be a basis for Ulmer's conviction because there was no evidence that anyone saw Ulmer shoot at the victim. Because we conclude that hitting the victim on the head with a gun is sufficient to support the conviction, we need not address this argument. *See* ***Cholvin v. Wisconsin DHFS***, 2008 WI App 127, ¶34, 313 Wis. 2d 749, 758 N.W.2d 118 (if a decision on one point disposes of the appeal, we typically will not decide other issues raised).

'no.' Did the defendant commit the crime of *Felony Intimidation of a Victim* while using a dangerous weapon?" (emphasis added). Accordingly, the follow-up enhancer question mistakenly references a different crime.

¶19 It is apparent that the jury discerned these discrepancies. During deliberations, the jury asked why the same crime ("felony intimidation of a victim") was identified in the dangerous weapon enhancer portion of all three verdict forms. There is no indication in the record that the circuit court or the litigants realized that the jury had identified errors in two of the verdict forms. The circuit court's response did not address the jury's question, but instead explained how these three offenses had been charged.

¶20 The jury later submitted a second question, this time directed at Count 4 only. There was no mistake on the verdict form relating to this charge. Still, the jury asked whether "felony intimidation of a victim" was the same as "felony intimidation of a victim while using a dangerous weapon." As to that charge and verdict form, the court correctly explained that the jury had to determine first whether Ulmer had engaged in felony intimidation of a victim and then, if the jury found Ulmer guilty, determine whether he committed that crime while using a dangerous weapon.

¶21 The jury returned a verdict of guilty on all four counts. As to Counts 1, 2, and 4, the jury found Ulmer guilty of the three charged crimes, but acquitted him of the weapon enhancer attached to each. In other words, the jury answered "no" in Ulmer's favor to the faulty questions in the Count 1 and Count 2 verdict forms.

¶22 At some point, after the circuit court dealt with the jury questions, the errors in the Count 1 and Count 2 verdict forms were detected by, or brought

to the attention of, the circuit court. When the circuit court read the jury's answers to the Count 1 and Count 2 questions regarding the dangerous weapon enhancers, the court omitted the erroneous "of felony intimidation of a victim" language. Also, on the Count 1 and Count 2 verdict forms in the record, it appears that this erroneous language is whited out.

¶23 With these background facts in mind, we address Ulmer's three arguments.

1. Whether Ulmer Was Denied His Right to Have the Jury Determine His Guilt Beyond a Reasonable Doubt for Each Offense

¶24 Ulmer argues that the verdict form errors, combined with the circuit court's insufficient responses to the jury's questions, means that he was deprived of his constitutionally guaranteed right to have the jury determine his guilt beyond a reasonable doubt for all four counts. *See* ***State v. Hansbrough***, 2011 WI App 79, ¶10, 334 Wis. 2d 237, 799 N.W.2d 887 ("A defendant has a constitutional right to a jury's determination of guilt beyond a reasonable doubt as to each charged offense.").

¶25 A central problem with Ulmer's argument is that he has not shown that he was prejudiced by these errors. The errors in the verdict forms involve the dangerous weapon sentence enhancers for Counts 1 and 2, but the jury acquitted him of each of these sentence enhancers (as well as the sentence enhancer for Count 4, which was stated correctly in the verdict form).

¶26 Ulmer contends that it is not possible that the jury could have correctly analyzed each charge in light of the errors in the verdict forms, particularly after the jury sought but failed to receive clarification about these errors. *See* ***State v. Anderson***, 2006 WI 77, ¶109, 291 Wis. 2d 673, 717 N.W.2d

74 ("[A] circuit court is obligated to respond to a jury inquiry with sufficient specificity to clarify the jury's problem."). However, Ulmer does not develop any argument as to how the errors in the questions regarding the weapon enhancers would have affected his conviction on the underlying charges, and we see no basis for concluding that they did.

¶27 Assuming, as we must, that the jury followed the jury instructions and the format of the verdict forms, the jury would first have assessed whether Ulmer was guilty of the underlying crimes. Only then would the jury have looked to the erroneous questions. Thus, it is not reasonable to think that the errors in the questions could have affected the jury's initial determination of guilt. It follows that Ulmer was not deprived of his constitutionally guaranteed right to have the jury determine his guilt beyond a reasonable doubt.

