

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 7, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP25-CR

Cir. Ct. No. 2006CF1848

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

OLU A. RHODES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Reversed and cause remanded for a new trial.*

Before Fine, Kessler and Brennan, JJ.

¶1 FINE, J. Olu A. Rhodes appeals a judgment entered after a jury found him guilty of first-degree intentional homicide as party to a crime, *see* WIS. STAT. §§ 940.01(1)(a) & 939.05, and first-degree recklessly endangering safety as

party to a crime, *see* WIS. STAT. §§ 941.30(1) & 939.05. Rhodes makes four claims: (1) the trial court erred when it cut off his cross-examination of Nari Rhodes while he was trying to “rebut the State’s allegation that [Olu A. Rhodes] had a motive to harm the victim”; (2) the trial court erroneously allowed a State witness to give allegedly unqualified expert testimony; (3) the trial court erroneously allowed the State to use cellular telephone records to place Olu A. Rhodes at the scene of the shootings; and (4) the trial court erroneously excluded prior-conviction evidence of one of the victims. We reverse on the first issue and remand for a new trial; thus, we do not address the other issues. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed); *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514, 520 (Ct. App. 1989) (“cases should be decided on the narrowest possible ground”).

I.

¶2 Olu A. Rhodes and his brother, Jelani Saleem, were tried together for the shooting death of Robert Davis and the shooting injury of Jonte Watt. The State’s theory was that the brothers killed Davis because they thought he was responsible for the beating of their sister, Nari Rhodes, and that Watt was an unlucky bystander. Watt and his girlfriend, Dominique Walker, were with Davis at the time of the shooting. Both Walker and Watt identified the brothers as the shooters. The jury acquitted Saleem.

¶3 In its opening statement, the State asserted that Davis told two women to beat up Nari Rhodes. Nari Rhodes testified that she had been fighting with Davis, who was the father of her child. According to Nari Rhodes, Davis broke her car window during the argument and took her cellular telephone and wallet. Nari Rhodes told the jury that after that she was driving past one of the

women's homes when Davis came outside and stopped her. Nari Rhodes said that she asked him when he was going to return her cellular telephone and wallet. According to Nari Rhodes, Davis then left, but the two women beat her.

¶4 After she was beaten, Nari Rhodes went home and then to a hospital for treatment. She testified that her brothers were at her home when she returned from the hospital, and that she told them what had happened.

¶5 During Nari Rhodes's cross-examination by Olu A. Rhodes's lawyer, the lawyer started to ask about Davis's earlier beatings of her when the State objected:

Q Were these ... injuries that you've got in these photographs, okay, in your conflict with Mr. Davis, have there been other times when you've been injured?

A Yes.

Q And what injuries had you received?

A One side -- My orbital bone in my eye was broken and it was like really bad.

[Prosecutor]: I'm going to object at this time.

[Defense lawyer]: Judge, could -- If you're going to sustain that, I'd like to be heard at sidebar.

¶6 The sidebar was not recorded, and the trial court did not allow Olu A. Rhodes's lawyer to ask Nari Rhodes any more questions about earlier beatings by Davis. Later, without the jury present, the trial court recounted the sidebar discussion:

What happened at sidebar was there was questioning gone into the witness as to the injuries that she sustained as a result of Mr. Davis and there was an objection.

The Court had permitted previously reference to the fact there had been other incidents of domestic violence between her and Mr. Davis ... other issues involved, but I did stop you from going into each instance of alleged violence from Mr. Davis.

I felt that ... We talked about this before on the record and I thought that there was an opportunity for fair response to raising it and -- and it was raised. We were going to avoid it altogether, but it was raised, and I gave opportunity for fair response, but what you were doing was going into a incident by incident which really gets into other acts and things that were not -- there was no motion and there was no order to admit that.

¶7 The defense lawyer had explained that he was not going to ask about every time Davis hurt Nari Rhodes, but, rather, was going to focus on one serious incident where Davis broke Nari Rhodes's orbital bone "to try and rebut this motive information." The defense lawyer said that he then "would have asked her did she make her brothers aware of that injury and who would have inflicted it and she would have said yes." The lawyer indicated that he would have then asked if her brothers retaliated, and that she would have replied that there was "no response" from her brothers. The defense lawyer argued: "I think I'm entitled to rebut that motive evidence by showing that there had been a previous ... serious incident and my client took no action in response to that. That was the purpose of that line of questioning." The trial court ruled that this questioning would be "extraneous evidence that would mislead the jury on other issues in a trial within a trial," and thus excluded the evidence.

¶8 The State emphasized the motive evidence in its closing argument:

[I]n this particular case, there is motive. There is motive for Olu Rhodes and Jelani Saleem to kill Robert Davis; and that is because as testified to, he had had a child with their sister, Nari Rhodes, who testified; and on the afternoon before this happened, he became involved in an argument with her. He broke her window and the State submits he set up her beating.