2. Whether Ulmer Received Ineffective Assistance of Counsel

¶28 Ulmer argues that his attorney was ineffective for failing to object to the erroneous verdict forms. To establish ineffective assistance of counsel, Ulmer must show that his attorney's performance was deficient and that such performance prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish prejudice, Ulmer must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See* ***id.*** at 694. We need not address both components of the analysis if defendant makes an inadequate showing on one. ***Id.*** at 697.

¶29 Ulmer cannot establish that he was prejudiced by the errors because, as explained in subsection 1. above, we are confident that the errors did not affect the result. Accordingly, we reject Ulmer's ineffective assistance of counsel claim.

3. Whether Ulmer Was Denied His Right to a Public Trial

¶30 Ulmer further contends that he was denied his constitutional right to a public trial because, at some point, away from Ulmer and the public, the verdict forms were corrected. More specifically, Ulmer argues that because the record contains no indication of who whited out the language, or why, the correction was not a part of his public trial. *See* ***State v. Ndina***, 2009 WI 21, ¶42, 315 Wis. 2d 653, 761 N.W.2d 612 (explaining that the Sixth Amendment right to a public trial is "an important constitutional safeguard").

¶31 The question of whether a defendant's right to a public trial has been violated requires a two-step analysis. ***Id.***, ¶46. First, does the closure implicate the Sixth Amendment right to a public trial. ***Id.*** Second, if the closure implicates the Sixth Amendment, was the closure justified under the circumstances. ***Id.***

¶32 Here, Ulmer's argument does not move past the first step because he has failed to persuade us that correcting a verdict form is an act that implicates Ulmer's Sixth Amendment right to a public trial. Ulmer provides no support for the contention that the act of correcting a verdict form must take place in open court. For that matter, we observe that the act of preparing a verdict form in the first instance is not typically conducted in open court.

¶33 Further, even if we assumed that such a correction should be made in open court, we would conclude that the correction here was too trivial to implicate Ulmer's Sixth Amendment rights. Our supreme court has explained:

> [A] closure [of a courtroom] is trivial and does not implicate the Sixth Amendment if the closure "does not implicate the values served by the Sixth Amendment." The Supreme Court has described four values furthered by the Sixth Amendment guarantee of a public trial: "(1) to ensure a fair trial; (2) to remind the prosecutor and judge of their responsibility to the accused and the importance of

> their functions; (3) to encourage witnesses to come forward; and (4) to discourage perjury."

Id., ¶49 (footnotes and quoted sources omitted). Ulmer makes a conclusory argument that these core values are implicated by a correction to a verdict form because a jury's verdict is a critical stage of trial. We are unable to discern from Ulmer's argument why the correction here (1) affected the fairness of Ulmer's trial, (2) implicates the importance of reminding the prosecutor and the circuit court of their responsibility to the accused and the importance of their functions, (3) discouraged any witnesses from coming forward, or (4) encouraged perjury. More generally, we perceive no "value" affected by the apparent whiting out of the verdict forms in this case.[4]

¶34 Accordingly, we reject Ulmer's claim that his right to a public trial was violated.

CONCLUSION

¶35 For the reasons above, we affirm the judgment of conviction and the circuit court's order denying postconviction relief.

[4] The State contends that the likeliest explanation is that the jury altered the forms during its private deliberations. The State then notes that deliberations are not part of the public trial guaranteed by the Sixth Amendment. Ulmer responds that, regardless of who made the change, Ulmer should have been notified and given an opportunity to approve the altered forms. But whether Ulmer should have received notice after the change is a very different question than whether Ulmer's right to a public trial was violated because the correction itself did not take place in open court. Ulmer's postconviction motion rested on the latter theory, and we generally decline to consider new theories on appeal. *See* ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995) ("[Appellate courts] will not ... blindside trial courts with reversals based on theories which did not originate in their forum.").

By the Court.—Judgment and order affirmed.

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