This is the beating of Miss Rhodes and this is what the defendant saw when she came home from the hospital, and this is what they sought to avenge by killing Robert Davis; and now Nari Rhodes attempted to minimize it, and Olu Rhodes says “I had given up,” and that just doesn’t make sense at all.

What makes sense is that they were horrified and angered by the fact that Nari Rhodes took such a bad beating at the hands of Robert Davis’ other girlfriend. That is why they went out. That is why Olu Rhodes followed them on that morning and early afternoon, and that is why they shot and killed Robert Davis.

II.

¶19 A trial court’s decision to admit or exclude evidence is discretionary, and we will not reverse if it was “in accordance with accepted legal standards and in accordance with the facts of record.” *State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498, 501 (1983) (quoted source omitted). We review *de novo*, however, whether the trial court’s decision comports with legal principles. *State v. Pittman*, 174 Wis. 2d 255, 275, 496 N.W.2d 74, 82 (1993).

One of the trial-process concerns that sets boundaries on what evidence the trial court may exclude in criminal trials is the defendant’s right to confrontation.

Every defendant in a criminal case is entitled to confront his or her accusers: In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him. U.S. CONST. amend. VI. This clause applies to the states as well as to the federal government. The Wisconsin Constitution also guarantees the right to confrontation: In all criminal prosecutions the accused shall enjoy the right ... to meet the witnesses face to face. WIS. CONST. art. 1, § 7. The two clauses are, generally, coterminous.

State v. Yang, 2006 WI App 48, ¶10, 290 Wis. 2d 235, 243–244, 712 N.W.2d 400, 404 (internal quotation marks and case citations omitted). Thus, a “defendant’s right to confront the witnesses against him is central to the truthfinding function of the criminal trial.” *Id.*, 2006 WI App 48, ¶10, 290 Wis. 2d at 244, 712 N.W.2d at 404 (quoted source omitted). “The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.” *Davis v. Alaska*, 415 U.S. 308, 315–316 (1974) (quoted source and emphasis omitted). A defendant’s right to cross-examine is “an essential and fundamental requirement for the kind of fair trial which is this country’s constitutional goal.” *Yang*, 2006 WI App 48, ¶10, 290 Wis. 2d at 244, 712 N.W.2d at 404 (quoted source and one set of quotation marks omitted).

¶10 A defendant’s “right to confront and to cross-examine is not absolute[,]” however, and “trial judges retain wide latitude ... to impose reasonable limits.” *Id.*, 2006 WI App 48, ¶10, 290 Wis. 2d at 244–245, 712 N.W.2d at 404–405 (quoted source omitted). Here, although we acknowledge the trial court’s “wide latitude,” Rhodes’s constitutional right to cross-examine was cut off too soon. As we have seen, the State emphasized the defendant’s motive to avenge his sister’s beating in its opening, during the testimony, and in its closing. The argument was that when Rhodes found out Davis had his sister beaten, he “hunted Davis down” and killed him. The trial court truncated Olu A. Rhodes’s lack-of-motive defense when it stopped him from proving he did not react violently when Davis had earlier hurt his sister. Although, as the State argues, the jury *could have* concluded that the beating that the State contends gave Olu A. Rhodes the motive to kill Davis in this case was the last straw and that the earlier incidents contributed to what the State asserted was Olu A. Rhodes’s and Saleem’s rage, the jury could have also reached the conclusion advanced by Olu

A. Rhodes’s lawyer. This was, therefore, a matter that the jury had to resolve, and it needed to have a full picture of the dynamics that roiled the relationships in this case. By cutting off the cross-examination of Nari Rhodes when Olu A. Rhodes’s lawyer was trying to rebut the State’s motive theory, the trial court deprived Olu A. Rhodes of his constitutional right to a fair trial.¹ Accordingly, we reverse.

By the Court.—Judgment reversed and cause remanded for a new trial.

Publication in the official reports is not recommended.

¹ The State argues in the alternative that the trial court’s limitation on Olu A. Rhodes’s cross-examination of Nari Rhodes was “harmless error.” It has not, however, shown that this error was harmless beyond a reasonable doubt. See *State v. Harris*, 2008 WI 15, ¶42, 307 Wis. 2d 555, 578, 745 N.W.2d 397, 408. The State argues that because Olu A. Rhodes testified to a prior physical confrontation after he first learned about the domestic violence, it “seems far more likely” the jury would have believed the State’s theory over Olu A. Rhodes’s theory. This, however, is not the standard. An error is harmless if there is no reasonable possibility that it contributed to the conviction. *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222, 232 (1985). As we have seen, although both brothers were charged, the jury only convicted Olu A. Rhodes.

